

(1999) 04 BOM CK 0058

In the Bombay High Court

Case No : Criminal Appeal No's. 296 and 297 of 1995 with Cri.A. No's. 35 and 36 of 1997

Karna Dasharath Mali and others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-04-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 222(2), 313, 378(1), 464(1)
Penal Code, 1860 (IPC) — Section 302, 34, 394, 396, 397

Citation : (1999) 5 BomCR 802 : (1999) 2 BOMLR 425 : (2000) CriLJ 1288 : (2000) 3 RCR(Criminal) 674

Hon'ble Judges : Vishnu Sahai, J;Ranjana P. Desai, J

Bench : Division Bench

Advocate : Ms. S.D. Khot, for the Appellant; I.S.Thakur, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Since these four connected criminal appeals arise out of the same set of facts and a common impugned judgment we are

disposing them off by one judgment.

2. Through these appeals the appellants challenge the judgment and order dated 28-3-1995 passed by the Additional Sessions Judge, Thane, in

Sessions Case No. 508 of 1991, convicting and sentencing them in the manner stated hereinafter :

- i) u/s 451 read with 34 I.P.C to undergo 3 years rigorous imprisonment; and
- ii) u/s 396 I.P.C. to imprisonment for life and to pay a fine of Rs. 1000/- each in default rigorous imprisonment for 6 months.

The substantive sentences of the appellants were ordered to run concurrently.

It is pertinent to point out that along with the appellants were tried three others, viz: Ghashiram Chanderabhanu Goud, Girikumar Kuladhar Kumar

and Bhaskar Rajani Biswal but they have been acquitted vide the impugned judgment and the State of Maharashtra has not impugned their acquittal by preferring an appeal u/s 378(1) Cr.P.C.

3. In short the prosecution case runs as under:

The informant Chandulal Shah P.W. I was employed as a Manager in Ravikiran Chemicals Private Limited located in Plot No. 7, M.I.D.C. area,

Tarapur. The owner of the company was the deceased Dilsukharaj Vrijalal Shah, a resident of Malad, Bombay. The appellants and the three

acquitted accused persons were said to be working in the said company and residing ,in its premises when the incident in question took place.

It is said that the informant often was required to go to Baroda to deliver goods of the company and in his absence the deceased used to stay in the premises of the company.

On 29-4-1991 the informant went to Baroda and returned therefrom on 1-5-1991 at about 12.30 p.m. As was the practice in his absence the

deceased slept in the premises of the company. When the informant returned, he found that the workers of the company (the appellants and the

acquitted accused) were sitting mute in front of the building of the company. When the informant went inside the laboratory of the company he

found Dilsukharaj Vrijalal Shah lying dead, in a pool of blood, with injuries on his person. He then went in the office room of the company and

found the steel almirah in a broken condition and files strewn helter skelter. He realized that Dilsukharaj Vrijalal Shah had been killed for money.

He took appellant Mahendra Bag Sakurbag in confidence. He made an extra judicial confession before him in terms that for greed of money he

along with other three appellants and three acquitted accused committed the murder of Dilsukharaj Vrijalal Shah; appellants Karna and Nandlal Jal

inflicted knife blows on him; and others caught hold of him.

Armed with this information the same day Chandulal Shah went to Tarapur Police Station and lodged his F.I.R., Exhibit 27. It was recorded by

P.S.I. Vilas Laxman Bhosle P.W. 5.

4. The investigation was conducted in the usual manner by P.S.I. Vilas Laxman Bhosle P.W. 5. Excepting acquitted accused Bhaskar Biswal who

was arrested by P.S.I. Vilas Bhosle P.W. 5 on 2-5-1991 the accused were arrested on 1-5-1991.

In the presence of public panch Ashok Kashinath Garat P.W. 3, on 2-5-1991 and 3-5-1991, P.S.I. Bhosle made recoveries from each of the

appellants; i.e. from Pradeep blood stained clothes which he was putting on and currency notes; from Nandlal blood stained knife and currency

notes; from Karna blood stained knife and currency notes; and from Mahendra the wrist watch of the deceased.

It is pertinent to point out that the blood stained clothes of Pradeep and the blood stained knives recovered on the pointing out of Nandlal and

Karna were sent to the chemical analyst who found on them human blood and blood of "O" group on the knife recovered from Karna.

It is also pertinent to point out that the watch which was recovered at the instance of the appellant Mahendra was identified during the course of

investigation and trial by Mayur Shah P.W. 2, the son of the deceased. After completing investigation P.S.I. Vilas Laxman Bhosle P.W. 5

submitted the chargesheet against the appellants and the acquitted accused.

