

(2014) 06 BOM CK 0074
In the Bombay High Court
Case No : Criminal Appeal No. 619 of 1994

Chandrakant Balkrishna Shedge

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 11-06-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 326

Citation : (2014) 06 BOM CK 0074

Hon'ble Judges : Mridula Bhatkar, J

Bench : Single Bench

Advocate : Niranjan Mundargi, Advocate for the Appellant; A.A. Mane, APP, Advocate for the Respondent

Final Decision : Allowed

Judgement

Mridula Bhatkar, J.—The appeal is directed against the judgment and order dated 2.9.1994 thereby convicting the appellant/accused u/s 452 and 365 r/w 34 of the Indian Penal Code. Both the appellants were convicted u/s 365 and sentenced to suffer RI for 5 years and to pay fine of Rs. 400/-, in default to suffer 2 months RI. They were also convicted u/s 452 and sentenced to suffer RI for 2 years and pay a fine of Rs. 250/-, i/d to suffer RI for 1 month.

2. Appellant No. 1 is the original accused No. 2 and appellant No. 3 Subhash is the original accused No. 3. The learned Counsel for the appellants has informed the Court that during the pendency of this appeal, the appellant Subhash B. Balchim had expired and thus, as on today, the appeal is only by appellant No. 1 i.e., the original accused Nos. Chandrakanat B. Shedge. It is the case of the prosecution that the complainant Mr. Sunil Kishan Gupta is a builder. On 14.6.1989 at 5.30 pm, he was distributing wages to the labourers in his office. At that time, 10 to 12 persons entered his office with swords and sticks. One of them was holding revolver. The person who was holding revolver, asked him whether he identified him or not. The complainant replied negatively. Thereafter, they asked him to come out and then they forced him to sit in rickshaw and they

took him near the city survey office. They manhandled him and assaulted him with sticks. He was forced to drink liquor. They demanded cash of Rs. 150,000/- from him. At that time around 7 pm, they heard some whistle sound and they ran away. The complainant thereafter went to Sapatnekar hospital and got himself admitted and then lodged FIR with the Naupada police station. The police officer registered the offence at C.R. No. I-335 of 1989 and registered C.R. No. I-335 of 1989 for the offences punishable under sections 147, 148, 149, 365, 326, 452 and 307 of the Indian Penal Code. The police prepared panchanama of the scene of the offence. They recorded statements of the witnesses. On information, they raided the premises at Priyanka Niwas and arrested the accused Nos. 1 to 4 on 15.6.1989 i.e., on the next day. The accused No. 5 was subsequently arrested. The police carried out the arrest panchanama so also the discovery panchanama at the instance of accused Nos. 1, 2 and 4. The police seized weapons pursuant to those panchanamas. Thereafter, test identification parade was conducted on 8.7.1989 by the SEM PW 6 Sahadeo Tukaram Bhoir. After completion of the investigation, the police filed chargesheet in the Court against accused Nos. 1 to 5 and the learned Magistrate committed the case to the Court of Sessions.

3. Charge was framed against all the accused. They pleaded not guilty. Thereafter, the trial was concluded in conviction of the accused Nos. 2, 3 and 4 as mentioned above. Hence, this appeal.

4. The learned Counsel for the appellants submitted that the case rests on the evidence of the sole witness Sunil Kishan Gupta. As per his evidence, when the assailants entered his office, three persons i.e., one Dalvi, Subhash Waghmare and Kamble were present. However, PW 4 Yashwant Sakharan Dalvi, PW 5 Subhash Narayan Waghmare did not support the case of the prosecution. Kamble was not examined by the prosecution. The complainant has stated in his evidence that he did not know the culprits but entered his office, kidnapped him and assaulted him. Therefore, on the point of identification, is a very material witness. In the present case, as pointed out by the learned defence Counsel, the complainant did not mention the name of any accused in the FIR. Rather, he has specifically stated in his examination in chief that he did not know the culprits. However, in his cross-examination, he admitted that he knew accused No. 1 before the incident took place. Therefore, the question was posed as to why the complainant did not mention the name of the accused No. 1 if he knew the accused No. 1 when he entered his office with revolver. Curiously, when the complainant was taken for the test identification parade, accused No. 1 was paraded before him and at that time, he informed the SEM (PW 6) that he knew accused No. 1. The learned Sessions Judge has considered this evidence as the complainant was acquainted with accused No. 1, who was holding revolver and who was the principal accused and was silent about mentioning his name in the FIR and yet, accused No. 1 was shown to the complainant in the test identification parade. The learned Sessions Judge has rightly discarded the evidence of the complainant against accused No. 1 and has acquitted him. The

