
(2016) 06 BOM CK 0119
In the Bombay High Court
Case No : Criminal Appeal No. 415 of 2007

Hari Balhim Dhas

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 16-06-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 149, 304, 326

Citation : (2016) 2 AIRBomRCri 744 : (2017) ALLMRCri 614 : (2017) 2 MhLJCri 708

Hon'ble Judges : Mrs. V.K. Tahilramani and Mrs. Mridula Bhatkar, JJ.

Bench : Division Bench

Advocate : Mr. Shirish Gupte, Senior Advocate a/w. Ms. Supriya Kak i/b. Mr. V.V. Purwant a/w. Mr. Sachin Deokar, Advocates. in Appeal Nos. 434 of 2007 and 415 of 2007, Mrs. A.S. Pai, APP. in Appeal Nos. 434 of 2007 and 415 of 2007 and for the appellant in Appeal Nos

Final Decision : Partly Allowed

Judgement

Mrs. Mridula Bhatkar, J.—These Appeals are directed against the judgment and order dated 12th April, 2007 passed by learned Sessions Judge, Solapur in Sessions Case No. 35 of 2006. In the said case, 18 accused were tried for the offences punishable under sections 147, 148, 302, 307, 326, 427, 504, 506 r/w. 149 of Indian Penal code, out of them, original accused no. 2 Suresh Das was convicted for the offences punishable under section 304(1) of the Indian Penal Code and was sentenced to undergo R.I for 10 years and to pay fine of Rs.15,000/-, in default to suffer further R.I. for three years. He has undergone the entire sentence and was released, hence he has withdrawn the Appeal. All other 17 accused were convicted for the offences punishable under sections 326 and 324 r/w. 149 of the Indian Penal Code. Under section 326 of IPC, each of them were sentenced to suffer R.I. for 3 years and to pay fine of Rs.2,000/- each, i/d. to suffer S.I. for 6 months. Under section 324 r/w. 149 of IPC, each of them were sentenced to suffer R.I. for 1 year and to pay fine of Rs.1,000/- each, i/d. to suffer S.I. for 6 months. All the accused were acquitted from the

remaining offences. Out of these 17 accused, accused no.1 Hari Balbhim Dhas, accused no. 7 Keraba Balbhim Dhas, accused no. 9 Vithal Balbhim Dhas and accused no. 15 Appa @ Bhanudas Prabhu Waghmode have expired. Their original death certificates are produced by the accused and hence, today Appeal No. 415 of 2007 was filed by original accused nos. 3, 4, 5, 6, 11, 12 and Appeal no. 437 of 2007 is filed by original accused nos. 8, 10, 13, 14, 16, 17 and 18. Appeal No. 611 of 2007 is filed by the State for enhancement of sentence against all the accused. The State has filed another Appeal No. 1174 of 2007 against acquittal of these accused from other sections. All the Appeals are heard together as they are all connecting due to common facts.

2. The case of the prosecution, in brief, is as follows:

The incident of assault has taken place on 23rd October, 2005 between 8 a.m. to 8.30 a.m. at Village Dhas-Pimpalgaon. It was a day of voting of the election of Village Panchayat of Dhas-Pimpalgaon. The complainant Rangnath S. Das and his family member and witnesses belonged to Rashtrawadi party and the accused were supporting another political party, namely, Shiv Sena. When complainant Rangnath along with his brother Sarjerao were proceeding near the polling booth and as they came near the booth of Shivsena party, the accused persons came near them and told Sarjerao that he should vote for Shiv Sena candidate. Original accused no. 2 Suresh Das took out the sword and pierced it in the left side chest of Sarjerao. PW-11 complainant Rangnath when tried to intervene the attack, he and his brother Rishikant S. Das, Appasaheb Namdeo Bhole, Rajendra Sarjerao Das, Urmila were also assaulted by the accused. The accused were armed with weapons like sword, axe, sticks and iron bars. After assaulting these persons, the mob of accused proceeded towards Joshivasti and they saw Pralhad Mastud, who was from the group of the complainant. He was going on the motorcycle, however, when he saw a mob armed with weapon, he alighted from the motorcycle and started running towards the river bed, however, these people chased and also told him to cast vote for Shiv Sena candidate and thereafter they assaulted him with axe, iron bar, sword. All the injured persons were shifted to the private hospital. Sarjerao succumbed to injuries which was inflicted by accused no. 2 Suresh Dhas. Other injured persons were treated in the hospital and amongst them some remained in the hospital for a month or more, as they have sustained fractures. Immediately after the assault, as it was election day, police van arrived there and Rangnath gave information to the police, pursuant to which, FIR (Exhibit 94) was taken down and registered at C.R. No. 79 of 2005 with Pangari Police Station. The police thereafter recorded the statements of witnesses, drew inquest panchnama, spot panchnama so also other panchnama including recovery panchnama of the weapons under section 27 of the Evidence Act. After completion of the investigation, the police filed charge sheet before the Court of Judicial Magistrate First Class, Solapur. The case was committed to the Sessions Court. The learned Sessions Judge framed charge. All the accused pleaded not guilty. The trial was concluded in conviction as mentioned above. Hence these Appeals.

