

(2000) 10 BOM CK 0065

In the Bombay High Court

Case No : Criminal Appeal No's. 108 and 353 of 1996

Kashinath Ramchandra Patil and Another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 06-10-2000

Acts Referred:

Evidence Act, 1872 — Section 103, 105, 106

Penal Code, 1860 (IPC) — Section 100, 302, 307, 324, 34

Citation : (2001) BomCR(Cri) 1 : (2001) 1 BOMLR 282 : (2001) CriLJ 4874 :
(2001) 1 MhLj 87

Hon'ble Judges : Vishnu Sahai, J;D.S. Zoting, J

Bench : Division Bench

Advocate : Mr. A.P. Mundergi, Mr. Ganesh Gole and Mr. R.V. More and Mr. A.M. Shringarpure, app, for the Appellant; Mr. A.M. Shringarpure, Assistant Public Prosecutor and R.V. More, for the Respondent

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. Through Criminal Appeal No. 108 of 1996 the appellants Kashinath Ramchandra Patil and Sudhakar @ Manya Dattatraya Patil have impugned the judgment and order dated 30th January, 1996 passed by the Additional Sessions Judge, Raged -Alibaug convicting and sentencing them in the manner stated hereinafter.

Both u/s 302 r/w 34 I.P.C. to imprisonment for life and to pay a fine of Rs. 5000/-, each in default to undergo one year's R.I. each. In addition Kashinath Ramchandra Patil u/s 324 I.P.C. to one year's R.I. and to pay a fine of Rs. 500/- and in default to undergo 6 months R.I. The substantive sentences of appellant Kashinath Ramchandra Patil were directed to run concurrently.

It is pertinent to mention that along with the said appellants was tried accused Madhukar Ramchandra Patil for the offence u/s 302 r/w 34 I.P.C. but since he has been acquitted through the impugned judgment, the State of Maharashtra

has impugned his acquittal through Criminal Appeal No. 353/96.

3. Shortly stated the prosecution case runs as under :

Appellant Kashinath Ramchandra Patil and acquitted accused Madhukar Ramchandra Patil are real brothers and appellant Sudhakar @ Many Dattatraya Patil is a friend of Kashinath. All of them are residents of village Kurul, taluka Alibaug. The deceased Arun @ Bandhu Raghunath Patil, was the husband of the sister of Naresh Naik P.W. 3. Pradnya Naik P.W.4 is the daughter of Naresh Naik. The informant Prasad Patil P.W. 1 is the cousin brother of the deceased Arun.

In village Kurul, next to the tailoring shop of Naresh Naik P.W. 3 there was a hotel of appellant Kashinath Patil and acquitted accused Madhukar. Naresh Naik P.W. 3 had fixed a weather shed in front of his tailoring shop which irked Kashinath Patil. On 12.5.1994 at about 9.30 a.m. Kashinath Patil went to the tailoring shop of Naresh Naik P.W. 3 and asked him to remove the weather shed and threatened to kill him if he did not remove it. Naresh Naik asked Kashinath Patil to ask his landlord.

On 15.5.94 at about 8 a.m. Naresh Naik went to his tailoring shop along with his daughter Pradnya Naik P.W. 4. From the road side Kashinath Patil threatened him to remove the weather shed. Thereupon Naresh asked Pradnya to sit in the shop and proceeded to Alibaug with the intention to lodge FIR. He went to the house of Prasad Patil P.W. 1, who was an advocate, but the latter advised him not to lodge the FIR as it would strain relations between him and Kashinath. Consequently at about 8.30 a. m. Naresh Naik returned to his shop.