learned defence Counsel on the point of credibility of the evidence of the complainant, on the point of identification of the other accused and also on the point of assault and the involvement of the appellant/accused, relied on this evidence of the complainant against the accused No. 1. The submissions of the learned Counsel that the conduct of the complainant that though he knew accused No. 1 as an assailant, not disclosing his name to the police is very doubtful and hence, the evidence is not reliable and convincing. The learned defence Counsel has further pointed out number of lacunae in the evidence of the prosecution which are relevant and has weakened the case on the prosecution. On perusal of this evidence of the witnesses i.e., SEM and PW 6 Sahadeo Tukaram Bhoir, it is found that two test identification parades were conducted on 8.7.1989 after a gap of 10 minutes. In the first test identification parade, 8 dummies were used as accused No. 1 was to be identified and thereafter for other 3 accused, other 10 dummies were added. The witness in para 8 of his evidence, in the cross-examination, has admitted that he used earlier 8 dummies in the second test identification parade also. Thus, the witness had an opportunity earlier to see those 8 dummies and thus, only 10 dummies were new for the three accused persons which is contrary to the procedure laid down for the test identification parade. It was also pointed out that in the evidence, the SEM has admitted that the other two witnesses were to attend the identification parade. However, the police produced Sunil Gupta, the complainant, as a witness for the identification parade when it was about to start.

5. Learned Prosecutor while opposing this appeal has submitted that the reasoning given by the learned Sessions Judge in respect of the involvement of accused No. 2 is correct and the judgment to be maintained.

6. After going through the 7 panchanamas, which were drawn on one day i.e., on 13.6.1989, it is found that a pair of the same panchas was used while drawing 7 panchanamas. The police while investigating may repeat the same panch if it is necessary and as per the time constraint and the fact simpliciter repetition of panch itself may not damage the case of the prosecution. However, some of the panchanamas i.e., which were drawn on 15.6.1989 are overlapping time wise, so it is physically impossible for the same panchas to attend two panchanamas at a time. Exhibits 29B and 29C are memorandum and discovery panchanamas at the instance of accused No. 2 i.e., the appellant. It was drawn on 15.6.1989 between 7 to 7.20 pm and 7.20 pm to 8.05 pm. The said panchanama was drawn away from the police station. However, another memorandum and discovery panchanama were drawn at the instance of accused No. 4, marked as exhibit 30A and 30B between 2010 hours to 2020 hours and 2020 hours to 2250 hours. Thus, the panchanama memorandum exhibit 30 started within 5 minutes after the discovery panchanama at exhibit 29C. Similarly, exhibit 32A is the arrest panchanama of accused No. 1 which was drawn between 1905 hours to 1930 hours, which is overlapping to exhibits 29B and 29C. So also exhibit 33 which is the arrest panchanama of accused No. 5 which was drawn between 2040 hours to 2110 hours is overlapping on the recovery panchanama of accused No. 4 i.e.,

exhibit 30B. Thus, this prosecution evidence itself destroys its own case. It was necessary for the learned Sessions Judge to take into account these contradictions and falsities in the case of the prosecution. Thus, the case of the complainant is not at all believable. The evidence produced by the prosecution of the panchas also appears to be false and hence, to be discarded.

7. In view of this, the judgment of conviction is required to be set aside. Accordingly, I pass the following order:

i) Appeal is allowed.

ii) the impugned judgment and order dated 2.9.1994 passed by the Assistant Sessions Judge, Thane in Sessions Case No. 50 of 1990 is quashed and set aside.

iii) The bail bonds stand cancelled.

8. Appeal is disposed of accordingly.