

(2012) 04 BOM CK 0087

In the Bombay High Court

Case No : Criminal Appeal No. 109 of 1991

Bhimrao Digambar Dhekle, Dattatraya Bhaurao Dhekle and
Sarjearo @ Sajjan Ramchandra Dhekle

APPELLANT

Vs

The State of Maharashtra, Shri Rajaram Nagnath Dhekale,
Shri Vishnu Nagnath Dhekale and Smt. Kashibai Dhekale

RESPONDENT

Date of Decision : 27-04-2012

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 304

Citation : (2013) 3 ABR 1427 : (2012) BomCR(Cri) 777

Hon'ble Judges : Shrihari P. Davare, J;B.R. Gavai, J

Bench : Division Bench

Advocate : A.P. Mundargi, with Mr. S.P. Marwadi, N.D. Yelkar and Mr. T.M. Bagal
advocate, for the Appellant; B.D. Joshi, Sandeep Salunkhe and Mr. K.V.
Saste -App advocate for respondents 2-4., for the Respondent

Judgement

B.R. Gavai and Shrihari P. Davare, JJ.—The appellants-original accused nos.1-7 have moved this Court being aggrieved by the judgment and order dated 31st January, 1990 in Sessions Case No. 100/1990 thereby convicting the appellants for the offence punishable u/s 147 of IPC and sentencing them to suffer one month's R.I. and to pay fine of Rs. 100/- in default to suffer further four days R.I. and for the offence punishable u/s 148 of the IPC and sentencing them to suffer R.I. for two months and to pay fine of Rs. 200/- and in default to suffer further R.I. for 8 days and for the offence punishable u/s 302 r/w 149 of IPC and sentencing them to suffer R.I. for life and to pay fine of Rs. 2000/- and in default to suffer further R.I. for six months and for the offence punishable u/s 504 r/w 149 of the IPC and sentencing them to suffer R.I. for one month and to pay fine of Rs. 100/- and in default to suffer further R.I. for four days and for the offence punishable u/s 506 r/w with 149 of IPC and sentencing them to suffer R.I. For two months and to pay fine of Rs. 200/- and in default to suffer further R.I. for eight days and for the offence punishable u/s 326 r/w 149 of IPC and sentencing

them to suffer R.I. for one year and to pay fine of Rs. 500/- and in default to suffer further R.I. for three months and for the offence punishable u/s 323 r/w 149 and sentencing them to suffer R.I. for one month and to pay fine of Rs. 100/- and in default to suffer further R.I. For four days and for the offence punishable u/s 447 r/w with 149 of the IPC and sentencing them to suffer R.I. For one month and to pay fine of Rs. 100/- and in default to suffer further R.I. for four days. The prosecution case in nutshell is that there was a strained relationship between PW-6 Rajaram and accused persons. They belong to different political parties. It is the case of the prosecution that accused no.1 Baban belongs to Congress party and was Sarpanch of Gram Panchayat at the relevant time, whereas PW-6 Rajaram belongs to Shivsena Party. It is the prosecution case that on 24th November, 1989 there was voting of Loksabha Election. PW-6 Rajaram and his brother came from the place where they were residing (hereinafter referred to as "vasti") to the village. It is further the prosecution case that when PW-6 Rajaram and one Uttam Mandhare were constructing a temporary shed near the booth, the accused no.1 came there and threatened them to the effect that they should not construct the shed, otherwise the consequences would be dire. It is the prosecution case that inspite of this they constructed the shed. It is the prosecution case that on account of this incident relations between the accused and PW-6 were strained.

It is the prosecution case that on the date of the incident i.e. on 7th December, 1989 at around 8.30a.m. to 9.00a.m. the mother of PW-6- Complainant had gone to the nearby vasti of Gajendra Dhekle for the purpose of cooking. PW-6 had also come to the said vasti for taking water. It is the prosecution case that when PW-6 was going back to his vasti alongwith a pot of water and when he came near the Bund where lemon tree was situated, he saw the Sarpanch coming alongwith his supporters namely Arjun, Revan, Baban, Bhimrao, Dattatraya, Mohan and Sajjan. It is the prosecution case that accused no.1 was armed with a gun, accused Revan with stick, accused Arjun with Sattur, accused Baburao with stick, accused Bhimrao with iron pipe, accused Dattatraya with stone and accused Sajjan with sticks. It is further the case of the prosecution that thereafter accused no.1 told PW-6 Rajaram that since he has constructed the shed on that day, he should face the consequences. Thereafter accused Arjun and Bhimrao rushed towards PW-6 Rajaram. Bhimrao started beating him with iron pipe and Arjun gave fists blows and kicks to Rajaram. Thereafter Vishnu who is the brother of PW-6 Rajaram rushed towards him. Baban told his followers to beat Vishnu. As such the other accused assaulted Vishnu. At that time Kashibai- the mother of PW-6 came there and she fell on the body of the Rajaram and Vishnu. Thereafter, Baban alongwith his followers went to the vasti of the Complainant's family. At that time the Complainant's father namely Nagnath, his brothers Krishnadev and Pandu were present in the vasti. After Nagnath asked the accused as to why they were beating his sons unnecessarily, Baban said "beat this old man as he was too much energy in his body". Thereafter, the accused beat deceased Nagnath with stones, sticks, Sattur and iron pipes. The

