

(2017) 08 BOM CK 0221
In the Bombay High Court
Case No : 303 of 2000

Ambadkha Subhankha, & Ors.

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-08-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 147](#),
[Section 307](#), [Section 148](#), [Section 149](#), [Section 332](#), [Section 353](#) - Puni

Citation : (2017) 08 BOM CK 0221

Hon'ble Judges : Rohit B. Deo

Bench : SINGLE BENCH

Advocate : Ranjit Singh, N.B. Jawade

Final Decision : Allowed

Judgement

1. The appellants seek to assail judgment dated 30.09.2000 in Sessions Trial 165/1991 delivered by Additional Sessions Judge, Akola convicting the accused for offences punishable under section 332 read with section 149 of the Indian Penal Code and section 353 read with section 149 of the Indian Penal Code. The sentence imposed is simple imprisonment for one year and fine of Rs.200/for offence punishable under section 332 read with section 149 of the Indian Penal Code and rigorous imprisonment for two years and fine of Rs.500/for offence punishable under section 353 read with section 149 of the Indian Penal Code. The appellants (hereinafter referred to as "Act") are acquitted of offence punishable under section 307 of the Indian Penal Code. Nine persons were chargesheeted and faced trial. Four have been acquitted of all the offences.

2. Heard Shri Ranjit Singh, the learned counsel for the appellants and Shri N.B. Jawade, the learned Additional Public Prosecutor for the respondent/State.

3. Shri Ranjit Singh, the learned counsel for the accused contends that the order impugned is contrary to evidence on record and is manifestly erroneous. The

offence is not proved beyond reasonable doubt, indeed, according to the learned counsel, there is absolutely no admissible evidence on record to bring home the charge. Shri Jawade, the learned A.P.P. would contend that out of the nine accused, four have been acquitted and the appellants who have been convicted were apprehended from the spot. The fact that the accused were apprehended from the spot would suggest their active and direct role in the incident.

4. The oral complaint and the First Information Report is at Exh.46 and 46A respectively. The complainant/informant is Head Constable Kailasgir, who states in the complaint dated 06.06.1988 that on 05.06.1988 the informant along with the Superintendent of Police, the Sub Divisional Police Officer (Rural), PSI Shri Sonone, PSI Shri Kulkarni and other policemen went to the Mussalman locality in search of persons whose involvement was suspected in an offence of murder that took place at Mouza Panchagavan. The informant states that at 04:30 a.m., he, PSI Sonone, Driver/Police Constable Mahendra and policemen armed with lathis went to the house of Amadkhan Subhankhan to trace him. He states that when the police party was looking for the said Amadkhan at his residence, his son who was armed with stick, all of a sudden, assaulted PSI Shri Sonone and driver Mahendra. PSI Sonone sustained injuries due to stick blow, he fell down and suddenly shouted, "Rush. Rush. Mohammeden people are beating us. Open fire in the air at once". The informant fired one round in the air. Immediately, two Mohammeden persons holding sticks pounced upon the informant and tried to snatch away his gun. The informant held the gun tightly and one of the Mohammeden persons inflicted a stick blow on the left leg of the informant. In the meanwhile other persons, (reference is to members of the police party) saw the assault and rushed to help. The complaint states that they (member of the police party) caught hold of the said accused persons.

5. The oral complaint and the F.I.R. registered on the basis thereof, does not contain a single name. It must be noted, that the oral complaint and the First Information Report is lodged at 07:00 a.m. and at that point in time, according to the prosecution version the five accused were already in police custody, having been allegedly apprehended at the spot. However, all that the F.I.R. states is, "son of Amadkhan" and "two Mohammeden persons holding sticks", committed the assault.

