

(2012) 11 BOM CK 0091

In the Bombay High Court

Case No : Criminal Revision Application No. 82 of 1996

Balhim Chitte

APPELLANT

Vs

The State of Maharashtra and Waman Patil

RESPONDENT

Date of Decision : 01-11-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 386, 397, 401, 462
Penal Code, 1860 (IPC) — Section 147, 148, 149, 323, 324
Probation of Offenders Act, 1958 — Section 4

Citation : (2013) ALLMR(Cri) 656 : (2012) BomCR(Cri) 593

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : N.B. Khandare holding for . Mr. M.P. Tripathi, for the Appellant; N.B. Patil, APP for State and Mr. V.S. Tanwade, advocate for respondent No. 2. (appointed), for the Respondent

Judgement

T.V. Nalawade, J.—The proceeding is filed against the judgment and order of Criminal Appeal No. 5/1996, which was pending in the Court of Additional Sessions Judge, Osmanabad. In the appeal, the judgment and order of Judicial Magistrate, First Class, Omerga, delivered in R.C.C. No. 66/1989 was challenged. The J.M.F.C. has sentenced the petitioners for offences punishable u/s 326, 324 and 34 of Indian Penal Code and this decision is confirmed by the Sessions Court. Both the sides are heard. The advocate of the original complainant was allowed to assist APP. This Court has perused the original record. In short, the facts leading to the institution of the proceeding can be stated as follows:-

There is a dispute between the side of complainant and the side of accused over some portion of agricultural lands bearing Survey Nos. 272 and 273 situated at Jakekurwadi. The incident took place on the night between 27.12.1988 and 28.12.1988. It is the case of complainant Waman that on that night, he and his three uncles like Tukaram, Sain and Vyankat were sleeping in a shed from this disputed field. It is the case of the prosecution that at about 00.30 hours on that night, the petitioners (original accused Nos. 4 and 10) and other accused entered

this shed and assaulted the complainant and his three uncles by using weapons like sticks, iron bars etc. There are specific allegations against the petitioner Balhim that he gave blow of iron bar on the head of the complainant and petitioner Balaji gave stick blow on the back of the complainant. There are specific allegations that injured Sain and other two uncles of the complainant were assaulted by Balaji and other accused. Sain sustained fracture injury in the incident. Other three persons sustained simple injuries.

2. On the basis of report given by Waman, crime at C.R. No. 168/1988 was registered in Omerga Police Station for offences punishable under sections 147, 148, 324, 326 and 149 of I.P.C. The four injured witnesses were referred to Government Hospital and M.L.Cs. were collected by police. Spot panchanama was prepared and stick having blood stains was taken over from the spot. All the accused came to be arrested.

3. In respect of the same incident, report was given by the other side against the aforesaid four injured persons. On the basis of that report, investigation was made and counter case, R.C.C. No. 65/1989 was filed by police against these four injured for offences punishable u/s 147, 148, 324 and 149 of I.P.C. Both the cases were decided by the same Magistrate. The J.M.F.C. gave conviction and sentence to persons from both the sides. Criminal Appeal No. 7/1993 was filed by other side. Criminal Appeal Nos. 7/1993 and 5/1993 are decided by Sessions Court by common judgment. Criminal Appeal No. 7/1993 is allowed and all the persons from the other side are acquitted by Sessions Court.

4. There was the charge against the appellants for voluntarily causing simple injuries to witnesses like Waman, Sain, Vyankat and Tukaram by using dangerous weapons and there was the charge for voluntarily causing grievous injury by using dangerous weapon like iron bar and stick to Sain. Thus, the charge was for the offences punishable u/s 324, 326 r/w. 149 of I.P.C. The petitioners are convicted and sentenced by using section 34 of I.P.C. when there was no charge for offence by using section 34 of I.P.C. However, there is no dispute over the proposition that both are principles of joint liability and so section 34 can be used. The remaining accused are acquitted.

5. The present proceeding is filed u/s 397 read with section 401 of Cr.P.C. The Court in revision is expected to consider the material only to satisfy itself about correctness, legality and propriety of the findings, sentence or order. This Court may also consider irregularity, if any, found in the proceeding of inferior Court. Though section 401 of Cr. P.C. shows that the powers of the Appellate Court u/s 386 of Cr. P.C. are available to revisional Court also, these powers are expected to be used sparingly and revisional Court cannot convert itself into regular Court of appeal. In the case reported as T.N. Dhakkal v. James Basnett reported as, (2001) 10 SCC 419 , it is observed by the Apex Court that the revisional power has to be used to correct miscarriage of justice and justification of the exercise of revisional power would depend upon facts and circumstances of each particular case.

