

(2011) 02 BOM CK 0049
In the Bombay High Court
Case No : Criminal Appeal No. 139 of 1997

Krishna Babu Bhoir and Others	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 10-02-2011

Acts Referred:

Arms Act, 1959 — Section 25(1)
Bombay Police Act, 1951 — Section 135, 37(1)(3)
Criminal Procedure Code, 1973 (CrPC) — Section 294, 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 323

Citation : (2011) CriLJ 1813 : (2011) 2 Crimes 144

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : S.R. Chitnis and V.R. Raje, for the Appellant; P.P. Bhosale, APP, S.V. Gavand, for the Respondent

Judgement

R.C. Chavan, J.—This Appeal is directed against conviction of the Appellants by the learned Additional Sessions Judge, Raigad at Alibaug for the offences punishable under Sections 307 read with Section 149 and Sections 147, 148 of the Indian Penal Code and sentence of rigorous imprisonment for five years and a fine of Rs. 500/-or in default rigorous imprisonment for three months and rigorous imprisonment for one year respectively inflicted on the two counts. This came on the conclusion of Sessions Case No. 126 of 1994 conducted before the learned Judge.

2. Facts which are material for deciding this Appeal are as under:

One Vilas Gharat had allegedly neglected to help Mahadeo Kothekar and Dashrath Patil, who were injured on 13th September, 1993 and had refused to carry them in Auto Rickshaw to the hospital. It is alleged that therefore, Dashrath Patil and his friends had a grudge against Vilas. Therefore, on 1st November, 1993 when Vilas Gharat was returning with Mahadeo Kothekar from Konkan Bhavan after meeting one Prakash Seth, the Appellants along with 12

other persons attacked Vilas at a place near Marave village. Vilas was severely injured and fell on the ground. Akash and Gangubai, brother and mother of Vilas, who came to rescue of Vilas were also allegedly beaten. Vilas was carried to Retibander Police Out Post and from there to Panvel Municipal dispensary. Mahadeo Kothekar gave a report at the Police Station Panvel. Vilas was shifted to Sion Hospital, Mumbai and was given necessary treatment. Vilas had sustained some fractures. On the report of Mahadeo Kothekar an offence was registered against the Appellant and 12 others and investigation commenced. In course of investigation, police recorded statements of witnesses, seized incriminating articles, sent them to the Forensic Science Laboratory, obtained reports from the Laboratory and on completion of investigation sent charge sheet to the learned Judicial Magistrate First-Class, Panvel, who committed the case to the Court of Sessions at Raigad-Alibaug.

3. The learned Additional Sessions Judge to whom the case was made over charged the Appellants and 12 others of the offence punishable under Sections 147, 148, 307 read with Section 149, Section 323 read with Section 149 and Sections 504, 506 read with Section 149 of the Indian Penal Code, Section 25(1) (c) of the Arms Act and Section 37(1)(3) read with Section 135 of the Bombay Police Act. Since the accused persons pleaded not guilty to the charge, they were put on trial at which as many as six witnesses were examined by the prosecution in its attempt to bring home guilt of the accused persons. After considering the evidence tendered in the light of defence raised, the learned Additional Sessions Judge acquitted all the accused persons, including the Appellants, of the offence of causing injuries to Akash and Gangubai. He also acquitted the other 12 accused persons of the offence of forming an unlawful assembly, committing rioting or participating in the attempt to commit murder of Vilas. He, however, held the Appellants guilty and convicted and sentenced them as mentioned in the earlier part of the Judgment. Aggrieved thereby the Appellants have preferred this Appeal.

