
(2015) 03 BOM CK 0379
In the Bombay High Court
Case No : Criminal Appeal No. 173 of 2013

Manoj and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 31-03-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 304, 307, 323, 324, 326

Citation : (2015) ALLMR(Cri) 3451

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

Bench : Single Bench

Advocate : S.G. Chapalgaonkar, Advocate, for the Appellant; S.R. Palnitkar, A.P.P., for the Respondent

Final Decision : Partly Allowed

Judgement

M.T. Joshi, J.—Heard both sides.

2. Aggrieved by the conviction for the offences punishable under section 307 r/w. 34 of the Indian Penal Code and consequent sentence to suffer rigorous imprisonment for five years and to pay fine of Rs. 5,000/- in default to suffer simple imprisonment for six more months, both the original accused Nos. 1 and 2 have preferred the present appeal. They were acquitted of the offences punishable under section 324 , 323 r/w. section 34 of the Indian Penal Code.

3. The prosecution case in short is as under:-

? That injured complainant - Mahesh Magar, while in the hospital, complained that on 22/5/2008, at about 5.00 pm. when he was sitting in front of his house at village Warud, Dist. Osmanabad, at that time, present appellant No. 1 - Manoj, who is resident of Bhimnagar was passing by the road. He was making faces and clenching his teeth by seeing at the informant. He went ahead for some steps and again returned back. He abused the complainant. Thereafter, he slapped him and, thereupon, threatened that he would see him later on. The complainant narrated the said incident to his uncle Dinesh Magar. Thereafter, on

the next day i.e. on 23/5/2008, at about 11.00 am. appellant No. 1 - Manoj was again seen going from the road. At that time, the complainant's uncle asked him regarding the earlier incident. The appellant No. 1, thereupon threatened that he would see them and went running to Bhimnagar. Thereafter, he returned at the spot with 3-4 boys. They had sword and knives with them. They included the present appellant No. 2 - Somnath, two children in conflict with law, namely, Rameshwar and Samadhan. All of them started abusing the complainant and his uncle. They also assaulted the complainant. Appellant No. 1 - Manoj gave a stab wound with sword on the stomach on left hand side of the complainant. Another blows of sword were given on the finger of right hand and chest. Appellant No. 2 - Somnath gave blows of knife on the head and forehead of the informant. Informant's uncle Dattu and father Babasaheb intervened. At that time, Rameshwar gave blows of sword to them while Samadhan gave blow of sword to the complainant's grandmother Sheshabai. Thereafter, all of them ran away. On the basis of this complaint, crime came to be registered.

? P.W. 13 - P.I. Anjum Shaikh carried the investigation as usual. She prepared the panchnama of the spot of occurrence. The present appellants made a statement leading to the recovery of the sword and the knife. The statement of the eye witnesses were recorded. The clothes of the injured were seized. Weapons were sent for chemical analysis. Injury certificates were collected and ultimately, the chargesheet came to be filed.

4. Upon committal of the case, the charge was framed. Plea of the present appellants is that of total denial. According to them, the injured complainant fell down on a pointed iron rod of cement pole by the side of the road and by taking undue advantage of the injuries on his person, has falsely filed the complaint. The learned Additional Sessions Judge, however, found that the case of attempt to commit murder in furtherance of common intention is proved beyond reasonable doubt against the present appellants. Hence, the conviction and sentences, as detailed supra came to be recorded.

5. Both learned counsel for the appellants i.e. Mr. Chapalgaonkar and Mr. Jadhavar took me through the evidence on record. They submitted that the evidence on record would show that there was communal tension in the village since long, previous to the present incident. P.W. 4 Tanaji Gadhave, the so-called President of the Tanta Mukti Samiti was himself an accused in the earlier riot case which was pending in the same Court. The medical evidence is perfunctory. P.W. 7 Dr. Milind Pol, who has merely preliminary treated the injured and though admittedly the injured was admitted to Civil Hospital at Solapur, no record of the same was produced. P.W. 7 Dr. Pol, though speaks about the stab injuries, conspicuously, he had left the very issue of the depth of the stab injury absent in his testimony as well as in his injury certificate as regards the injury to the complainant at Exhibit 30. Further, since there is no testimony of this Medical Officer that the injuries caused to the informant were, in ordinary course of nature, sufficient to cause death, the learned Additional Sessions Judge directly

held that the offence punishable under section 307 of the Indian Penal Code is made out.