6. In the cases reported as K. Chinnaswamy Reddy Vs. State of Andhra Pradesh, , Khetrabasi Samual etc. Vs. The State of Orissa, and Akalu Ahir and Others Vs. Ramdeo Ram, , the Apex Court has laid down that the revisional power can be exercised, if the evidence which is inadmissible is considered by the Trial Court and if some material evidence is overlooked. Similarly, if there is irregularity of procedure, which caused prejudice to the accused, revisional power can be exercised. The propositions made by the Apex Court show that the power of High Court is not confined to the questions of law alone and it can deal with questions of facts, but as a rule of practice, High Court is not expected to interfere with the findings of fact. However, when it is brought to the notice of the High Court that there is misconception about the procedure due to which some evidence is wrongly used against accused and that has caused miscarriage of justice, the High Court can interfere in the decision of the Lower Court. Thus, when there is such contention, the High Court can go into the facts to ascertain as to whether there is force in this contention and whether the contentions are true. The parameters for the use of power u/s 401 in revision filed against acquittal by private party and in the revision filed by accused against conviction are different.

7. The Additional Sessions Judge has not only decided two appeals filed in two separate criminal cases together, but the judgment shows that the Additional Sessions Judge has compared the evidence of two cases to find out as to which side was aggressor and as to which side committed offence. In view of this circumstance, the advocate of the petitioners submitted that the prejudice is certainly caused to the accused and it needs to be inferred that there has been miscarriage of justice.

8. Reliance was placed by the advocate of the petitioners on the case reported as AIR 2001 SC 826 [Sudhir and Ors. Vs. State of Madh. Pra.]. The Apex Court has laid down that when there are two cross cases, counter cases, it is desirable that the same Judge decides both the cases. Following reasons are given for such necessity.

(i) To avoid conflicting decisions,

(ii) It staves off the danger of an accused being convicted before his whole case is before the Court and

(iii) In reality the case and counter case are, to all intents and purposes, different or conflicting versions of one incident.

There cannot be any dispute about this proposition and the same J.M.F.C. decided these two cases.

9. In the case reported as Mitthulal and Another Vs. The State of Madhya Pradesh, , it is made clear that each criminal case must be decided on the evidence recorded in it and evidence recorded in another case though it may be cross-case cannot be taken into account in arriving at the decision. It can be said

that the Sessions Judge has committed an error in reading the evidence of counter case in the appeal filed by the present petitioners. Thus, there is certainly irregularity in the procedure adopted by the Sessions Court.

10. The provisions of section 462 to 465 of Cr. P.C. show that when any irregularity is noticed by the Appellate Court, the Appellate Court is expected to consider these provisions and then decide the proceeding before it. In section 465 of Cr.P.C., the general power of Appellate Court is considered, which is subject to the previous provisions of Cr. P.C. from the same Chapter. This provision shows that if, in the opinion of the Court, a failure of justice has been occasioned, then the Court is expected to interfere in the matter. In order to ascertain, whether due to such irregularity, prejudice has been caused to the defence and due to that there has been failure of justice, the Court is expected to look into the substance and not the technicality. These sections cover errors of procedures arising out of inadvertence. Thus, the Trial Court is expected to ascertain whether "infact" failure of justice has been occasioned by such irregularity. In view of the facts and circumstances of the present case and the aforesaid position of law, this Court holds that it needs to be ascertained as to whether the Sessions Court has considered the evidence available as against the petitioners. It also needs to be seen whether such view is possible on the basis of the evidence.

11. Waman (PW 1), complainant, has given evidence that these two accused along with others entered a shed situated in the disputed property on that night and then assault was made on him and on his three uncles. He has given specific evidence against petitioner Balbhim that Balbhim assaulted him with iron bar on head. He has given specific evidence against Balaji that Balaji gave beating on his back with stick. At Exh. 60, there is the F.I.R. given by this witness and it is consistent with the part of evidence, which is given against these two petitioners. The F.I.R. was given almost immediately after the incident.

12. The evidence of Dr. Pandit (PW 4) shows that he examined Waman (PW 1) at 9.00 a.m. on 28.12.1988 and he found C.L.W. over parietal region of Waman of size 1 1/2" x 1/2 x 1/2". He found one contusion over back of size 6" x 3". One more contusion was found on left elbow joint. According to the Doctor, all these injuries were sustained within 6 to 12 hours and were caused by hard and blunt object. The injury certificate at Exh. 66 prepared by this doctor is consistent with his oral evidence. This medical evidence gives corroboration to the version of Waman (PW 1).

13. Sain (PW 2) has given evidence that some accused were armed with axe, also but he was assaulted with stick. He has given specific evidence against Balbhim and Balaji. But, there is specific evidence against Madhukar, Gopal and one Shivaji also. He has given evidence that they used sticks against him and due to beating given to him, he sustained fracture injury to hand. Though it can be said that there are no specific allegations against these two petitioners from Sain, there is no reason to disbelieve Sain in respect of his contention that Balaji

and Balbhim participated when he was assaulted.

