

(2000) 11 BOM CK 0011

In the Bombay High Court

Case No : Criminal Appeal No. 930 of 1998 and 66 of 1999

Jitendra @ Jitu Sakharam More and Another

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-11-2000

Acts Referred:

Evidence Act, 1872 — Section 32, 45, 59

Penal Code, 1860 (IPC) — Section 143, 149, 302, 304, 34

Citation : (2001) ALLMR(Cri) 1175 : (2001) 5 BomCR 172

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

Bench : Division Bench

Advocate : Prakash Naik, in Cri.A. No. 930 of 1998 and in Cri.A. No. 66 of 1999 No. 3 and A.P. Mundargi, in Cri.A.P. No. 66 of 1999, for the Appellant; B.R. Patil, Assistant Public Prosecutor in Cri.A. No. 930 of 1998 and 66 of 1999, for the Respondent

Judgement

Vishnu Sahai, J.—Seven persons namely Alex Senna Joseph, Jitendra @ Jitu Sakharam More, Vinod @ Vinya Shantaram Jadhav, Agnelia Xavier Fernandes, Smt. Rajeshri Rajesh Pawar, Nitesh Mahadeo Kasare and Ravi @ Godwin Nandu Pujari were charged by the Additional Sessions Judge, Greater Bombay in Sessions Case No. 1510/1995, 762/1997 and 533/1998 for offences punishable u/s 143 r/w 149 or 34 I.P.C., 144 r/w 149 or 34 I.P.C., 147 r/w 149 or 34 I.P.C., 148 r/w 149 or 34 I.P.C., 307 r/w 149 or 34 I.P.C., 302 r/w 149 or 34 I.P.C. and 212 I.P.C. The learned Judge found two of them namely Smt Rajeshri Rajesh Pawar and Ravi Nandu Pujari not guilty on any of the said counts and consequently acquitted them vide the judgment and order dated 14-12-1998. He however, found the remaining five accused persons guilty and convicted and sentenced them in the manner stated hereinafter :---

(i) u/s 143 r/w 149 I.P.C. to suffer six months R.I.

(ii) u/s 144 r/w 149 I.P.C. to suffer two years R.I.

(iii) u/s 147 r/w 149 I.P.C. to suffer two years R.I.

(iv) u/s 148 r/w 149 I.P.C. to suffer two years R.I.

(v) u/s 302 r/w 149 I.P.C. to suffer imprisonment for life and to pay a fine of Rs. 1000/- in default to suffer one month R.I.

It is pertinent to mention that the learned Judge acquitted the said persons for the offence u/s 307 r/w 149 I.P.C.

The said convictions and sentences have been challenged by the appellants by preferring two separate criminal appeals. Criminal Appeal No. 930 of 1998 has been preferred by appellant - Jitendra Sakhamore and Nitesh Mahadeo Kasare. Criminal Appeal No. 66 of 1999 has been preferred by appellants - Alex Senna Joseph, Vinod Shantaram Jadhav and Agnelia Xavier Fernandes.

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

At the time of the incident, Smt. Shaila Mohan Mohite P.W. 1 was residing at Mohite House in K.M. Colony, behind Aasra Stores, Ambedkar Road, Khar (W) Bombay-52 along with her husband Mohan Mohite. The appellants Alex Joseph, Jitendra More and Vinod Jadhav were also residing in the same locality. In 1990, on account of enmity, the appellants - Alex, Nitesh, Vinod and Jitendra along with Robin and Godwin murdered one Siddharth Dhotre, a friend of Mohan Mohite (husband of Shaila Mohite) at Family Hospital, Bandra (W) Bombay. All of them were arrested by the Bandra Police ; were put up for trial but, were acquitted in July, 1995. It appears that since Mohan Mohite was a friend of Siddharth Dhotre the said appellants and others bore a grudge against him.