The same day at about 11.30 a.m., Kashinath Patil along with Shrikant Patil, who was the landlord of Naresh Naik, went to the tailoring shop of the latter and asked him to remove the weather shed. Naresh Naik replied that he would remove it later on and went away. After some time Kashinath Patil entered into the tailoring shop of Naresh Naik P.W. 3; caught hold of his banian and abused and threatened him. Hearing the abuses of Kashinath Patil his brother Madhukar Patil (acquitted accused) came to Naresh Naik's shop armed with a soda water bottle and gave blows with the same on the eye of Naresh Naik P.W. 3. Thereafter Kashinath Patil took out a knife and inflicted blows with it on the stomach of Naresh. But as chance would have it, the blow struck the right arm of Naresh Naik P.W. 3. Thereafter Kashinath Patil and Madhukar Patil brought Naresh Naik out of his tailoring shop. At that juncture the deceased Arun arrived and intervened. A scuffle took place between him and Kashinath Patil. During the course of that scuffle Madhukar Patil assaulted Arun with the soda water bottle on his head. In the meantime appellant Sudhakar @ Many who was in the adjoining hotel, seeing the quarrel came and alongwith Kashinath Patil started inflicting knife blows on the person of Arun. On seeing the assault Naresh Naik P.W.3 started proceeding to the house of Arun but since he felt giddy he sat near a tree. On account of fear Pradnya Naik ran away. Apart from Naresh Naik P.W. 3 and Pradnya Naik P. W. 4 this incident was seen by Prakash Kavle P.W. 5. After

assaulting Naresh Naik P.W. 3 and Arun. Kashinath Patil, Sudhakar @ Manya and Madhukar ran away. Thereafter Naresh Naik proceeded to Civil Hospital, Alibaug.

4. The evidence of Prasad Patil P.W. 1 shows that on the date of the incident (15.5.94) at about 12 O'clock he, his wife Sujata and his friend Satish Naik proceeded in a car from Alibaug to village Kurul. At about 12.15 p.m. they reached near the naka of Kurul. They found a crowd assembled there and learnt that Kashinath Patil and Sudhakar (c) Manya with sharp weapons had stabbed Arun who was lying in the vicinity on the ota of Sriram. Consequently in the said car Prasad Patil took Arun to Civil Hospital Alibaug.

5. The evidence of Dr. Ajit Gawali P.W. 8 shows that on 15.5.1994 one Arun Patil was brought to the hospital by Prasad Patil. He was unconscious and died within 20 minutes. His evidence further shows that the same day he medically examined Naresh Naik P.W. 3 and found on his person the following injuries :

(1) Incised wound 2" x 1" x 0.5 cm. on right infra-orbital region.

(2) Incised wound 7 cm x 0.2 cm dermis deep on rt. anterior arm tailing lower side oblique.

In his opinion the said injuries were simple in nature and attributable to a blunt object.

6. The evidence of Prasad Patil P.W. 1 shows that after Arun had been pronounced dead by the doctor he proceeded to Alibaug Police Station and lodged his FIR.

7. The evidence of P. S. I. Dwarakanath Gharat P.W. 7 shows that at about 1.35 p.m. when he returned from patrol duty he saw Prasad Patil P.W. 1 sitting. Prasad Patil informed him that he wanted to lodge an FIR. He took down Prasad Patil's FIR Exhibit 34 and registered on its basis C.R. No. 38/94 under Sections 302, 307 and 34 I.P.C.

8. It is pertinent to mention that immediately after the incident appellant Kashinath Patil also went to Civil Hospital. Alibaug where Dr. Ajit Gawali P.W. 8 medically examined him on the date of the incident itself and found on his person the following injuries.

(1) Incised wound 2.5 sub-mental region right side.

(2) Incised wound vertical 3"x 1" x 0.5 middle anterior neck;

(3) Incised wound/oblique 2x 1x 0.5 right thumb base vertical aspect and

(4) Stab injury a) 2 x 1cm. b) 2 x 1 cm. both on left side on upper abdomen subject to exploration.

It is also pertinent to mention that Kashinath Patil lodged an FIR on the same day, on the basis of which Crime No. 39 u/s 307, 504, 506 and 34 I.P.C. was registered. This has come in the cross-examination (para 12) of P. S. I.

Dwarakanath Gharat P.W. 7. A perusal of para 12 of his evidence shows that P. H. C. More who was on duty in police chowki in Civil Hospital Alibaug took down the FIR of Kashinath Patil at his behest.

9. The autopsy on the corpse of Arun was conducted by Dr. Ajit Gawali P.W. 8 who found on it 15 ante mortem injuries which mainly included stab wounds and which as per his statement in the Trial Court could be caused by broken soda water bottle and knives. In the opinion of Dr. Ajit Gawali P.W. 8 the said injuries were sufficient in the ordinary course of nature to cause death.