5. Going backwards the autopsy on the corpse of Dilsukharaj Vrijalal Shah was conducted on 1-5-1991 at about 5 p.m. by Dr. Suresh Kadam

P.W. 4 who found on it the following two injuries:

1. Incised wound at right side of neck extending from nape i.e. posterior aspect of neck in midline upto anteriorly upto thyroid cartilage. Muscles

of neck cut, right carotid artery totally incised. Size 15 cms. x 6 cms.

2. Stab wound at right lumbar region

a) wound of entry wedge shaped size 6 cms. x 2 cms. Depth cannot be judged properly.

b) Direction of wound was upward and laterally because tailing of wound was at upper part.

On internal examination Dr. Kadam found small intestines to be punctured and rupture of carotid artery. He opined that the deceased died on

account of shock and haemorrhage due to the incised wound at right carotid artery.

6. The case was committed to the Court of Sessions in the usual manner where the appellants and the three acquitted accused were charged for

offences punishable under sections 451 read with 34 I.P.C., 396 I.P.C. and 396 r.w. 397 I.P.C.

On 10-11-1994 and 11-11-1994, when the trial was at the fag end, the charges

were altered and an additional charge u/s 302 read with 34

I.P.C. was framed against the appellants Nandlal and Karna.

The appellants pleaded not guilty to the original charges and accused Nandlal and Karna pleaded not guilty to the additional charge. All the

appellants claimed to be tried.

7. During trial in all the prosecution examined five witnesses. We may straight away mention that there is no eye-witness of the incident and the

case rests on circumstantial evidence.

The learned Judge after perusing the evidence adduced by the prosecution and hearing learned Counsel for the parties convicted and sentenced the

appellants for offences punishable under sections 451 read with 34 I.P.C. and 396 I.P.C. He acquitted appellants Nandlal Jal and Karna for the

offence u/s 302 read with 34 I.P.C. and accused Ghashiram Goud, Girikumar Kumar and Bhaskar Biswal on all the charges.

8. It is pertinent to mention that the State of Maharashtra has neither challenged the acquittal of the appellants Nandlal Jal and Karna for the

offence u/s 302 read with 34 I.P.C. nor that of the three accused named above for any of the offences.

9. Aggrieved by their convictions and sentences for the offences under sections 451 read with 34 I.P.C. and 396 I.P.C. the appellants have come

up in appeal before us.

10. We have heard Ms. S.D. Khot for the appellants and Mr. I.S. Thakur for the respondents. We have also perused the depositions of the

prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statement of the appellants recorded u/s 313 Cr.P.C.;

and the impugned judgment. In our judgment these appeals deserve to be partly allowed.

11. In this case we find that there is sufficient circumstantial evidence fixing the involvement of the appellants in the instant case. The said evidence

has been referred to by us earlier and discussed extensively in the impugned judgment. Reference to the said evidence is not necessary because

that would only swell the length of the judgment.

In all fairness we would also like to mention that Ms. Khot learned Counsel for the appellants has not challenged the involvement of the appellants

in the incident.

12. The question is whether the learned trial Judge was justified in holding the appellants guilty both for the offences u/s 451 read with 34 I.P.C.

and 396 I.P.C.

Our answer is in the affirmative so far as the offence u/s 451 read with 34 I.P.C. is concerned but in the negative so far as that u/s 396 I.P.C. is

concerned.

The evidence on record, including that of the informant Chandulal Shah P.W. 1 and the son of the deceased Mayur Shah P.W. 2, shows that the

appellants were working in the company of the deceased and were residing in its premises. The evidence of the former shows that when he

returned from Baroda on 1-5-1991 appellant Mahendra made an extra judicial confession to him admitting therein that for the lust of money he, the

other three appellants and the acquitted accused conjointly committed the murder of the deceased. Since the corpse of the deceased was found in

the office of the company and blood was recovered from the office it is certain that the deceased was murdered in the office. In such a situation, in

our view, the learned trial Judge acted correctly in convicting the appellants for the offence u/s 451 read with 34 I.P.C.

13. But we have no hesitation in holding that the learned trial Judge blundered in convicting the appellants for the offence u/s 396 I.P.C. Section

396 I.P.C. reads thus :

396. Dacoity with murder.---If anyone of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity,

every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten

years, and shall also be liable to fine.

13-A. A perusal of the said section would show that in order to constitute an offence of dacoity with murder two pre-requisites have to be

satisfied:

a) a conjoint commission of dacoity by five or more persons; and

b) commission of murder by any of the said five or more persons while committing dacoity.

It is only when both these elements co-exist would an offence of dacoity with

murder be made out.

14. In the instant case, as mentioned earlier, originally the charges were that the appellants along with accused Girikumar, Ghashiram Goud and

Bhaskar Biswal participated in the commission of offences punishable under sections 451 read with 34 I.P.C., 396 I.P.C. and 396 read with 397

I.R.C. At the fag-end of the trial in respect of appellants Nandlal Jal and Karna an additional charge u/s 302 read with section 34 I.P.C. was

framed. It is pertinent to mention that in the charges framed against the appellants and orders there is no mention that they conjointly committed the

offences along with unknown persons.

