
(2021) 06 BOM CK 0024
In the Bombay High Court
Case No : Criminal Appeal No. 623 Of 1996

Namdeo S. Daki And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 08-06-2021

Acts Referred:

Indian Penal Code, 1860 — Section 147, 148, 149, 302, 307, 323, 324, 427, 452, 504
506

Bombay Police Act, 1951 — Section 37, 135

Citation : (2021) 06 BOM CK 0024

Hon'ble Judges : S.S. Shinde, J; Manish Pitale, J

Bench : Division Bench

Advocate : Rajiv Patil, Prashant Badole, P.P. Shinde

Final Decision : Allowed

Judgement

N.R. Borkar, J

1] This appeal challenges the judgment and order dated 10.10.1996 passed by the learned Sessions Judge Raigad at Alibag in Sessions Case No. 217

of 1988.

2] In the abovesaid sessions case, the appellant Nos.1 to 5, who were accused Nos.1,5,9, 12 and 14 respectively before the trial court were tried

alongwith other 40 co-accused for the offences punishable under sections 147, 148, 302, 307, 452, 323, 504, 427 506 read with 149 of the Indian Penal

Code (for short ""IPC"") and section 37 read with section 135 of the Bombay Police Act. By the impugned judgment and order, the trial court convicted

the present appellants for the offence Dinesh Sherla 1/15 j-cri-appeal-623-1996.odt punishable under section 302 read with 149 of IPC and sentenced

them to suffer Life Imprisonment and to pay fine of Rs.3000/- each, in default, to suffer further R.I. for one year. The trial court further convicted them

for the offence punishable under section 324 read with 149 of the IPC and sentenced them to suffer R.I. for one year and to pay fine of Rs.1000/- each,

in default, to suffer further R.I. for three months. The trial court further convicted them for the offence punishable under section 452 read with 149 of

the IPC and sentenced to suffer R.I. for one year and to pay fine of Rs.1000/- each, in default, to suffer further R.I. for three months. The appellants

have been further convicted for the offence punishable under section 148 of the IPC and sentenced to suffer R.I. for six months and to pay fine of

Rs.500/- each, in default, to suffer further R.I. for one month.

3] Appellant No.3/accused No.9 died during pendency of the appeal. Appeal, thus, stands abated qua appellant No.3/accused No.9.

4] The deceased Kishor Bhopi was son of PW-1 Harishchandra Bhopi. Another deceased Uttam was friend of deceased Kishor. On the day of

incident which took place on 15.8.1988, at about 8.00 to 8.30 p.m., the present appellants along with other co-accused suddenly entered into the house

of PW-1 Harishchandra while he and his family members were having dinner and at that time all the accused were armed with weapons like axes,

swords, spears and sticks. After Dinesh Sherla 2/15 j-cri-appeal-623-1996.odt entering into the house of PW-1, accused Nos.1 and 5 asked him as to

where are his sons and their friend Uttam as they have decided to kill them. According to the prosecution, PW-1 and his relative Arun Dundrekar,

who has not been examined in the matter, tried to stop the accused when they tried to rush towards the family members of PW-1. It is alleged that

at that time, accused Nos.1 and 5 assaulted PW-1 on his shoulder and head by axe. At the same time, accused Nos.5 and 9 assaulted Arun by axe. It

is alleged that while this assault was going on deceased Kishor and Uttam due to fear rushed towards staircase. They climbed the staircase and went

on the mezzanine floor. Accused followed them. At that time, PW-3 Deepak, the brother of the deceased Kishor, tried to stop them. The accused

however, assaulted him also. It is alleged that accused Nos.1,5,9,12, 13, 14 and 18 followed the deceased Kishor and deceased Uttam and went on the

mezzanine floor armed with axes and swords. It is alleged that the said accused assaulted deceased Kishor and Uttam and committed their murder. It

is alleged that the female family members of PW-1 were also assaulted by kick and fist blows.

5] It is further alleged that the accused after leaving the house of PW-1, assaulted PW-4 Keshav Gavand who was going back to his house on

bicycle. The accused then entered into the house of PW-5 Sunita Patil and ransacked her house. It is further alleged that the accused then entered

into the house of PW-6 Lahu Keni and assaulted him also.

6] The report was lodged by PW-1 Harishchandra in relation to the incident at Panvel Police Station. On the basis of said report, crime vide crime No.

435 of 1988 was registered for the offences punishable under sections 147, 148, 302, 307, 452, 323, 504, 506, 427 read with 149 of the IPC and also

under section 37 read with section 135 of the Bombay Police Act. On completion of investigation, the chargesheet was filed against the present

appellants/accused and other co-accused for the aforesaid offences.

7] The accused were charged and tried for the aforesaid offences. As stated earlier, the trial court by the impugned judgement and order convicted the

present appellants/accused and acquitted rest of the 40 accused of all the charges..

