
(1988) 04 BOM CK 0007
In the Bombay High Court
Case No : Criminal Appeal No. 172 of 1981

Chandrakant Yeshwant Sawant and Others	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 25-04-1988

Acts Referred:

Evidence Act, 1872 — Section 3, 9
Penal Code, 1860 (IPC) — Section 143, 149, 324

Citation : (1989) 1 BomCR 617

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

Bench : Single Bench

Advocate : P.B. Patil, for the Appellant; Y.V. Patil, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S.W. Puranik, J.—Initially, 9 persons were chargesheeted for an offence of riot and causing grievous injuries and an attempt to commit murder with a common object of wrongful assembly under Crime No. 556/78 registered at Mulund Police Station on the night intervening 29th and 30th December, 1978. At the stage of framing charge, the learned Sessions Judge discharged two out of them and framed charge only against seven accused. After the trial in Sessions Case No. 345 of 1979 was over, the learned Sessions Judge by his order dated 28-1-1981 acquitted accused Nos. 2, 3, 4 and 5 of all the charges. He also acquitted accused Nos. 1, 6 and 7 of the charges u/s 307 read with section 149 of the Indian Penal Code. However, he convicted accused Nos. 1, 6 and 7 for the offences u/s 324 read with section 149 of the Indian Penal Code and sentenced them to suffer R.I. for 18 months. He also convicted them for the offence u/s 143 and sentenced them to suffer R.I. for three months. This judgments convicting accused Nos. 1, 6 and 7 as above was passed on 28th January, 1981 by Additional Sessions Judge, Greater Bombay and it is the said order which is impugned by the present applicants original accused Nos. 1, 6 and 7.

2. Brief facts relating to the present proceedings may be narrated as follows :

A small incident at about 11.00 in the night at the Check Post at Mulund on Bombay Agra Highway is the cause of assault leading to the Sessions trial. According to the prosecution, P.W. 4 Sadu Shetty is a person who carries on a business of pan shop and at night he also carries on the additional business of selling vada-pav on a hand card placed near his pan shop at the octroi check post at Mulund. He commences the business of sale of vada-pav only after about 10 or 10.30 p.m. In this additional business he is assisted by Navnit Shetty P.W. 6 and Shashi alias Arunkumar Shetty. One Raju Shetty P.W. 5 has a pan shop near the pan shop and hand cart of Sadhu Shetty P.W. 4. So also, one Shekhar Shetty has a pan shop at Mulund Check post and another Shekhar Shetty P.W. 11 is a driver by occupation and was at the scene of offence as a casual visitor. Thus all the witnesses and the injured are apparently from Karnataka and belonging to Shetty community.

3. On the night of 29th December, 1978 at about 11.00 p.m. initially, incident started. Some three persons came to the hand cart of Sadhu Shetty P.W. 4 and demanded vada-pav. They themselves picked up the vadas and started eating them. The vendor Sadhu Shetty P.W. 4 demanded payment. The three customers however, complained that the vada pay was of inferior quality and they would not pay the full price. There was a verbal dispute and one of the customers threw down a currency note of Rs. 50/- which fell on the stove of the vendor. The vendor immediately picked up the currency note. He returned the currency note and accepted one rupee note from the customer. However, three customers were annoyed and while leaving they abused the vendor and also threatened him that they will see him afterwards.

4. It is the case of the prosecution further that within 20/30 minutes at about 11.30 p.m. the same three customers along with 4/5 others came to the shop of P.W. 4. Sadhu Shetty armed with iron bars and guptis and suddenly started assaulting Sadhu Shetty and his assistants and his friends Navnit Shetty- P.W. 6 and Shashi alias Arunkumar Shetty P.W. 10 the adjoining pan shop owner and Raju Shetty-P.W. 5 and Shekhar Shetty P.W. 1 rushed to the scence to help the victim. They were also injured. Another Shekhar Shetty P.W. 11, a driver who were visiting that area also rushed to help and was injured. The entire incident lasted for about 5 minutes and the assailants ran away from that place. Sadu Shetty was precariously injured and unconscious as also one or two other. Two taxies were engaged and all the injured sat in these two taxis and were proceeding to the hospital. On the way, they halted at the Mulund police station and it is alleged that P.W. 11 Shekhar Korja Shetty lodged the complaint. Police Sub Inspector Shaikh P.W. 15 was at the Police Station. He directed one police constable to accompany the injured to the hospital. He himself followed the taxies within few minutes. He recorded the statement of P.W. 11 Shekhar Shetty at the Hospital and gave it to him to sign the same. The said F.I.R. was however, not signed by P.W. 11 Shekhar Shetty and P.S.I. Shaikh also failed to verify the

