
(2019) 09 BOM CK 0120

In the Bombay High Court

Case No : Criminal Appeal No. 803, 804, 805 Of 2013, Criminal Application No. 603, 1985, 2061 Of 2018, 1037 Of 2017

Darshan Harbans Singh And Ors

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 17-09-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 307, 308

Code Of Criminal Procedure, 1973 — Section 290, 291, 291A, 291A(2)

Citation : (2019) 09 BOM CK 0120

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Advocate : Kartik Garg, Dr. Yug Mohit Chaudhary, S.R. Agarkar

Final Decision : Disposed Of

Judgement

1. The appellants herein are convicted for the offences punishable under section 307, 34 of IPC and sentenced to suffer R.I. for 10 years and fine of Rs.3,000/- each I/d to suffer R.I. for two years by the Ad hoc Additional Sessions Judge vide judgment and order dated 18th June 2013 in Sessions Case No.762 of 2004. The appellants in Criminal Appeal No.805 of 2013 are in custody whereas the appellant Mr. Jamin Sharafat Khan in Criminal Appeal No.804 of 2013 was enlarged on bail by this Court vide order dated 3rd March 2015.

2. Such of the facts necessary for the decision of this appeal are as follows:-

That, on 14th March 2003 at about 5 to 5.30 pm PW1 Hasmukh Gala, his brother Arvind and his friend Deepak were in the compound of Upendra Nagar Co-operative Housing Society. They had heard the shouts of the children on the terrace and therefore, PW1 - Hasmukh Gala and Deepak Vishwakarma had gone on terrace to find out what had happened. That time, they had seen Altaf and his friend assaulting small children. In the course of rescuing the children there were verbal altercation between them and Altaf had extended threats to PW1 of facing dire consequences for interfering with his business. Within sometime, after the

said incident when PW1 along with Deepak was standing in the compound watching some children playing cricket, Arvind, Aniket, Dipesh, Nilesh and Kunal came there. In fact, Kunal had met them only to invite them for his house warming ceremony. They suddenly saw that 10 to 12 boys had come there. They were armed with weapons like stumps, bats, iron rods, etc. Altaf (juvenile in conflict with law) had assaulted PW1 with stump and also attempted to assault his other friends whereas Kunal was assaulted by Darshan and Jayesh with iron bar. Aniket who had attempted to rescue Kunal was also assaulted. Similarly, Deepak and Arvind were also assaulted. Kunal had sustained bleeding injury and had fallen instantly on the ground. Upon seeing the condition of Kunal all the friends raised hue and cry. Upon hearing the same, the residents of the locality had rushed to the spot and thereafter the assailants had fled from the spot. The boys had stopped a rickshaw and taken Kunal to Mulgaonkar Hospital, where the Doctor had informed them that the condition of Kunal is serious and therefore, he was taken to Karuna Hospital and shifted to ICU.

3. In the meanwhile, someone had informed the father of Kunal, who was officiating as Police Officer. The family had shifted Kunal first to Gandhi Nursing Home and then to Lilavati Hospital. Kunal was treated as an indoor patient for more than 45 days. He had undergone craniotomy.

4. On 15th March 2003 PW1 - Hasmukh Gala had lodged FIR at Dahisar Police Station on the basis of which Crime No.84 of 1993 was registered against one Altaf and three unknown persons. After completion of investigation charge sheet was filed against 11 accused persons. It had transpired that Altaf - Original accused no.1 is a juvenile in conflict with law and hence, his case was transferred to Juvenile Justice Board.

5. According to the prosecution, on 11th April 2003 identification parade was conducted in Thane Jail. PW1 - Hasmukh had identified accused no.2 - Darshan, accused no.3 - Jamin and accused no.4 - Jayesh. He was then taken to Arthur Road Jail where he had identified accused no.7 - Kamran. It is pertinent to note that PW1 had identified original accused nos.2, 3, 4 and 7 in the Court during the course of trial. The said evidence would be substantive evidence. Similarly, other witnesses were also taken for identification and they had identified the said accused persons and have also identified them in the Court.

