
(2013) 08 BOM CK 0028

In the Bombay High Court

Case No : Criminal Appeal No. 297 of 2011 and Criminal Revision Application No. 10 of 2012 and Criminal Application No. 2568 of 2013

Manmath Baburao Kadam and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-08-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 870

Hon'ble Judges : M.T. Joshi, J

Bench : Single Bench

Judgement

M.T. Joshi, J.—Aggrieved by the conviction of the present appellants, recorded by the learned Additional Sessions Judge, Beed in Sessions Case No. 76/2009, vide judgment and order dated 13.6.2011, for the offences punishable u/s 307 read with section 34 of the I.P. Code, u/s 341 read with section 34 of the I.P. Code and u/s 506 read with section 34 of the I.P. Code, original accused Nos. 1, 2 and 4 have preferred the present criminal appeal. Accused No. 1 Manmath and accused No. 2 Bhagwan i.e. the present appellants No. 1 and 2, respectively were sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 1000/- each, while accused No. 4 i.e. present appellant No. 3 Baburao was sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 5000/- each, for the major offences, while different sentences were awarded for rest of the offences. All other lesser sentences were, however, directed to run concurrently with these sentences. Aggrieved by the lesser sentences awarded by the Sessions Court, the original complainant-Pandurang Maruti Rasal has filed Criminal Revision Application No. 10/2012.

2. The prosecution case, in short, is as under:--

That, P W1 Pandurang Maruti Rasal -the complainant and his son - the injured in the incident i.e. PW-3 Subhash are residents of village Gawari in Beed district. They had their agricultural land. A dispute over a sandal-wood tree in certain land was continuing between the complainant and his son on one side and the

present appellants alongwith two more accused i.e. acquitted accused as well as juvenile accused Praveen Kadam, on the other.

The incident in question had occurred on 18.11.2008 at about 5 p.m. The complainant -PW1 Pandurang was driving the motorcycle from their land of Safepur towards village Gawari. PW-3 Subhash was the pillion rider. When the motorcycle was proceeding towards the village from Gawari square, at that time the present appellants alongwith acquitted accused and juvenile accused came in front of the motorcycle. They were wielding sticks, sickles and sword. Accused No. 1 Manmath (present appellant No. 1) gave a push to the motorcycle. Both the motorcycle riders fell on the ground. Appellant No. 1 Manmath assaulted PW-3 Subhash with a sickle over his head. Accused/appellant No. 2 Bhagwan assaulted PW3 Subhash by a sword over his head. The rest of the accused started beating the injured with sticks. When complainant - PW-1 Pandurang tried to intervene, all of them threatened him to be away from the place of assault, else warned that he would also be killed. At that time, accused No. 4 Baburao was instigating the others by exhorting them to kill P W3 Subhash. After a while PW-3 Subhash was seen motionless on the ground. In the circumstances, assuming that he might have died, all the accused went away.

Due to the shouts of the complainant, some villagers by name Mahadu Rasal, Baban Rasal, Suresh Rasal, etc. came on the spot of occurrence. PW3 Subhash was taken by a vehicle of one Appa Jogdand to the Civil Hospital, Beed. However, since he was seriously injured and was unconscious, he was referred to Aurangabad. The complainant accompanied P W3 Subhash to Aurangabad and admitted him in a private hospital of Dr. Dunakhe at Aurangabad. On 21.11.2008 i.e. two days after the incident, the complainant returned to the village, as his father had died in the village. After his funeral, the complainant went to Police Station, Neknur and filed his complaint. It was found that besides other injuries, right eye of the injured was removed and one of his fingers was amputated. On these allegations, the complaint came to be filed.

3. PW7 A.P.I. Sanjay Lohakare had already received a phone-call on the day of incident i.e. on 18.11.2008 of one advocate Kavathe that injured Subhash was beaten by some villagers and was already admitted in Civil Hospital, Beed. Therefore, P.S.I. Nalawade was sent to the village for confirmation. After return, P.S.I. Nalawade, on 18/11/2008 made entry No. 34 in the Station Diary to the effect that appellant No. 1 Manmath and some others assaulted PW3 Subhash Rasal by means of sickle like weapon and said Subhash was already taken to Civil Hospital, Beed. It was gathered by A.P.I. Sanjay Lohakare that just within some period PW3 Subhash was shifted to Aurangabad. Therefore, he sent P.S.I. Gawande to Aurangabad by taking entry in this regard in the Police Station Diary. The extract of these entries was placed at Exhibit-91. After return from Aurangabad, P.S.I. Gawande reported to PW7 A.P.I. Sanjay Lohakare that PW3 Subhash was not in a position to make his statement. Eventually, as detailed after two days PW 1 Pandurang came to the Police Station and filed his

complaint, on the basis of which further regular investigation was started.