On 26-8-1995, at 2.30 p.m. while Mohan Mohite and Shaila Mohite were inside their house, co-accused Robin who died prior to commencement of the trial removed the curtain from the door of their house and called Mohan Mohite out. Mohan Mohite went out. Shaila Mohite followed him. She noticed that Mohan Mohite was being assaulted in the space ; opposite Aasra Stores by the appellants - Alex, Nitesh, Vinod, Jitendra and Agnelia and co-accused Robin with choppers, guptis and swords. She started shouting for help but, none came forward. It appears that one Chetan Mohite P.W. 6 saw Mohan Mohite being assaulted. He consequently reached and informed his mother Vandana P.W. 5, and sister Jyoti @ Renu P.W. 3.

The evidence of Jyoti @ Renu shows that on 26-8-1995, at 2.30 p.m. Chetan came shouting that Myamamma (Mohan) is being assaulted. Consequently, she left for the house of Seema P.W.2. When she reached there, she found that Seema was in the house and Lalyamama @ Rajeshmama was taking his meals there. Jyoti told them that somebody was assaulting Mohan in the colony. On the said information, Lalyamama @ Rajeshmama took a bamboo stick from the house and left. Lalyamama who was behind Jyoti went ahead running. The evidence of Jyoti shows that on seeing Lalyamama, the appellants and the

acquitted accused and Robin who were armed with weapons like guptis, swords and choppers shouted take him. They thereafter started assaulting Lalyamama who tried to save himself with bamboo stick. Then, the appellants - Jitu and Vinya picked up a chaddar which was kept there for drying and covered the face of Lalyamama with the same. Thereafter, the appellants - Alex and Ravi pushed Lalyamama down and caught hold of his hands. Angelo and the acquitted accused Robin caught hold of the legs of Lalyamama. One of the assailants was saying that he should be shown how to do goondagiri. Thereafter, the appellants Nitesh pierced a gupti in the chest of Lalyamama @ Rajeshmama. Then, the appellants ran away.

The evidence of Seema P.W.2 shows that on receiving information in respect of the assault on Mohan Mohite, from Jyoti she rushed and found Mohan lying in a injured condition. In the meantime, her sister Vandana P.W. 5 came and informed her that Rajesh was lying in a pool of blood in the house of a lady (Sunanda Yewle P.W.7). She went there and found Rajesh in a precariously injured condition. Seema's evidence shows that thereafter both Rajesh and Mohan were removed to Bhabha Hospital but before being removed to the said hospital, Rajesh told her that four to five persons namely Nitesh, Jitu, Alex, Godwin, Vinya and Agnelia assaulted him.

3. The evidence of Dr. Suniti Bhatt P.W. 11 shows that on 26-8-1995 she was attached to Bhabha Hospital as Casualty Medical Officer and at 3.20 p.m. Rajesh was brought to the hospital. He was restless, pulse was feeble and blood pressure was not recordable. On examining him she found that he had sustained one incised wound on right side of his chest in 6th intercostals mid clavicle line which was measuring 4 cm x 2 cm deep and at 3.35 p.m. he succumbed to the said injury.

The evidence of Dr. Bhatt also shows that she medically examined Mohan and found on his person nine incised wounds some of which were simple and some were grievous. In her opinion, the said injuries were caused by a sharp edged weapon like a knife and were likely to endanger life.

4. The evidence of Shaila Mohite P.W. 1 shows that she had removed her husband Mohan Mohite to Bhabha Hospital wherefrom he was discharged fifteen days later. Her evidence shows that on the date of the incident itself she lodged her F.I.R.

The evidence of P.S.I. Govind Parmar P.W. 12 shows that on 26-8-1995, at 3.15 p.m. he received a message that two injured were admitted in Bhabha Hospital, and after recording the said message in the station diary he went to Bhabha Hospital where he recorded Shaila Mohite's F.I.R.

5. The autopsy on the corpse of the deceased Rajesh was conducted by Dr. Baban Shinde P.W. 9 who found on it the following ante-mortem injuries :---

"1. Stab wound 4.5 cm x 1.8 cm x cavity deep over rt. lower chest medial to

nipple line upper and medially double edged at level of 6th and 7th ribs.