? Further, both the uncles of the informant i.e. P.W. 2 - Ramprasad and P.W. 3 - Dattatraya and P.W. 6 - Babasaheb i.e. father of the informant did not support the prosecution case, still, solely relying on the testimony of the interested informant, the conviction came to be recorded. The learned counsel alternatively submitted that at the most the case for the offence punishable under section 326 of the Indian Penal Code is made out and in the facts of the case, as would be detailed later-on, they submitted that both of them be released by giving benefit under the provisions of Probation of Offenders Act, 1958.

6. On the other hand, learned A.P.P. submitted that the deposition of the injured is not only corroborated by the injuries found on his person but also by the statement of his father i.e. P.W. 6 - Babasaheb, who was also injured in the incident albeit by children in conflict with law, against whom a separate chargesheet is filed. He submitted that though the Medical Officer failed to give opinion, as to whether the injuries found on the person of the complainant are in ordinary course of nature sufficient to cause death, the very nature of the injuries would fortify the same. In the circumstances, he submitted that the appeal be dismissed.

7. On the basis of this material, following point arises for my determination:-

? Whether the prosecution has proved that on 23/5/2008 at about 11.00 am. at village Warud, Taluka and District - Osmanabad, the present appellants, in furtherance of the common intention with the children in conflict with law, voluntarily caused grievous hurt to the complainant P.W. 1 - Mahesh Magar by means of sword and knife with such intention and knowledge and under such circumstances, by the said act, the death would have caused?

My finding to the said point is in the negative. The appeal is therefore partly allowed and the appellants are acquitted of the offences punishable under section 307 r/w. 34 of the Indian Penal Code. Instead, both the appellants are convicted for the offences punishable under section 326 r/w. 34 of the Indian Penal Code. The appellant No. 1 - Manoj S/o Sahebrao Gangawane is sentenced to suffer rigorous imprisonment for the period already undergone by him with fine of Rs. 5,000/- (Rs. Five Thousand) as imposed by the learned Sessions Court with further direction that in default of payment of fine amount, he shall further suffer simple imprisonment of three (3) months and the appellant No. 2 - Somnath S/o Tanaji Gangawane is released under the provisions of the Probation of Offenders Act, 1958, for the reasons to follow.

REASONS

8. The statement of P.W. 7 Dr. Milind Pol coupled with the injury certificate issued by him as regards complainant - Mahesh at Exhibit 30 would show that the complainant has received the following injuries:-

- 1) Deep Stab injury on Chest Lt. side - 2cm X 1cm X deep
- 2) Deep stab injury - 4cm X 3cm X deep
- 3) Deep incised wound palpable fracture skull bone seen - 8cm X 1cm X 1cm
- 4) Incised wound over Lt. hand fingers, except thumb - 1cm X 1/2cm X 1/2cm

9. According to the Medical Officer, all the injuries were caused by sharp edged pointed weapons. First three injuries were grievous and last injury was simple one. The complainant was thereafter referred to Civil Hospital, Solapur on the same day at 1:20 pm. He further deposed that the injuries are possible by sword and knife i.e. muddemal articles No. 16 and 17, claimed to have been recovered in view of the statement made by the respective appellants.

10. During cross-examination, the Medical Officer admitted that the depth of the injury Nos. 1 and 2 is not mentioned by him and, therefore, naturally in the witness box also, he was unable to give the depth of those injuries. He denied that the injuries were not serious in nature.

11. We do not have the depth of the stab injuries i.e. injury No. 1 and 2. So far as injury No. 3 is concerned, it is the incised wound with palpable fracture of skull bone. Thus, though the fracture was palpable i.e. perceivable by touch, the nature of the fracture is not mentioned. It was 8 cm in length and 1cm in width. No further evidence in this regard was led, though, according to the prosecution, immediately at 1:20 pm. in the noon, the complainant was referred to the Civil Hospital, Solapur.