3. The learned senior counsel Mr. Gupte appearing for the accused persons has submitted that the prosecution has examined total 21 witnesses. He categorized these witnesses in three categories, i.e., eye witness, panch witness and witness on medical evidence. He submitted that PW-7 Rajendra Sarjerao Dhas, PW-8 Rishikant Dhas, PW-9 Appasaheb Namdeo Bhole, PW-10 Pralhad Mastud, PW-11 Rangnath Dhas are all injured eye witnesses but have given exaggerated version of actual assault. The learned senior counsel argued that it was a election day and it is admitted by the witnesses that it was a sudden attack. The two groups of the accused and the complainant hostile to each other, had history of criminal cases against each other. The learned senior counsel read over the evidence of all these injured witnesses. He relied on evidence of PW-8 Rishikant Dhas, who has admitted in the cross-examination that there was scuffle between the villagers and group of the complainant and accused. He submitted that the defence is not challenging the incident of assault, however, it creates doubt that the incident might not have occurred the manner in which the witnesses have described that act. So also if the entire genesis of the events is considered, then the acts attributed by the witnesses to the appellants/accused have not taken place in different manner. However, as the witnesses were holding animus against the accused, who belonged to other political party, have falsely implicated these accused. He further submitted that statements of PW-7 Rajendra Dhas and PW-9 Appasaheb Namdeo Bhole were not believed by the trial Court. He relied on paragraph no. 87 to that effect in the said judgment. He further submitted that the assault has taken in two parts, one near the polling booth where four eye witnesses except Pralhad were injured and other is at the river bed where Pralhad was assaulted. He submitted that the evidence of PW-10 Pralhad Mastud is supported with the medical certificate (Exhibit 115), however, there is no corroboration regarding the assailants of Pralhad. He submitted that many cases are pending against the complainant and other witnesses. In respect of the incident of assault, the accused persons have also filed cross case against the complainant and the persons from their group. He pointed out that said cross case is concluded in conviction and complainant and other persons are also convicted under section 326 of Indian Penal Code. He further argued that recovery panchnama of the weapons are false and cannot be relied. Spot panchnama was conducted not on 23rd October, 2005 but it was conducted on next day, i.e., 24th October, 2005 hence recovery of blood from the spot is unbelievable. The statement of the witnesses, i.e., complainant Rangnath Dhas, Rishikant Dhas and Pralhad Mastud was not recorded on 23rd October, 2005 though they were available as they were treated in the hospital. Their statements were recorded two to three days thereafter. This creates doubt in the mind that the complainant and the witnesses might have planned and after deliberation, the appellants/accused are falsely implicated.