2. Stab wound 2 cm x 1 cm x cavity deep 1 cm lateral and above injury No. 1 double edged.

3. Incised wound 2 cm x 1 cm x S.D. over Rt. axilla horizontal at 6th ribs level.

4. Incised wound 5 cm x 1.8 cm x muscle deep over Lt. forearm, horizontal 4 cm, behind wrist ant aspect.

5. Incised wound 2.5. cm x 0.5 cm x skin deep over it, forearm oblique medially.

6. Two linear abrasions.

(i) 4 cm x 0.8 cm, ii) 3 cm x 0.5 cm over Lt. thigh lateral aspect oblique.

7. Abrasion 6 cm x 4 cm over Rt. scapula probable cause of Injury Nos. 1 to 5 hard and sharp object and of 6 to 7 hard and blunt object, death within 6 hours."

On internal examination, Dr. Shinde found rupture and collapse of lower lobe of right lung which corresponded to Injury No. 1. In the opinion of Dr. Shinde, the deceased died on account of shock and hemorrhage to injury to vital organs.

A perusal of the post mortem report shows that Injury No. 1 was necessarily fatal.

6. The case was investigated in the usual manner. During the course of investigation, a chopper was recovered at the instance of the appellant - Alex but, we are not entering deeper into the details in respect of this recovery because, the same has been disbelieved by the learned Judge for plausible reasons contained in para 24 of the impugned judgment.

On completion of investigation, the appellants and others were charge sheeted.

7. The case was committed to the Court of Sessions in the usual manner where the appellants and the acquitted accused were charged on counts mentioned in para one above. They pleaded not guilty to the charges and claimed to be tried.

During trial, in all the prosecution examined 15 witnesses. Two of them namely Jyoti @ Renu P.W.3 and her mother Vandana P.W. 5 were examined as eye-witnesses. For plausible reasons, which are contained in para 22 of the impugned judgement, the learned Judge rejected the evidence of Vandana. He however, placed reliance on the evidence of Jyoti @ Renu.

It is pertinent to mention that the learned Judge primarily on the evidence of Jyoti @ Renu, convicted and sentenced the appellants in the manner stated in para 1 above.

As mentioned in the said para, the learned Judge acquitted the appellants for the offence punishable u/s 307 r/w 149 or 34 I.P.C. He acquitted them thereunder because, the victim Mohan Mohite had died prior to the commencement of the trial and Shaila P.W. 1 and Chetan P.W. 6, the two eye - witnesses in respect of

the assault on Mohan did not give out the names of the assailants.

As also mentioned in para 1, the learned Judge acquitted co-accused Rajesh Pawar and Ravi alias Godwin Pujari on all the counts.

We may mention that the state of Maharashtra has not impugned the acquittal of Smt. Rajeshri Rajesh Pawar and Ravi @ Godwin Pujari by preferring an appeal u/s 378(1) Cri.P.C.

8. We have heard learned Counsel for the parties and gone through the entire record. In our view, the involvement of the appellants in the incident is established beyond all shadow of doubt. We however feel that the learned Judge erred in convicting the appellants other than the appellant Nitesh Kasare for the offence u/s 302 r/w 149 I.P.C. In our view, against them only an offence u/s 304(2) I.P.C. r/w 149 I.P.C. is made out but, so far as appellant Nitesh Kasare is concerned, in our view, an offence u/s 307 I.P.C. simplicitor is made out.

9. So far as the involvement of the appellants in the incident is concerned, the prosecution adduced evidence of a dual nature namely; the ocular account of Jyoti alias Renu P.W. 3 and Vandana P.W. 5 and the oral dying declaration made by the deceased to Seema.

We have already mentioned that for plausible reasons contained in para 22 of the impugned judgment, the learned Judge was justified in rejecting the evidence of Vandana P.W.5.