12. In the above circumstances, unless and until there is a definite evidence that all these three injuries either jointly or solely would have in ordinary course of nature, caused the death, the conviction for the offence punishable under section 307 of the Indian Penal Code is not possible.

13. The learned counsel for the appellants have relied on the ratio laid down in various judgments of this Court i.e.:

- 1) Pannalal Yadav Vs. The State of Maharashtra, ,
- 2) The State of Maharashtra Vs. Bodaya Ramji Patil, , and
- 3) "State of Maharashtra Vs. Inderalal Manumal Makhija and others" 2011 All MR Criminal 3830 etc. in this regard.

? However, as to whether the particular injury or injuries would, in ordinary course of nature, is likely to cause death would depend on the nature of the injury or injuries in each case. Here, there is no evidence in regard to depth of the stab injuries or the nature of the fracture to the skull bone and, therefore, the necessary conclusion would be that the offence punishable under section 326 of the Indian Penal Code i.e. of "causing grievous hurt by dangerous weapons or means" is only made out. For the reasons hereinafter, I hold that the present appellants are the authors of those injuries.

14. It is true that the uncles of the complainant i.e. P.W. 2 - Ramprasad and P.W.3 - Dattatraya did not support the prosecution case. P.W. 2 - Ramprasad deposed that when he went to the spot, at that time, the informant was seen lying and, thereafter, he received one injury of stone on the right side of his chest as one of the children in conflict with law hurled a stone towards him. He was therefore cross-examined by the prosecution. He denied that he was present since beginning and watched the incident of assault over the complainant.

15. P.W. 3 - Dattatraya, another uncle of the informant has deposed that he did not recollect as to who had assaulted the informant.

16. As against this, we have the definite testimony of complainant coupled with the testimony of his father, supported by the immediately filed FIR and the history given to the Medical Officer regarding the assault. Further, the searching cross-examination of the Medical Officer would show that the injuries found on the person of the complainant are not possible by repeated fall on a pointed object. The number and nature of the injuries would also make it clear that due to multiple fall over a cement pole, those injuries are not possible. In the circumstances, the incident has been clearly proved beyond reasonable doubt.

17. This takes us to the issue of sentence to be awarded for the offence punishable under section 326 of the Indian Penal Code.

18. Mr. Chapalgaonkar, learned counsel for appellant No. 1, on the basis of the record, submitted that the present appellant No. 1 - Manoj has suffered incarceration for a period of 2 years and 2 months. As per the prosecution itself, he was merely 20 years old at the time of the incident. The injured was also 19 years old at that time. The statement of the complainant would show that the mother of the complainant was the Secretary of Jal-Swarjya Committee. There is a Tanta Mukti Committee (Dispute Redressal Committee) in the village, of which P.W. 4 - Tanaji was the President. Further, 15-20 days prior to the present incident, the atmosphere in the village had become tense due to tearing off of flags which were displayed at the time of celebration of Dr. Babasaheb Ambedkar Birth Anniversary. The present appellants belong to Baudh community as the complainant admitted that the persons having surname "Gangawane" reside in Bhimnagar. The complainant further deposed that there was no personal animosity between him and the appellant No. 1 prior to the incident. Still, according to his own case, one day earlier to the present incident of injuring him, the present appellant No. 1 - Manoj had made faces and was seen clenching his teeth towards him and even had abused him. P.W. 4 - Tanaji Gadhave, the chairman of the Tanta Mukti Samiti has admitted that the mother of the complainant was a member of Jal-Sawarajya scheme, though he denied that she was worker of the Nationalist Congress Party. As regards the communal tension in the village, she admitted that just fortnight preceding the present incident, blue flags were displayed for celebration of Dr. Babasaheb Ambedkar Birth Anniversary. Some of the flags were removed by some persons and, therefore, the atmosphere in the village was tense. He denied that the present appellants

had taken initiative in the celebration of the said function. Further, just within three weeks of the present incident, big communal riot erupted in his village, wherein the incident of burning property has occurred and 80-81 villagers were arrayed as accused in the said riot. In the said riot case, this witness himself alongwith the uncles of the complainant are arrayed as accused.

