

(1999) 07 BOM CK 0101

In the Bombay High Court

Case No : Criminal Appeal No's. 34 and 173 of 1995

Henmant Hariba Sonwalkar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 01-07-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 101, 104, 147, 148, 149

Citation : (1999) 101 BOMLR 308 : (1999) 3 MhLj 401

Hon'ble Judges : Vishnu Sahai, J;T.K. Chandrasekhara Das, J

Bench : Division Bench

Judgement

Vishnu Sahai, J.—Since both these appeals arise out of the same set of facts and a common impugned Judgment we are disposing them off by one Judgment.

2. Nine persons namely (1) Hanmant Hariba Sonwalkar (2) Jagannath Dagadu Kharat (3) Sahebrao Dagadu Kharat (4) Mohan Dagadu Kharat (5) Sou. Radhabai Jagannath Kharat (6) Sou. Suman Sahebrao Kharat (7) Sou. Sindhu Mohan Kharat (8) Dagadu Krishna Kharat and (9) Dattu Hariba Sonwalkar, were tried by the Sessions Judge, Satara for offences punishable under Sections 148, 302 read with 149 of the I.P.C., 325 read with 149 of the I.P.C. 324 read with 149 of the I.P.C. and 323 read with 149 of the IPC.

In addition:-

(i) Hanmant Hariba Sonwalkar was tried for the offence u/s 302 of the I.P.C.;

(ii) Jagannath Dagadu Kharat was tried for offence u/s 325 of the I.P.C.;

(iii) Sahebrao Dagadu Kharat and Mohan Dagadu Kharat were tried for the offence u/s 324 of the I.P.C. (for causing hurt to Dada Raghu Kharat);

(iv) Sou. Suman Sahebrao Kharat was tried for offence u/s 324 of the I.P.C.; and

(v) Sou. Radhabai Jagannath Kharat, Sou. Sindhu Mohan Kharat, Dagadu Krishna Kharat and Dattu Hariba Sonwalkar, were tried for offence punishable u/s 323 of

the IPC.

The learned trial Judge convicted Hanmant Hariba Sonwalkar for the offence u/s 302 of the IPC and sentenced him to undergo life imprisonment and to pay a fine of Rs. 2,000/- and one year R.I. in default, for the same. He however, acquitted other accused persons.

Criminal Appeal No. 34 of 1995 has been preferred by Hanmant Hariba Sonwalkar against his aforesaid conviction and sentence.

Criminal Appeal No. 173 of 1995 has been preferred by the State of Maharashtra against the acquittal of eight others who were tried with Hanmant Hariba Sonwalkar.

3. In short, the prosecution case runs as under:-

The accused Dagadu Kharat is the father of the accused Jagannath Kharat, Sahebrao Kharat and Mohan Kharat and father-in-law of Sou. Radhabai Kharat, Sou. Suman Kharat and Sou. Sindhu. The accused Hanmant Sonwalkar and Dattu Sonwalkar are his grandsons.

The said accused persons on the one hand, the deceased Shivaji, his wife Phulabai P.W. 7, his nephew Dada Kharat P.W. 5, his nephew Vithal Kharat P.W. 6 and Namdeo Shelke P.W. 4 lived in the immediate proximity of one another, in village Nimbodi, Taluka Khandala, District Satara.

There was enmity between Shivaji and the accused because, water from the bath room of the accused, used to flow towards the wall of Shivaji and cattle of the accused used to dig its foundations.

On 10.9.1993, at about 7 p.m. the accused called Shivaji to their house. He went into their courtyard. At that time, Shivaji's wife Phulabai P.W. 7, his nephews Dadu Kharat P.W. 5 and Vithal Kharat P.W. 6 and Namdeo Shelke P.W. 4 heard commotion. They went to the house of the accused and saw that an exchange of hot words between the accused Dagadu Kharat and Shivaji was taking place. Vithal tried to separate Shivaji and Dagadu Kharat. In the meantime, the accused Hanmant Sonwalkar inflicted an axe blow on the neck of Shivaji as a consequence of which, he fell down. Accused Jagannath, Sahebrao Mohan, Sou. Radhabai, Sou. Suman, Sou. Sindhu Dagadu and Dattu who were also there assaulted Dada Kharat, Vithal Kharat and Phulabai with sticks. Some of them also abused them and hurled stones towards them. After assaulting them, the accused persons ran away.