4. The learned senior counsel Mr. Gupte has further submitted that Pralhad Mastud is also disbelieved by the learned Judge. He submitted that the accused had no reason to go towards the river bed and to catch Pralhad. As the Appeal

against the enhancement of sentence is filed by the State, the learned senior counsel has relied on the postmortem report (Exhibit 103) and also evidence of Dr. Ravindra Dhondiba Mali PW-13 who had performed postmortem on the body of Sarjerao. He submitted that there was injury by sword (Article 18), however, the said weapon was not shown to the witnesses. There was only one injury on the body of Sarjerao. Though it was on the vital part, no other injuries were found on his body. Therefore, the case was rightly reduced from section 302 to 304 Part I only against original accused no. 2 Suresh Dhas, who had mounted assault on deceased Sarjerao. The learned senior counsel further submitted that there was a sudden fight between two groups and a cross case was filed against the complainant and his associates. The theory of scuffle between the two groups is very much supported due to the conviction of the complainant PW-11 and other persons in the said case.

5. Learned APP has submitted that the conviction ought not to have been reduced to the offence punishable under section 326 of the Indian Penal Code but it is a fit case to convict all these accused for the offences of murder of Sarjerao. She argued that Sarjerao and complainant when were proceeding near the polling booth, they were attacked by the accused persons. The attack was premeditated. They all were armed with weapons like iron bars, sword, sticks, axe. They were in a group of 18 persons. Therefore, they were charged under section 149 of the Indian Penal Code. Their presence on the spot is proved. The assault was mounted on the vital part of Sarjerao, i.e., left side chest and as per the postmortem notes, he died due to chest injury. The responsibility of this murder is on all the members of this unlawful assembly and therefore, the conviction of accused no. 2 is to be enhanced to section 302. So also the acquittal of other accused from section 302 is not justifiable, as there is sufficient evidence to hold them guilty not only under section 326 but under section 302 of the Indian Penal Code. A theory of scuffle is bogus and imaginary. None of the witnesses admitted that there was scuffle. There was no grave or sudden provocation and therefore, the charge cannot be brought down as an exception under section 300 of Indian Penal Code. She also relied on the recovery of axe (Article 19) and swords (Articles 18 and 22). She submitted that blood stains of deceased discloses that blood group was "A". She relied on the Chemical Analyzer (CA) report wherein on sword (Article 19) human blood having group A & B was found. She further argued that the learned trial Judge ought not to have accepted the theory of scuffle. In support of her submissions, she relied on the ratio laid down by the Hon"ble Supreme Court in the case of State of Uttar Pradesh v. Virendra Prasad, reported in (2004) C.R. L.J. 1373.

6. We have gone through the evidence of all 21 witnesses of the prosecution. On the date of incident, i.e., 23rd October, 2005, there was election of Gram Panchayat at Dhas. From the witnesses, prosecution has established that in the village, there were two groups belonging to two political parties and the accused and the complainant had loyalties to these two different political parties, therefore, there was hostility between them. On the point of incident and assault,

evidence of PW-7 Rajendra Sarjerao Dhas, PW-8 Rishikant Dhas, PW-9 Appasaheb Namdeo Bhole, PW-10 Pralhad Mastud, PW-11 Rangnath Dhas are relied. PW-11 Rangnath is a complainant, who was injured. He is a brother of deceased Sarjerao. PW-7, PW-8, PW-9 and PW-10 all were injured and they have stated about the incident and assailants. As per the evidence of these witnesses, assault is divided in two parts. The first part of assault has taken place near polling booth and immediately second part of assault has taken place at river bed when PW-10 Pralhad Mastud was assaulted. Both the incidents in res-gestia. After going through the evidence of these witnesses and also their respective injury certificates, i.e., Rajendra Dhas (Exhibit 110), Urmila (Exhibit 113), Appasaheb Bhole (Exhibit 114) and Pralhad Mastud (Exhibit 115). This evidence clearly establishes that the incident of assault has taken place as stated by the witnesses.