stone pelted by accused Dattatray hit Nagnath on his head as a result of which Nagnath fell down. Janardhan, the uncle of Rajaram came from his vasti. After hearing the shouts Kashibai also rushed to their vasti. Thereafter, accused Revan given stick blows on the left leg of Janardhan and also assaulted him on his left ear which caused bleeding injury to Janardhan. There were also injuries to Kashibai. As Nagnath was found dead, all the accused persons rushed towards the vasti of sarpanch.

It can thus be seen in nutshell that it is the case of the prosecution that the accused nos. 1-7 formed unlawful assembly on that day on account of previous enmity with Rajaram and they came to the vasti of deceased Nagnath armed with deadly weapons like iron pipes, Sattur, sticks, stones and assaulted Rajaram and Vishnu and thereafter killed Nagnath.

It is further the case of the prosecution that after accused ran to the vasti of Baban, then the grand-father of Rajaram namely Govind Dhekle and sister of Nagnath namely Chandrabhaga came to their vasti from village Dheklewadi and brought injured Rajaram and Vishnu firstly to the Hospital of Modnimb through bullock cart. It is further the prosecution case that meanwhile the incident was reported to Mohol Police Station by PW-5 police constable Tanaji Kashid as he received information from one Bandu Mali of Modnimb that there was scuffle at Dheklewadi between two parties, one belonging to Sarpanch and another belonging to Nagnath Dhekle, in which Nagnath died whereas his two sons Rajaram and Vishnu were injured. After receipt of this information P.S.I. Ghadge, PW-9 I.O. came on the spot at around 12.00 at noon and saw the dead body of deceased Nagnath. After executing the necessary panchnama he recorded written complaint given by Krishnadev as per his say vide Exhibit 65 which came to be treated as FIR. The investigation was conducted by the Investigating officer during which under memorandum of various accused, the weapons used in the crime came to be attached. Statements of witnesses were recorded. After the conclusion of the investigation, the charge sheet came to be filed in the Court of Judicial Magistrate, First Class, Mohol. Since the offence was punishable u/s 302, the case was exclusively triable by the Court of Sessions, the case came to be committed to the learned Sessions Judge, Solapur. Chargesheet came to be filed against the present appellants alongwith the accused no.8 namely Mohan. Learned Sessions Judge framed charge vide Exhibit 5. The accused pleaded non guilty and claimed to be tried.

2. The prosecution examined 11 witnesses and produced other documentary evidence on record. At the conclusion of the trial learned Sessions Judge acquitted the accused no.8 for the charges levelled against him and also acquitted the accused no.1 for the offence punishable u/s 27 of the Arms Act and convicted the accused-appellant for the offences as referred herein above and sentenced them as aforesaid. Being aggrieved thereby the present appeal.

3. Shri Mundargi, the learned Senior Counsel appearing on behalf of appellant submits that the conviction of the accused is based only on the basis of

testimony of the interested witnesses. He submits that the conviction of the accused on the basis of testimony of interested witnesses would not be sustainable in law. He further submits that the evidence of Investigating Officer is sufficient to discard the entire evidence regarding recovery of weapons which are admitted in his evidence to be lying with police for three months in unsealed condition. He further submits that as such the conviction only the basis of ocular testimony would not be sustainable. It is further submitted that incident has taken place at 9.00 a.m., police have received the information at 11.00 a.m.. There is also an entry with regard to the same in the register maintained by the police. It is submitted that prosecution has not produced entry in that register on record and as such it creates doubt on the veracity of the prosecution case. It is further submitted that Exhibit 65 which is treated as a FIR also cannot be treated as a FIR inasmuch as the investigation is set in motion on the basis of prior information. It is, therefore, submitted that prosecution has failed to prove the case beyond reasonable doubt and as such the appellants are entitled to be acquitted.

4. The learned APP Shri K.V. Saste on the contrary submits that ocular testimony of all the prosecution witnesses is consistent. The testimony is supported by medical evidence. It is submitted that postmortem report of deceased and the medical certificates of the injured persons corroborate the version given by the eye witnesses. It is submitted that merely because there are certain minor contradictions and omissions in the evidence of the witnesses, cannot be a ground to discard the testimony of the eye witnesses. It is, therefore, submitted that appeals are liable to be dismissed.