same. He recorded the statements of some of the injured persons in the night, while those who were seriously injured he recorded their statement on the next day. In the meantime at the Police Station Shri Gawade Police Inspector P.W. 16 was also present. He directed P.S.I. Shaikh P.W. 15 to proceed to the hospital, while he himself went to the scene of offence. At that place he noticed that a hand cart was upturned and articles were disturbed. However, because it was past mid-night, he did not carry out spot panchanama but deputed a Constable to stay at the scene of offence, In the morning at about 9.00 a.m. he conducted the spot panchanama Exh. 17 in the presence of panchas Babu P.W. 2 and another. On the next day i.e. late evening on 30th December, 1978 P.W. 15-P.S.I. Shaikh went in search of the assailants. He was accompanied by Shekhar Shetty. While proceeding by the jeep in the area Sadu Shetty pointed out to one person as one of the assailant. He was immediately taken in custody. Accused No. 1 came to be apprehended on the next night. During the course of investigation on 1-1-1979 accused No. 7 made the discovery Statement Exh. 19 and knife Article 1 was recovered at his instance. B.R. Tube P.W. was the panch for the said recovery of knife. Article 2 was recovered at the instance of accused No. 1 No 6-1-1979 vide Exh. 42 N.R. Thakur P.W. 13 and YU. Rajesh P.W. 14 are the panchas in that respect.

5. On 6-1-1979 first identification parade was held at Mulund Police Station under the supervision of Special Executive Magistrate Shri Bhavan Kataria. Exh. 27 is the Memorandum of that parade. On 24-2-1979 another identification parade was held by special Executive Magistrate, D.K. Fadnis, P.W. 12 vide Exh. 40 the Memorandum of the said parade.

6. The injured Sadu Shetty P.W. 4 and Shekhar Shetty P.W. 10 were examined by Dr. Muddebisal-P.W. 8 and the injury report is at Exh. 29 while Dr. Nebhrajani P.W. 9 proves three injury certificates from the Corporation Hospital at Exh. 31 (colly) regarding injuries sustained by Raju Shetty- P.W. 5, Navnit Shetty P.W. 6 and Shekhar alias Arunkumar Shetty P.W. 11. The investigation was conducted by Sheikh-P.S.I. P.W. 15 and Police Inspector V.G. Gawade-P.W. 16.

7. This in brief is the prosecution case and its investigation.

8. As soon as the charge sheet was put up, the learned Judge, as already pointed out held, that there was no prima facie material whatsoever against two of the accused and he discharged them. He had framed charges against seven accused persons for the offence u/s 143 and also offence u/s 307 read with section 149 of the Indian Penal Code. After recording of the prosecution evidence, the learned trial Judge acquitted two more accused without examining them u/s 313 of the Code of Criminal Procedure because there was no incriminating circumstances against them from the prosecution evidence. The remaining five were examined u/s 313 of the Code of Criminal Procedure. They denied the incriminating circumstances and ultimately the trial Court found that there was sufficient evidence to hold accused Nos. 1,6 and 7 guilty for the offence u/s 149 read with section 324 of the Indian Penal Code and also u/s 143 of the Indian Penal Code

and acquitted the rest of the accused.

9. Shri P.B.Patil, Advocate appears for the appellants-accused whereas the State is represented by Shri Y.V. Patil.

10. Perusal of the judgment of the trial Court discloses that the evidence of P.W. 10-Shashi alias Arunkumar Shetty and P.W. 11 Shekhar Shetty has been completely disbelieved by the trial Court and hence we need not go into that evidence in details. Suffice it to say that the trial Court has rightly discarded their testimony on certain salient grounds. P.W. 10 Shashi Shetty who is alleged to be the assistant to the main victim Sadu Shetty for the sale of vada-pav in the absence of Sadu Shetty was placed for purposes of identification parade on 24th February, 1979, eventhough he was available earlier to the police, he was discharged from the hospital as far back as on 10-1-1979 but no attempt to secure identification through this witness was made for a long period. Further more, his statement was also not recorded by the police during the investigation but for the first time it came to be recorded after the prosecution trial had started before the learned Sessions Judge. Apart from this there are a number of contradictions and omissions in his testimony which led the trial Court to disbelieve his testimony. Similarly the case of the testimony of Shekhar Shetty P.W. 11. According to the prosecution, he is the alleged informer of the incident but the First information Report is not signed by him. There is another Shekhar Shetty who is also examined by the prosecution as P.W. 1 because initially, the prosecution thought that it was P.W. 1 who was the original informer. At any rate, for want of signature on the First Information Report, the identity of the informer cannot be established with certainty .It is also found that Shekhar Shetty P.W. 11 has stated in his substantive evidence before the Court that he had received an injury on wrist and on the thigh whereas the medical injury report Exh.31 (Colly) shows that he had received only one injury and that too a minor abrasion. The said Shekhar Shetty P.W. 11 was not even admitted in hospital for treatment and lastly, in his cross-examination in paragraphs 14, and 15 there are contradictions glare as also material omissions amounting to contradictions which fully discard his testimony. It is in these circumstances that the evidence of P.W. 10 Shashi Shetty and Shekhar Shetty P.W. 11 has been rightly rejected by the trial Court.