4. I have heard the learned Senior Counsel for the Appellants and the learned APP for the State assisted by Advocate, S.V. Gavan for the victim. With the help of the learned Counsel I have gone through the record. The learned Senior Counsel for the Appellants submitted that acquittal of the Appellants as well as the other 12 accused persons of the offence punishable u/s 323 read with Section 149 of the Indian Penal Code for the assault on Akash and Gangubai casts a serious doubt about the reliability of the F.I.R. as also the evidence of P.W.1 Mahadeo Kothekar, the first informant, and P.W.2 Vilas, the victim. He further submitted that though the other assailants were also named in the F.I.R., the learned Trial Judge had disbelieved the prosecution evidence about their complicity. Therefore, there was no warrant for the learned Judge to accept the evidence insofar as it related to complicity of the Appellants. In *Shri. Ananta Janardan Patil v. State of Maharashtra* 2009 ALL MR 2716, a Division Bench of this Court set aside the conviction on the ground that the eye witnesses had projected one version of the incident whereas the investigating officer supported

by the record projected another version of the incident. Such is not the present case. Therefore, this decision is unhelpful to the defence.

5. As rightly pointed out by the learned APP and as has been rightly observed by the learned Trial Judge the maxim falls in uno, fabus in omnibus is not regarded as valid in India and Trials Courts are expected to sift the evidence in order to find out what part of the evidence can be believed. Therefore, merely because the Appellants and others have been acquitted of the charge of causing injuries to Akash and Gangubai, or the remaining accused persons though named in the F.I.R. have been acquitted for their assault on Vilas, it does not follow that the case of the prosecution was required to be thrown out in its entirety.

6. With this prelude I would proceed to examine the evidence tendered on behalf of the prosecution in the light of arguments advanced. In this case, the Medico-Legal Certificate at Exhibit 45 issued by the Medical Officer at Municipal Dispensary, Panvel, Raigad-Alibaug had been admitted by the defence. Dr. Pawar, who issued this Certificate was also examined as P.W.4. The injuries observed by Dr. Pawar in his Certificate at Exhibit 45 are six incised wounds caused by sharp object. The first was on the left fore arm possibly 1.2 x 1.5 inches, and muscle deep. The second injury was on the right palm posterior aspect, 3 x 2 inches, bone deep and was accompanied by fracture. The third injury was on the left foot, posterior and anterior aspect 5 x 3 inches and was bone deep. The 4th injury was on the posterior aspect of the right foot 1 x 2 x 1 inches and was muscle deep. The 5th injury was on the right leg anterior aspect along with fracture which was 2 x 1 x 3 inches and the last injury was to the ankle. It was 1.5 x 1/2 inches and was muscle deep. All the injuries were certified by Dr. Pawar to have been caused within about two hours of his examination by a sharp object and were grievous in nature. Though Dr. Pawar had stated about three fractures, he had not produced any X-ray plates and it seems that he had made observations on the basis of clinical examination and without any radiological examination.

7. The learned Senior Counsel for the Appellants submitted that without radiological examination, it could not have been possible for the Medical Officer to decide that there were fractures and therefore, notwithstanding the doctor's claim that the victim had suffered grievous injuries, the injuries may not be treated as grievous. He further submitted that though no Medical Officer was examined from Lokmanya Tilak Hospital, Mumbai, the Injury Certificate issued by the said Medical Officer was read at Exhibit 50, though, it Certificate could not have been read. This Certificate shows that there was a grade II compound fracture of right tibia fibula along with dislocation of 1st left Metatarsal .

8. It seems that both these Certificates at Exhibits 45 and 50 were admitted by the Defence Counsel at the trial stating that their authenticity and genuineness was admitted. The learned APP placed reliance on a judgment of the Supreme Court in Akhtar and Ors. v. State of Uttaranchal 2009 DGLS 462, to support her contention that if u/s 294 of the Code of Criminal Procedure the genuineness of