5. Shri Joshi, the learned Counsel who appears for the Complainant also adopts the submissions made by the learned APP.

6. With the assistance of learned Counsel for the parties, we have gone through the entire evidence on record. The prosecution story regarding the assault on PW-6 Rajaram and PW-7 Vishnu and assault on deceased Nagnath is supported by ocular testimony of four eye witnesses namely PW-6 Rajaram, PW-7 Vishnu who have sustained injuries in the incident and PW-4 Krishnadev- the Complainant and PW-8 Kashibai.

7. The said ocular testimony is duly supported by the evidence of PW-2 Dr. Prabha Shinde who has examined the injured witnesses and PW-3 Dr. Sidramappa Kore who has carried out the post mortem examination of deceased Nagnath.

8. Insofar as prosecution witnesses' testimony is concerned, the injured witness PW-6 Rajaram and PW-7 Vishnu have clearly stated in their deposition that when Rajaram was going back to his vasti after taking water from the vasti of Gajendra, the accused no.1 alongwith his supporters i.e. accused nos. 2-7 came towards him. He also categorically stated that accused no.1 said that on that day he constructed the shed, now face the consequences. After accused no.1 saying

this, Bhimrao started beating PW-6 with iron pipe which hit him on right hand and right leg due to which he fell down. Arjun also gave fists and kicks blows to him. When Vishnu rushed towards Rajaram, Baban told his supporters to beat Vishnu. Evidence of Vishnu would also show that Bhimrao had given blow with iron bar on his left arm. Arjun had given a blow by Sattur on his left leg. Said version is also supported by PW-4 Krishnadev and PW-8 Kashibai. Though all these witnesses have been thoroughly cross-examined, nothing damaging has come in the cross-examination of these witnesses insofar as assault on Rajaram and Vishnu is concerned. The ocular version is duly supported by evidence of PW-2 Dr. Prabha Shinde who has categorically stated in her evidence that injuries on the person of Vishnu and Rajaram are possible with the means of iron pipes, sticks etc. and as such the findings of conviction insofar as offence punishable u/s 326 r/w 149 of IPC, in our view calls for no interference. Insofar as charge for the offence punishable u/s 447 r/w 149 of the IPC is concerned, from the perusal of evidence on record, we are of the considered view that no interference is warranted insofar as the findings of conviction in regard to these offences is concerned.

9. That leaves us with main offence regarding the death of Nagnath G. Dhekle, for which the accused have been convicted for the offence punishable u/s 302 r/w 149 of IPC. Insofar as this offence is concerned, also the prosecution relies on the aforesaid four eye witnesses. From the evidence of PW-6 and PW-7, however, it appears that even according to them they were not conscious after they were assaulted. It will be relevant to note the following statement in the evidence of PW-6 Rajaram:

"They brought me and Vishnu to the hospital through bullock cart. I do not know who remain at vasti as I was unconscious."

It thus appears that after the assault on these two witnesses, they became unconscious and it is doubtful as to whether they have witnessed the assault on their father. Apart from that insofar as evidence of PW-7 Vishnu is concerned, there is omission in his statement before the police regarding the details attributed by him to the accused about assault on his father. It can further be seen from the evidence of PW-4 Krishnadev-Complainant that after the accused started assaulting Rajaram and Vishnu, Kashibai fell on the body of Rajaram and Vishnu. In his evidence, thereafter he narrates the story regarding the altercation between the deceased and Baban and assault on the deceased. He further states in his evidence that thereafter his uncle Janardhan ran towards their vasti from his vasti after hearing their shouts. He further states in his evidence "at the same time our mother rushed towards our vasti from Vishnu Rajaram". It can thus clearly be seen from the evidence of PW-4 Complainant that PW-8 Kashibai has arrived at the incident after the incident regarding the altercation and assault on deceased has taken place. In our considered view, therefore, insofar as evidence of these three witnesses regarding the assault on deceased Nagnath is concerned, is doubtful and, therefore, cannot be relied on.

Sofar as the evidence of PW-4 Krishnadev who is also a Complainant deposed thus in his evidence:-

"Then those persons came to our vasti. Then our father "Dada" asked these persons why you were beating his son unnecessarily. Then accused no.6 Dattatraya pelted stone towards our father. At that time accused no.1 told as there is too much energy in this old man, kill him. Then accused Arujn, Revan, Baburao, Bhimrao Dattatraya started beating our father with sticks, stone, Sattur and iron pipe. Stone pelted by accused Dattatraya on the head of our father, then our father fell down."