7. On the point of involvement of the appellants, same set of witnesses is relied. PW-11 Rangnath/complainant gave details about the attack and the blows inflicted by the accused persons. We have also considered the evidence of PW-7 Rajendra, PW-8 Rishikant, PW-9 Appasaheb and PW-10 Pralhad. The learned senior counsel has read over the relevant paragraphs in the judgment wherein the learned trial Judge has discussed the evidence of PW-7 Rajendra, PW-9 Appasaheb Bhole and PW-10 Pralhad and have inferred that the evidence of these three witnesses could not be believed. The State has filed an Appeal for enhancement of sentence and so also the Appeal against acquittal, therefore, we independently considered the evidence of all these 5 witnesses. We do come across material omissions in the evidence of these eye witnesses. For eg.: Rishikant PW-8 has made material omissions on the point of assault that accused no. 15 Appa Prabhu Waghmode gave blow of axe on the right leg of Rishikant Dhas, Chandrakant pulled Urmila and assaulted her on her left leg. Similarly, there is a material omission in the statement that other accused Govardhan Jagdale, Appa Waghmode, Birmal Mastud, Gorak Mastud assaulted Rajendra Dhas. As these are material omissions, which cannot be considered as evidence against the accused persons on the point of assault. However, the evidence of these eye witnesses corroborate the medical evidence of Dr. Anand Sudhir Kulkarni, PW-15 who had examined the injured. Their injury certificates are exhibited nos/ 110, 111, 113, 114 & 115. The witnesses had received CLWs, blunt injuries with sharp edged or hard and blunt object. As per the evidence of these witnesses, the accused persons were holding the sword, axe, iron bars and sticks. Considering the injuries sustained by them and the assault described by them, the evidence is found consistent. We also believe the evidence of PW-10 Pralhad. He has stated in the evidence specifically that accused no. 13 Dattatray Bhole gave blow of axe on his both arm and leg. Chandrakant Dhas/accused no. 3 and Suresh Dhas/accused no. 2 assaulted with sword on the legs of PW-10 Pralhad. Then he stated that Birmal Mastud/accused no. 11 holding iron bar and Gorakh Mastud/accused no. 12 holding stump assaulted him on leg. Hanmant Dhas/accused no. 6 assaulted with stick and Gorvardhan Jagdale/accused no. 16

with iron bar assaulted him. He was assaulted in the river bed. It appears that all the accused persons were in frenzy of election fever and while walking they saw Pralhad who was from other party and so they assaulted him. His injury certificate (Exhibit 115) discloses that he has received 3 blunt injuries and 3 fractures including ulna and fibula. Therefore, we are of the view that incident of assault has taken place and accused persons have attacked the complainant and his associates.

8. PW-5 Babasaheb Mahadeo Kumbhar and PW-6 Shivaji Bhanudas Mastud both have acted as panch. At the instance of accused no. 4 Birmal Karaba Dhas, recovery of the weapons is proved through PW-5, i.e. axe and sword under recovery panchnama (Exhibit 73A and 74A). At the instance of accused no. 13 Dattatray Bhole, the weapons like axe, iron bars, pipe, bamboo sticks were recovered (Articles 27 to 32) under the recovery panchnama which is marked as Exhibit 76A. We also rely on the report of Chemical Analyser marked at Exhibit 127. We do not find any reason for not believing the evidence of panchas and eye witnesses. The assailants were more than 5 and thus the prosecution has proved formation of unlawful assembly.

9. Let us discuss the evidence of the prosecution and the submissions made by the learned Prosecutor against the order of acquittal and Appeal for enhancement of the punishment. Sarjerao died due to assault. This fact is proved by the prosecution. Postmortem notes disclose that Dr. Ravindran Mali PW-13 is opined that Sarjerao Dhas died due to external as well as internal injuries, as it was sufficient to cause death in the ordinary course of nature and that injury can be caused by Article 18 (sword). In the postmortem notes (Exhibit 103) in Clauses 17 and 18 he has described the wound as stab wound in chest. He specified the place of wound with the sketch. As per the medical evidence as well as oral evidence of the witnesses, it was Suresh Dhas who inflicted first a blow of sword on the chest of Sarjerao. This fact remained unshaken and it is believed by us. Thus, death of Sarjerao was undoubtedly homicidal for which Suresh Dhas was responsible. However, while fixing the liability for the offences punishable under section 302, it is necessary to take into account some more aspects. Besides this, one blow though was on the vital part, no other injuries were seen on the person of Sarjerao. As the evidence of eye witnesses, the assailants came near the deceased and his brother Rangnath PW-11 and told them to cast vote for their political party and as Sarjerao refused or expressed hesitation, accused no. 2 Suresh Dhas suddenly stabbed sword in the chest of Sarjerao and pulled it out. Thereafter, they assaulted other persons. Thus, it appears that though all the assailants were holding different weapons, it cannot be said that it was a premeditated attack. It is necessary to take into account that it was a day of Village Panchayat election. The entire atmosphere in the village was politically charged. These persons were holding weapons like stick, axe, iron bars, sword and moving around, putting pressure on the voters that they should vote for their political party. It is a criminal and unlawful act and therefore, they were charged and punished for the offence of being a member of unlawful assembly