6. P.W.1 Shankar s/o Laxman Nand, who was examined as an eye witness, did not support the prosecution, was declared hostile and crossexamined by the A.P.P. Nothing is brought out in the crossexamination of P.W.1 to assist the prosecution. Similarly, P.W.2 Vitthal Tekade did not support the prosecution, was declared hostile and his crossexamination also did not bring on record any material to take the case of the prosecution any further. P.W.3 is the informant Head Constable Kailasgir. P.W.3 states that on 05.06.1988 a function to mark the formation of Shivsena branch was organized at Panchgavhan. P.W.3 was deputed for Bandobast duty at the said programme. The opening of Shivsena branch at Panchgavhan led to a dispute between the Shivsena supporters and the

Mohemmadan community and in the altercation four persons lost their lives. An offence was registered in relation to the death of the aforesaid four persons and during the investigation, the informant along with PSI Kulkarni, PSI Sonone and others went to Panchgavhan between 09:30 to 10:00 p.m. The PSI received some information about the involvement of some persons in the offence of murder and to arrest the suspects, police party including the informant and some panchas went to the residence of Amadkhan. PSI called Amadkhan. Suddenly 4 to 5 persons came out of the house brandishing sticks and assaulted P.S.I. Sonone. P.W.3 further states that the said persons also assaulted him and Police Constable Mahendra. P.W.1 further states that PSI Sonone ordered him to fire which he did. He then deposes that a scuffle took place between Sk. Ahmed and his two sons and him. He further deposes that the police party could arrest some accused namely Sk. Ahmed and others from the spot. In the crossexamination, P.W.3 admits that it was 04:30 a.m. and dark night when the police party approached the residence of Amadkhan. He admits that when his statement was recorded, he did not disclose to the police that the police party included panchas. P.W.3 immediately retracts and says he may have disclosed the said fact when the police recorded the statement. That 56 persons came out of the house with sticks is brought on record as an omission.

7. Similarly, the scuffle between P.W.3 and Ahmadkhan and his two sons is also brought on record as an omission. P.W.3 states that due to oversight he could not mention specific names in the police report. P.W.3 admits that he did not know as to how many sons did Ahmadkhan have. A suggestion is given to P.W.3 that when the police party reached the residence of Amadkhan, stone pelting was already going on and that the provocation was the injury suffered by one Sk. Gaffar due to police firing (Sk. Gaffar allegedly expired two days after the incident.). The next eye witness P.W.5 Mahendrasingh Thakur who deposes that on 05.06.1988 when the police party approached the house of Amadkhan, police party heard shouts of "Maro, Maro" from "persons inside the house". He states that the persons inside the house pelted stones on PSI Sonone. P.W.5 states that Sonone suffered injury due to stone. P.W.5 states that he also suffered injury and that firing in the air was ordered. P.W.5 further states that 45 persons came out from the house, it was dark and P.W.5 could not recognize the person who inflicted stick blow on his wrist. P.W.5 states that P.W.3 Kailasgir also suffered a stick blow. He then states that 56 persons were apprehended from the spot and four persons fled. In the crossexamination, the version that shouts of "Maro, Maro" were heard from the house is shown to be an omission. Similarly, stone pelting is also shown to be an omission. P.W.5 admits that he was not known any of the accused by name nor did he tell the police that he was not a position to recognize the assailants. He admits that he did not give the description of the assailants as he did not see the faces of the assailants due to darkness. The next eye witness Balkrishna Pandit, who was a member of police party. He states that on approaching the residence of Amadkhan, PSI Sonone called him and in response the inmates of the house pelted stone and then came out brandishing

