
(2016) 09 BOM CK 0156
In the Bombay High Court
Case No : Criminal Appeal No. 622 of 2012

Krishnarao

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 19-09-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 149, Section 300

Citation : (2017) 2 AIRBomRCri 323 : (2017) ALLMRCri 1221

Hon'ble Judges : A.V. Nirgude and A.I.S. Cheema, JJ.

Bench : Division Bench

Advocate : Criminal Appeal No. 622 of 2012; Mr. Joydeep Chatterji, Advocate, for the Appellants; Mr. M.M. Nerlikar, APP, for the Respondent/State; Criminal Appeal No. 625 of 2012, Criminal Application No. 5160 of 2013; Mr. M.A. Tandale, Advocate, for the Appellants;

Final Decision : Disposed Off

Judgement

1. All these appeals arose from judgment and order dated 15.10.2012 passed by learned Additional Sessions Judge, Hingoli in Sessions Case No. 15 of 2008 convicting the appellants for the offences punishable under Sections 302 r/w Section 149 of the Indian Penal Code. (All the appellants hereinafter are referred as per their original designation in the Sessions Case as accused No. 1, 2 etc.)
2. In Sessions Case No. 15 of 2008 there were 11 accused out of which accused Nos. 1,4,6,7,8,9,10 & 11 (Total 8 accused) were convicted. Where as accused Nos. 2,3 and 5 were acquitted.
3. Criminal Appeal No. 622 of 2012 is filed by accused Nos.1, 4 & 9. Criminal Appeal No. 625 of 2012 is filed by accused Nos. 8,10 & 11 challenging their conviction. Accused Nos. 6 & 7 challenged their conviction through Criminal Appeal No. 633 of 2012. The State of Maharashtra filed Criminal Appeal No. 431 of 2013 for seeking conviction of accused Nos. 2 and 5.
4. The case of the prosecution was that on 23.02.2007 at about 11.00 a.m. all

accused forcibly entered in the field of deceased Vitthalappa with a view to forcibly harvest and take away crop of turmeric. They eventually assaulted Vitthalappa and others causing Vitthalappa's death.

5. The prosecution case depended on depositions of 16 prosecution witnesses. Gist of the evidence is given below:

6. P.W.2-Suresh Gyanuappa Torkad nephew of victim Vitthalappalodged the complaint of this offence. Witness Nos. 2,4,5,13,14 and 15 are eye witnesses.

7. P.W.2-Suresh is the complainant. He stated that Vitthalappa was his Uncle and was a farmer. He had purchased an agriculture land adm. 4 Acre 38 Guntha about 10 years back. A dispute started in respect of this land since Dasara of 2006. Accused No. 1 and others claimed that Vitthalappa had encroached on their land to the extent of 20 Guntha. They demanded back that encroached portion of the land.

8. On the day of incident at about 10.00 to 11.00 a.m. Vitthalappa was present along with his brothers Gangadharappa, Babanappa, Gajanan, Santosh and Kundalik and 78 other persons in his land. He had grown there crops of Turmeric which was almost ready for harvest. At that time accused Nos. 1, 2, 8, 9, 10 and 11 came there. They started telling Vitthalappa that since he did not vacate their land they would forcibly take away the turmeric crop and threatened if they were stopped, they would kill Vitthalappa. After this threat they left field and went to their house. P.W.2 then went near Vitthalappa. Bhagwanappa, Subhashappa and Gangadharappa said, they would go the police station for lodging a complaint. They left for the police station.

9. Thereafter accused Nos. 8, 11, 1, 2, 9, 10 and 4 came back to Vitthalappa's field. This time they came with axe and sticks in their hands. They started abusing Vitthalappa in presence of his nephews and brothers. Accused No. 8 assaulted Vitthalappa and delivered 23 blows of axe utilizing back side of the axe on Vitthalappa's head. Accused No. 9 delivered stick blows on Vitthalappa's back. Accused No. 11 delivered stick blows on Vitthalappa's nephew Santosh. Other accused started beating other persons. Due to injury to the head, Vitthalappa fell down. In the meantime a police jeep came there. Accused left the field, leaving their sticks and axes in the field. Vitthalappa was taken to hospital in a private vehicle. Medical Officer declared him dead. P.W.2 then lodged a complaint to Police Officer P.S.I. Chate.

10. P.W.3-Gangadharappa Vitthalappa Torkad stated that the land in question was purchased in his and his wife's name by his father Vitthalappa long back. He too stated that till Dasara 2006 there was no dispute about the land.