any such document filed by a party is not disputed by opposite party, such document can be read as substantive evidence. She submitted that therefore non-examination of the Medical officer from Sion hospital was irrelevant. The learned APP, therefore, submitted that once the defence admits the authenticity and genuineness of such documents, it would not be open to the defence to question the correctness of observations made in the documents. Therefore, according to her, it would not be open for the defence now to say that Vilas had not suffered fractures as had been recorded in the two Certificates. The learned Senior Counsel for the Appellants submitted that merely because genuineness and authenticity of the documents was admitted by the defence, it does not follow that the documents depict the truth. Admission of genuineness and authenticity only means that the documents are not bogus and are a record of the examination carried out by the Medical Officers concerned. It does not mean that the observations of the Medical Officer are accepted by the defence as correct. In any case, he submitted that Certificate at Exhibit 50 issued by Medical Officer of Lokmanya Tilak Hospital, Mumbai, where victim was taking treatment from 1st November, 1993 to 5th December, 1993, would show that there was only one fracture and one dislocation as against three fractures to which P.W.4 Dr. Pawar makes a reference in his Certificate. Therefore, according to the learned Senior Counsel for the Appellants, the Certificate at Exhibit 50 would in fact nullify the effect of Certificate at Exhibit 45 issued by Dr. Pawar and would bring down substantially the gravity of injuries sustained by Vilas.

9. The learned Senior Counsel also argued that one of these Certificates, Exhibit 50 was not put up to Appellants in statement u/s 313 of the Code of Criminal Procedure and therefore, could not have been used against the Appellants. The learned AP countered and also drew my attention to the Judgment of the Supreme Court in State (Delhi Administration) Vs. Dharampal, , where the question was about Certificate by Director, Central Food Laboratory. The contents of the Certificate had not been put up to the accused while recording his statement u/s 313 of the Code of Criminal Procedure. The Court held that this does not ipso facto result in acquittal of accused and that it was not necessary that the contents of the report should be put to the accused while examining accused u/s 313 of the Code of Criminal Procedure.

10. I have carefully considered these contentions. Failure to put up an important piece of evidence to the accused in their examination u/s 313 of the Code of Criminal Procedure is not always fatal to the prosecution case and even at appellate stage response about the document or the piece of evidence can always be had from the accused persons. In view of this, position of law I had asked the learned Senior Counsel for the Appellants to state as to what would be the stand of the Appellants on the Certificate which was not put up to them and he submitted that non examination of the Medical Officer was fatal. The Certificate itself was unintelligible and in any case, it nullified the Certificate issued at Exhibit 45 by P.W.4 Dr. Pawar.

11. In the light of Certificate at Exhibit 50, the evidence of P.W.4 Dr. Pawar may be again recollected. Though Dr. Pawar had branded all the injuries as grievous, except for fractures the other injuries do not appear to be grievous. Though he had observed three fractures, there is only one fracture and one dislocation. Even Dr. Pawar admits that the injuries were either on hands or legs and not on any other part of the body. Therefore, from the injuries, the intention of the assailants appears to break hands and legs. Dr. Pawar denied the suggestion that his opinion, that cumulative effect would be to cause death, was not correct. Now, if all the injuries are on hands and legs alone and there's only one fracture with one dislocation, it would be difficult to conclude that the assault was aimed at causing death. For the purpose of proving charge u/s 307 of the Indian Penal Code, it would be necessary to establish that the assault was launched with such intention or knowledge and under such circumstances and if by that act the accused had caused the death of the said persons, the accused would have been guilty of murder. Considering the nature of assault and the nature of the injuries observed by Dr. Pawar, it is difficult to attribute intention of causing death or knowledge that death would result to the Appellants.

12. It may be recalled that five Appellants are alleged to have been mercilessly beating one helpless victim with Swords. If such an assault did not produce any injury on vital parts, it would be difficult to hold that the assault was aimed at causing the death of the victim. Therefore, it is clear from the evidence of Medical Officer and the Medical Certificates that case of the offence punishable u/s 307 of the Indian Penal Code had not been made out. This is also fortified by the motive of assault attributed by P.W.1 Mahadeo, namely a threat given on 13th September, 1993 that Appellants would cut their legs.

13. This takes me to the question of authorship of injuries sustained by P.W.2 Vilas. Apart from P.W.2 Vilas, P.W.1 Mahadeo Kothekar is the other eye witness to the incident. The learned Trial Judge has already discarded the evidence of P.W.3 Akash since Akash stated that on hearing shouts he & his mother started running, when they found the Appellants and other accused persons holding words, Sticks, Spears and Axes. They said to Akash that Akash's tiger had fallen and Akash may go and lift him. Thus, Akash went to the spot after the incident. Consequently, the learned Trial Judge must be held to have rightly excluded the evidence of Akash. This leaves only P.W.1 Mahadeo and P.W.2 Vilas as the witnesses to the assault.