15. It is further pertinent to mention that the learned trial Judge acquitted accused Ghashiram Goud, Girikumar and Bhaskar Biswal and after their

acquittal the number of persons who participated in the incident would naturally come down to four.

15-A. Since a reading of section 396 I.P.C. shows that for the commission of the said offence there should be minimum five persons, the four

appellants, in our view cannot be held guilty for the offence u/s 396 I.P.C. We feel that instead an offence u/s 394 I.P.C. would be made out

against them.

15-B. The numbers factor is often as crucial in law as in politics. A solitary number in the latter may bring down a Government, in the former a

charge. 16. Ms. Khot for the appellants strenuously urged that it is not open for us to convict the appellants for the offence u/s 394 I.P.C. because

they were not charged for the said offence. We regret that we do not find any merit in her submission.

In our view since the offence u/s 394 I.P.C. is a minor offence in relation to the offence u/s 396 I.P.C. and all the ingredients of the latter offence

are in it, the absence of a formal charge u/s 394 I.P.C. would not prejudice the appellants.

Our view is founded on the provisions contained in section 222(2) Cr.P.C. which read thus:

222. When offence proved included in offence charged.---(1).....

(2) When a person is charged with an offence and facts are proved which reduced it to a minor offence, he may be convicted of the minor offence,

although he is not charged with it.

(3)

(4)

Our view is fortified by the provisions contained in section 464(1) Cr. P.C. 1973. The said section reads thus:

464. Effect of omission to frame, or absence of, or error in, charge.---(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

2.

.....

A perusal of the above provision would show that if a conviction is recorded in respect of an offence for which no charge was framed it would only

be vitiated if ""failure of justice has in fact been occasioned thereby."" In the instant case on account of non-framing of charge for the offence u/s 394

I.P.C. no failure of justice has resulted.

In this connection it would also be pertinent to refer to the time-honoured decision of the Supreme Court reported in Willie (William) Slaney Vs.

The State of Madhya Pradesh, , wherein in paras 44 and 45 the Supreme Court has held that omission to frame a charge in the absence of, any prejudice accruing to the accused, would only be an irregularity.

As observed by us above no prejudice has been caused to the appellants by not framing a charge u/s 394 I.P.C.

For the said reasons we reject the submission of Ms. Khot.

17. We feel it appropriate to mention that although an additional charge u/s 302 read with 34 I.P.C. was framed against the appellants Nandlal Jal

and Karna Mali but they have been acquitted by the learned trial Judge and the State of Maharashtra has not impugned their acquittal by preferring

an appeal u/s 378(1) Cr.P.C. In such a situation, by virtue of the embargo contained in section 401(3) Cr.P.C. which prohibits the High Court, in

its revisional jurisdiction, from converting a finding of acquittal into one of conviction, we cannot exercise our revisional powers suo motu and

convict them on this count.

18. The sole question which remains is that of sentence.

Mr. Thakur, the learned A.P.P. for the respondent strenuously urged that since for an offence u/s 394 I.P.C. the maximum substantive sentence

prescribed by the legislature is life imprisonment, in this case the said sentence be imposed on the appellants, for in a callous and depraved manner,

to feed their lust for money, they killed their master. On the converse Ms. Khot learned Counsel for the appellants strenuously urged that since the

appellants have been in jail for nearly 8 years the ends of justice would be satisfied if their sentence is reduced to the period already undergone by them.

19. We have given our anxious consideration to the rival submissions. In our view, considering the over all circumstances a sentence of 10 years

R.I. to each of the appellants would be just and proper for the offence u/s 394 I.P.C.

As regards the offence u/s 451 read with 34 I.P.C. we find that the appellants have been sentenced to undergo 3 years R.I. which in our view is not excessive.

20. In the result all these appeals are partly allowed. Each of the four appellants viz. Karna Dashrath Mal, Mahendra Bag Sakur Bag, Nandlal

Amar Jal and Pradeep Rajani Biswal are acquitted of the offence punishable u/s 396 I.P.C. and their sentences for the said offence are set aside.

In case they have paid the fine it shall stand refunded to them. We find the said appellants guilty of the offence u/s 394 I.P.C. and sentence each one of them to undergo 10 years R.I.

We confirm the conviction and sentence of each of the appellants for the offence u/s 451 read with 34 I.P.C.

We direct that the sentence of each of the appellants on both the counts viz. 394 I.P.C. and 451 read with 34 I.P.C. shall run concurrently.

The appellants are in jail and shall only be released therefrom after they served out their sentence provided they are not wanted in any other case.

21. Appeal dismissed.