6. During the course of trial, the prosecution has examined as many as 25 witnesses to bring home the guilt of the accused. However, the case rests upon evidence of PW1 - Hasmukh Gala, PW4 - Swapnil Tawde, PW10 - Aniket Satpute, PW11 - Arvind Gala, PW13 - Pranav Bhatt, PW19 - Dipesh Kapdiya. All of them are injured eyewitnesses. PW20 - Dr. Ashok Sirsat was working as Medical Officer at Lilavati Hospital where Kunal Sankhe was treated as injured patient for more than 45 days and had undergone craniotomy. PW21 - Dr. Manesh Patel who was attached to Bhagwati Hospital has examined PW11 - Arvind Gala, PW1 - Hasmukh Gala and PW8 - Deepak Khavanekar. PW23 - Dr. Atul Gandhi, Medical Officer at Gandhi Nursing Home who had examined PW10 - Aniket Satpute and

PW24 - Satish Mayekar, Investigating Officer.

7. PW1 is not only an injured eyewitness but the whole incident had occurred due to his intervention in the incident where he had rescued minor children from the clutches of Altaf. In the FIR he had named Altaf and had attributed active role to three other accused whom he had identified in the Test Identification Parade as well as in the Court. There is no material elicited in the cross-examination which would dislodge the evidence of PW1 as far as accused nos.2, 3 and 4 are concerned.

8. PW4 - Swapnil Tawde is an eyewitness to the incident. His evidence is corroborating the deposition of PW1. He has specifically stated that the first person to be assaulted was Arvind Gala. All the boys had questioned the assailants as to why they were being assaulted and at that time one of the assailants had given a forceful blow of the rod on the head of Aniket. It is stated that the same assailant had assaulted Kunal near his ear due to which Kunal had sustained bleeding injury and had collapsed. He has named accused no.4 - Jayesh as the only person who has assaulted Aniket as well as Kunal.

He has also identified the accused at the Test Identification Parade more particularly accused no.4 - Jayesh.

9. PW10 - Aniket Satpute has also deposed in consonance with PW1 and PW3. He was also assaulted by his friends. According to him, the persons who had assaulted him are Darshan Singh, Jamin Khan, Jayesh, Mehtab and original accused no.10. He has identified the said persons at the time of trial as well. He has specifically stated that Kunal was assaulted by accused Darshan Singh, Jamin Khan and Jayesh. However, he has also named Mehtab i.e. accused no.10. The learned Sessions Judge has acquitted Mehtab of all the charges. His evidence appears to be genuine inasmuch as he has admitted even in the cross-examination that he would not be able to tell exactly which accused was carrying which weapon at the time of the incident. This appears to be a natural conduct since all the boys were taken by surprise and it was not expected of them to identify the weapons in the hands of each accused since according to witnesses they were about 10 to 12 boys who had mounted assault upon them. Altaf was identified however the witnesses had learnt the names of other assailants.

10. At the Test Identification Parade he had identified four accused viz. Darshan Singh, Jamin Khan, Jayesh and Mehtab. They have also identified them in the Court. The defence has failed to create any dent in the substantial evidence adduced in the examination-in-chief.

11. PW11 - Arvind Gala has identified the original accused nos.2, 3 and 4 as the assailants of all the injured witnesses as well as Kunal Sankhe. In the Court at the time of recording of substantive evidence he has identified accused nos.2, 3 and 4. He has also attributed the overt acts only to accused nos.2, 3 and 4 as the persons who had mounted assault on Kunal.

12. PW12 - Ramjan Khan is the Special Executive Magistrate who had conducted Test Identification Parade in Thane Central Prison.

13. It is pertinent to note that the prosecutor in the present case had given an application to dispense with recording of examination-in-chief of the Executive Magistrate. The application was filed at Exh.139.

PW14 - Subhash Morajkar is the Special Executive Magistrate who had conducted Test Identification Parade at Arthur Road Jail. PW14 has specifically contended that Pranav Bhatt had not come for Test Identification Parade. As far as PW14 - Subhash Morajkar is concerned, there was no application for dispensing with his examination-in-chief and therefore, examination-in-chief was conducted by the prosecutor.