4. During investigation, A.P.I. PW7 Sanjay Lohakare visited the spot of occurrence in presence of panch witnesses and drew the panchanama of spot of occurrence where under clear soil as well as blood mixed soil was seized. The statements of various witnesses were recorded. The accused were arrested on different dates. The appellant No. 1 -Manmath, while in the Police custody, made a statement leading to the discovery of Koyata (sickle) hidden in a high grown grass in one field of the village. The panchanama to that effect was executed.

5. PW3 Subhash, upon admission in Civil Hospital, Beed, was examined by P W5 Dr. Deepali Marpalkar, Medical Officer. She found the following injuries on his person:--

i) Incise wound on forehead, 15 ? 1 ? 2 cm. within 24 hours the probable sharp and heavy, nature of injury grievous. The injury is accompanying with evidence of fracture and anterior wall to both frontal sinuses, with evidence of opthalmic injury to right eye causing traumatic iris pro-laps.

ii) Incise wound to left parietal eye region the size 8 ? 1 ? 1 cm. The injury within 24 hours. The probable weapon is sharp. The nature of injury is simple.

iii) Incise wound, direction is obliquely transverse to midline on occipital region, size 8 ? 1 ? 1 cm. Injury is within 24 hours. Probable weapon is sharp. Nature of injury is simple.

iv) Incise wound, the injury is circular with evidence of loss of skin on occipital region. 4 ? 1 ? 1 cm. within 24 hours, sharp weapon and simple in nature.

v) Incise wound circular with half cm. skin tag on occipital region, 5 ? 5 cm. within 24 hours, sharp weapon and simple in nature.

vi) Incise wound on occipital region, 6 ? 1 ? 1 cm. vertical extending to neck, within 24 hours, sharp and simple.

vii) Traumatic amputation from proximal inter phalangeal joint to left index finger, within 24 hours, probable weapon sharp and hard, the nature of injury is grievous.

viii) Incise wound to middle finger over middle phalynx left side, 3 ? 1 ? 1 cm, within 24 hours, sharp weapon, simple in nature.

ix) Incise wound to ring finger over middle phalynx left side 2 ? 1 ? 1 cm. within 24 hours, sharp weapon and simple in nature.

All incise wounds having sharp and clear edges, active bleeding was present. Accordingly, she had issued the injury certificate at Exhibit-74. According to her, at the time of admission of the PW3 Subhash, the history of assault was told to her without naming any person. She has, however, not clarified as to who had given the said history.

6. As PW3 Subhash was admitted to Dunakhe hospital at Aurangabad, PW6 Dr. Milind Dunakhe was examined. His medico-legal papers were already collected by the Kranti Chowk Police Station, Aurangabad and referred those to the Police Station at Neknur. PW6 Dr. Dunakhe deposed about the condition of PW3 Subhash when he was admitted in his hospital like history of unconsciousness, etc. He deposed that the injured has perforating injury to right eye with evisceration. Other injuries as noted earlier by the Medical Officer at Civil Hospital, Beed were also confirmed by him.

7. The chargesheet was filed against the accused for the offences punishable u/s 147, 148, 307 r/w. section 149 of the I.P. Code and other offences, as detailed supra.

8. The appellants as well as other accused did not plead guilty and claimed to be tried. The defence, in short, is that though the injured might have been assaulted by some unknown persons, in view of the previous enmity they are falsely involved in the offence.

9. The learned Sessions Judge came to the conclusion that the charge of attempt to commit murder in furtherance of common intention is proved against three of the accused as detailed supra. Therefore, the conviction and sentence, as detailed hereinabove came to be recorded. The original accused No. 3 Pradip was acquitted of the offences for want of evidence in this regard. Aggrieved by the conviction and sentences, the present Criminal Appeal is preferred by original accused No. 1, 2 and 4, whereas aggrieved by the lesser sentences awarded, the original complainant has preferred the Criminal Revision Application.