But, what we have not mentioned earlier is that the evidence of oral dying declaration furnished by Seema does not inspire any confidence. Seema P.W. 2 stated that when she reached the house of a lady (Sunanda Yewle P.W.7) she found Rajesh in the room. She stated that before Rajesh was shifted to Bhabha Hospital, he told her that four to five persons namely Nitesh, Jitu, Alex, Godwin, Vinod and Agnelia had assaulted him. We, however, are not inclined to place reliance on this oral dying declaration because, the same does not find place in her statement u/s 161 Cr. I.P.C. When during cross examination it was suggested to her that she had not deposed to the Investigating Officer that four to five persons named above had assaulted Rajesh, all that she could reply was she had told the police. In our view, had she told the police the same would have been mentioned by it in her statement u/s 161 Cri.P.C. It is pertinent to mention that the said omission has been proved by the Investigating Officer P.I. Jadhav P.W. 13. Hence we do not place reliance on this piece of evidence.

10. We however, have not even an iota of doubt that the evidence of Jyoti @ Renu P.W.3 inspires confidence. In para 2, we have set out the circumstances in which she witnessed the incident. We do not want to burden our judgment and consequently do not intend reiterating the details. Her evidence shows that her brother Chetan P.W. 6 came and informed her that Mohan Mohite was being assaulted. On the said information, she went to the house of Seema P.W.2 (whom she called aunty) and thereafter left along with Rajesh who was having

lunch at the house of Seema P.W. 2 left. Her evidence shows that Rajesh who was having a bamboo stick and was initially behind her ran and at the place of the incident, he was over powered by the appellants and the acquitted accused persons. They were armed with weapons like guptis, swords, choppers. They stated take him and started assaulting him. Rajesh tried to defend himself by the bamboo stick but, his endeavour proved futile. Thereafter, the appellants-Jitendra and Vinya put a chaddar on the face of Rajesh and pushed him down. Then the appellants Alex and Godwin caught hold of Rajesh's hands and the appellant-Agnelia and the acquitted accused Robin caught hold of the legs of Rajesh. Then, one of the assailants shouted show him how to do goondagiri. Then the appellant-Nitesh thrust a gupti in the chest of Rajesh. Thereafter, the appellants ran away.

11. We have examined the version of Jyoti alias Renu and we find that it inspires confidence. Her claim that Chetan informed her that Mohan was being assaulted is reassured by the evidence of Seema P.W. 7 which shows that on the date and time of incident, Jyoti came and told her that Mohan was being assaulted. Her evidence that the deceased Rajesh left along with her is also corroborated by the evidence of Seema P.W. 7. Her claim that the appellants assaulted Rajesh is reinforced by the injuries found on the person of Rajesh by the Autopsy Surgeon. Her account that Alex and Godwin caught hold of the hands of Rajesh and Agnelia and Robin caught hold of the legs of Rajesh also appears to be credible. It is pertinent to mention that it has not been suggested to her in cross-examination that she did not state the said facts in her statement u/s 161 Cri.P.C. Her evidence that the appellant Nitesh pierced a gupti in the chest of the deceased Rajesh is corroborated both by the evidence of Dr. Bhatt P.W. 11 who medically examined Rajesh in his life time and the evidence of the Autopsy Surgeon Dr. Baban Shinde P.W. 9. They found corresponding injuries.

It is pertinent to mention that Jyoti has explained her presence on the place of the incident. As mentioned earlier, she had rushed along with the deceased Rajesh. We may also mention that she lived in the immediate proximity of the place of the incident.

It should also be borne in mind that she is an independent witness who had no rancor of ill-will against the appellants. In our view in the absence of the same she would not have falsely implicated them.

We may also mention that the place of the incident furnished by her appears to be correct because, from the same the Investigating Officer recovered plain and blood stained earth.

12. For the said reasons, in our view, the evidence of Jyoti fixes the participation of the appellants in the incident.

13. As mentioned earlier, in our view, the learned Judge however, erred in convicting the appellants-Alex Joseph, Jitendra More, Vinod Jadhav and Agnelia Fernandes for the offence u/s 302 r/w 149 I.P.C. In our view, only an offence u/s

304(2) r/w 149 I.P.C. is made out against the said appellants. In our view, an offence u/s 302 I.P.C. simplicitor is made out against the appellant Nitesh Kasare.