under section 149 of Indian Penal Code. From the evidence of all the witnesses, it can be easily inferred that Sarjerao was not target of the assailants, as arrival of Sarjerao near the polling booth was not scheduled, so the assault was not premeditated. Only accused no. 2 Suresh suddenly stabbed Sarjerao with sword and, therefore, learned trial Judge has rightly reduced down the offence of murder to a lesser degree of culpable homicide not amounting to murder qua Suresh only, by invoking the exception under section 300 of Indian Penal Code. Accused no. 2 Suresh had undergone the entire sentence of 10 years and is released. So he has withdrawn the Appeal. All eye witnesses attributed the role of mounting of assault with sword on Sarjerao to only Suresh. Therefore, though all the assailants were the members of unlawful assembly, they cannot be held responsible for the assault on Suresh and offences either under section 302 or under section 304 of Indian Penal Code.

10. The defence has put forth a theory of scuffle on the basis of cross case which is registered at C.R. No. 80 of 2005 on the same day with the same police station. The said case was tried and not all but four persons were convicted under sections 326 and 324 of Indian Penal Code. Amongst those four persons, PW-11 Rangnath, who is complainant in the present case, is also a convict. It is a fact that some of the accused persons were injured and were admitted in the hospital and this fact supports that scuffle might have taken on that day. The suggestions given by the defence counsel in the cross-examination of eye witnesses about scuffle however were denied by the witnesses. PW-8 Rishikant has given a sweeping admission about the scuffle. However, death of Sarjerao has occurred due to the assault by accused no. 2 Suresh. Apart from Sarjerao, other four persons were injured. This shows that though the accused persons were aggressors, the possibility of scuffle thereafter between the two groups cannot be overruled.

11. In the case of State of Uttar Pradesh v. Virendra Prasad (supra), the accused has indiscriminately fired at police. The deceased (police officer) died due to bullet injury on chest and two other police personnel were injured. Therefore, the defence of the accused that there was fighting or scuffle was rightly rejected by the Hon"ble Supreme Court. The case in hand is altogether different. Accused no. 2 Suresh after mounting assault on Sarjerao did not inflict other blows on the person of Sarjerao. This case is not useful to nullify the defence adopted by the learned counsel for defence.

12. Thus, considering the evidence and the submissions of both the counsel, we confirm the conviction of all the accused persons in Criminal Appeal No. 415 of 2007 and Criminal Appeal No. 437 of 2007 as passed by the learned trial Judge under sections 326 and 324 r/w. 149 of Indian Penal Code. However, on the submissions of learned senior counsel and learned counsel appearing for the appellant/accused, we understood that since 2005 after this incident, two elections between two groups have taken place in the village peacefully. No further cases are registered between these two groups and the accused and

complainant and injured persons and they are not carrying animus against each other. Accused no.2 Suresh has undergone the entire sentence of 10 years and other appellants/accused had undergone nearly 20 to 22 months out of their maximum sentence of 3 years and they have paid the fine. Considering this, though we maintain the conviction, we are inclined to reduce the quantum of sentence from 3 years to the period undergone by the accused in the jail under all the charges.

13. Appeal No. 415 of 2007 and Appeal No. 434 of 2007 are partly allowed.

14. Appeal no. 611 of 2007 and Appeal No. 1174 of 2007 are dismissed.