

(1993) 09 BOM CK 0069
In the Bombay High Court
Case No : Criminal Appeal No. 488 of 1987

Balu Waghu Waghpure

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-09-1993

Acts Referred:

Penal Code, 1860 (IPC) — Section 325

Citation : (1994) 3 BomCR 655

Hon'ble Judges : S.W. Puranik, J

Bench : Single Bench

Advocate : Anita Agarwal, for the Appellant; B.R. Patil, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S.W. Puranik, J.—The appellant along with two other acquitted accused Raghu his brother and Waghu his father were initially charged with the offences u/s 302, 325 & 323 read with 34 of the Indian Penal Code. However after the trial in Sessions Case No. 77 of 1987 concluded the original accused Nos. 2 and 3 Raghu and Waghu were acquitted of all the offences, while appellant-original accused No. 1 came to be acquitted of all other offences except section 325 of the Indian Penal Code for which he has been sentenced to suffer R.I. for two years and a fine of Rs. 500/-, in default R.I. for six months. This judgment and order was rendered by the Additional Sessions Judge, Pune.

2. Feeling aggrieved thereby, the appellant has carried this appeal. Mrs. Anita Agarwal appears for the appellant, while Mr. B.R. Patil appears for the State. With the assistance of learned Counsel of both the parties I have gone through the record and papers of the case as well as the impugned judgment.

3. The charge against the appellant and two acquitted accused was that they along with juvenile accused Vithal Waghu Waghpure, on or about 22-10-1986 at about 8.00 a.m. at Village Gulunche, Zirap Wasti, Taluka Purandhar, District

Pune, either individually or in furtherance of their common intention committed the murder by intentionally or knowingly causing the death of Appa Mahadu Mahanwar and thereby committed an offence punishable u/s 302 simplicitor or 302 read with 34 of the Indian Penal Code. They were also similarly charged for the offences u/s 325 read with 34 and 323 read with 34 of the Indian Penal Code.

4. Briefly stated, the prosecution case was that the family of the accused and the family of the complainant are both related to each other. They all stay in a vasti known as Zirap on the outskirts of Village Gulunche. The complainant is an elderly person. His sister Rakhma is married to original accused No. 3 Waghu. All these people belong to shepherd community and carry on agricultural operations in the aforesaid area. There was no previous enmity or dispute between them at the material time. It appears however that a fortnight before the incident some agricultural land in which the accused persons were interested in purchasing was in fact purchased by the family of the complainant. According to the prosecution, this is the motive for the crime.

5. The complainant and his family had gone to attend the fair of Bhairoba deity and had returned on the evening of 22-10-1986. They were sitting in front of their house. At that time appellant Balu, Vithal a minor and Tanhabai went to them and made enquiries about their horse which was lost. The complainant Mahadu informed them that the horse had been let lose by him. He assured them that whatever be the dispute or whatever be the compensation payable, the same will be settled on the next morning. According to the prosecution at this time accused No. 2 Raghu and accused No. 3 Waghu reached the spot. Raghu caught hold of Gajanan by his collar and slapped him. The complainant intervened but was given a stick blow by Raghu injuring him on the base of the ring finger. Raghu also gave a stick blow on his head. At this time accused No. 1 appellant allegedly lifted the complainants' son Appa and dropped him on the ground head downwards. Accused No. 2 also gave fist blow on fallen Appa. Due to this Appa had become unconscious. Ladabai, the mother of Appa was present there. She also received injuries in the scuffle by the stick blows given by Raghu.

6. Appa who had become unconscious was removed to the nearest hospital. From there after giving him first aid he was sent to the Government hospital at Village Wala. The doctor examined the injured Appa and directed him to Sassoon Hospital, Pune. He was admitted there on the next morning. He was throughout unconscious. Finally on 11-11-1986 Appa succumbed to his injuries.

7. Complainant Mahadu had already made a report at Ex. 14, at the Police Station, but no cognizable offence was registered. Later on the information of death of Appa offence u/s 302 of the Indian Penal Code came to be registered and investigation began.

8. The prosecution claims to have recorded the dying declaration of Appa which is at Ex. 26. After completion of the usual investigation, charge-sheets were filed against the accused. It has come on record that in respect of the very incident in

which the accused persons were also injured an offence was registered against the complainant party and they were simultaneously charge-sheeted in the same Court.

9. It was the defence of the accused in the trial that they had gone in search of their missing horse, but on the other hand complainant and his sons attacked them and if at all they have acted that was in exercise of the right of private defence.