8] We have heard learned Senior Counsel for the appellants/ accused and learned APP for the respondent - State.

9] At the outset, we must mention that the trial court has convicted the present appellants/accused for the first incident only, i.e., the incident which

took place in the house of PW-1. As regards second incident, i.e., assault on PW-4 Keshav Gavand; third incident, i.e., ransacking the house of PW-5

Sunita Patil and fourth incident, i.e., assault on PW-6 Lahu Keni, the trial court has held that the prosecution has failed to prove the charges in relation

to the said incident and Dinesh Sherla 4/15 j-cri-appeal-623-1996.odt acquitted appellants/accused and other co-accused of the said charges. The

State has not filed appeal against the acquittal of the present appellants/accused of the charges which were framed against them in relation to second,

third and fourth incident. The State has also not filed appeal against the acquittal of other co-accused.

10] The trial court has convicted the appellants/accused on the basis of evidence of following three eye-witnesses:

(i) PW-1 Harishchandra Bhopi, the father of deceased Kishor;

(ii) PW-2 Anant Gavand, the brother of wife of PW-1;

and

(iii) PW-3 Deepak Bhopi, the brother of the deceased Kishor.

11] PW-1 Harishchandra Bhopi has stated in his evidence that the incident occurred on 15.8.1988 at about 8.30 p.m.. At that time, he, his wife, his

brother-in-law Anand, wife of his brother-in-law Bebibai, his sons Deepak and Kishor and their friend Uttam and his relative Arun were present at his

house. They all were having dinner in front portion of their house. A mob of about 40 to 45 persons came to their house and they all were having axes,

swords, spears and sticks in their hands. Some of them stood in front of northern door of his house and some stood in front of western door. PW-1 has

stated that accused Nos.1, 5, 6, 8, 9, 10, 11, 12, 14, 15, 17, 18, 19 and 20 entered into his house from northern door of his house.

Dinesh Sherla 5/15 j-cri-appeal-623-1996.odt Accused Nos.1 and 5 enquired with him as to where are his sons and their friend Uttam. Accused No.1

then said to him that he will kill them and will cut down their hands and legs. PW-1 asked them what happened. PW-1 has stated that accused No.1,

instead of telling him anything, rushed towards him and assaulted him by axe on his right shoulder. Similarly, accused No.5 assaulted him on head by

axe. While Arun rushed towards him for help, accused No.9 assaulted him by sword on his hands and legs. PW-1 has stated that to protect himself

from the assault, he picked up iron chair and moved it in the air to avoid further assault, on him.

12] PW-1 has further stated that his son Kishor and his friend Uttam on seeing assault, went on the mezzanine floor by climbing staircase. PW-1 has

stated that the accused Nos.1,5,9, 11 and 12 went behind them on mezzanine floor and at that time they were having weapons in their hands. After

they went on the mezzanine floor, he heard the sound of crying of his son and his friend Uttam and they were requesting the accused persons not to

assault them. PW-1 has stated that then he heard sound like something was thrown down from mezzanine floor towards cattle-shed. PW-1 has stated

that after some time, the accused persons came down from the mezzanine floor and then all of them left his house. PW-1 has stated that after the

accused left his house, he went on the mezzanine floor and found that his son Kishor was lying there in injured condition and he was dead. Then he

went towards cattle-shed and found that Uttam was lying Dinesh Sherla 6/15 j-cri-appeal-623-1996.odt there and was asking for water and there

were multiple injuries on his person. PW-1 has stated that he thereafter in injured condition itself had gone to the Panvel Police Station and narrated

the incident to the police. He stated that Uttam was shifted to the hospital, however, he died while he was being treated in the hospital.

13] PW-1 has further stated that prior to two months of the incident, tenders were invited for construction of a road in the village. The persons from

his party were trying to obtain the said contract. Accused No.1 and persons from his party were also trying to obtain the said contract. On that

account, they were on cross terms.

14] PW-1 has, in his cross-examination initially reiterated that only 16 persons entered in the house at the time of alleged incident and about 40-45

assailants were standing outside. Said 16 persons entered in the house from northern side door and none came inside from southern side door. PW- 1

was then confronted with contents in his complaint, wherein he has stated that the assailants entered in his house from both the doors. PW-1 has then

stated that 15-20 persons entered in his house from southern side of door. He has stated that the food was scattered on the floor. PW-1 has admitted

that except enmity on account of contract of construction of road, the accused had no other cause to assault them.