10. It can further be seen that medical evidence supports the prosecution case inasmuch as PW-3 clearly states that injuries 1-6 and 10 and 11 were grievous and serious and sufficient in the ordinary course of nature to cause death. It can thus clearly be seen that the prosecution case establishes that deceased was assaulted by accused nos. 2-7 under the instigation of accused no.1 as a result of which he sustained several injuries. The prosecution also has established that injuries at Sr. No. 1-6 and 10 and 11 were grievous and serious and sufficient in the ordinary course of nature to cause death.

11. In that view of the matter, finding of the learned trial Court that the accused had inflicted injuries upon the deceased as a result of which his death occurred, cannot be faulted with. Therefore, only question would be as to whether the finding of conviction u/s 302 would be proper or not?

12. Insofar as assault on deceased Nagnath is concerned, the evidence of PW-6 Rajaram and PW-7 Vishnu will not be relevant inasmuch as from their evidence it is seen that after assault on them, they fell unconscious, it is improbable they have witnessed assault on their father which has taken place subsequently. As already discussed herein above from the evidence of PW-4 Krishnadev, PW-8 Kashibai arrived at the spot where the deceased was assaulted after the altercation and the act of assault was complete. As such it is difficult to believe the version of PW-8 insofar as the instigation given by accused no.1 to other accused to kill the deceased. As such the evidence of PW-4 Krishnadev would only be relevant insofar as assault on deceased Nagnath is concerned. PW-4 Krishnadev states in his evidence that the accused no.1 said "as there is too much energy in the old man, kill him". It is the prosecution version that after the accused no.1 said this to his supporters, the other accused started assaulting the deceased. From the evidence of PW-3 Dr. Sidramappa Kore, it could be seen that all the injuries sustained by the deceased were grievous and serious and sufficient in the ordinary course of nature to cause death. It has also come in the evidence that the injuries mentioned in para-17 of the postmortem notes can be possible by means of Sattur. From the examination and cross-examination of said witness, it can be inferred that injury caused to the deceased on the head is possible by attack of Sattur from the blunt side. It can thus be seen that from the part of the body of the deceased on which assault was made, the weapons used and the nature of injury sustained, no fault could be found with the finding

that the act of accused was done with the knowledge that it is likely to cause death. The only question, therefore, is as to whether it was done with an intention to cause death or to cause such bodily injury as is likely to cause death. From the evidence it could be seen that the alleged enmity of the accused is with PW-6 Rajaram.

13. It can be seen that the accused had come to initially assault Rajaram, after that he assaulted Vishnu who came to rescue his brother Rajaram. After that when they went to the vasti of the deceased and his family members, the deceased asked the accused as to why they were assaulting his sons. It is a prosecution case that on this, the accused no.1 told his supporters to kill the deceased. It is to be noted that accused no.1 was armed with pistol and even according to the prosecution the other accused were armed with Sattur and other weapons. If the accused had an intention to cause death, they could have very alone run away with Rajaram since alleged enmity is with him, however, from the nature of injuries sustained by Rajaram or for that matter by Vishnu, it could be seen that no such intention could be gathered. If the accused had an intention to cause death of the deceased, then they could have very well assaulted the deceased with the pistol, however, it has not been done. It is to be noted that incident has taken place in the morning between 8.30 a.m. to 9.00 a.m. whereas FIR is registered at 5.30 p.m. It thus appears that the prosecution witnesses had sufficient time to improve their case. The possibility of putting the words in the mouth of accused no.1 "kill him" being improved, cannot be ruled out taking into consideration the long gap between the incident and the FIR. As already discussed herein above if the accused had an intention to cause death of the deceased, nothing prevented them from using the pistol or the sharp side of Sattur. In that view of the matter we find that the prosecution has failed to prove that act of the accused was done with an intention to cause death of the deceased or to cause bodily injuries as is likely to cause death. In that view of the matter, we find that conviction for the offence punishable u/s 302 would not be tenable and it will have to be altered to one under Part II of Section 304 of IPC. Hence, following order:-

i) The Appeal is, therefore, partly allowed.

ii) The conviction of the appellants for the offence punishable u/s 302 r/w Section 149 is altered to one under Part II of Section 304 r/w 149 of IPC and accused are sentenced to suffer R.I. for seven years and to pay fine of Rs. 2000/- and in default to suffer further R.I. for six months.

iii) The rest of the order as passed by the learned Sessions Judge is confirmed.

iv) The accused are directed to surrender before the learned Sessions Judge within a period of two weeks from today who shall commit them to the concerned prison for undergoing the sentence as aforesaid. On failure, the learned Session Judge shall issue arrest warrants against the appellants and on their arrest commit them to the concerned prison for undergoing the sentence as

aforesaid.