Evidence of Dada Kharat P.W. 5 (the informant) shows that thereafter, he went to Vithal Shelke and got his Bajaj-M-80 on the same, he and Vithal went to their family doctor Dr. Adsul in Lonand who, advised them to approach the Government Dispensary. They proceeded there. At the Government Dispensary, they learnt that Shivaji had also come there but was taken to Dr. Shivde. Thereafter, they went to Dr. Shivde who informed them that Shivaji had been

sent to Pune. Then, they returned to Lonand.

4. The FIR of the incident was lodged by Dada Kharat P.W. 5 at 10.30 p.m. same day at Police Station, Lonand. It was registered by ASI Balasaheb Gaikwad P.W. 11. Evidence of ASI Balasaheb Gaikwad shows that the same night, at 11.15 p.m., accused Jagannath lodged an FIR at the said police station against the informant Dada Kharat, the deceased Shivaji, Vithal Kharat and Dayaram alleging therein that the said persons had entered his house and assaulted him, Sahebrao, Mohan and Dagadu with sticks and axe. On the basis of Jagannath's FIR, ASI Gaikwad registered read C.R. No. 73 of 1993 under Sections 147, 148, 452, 324 and 323 of the I.P.C. with Section 149 of the I.P.C.

5. The injuries of both the sides were examined the same night by Dr. Subhash Doshi P.W. 9 Primary Health Centre, Lonand.

Dada Kharat was examined at 8 p.m. and was found to have suffered the following injuries:-

(1) C.L.W. 1.2" x 2" on the back of the top of scalp. Bleeding was present, wound was bone deep.

(ii) Oblique C.L.W. 1" x 0.2" bone deep, on the left side of the top of scalp.

The two injuries are separated by a distance of about 4 inches.

(iii) Oblique contusion about 2" right to the midline of the back of the chest, about 6" x 1" near the outer margin of the right shoulder blade.

(iv) Horizontal contusion 5" x 1" on the left side of the back of the chest.

(v) Oblique contusion 2.4" x 1" on the outer side of the upper aspect of the left upper arm.

(vi) Vague contusion on the back of the left forearm 3" x 1.5".

Vithal Kharat was examined at 8.15 p.m. and was found to have sustained the following injuries:-

(i) One deformed left elbow joint which is swollen, marked tenderness was present. Clinically suspected supra condoler fracture of the left humerus.

(ii) Vague contusion on the back of the middle of the right forearm about 2" x 1" in size.

In the opinion of Dr. Doshi, injuries of Dada Kharat and Vithal Kharat were due to a hard and blunt object.

Shivaji Kharat was examined at 7.45 p.m. and was found to have sustained one incised cut injury/oblique in nature, on the right side of the neck.

The accused Dagdu Kharat, Sahebrao Kharat and Mohan Kharat were medically examined the same night between 11.30 p.m. and 11.45 p.m.

On the person of Dagadu Kharat, the following injuries were found:-

- (i) Faint horizontal contusion 2" x 1" across the left side of the back of the chest.
- (ii) Superficial abrasion 2" x 2" on the lower aspect of right knee.

On the person of Sahebrao Kharat, the following injuries were found:-

- (i) Superficial abrasion 2" x 1.5" area on the front of left knee cap.
- (ii) Faint/contusion 5" x 1" across the right shoulder blade region.
- (iii) Scattered superficial abrasion on the right knee cap region.

In the opinion of Dr. Doshi, the injuries of Dagadu and Sahebrao Kharat were attributable to a hard and blunt object.

On the person of Mohan Kharat, an incised superficial cut injury 0.5" x 0.2" below the left elbow was found which in the opinion of Dr. Doshi was attributable to a light and sharp cutting object.

Jagannath Kharat was medically examined at 7.15 p.m. on 11.9.1993 and was found to have suffered the following injuries:-

- (i) Abrasion with contusion 1" x 0.8" outside right eye.
- (ii) Abrasion 0.4" x 0.3" on the back of the left ear pinna.
- (iii) Oblique contusion 3.5" x 1.2" on the outer side of the left shoulder.
- (iv) Abrasion with contusion on the inner aspect of right knee, size 1.2" x 1.2.

In the opinion of Dr. Soshi, they were attributable to a hard and blunt object.