We say this for reasons enumerated hereinafter :---

Firstly, the prosecution evidence does not suggest even an iota of enmity between the deceased Rajesh on one hand and the appellants on the other. It appears that when the deceased Rajesh proceeded to the rescue of Shaila's husband Mohan, the appellants were irked.

Secondly, the evidence of Jyoti shows that prior to assaulting Rajesh, the appellants stated take him and one of the assailants shouted that he should be shown how to do goondagiri. It is pertinent to mention that although Jyoti in a general manner stated that initially the appellants assaulted Rajesh but, excepting the two stab wound which were inflicted on Rajesh at the fag end by appellant Nitesh Kasare, the remaining injuries found on his person clearly show that the common object of the appellants was to teach a good lesson to the deceased Rajesh. But, even if a stricter view is taken then what can be said is that when the appellants chose to attack Rajesh in the manner mentioned earlier, they had the knowledge of his death as contemplated by second part of section 304(2) r/w 149 I.P.C.

Thirdly, the evidence of Jyoti shows that after the appellant-Nitesh Kasare had inflicted fatal gupti blow on the chest of the deceased Rajesh, the other appellants did not assault him or do anything which would suggest that they shared the object to murder him.

The medical evidence shows that it was this chest injury (Injury No. 1) which was necessarily fatal.

14. It would be pertinent to refer to the Division Bench decision of the Allahabad High Court rendered in the case of Moti and others, appellants v. State, respondents, reported in 1967 Cri.L.J. 1174, the Division Bench has observed thus :---

"The question as to what was the common object of the unlawful assembly is essentially a question fact which has to be determined on the facts and circumstances of each case. The motive for the crime, the weapons used in the attack, the conduct of the assailants, both before and at the time of the attack are relevant considerations."

15. We may also refer here to the decision of the Supreme Court reported in AIR 1960 SC 775 Shambhunath Singh and others, appellants v. State of Bihar, respondent. As is evident from a perusal of para 6 of the said judgment, Their Lordships have approved the following observations made in the case of Jahiruddin v. Queen Empress ILR 22 Cal. 306.

"But, members of an unlawful assembly may have a community of object upto a certain point, beyond which they may differ in their objects, and the knowledge

possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly."

16. In our view, on the facts of the instant case, it would be reasonable to infer that when the appellants assaulted Rajesh they had the knowledge of his death contemplated by section 304(2) I.P.C. Since they acted in a concerted manner, they would be liable u/s 304(2) r/w 149 I.P.C.

17. But, since the appellant Nitesh Kasare intentionally inflicted fatal injury on the chest of the deceased, there is no doubt that an offence u/s 302 I.P.C. would be made out against him. As we have mentioned earlier, the post mortem report prepared and proved by Dr. Shinde P.W. 9 shows that Injury No. 1 suffered by the deceased, which was a stab wound situated on right lower chest and was accompanied by rupture and collapse of lower lobe of right lung was fatal. We have seen the evidence of Jyoti who candidly stated that this injury was intentionally caused by the appellant Nitesh Kasare. In our view, the act of the appellant would be covered by Clauses Firstly and Thirdly of Section 300 I.P.C., the breach of which is punishable by section 302 I.P.C. He had the intention to cause death as contemplated by Clause Firstly of section 300 I.P.C. He also had the intention to inflict injuries sufficient in the ordinary course of nature to cause death as contemplated by Clause Thirdly of section 300 I.P.C.

18. It is true that no charge u/s 302 I.P.C. has been framed against appellant Nitesh Kasare but that in our view, would be inconsequential in view of the decision of the Supreme Court rendered in the case of W. Staney v. State of M.P.. A perusal of paras 55, 56 and 57 of the said decision would show that the failure to frame a charge would only be consequential if prejudice has been caused to the accused. In the instant case, in our view, no prejudice has been caused to the accused for the failure to frame charge under the said count. It is pertinent to mention that question No. 21 which was put to the appellant Nitesh in his statement u/s 313 Cri.P.C. was that the evidence of P.W. 3(Jyoti) showed that Nitesh thrust a long pointed gupti in the chest of deceased.