sticks. He states that one of them inflicted a stick blow on PSI Sonone who fell down and when Mahendrasingh Thakur (P.W.5) rushed to help PSI Sonone he was also assaulted by sticks. Head Constable Kailasgir (P.W.3) was also assaulted by sticks. He states that son of the accused attempted to snatch the rifle from P.W.3, he opened fire by rifle in the air, and he and the other members of the party apprehended the accused from the spot. During the cross-examination, the witness fairly admits that he had no occasion to see any of the accused and that he did not reveal the name any of the accused nor did he describe any of the accused in the statement recorded during the investigation. He admits that after the arrest of the accused, he was seeing them for the first time in the court. P.W.10 is examined as an eye witness. He states that he was summoned by the police to be a panch for the search to be taken of the houses in Panchgavhan. He states that he accompanied the police party to the house of Amadkhan Subhankhan. There were 8 to 10 persons in the house. Those 8 to 10 persons pelted stones at the police party and rushed to assault the police party. P.W.10 states that some of them snatched the rifle, 8 to 10 persons had scuffle with the police, in the incident PSI Sonone sustained injury to his head due to stone and suffered a stick blow. He then states that other policemen also suffered injuries due to stick blows. He states that 5 to 6 persons were apprehended from the spot and the others fled. He names Amadkhan, his two sons, Gaffarkha, Sherkha and his son as the persons who were apprehended from the spot. In the cross-examination P.W.10 states that the incident took place after 01:00 a.m. and that after the incident he went to his residence between 02:00 to 02:30 a.m. He denies that the incident occurred between 04:00 to 04:30 a.m. He states that the police did not make any inquiry from him. He further states that police did not obtain his signature on 8 to 10 papers during the course of investigation. He admits that it was dark when the incident took place. Certain omissions and contradictions are brought on record. I will advert to the testimony of P.W.10 at a later stage in the judgment. P.W.11 is Police Constable Deorao Rathod, who states that he was a member of the police party which went to the house of Amadkhan, and that 10 to 12 persons came out with sticks and spears and assaulted the police party. His evidence is on the same lines as that of the other witnesses who are members of the police party. The last material eye witness is P.W.13 Kashinath Sonone who then was P.S.I. P.W.13 states that on 05.06.1988 he was asked to proceed to Panchagavan for Bandobast. He was then attached to Hiwarkhed Police Station. P.W.13 states that he immediately proceeded towards Panchagavan and reached at 10:30 p.m. P.W.13 states that at Telhara Police Station he met PSI Kulkarni and learnt that there was a serious incident in relation to which offence was registered vide Crime 49/1988 and the suspects had taken shelter in the house of Amadkhan Subhankhan. P.W.13 Sonone says he along with PSI Kulkarni and staff approached the house of Amadkhan Subhankhan and when the police party reached the spot the persons inside the house started pelting stones. He states that despite the stone pelting, the police party made an attempt to apprehend those persons and in the attempt P.W.13 suffered a stick blow on the right leg. P.W.13 states that on receiving the stick

blow, he shouted loudly, the other members of the police party rushed towards. P.W.13 states that the driver Mahendra and Police Constable Kailasgir were assaulted an attempt was made to snatch gun from Police Constable Kailasgir, P.W.13 ordered Kailasgir to open fire and he accordingly fired in the air. P.W.13 states that still the assault continued and P.W.13 therefore, ordered Constable Kailasgir to open fir in the air. He states that meanwhile, PSI Kulkarni and his staff rushed to assist him and the police party could apprehend 5 to 6 persons on the spot. He states that 4 to 5 suspects manage to flee.

8. The prosecution case is founded entirely on the testimony of the members of the police party some of whom have suffered injuries albeit minor injuries. In a sense, the police are the victim, accuser, investigator and the prosecutor. The backdrop is apparently an unfortunate incident in which some innocent persons lost their lives. The genesis of the incident was an altercation between two communities and the cause is presumably the differences over the opening of Shivsena branch in the village. The defence has brought on record that one person from the minority community suffered injury in the police firing and expired two days after the incident. The situation on 05.06.1988 was a live, turbulent and emotionally charged one. The evidence must receive close scrutiny and must be decided on the anvil of caution, since the conviction is based entirely on the testimony of the members of the police party. The only independent witness, who is examined as an eye witness is P.W.10 one Sukhdeo Niwane (P.W.10) who claims that he was included in the police party as a panch and was present on the spot when the members of Mohammaden community including the accused allegedly assaulted the police party who approached the residence of Amadkhan to apprehend some suspect. I have no hesitation in disbelieving and discarding the testimony of P.W.10. The prosecution has not produced any contemporaneous record whatsoever to prove that P.W.10 was summoned as a panch. It is axiomatic, that if a person is a summoned as a panch and that too a search of the houses in the village which would be a search with some deliberation and planning, record evidencing the summoning of the panch inter alia entries in the station diary and presearch panchnama, is bound to be available. Nothing is brought on record for this Court to believe the version of P.W.10 that he acted as panch to the search of the houses in the village and thereafter at night accompanied the police party to the residence of Amadkhan. P.W.10 interestingly deposes that the incident took place at 01:00 a.m. or thereabout and that he had returned to his residence between 02:00 to 02:30 a.m. This testimony is in the teeth of the consistent assertion of every other witness that the incident took place at 04:30 a.m. and thereafter. I have no doubt in my mind that P.W.10 was not present on the spot and that P.W.10 is introduced as a witness only to lend an objective and impartial colour to the prosecution evidence. This Court would be justified in discarding the entire prosecution version on the short ground that the investigation is not only unfair and dishonest, the examination of P.W.10 as an alleged eye witness is subversive of the sanctity of the justice dispensation system. However, I have nonetheless

scrutinized the other ocular evidence, which is the version of the eye witnesses to the incident who are members of the police party involved in the incident.