19. This evidence on record, according to him, would show that without having any personal animosity against the present informant, the appellant No. 1 - Manoj, a youth, who was 20 years old at the time of occurrence of the incident, has caused the injuries in the background of the surcharged atmosphere in the village. He has no criminal antecedent. Appellant No. 1 - Manoj is already behind the bar for a period of 2 years and 2 months.

20. Mr. Jadhavar submits that the evidence on record would show that even the present appellant No. 2 - Somnath had no motive at all and only upon calling by the appellant No. 1 - Manoj, he had gone with him.

21. Mr. Jadhavar, while advancing arguments for extending benefits of the provisions under the Probation of Offenders Act, 1958, relied on the ratio of "Balhim S/o Ramrao V. The State of Maharashtra and anr." 2003 ALL M.R. (Cri.) 656, wherein for the offence punishable under section 326 of the Indian Penal Code, finding that in the set of evidence adduced, it would not be desirable to send the accused behind the bar after many years of the incident and, therefore, benefit of the provisions under the Probation of Offenders Act, 1958 was extended.

? Further, reliance was placed on the ratio of State of Karnataka Vs. Muddappa, , wherein the same benefit for the offence punishable under section 304 of the Indian Penal Code was extended in the facts of the said case. Hence, the learned counsel submitted that the same benefit may be extended to the appellant No. 2 - Somnath.

22. The material, as detailed supra, would show that appellant No. 1 - Manoj, a youth in the twenties, without having any personal animosity with the informant, had caused two grievous stab injuries, as detailed supra, of which depth is not known. The atmosphere in the village was vitiated by communal mischiefs. He has already suffered incarceration for a period of 2 years and 2 months. In that view of the matter, in my view, the period of sentence already undergone by appellant No. 1 - Manoj would be sufficient.

23. As regards appellant No. 2 - Somnath, he was also in the same age group. The injury attributable to him, is injury No. 3 i.e. palpable fracture to the skull bone admeasuring 8cm X 1cm. Mr. Jadhavar makes a statement that now the appellant No. 2 - Somnath is even appointed as a Junior Clerk in the year 2013 with one Poornavadi Nagarik Sahakari Bank Ltd., Beed and files photocopy of the said appointment order dated 21/12/2013, which was already accepted on record as "X". He submits that the present appellant No. 2 - Somnath was arrested and, thereafter, was released on bail during investigation. He also submits that there

is no criminal antecedent of the present appellant No. 2 - Somnath and as during the pendency of the present appeal, he made progress and by taking education, he was even able to secure a stable job, as detailed supra.

24. Learned A.P.P. opposed the submissions made on behalf of the learned counsel for the appellants.

25. Taking into consideration all the facts, in my view, directing to serve the sentences, as awarded by the learned Additional Sessions Judge, Osmanabad vide the impugned judgment and order dated 28/03/2013, is not required in the facts and circumstances of the case, as detailed supra.

26. In the result, the following order:-

I) The appeal is hereby partly allowed.

II) The conviction and sentence of both the appellants for the offences punishable under section 307 r/w. 34 of the Indian Penal Code awarded by the learned Additional Sessions Judge, Osmanabad vide judgment and order dated 28/03/2013 is hereby set aside. Instead, both the appellants are convicted for the offences punishable under section 326 r/w. 34 of the Indian Penal Code.

III) Appellant No. 1 - Manoj S/o Sahebrao Gangawane is sentenced to suffer imprisonment for the period already undergone by him with fine of Rs. 5,000/- (Rs. Five Thousand) as imposed by the learned Sessions Court with further direction that in default of payment of fine amount, he shall further suffer simple imprisonment of three (3) months.

IV) Appellant No. 2 - Somnath S/o Tanaji Gangawane is released on execution of bond to be of good behaviour for a period of two (2) years. Bond to be executed in the Sessions Court, Osmanabad within a period of three (3) months from the date of this order.

V) The appellant No. 1 - Manoj S/o Sahebrao Gangawane be released forthwith, if not required in any other crime.

VI) The bail bonds of appellant No. 2 - Somnath S/o Tanaji Gangawane shall stand cancelled.

27. Criminal Appeal stands disposed of accordingly.