
(1994) 07 BOM CK 0096

In the Bombay High Court

Case No : Criminal Appeal No's. 157 and 162 of 1988

Chintaman Rajaram Kharkar and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 29-07-1994

Acts Referred:

Evidence Act, 1872 — Section 60, 61
Penal Code, 1860 (IPC) — Section 147, 149, 324

Citation : (1995) 2 BomCR 74

Hon'ble Judges : Vishnu Sahai, J

Bench : Single Bench

Advocate : S.P. Kotwal, holding for S.R. Chitnis, in C.A. No. 157 of 1988 and D.S. Savani, in C.A. No. 162 of 1988, for the Appellant; S.J. Pingelkar, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Vishnu Sahai, J.—Since both these appeals arise out of common judgment, they are being disposed of together.

2. All the six appellants in both the connected criminal appeals were convicted under sections 147 I.P.C., 452 and 324 I.P.C. read with section 149 I.P.C. and were sentenced to undergo 4 months, 6 months and 8 months rigorous imprisonment respectively. In addition, appellants Chintaman Rajaram Kharkar, Trimbak Shimgya Mokashi, Ashok Harishchandra Mokashi and Kiran Trimbak Mokashi were convicted u/s 142 I.P.C. and were sentenced to undergo 6 months rigorous imprisonment. All the sentences of the appellants were directed to run concurrently. The aforesaid convictions and sentences of the appellants were recorded by the Second Additional Sessions Judge, Thane, in Sessions Case No. 262/1986 vide order dated 4-2-1988.

3. The prosecution case in brief is that the informant Chandrakant, P.W. 1 and Vitthal P.W. 2 are real brothers. They reside in Village Vitawa, Koliwada, Taluka and District Thane. The appellants are also said to be the residents of the same

village. It is alleged that they had jointly purchased a video which had been stolen away and a complaint of theft had been lodged at Rabale Police Station. In pursuance of that complaint, P.W. 1 Chandrakant is said to have been arrested but later on acquitted. On this score, relations between the complainant and others on one side and the appellants on the other are said to be sour.

On 26-9-1985, at about 9.30 p.m. complainant Chandrakant P.W. 1 had gone to take darshan of Ganpati idol at the house of one Nandkumar Patil of his village. It is said that a large number of persons including the appellants and deceased-accused Girinath, had also assembled there. It is alleged that after darshan, when Chandrakant was about to leave the house, appellant Chintaman caught hold of him and asked him to return the video which he had stolen and threatened him that, in case, he did not do the same, he would be beaten. Later on an altercation on account of this challenge of Chintaman is alleged to have taken place between Chintaman and Chandrakant and it ultimately exploded into a scuffle. It is alleged that all the appellants rushed towards Chandrakant, who, on seeing them ran to his house, which was situated nearby. It is said that the appellants chased him inside his house. It is also stated that appellants Chintamani Trimbak and deceased-accused Girinath were armed with knives. Appellant Ashok had an iron rod and appellant Kiran had a dagger in his hand. The allegation is that the deceased-accused Girinath inflicted one knife blow on the abdomen of Chandrakant and another knife blow on his chest. It is said that, he made a third attempt to inflict a knife blow on Chandrakant but he warded off the same by raising his arms. The allegation is that the appellant Ashok gave a blow with iron rod on the right shoulder of Vitthal and appellant Vishvanath assaulted him by a stick on his head. One Suresh is also said to have received injuries in the incident. After assaulting Chandrakant and others, the appellants are said to have run away.

4. The First Information Report of this incident was lodged by Chandrakant P.W. 1 on 26-9-1985 at 11.45 p.m. at Police outpost, Kalwa which was attached to Rabale Police Station. The time of incident in the F.I.R. is mentioned as 10.30 p.m. the same day.

5. The injuries of the three victims, namely, Chandrakant, Vitthal and Suresh P.Ws. 1, 2 and 3 respectively were medically examined on 27-9-1985 at Civil Hospital Thane, by Dr. Suresh Dadu Bhaite P.W. 5.

On the person of Chandrakant, the doctor found following injuries :---

1. Abrasion on left side of abdomen 2 x 2 cms.
2. Incised wound on left thigh 1 x 1/2 x 1/2 cms bleeding present.
3. Abrasion on right big toe 2 x 2 cms.
4. Incised wound on left side of chest wall (anterior) 1/2 x 1/2 x 1/2 cms. bleeding present.