14. P.W.1 Mahadeo has a very curious story to tell. He states on 1st November, 1993 he had gone along with Vilas to Konkan Bhavan to meet one Prakash Seth, a Contractor, and was returning with Vilas to their village when the incident took place on the road towards Marave village. He states that the Appellants and other accused persons were beating Vilas but not him. He claims that when he requested them presumably asking them as to why they were assaulting, they pushed him aside and told him that if he gave evidence they would finish him also. Mahadeo then claims that he told the assailants that he will not give the

evidence and they should not assault him and then it seems that the assailants left Mahadeo to witness the incident without injuring him.

15. The learned Senior Counsel is right in submitting that this account is hard to believe. If P.W.1 Mahadeo was indeed present, there would be no reason why the assailants would leave him alone, particularly since the genesis of the incident as stated by Mahadeo would warrant Mahadeo's being assaulted too. Mahadeo stated that there was an accident of a motor cycle when accused No. 16 Dashrath and one Shantaram, were lying near village Ovala. He states that Vilas was going in Auto Rickshaw and though Dashrath asked Vilas to take them to hospital, Vilas did not take them to hospital. He states that therefore, the Appellants and other accused persons had abused them and threatened that they would cut the legs of P.W.1 Mahadeo and others. P.W.1 Mahadeo admitted in his cross examination that Shantaram died in the accident. In respect of that accident a case had been filed by the police. In that case along with Vilas, P.W.1 Mahadeo was also a co-accused and the charge was that of murder of Shantaram. Thus, it is not that Vilas was alleged to have innocuously refused to help a victim in an accident, but the allegation was that P.W.1 Mahadeo along with P.W.2 Vilas were involved in the murder of one Shantaram, who died at that time. If this was so there would be absolutely no reason for the assailants to leave Mahadeo alone to witness the incident as they proceeded to assault Vilas. Therefore, though the learned Trial Judge has accepted the evidence of P.W.1 Mahadeo, the learned Senior Counsel for the Appellants is right in submitting that Mahadeo's presence itself is doubtful. Except for the word of Mahadeo, there is nothing to show that he was in fact present when the incident took place. If that be so, report given by Mahadeo on which an offence has been registered, which is at Exhibit 52, cannot provide any corroboration to the word of Mahadeo or Vilas.

16. The learned Counsel for the Appellants also pointed out that the evidence of Mahadeo and Vilas is also discrepant while P.W.1 Mahadeo states that Baliram and Ors. stretched left hand of Vilas, P.W.2 Vilas himself attributes such a role only to Govind Janu Patil. Secondly, while according to Mahadeo, accused Baliram, Datta, Govind and Baburao had given blows by Axe to Vilas. Vilas states of only blow by Sword on the left leg by Baliram Goma Patil and not by others. In view of this contradiction also, it would be unsafe to rely upon the word of Mahadeo that he witnessed the incident. The learned Trial Judge, therefore, should have excluded the evidence of Mahadeo from consideration.

17. This leaves evidence of only P.W.2 Vilas, the sole eye witness and victim to the incident. There would be no reason for the victim to depose of falsely about his assailants. In the light of previous disputes, the possibility of such an assault by the party of the accused on the victim did exist. The learned Senior Counsel for the Appellants submitted that in the light of fact there was previous dispute between the factions, the possibility of persons, who were not involved in the assault also being roped in and the assault being aggravated to a higher degree

than what was actually launched could not be ruled out. There can be no doubt that in a fight between two groups in a village, the possibility of roping in from the enemy camp as many persons as possible and aggravating the story of assault would be there. This has also been noticed by the learned Trial Judge in his Judgment. He has observed in para 20 of his judgment that because of the group rivalry possibility of implicating some others along with real culprits cannot be ruled out and Courts must separate the truth from false flood. After bearing in mind this caution, the learned Judge has come to accept the word of Vilas about complicity of Appellants Krishna, Govind, Natha and Baliram in the assault on P.W.2 Vilas.

