
(2019) 01 BOM CK 0084
In the Bombay High Court
Case No : Criminal Appeal No. 566 Of 2005

Maresh

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 21-01-2019

Acts Referred:

Indian Penal Code, 1860 — Section 394, 397

Citation : (2019) AIIMR(Cri) 726

Hon'ble Judges : V.M. Deshpande, J

Bench : Single Bench

Advocate : S.V. Sirpurkar, N.S. Rao

Final Decision : Dismissed

Judgement

V. M. DESHPANDE, J.

1. The appellant was charged by the learned 2nd Additional Sessions Judge, Akola that on 20.4.2002 at about 00.15 hours at Chhoti Umri, Vrundavan Nagar, Akola, the appellant along with Balu Shankar Bawne (acquitted accused) committed robbery and at the time of commission of the same, he used deadly weapon i.e. knife and caused injuries to Hemant Kisanlal Nim (PW2), Sau. Bharti Hemant Nim (PW5), Mohan Ganpatsingh Yadav (PW3) and Mahendrakumar Mohansingh Yadav (PW1). Before the Court below, the prosecution examined in all Seven witnesses to prove the said charge.

After the appreciation of the entire prosecution case and after evaluation of the evidence of the prosecution witnesses in Sessions Trial No. 131/2002, the learned Ad-hoc Additional Sessions Judge, Akola on 05.10.2005 convicted the appellant for the offence punishable under Section 394 read with Section 397 of the Indian Penal Code and directed to suffer rigorous imprisonment for Seven years and to pay fine of Rs.500/- and in default of payment of fine to suffer rigorous imprisonment for three months. Necessary set off was also given by the learned Judge.

2. I have heard Mr. S.V. Sirpurkar, the learned counsel for the appellant and Mr. N. S. Rao, the learned Additional Public Prosecutor for the respondent/State. Both the learned counsel took me through the notes of evidence and other relevant material from the record and proceedings.

3. According to Mr. Sirpurkar, the learned counsel for the appellant, the prosecution has not explained the injuries appearing on the person of the appellant. It is also his submission that the dangerous weapon i.e. knife was not recovered at his behest. It is also his submission that the knife which was sent to Chemical Analyzer, was not having any blood stains. He, therefore, submitted that it is a fit case wherein the Court should extend benefit of doubt by allowing the present appeal.

4. Per contra, Mr. Rao, the learned Additional Public Prosecutor for the State would submit that the prosecution case is duly proved through four injured, who are the eye-witnesses. It is also his submission that on the spot itself, the appellant was apprehended by the mob and he was subjected to beating. Therefore, the injuries on the person are duly explained by the prosecution. He, therefore, submitted that the appeal be dismissed.

5. Out of the seven witnesses, PW6 Sandip Kawale has turned hostile, however from his evidence it is clear that the mob was gathered in front of the house of Mahendra Yadav (PW1), one of the injured. According to his evidence, he did not try to catch anybody. At this point, he was declared hostile by the learned Additional Public Prosecutor. Merely because a witness is hostile to a party which called such witness to depose, that does not mean that his entire evidence is washed out. The evidence of such witness can be considered to the extent it supports the party which called the witness as its witness and in the present case, to the prosecution. This law is well settled by the Hon'ble Apex Court in the case of Khujji alias Surendra Tiwari .vs. State of Madhya Pradesh, reported in AIR 1991 SC 1853. Therefore, evidence of PW6 Sandip Kawle can very well be considered and it supports the prosecution case that the mob was gathered at the spot of the incident.

6. PW7 Uttam Chavan, is the Investigating Officer. On 20. 4.2002 he was attached to Police Station, Civil Lines, Akola as Police Sub Inspector. He deposed that at about 11.20 pm he was patrolling in the city and he was taking Digambar Lahe and Kashinath Bagde to police station through Big Umari road. At that time, he received a message from Control Room that one thief is caught by public at Vrundawan nagar and he was directed to go there. It was 12.15 mid night. PW7 Uttam Chavan, therefore, went to the said spot along with police staff. At the same time mobile police van of control room also came there. PW7 PSI Chavan noticed that many people were gathered in front of the house of Yadao and one person was sitting on the ground in that mob. On inquiry with the said person, he disclosed his name as Mahesh Ramchandra Gupta (appellant). The assembled people told him that they caught hold the accused. It was also informed to him that his companion was also there, however he ran away. The appellant disclosed

the name of his companion as Balu Shankar Bawne (acquitted accused). PW7 PSI Chavan prepared seizure panchanama on the spot in presence of two panchas. He seized iron rod, one knife and one bicycle lying on the spot. The panchanama is at Exh.36. He, thereafter took the appellant and injured persons to police station. Mahendra kumar (PW1) lodged the oral report (Exh.21).

