

(1993) 03 BOM CK 0046

In the Bombay High Court

Case No : Criminal Appeal No's. 959 and 1058 of 1988

Chandrakant Mahadu Mhatre and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 23-03-1993

Acts Referred:

Penal Code, 1860 (IPC) — Section 149, 302, 34

Citation : (1994) 1 BomCR 97

Hon'ble Judges : M.K. Mukherjee, C.J.; M.G. Chaudhari, J

Bench : Division Bench

Advocate : P.P. Hudikar, Sujata Mogre, 1 to 4 in Cri.A. No. 956 of 1988, J.V. Kenjalkar, S.R. Chitnis, 5 and 6 in Cri. A. No. 959 of 1988, V.R. Bhonsale and R.J. Mane, in Cri.A. No. 1058 of 1988, for the Appellant; R.Y. Mirza, Public Prosecutor, for the Respondent

Judgement

M.K. Mukherjee, C.J.—The following ten persons --- 1) Chandrakant Mahadu Mhatre 2) Bhaskar Mahadu Mhatre 3) Padu Mahadu Mhatre 4) Charpat Shankar Mhatre 5) Kisan Tukaram Mhatre 6) Balkrishna Shaniwar Patil 7) Mohan Shankar Mhatre 8) Dasharath Arjun Patil 9) Gajanan Balkrishna Patil 10) Arun Haridas Patil

were placed on trial before the learned Additional Sessions Judge, Thane, to answer common charges under sections 147, 148, 149/302, 149/323 and 149/307 of the Indian Penal Code. Alternative charges were also framed against them u/s 302/34, 323/34 and 307/34 of the Indian Penal Code. Against accused Nos. 1, 2 and 3 separate charges u/s 379 of the Indian Penal Code and u/s 25(1) (b) of the Indian Arms Act, 1959 were also framed. As against accused No. 1 there was an additional charge u/s 302 of the Indian Penal Code. On conclusion of the trial the learned Judge, while acquitting accused Nos. 8, 9 and 10 of all the charges framed against them, convicted accused No. 1 u/s 302 and the other six u/s 149/302 of the Indian Penal Code and sentenced each of them to suffer imprisonment for life and to pay a fine of Rs. 1000/- in default to suffer rigorous imprisonment for six months. All of them were also convinced under sections

149/326, though the charge was under sections 149/307, and 149/323, of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years, for the former conviction but no separate sentence was passed for the latter. Accused Nos. 1 and 2 were also convicted u/s 379 of the Indian Penal Code and section 25(1)(b) of the Indian Arms Act and sentenced to suffer rigorous imprisonment for one month and six months respectively. Substantive sentences were directed to run concurrently.

2. Aggrieved by the above order of conviction and sentence, Kisan Mhatre, the accused No. 5, had filed one of these two appeals (Criminal Appeal No. 1058 of 1988) while the other six have jointly filed Criminal Appeal No. 959 of 1988. As both these appeals stem from the common judgment, they have been heard together and this judgment will dispose of both of them.

3. The case for the prosecution, briefly stated, is as under :---

(a) Baliram (the deceased) was a residents of Village Pissarwe within the police station of Turbha in the District of Raigarh. Accused No. 6 also hails from the same village while the others are residents of the nearby Village Kutarli.

(b) In the year 1984, Shripat (P.W. 19), father of Waman (P.W. 1), the first informant, and his brother had gone to Thane for selling vegetables. There accused Nos. 1 and 2 demanded a sum of Rs. 10,000/- from them for defending a murder case in which they were indicted. As they refused to accede to the demand, they were threatened by those accused persons with dire consequences. Again on September 9, 1984 the above two accused and accused No. 6 beat up Shantaram, uncle of P.W. 1, with sticks and stickles for which a report was lodged with the Police. Owing to these incidents the relation between the above accused persons and P.W. 1 and P.W. 19 became strained and the latter and their family members were apprehending danger to their lives at the hands of the former.

(c) In September 1985, Babural Mhatre of nearby Village Waklan who was a cousin of P.W. 1 died due to snake bite. To attend the 13th day ceremony of his death on September 23, 1985 Baliram, an uncle of Waman, Waman (P.W. 1), Dhyaneswar (P.W. 2), Budhaji (P.W. 3), Gangaram (P.W. 5), Natha (P.W. 6), Choutibai (P.W. 18) and Shripat (P.W.19) along with others went to that village in the morning. Kalu (P.W. 9), a resident of Ghotwada, also went there along with his wife and other persons. P.W. 6 had taken his licensed gun with him as he was apprehending danger from accused Nos. 1 and 2.