14. The Sessions Court had directed defence to file its say and the say is as follows :-

"In view of the present application our rights to cross-examine the witness (SEO) should not be defeated and we may please be allowed to cross-examine the witness in the interest of justice."

The learned Sessions Judge had therefore protected the right of the accused to cross-examine the witnesses by dispensing with the examination-in-chief.

15. Section 291 of Cr.P.C. reads as follows :-"291. Deposition of medical witness.-

(1) The deposition of a civil surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under this Chapter, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such deponent as to the subject-matter of his deposition."

The Court cannot be oblivious of the fact that the word used in the said section is "may" and moreover objection is registered at the behest of the accused.

16. This Court in the case of Rajesh Laxman Shirke & Ors. vs. State of Maharashtra in Criminal Writ Petition No.1665 of 2017 has held as follows :-

"It would not be possible for any Court to presume that the circumstances in which the test identification parade was held are beyond reasonable doubt, as to whether the contents of the memorandum as ascribed by the Executive Magistrate can be held to be true and genuine in the absence of any substantive evidence. The Court cannot be oblivious of the fact that it would be a hazardous situation in the eventuality that the memorandum of T.I. parade is made admissible at the discretion of the trial Court. By virtue of sub-section (2) of Section 291-A, it cannot be said that it is a negative legislation and that Section 291-A is designed to prevent the Magistrate who supervise the test identification

parade, the cornerstone of the criminal trial, from being summoned to give evidence in Court. It is not a negative change sought to be introduced by the Criminal Amendment. All that is contemplated by the said insertion of section 291-A is that in the absence of any application by the prosecution or the defence or in the absence of any grounds raised by either of the parties, the Magistrate may in his wisdom admit document captioned as "a memorandum of test identification parade". However, if the Magistrate has serious doubts, he is not powerless to summon the Executive Magistrate who has conducted the test identification parade as a Court witness."

The provision under section 291 of Cr.P.C. is a statutory, discretionary provision as the word used is "may". The Court has to record a subjective satisfaction that it would not be necessary to examine the Special Executive Magistrate who has conducted the Test Identification Parade. It would be necessary at least to call upon the witnesses to prove the contents of the document which would be preliminary memorandum drawn before conducting TIP. In absence of the same, the Investigating Agencies would be given a free hand to presume that irrespective of the lacuna in conducting Test Identification Parade, it would be exhibited as a matter of course.

17. PW13 is Pranav Bhatt. He has stated that two to three days after the incident he has learnt the names of the accused through Dahisar Police.

18. The other relevant witnesses would be PW20 - Dr. Ashok Sirsat who was attached to Lilavati Hospital as a Consultant Neurologist. Injured Kunal Sankhe was under his treatment. He has stated that he was doubtful as to whether injured Kunal would regain his intelligence to revive his studies as a engineering student. He has proved the treatment papers which are collectively marked as Exh-182. The rest of the Doctors i.e. PW21 - Dr. Manesh Patel had examined and treated Arvind Gala, Hasmukh Gala and Deepak Vishwakarma and the medical certificates are at Exhs. 184 and 186.

19. PW23 - Dr. Atul Gandhi was attached to Gandhi Nursing Home. He had examined the injured Aniket Satpute.

20. PW24 - Satish Mayekar, has deposed that it was his prima facie opinion that only four persons were involved in the said case rather the overt act was attributed to four persons out of which accused no.1 Altaf is a juvenile in conflict with law and the learned Sessions Judge has convicted original accused nos.2, 3 and 4.

21. PW25 - Manohar Vichare had taken over investigation on 2nd February 2004, arrested accused Mobin Khan and some other accused.