7. As per the oral report (Exh.21) filed by PW1 Mahendra kumar, on 19.4.2002, after having dinner, he was watching television. In the intervening night of 19.4.2002 to 20.4.2002 at about 12.00 O'clock, two unknown persons came in front of his house. One of them entered inside the courtyard from open gate. On this, attention of PW1 Mahendra was drawn and therefore, he came outside. At that time the said unknown person was about to take the parked bicycle. When that was objected by Mahendra, the unknown person, who was taking away the bicycle, gave threat to kill him. However, the first informant caught the bicycle. At that time, the said person by means of knife assaulted on him. He raised hue and cry. Therefore, his sister Bharti (PW5), her husband Hemant kumar (PW2) and Mohansingh (PW3) father of Mahendra came there. At that time, the said person assaulted by means of knife on PW2 Hemantkumar. When the father of first informant tried to caught the knife, he also suffered injuries. The person who was standing outside the courtyard threw brick resulting into causing injury on the leg of Bharti. Due to hue and cry, the neighbourers gathered there and with their help, the person who was assaulting by means of knife, was apprehended and there was a scuffle in between him and the members of the gathering. After some time, police came and upon inquiry, the person who was apprehended on the spot has disclosed his identity as Mahesh Gupta (appellant).

8. PW4 is Dr. Paresh Mehta. On 20.4.2002, he was attached to District Hospital, Akola. Four persons were brought to him for medical examination. He examined all those four persons.

First injured who was examined was Mohan Yadao (PW3). On examination, the doctor found incised wound of size 3 cm x 0.5 x 0.5 cm on the right palm web space between thumb right and right index finger with sharp margin. According to the doctor, this injury is caused by sharp margin weapon. He issued the certificate and it is at Exh.25.

At about 1.15 am, PW4 Dr. Mehta examined Bharti Neem and found a contusion on her person over right foot proximal half (below the ankle) of size 8 x 3 cm. According to the doctor, the said was caused due to hard and blunt object. The injury certificate of Bharti is at Exh.26. According to the doctor, this injury is possible by pelting of stone or a brick.

At about 1.25 am, PW4 Dr. Mehta examined Hemant kumar (PW2) and found the following injuries :

1. Incised wound over left parietal scalp with sharp margins of size 4 x 0.5 x 0.5 cm.

2. Incised wound over left ear pinna back side upper third with sharp margins of size 1 x 0.05 x 0.5 cm

3. Lacerated wound over left maulmmary area of size 4 cm x 0.5 x 0.5 cm.

After perusal of original bed head ticket of PW2 Hemant kumar, he found wound no.3 is a scratch wound of size 4 cm x 0.5 mm and skin deep caused by sharp and pointed object. Bed Head Ticket is at Exh.27 and injury certificate is at Exh.28. According to the doctor,

injuries are possible by knife (article 1).

Thereafter, PW4 Dr. Mehta examined Mahendra Yadav (PW1) and found the following injuries -

[1] Abrasion on left sub-mandibular area, size 0.5 x 0.5 cm.

[2] Abraded contusion on right middle finger nartile of size 1 cm x 1 cm.

He proved injury certificate (Exh.29). As per the evidence of doctor, all the injured persons gave history of assault on them.

9. PW4 Dr. Mehta also examined appellant Mahesh Gupta to notice the following injuries -

[1] Lacerated wound over right frontal scalp of size 3 cm x 0.5 cm x 0.5 cm.

[2] Lacerated wound over left parietal scalp of size 0.5 x 0.5 x 0.5 cm.

[3] Lacerated wound left frontal scalp of size 1 x 0.5 x 0.5 cm.

[4] Abrasion of size 1 x 1 cm on forehead.

[5] Abrasion of size 1 x 1 cm on left mastoid area.

[6] Abrasion of size 2 x 2 cm on left elbow.

[7] Contusion of size 6 cm x 3 cm on left back.

Evidence of PW4 Dr. Mehta would reveal that while taking history from the patients, the appellant himself gave history of assault. The injury certificate of the appellant is at Exh.30. The injuries found on the person of the appellant, according to the doctor, were simple in nature.

10. Evidence of all injured witnesses corroborates with each other about the assault on them by means of knife. All the injuries appearing on the injured, except on Bharti, are caused by sharp cutting weapon. Evidence of injured witnesses do not show that Bharti was assaulted by the present appellant.

11. The prosecution witnesses in their testimony have stated that due to hue and cry the people from neighbour gathered there and they apprehended the appellant on the spot itself. The Investigating Officer PW7 PSI Uttam Chavan has corroborated this fact. His evidence shows that when he reached to the spot, the

mob was gathered there and one person namely the appellant was sitting in the mob.