11. We are therefore, left with the testimony of the eye-witnesses Shekhar Shetty P.W. 1, Sadu Shetty P.W. 4, Raju Shetty P.W. 5 and Navnit Shetty P.W. 6, for purposes of ascertaining about the illegality or otherwise of the conviction of the appellants-accused Nos. 1, 6 and 7.

12. As regards the evidence of Shekhar Shetty P.W. 1, the trial Court has simply brushed it aside because after the evidence of P.W.1 was tendered by the prosecution and the said witness was fully examined by the prosecution, the prosecution had sought permission to delete his testimony from the record. I find from the original charge sheet that one Shekhar Korja Shetty was cited as complainant's witness for the prosecution. There was no other Shekhar Shetty in the prosecution list. It is also seen that Shekhar Shetty P.W. 1 has the said first

name and surname; but the father's name and age are different. Their ages are different and occupations are different. The complainant has cited Shekhar Korja Shetty as aged 25 years and is a driver by occupation while P.W. 1 is the Shekhar Kargha Shetty, aged 22 years, a pan-bidi shop owner. Thus obviously Shekhar Shetty P.W. 1 was examined through mistake. His statement by the police was also not recorded nor supplied to the defence. He may have been present at the time of the incident but the prosecution never relied upon the testimony of such a person because he was not interrogated during the investigation and the accused was not supplied with any of the statement and his testimony is therefore, rightly rejected.

13. Now, therefore, we are only left with the testimony of Sadu Shetty P.W. 4, Raju Shetty P.W. 5 and Navnit Shetty P.W. 6 from amongst eye-witnesses P.W. 4 is the main victim-Sadhu Shetty P.W. 5 Raju Shetty is a pan-shop owner and P.W. 6 Navnit Shetty is the assistant of Sadhu Shetty P.W. 4.

14. From the fact that about 4/5 persons sustained injuries by knife because of the assault at about the mid-night at the relevant time and that the incident was immediately brought to the notice of the Mulund Police Station that an information of cognizable offence was conveyed to the police and the injured were forwarded to the Corporation Hospital in the company of constable, the fact that on examination, they were found to have been sustained injuries as reported, there is ample evidence that this incident as stated by the prosecution in the charge sheet had in fact taken place. The only question is whether the convicted accused Nos. 1, 6 and 7 had any nexus with the causing of the injuries and whether they had played any part in the commission of the said offence either individually or with the aid of section 149 of the Indian Penal Code.

15. This fact is of more importance because the main victim Sadu Shetty P.W. 4 who was the Vendor of vada-pay stall was grievously injured, is duly proved by the prosecution witness No. 8 vide Exh. 29. So also his neighbour pan-shop owner Raju Shetty P.W. 5 and his servant Navnit Shetty P.W. 6 had sustained injuries which are duly proved. This aspect is not seriously challenged. Now, to find out whether prosecution witnesses Nos. 4, 5 and 6 have identified some of the assailants namely, the appellants, the prosecution has led the direct evidence of these three witnesses and also relies on the corroborative testimony emerging from the identification parade held during investigation. No other independent witnesses have been examined from the place of the incident. Admittedly, some other customers were present at the shop of the witness Sadu Shetty P.W. 4 as well as the nearby stalls. Bombay Agra Highway is a busy thoroughfare and at night several cars and trucks are parked for the purposes of checking.

16. The scene of offence is not disputed. The details given in the spot panchanama Exh.17 show the description of the scattered tables and articles and the condition of the hand-cart of Sadhu Shetty P.W. 4 which also indicates that there were blood-stains on 2/3 places near the place of incident. But since the incident has taken place at about mid-night, it is imperative for the prosecution

to show that the witnesses or the victim had sufficient opportunity to observe the features and faces of their assailants. Admittedly, the assailants were strangers. This responsibility of the prosecution is also diminished by the anxiety of the investigating officer while recording the spot panchanama. He has noted that at the scene of offence, there was one electric light pole which was about 37" away from the scene of offence and which was on the road divider of the highway. Now, as admitted by the three witnesses P.Ws. 4, 5 and 6 and as described in spot panchanama, the stall of Sadu Shetty was on the pavement. There is no other source of light available nearby the scene except from the street pole 40, away. Since the pole is situated on the road divider and the stall was on the pavement, the light from the street light would be falling on the faces of the shop-keeper and his assistance while the assailants are alleged to have come from the other side i.e. from the side of these street poles. The light therefore, will fall on the back of the assailants and their faces would be in the dark. The victim looking at the assailants would be looking against the light. This aspect has to be taken into account as also the feebleness of that light coming from 40" away. While bearing this in mind, the state of mind of the victim has also to be taken into consideration. As called from the prosecution evidence, the incident was of a very short duration and they had witnessed such an assault with knives for the first time in their life. In that sudden attack they were not paying attention to the details. They were also not able to observe the face of the assailants. These three witnesses were able to describe the nature of assault upon themselves individually. All of them have stated that they became scared and unconscious. All of them have stated that no sooner the assailants came they assaulted. Therefore, there was hardly any gap to observe the features and faces of the assailants and all the victims became unconscious and scared. It is in these circumstances I find it hard to believe that any of them could get sufficient moment to observe the faces of the assailants.