11. On the day of incident at about 11.00 a.m. while he was at his residence, he learnt that the accused persons were going towards his land. So he, his father, mother, uncle and cousins came out of the house. Accused entered their field where crop of turmeric was cultivated. They started saying that they would take

away the crop of turmeric. They also threatened, if they were obstructed, they would kill any one. Accused Nos.8 and 9 issued such threats. Thereafter accused left the field.

12. P.W.3 Gangadharappa made a phone call to the police and informed them about the incident. He had talk with P.S.O. Bangar. P.W.2,3 and others went towards Basamba Police Station on a motorcycle.

13. P.W.4-Annapurnabai is also an eye witness. She is Vitthalappa's wife. She described the incident. She was present in the field where the incident took place. She said at about 11.00 a.m. accused No. 8, 10, 11, 1, 4, 2 and 9 came there. They started saying that they would forcibly harvest the crop and if they were obstructed, they would not hesitate to kill anyone. They left thereafter.

14. After sometime they again returned to the field. Accused No. 8 had an axe in his hands. He delivered an axe blow on the head of Vitthalappa. Vitthalappa fell down. The accused and persons belonging to Vitthalappa's group started quarreling. Thereafter police came in a vehicle. The accused ran away.

15. P.W.5-Gajanan Gangadharappa Torkad is Grandson of Vitthalappa. He said that the incident took place on 23.02.2007 at about 12.00 noon. He was present in the field along with his brother Santosh, Uncle Raju, Kundalik and brother Anil. At about 10.00 to 11.00 a.m. accused Nos. 1, 8, 4, 11, 9, 2 and 10 came there. They started saying that they would forcibly harvest the crop of turmeric. They threatened that if they were obstructed, they would kill such person. They left the field and went towards the road. They started making phone calls.

16. After sometime they came back in the field. Accused No. 8 started asking Vitthalappa as to why he had retained the land belonging to him. Accused No. 8 had an axe in his hand. He delivered a blow of axe on the Vitthalappa's head. Accused No. 9 delivered a blow on handle of spade to Raju. Accused Nos. 1 and 2 delivered blows of ribs of Santosh. In the meantime the police jeep arrived. Accused ran away.

17. P.W.14-Santosh Krishnappa Torkad a nephew of Vitthalappa stated that on the day of incident at about 10.00 to 11.00 a.m. he was present in the house. While he was walking on the road he saw accused Nos. 1,8,11,4,9,10 and 2 going towards Vitthalappa's land in which turmeric crop was grown. He heard them saying that they would forcibly take away turmeric crop. Accused No. 1 then made a phone call to someone asking him to come soon.

18. Thereafter all accused came back with axe and sticks. They wanted to enter the land. They raised shouts and abused. Vitthalappa went in front of them. Accused No. 8 delivered blows on Vitthalappa's head. Vitthalappa fell down. Accused No. 9 delivered blows of stick on Vitthalappa's back. When Santosh tried to intervene accused No. 1 delivered blows of stick on Santosh's right knee. Due to assault Santosh and others ran away.

19. P.W.15-Raju Bhimappa Torkad is another nephew of deceased Vitthalappa. He

too stated that accused Nos. 8, 11, 4, 1, 9 and 10 came to the field of Vitthalappa where turmeric crop was cultivated. They started abusing Vitthalappa and telling him that they would harvest the crop. They abused Vitthalappa.

20. After sometime they came back from the field. After few minutes they again went back to Vitthalappas's land. This time accused No. 8 delivered an axe blow on Vitthalappa's head. Accused No. 9 delivered a stick blow on Vitthalappa's back. Other accused assaulted others. Due to assault prosecution witness No. 15 sustained injury to his little finger of left hand. In the meantime police came there.

21. Other relevant prosecution evidence is postmortem report of Vitthalappa's dead body, scene of occurrence panchanama and injury certificates of witnesses Santosh, another Santosh and Raju.

22. There were 11 accused before the trial Court. We have noted above that the prosecution witnesses who claimed that they had seen the incident named only accused Nos. 1, 2, 4, 8, 9, 10 & 11 (seven persons) being the assailants. They have not named accused Nos. 3, 5, 6 and 7 as assailants. They are silent about them. It is because of this selective depositions prosecutions witnesses were declared partly hostile and they were cross-examined.

23. Learned Judge of the trial Court as said above convicted the accused Nos. 1, 4, 6, 7, 8, 9, 10 and 11, since he believed the prosecution case that these accused persons were members of unlawful assembly etc. Learned Senior counsel Shri Gupte who appeared for the appellants asserted that appreciation of evidence by the learned trial Court was grossly erroneous. After hearing the submissions at bar following questions arose for our consideration.

i] Who were members of unlawful assembly?

ii] What was the common object of the unlawful assembly?