10. As already stated above, the learned trial Judge found that accused No. 3 Waghu, the father of accused Nos. 1 and 2, had not participated in the incident at all and acquitted him. He also held that there is no positive evidence against Raghu having given the stick blows to any of the injured members of the complainant's family and acquitted him of all the charges. The trial Judge also came to the conclusion that in the facts and circumstances of the case and the manner in which the incident occurred, the appellant Balu had no reason to cause the death of deceased Appa and acquitted him of the charge of murder. He, however, came to the conclusion that the prosecution evidence was adequate enough to establish that the appellant had in fact physically lifted Appa and had thrown him head downwards on the ground thereby causing haematoma below the scalp and had fractured the cervical vertebra thereby causing pressure on the spinal cord which has resulted in shock and death of Appa. He, therefore, convicted him of the offence punishable u/s 325 of the Indian Penal Code and sentenced him to suffer R.I. for two years and to pay a fine of Rs. 500/-.

11. Mrs. Agarwal, the learned Counsel for the appellant contended that the prosecution evidence discloses that even as the appellant was returning after making enquiry about the horse, the other members of the family came on the spot and admittedly there was a free fight between the two parties and that both the parties sustained injuries and counter cases have been filed against each other. In these circumstances, she submitted that it would not be possible to pinpoint as a specific act of the appellant to have lifted deceased Appa and to have dropped him on the ground head downwards thereby causing the fatal injury. She submitted that taking it at the worst, it could not be said that he had intention to voluntarily cause a grievous hurt, but only of causing a simple injury constituting an offence punishable u/s 323 of the Indian Penal Code.

12. Mr. B.R. Patil supported the impugned judgment. According to him the three prosecution witnesses have consistently deposed that it was the appellant who lifted Appa and forcefully threw him on the ground head downwards. Therefore, he must be held responsible for his act which has resulted in the unfortunate death of Appa.

13. In the light of these submissions the evidence will have to be scanned closely. The prosecution has examined P.W. 4 Mahadu, the complainant the father of deceased Appa. His First Information Report is at Ex. 14. The next eye witness is Babu, P.W. 5, the brother of deceased Appa and the third eye witness

is Ladabai, P.W. 8, the mother of the deceased Appa. These are the only three eye witnesses to the incident of attack upon the family of the complainant. It may be mentioned here that according to the depositions of these witnesses even the adjoining neighbours were also present, but were not examined. The depositions of these independent persons would have assisted the Court in arriving at the truth. Besides this, the prosecution has examined Dr. Kamble, P.W. 7 who treated injured Appa as well as injured Mahadu and Ladabai. He has placed on record the injury certificates in respect of these persons at Exs. 21, 22 and 23. So also the prosecution has examined Dr. Pherwani, P.W. 6 who conducted the post mortem on the body of deceased Appa and his notes are at Ex. 19. Apart from this, the formal evidence consisted of P.W. 2 Ramrao who was called to act as panch and in whose presence the scene of offence was examined. Ex. 11 is the panchanama of the scene of offence. P.W. 1 is Head Constable Dashrath who conducted the inquest over the dead body of Appa (Ex. 9). P.W. 3 is Head Constable Haribhau who intimated that injured Appa was admitted to Sasson Hospital on 23-10-1986. P.Ws. 9, 10 and 11 are the Investigating Officers.

14. According to Mahadu in the evening when they were sitting in front of their house, appellant Balu came to his house at about 8.00 p.m. and asked him about the horse. He told him that it was night time and they shall discuss and settle the matter next morning. But at that time the other two accused came there. Accused No. 2 Raghu caught hold of his nephew Gajanan and the complainant Mahadu went ahead to intervene, but got injured by the stick blow given by Raghu. He then claims to have seen Balu lifting up his son Appa and dropping him on the ground head downwards. He also claims to have seen Raghu giving stick blows on the fallen Appa. In his cross-examination he has admitted that there is no dispute about grazing rights with the accused persons and thereby he contradicts his earlier statement given to the police. He admits that one Bayadabai was also witness to the incident. She is not examined in this trial. He also admits that Babu Rajaram Thombare as well as Sampat Chander Nigade and his servant Sitaram were present at the spot at the time of the incident. These persons have also not been examined at the trial. What is pertinent to note is that in his cross-examination he has admitted that in his earlier statement to the police he had not deposed to the fact that the appellant had lifted Appa and throw him forcefully on the ground head downwards. Another factor to be noted from his admissions in cross-examination is that this complainant Mahadu was facing a trial at the material time along with his sons Dagadu, Sadhu, Gaja Babu launched on the basis of the complaint of the accused persons. At the end of his cross-examination he stated that in one incident of maramari he was convicted and suffered imprisonment for one year. So this is the character of the complainant in the instant case having a previous conviction to his credit. As already stated above, there is an important omission on the part of the complainant of the fact that Appa was dropped on the ground head downwards by the appellant in his police statement recorded at the earliest point of time. He has tried to show that he is totally innocent in this incident though he admits

that a counter case against him and his family is pending.