15] PW-1 has admitted that there are other houses surrounding his house. After the accused left his house, he was waiting for help from the villagers,

but none came for his help. He has stated that by walk, he went to the police station Panvel and reached there at 10.00 to 10.30 p.m.. He narrated the

incident to the police and at the same time the police recorded his complaint. PW-1 has then stated that his complaint was recorded by the police at

village Chinchpada and not in the police station. He stated that till arrival of the police, the dead body of Kishor was on mezzanine floor. The police

brought the dead body of Kishor on the ground floor and thereafter the inquest panchanama was recorded. He has stated that the dead body of Kishor

was never lying near cattle-shed and thus there arises no question of his blood being found there. PW-1 has stated that the contents in his complaint

that the assailants dragged Uttam and thrown him towards cattle-shed are correct. He has not seen the accused assaulting Kishor or Uttam on

mezzanine floor. PW-1 has admitted that he was doing business of selling mangoes in partnership with accused No.1.

16] PW-2 Anant Gavand, the brother of wife of PW-1 has stated in his evidence that at the time of incident, he was staying at the house of PW-1 as

the work of repairing of his house was going on. He has stated that on the day of incident, at about 8.00 to 8.30 p.m. while they were having dinner,

about 16 to 17 persons entered into the house of PW-1 from northern side door of his house. They were having Dinesh Sherla 8/15 j-cri-appeal-623-

1996.odt weapons like axes, swords, spears. Those 16-17 persons were accused Nos.1, 5, 6, 8, 9, 10, 14,15, 16, 17, 18 and 19. They asked PW-1 as to

where are Kishor and Uttam. PW-1 and Arun tried to stop them from coming forward. That time, Kishor and Uttam went upstairs by staircase. He

has stated that accused No.1 assaulted PW-1 on his right shoulder by axe. Similarly, accused No.5 assaulted PW-1 on his head by axe. PW-2 has

stated that PW-1 picked up steel chair to avoid further assault on him. He further stated that accused Nos.5 and 9 assaulted Arun by axe. He stated

that at that time his sister Sulochana and his wife Bebibai went ahead to prevent the accused from coming forward, however, they were also

assaulted by kick and fist blows. He has stated that Deepak tried to prevent them from going upstairs, at that time, accused No.5 assaulted him by axe.

Similarly, accused Nos.12 and 14 assaulted Deepak by axe and sword. When he went to save Deepak, he was also assaulted by four persons by axe

and swords. Thereafter all those assailants went upstairs by staircase. Then they assaulted Kishor and Uttam. After some time, the assailants went

out of the house. After the assailants left the house, he and PW-1 went on the mezzanine floor and found that Kishor was lying therein. Uttam was not

there. Kishor was made to drink water. However, he was dead. They came out and went towards cattle-shed and found that Uttam was lying there

at the distance of 4-5 feet from the cattle-shed. There were injuries on his person. He was asking for water. Thereafter PW-1 went to Panvel Police

Station . At about 10 . 00 to 10 . 30 p . m . , PW - 1 came back with Dinesh Sherla 9/15 j-cri-appeal-623-1996.odt the police. Thereafter, they all were

shifted to hospital at Panvel. The dead body of Kishor was also taken to the hospital.

17] PW-2 though in his examination-in-chief has stated that 16 to 17 assailants entered into the house of PW-1, however, in his cross-examination, he

has stated that 16-17 assailants entered in the house from northern side door and 25-30 assailants entered into the house from southern side door. All

the assailants came in the room where they were having dinner.

18] PW-3 Deepak Bhopi, the son of PW-1 has stated in his evidence that the deceased Kishor was his brother and deceased Uttam was friend of his

brother Kishor. At the time of incident, 16-17 persons entered into their house from northern side door and some persons entered into his house from

southern side door. He stated that the persons who entered into their house from northern door were accused Nos.1, 5, 6, 8, 9, 10, 12, 13, 14, 15, 18,

19 and 20. He has further stated that the persons who entered into their house from southern door were accused Nos.7, 21, 29, 31, 36, 37, and 45. He

has stated that all of them were armed with weapons like axes, sticks, swords. He has stated that accused Nos. 9, 14 and 38 assaulted him by axes

and swords on his both hands. Accused No.7 assaulted him by axe on his hands. PW-3 has further stated that accused Nos.1 and 5 assaulted his

father on his shoulder and head by axe. His maternal Dinesh Sherla 10/15 j-cri-appeal-623-1996.odt uncle was also assaulted by accused Nos.9, 14,18

and 38 by axe and sword. Accused Nos.5 and 9 assaulted Arun by axe and sword. When this assault was going on, due to fear, Kishor and Uttam

went upstairs. He has further stated that his mother Sulochana and maternal aunt Bebibai were also assaulted by fsts and kick blows. All 16-17

assailants after assaulting them, went upstairs by staircase. They were the persons who entered into their house by northern side door. They started

assaulting Uttam and Kishor as he heard their shouts. After some time, the assailants came down and left their house. PW-3 has stated that then his

father went to Panvel Police Station. After some time, PW-1 came back with police. They were then shifted to Panvel hospital.