24. On perusal of the evidence which is narrated in short above we are not disbelieving the prosecution case that the incident of rioting took place on 23.02.2007 at about 11.00 to 11.30 a.m. in the field of Vitthalappa where he had cultivated turmeric crop. We are inclined to believe that accused Nos. 1,2,4,8,9,10 and 11 were alleging that Vithallappa had encroached on their land etc. & there was a dispute between the two groups. We also hold that due to this dispute on the day of incident both the parties were present near the disputed land where the incident occurred. On one side Vitthalappa, his brothers, nephew and other members of his family were present either in the field or near by. Accused Nos. 1, 2, 4, 8, 9, 10 and 11 (and not other accused) came there and threatened Vitthalappa that they would take away turmeric crop. We are inclined to believe this part of the prosecution case. We are also inclined to believe the prosecution case that they went away after issuing threats and came back in few minutes with weapons. Accused No. 8 apparently took lead. He went ahead armed with an axe and delivered 23 blows of axe on Vitthalappas's head who

was unarmed and was practically defenceless. There were several companions of Vitthalappa in the field and around but apparently the assault by accused No. 8 was so sudden and unexpected that no one could go close to him for retaliation. We also noticed that Vithallappa and his companions though were aware of the lurking danger, they did not make any preparation for repulsing any attack. They were many in number but were not armed.

25. Medical evidence supported prosecution case that Vitthalappa's head was targeted. P.W.7-Medical Officer clearly stated that he found three injuries on Vitthalappas's head. Injury No. 1 was incised wound on head which can be attributed to accused No. 8's axe blow, injury Nos. 2 & 3 were contusion on head which incidentally proved fatal, they can also be attributed to axe blows of accused No. 8.

26. We have, therefore, no doubt that accused No. 8 caused fatal injuries to Vitthalappa and caused his death.

27. Medical Officer also deposed that he saw abrasion on left shoulder of Vitthalappa. Prosecution witness stated that author of this injury was accused No. 9. We are inclined to hold that injury on the back was caused by accused No. 9.

28. P.W.5-Gajanan and P.W.15 deposed that accused No. 4 dealt a stick blow on P.W.15's left hand and caused an injury. Injury certificate corroborated this part of the prosecution case and therefore we are inclined to believe that accused No. 4 was author of injury caused to P.W.15 Raju.

29. P.W.13-Santosh Gangadharappa Torkad stated that he sustained injury on the hands of the accused No. 11 and the injury certificate corroborated this part of the prosecution evidence. We are inclined to believe this part and hold that accused No. 11 was author of injury caused to P.W.13.

30. P.W.14-Santosh Kishanappa Torkad asserted that on his knee accused No. 1 delivered a stick blow and caused an injury. Injury certificate corroborated this part of the prosecution evidence. Therefore we hold that accused No. 1 is author of injury caused to P.W.14.

31. We have, no doubt, in our mind that the prosecution has proved its case to this extent. Prosecution could prove overt acts on the part of the accused Nos. 1, 4, 8, 9 and 11. But there is practically no overt acts on the part of the accused Nos. 2 and 10. Nonetheless the prosecution witnesses have stated that even these two accused were present at the time of incident and participated in the riotous assault. We are inclined to believe the prosecution case that accused Nos.2 and 10 were also present at the time of incident along with other accused against whom there is evidence of overt acts.

32. We have no doubt that there were more than five persons participating in the melee. So we have no hesitation to hold that they were members of an "unlawful assembly". We have no doubt about prosecution case that this unlawful assembly

had weapons like axes and sticks. Accused Nos. 1, 2, 4, 8, 9, 10 and 11 were members of unlawful assembly.

33. The next and crucial question is what could be the common object of this unlawful assembly which was also armed with deadly weapons? The object of this assembly could be gathered from the evidence that has come on record. Witnesses stated that the accused had proclaimed that they would enter the agriculture field and take away the crop of turmeric forcibly. They even threatened that if anyone obstructed them, they would not hesitate to kill such person. When they came back within few minutes, apparently they came for taking over the land for the purpose of harvesting the crop. The common object of this assembly at that time was to cause criminal trespass for the purpose of taking away the crop which admittedly did not belong to them. and to drive away anyone who would oppose them. So, the purpose of forcibly and unauthorised entry in the field was for robbery of the crop. Another object of this unlawful assembly was to over power and desist anyone who would oppose their entry in the field. In other words they expected that when they came to the field with arms in their hands all the opponents including Vitthalappa would meekly leave the field for them. Apparently had Vitthalappa and others left the field seeing the riotous assembly with deadly weapons, probably no further mishap would have happened.