14. Dr. Pandit (PW 4) has given evidence that on 28.12.1988 as many as 9 injuries were found on the person of Sain. On clinical examination, he found fracture to middle 1/3 of left forearm. There were three abrasions, five contusions and one C.L.W. The X-ray in respect of these injuries were not produced. Doctor has given evidence that these injuries were sustained within 6 to 12 hours and they were caused by hard and blunt object. The M.L.C. at Exh. 67 is consistent with his oral evidence. Though there is no X-ray report in respect of aforesaid fracture injury, this Court sees no reason to disbelieve the doctor on his contention that on clinical examination, he found that there was fracture of left hand. This medical evidence gives corroboration to the evidence of Sain.

15. Vyankat (PW 3) has given evidence that Balbhim assaulted Sain with stick and Balbhim assaulted him also with stick. He has given evidence that Balbhim assaulted Waman with iron bar and Balbhim assaulted Tukaram with stick. He has given evidence that other accused also assaulted Waman. Thus, Vyankat (PW 3) has tried to say that Balbhim used both stick and iron bar. It can be said that there is little bit exaggeration in the evidence given by this witness and it is not probable that Balbhim had used both such weapons in the same incident. There is probability that all the assailants had used sticks only, in view of the evidence given by Sain.

16. Dr. Pandit (PW 4) has given evidence that on 28.12.1988 when he examined Vyankat (PW 3) he found a contusion over the left shoulder and one abrasion over right clavicle. According to him, the injuries were caused within 24 hours and they were caused with hard and blunt object. M.L.C. at Exh. 68 is consistent with his oral evidence and it gives corroboration to the version of Vyankat.

17. Dr. Pandit (PW 4) has given evidence in respect of the injuries sustained by Tukaram also, but Tukaram is not examined as a witness. In any case, in view of the evidence given by Vyankat and Sain that, Tukaram was also assaulted, non examination of Tukaram will not affect the case of prosecution as cognizable offence was committed.

18. Panch witness Dattatraya (PW 5) has proved the spot panchanama which is at Exh. 74. His evidence shows that he is an independent witness. This evidence shows that one stick, having blood stains, was found on the spot of offence. The defence taken by the petitioners in statements u/s 313 of Cr. P.C. shows that the incident is not disputed. It is only contended that the petitioners were in possession and they were sleeping in the shed as the property belongs to them. It is their case that it is the injured witnesses from this case, who assaulted them.

19. The aforesaid evidence is sufficient to prove that the petitioners were involved in the incident and they caused injuries to atleast 3 prosecution witnesses by sticks. One of the prosecution witness sustained fracture injury. The J.M.F.C. and Sessions Court have held that the offence punishable u/s 326 of I.P.C. is proved, but the aforesaid evidence does not show that any dangerous

weapon was used. In view of the nature of the evidence and aforesaid circumstances, this Court holds that the conviction is possible for offence punishable u/s 325, 323 and 34 of I.P.C. For conversion of such findings, this Court holds that the proceeding needs to be allowed. However, due to the aforesaid irregularity, there is no need to remand the matter to Sessions Court. The incident took place in the year 1988. The other side is acquitted of the offences in the counter case. The record shows that no revenue record as such was produced by both the sides. The decision is given only on the basis of oral evidence and both the sides contend that they were in possession of disputed portion. Investigating Officer is not examined. The complaint was confronted with supplementary statement in which he had stated that in all 19 persons had assaulted them. Due to non examination of Investigating Officer, this contradiction could not be proved. The case was filed against ten accused, but the Criminal Court has convicted only the petitioners, two accused, in view of the nature of evidence given in the case. In view of these circumstance, this Court holds that it is not desirable to send the petitioners behind bars after so many years of the incident. This Court holds that benefit of provisions of Probation of Offenders Act need to be given for doing justice. The petitioners can be directed to pay compensation to Sain as he sustained fracture injury. So the order.

ORDER

- (i) The revision is allowed.
- (ii) The judgment and order of Sessions Court is modified to convict the petitioners for offences punishable u/s 325, 324 r/w. 34 of I.P.C.
- (iii) In stead of sentencing them, at once they are given benefit of provisions of section 4 of the Probation of Offenders Act. Each of the petitioner is to execute the bond of Good Behaviour for the period of one year of the amount of Rs. 15,000/- (Rupees fifteen thousand) with one surety of similar amount. Each petitioner is to keep peace, be of good behaviour and not to commit similar offence during this period.
- (iv) In case of breach of conditions of bond, the petitioners will be liable to undergo sentence.
- (v) Each appellant is to pay compensation of Rs. 5,000/- (Rupees five thousand) to Sain or his widow and if widow is not there to his other legal representative, if he is dead. The amount is to be deposited in the Court of J.M.F.C. within four weeks from the date of this order. The J.M.F.C. is to call Sain for giving of the amount.
- (vi) The fees of the advocate appointed for original complainant, respondent No. 2, is quantified at Rs. 2500/- (Rupees two thousand five hundred).