19] According to the witnesses, the incident took place while they were having dinner. The witnesses have admitted that the food was scattered on

the floor. PW-1 has admitted that the blood which was oozing from his injuries did fall on the floor.

20] We have perused the spot panchanama at Exhibit-129. The abovesaid facts are missing in the spot panchanama. The trial court has held that the

panchamana was done on the next day and therefore, possibility of cleaning the floor by that time by the inmates of house cannot be ruled out.

However, none of the witnesses have stated so in their evidence. It is unlikely that the police, who had arrived at the place of incident, immediately within two hours, would not Dinesh Sherla 11/15 j-cri-appeal-623-1996.odt take steps to secure the place of incident in a case of such serious nature and would allow the destruction of evidence.

21] According to the witnesses, both the deceased Kishor and Uttam were assaulted on mezzanine floor. PW-1 in his substantive evidence has stated

that the deceased Uttam was thrown down from mezzanine floor and he was found lying near cattle-shed. However, PW-1 in the report lodged with

the police at Exhibit-106 has stated that the deceased Uttam was dragged from mezzanine floor to the ground floor and was then left near cattle-shed.

The evidence of PW-1 is, thus not consistent with the report lodged by him. Apart from it, according to the witnesses, Kishor was assaulted on the

mezzanine floor and his dead body was lying there only till arrival of the police. However, in the spot panchanama at Exhibit-129, which appears to

have been drawn on the basis of information given by witness to the incident namely Ramesh N. Keni, the place where the deceased Kishor was lying

after assault is shown to be 3 feet away from the cattle- shed and even his blood was found there. PW-11 Dilip Panse, the Investigating Ofcer, who

drew the spot pancahanama has admitted the said fact in his cross-examination. The spot panchanama thus belies the versions of the witnesses.

22] According to substantive evidence of PW-1, only 16-17 persons entered in his house. He was, therefore, confronted with the report lodged by him

at Exhibit-106, wherein he has stated about 35-40 persons entered in his house. PW-1 then Dinesh Sherla 12/15 j-cri-appeal-623-1996.odt stated that

his statement in the report that about 35 to 40 persons entered in his house is correct. According to substantive evidence of PW-2 about 16-17 persons

entered in the house, PW-2 was thus confronted with his statement portion marked ""A"" at Exhibit- 145 wherein he has stated that about 50-60 persons

entered in the house. PW-2 then tried to improve his version by stating that 16-17 persons entered in the house from northern side door and 25-30

assailants entered in the house from southern side door.

23] The reason for witnesses' to improve their version appears to be the dimension of the room in which the incident took place. According to the spot

panchanama, the dimension of said room is 10 ft x 20 ft. At the time of trial the

witnesses must have realized that, considering the dimension of the room their testimony that 40 to 50 persons entered into their house and that too with arms like, axes, swords and spears in a room of 200 sq. ft. would not be believed. They, thus improved their version at the time of trial. Considering the facts and circumstances, we are constrained to say that the improvements made by the witnesses do cast doubt on the veracity of their versions.

24] According to the PW-1, the alleged incident took place as he and persons from his party were on cross terms with accused No.1 and persons from his party. According to him, the motive for alleged assault was dispute between him and accused No.1. If this is so then there was no reason for the Dinesh Sherla 13/15 j-cri-appeal-623-1996.odt accused to spare PW-1 and assault his son Kishor and his friend Uttam.

25] We have perused the postmortem notes. From the injuries mentioned in the postmortem notes the deceased Uttam appears to have been more brutally assaulted than the deceased Kishor. According to PW-1, the deceased Uttam was even thrown down from mezzanine floor. If at all the accused were on cross terms with PW-1, then it is not understood as to why they would assault deceased Uttam so brutally.

26] Considering the facts and circumstances of the case, and omissions and contradictions in the evidence of PW-1 to PW-3, we are compelled to hold that, it would not be safe to rely upon the evidence of PW-1 to PW-3 to conclude that the prosecution has proved its case against the appellants beyond reasonable doubt.

27] Apart from above, PW-1 has admitted that his house is surrounded by other houses. In the facts and circumstances of the case and in view of enmity between the parties, evidence of independent witnesses at least to the extent that a mob of 40 to 50 persons came to the house of PW-1 was necessary. However, no independent witness is examined.

28] Considering over all facts and circumstances, in our view the trial court was not justified in convicting the appellants/accused. In the result, the following order is passed.

ORDER

1] Criminal Appeal is allowed.

2] The impugned judgment and order dated

10.10.1996 passed by the learned Sessions Judge Raigad at Alibag in Sessions Case No. 217 of 1988 convicting the appellants for the offence

punishable under sections 302, 324, 452 read with 149 and under section 148 of the IPC is set aside and they are acquitted of the said offences.

3] Their bail bonds are cancelled.

4] The fine amount, if any paid by the appellants, be refunded to them.