34. However many things thereafter happened. Accused No. 8 went forward and delivered mortal blows on Vitthalappa's head. Accused No. 9 followed him and he too delivered a stick blow on Vitthalappa's back. The question is whether this assault was part of common object of the unlawful assembly? In our considered view, it was not. Apparently many persons were present on the spot, many persons were favourable to Vitthalappa. No one came forwarded to protect Vitthalappa. In fact the evidence shows that, Vitthalappa himself walked up to the accused and tried to "console" them. Apparently no one expected that accused No. 8 at that unfortunate moment would act swiftly and assault Vitthalappa. Even the other accused might not be aware that accused No. 8 would act in that manner. The act attributed to accused No. 8 thus appears to us an individual one. The other members even including accused No. 9 did not anticipate that accused No. 8 would cause fatal injuries to the deceased. Accused No. 9 cannot be attributed with "common intention" of accused No. 8 of causing Vitthalappa's death. No doubt he too assaulted Vitthalappa but his blow was not fatal one. He did not target the victim's vital organ like head.

35. As against accused Nos. 1, 2, 4, 8, 9, 10 and 11 there is ample evidence to hold that they were members of unlawful assembly with deadly weapons. The offence punishable under Section 148 of the Indian Penal Code is proved against them. As against accused No. 1, 4, 9 and 10 offence of rioting and causing simple injury is amply proved.

36. In view of this, we are inclined to dismiss the appeal filed by accused No. 8. We are inclined to partly allow the State Appeal seeking conviction of accused

No. 2 and 5.

ORDER

[I] Criminal Appeal No. 625 of 2012 is partly allowed.

(a) Conviction of accused No. 8-Goprao Marotrao Maske for the offence punishable under Section 302 of the Indian Penal Code is confirmed. He is sentenced to suffer life imprisonment with fine of Rs. 5,000/- in default to suffer six months rigorous imprisonment.

(b) Conviction and sentence of accused No. 10-Marutrao Kanbarao Maske and accused No. 11-Waman Madhavrao Maske for the offence punishable under Section 302 r/w 149 is quashed and set aside.

(c) Accused No. 10-Marutrao Kanbarao Maske and accused No. 11-Waman Madhavrao Maske are convicted for the offence punishable under Section 148 and also under Section 323 r/w 149 of the Indian Penal Code and sentenced to suffer imprisonment which they have already undergone and the fine amount they have already paid.

[II] Criminal Appeal No. 622 of 2012 is partly allowed.

(a) Conviction and sentence of accused No. 1-Krishnarao Gangram Maske, accused No. 4-Kondbarao Krushnarao Maske & accused No. 9-Baban @ Uttam Keshavrao Maske under Section 302 r/w 149 etc. of Indian Penal Code is quashed and set aside.

(b) Accused No. 1-Krishnarao Gangram Maske, accused No. 4-Kondbarao Krushnarao Maske & accused No. 9-Baban @ Uttam Keshavrao Maske are convicted for the offence punishable under Section 148 and also under Section 323 r/w 149 of the Indian Penal Code and sentenced to suffer imprisonment which they have already undergone and fine amount they have already paid.

[III] Criminal Appeal No. 633 of 2012 filed by accused No. 6-Santosh Laxman Bangar and accused No. 7-Shriram Laxman Bangar is allowed.

(a) Conviction and sentence of accused No. 6-Santosh Laxman Bangar and accused No. 7-Shriram Laxman Bangar under Section 302 r/w 149 etc. of Indian Penal Code is quashed and set aside.

[IV] Criminal Appeal No. 179 of 2014 filed by State of Maharashtra is partly allowed.

(a) Order of acquittal of Accused No. 2 is set aside. He is convicted for the offence punishable under Section 148 IPC and is sentenced to suffer rigorous imprisonment for the period which he had already undergone and to pay a fine which he has already paid.

(b) The appeal as against Accused No. 5 is dismissed.

V] Criminal Application No. 5160 of 2013 in Criminal Appeal No. 625 of 2012 does not survive and disposed of accordingly.

VI] Accused No. 9-Baban @ Uttam be set at liberty forthwith, if not required in any other case.

VII] Bail bond of accused No. 1-Krishnarao, accused No. 4-Kondbarao, accused No. 6-Santosh, accused No. 7-Shriram, accused No. 10-Marotrao and accused No. 11-Wamanrao stand canceled.