5. Incised wound on left arm 2 x 1/2 x 1/2 cms.

On the persons of Vitthal, the doctor found following injuries :---

1. Incised wound on left side of scalp 2 x 1/2 x 1/2cms. bleeding present.

2. Abrasion over left side of cheek 2 x 2 cms.

3. Abrasion on left index finger knuckle 1 x 1 cms.

4. Abrasion on right shoulder 2 x 1 cms. tenderness was present.

5. Dislocation of right shoulder.

On the person of Suresh, the doctor found following injuries :---

1. Incised wound on right leg near ankle joint, 8 cm x 3 cm x 2 cm., bleeding present, muscle exposed up to bone.

2. Incised wound on lateral malleolus (right leg) 3cm x 1/2 cm x 1/2 cm. bleeding present.

It may be mentioned that the doctor did not state that injuries of any of the aforesaid victims were dangerous to life.

6. P.I. Ramchandra Mirokhe P.W. 8 deposed that a F.I.R. u/s 302 I.P.C. in respect of murder of deceased-accused Girinath was registered by him and in the aforesaid F.I.R. P.W. 1 Chandrakant was named as the accused. He also carried out investigation in the case arising from that F.I.R. and stated that the place of incident in both the cases is the same.

7. On 27-9-1985, P.I. Ramchandra Mirokhe P.W. 8 visited the place of the incident and prepared the spot panchanama with the help of P.W. 1 Chandrakant. During the course of investigation, he recorded the statements of as many as 24 witnesses. He recovered weapons at the pointing out of the appellants Kiran, Trimbak Mokashi and Ashok Harischandra Mokashi. Thereafter, the investigation was handed over to A.C.P. Ughade. In the usual course, the charge-sheet was submitted against the appellants.

8. The case was committed to the Court of Sessions. In the trial Court charges under sections 147 I.P.C., 148 I.P.C., 307/149 I.P.C., 307/34 I.P.C. and 336/34 I.P.C. were framed against the appellants to which they pleaded not guilty and claimed to be tried. During the trial the suggestion given by the defence to the prosecution witnesses was that contiguous to the house of the informant Chandrakant was the house of one Pandurang and in between the aforesaid houses there was a lane and in that lane it was Chandrakant who with a knife assaulted Girinath (deceased accused), appellant Trimbak and one Suryakant. The suggestion given to the witnesses was also that while they were assaulting Girinath and others, they received injuries. The learned trial Judge believed the prosecution case and rejected the defence of the appellants. He passed the impugned order.

9. In these two connected criminal appeals, I have heard Mr. S.P. Kotwal and Mr. D.S. Sawant for the appellants and Ms. S.J. Pingolkar for the State of Maharashtra, at a considerable length. I have also perused, depositions of the witnesses recorded in the trial Court, as well as the various exhibits tendered and proved by the prosecution during the trial and the impugned judgment. After giving my anxious consideration to the matter, I am of the opinion that these appeals deserve to be allowed.

10. The crucial question for determination in this appeal is as to whether the prosecution has established its case beyond reasonable doubt or whether the case set up by the defence may have been true.

11. For the reasons mentioned below, I am of the opinion that the prosecution has failed to prove its case beyond reasonable doubt and the case as stated by the defence may be true.

12. In the instant case, three eye witnesses had been examined by the prosecution, namely, Chandrakant, his brother Vitthal and Suresh P.Ws. 1, 2 and 3 respectively. I am afraid that the evidence of neither of the aforesaid three witnesses inspires confidence.

13. P.W. 1 Chandrakant is the informant in the instant case. In his F.I.R., he alleges that all the accused persons (appellants) were armed with knives but in the trial Court seeing that there were injuries of weapons other than knives also he modulated his aforesaid averment in the F.I.R. in terms that the appellant Kiran had a dagger in his hand, deceased-accused Girinath had a knife in his hand, appellant Trimbak had a knife in his hand, appellant Ashok had a iron rod with him and appellant Chintaman had a knife in his hand. The Apex Court in the decision reported in *Badri Vs. State of Rajasthan*, has observed in paragraph 18 thus:-

"If a witness, who is the only witness against the accused to prove a serious charge of murder, can modulate his evidence to suit a particular prosecution theory for the deliberate purpose of securing conviction, such a witness cannot be considered as a reliable person and no conviction can be based on his sole testimony".

Definitely, the aforesaid modulation by him in his version impairs his veracity. I further find that his statement is belied by medical evidence in as much as he says that appellant Girinath assaulted him with a knife on abdomen but a perusal of his injuries, which have been reproduced by me in the earlier part of my judgment, shows that he sustained no injury attributable to knife on his abdomen. I further find that this witness is wholly silent on the question of injuries being caused to deceased-accused Girinath. I have mentioned earlier that he was named as accused in the F.I.R. with respect to the same incident which was lodged in respect of murder of deceased-accused Girinath. Admittedly, there was enmity between him and the appellant Chintaman. On account of the aforesaid reasons, in my opinion, it would not be safe to accept his testimony.