10. Mr. R.N. Dhorde, the learned Senior counsel for the appellants in Criminal Appeal No. 297/2011, principally submitted that in the background of the admitted facts that P.W. 1 Pandurang, the father of PW3 Subhash was Police Patil of the village for a considerable time and though sufficient opportunity to file the FIR was there for a period of two days, the FTR came to be filed belatedly on 21.11.2008. Further, though the complaint at Exhibit-56 would show that some eye witnesses had come to the spot of occurrence, none of them has been examined. Not only this, the cross-examination of P.W. 1 Pandurang and PW3 Subhash would show that the houses of many villagers are nearby the alleged spot of occurrence, but the statements of none of these villagers were recorded by the Investigating Officer. Therefore, inter-alia relying over other anomalies in the prosecution case, as would be detailed later-on in this judgment, Mr. Dhorde submitted that the appeal be allowed. Mr. Dhorde in support of his above contentions relied on the ratio laid down in the following authorities:--

1) AIR 1973 SC 501 (Thulia Kali v. The State of T.N.) (For delay in lodging the F.I.R.)

2) AIR 2004 SC 1169 (Gorle S. Naidu v. State of A.P. and Ors.) (For delay in lodging the F.I.R.)

- 3) AIR 1997 SC 1526 (Rehmat v. State of Haryana) (Names of the accused are not disclosed to the medical officers)
- 4) AIR 2001 SC 1380 (Sohan and Anr. v. State of Haryana and Anr.) (Non-examination of the witnesses mentioned in F.I.R.)
- 5) AIR 1976 SC 2423 (Ham Singh and Ors. v. State of U.P.) (Non-examination of the material witnesses)
- 6) AIR 2008 SC 1260 : [2008 ALL SCR 687] (Babu Ram and Ors. v. State of Punjab) (Non-examination of independent witnesses)
- 7) AIR 2003 SC 854 : [2003 ALL MR (Cri) 590 (S.C.)] (Lallu Manjhi and Anr. v. State of Jharkhand) (Non-examination of independent witnesses)
- 8) (2002) 2 SCC 737 (Deepak Kumar v. Ravi Virmani and Anr.) (Benefit of doubt may be given to the accused)
- 9) (2002) 6 SCC (470) (Harjana Thirupala and Ors. v. Public Prosecutor, High Court of A.P., Hyderabad) (Benefit of doubt may be given to the accused, particularly when the independent witnesses are not examined)
- 10) 2000 Cri.L.J. 1566 : [1999 ALL MR (Cri) 1593] (Tulshiram Bhanudas Kambale and Ors. v. State of Maharashtra) (Recovery of articles not sealed immediately)
- 11) 2004 Cri. L.J. 654 (State of Rajasthan v. Taran Singh and Anr.) (There are no blood stains on the clothes of the witnesses who are present at the spot)
- 12) 2007 ALL MR (Cri) 2554 (Ashok S/o. Raghunath Bawane and Ors. v. State of Maharashtra)

(Delay in recording statement of eye witness)

11. None appeared for the petitioner in Criminal Revision Application No. 10/2012.

12. Mr. T.S. Lodhe, learned A.P.P. submitted that the circumstances of the case would show that there is no delay in filing the FIR and even alternatively if we come to the conclusion that the delay is caused in filing the FIR, then the surrounding circumstances would show that the FIR is not concocted piece of evidence. He further submitted that when the injured is examined and the number of serious injuries were found on his head corroborates his statements, then there was even no need to examine any other eye witness like P.W. 1 Pandurang, the complainant, much less any other villagers whose houses were far away from the spot of occurrence. He further submitted that the other villagers who rushed to the spot of occurrence came after the incident and therefore, cannot be called as eye witnesses. In the circumstances, he submitted that the appeal be dismissed.

13. On the basis of above material, the following points arise for my determination in this appeal:

i) Whether the prosecution has proved that on 18.11.2008 at about 5:00 pm, all the present appellants in furtherance of their common intention have assaulted PW3 Subhash with sickle, sword and sticks, with an intention or knowledge that if by that act they had caused the death of PW3 Subhash, they would have been guilty of murder?

ii) Whether the present appellants in furtherance of their common intention had at the aforesaid time, on the aforesaid date and at the aforesaid place committed criminal intimidation by threatening P.W. 1 Pandurang with injury to his person?

My findings to the above points are in the affirmative. The Criminal Appeal as well as Criminal Revision Application are therefore dismissed for the reasons to follow.