(d) After the ceremony was over, deceased Baliram along with P.Ws 1, 2, 3, 5, 6, 18 and 19 and Janabai, Kusumbai and Shantaram started their journey back at or about 4 p.m. through village Turme, and P.W. 9 and others through village Karwale. When the former group reached a stream (Nala) which divided villages Waklan and Turme, they heard two gun shots. When their attention was immediately drawn towards the same they found that accused Nos. 1 and 2 were standing with guns in the paddy field and that the bullet fired by accused No. 1

hit Baliram on his chest felling him down. Then all the accused persons, who were there, suddenly attacked the above witnesses with sticks and axes with which they were armed. Accused Nos. 1 and 2 also scuffled with P.W. 6 and snatched away his gun. Then all the accused persons ran away.

(e) On hearing the gun shots P.W. 9, his wife and others came to the place of occurrence and saw Baliram lying on the ground with a bleeding injury on his chest and others also injured. Baliram and the other injured were then taken to village Turme. From there the injured and Baliram were taken to Raigarh Police Out Post and then to the Civil Hospital, Thane, where Baliram succumbed to his injuries. The other injured were examined by Dr. Chincholikar (P.W. 16) and some of them were admitted in the Hospital. P.W. 1 however, was taken to Turbhe Police Station from Raigarh by a Constable. There he lodged a complaint about the incident and treating the same as First Information Report a case was registered against the accused persons.

(f) P.I. Pandit (P.W. 10) took up investigation of the case and went to the spot of incident with P.W. 1. There he prepared a spot panchanama (Exhibit 63). In the meantime, Dr. Chincholikar (P.W. 16) had performed the post-mortem examination on the dead body of Baliram and extracted four pellets from his body which were handed over to the police. The clothes of the deceased were also sent by him to the police station and seized under a panchanama.

(g) In course of the investigation, an axe was seized from accused No. 6 Balkrishna and a stick from accused No. 7 Mohan. A barrel of gun was also seized pursuant to the statement made by accused No. 1 and pursuant to the statement of accused No.2 the gun belonging to Natha was seized from bamboo bushes. On conclusion of investigation, the Investigating Officer submitted charge-sheet against the accused and in due course the case was committed to the Court of Session.

4. The appellants pleaded not guilty to the charges levelled against them and contended that they were falsely implicated due to enmity.

5. To bring home the charges levelled against the accused persons, the prosecution relied primarily on the ocular version of the incident as given out by P. Ws. 1, 2, 3, 5, 6, 18, 19. Among the eye-witnesses, the most important is Waman (P.W. 1) as he had lodged the First Information Report also. In narrating the incident he testified that when he along with P. Ws 2, 3, 5, 6, 18 and 19 and others were coming back to their village along a footway after attending the 13th day ceremony of deceased Baburao Mhatre in Village Waklan and had just crossed a Nala to enter a paddy field he suddenly heard two gun shots. He immediately looked forward and saw the accused Nos. 1 and 2 there, each armed with a gun and that the gun fired by the former had caused a bullet injury on the chest of Baliram. He also saw the other accused present there armed with axes. When they rushed towards them and started giving axe blows they raised shouts. He named individually the accused who had given axe blows to the

persons accompanying him. Narrating the incident further he stated that accused No. 1 and others then snatched away the gun of Natha (P.W. 6) and all of them ran away. The other eye-witnesses referred to above also spoke in the same vein so far as the incident and roles played by accused Nos. 1 and 2 were concerned. Cutting their evidence we find that the prosecution has been able to first establish that when P.W. 1 and the other witnesses had reached a Nala at the boundary of villages Waklan and Turme on their way back home accused Nos. 1 and 2 fired from their guns towards Baliram as a result of which he sustained injury on his chest and fell down. Evidence further establishes that the gun, which Natha was carrying was snatched away by accused.

6. It was, however, contended on behalf of the appellants that the evidence of the above witnesses that they saw accused Nos. 1 and 2 firing was wholly unreliable inasmuch as it was not expected of them to see as to who fired, for, according to them, their attention was drawn by the sound of the gun shots which necessarily meant that the firing was over before they could see the miscreants. We do not find any substance in this contention regard being had to the fact that it was only accused Nos. 1 and 2, who were armed with guns and the shots were fired from the place where they found standing with the guns. That necessarily meant that the firing could not have been from any other place or source.