6. In the opinion of Dr. Doshi, the injuries of all the seven victims could have been caused at the time of the incident.

7. Evidence is that same night, Shivaji succumbed to his injuries. The autopsy on his corpse was conducted on 11.9.1993, between 11.20 a.m. and 12.30 p.m., by Dr. Syed Sami P.W. 10 who found on it the following ante-mortem injuries:-

- (i) Abrasion 1 cm. x 1/2 cm. over right big toe.
- (ii) Contused abrasion 1 1/2 cm. x 1 cm. over left forehead, just above left eye brow medically.
- (iii) Small abrasions over left forehead.
- (iv) Incised wound 15 cms. x 4 cms. over left side neck posterolaterally, bone deep.
- (v) Incised wound, 10 cms. x 2 cms. over right side neck, laterally oblique in direction and muscle deep.

On internal examination, Dr. Sami found dislocation of third and fourth cervical

vertebrae and spinal cord to be partly cut.

In the opinion of Dr. Sami the deceased died due to shock and haemorrhage on account of fracture of cervical spine. He also opined that injury No. 4 was sufficient in the ordinary course of nature to cause death and fracture of cervical vertebrae and cutting of spine was on account of it.

In his cross-examination, he stated that the injuries No. 1 to 3 were possible by a fall.

8. The investigation was conducted in the usual manner by PSI Ramchandra Pathare P.W. 13. During the course of it, on the pointing out of some of the accused persons, he recovered weapons in the presence of public panchas under panchanamas. We are not adverting to the details of recovery because, the same in our view, are not material for the disposal of these appeals. It is significant to point out that he proved the panchanama of the scene of the offence, a perusal of which shows that blood was found in the house of the accused persons.

After completing the investigation, PSI Pathare submitted the charge-sheet against the accused persons.

9. The case was committed to the Court of Sessions in the usual manner where the accused persons were charged on a number of counts, including Section 302 read with Section 149 of the I.P.C. They pleaded not guilty to the charges and claimed to be tried.

During the trial, in all the prosecution examined 13 witnesses.

Four out of them, Namdeo Shelke, Dada Kharat, Vithal Kharat and Phulabai Kharat, P.W.s 4, 5, 6 and 7 respectively were examined as eye -witnesses.

The defence case suggested to the eye-witnesses in their cross-examination, was that on the date and time alleged by the prosecution, Dada Kharat P.W. 5, Vithal Kharat P.W. 6, the deceased Shivaji and Dayaram armed with axes and sticks entered inside the house of the accused persons; disturbed the utensils with sticks, dragged out Dagadu Kharat. started assaulting Dagadu Kharat; and also assaulted Jagannath Kharat, Sahebrao Kharat and Mohan Kharat who reached hearing the shouts of Dagadu. It was suggested to the eye-witnesses on behalf of the defence that the deceased Shivaji was injured by the axe of Vithal.

However, the said defence suggestion was denied by the eye-witnesses.

The learned trial Judge believed the evidence vis-a-vis the accused Hanmant Sonwalkar and convicted and sentenced him in the manner stated in para 2, above. He however, acquitted eight accused persons who were tried along with him.

Hence, these appeals.

10. We have heard Mr. A.P. Mundargi for the appellant and Mr. D.N. Salvi, Additional Public Prosecutor for the respondent in Criminal Appeal No. 34 of 1995

and Mr. D.N. Salvi, Additional Public Prosecutor for the Appellant and Mr. A.P. Mundargi for the Respondents in Criminal Appeal No. 173 of 1995. We have also perused the entire material on record. After the gravest circumspection, we have reached the conclusion that Criminal Appeal No. 34 of 1995 deserves to be partly allowed and Criminal Appeal No. 173 of 1995 warrants to be dismissed.

In the instant case the controversy lies in a very narrow ambit. The date, time and place are admitted to the prosecution. The dispute is about the manner in which the incident took place and whether the right of private defence was available to the accused persons.

11. Four eye-witnesses of the incident namely Namdeo Shelke, Dada Kharat, Vithal Kharat and Phulabai Kharat, P.W Section 4, 5, 6 and 7 respectively have admitted that the incident took place on the date and time alleged by the prosecution and also the place alleged by it namely inside the house of the accused persons. The manner in which, it took place according to them, has been detailed by us, in para 3 above, wherein the prosecution story has been set out on the basis of the recitals contained in their examination-in-chief.