10. The investigation was conducted in the usual manner by P. S. I. Dwarakanath Gharat P.W. 7 who after completing the same filed the chargesheet against the appellants Kashinath Patil and Sudhakar @ Manya and the acquitted accused Madhukar.

11. The case was committed to the Court of Sessions in the usual manner where all the three accused were charged for an offence punishable u/s 302 r/w 34 I.P.C. Accused-appellants Kashinath Patil and Sudhakar @ Manya were further charged for offence punishable u/s 307 r/w 34 I.P.C.

During trial in all the prosecution examined 8 witnesses. Three of them viz. Naresh Naik P.W. 3, his daughter Pradnya Naik P.W. 4 and Prakash Kavle P.W. 5 were examined as eye-witnesses.

The learned Trial Judge, for plausible reasons contained in para 37 of the impugned judgment rejected the evidence of Prakash Kavle P.W. 5. He however, believed the evidence of the other two eye-witnesses; rejected the defence suggestion made to the eye-witnesses in terms that the deceased Arun tried to assault Kashinath Patil with a knife and Naresh Naik P.W. 3 gave scissors blow on the abdomen of Kashinath Patil and in the scuffle between Kashinath Patil and the deceased Arun the latter received injuries; and convicted and sentenced Kashinath Patil and Sudhakar @ Manya in the manner stated earlier.

The learned Trial Judge however, acquitted Madhukar Patil.

As mentioned earlier Criminal Appeal No. 108/96 has been preferred by Kashinath Patil and Sudhakar @ Manya against their convictions and sentences and Criminal Appeal No. 353/96 has been preferred by the State of Maharashtra against the acquittal of Madhukar Patil.

12. We have heard learned counsel for the parties and perused the entire material on record. In our view, Criminal Appeal No. 108 of 96 deserves to be allowed and Criminal Appeal No. 353/96 warrants to be dismissed.

13. The area of controversy in this appeal lies in a very narrow ambit. From the cross-examination of the two eye-witnesses of the incident relied upon by the Trial Court viz. Naresh Naik P.W. 3 and his daughter Pradnya Naik P.W. 4, the circumstance that the injuries of appellant Kashinath Patil were examined on the date of the incident itself and his FIR was registered on the same day, it appears

that the date, time and place of the incident is admitted.

14. The only question which requires to be decided is whether the prosecution version of the incident is correct or the defence suggestion, referred to earlier, may be correct in terms of the burden cast on the defence by section 105 of the Evidence Act.

In our view the prosecution version as furnished by Naresh Naik P.W. 3 and Pradnya Naik P.W. 4 does not inspire confidence and the defence version may be correct.

We say this for the following reasons:

Firstly because neither of the two eye-witnesses have explained the extremely serious injuries sustained by appellant Kashinath Patil, which were received by him about the time of occurrence and which we have set out earlier.

It is pertinent to mention that Dr. Ajit Gawali P.W. 8 who medically examined him in his cross-examination (in para 5) stated that the injuries of Kashinath Patil could have caused his death.

In this connection it would be pertinent to refer to para 12 of the decision of the Supreme Court rendered in the case of Laxshmi Singh and ors. v. State of Bihar, wherein it has been observed thus ;

"It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences :

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable:

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

Secondly both these eye-witnesses have candidly stated that acquitted accused Madhukar Patil with a soda water bottle assaulted Naresh Naik P.W. 3 on his eye and deceased Arun on his head. This version of theirs, we regret to observe, is false because Dr. Ajit Gawali P.W.8. who medically examined Naresh Naik P.W. 3 and performed the autopsy on the corpse of Arun, in his examination in chief

(para 4) stated that injuries Nos. 1, 2, 3, 9, 11 and 14 suffered by the deceased could be caused by broken soda water bottles and injuries Nos. 1 to 3 could not be caused by the blows of filled soda water bottle. He also stated that the injuries of Naresh Naik could be caused by a broken soda water bottle. It is not the prosecution case that Madhukar Patil used broken soda water bottle.