15. The next witness is P.W. 5 Babu, son of the complainant. According to this witness P.W. 1 Mahadu came on the scene a little later after the incident had started. He also states in his cross-examination that the incident did not take place in front of their house as stated by P.W. 1 Mahadu but in front of the house of his uncle Sadhu. He also admits in his cross-examination that his father was not present when the accused-appellant came on the spot and made enquiry about the horse. On the other hand, he makes out a case that not only appellant Balu but Vithal and Gulab along with Balu came and made complaint about the horse. The discussion was going on and quarrel had started. But on the assurance of Jagabai, Gulab, Balu and Vithal started returning back to their house. After they had proceeded for 10-15 paces, his father P.W. 1 Mahadu came there and stopped them. He admits that he had in his statement to the police not at all mentioned about the assault on his father. So also he had not stated before the police that accused Raghu slapped Gajanan. Finally, he admits that due to darkness he was not in a position to see what was happening. He admits that after the commotion started his father came alone from the house.

16. Thus a very contradictory version is narrated by this witness and it appears that as the accused were returning to their home, complainant Mahadu came on the scene and stopped and at this point of time the quarrel started. Apart from this, this witness has not stated before the police that appellant Balu lifted Appa and dropped him on the ground head downwards. This omission has been duly proved in the cross-examination of P.W. 9 Suresh Kulkarni, A.S.I. Jejuri Police Station. Besides this witness has given categorical admission that due to darkness he was not in a position to see what was happening.

17. The last eye witness is Ladabai. In Ladabai's deposition one finds that she has again tried to mention that she saw appellant lifting Appa and dropping him on the ground head downwards. But in her cross examination it is admitted that her statement was not recorded immediately after the incident, but almost three weeks after the incident, i.e. after the death of Appa on 11-11-1986. In her cross-examination the omission about Appa having been lifted by appellant and dropped on the ground head downwards has been duly established.

18. These are the only three witnesses to the incident examined by the prosecution. As noted earlier P.W. 4 Mahadu is the father of the deceased, P.W. 5 Babu is the brother of the deceased and P.W. 8 Ladabai is the mother of the deceased Appa. However, they are highly interested. Admittedly, many independent witnesses were present at the scene of offence but for the reasons best known to the prosecution, they have not been examined. Further it has come on record that none of these three eye witnesses even though highly interested in the prosecution had stated in their earlier statements before the police the fact of appellant having lifted Appa and having dropped him on the ground head downwards. These are material omissions amounting to contradictions and these very facts are the basis for holding the appellant guilty

of having caused the fatal injury by having lifted Appa and having thrown him on the ground head downwards. Besides this P.W. 5 Babu has admitted that at the material time there was darkness and he could not see what was happening and how. Judicial notice can be taken of the fact that the place of incident is even beyond the Village Gulunche and it was 8.00 p.m. in the last week of October. It was, therefore, beginning of winter and the sun sets early. It must, therefore, necessarily be dark at the material time. None of these eye witnesses have deposed to any source of light or visibility at the scene. The panchanama Ex. 11 of the scene of offence also does not refer to any light being available at that time. In view of this coupled with the fact that P.W. 5 has admitted that there was darkness, it would be well-nigh impossible for the witnesses to see the fight that was going on between both the parties. The learned trial Judge in his judgment at paragraph 20 categorically stated as follows :-

"It has come on record that accused Balu did not go there with any instrument in his hand. His intention was only to know why his horse has been beaten by Gajanan and where that horse has gone. The exchange of words took place between them, which brewed the quarrel and in this quarrel both the parties were injured and the counter cases were filed and tried in this Court simultaneously."

Thereafter, however the learned trial Judge drew his inferences, surmises and conjectures about the accused persons being the aggressors and convicted the appellant for the offence punishable u/s 325 of the Indian Penal Code. The learned Public Prosecutor at the trial had conceded that there was no case u/s 302 of the Indian Penal Code inasmuch as none of the accused had any intention to cause the death of Appa.

19. I am not in agreement with the learned trial Judge as regards the culpability against the appellant also. The appellant has simply gone to the place of incident to enquire about his horse which was lost and while he was satisfied by the answer given and was about to return, the incident was triggered off in which there was a free fight between both the parties. The other two accused have been acquitted of all the charges levelled against them. In respect of the present appellant, however, the facts which are made the basis for convicting him viz. the appellant having lifted Appa and having dropped him on the ground head downwards are not at all established. In view of the fact that there was a free fight between both the parties, that there was darkness all around and that both the parties were injured, I do not see why this particular injury caused to deceased Appa can be attributed to the act of the appellant. Consequently, he is entitled to acquittal or in the alternative he is entitled to the benefit of doubt of his complicity in the offence.

20. In the result, therefore, the appeal succeeds. Appellant is acquitted of the offence punishable u/s 325 of the Indian Penal Code. The conviction and sentence imposed against him are quashed and set aside. Bail bonds, if any, furnished by the appellant shall stand discharged.