18. Now this has to be co-related with the Medical Certificates produced and the medical evidence tendered as also evidence about seizure of weapons and report of the Forensic Science Laboratory.

19. The prosecution examined P.W.5 Sharad Patil to prove discovery of certain articles. He states that he had been called by Panvel police when accused Krishna Babu Bhoir stated that he kept some weapons near crematorium of a village and accordingly, Krishna led the police party to the place from which two Swords, three Axes and three Sticks were taken out by the accused and were seized vide Memorandum Panchnama at Exhibit 63 and 63A effected on 19th November, 1993. He was categorical in his cross examination that the memorandum was recorded between 12:00 noon and 13:05 p.m. and all the weapons were taken out from one place. He stated that only accused Krishna was with them. He admitted having seen accused No. 2 Vijay in the police station but stated he did not remember whether two discovery panchanamas were drawn up on that day at the instance of two accused persons. P.W.6 Police Inspector Sonawane, however, states that on 19th November, 1993, apart from seizure at the instance of accused Krishna, he had also gone to the spot at the instance of one Vijay Maruti Thakur vide Exhibit 66. Now, this Memorandum was also made in presence of same panch Sharad Damodar Patil between 13:15 to 13:50 hours. The discovery itself was between 16:05 and 16:45 hours from a place which is near the place from where accused Krishna had taken out his weapons. It is interesting to note that the panchnama about recovery of weapons at the instance of accused Krishna was effected from 14:20 hours to 16:00 hours at which P.W.5 Sharad Damodar Patil was obviously present. Therefore, his omission to state about the discovery at the instance of Vijay assumes importance. It is also worthy of note that the weapon seized at the instance of Vijay was just in the vicinity of the place from where weapons were seized at the instance of accused Krishna. It would not stand to reason that the two assailants would incidentally conceal the weapons at two spots in the close proximity. Therefore, attempt of the investigating officer to show discovery at the instance of the two accused persons appears to be aimed at helping the Complainant to rope in as many accused persons as possible. This casts a doubt on the complicity of Appellant Vijay in the incident.

20. According to both P.W.1 Mahadeo and P.W.2 Vilas, Appellant Govind Janu Patil had only stretched the left hand of Vilas. Now, if on such a stretched hand assault by Swords was launched, result could well be imagined. But it may be recalled that victim's left forearm had only one incised wound 1.2 x 1.5 inches which was muscle deep, which could as well have been caused without Appellant Govind Janu Patil holding hand of Vilas.

21. In view of this, Appeal of Appellants Vijay Maruti Thakur and Govind Janu Patil would have to be allowed and they would be entitled to be acquitted of the offences punishable u/s 307 read with Section 149 and under Sections 147 and 148 of the Indian Penal Code.

22. As far as other three Appellants are concerned, their convictions for the offence punishable u/s 307 read with Section 149 of the Indian Penal Code would have to be altered to one for the offence punishable u/s 325 read with Section 34 of the Indian Penal Code (since number of participants has divided to three). Their conviction for the offence punishable under Sections 147 and 148 of the Indian Penal Code would also have to be set aside.

23. Since sentence of rigorous imprisonment for five years was imposed for the offence punishable u/s 307 of the Indian Penal Code, a lesser sentence would be warranted for the offence punishable u/s 325 of the Indian Penal Code. Also it cannot be overlooked that Appellants would be revisiting jail for an incident in the year 1993 for which they were convicted in the year 1997 and have been living in shadow of conviction for the last 14 years. Therefore, Appellant No. 1 Krishna, Appellant No. 3 Baliram 27 Cri. Appeal No. 139-97 and Appellant No. 4 Natha would be sentenced to rigorous imprisonment for three years with a fine of Rs. 500/- or in default rigorous imprisonment for three months for the offence punishable u/s 325 read with Section 34 of the Indian Penal Code.

24. Appeal is, thus, partly allowed in the above terms.