22. Respective counsel i.e. Advocate Kartik Garg (appointed by this Court to espouse the cause of the appellant in Appeal No.805 of 2013 and Appeal No.804 of 2013) and Dr. Yug Mohit Chaudhary appearing for the accused Jamin Khan has submitted that in fact the names of all the accused persons were not known on

the date of lodging FIR and the allegation was mainly against accused Altaf Khan who turned out to be a juvenile in conflict with law. According to the respective counsel, the Test Identification Parade was not held in accordance with law and moreover, it was not proved at the trial in consonance with sections 290, 291 and 291A of Cr. P. C. It is also argued that although eyewitnesses were injured in the same incident none of them have stated in respect of the weapon held by each of the accused persons, that there is suppression of facts and therefore, the accused deserve to be acquitted of the charge under section 307 read with section 34 of the Indian Penal Code. It is submitted by the respective counsel that it is the case of the prosecution that Altaf was accompanied by 10 to 12 persons who have participated in the assault. The allegations are not proved against 10 to 12 persons and the accused persons 5 to 11 have been acquitted of all the charges leveled against them. It is contended that since the foundation of the case is not proved to the extent that the overt act of each of the accused, they deserve to be acquitted. The said submission would be unfounded and therefore, cannot be considered.

23. PW1 - Hasmukh while lodging the FIR had specifically attributed the role of assault to Altaf and three unknown persons. It was not necessary to rely on each of the eyewitness, as in a case of direct evidence the sterling testimony of a single eyewitness would be sufficient to uphold the conviction of the appellants.

24. The accused persons had no specific motive to assault Kunal or any particular person except PW1 - Hasmukhlal. They were, in all probabilities, not even aware that PW1 - Hasmukhlal was in the company of so many boys. It appears that in order to rescue PW1 Altaf Khan, injured witnesses had attempted to ward the blow and at that time except Kunal others were injured mostly on their hands and arms. The accused were brandishing and wielding the weapons at random. It is doubtful as to whether they even knew Kunal. At this stage, Advocate Chaudhary has submitted that in fact the conviction ought to have been under section 308 of Indian Penal Code.

25. The submission cannot be appreciated at this stage since no charge was framed under section 308 of Indian Penal Code.

26. The accused - appellants have undergone substantial sentence of more than 8 years during the pendency of the trial and the pendency of the appeal. They were all young boys who had indulged into a violent act at the behest of Altaf Khan who had incited them to assault PW1 and the other witnesses including Kunal. No separate conviction is recorded for having caused injuries to PW1 and/or Aniket Satpute or Arvind Gala and Deepak Vishwakarma. The appellants have no criminal antecedents.

27. The prosecution has not placed on record medical certificate to prove the injuries sustained by Kunal and all that is proved through Dr. Ashok Shirsat is the treatment papers at Lilavati Hospital and therefore, it is not known as to whether it was a single injury by one particular accused or the other accused had taken

undue advantage of the circumstances and assaulted Kunal.

28. The accused Jamin Khan has been enlarged on bail during the pendency of the appeal. However, it appears that he had undergone some period during the pendency of the trial. He was enlarged on bail vide order dated 3rd March 2015. He was taken into custody on 18th June 2013. No overt act is attributed to him. The acts are only attributed to accused nos.2 to 4 i.e. Darshan Singh and Jayesh Singh. Hence, he also deserves the sentence already undergone by him.

29. The appeals are pending hearing for a longtime. This Court had requested Kartik Garg to espouse the cause of the accused Jayesh Singh, Jamin Khan. He has graciously accepted to espouse their cause and put in best of his efforts. He is entitled for the professional fees as per rules.

30. In view of the above discussion, conviction of the appellants deserves to be upheld for the offence punishable under section 307 of the Indian Penal Code. However, they are sentenced to suffer R.I. for the period already undergone. Hence, the following order is passed :-

ORDER

- (i) Appeals are partly allowed as far as the sentence is concerned;
- (ii) The conviction of the appellants for the offences punishable under section 307 read with 34 of the Indian Penal Code is upheld. They are sentenced to the period already undergone. The sentence of fine is maintained;
- (iii) They be set at liberty forthwith if not required in any other offence;
- (iv) Parties to act upon an authenticated copy of the order.

31. Appeals are disposed of accordingly;

32. In view of disposal of Appeals, pending Criminal Applications do not survive and the same are disposed of accordingly.