17. The learned Public Prosecutor however, brought to my notice that P.W. 4 Sadhu Shetty in his substantive evidence has stated that at his pan bidi shop he has got two electric lights and thus, there was availability of sufficient light. As already stated, the sufficiency of light for an incident in the night is very crucial. This material fact has not been deposed by Sadhu Shetty P.W. 4 in his earlier statement. This fact is also not brought on record during the testimony of any of the other eye-witnesses. This fact is also not borne out from the spot panchanama recorded by the police. It is therefore, hard to believe that there was any other source of light except the street light about 40, away from the backside.

18. Lack of light at the street is apparent to the reason for the various contradictions which have come on record inter se on the deposition of various witnesses examined. It is very material that none of them could observe the details of the scene of offence. It is therefore, very unlikely that any of them could observe the faces of the assailants so as to identify subsequently in the identification parade. At any rate, on the ground of inadequacy of light the

identification done by the witnesses Nos. 4, 5 and 6 during the Court has to be discarded. Similarly, the identification done by P.W. 5 Raju Shetty and Navnit Shetty-P.W.6 in the first parade held on 6-1-1979 and will have to be discarded for want of opportunity of observing the faces at the time of the incident. As far as identification parade held on 24-2-1979 is concerned, only Sadhu Shetty P.W. 4 identified the accused persons. The said parade has been held almost two months after the date of incident. The accused persons were already relieved from jail. Therefore, such a delayed identification parade loses all its sanctity.

19. Lastly, the very holding of the identification parade has been rightly challenged by the appellants. Both the parades were held in the Police Station itself. The presence of constable all around has been admitted by this witness. P.W. 5 in his deposition before the Court has not even stated whether he was called for identification parade and how the said parade was carried out. It is for the first time in his cross-examination that he tries to say about the identification parade. It is admitted by the Executive Magistrate that the same set of dummies were remained throughout the identification parade even though only two accused persons were replaced and substituted at each time. The replacement and substitution as well as the change of the dress of the accused was carried out in the presence of the messenger panch. After the substitution took place, the messenger was sent out of the room to call for the identifying the witnesses. It is thus very probable that the messenger panch already knew the position of the accused persons in the fixed set of dummy. The possibility cannot be ruled out and the benefit of such irregularities and possibilities must go to the accused. The learned Session judge in paragraph 9 of the judgment has observed as follows:

".....Though the procedure followed is not commendable the purpose of imparting authenticity to the identification by the witnesses has been adequately served by the slip-shod identification parade. The value of the identification parade does not necessarily depend on the precautions taken by the Special Executive Magistrate conducting it, but it depends more on the consequence from which it is possible to infer that the witness were so observant as to take advantage of the lacuna in the identification parade in arriving at the conclusion that the persons who were made to stand in the identification parade were the accused....."

In paragraph 10 also, the learned Judge observed as follows :

".....However, from the total investigation it appears that the officers were not adequately interested in the investigation of the offence and the delay was caused more due to their carelessness. Except one all other accused were let off on bail and hence the police had no opportunity of coaching the witnesses earlier for confronting them with the suspects. The observation made in the decisions cited by the Counsel would certainly be applicable to a case which has been "properly investigated" but same cannot be said about this case. The infirmity in the investigation is explained in this case more adequately by the results than

the oral evidence of the investigating officer and hence merely because the identification parade was delayed it does not lose authenticity."

20. The above observations quoted are nothing short of causing the justice in all its infirmity and insufficiency and yet convicting the accused on such identifications. The delay in identification parade itself is the ground to discard the same. Moreover, as found earlier, the eye-witness could not have had opportunity of reading the faces of their assailants in the unfortunate attack which they had to suffer.

21. In the result therefore, the conviction of the three appellants also cannot be sustained. The entire case was hanging on the identification of the accused persons. Their direct identification was not possible and the corroborative identification at the parade also is not admissible. For this reason and there being no evidence to connect the accused with the incident, the appellants deserve to be acquitted of all the charges levelled against them.

22. In the result, the appeal succeeds and is allowed. The conviction and sentence recorded against them are quashed and set aside. They be set at liberty forthwith. Their bail bond shall stand discharged.