REASONS

14. In order to prove the charges against the accused, the prosecution has examined in all nine witnesses. While P.W. 1 Pandurang Rasal is the complainant and eye witness to the incident, PW3 Subhash is the victim of the incident. PW2 Kalyan Sapkal and PW4 Kishor Giram are the panch witnesses to the recording of panchanama of spot of occurrence and to the alleged statement made by appellant No. 1 Manmath regarding the seizure of his clothes and the sickle respectively. PW5 Dr. Deepali Marpalkar, a Medical Officer of Civil Hospital, Beed and P.W. 6 Dr. Milind Dunakhe are the expert witnesses, who have deposed about the injuries on the person of the victim as well as his condition during the relevant period. PW7 A.P.I. Sanjay Lohakare had carried the investigation in the offence. PW8 Police Head Constable Rafiz Ahmed and PW9 Police Constable Krishna Jayabhaye had carried the muddemal property, as detailed supra to the C. A.

15. P.W. 1 Pandurang Rasal is, no doubt, an interested witness being the father of the victim. In the situation, Mr. Dhorde, learned Senior counsel pointed towards the admission of this witness that near the spot of incident on the western side at some distance, four/five houses of certain villagers from Kadam family are there. He deposed that those houses are at a distance of 200 feet away from the spot of incident.

16. It was also further pointed out that in the teeth of the allegations that five persons were armed with deadly weapons like sickle, sword and sticks started assaulting PW3 Subhash, PW1 Pandurang (father of PW3 Subhash) admittedly did not suffer any injury in the incident. According to Mr. Dhorde, learned Senior Counsel, this would show that the witness was not at all an eye witness to the incident. Hence according to him, it would corroborate the defence case that certain unknown person might have assaulted PW3 Subhash. However, out of enmity or on suspicion only, the present appellants are framed.

17. It is to be noted that PW1 Pandurang, during cross-examination, was specific in deposing that the houses of other villagers from Kadam family are around 200

feet away from the spot of occurrence. In the circumstances, none of the villagers can be called as probable eye witnesses to the incident. More specifically, the witness has clarified that the spot of incident occurred at a sloping road and nothing was visible even from a distance of 30 feet.

18. Admittedly, the FIR in the case is recorded on 21.11.2008 while the incident has occurred on 18.11.2008 at 5 p.m. The evidence on record, as pointed out by Mr. Dhorde would show that the police personnel from Police Station, Neknur as well as Kranti Chowk Police Station, Aurangabad had visited PW3 Subhash at Dunakhe Hospital, Aurangabad. They, however, returned without recording any statement of PW3 Subhash on the ground that PW3 Subhash was unable to make any statement at that time. It was, however, pointed out that the evidence of PW5 Dr. Deepali Marpalkar would show that it was not recorded that PW3 Subhash was unconscious. It was further pointed out that even if we assume that the victim was unconscious, nothing had prevented the eye witness i.e. P.W. 1 Pandurang to make a statement about the incident immediately. However, after two days of the incident, his FIR came to be accepted.

19. No doubt, the above lacunae in the prosecution case are there and would have been very material to cast a shadow of doubt on the prosecution case. It should, however, be noted that despite all these lacunae, the evidence of PW5 Dr. Deepali Marpalkar would show that PW3 Subhash was admitted to Civil Hospital, Beed on 18.11.2008 at 6.55 p.m. This lends corroboration to the prosecution case that the incident had occurred in the village at 5 p.m. on 18.11.2008. It was a broad-day light when the assault near the village took place. In these circumstances, it is difficult to believe that some unknown persons of whose even description also cannot be given by the victim, might have assaulted the victim as is the defence case.

20. It is further to be noted that PW3 Subhash is the only son of P.W. 1 Pandurang. The injuries found on the person of PW3 Subhash, as noted supra, would show that all these injuries were on the head and were grievous in nature. While the right eye was completely lost, a fracture was noted on the forehead. The evidence of PW5 Dr. Deepali, the Medical Officer of Civil Hospital, Beed as well as PW6 Dr. Milind Dunakhe would show that the victim was given a preliminary treatment at Civil Hospital, Beed and he was immediately evacuated to Aurangabad. Even in all these hustles and bustles, the history of the assault is recorded by the Medical Officer of Civil Hospital, Beed on the basis of the information given to her. The Medical Officer is silent as to who had given the history. The record, at least however, shows that at the time of assault of the victim, the history of assault was given to the Medical Officer immediately after the incident.

21. Not only this, the Investigating Officer PW7 A.P.I. Sanjay Lohakare, as detailed earlier, has narrated about the course of action taken by him, upon receipt of a preliminary information that some person of village Gowari was assaulted and was admitted to Civil Hospital, Beed on the telephonic call of one

advocate. A.P.I. Sanjay Lohakare (PW7) has proved on record the certified extract of the entries made in the police station diary of the day at Exhibit-91. The prominent amongst those entries is Entry No. 34 made at 8.05 p.m. The entry would show that PSI Nalawade, who was sent to village Gowari, returned back and had received a preliminary information that PW3 Subhash was assaulted by present appellant No. 1 Manmath with the aid of other three persons on certain previous dispute and was sent to Civil Hospital, Beed.