Their evidence shows that on 10.9.1993, at about 7 p.m. they heard the cries of Shivaji coming from the house of the accused persons. On the said cries, they reached his house. They saw that an exchange of abuses was going on between Shivaji and Dagadu Kharat. Vithal Kharat P.W. 6 tried to separate them. In the meantime, the accused persons reached there. Hanmant Sonwalkar who had an axe inflicted a blow with the same on the neck of Shivaji resulting in his falling down. Others inflicted blows with sticks on the person of Dada Kharat, Vithal Kharat and Phulabai Kharat. Some of them also hurled stones.

The version of the four eye-witnesses in respect of assault on Dada Kharat and Vithal Kharat and the deceased Shivaji is corroborated by the medical evidence which we have referred to earlier. Their claim that the incident took place inside the house of the accused persons, is corroborated by the circumstance that from there, the Investigating Officer recovered blood.

12. The question is whether the incident took place in the manner alleged by the four eye-witnesses or they are suppressing the genesis. We are constrained to observe that they are not furnishing the true story in respect of the incident and are concealing their aggression. As we have mentioned earlier, four of the accused persons namely Dagadu Kharat, Jagannath Kharat, Sahebrao Kharat and Mohan Kharat sustained injuries. Excepting Jagannath Kharat, who was medically examined at 7.15 p.m. on 11.9.1993, others were medically examined the same night between 11.15 p.m. and 11.30 p.m. i.e. within 4 1/2 hours of the incident taking place.

During the course of the cross - examination of the eye-witnesses, it was suggested to them that on the date and time alleged by the prosecution. Dada Kharat P.W. 5, Vithal Kharat P.W. 6, the deceased Shivaji and Dayaram armed with axes and sticks entered inside the house of the accused persons, disturbed

the utensils with sticks, dragged out Dagadu Kharat, started assaulting Dagadu Kharat and also assaulted Jagannath Kharat, Sahebrao Kharat and Mohan Kharat who, reached hearing the shouts of Dagadu. It was suggested to the eye-witnesses on behalf of the defence that the deceased Shivaji was injured by the axe of Vithal.

However, the said defence suggestions were denied by the eye-witnesses.

We are constrained to observe that we are not inclined to accept this denial of theirs. Not only because, the Investigating Officer PSI Ramchandra Pathare P.W. 13 in his cross-examination, in para 1, admitted that the spot panchanama shows that the utensils in the house of Dagadu were in a scattered condition but, also because four of the accused persons have sustained injuries which we have detailed above.

It is significant to point out that three of the eye-witnesses namely Namdeo Shelke, Dagadu Kharat and Vithal Kharat admitted in their cross-examination that none from the side of the accused was injured and none from the side of the prosecution assaulted them.

12A. We are constrained to observe that we are not inclined to accept the finding of the learned trial Judge that since the injuries on the side of the accused were less severe and minor, the prosecution was under no obligation to explain them and no adverse inference can be drawn against it for the failure to explain them. It is true that the Apex Court, as quoted by the learned trial Judge in the decision in Lakshmi Singh and Others Vs. State of Bihar, has held that the prosecution is under no obligation to explain minor and superficial injuries and the said ratio is binding on us.

13. But, the question whether the injuries are minor or superficial is a question of fact and not one of law. In the instant case, we have earlier set out the injuries suffered by the accused persons. We find that three of the injured namely Dagadu, Sahebrao and Mohan were medically examined within 4 1/2 hours of the incident and Jagannath Kharat was medically examined the next day. Why he was examined next day, is for the prosecution to explain because, ASI Balasaheb Gaikwad P.W. 11 who on the night of the incident, at 1 1.15 p.m. registered a case on the basis of Jagannath's FIR in his cross-examination admitted that he was referred to the Medical Officer immediately after lodging the FIR. A perusal of the injuries of the accused persons would show that some of them cannot be classified as superficial and minor; such as:-

(i) Injury No. 1 of Dagadu which was a contusion 2" x 1" across the left side of the back of the chest;

(ii) Injury No. 2 of Sahebrao which was a contusion 5" x 1" across the right shoulder region; and

(iii) Injury No. 3 of Jagannath which was a contusion 3.5" x 1.2" on the outer side of left shoulder.