Thirdly there was enmity between the two eye-witnesses on the one hand and the appellant Kashinath Patil and the acquitted accused Madhukar on the other hand.

Fourthly neither Naresh Naik P.W. 3 and Pradnya Naik P.W. 4 can by no standards be described as independent witnesses.

15. When these four infirmities in the evidence of the two eye-witnesses are borne in mind in the light of the fact that although the incident took place in broad day light, in a crowded locality, and yet no independent witness is forthcoming to depose about it, it becomes extremely unsafe to accept the ocular account furnished by them.

16. As is well known the burden on the defence is not so onerous as on the prosecution. Whereas the former has to only show by a preponderance of probability that its case may be true, the latter has to prove its case beyond reasonable doubt.

We feel that the defence has discharged the burden cast on it not only because the defence version has been suggested to the eye-witnesses in their cross-examination but also as there is no explanation for the injuries of Kashinath Patil which were examined on the date of the incident itself by Dr. Ajit Gawali P.W. 8; which injuries, in his opinion, could have caused Kashinath Patil's death.

17. We would be failing in our fairness if before proceeding to the operative part of the judgment we do not deal with two submissions of Mr. Shringarpure, the learned Additional Public Prosecutor viz. (i) that the defence version of the incident does not explain the injuries of Naresh Naik P.W. 3 and (ii) at any rate since there is an enormous disparity between the number of injuries sustained on the side of the prosecution (fifteen by the deceased and two by the injured) and those on the side of appellant Kashinath Patil, which were only four in number, the right of private defence, has been exhausted.

We regret that we do not find any merit in either of the two submissions.

18. So far as the first submission is concerned it is not tenable for the reasons enumerated herein-after. Even in a case in which the right of private defence is pleaded the burden on the accused only shifts after the prosecution has discharged its initial burden of proving its case beyond reasonable doubt. Consequently, this weakness in the defence case would not enure to the advantage of the prosecution. It is well settled that the prosecution swims or sinks on the strength or weakness of its case and its case is not proved by weaknesses of the defence. We have earlier given the reasons as to why the

evidence of the two eye-witnesses Naresh Naik P.W. 3 and Pradnya Naik P.W. 4 does not inspire confidence and why the prosecution case has not been established beyond the pale of doubt.

In this connection it would be apposite to refer to para 10 of the decision of the Supreme Court rendered in the case of Sawal Das v. State of Bihar, which reads thus :

"10. Neither an application of Section 103 nor of 106 of Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused".

19. There is another reason as to why the aforesaid infirmity does not enure to the benefit of the prosecution.

Since the defence version of the incident does not explain the injuries sustained by Naresh Naik P.W. 3 and the prosecution version does not explain the injuries sustained on appellant Kashinath Patil at the worst what can be said is that both prosecution and the defence are coming with untrue facts. In such a situation, it is not the prosecution which is the gainer but the regrettable result is both the versions have to be rejected and the accused given the benefit of doubt. We say this on the basis of two decisions viz. those in Subrati and ors. v. State and Jamuna Chaudhary and ors. v. State of Bihar,

In the former decision- (Subrati's case) it has been observed thus:

".....If both the parties come to the Court with untrue facts and conceal the real truth they have themselves to blame and they cannot except the Court to arrive at any definite conclusion on the unreliable evidence produced either for or against either of the parties. In such a case the Court will certainly attempt to separate the grain from the chaff but only if it is possible to do so. In certain circumstances it may be found to be an impossible task. That is particularly so when the evidence of both the parties is thoroughly unreliable and cannot be accepted even in part with safety. In such a case it is not open to the Court to make out a third case which is different from the case set up by both the parties. In such a case the Court can only say that the matter is doubtful in the extreme and it is not possible to arrive at any conclusion one way or the other. The result of such a finding may be that all the persons who stand as accused in the case may have to be given the benefit of doubt. But that cannot be helped. The defective investigation and the conduct of the parties themselves are really responsible for that regrettable result. In such a case there can be no question of recording any conviction."

In the latter case in para 12 the Supreme Court observed thus ;

"12. As neither the prosecution nor the defence have, in the case before us,

come out with the whole and unvarnished truth, so as to enable the Court to judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place in which so many persons, including Laldhari and Ramanandan, were injured, Courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits, to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case."