12. Even during the trial or before this Court, presence of the appellant on the spot is not denied by the appellant. According to the defence, the appellant gave dash to Bharti due to which he was assaulted by the remaining injured and there took scuffle in between him and remaining injured persons, resulting into sustaining injuries by them. This defence, in my view, is not only improper, but false one. The time of the incident is at about 00.15 hours to 00.30 hours in the night. It is really hard to believe that a married woman will ply cycle in the night for nothing. On the contrary, though PW6 Sandip has turned hostile, has supported the prosecution case that mob was gathered in front of the house of the injured persons. This, in my view, negates the defence as sought to be submitted before this Court by the learned counsel for the appellant and therefore, the said contention is rejected.

13. According to Mr. Sirpurkar, the learned counsel for the appellant, the weapon is not seized at the behest of the appellant. True it is that the weapon was not seized from the possession of the appellant. The Investigating Officer found that the weapon was lying on the spot of the incident. The appellant was apprehended on the spot itself by the members of the mob and the injured persons and in apprehending the appellant, the knife must have fallen on the ground. No explanation is given by the appellant as to how the weapon was found in the dead hour of night on the spot. Therefore, the submission on behalf of the learned counsel for the appellant in that behalf, in my view, is worthless.

14. Insofar as the injuries appearing on the person of the appellant, true it is, that in view of injury certificate Exh.30, the appellant was having seven injuries and out of them, four injuries were in the nature of abrasion. PW4 Dr. Mehta's opinion is that the injuries are simple in nature. Further, in the first information report itself, it is stated by the first informant that while apprehending the appellant by them and the members of the mob, there was a scuffle. In view of the said, which is also corroborated by the substantive evidence of the injured, which has remained unshaken, the injuries must have occurred. In that view of the matter, the prosecution has explained the injuries properly.

15. During the course of the investigation, the Investigating Officer has sent the muddemal articles to the Chemical Analyser. As per the Chemical Analyser's report (Exh.51), blood group of injured Hemant (PW2) is found to be 'B'. So also as per the report (Exh.53), the blood group of Mohansing (PW3) was also found to be 'B'. The clothes of the appellant/accused were stained with blood group 'B'.

16. The another submission of Mr. Sirpurkar, the learned counsel for the appellant is that no blood was detected on knife. In my view, much capital cannot be made of this aspect, since the Chemical Analyser's reports are always in the nature of corroborative piece of evidence. Merely because blood was not found on the weapon, which was seized from the spot, the entire prosecution

case cannot be branded as untruthful one, especially in the light of substantive evidence of four injured eye-witnesses.

17. Mr. Sirpurkar, the learned counsel for the appellant submitted that the appellant is convicted for the offence punishable under Section 394 read with Section 397 of the Indian Penal Code, however, there is no charge for the offence punishable under Section 394 of the Indian Penal Code. Section 394 is a lesser offence and the appellant could not show any prejudice caused to him by that.

18. It is obvious that since the appellant has used deadly weapon, the Court below has framed Charge under Section 397 of the Indian Penal Code and convicted him. It is the submission of the learned counsel for the appellant that the injuries on all the injured persons are simple in nature and therefore, the appellant could not have been convicted for the offence punishable under Section 397 of the Indian Penal Code.

19. In the case of Dilawar Singh .vs. State of Delhi, reported in (2007) 12 SCC 641, the Hon'ble Apex Court noticed the following essential ingredients of Section 397 of the IPC.

[1] The accused committed robbery.

[2] While committing robbery or decoity (i) the accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person.

In paragraph 21 of Dilawar Singh's case (supra), the Hon'ble Apex Court found that though no injury was inflicted, the use of weapon by offender for creating terror in mind of victim is sufficient. In the present case, the appellant while committing robbery has used deadly weapon Knife. Therefore, the case of the appellant falls within the first part of Section 397 of the IPC. In my view, grievous hurt alone is not sine qua non for punishment under Section 397 of the Indian Penal Code. For punishment under Section 397 IPC, the prosecution is required to prove use of deadly weapon or cause grievous hurt or attempt to cause death or grievous hurt. In the present case, the prosecution has proved use of deadly weapon at the behest of the appellant and therefore, merely because the injuries were simple that is not sufficient for the appellant to get himself out of the clutches of Section 397 of the Indian Penal Code.

20. On re-appreciation and revaluation of the entire prosecution case, I pass the following order :

ORDER

1. The criminal appeal is dismissed.

2. The judgment and order of conviction passed by the learned Ad-hoc Additional Sessions Judge, Akola on 05.10.2005 in Sessions Trial No. 131/2002 for the offence punishable under Section 394 read with Section 397 of the Indian Penal Code, is maintained.

3. The appellant, who is on bail, shall surrender himself to his bail bonds immediately, else the Court below is directed to issue non-ailable warrant against the appellant to procure his presence for serving out the remainder of sentence.

4. With this, the criminal appeal is disposed of.