7. The evidence of the eye-witnesses that Baliram was fired at near the Nala gets ample corroboration, from the find of blood near about that place. This part of the prosecution case was proved by the Investigating Officer who prepared a spot panchanama. He stated in his deposition that blood stains, sample of earth, pieces of bangles and a pair of slipper were seized by him from near about the Nala which was by the side of some paddy field. The articles seized by him were sent for examination by the Chemical Analyser and it was found to contain human blood.

8. The next piece of corroboration of the evidence of the eye-witnesses comes from the recovery of the gun of Natha (P.W. 6) pursuant to the statement made by accused No. 2. It is in evidence that on October 29, 1985 accused No. 2 was arrested and thereafter interrogated by P.W. 30. According to P.W. 30, accused No. 2 stated, inter alia, that a gun was kept by him concealed in grass near Ghod and he recorded that statement (Exhibit 67). Accused No. 2 then led the police and other witnesses to Ghod and produced a gun (Article 42) from Bamboo bushes which was seized by him (P.W. 30) under a seizure memo (Exhibit 68). This gun was identified by P.W. 6 as his licensed gun and in support of his claim he produced the license. Incidentally, it may be mentioned that the testimony of P.W. 30, regarding recovery of the gun was not seriously challenged in cross-examination. That apart the evidence of P.W. 30 on this point gets corroboration from Shivrām (P.W. 13), the Panch witness. The recovery of the gun belonging to P.W. 6 at the instance of accused No. 2 not only fits in with the prosecution case about snatching away of that gun by the accused persons at the time when the

incident took place but also corroborates the testimony of the eye-witnesses regarding the role played by accused No. 2 in the commission of the offences.

9. From Dr. Chincholikar (P.W. 16) we get that he held post-mortem examination upon the dead body of Baliram and he found eight round injuries on the chest and four similar injuries on the back. According to the doctor, the injuries on the chest were entry of gun shots and that on the back were exit injuries. The doctor further stated that four gun shots (pellets) were found inside the body and those were handed over to the police. He opined that from the injuries it could be said that the gun was fired from the front side of the deceased. He further opined that these gun shot injuries were sufficient in the ordinary course of nature to cause death.

10. In course of the argument it was pointed out to us that the evidence relating to the actual place of the incident was patently contradictory inasmuch as while some of the eye-witnesses stated that it took place at the Nala some others spoke about a track. Having considered the evidence as discussed above, we do not find any contradiction of moment in the evidence, particularly when blood was found in and around that place. Then again, on this point there is the evidence of Kalu (P.W. 9). As has already been noticed, he was also one of the persons who had gone to the 13th day ceremony. According to P.W. 9, after the ceremony was over, he and his wife left for their village by Waklan-Karwala pathway while the others by Turme. On the way he heard two gun shots. He then went towards the people who were going to Pisare. When he went near them, he found them on the foot track and Baliram lying with a bleeding injury on his chest. This witness was not at all cross-examined with reference to the above testimony given by him. That necessarily means that his evidence that Baliram was found lying injured at the place referred to by the eye-witnesses remains unchallenged. Any controversy or doubt sought to be raised by the defence about the actual place of offence, therefore, stands completely dispelled by the evidence of Kalu (P.W. 9).

11. Evidence was led by the prosecution to prove that the accused Nos. 1 and 2 had a motive to commit the crime. Evidence was also led to prove the recovery of the guns with which they fired. As the other evidence on record which we have already discussed conclusively proves their involvement in the crime we need not detail or discuss the same.

12. Coming now to the roles of the other five accused persons, we find that it is the consistent evidence of the prosecution witnesses that Padu and Balkrishna (Appellants Nos. 3 and 5 respectively in Criminal Appeal No. 959 of 1988) had assaulted some of the prosecution witnesses including P.Ws. 5 and 6 with axes which were in their hands, as a result of which they sustained injuries on their persons. Their presence and participation in the incident that took place in the incident referred to by the prosecution also, therefore, stands conclusively proved.