14. So far as Vitthal P.W. 2 Chandrakant's real brother is concerned, his evidence is hardly any better. He also says that the deceased-accused Girinath assaulted Chandrakant with a knife on abdomen. He also does not explain the injuries sustained by the deceased-accused Girinath. He does not depose about the participation of appellants Chintaman and Trimbak in the incident. On account of the aforesaid 3 reasons coupled with the fact that he is the real brother of Chandrakant P.W. 1, it would not be safe to accept his testimony.

15. The evidence of last eye witness, namely, P.W. 3 Suresh also does not inspire any confidence. He like P.W. 2 Vitthal does not depose about the presence of Chintaman and Trimbak. He is also silent with respect to the injuries sustained by deceased-accused Girinath. In his statement u/s 161 of Criminal Procedure Code, he has not mentioned the place of incident as given out by the prosecution, namely, house of Chandrakant. It appears from a reading of his evidence that he is related in some manner to Chandrakant and Vitthal. For the aforesaid reasons, I do not think that his testimony is worth placing reliance.

16. Another circumstance which creates grave doubts on the genuineness of the prosecution case is that no witness has been examined from the house of Nandkumar from where the incident is alleged to have commenced. The prosecution case is that just before the incident the informant Chandrakant had gone for Ganpati Darshan to the house of Nand Kumar, It has come in the evidence of Chandrakant P.W. 1 that about 100 persons were present, at the time when the incident commenced, at the house of Nandkumar. The submission of the learned Counsel for the appellants is that the circumstance that no one from the house of Nandkumar has been examined as a witness by the prosecution shows that the prosecution version of the incident is false. In my opinion, the failure of the prosecution to examine any witness from the house of Nandkumar certainly discredits the prosecution case. On that score I draw the adverse legal inference provided by illustration (g) of section 114 of the Evidence Act, against the prosecution. The aforesaid illustration and section read thus :---

"114. Court may presume existence of certain acts---The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.

Illustration

The Court may presume---

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person with holds it."

17. In my opinion, it cannot be ruled out that the manner of the incident as suggested by defence to the aforesaid three witnesses, to which I have referred in paragraph 8, may have been true. In the first place, I find that at the place of incident, suggested by the defence, namely, the lane in between the houses of

Chandrakant and Pandurang, the Investigating Officer P.I. Ramchandra Mirokhe found blood. About this blood, there is a mention in the site plan Exhibit-31. I may mention that P.W. 2 Vitthal has frankly admitted in paragraph 3 of his statement that the house of Pandurang is opposite his house and in between his house and that of Pandurang is a lane. The second circumstance which shows that the defence case as suggested to all the three eye witnesses may have been true is that the learned trial Judge himself has conceded in paragraph 47 of his judgment that deceased-accused Girinath also received injuries in the same incident and the Investigating Officer P.W. 8 Ramchandra Mirokhe in paragraph 2 of his statement has mentioned that the place of incident in the case arising out of F.I.R. lodged with respect to the murder of deceased-accused Girinath is the same as that alleged by the prosecution. The lodging of counter F.I.R. with respect to the same incident, murder of deceased accused Girinath on the basis of which case u/s 302 I.P.C. was registered against P.W. 1 Chandrakant also shows that the defence case may have been true.

18. I may frankly observe that in the instant case neither the prosecution nor the defence is coming out with true facts. Both sides are suppressing their aggression in the incident. It is difficult to say as to who was the aggressor. In such a situation the only option with the Court is to acquit the accused. I am fortified in my view by paragraph 12 of the decision of the Apex Court, Jamuna Chaudhary and Others Vs. State of Bihar, . In the aforesaid paragraph the Apex Court observed thus -

"As neither the prosecution nor the defence have, in the case before us, come out with the whole and unfurnished truth, so as to enable the Court to Judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place in which so many persons, including Laldhari and Ramanandan, were injured, courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits, to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case".

19. From the material on record of the instant case, it is impossible to fathom as to where the truth lies. That being so, in my view, the appellants deserve to be acquitted.

20. In the result, both Criminal Appeal No. 157 of 1988 and Criminal Appeal No. 162 of 1988 are allowed and all the six appellants in the aforesaid two appeals are acquitted of the various offences. Appellants are on bail. The need not surrender. Their bail bonds stand cancelled and sureties discharged.