20. Bearing in mind the ratio laid down in the said cases we regret that in the instant case it would not be possible to decide whether the prosecution version of the incident is correct or the defence version. In such a situation, as held in the said cases, the appellants would have to be given benefit of doubt.

21. We also find no merit in Mr. Shringarpure's submission that the right of private defence has been exceeded. The medical evidence furnished by Dr. Ajit Gawali P- W. 8 shows that the injuries of Kashinath Patil were serious and could cause death. In such a situation the appellants had the apprehension that appellant Kashinath Patil could be done to death, in terms of clause firstly of section 100 I. P. C. and hence they had the right to kill the deceased Arun. In this view of the matter, when appellants Kashinath Patil and Sudhakar @ Manya assaulted the deceased with knives they had the right to kill him.

It is true that the post mortem report which has been proved by Dr. Ajit Gawali P. W. 8 shows that four of the injuries suffered by the deceased viz. injuries Nos. 7, 8, 10 and 15 were individually sufficient in the ordinary course of nature to cause death but that would make no difference because the right of private defence cannot be weighed in golden scales. Neither the person who is receiving fatal injuries nor his companion can be expected to weigh in golden scales the amount of force which they should use to quell the attack on them.

In our view, on the facts of this case the right of private defence has not been exceeded.

22. At any rate persons who act in the exercise of right of private defence do not commit a criminal act and therefore section 34 I. P. C. which stipulates of a criminal act being committed by several persons in furtherance of their common intention would have no application when it comes to decide the question where more than one person is acting in the discharge or right of private defence, as is the case here, as to who amongst them exceeded the right of private defence of person or property. In such a contingency, prosecution has to specifically establish as to who amongst them exceed the right of private defence of person or property, as the case may be.

23. In the instant case there is no evidence as to who amongst Kashinath Patil and Sudhakar @ Manya were responsible for the four fatal injuries suffered by the deceased. The view which we have taken is fortified by the observations contained in para 4 of the decision of the Supreme Court in Joginder Ahir v. The State of Bihar and ors,. In the said case four persons had been convicted by the

Trial Court for the offence u/s 304(ii) read with 34 I. P. C. and sentenced to five years R. I. On appeal the Patna High Court reduced their sentence to 3 years R. I. A perusal of para 3 of the said judgment shows that the High Court was of the view that the right of private defence of property had been exceeded. The Supreme Court, as is evident from para 4, reversed the judgment of the High Court on the ground that it was not clear from the evidence as to who amongst them had exceeded the right of private defence of property.

We are extracting the relevant observations of the Supreme Court which are contained in para 4, and which reads thus :

"..... In the present case on the findings of the High Court, there was no common intention of the accused persons to murder the deceased. They were, however, convicted for having exceeded the right of defence of property in furtherance of the common intention of all. We are unable to concur with the view of the High Court that any such common intention could be attributed to the appellants on the facts and in the circumstances of the case. They certainly had the common intention of defending the invasion of the right to property. While doing so if one or two out of them took it into his or their heads to inflict more bodily harm than was necessary, the others could not be attributed the common intention of inflicting the injuries which resulted in the death of the deceased. Section 34 can only be applied when a criminal act is done by several persons in furtherance of the common intention of all."

24. In the result :

(A) Criminal Appeal No. 108/96 is allowed. Both the appellants viz. Kashinath Ramchandra Patil and Sudhakar @ Manya Dattatraya Patil are acquitted for the offence u/s 302 r/w 34 I. P. C. and their convictions and sentences thereunder are set aside. Appellant Kashinath Patil is also acquitted for the offence u/s 324 I.P.C. and his conviction and sentence thereunder is set aside. The said appellants are in jail and shall be released forthwith unless wanted in some other case.

In case fine has been deposited by the said appellants the same shall be refunded.

(B) Criminal Appeal No. 353/96 preferred by the State of Maharashtra against the acquittal of Respondent Madhukar Ramchandra Patil is dismissed and his acquittal for offences punishable under sections 302/34 I. P. C. and 307/34 I. P. C. is confirmed. The Respondent is on bail. He need not surrender.