19. For the said reasons, we alter the conviction of the appellant Nitesh Kasare from section 302 r/w 149 I.P.C. to section 302 I.P.C. simplicitor and find the other four appellants guilty for the offence u/s 304(II) read with 149 I.P.C.

20. We make no bones in observing that we do not find any merit in Mr. Mundargi's submission that the common object was to only cause grievous hurt to the deceased.

We say this because for the following reasons :---

Section 149 I.P.C. reads thus :---

"Every member of unlawful assembly guilty of offence committed in prosecution

of common object,---If an offence is committed by a member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing that offence is a member of the same assembly is guilty of that offence."

A perusal of the section would show that the section would be invoked in any of the two contingencies namely :---

(a) if the Act was committed by any member of the unlawful assembly in prosecution of the common object of that assembly :

(b) or such which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object.

In our view, on the facts of this case, bearing in mind that even the appellants other than the appellant-Nitesh were armed with weapons like choppers, guptis etc. and assaulted the deceased Rajesh it would be reasonable to hold that when the appellants chose to attack the deceased in the manner mentioned earlier, they had the knowledge of his death contemplated by section 304(2) I.P.C. and since they conjointly assaulted him, they would be liable u/s 304(ii) read with 149 I.P.C.

21. The only question which remains is the quantum of sentence to be awarded to appellants Alex Joseph, Jitendra More, Vinod Jadhav and Agnelia Fernandes for the offence u/s 304(ii) r/w 149 I.P.C. We have bestowed our anxious consideration to the said question and regret that we cannot accede to the contention of the Counsel for the appellants that a sentence of five years R.I. would meet the ends of justice. In our view, considering the manner in which the deceased was assaulted, in broad day light in the heart of Mumbai, a sentence of seven years R.I. on the said count coupled with fine of Rs. 1,000/- in default one month R.I. would meet the ends of justice.

22. IN THE RESULT :

(A) Criminal Appeal No. 930 of 1998 is partly allowed. We maintain the conviction and sentence of the appellants for the offence punishable u/s 143 r/w 149 I.P.C., 144 r/w 149 I.P.C., 147 r/w 149 I.P.C. and 148 r/w 149 I.P.C. We however, acquit appellant Jitendra alias Jitu Sakharam More for the offence u/s 302 r/w 149 I.P.C. and set aside his sentence of imprisonment for life and fine of Rs. 1000/- and one month R.I. in default thereunder. We direct that in case he has paid the fine under the said count the same shall stand refunded to him. We however, convict Jitendra @ Jitu Sakharam More for the offence u/s 304(2) r/w 149 I.P.C. and sentence him to undergo seven years R.I. and to pay a fine of Rs. 1,000/- and one month R.I. in default thereunder.

As directed by the trial Court, the sentences of the appellants shall run concurrently. They are in jail and shall serve out their sentence.

(B) Criminal Appeal No. 66 of 1999 is partly allowed. We maintain the conviction and sentence of the appellants for the offence punishable under sections 143 r/w 149 I.P.C., 144 r/w 149 I.P.C. 147 r/w 149 I.P.C., 148 r/w 149 I.P.C. We however set aside their convictions and sentences for the offence u/s 302 r/w 149 I.P.C., acquit them thereunder. We direct that in case they have paid the fine, it shall stand refunded to them. We however, convict them for the offence u/s 304(2) I.P.C. r/w 149 I.P.C. and sentence them to undergo seven years R.I. and to pay a fine of Rs. 1000/- in default to undergo one month R.I. for the same.

As directed by the trial Court, the sentence of all the appellants shall run concurrently. They are in jail and shall serve out their sentences.

Appeals partly allowed.