22. No doubt, this Entry No. 34 cannot be taken as a piece of evidence to prove the actual assault as it was the hearsay information received by the police officer who was deputed to the spot of occurrence by the A.P.I, on the very same day. It would, however, reveal that the name of present accused as the assailants, was very much known to the villagers immediately after the incident and the same was reported by the P.S.I, and recorded in the police station diary.

23. To repeat, not as a piece of direct evidence against the accused but as corroboration to the argument of learned A.P.P. that though the FIR is filed after two days of incident, it cannot be called as concocted one, this piece can be considered.

24. In this view of the matter, the delayed filing of the FIR would not take us to cast suspicion on the entire prosecution case. As pointed out, the only son of the complainant was seriously injured with one of his eye totally lost in the incident. The son was taken to the Civil Hospital, Beed and after the preliminary examination, was immediately shifted to a private hospital at Aurangabad. Thereafter, within two days of the incident, the father of the complainant died, which compelled him to return back to the village though his injured son was admitted to Dunakhe Hospital at Aurangabad. In the circumstances, as the complainant returned back to his village, he came to the Police Station Neknur and filed the report.

25. The Police Officer deputed by PW7 A.P.I. Sanjay Lohakare to Aurangabad, returned without any statement of the complainant or the victim being recorded, as the victim was not able to make the statement as deposed to by PW6 Dr. Milind Dunakhe. This slipshod investigation would not give any advantage to the defence.

26. No doubt, during cross-examination, certain material is brought on record to show that the FIR could have been recorded earlier. P.W. 1 Pandurang tried to avoid the question in this regard that as to whether there was any chance meeting between him and the Police in the hospital of Dr. Dunakhe at Aurangabad. While PW6 Dr. Milind Dunakhe has accepted that the Police personnel from Kranti Chowk Police Station, Aurangabad had visited the patient and "accompanying men" of the patient, P.W. 1 Pandurang has pleaded his ignorance as to whether the Police Officials came to the hospital at Aurangabad. However, as earlier pointed out, though the evidence on record would show that certain opportunity to give the statement or to record the statement was in

existence, but in the background of the facts, as detailed supra, in view of the entries made in the Police Station Diary, it is difficult to believe that the FIR is a concocted document.

27. It was further pointed out that while the motorcycle of one of the accused is seized, the motorcycle of the complainant, which is alleged to have been damaged due to giving of kick, was not seized. The prosecution case would have been corroborated, had there been any blood stains over the motorcycle. It was also pointed out that admittedly all the panch witnesses examined in the present case are the near relatives of the complainant and PW3 Subhash. PW2 Kalyan Sapkal is the maternal uncle while PW4 Kishor Giram is the brother-in-law of PW3 Subhash. Further it was pointed out that panchanama of spot of occurrence would show that since the date of incident there was rainfall, still finding of blood stains on the tar road was doubtful. It was also pointed out that the C.A.. report would show that the group of the blood found on the cloth as well as on the earth could not be determined. In the circumstances, relying on various authorities, cited supra, learned Senior counsel Mr. Dhorde wanted that the appellants be acquitted of the offences with which they are charged.

28. The core of prosecution case is required to be examined in the light of all the circumstances placed on record. The principle that innocence of the accused is to be presumed, is running through all the authorities cited and relied upon by the learned Senior counsel. It should however be noted that mere delay in filing the FIR and non examination of many of the witnesses would not ultimately lead to advance benefit of doubt to the accused. The doubt should be a reasonable one and not an imagination or fascination of the mind. In the light of these principles, I hold that the prosecution has proved its case beyond reasonable doubt, for the reasons already forwarded hereinabove. In the circumstances, in view of above discussion the Criminal Appeal fails. The Criminal Revision Application also is liable to be dismissed, for want of presence of the complainant before this Court.

29. In the result, Criminal Appeal and Criminal Revision Application are hereby dismissed. The impugned order of conviction and sentence is hereby confirmed. The learned trial Court shall take appropriate steps according to law for cancellation of the bail bonds of the appellants/accused, who are on bail, for serving the remaining sentence by them. In view of dismissal of Criminal Appeal, Criminal Application No. 2568 of 2013, filed by the accused/appellant No. 1- Manmath seeking grant of bail during pendency of the Criminal Appeal does not survive and the same stands dismissed accordingly.