13. The same, however, cannot be said about the other three accused persons, namely Charpat (Accused No. 4), Kisan (Accused No. 5) and Mohan (Accused No. 7). So far as these three accused persons are concerned, there is some evidence on record about their participation, but the witnesses who have spoken of such participation stand contradicted by the evidence of the other eye-witnesses. In other words, their being party to the incident that took place is rather doubtful. Mere presence of persons, along with the miscreants does not ipso facto, conclusively prove the former's involvement in the offence also. This aspect of the matter assumes importance when the offences alleged are of rioting and committing murder with a common object for before founding a conviction for such offences it has to be conclusively proved by the prosecution that each of the persons of that assembly shared the common object of the others. As the evidence on record does not conclusively establish that accused Nos. 4, 5 and 7 shared the common object of the other accused persons and as admittedly, according to the prosecution, only ten named persons formed the unlawful assembly and three of whom have been acquitted, it must be held that there was no unlawful assembly within the meaning of section 141 of the Indian Penal Code. Consequently, the convictions recorded u/s 147, 148 and 149/326, 149/323 and 149/302 of the Indian Penal Code cannot be sustained.

14. The next question, therefore, that requires an answer is what offences the accused Nos. 1, 2, 3 and 6 have committed by their acts. So far as the assault on Baliram is concerned, we have already found that the evidence is consistent that both accused Nos. 1 and 2 fired from their respective guns. The prosecution has also led evidence to show that owing to the firing by accused No. 1, Baliram died as the shot fired from his gun hit him on his chest. It was submitted on behalf of the appellants that the evidence on the point as to whose firing caused the injury to Baliram was contradictory. This question need not detain us for there is overwhelming evidence on record to prove that both the above accused persons fired from their guns and as a result thereof one gun shot hit Baliram due to which he died. The fact that both accused Nos. 1 and 2 came armed with guns and gun shots were fired from both the guns aiming Baliram as a result of which he died necessarily means that both of them shared the common intention to commit the murder of Baliram. While on this point it may be mentioned that these two accused persons are not the residents of the village where they were found with guns. Both these accused are therefore guilty of an offence punishable u/s 302 read with section 34 of the Indian Penal Code. The other two accused persons, namely, accused Nos. 3 and 6 cannot, however, be held guilty of the same offence as there is nothing on record to show that they shared common intention with accused Nos. 1 and 2 to commit the murder of Baliram but then they are certainly guilty of the individual offences committed by them, namely, in assaulting some of the prosecution witnesses with axes pursuant to their common intention of causing grievous hurt and hurt to them. The ocular version of the eye-witnesses in this regard gets support from the medical evidence on record.

15. The evidence in this case also conclusively proves that in course of the incident the gun belonging to Natha (P.W. 6) was taken away by accused No. 2 and subsequently recovered pursuant to his statement. Accused Nos. 1 and 2 are therefore guilty of the offence punishable u/s 379 of the Indian Penal Code. Besides being in possession of fire arms with which they fired, the accused Nos. 1 and 2 are also guilty of the offence u/s 25(1)(b) of the Indian Arms Act.

16. On the conclusions as above, we dispose of the appeals as under :

(a) The order of conviction and sentence recorded against Charpat Shankar Mhatre and Mohan Shankar Mhatre, Appellants Nos. 4 and 6 in Criminal Appeal No. 959 of 1988, and Kisan Tukaram Mhatre, Appellant in Criminal Appeal No. 1058 of 1988, is set aside and they are acquitted of all the charges levelled against them.

(b) The conviction and sentence of accused Nos. 3 and 6 (Appellants Nos. 3 and 5 respectively in Criminal Appeal No. 959 of 1988) u/s 302 read with section 149 of the Indian Penal Code are hereby set aside and they are acquitted of the said charges. Their conviction u/s 326 and 323 read with section 149 of the Indian Penal Code is altered to one u/s 326 and 323 read with section 34 of the Indian Penal Code and the sentences imposed upon them are upheld.

(c) The conviction of accused No. 1 and 2 (Appellants Nos. 1 and 2 respectively in Criminal Appeal No. 959 of 1988) u/s 302 and 302/149 of the Indian Penal Code is altered to one u/s 302/34 of the Indian Penal Code and the sentences of imprisonment for life and fine of Rs. 1000/- in default rigorous imprisonment for six months imposed upon them are maintained. Their convictions and sentences u/s 379 of the Indian Penal Code and section 25(1)(b) of the Indian Arms Act are also maintained.

(d) Kisan Tukaram Mhatre (Appellant in Criminal Appeal No. 1058 of 1988) and Mohan Shankar Mhatre (Appellant No. 5 in Criminal Appeal No. 959 of 1988) who are on bail, are discharged from their bail bonds.