The circumstance that these injuries were examined promptly and are backed up by the counter - FIR which was lodged within 4 hours of the incident i.e. at 11.15 p.m. the same day by accused Jagannath shows that they are not manufactured. At any rate, on suggestion was put to the doctor of these injuries being manufactured.

14. To repeat, in our view, the injuries sustained by the four accused persons are not superficial and are not explained by the prosecution. Their injuries coupled with the circumstance that the Investigating Officer has admitted in his cross-examination that the utensils in the house of the accused were lying scattered shows that there is a fair amount of substance in the defence suggestion put to the eye-witnesses. It is true that the defence has not explained the injuries of Dagadu Kharat and Vithal Kharat and that offered by it with respect to the injuries of the deceased Shivaji is not plausible. But, the the gainer in such a situation is not the prosecution.

It is well-settled that where both the prosecution and the defence are coming with untrue versions, the Court will attempt to separate the grain from the chaff, only if it is possible to do so. If not, the accused would have to be given the benefit of doubt. (See Subrati and Ors. v. State of U.P., 1959 A.L.J. 423 and Jamuna Chaudhary and Others Vs. State of Bihar, .

In our view, the circumstances existing on record do not rule out the probability of the prosecution side first assaulting the accused persons. It is well-settled that if from the circumstances on record, it appears that the accused could have acted in exercise of the right of private defence, the benefit of such a plea can be given.

In our view, the circumstances on record spell out that the accused may have acted in the exercise of the right of private defence.

15. We feel that in the instant case, both the right of private defence of person to cause harm short of death in terms of Section 101 of the I.P.C. and the right of private defence of property to cause harm short of death, in terms of Section 104 of the I.P.C. was available to the accused persons. The former because the probability of the accused persons being injured first cannot be ruled out. The latter because on the own showing of the prosecution, the deceased Shivaji, Dada Kharat and Vithal Kharat had trespassed in the house of the accused persons and disturbed the utensils.

15A. But, we feel that on the basis of the injuries found on the person of the accused which were simple in nature and the fact that Shivaji and others had merely trespassed in the house of accused persons, the right of private defence of person and property available to the accused persons only extended to causing harm short of death.

15B. In our view, since Shivaji was killed, the right of private defence of person and property has been exceeded by the accused-appellant Hanmant Sonwalkar.

He had no right to kill him. In that view of the matter, he has exceeded the right of private defence and committed the offence punishable u/s 304(1) of the I.P.C.

15C. In our Judgment, so far as accused other than Hanmant Sonwalkar are concerned, they did not exceed the right of private defence. The evidence shows that it was Hanmant Sonwalkar who inflicted fatal axe injury on the deceased Shivaji. Accused other than him acted within the four corners of their right of private defence in causing abrasions to the deceased which had no nexus with his death and injuries to Dada Kharat and Vithal Kharat.

It is well-settled that in cases of exceeding of right of private defence only the person who exceeded would be liable and Section 149 of the I.P.C. would have no application. For the application of the said section the essential pre-requisite is that there should be an unlawful assembly and persons who act in the exercise of right of private defence do not form an unlawful assembly because, the exercise of right of private defence is a lawful act and by virtue of the provisions contained in Section 96 of the I.P.C. nothing is an offence which is done in exercise of the right of private defence. (See Para 8 of State of Bihar Vs. Nathu Pandey and Others, .

16. The only question which remains is the quantum of sentence to be awarded to the appellant Hanmant Sonwalkar for the offence u/s 304(1) of the I.P.C. We have reflected over it. In our view, a sentence of seven years R.I. coupled with a fine of Rs. 2000/-, in default one years R.I., would meet the ends of justice.

17. In the result:-

(A) Criminal Appeal No. 34 of 1995 is partly allowed. Although we acquit the appellant Hanmant Hariba Sonwalkar for the offence u/s 302 of the I.P.C. and set aside his conviction and sentence thereunder but, we find him guilty for the offence u/s 304(1) of the I.P.C. and sentence him to undergo seven years R.I. and to pay a fine of Rs. 2000/in default to undergo one year R.I.

The appellant Hanmant Hariba Sonwalkar is in jail and shall remain there till he serves out the sentence.

(B) Criminal Appeal No. 173 of 1995 is dismissed. The respondents are on bail. They need not surrender. Their bail bonds shall stand cancelled and sureties discharged.

Office is directed to communicate our order forthwith to the concerned authorities.