9. A common thread which runs through the version of every eye witness is that the accused were apprehended from the spot and some persons involved in the alleged assault fled. The First Information Report makes a reference only to three persons as the assailants. The first person is referred to as "son of Amadkhan" and the other reference is to "Two Mohammadens". P.W.1 and P.W.2 have not supported the prosecution although they were examined as eye witnesses. P.W.3 Kailasgir only names one Sk.Ahmed and his two sons as persons who got into a scuffle with P.W.3. He states that 4 to 5 persons came out of the house and assaulted the members of the police party. He then deposes that the accused persons in the Court are the same persons assaulted the police party. It is more than apparent that the oral testimony of P.W.3 is absolutely inconsistent with the First Information Report which he lodged on 06.06.1988, and that too, which First Information Report was lodged when the accused were allegedly already in police custody. The version of P.W.5 is marred by serious and significant omissions and contradictions. P.W.5 neither assigns any role to any particular accused nor names or otherwise identifies any accused by correlating the occurrence and the role of the accused therein. He makes a bald statement that the persons arrested by the police party from the spot are before the court. May it be noted, that nine persons were tried and were before the court. The testimony of P.W.5 is absolutely irrelevant and is of no assistance to the prosecution. On the contrary, P.W.5 admits that since it was dark, he did not see any person involved in the alleged assault. The testimony of P.W.6 Balkrishna Pandit is again of no assistance to the prosecution. P.W.6 states that six persons are among the accused (nine) who are present before the court. In the entire testimony there is not any whisper of the name, description, identity or the role played by the accused. His testimony, too, is shaken due to the omissions and contradictions brought on record. The version of P.W.11, P.W.13 and P.W.16, even if taken at face value, is not sufficient to come to a conclusion that the accused actively participated in any assault or that the accused shared a common object with the assailants as is envisaged within the meaning of section 149 of the Indian Penal Code. None of the aforesaid three witnesses including P.W.13 PSI Sonone names any accused as the assailant or assigns any particular role to any accused or describes any accused. P.W.13 fairly states in the examination in chief that he is not in a position to recognize 5 to 6 persons apprehended from the spot.

10. Even if the entire evidence is taken at face value, the only fact which may be taken as proved is that the accused were apprehended from the spot. However, in the teeth of the prosecution version that 8 to 12 persons rushed out of the residence of Amadkhan and that only few participated in the assault and that some fled away, in the absence of any evidence on record to suggest that the persons apprehended from the spot are the assailants, it would be a travesty of justice to convict the accused. It must be noted that even version of 8 to 12

persons rushing out of the residence of Amadkhan and some of them participating in the assault is inconsistent with the F.I.R. which makes a reference to one unidentified and one unnamed son of Amadkhan and to two unnamed Mohammeden. The version of the members of the police party who are examined as eye witnesses suffers from significant inter se contradictions. I had already taken a note of the unfair and dishonest attempt to introduce and set up P.W.10 as an eye witness to the incident.

11. In view of the utter failure of the prosecution to adduce cogent and reliable evidence, I am not persuaded to uphold the judgment of conviction. It would be extremely unsafe and hazardous to do so. Liberty of any citizen is too valuable and sacred to be eviscerated on a mere suspicion.

12. In the light of the discussion and findings recorded supra, the appeal is allowed. The judgment impugned passed by the Additional Sessions Judge, Akola on 30.09.2000 in Sessions Trial 165/1991 is set aside. The appellants are acquitted of the offences punishable under sections 147, 148 and 353, 332 and 307 read with section 149 of the Indian Penal Code. Their bail bond shall stand discharged. Fine paid, if any, by the appellants shall be refund to them. The appeal is disposed of accordingly.