
(1981) 10 BOM CK 0030
In the Bombay High Court
Case No : Criminal Appeal No. 816 of 1979

Raghunath Gavali and Another	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 01-10-1981

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, 147, 148, 149, 152

Citation : (1982) 2 BomCR 124

Hon'ble Judges : D.B. Deshpande, J

Bench : Single Bench

Advocate : S.C. Bora, for the Appellant; S.G. Deshmukh, A.G.P., for the Respondent

Judgement

D.B. Deshpande, J.—This appeal is directed against the order of conviction and sentence recorded by the learned Additional Sessions Judge, Aurangabad in Sessions Case No. 34/79 on his file against only accused Nos. 1 and 2 and it arises out of the following facts.

2. The prosecution story is briefly as under :---

There is an Industry known as Korula Rubber Factory at Aurangabad. The appellants and the other accused before the trial Court, who were four in addition to these appellants were some of the labourers employed in this industry. Mani P.W. 7 is the manager of this rubber industry and Shetty P.W. 4 is the Assistant Manager. It appears that the workers working in this factory wanted to form one union and it appears further that the workers wanted to pressurise the management to recognise their union. It appears further that it was the say of the management that they should follow the legal procedure for getting their union recognised. In view of the diversion opinion there was restlessness amongst the workers of this factory. In the course of events, therefore, there were some gate meetings and speeches of the workers. This incident has taken place on 16-11-78. According to the prosecution since morning the workers including the accused were threatening and abusing the management staff. At

about 5-30 p.m. Mani and Shetty left the factory premises. At the material time, Mani was staying in a bungalow in Pannalal Nagar Colony at Aurangabad. Between 9.30 and 10.30 p.m. Mani and Shetty were together in the bungalow of Mani discussing the labour problems. Shetty then left for his residence which is located in the colony known as Rokadia Hanuma Colony. Mani had two domestic servants : one was Ramesh and the other was Bhikaji. After the Shetty left Mani the letter sent Bhikaji for fetching cigarettes. Mani then instructed Ramesh P.W. 1 to warm up the food in the kitchen and that is why P.W. 1 Ramesh was busy in the kitchen. Mani was sitting on the Sofa in the drawing room and after taking beer he was smoking. At about that time, five or six persons including the two appellants before this Court entered the house of Mani and out of these persons Mani identified only accused Nos. 1 and 2 who are the appellants before this Court. Accused No. 1 was armed with an iron bar or rod and accused Nos. 2 was merely accompanying accused No. 1. Immediately after they came in, accused No. 1 assaulted with the iron bar or rod on the head of Mani and immediately Mani raised a shout in the name of Ramesh. Mani became a little unconscious and immediately assailants left the residence of Mani. Immediately after hearing the shouts of the master Ramesh came out of the kitchen and he saw that his master was profusely bleeding on the Sofa over which he was sitting. Ramesh peeped through the window and in the electric light he saw five persons, he, identified four, of which the two are the appellants before me. It appears that by that time Bhikaji came back and seeing such an incident both Ramesh and Bhikaji rushed to the residence of Shetty and Ramesh narrated the incident of Shetty. Shetty immediately contacted the police control room with a request to the police to come to the residence of Mani and he gave the police the information about the location of the house of Mani. Shetty took out his car and he conducted Ramesh and Bhikaji in his car and practically the police and Shetty happened to reach the residence of Mani at about the same time. Shetty saw the condition of Mani and immediately rushed to two of his supervisors and brought those supervisors to the residence of Mani. Then Mani was removed in the car of Shetty and on the way they obtained the memo from Kranti Chowk Police Station for medical college hospital and Mani was admitted to the medical college hospital popularly known as Ghati Hospital at Aurangabad. The Casualty Medical Officer examined Mani and Mani was admitted to the Emergency Ward. The injury was bone deep and then he was removed to the paying ward. By that time police also had come there and they recorded the complainant of Ramesh and this complaint of Ramesh was treated as F.I.R. and an offence was registered on the strength of this complaint. During the course of investigation, these accused were arrested. Several statements were recorded and after completion of investigation the charge sheet was sent in the committing Court against this accused for different offence including offence u/s 307 I.P.C. and the learned Magistrate committed the accused to the Court of Sessions and that is how the case went to the Sessions Court at Aurangabad.

3. The case was heard by the learned Additional Sessions Judge at Aurangabad.

Charge was framed in the trial Court against the accused u/s 307 I.P.C. This was an individual charge framed against all six accused. In the alternative charge was framed against all accused for offence u/s 307 read with section 149 I.P.C. Similarly charge was framed against all accused under sections 147, 148, 452 and 120B and 323 I.P.C. All the accused pleaded not guilty and claimed to be tried. Their defence is of denial and it appears to be their contention that they are implicated in this case falsely in order to suppress the union activities amongst the labourers.

4. In order to prove the case, prosecution examined as many as 8 witnesses in the trial Court. This included Mani, Shetty and Ramesh. There was evidence of two panchas and also there was evidence of Dr. Mangala Sonavane and there was police evidence also. After considering entire evidence on record, the learned Judge felt that case against accused Nos. 3 to 6 was not established and so the learned Judge acquitted accused Nos. 3 to 6. However, he held that accused Nos. 1 and 2 were guilty of offence except offence u/s 120B I.P.C. So he acquitted accused Nos. 1 and 2 so far as offence u/s 120B I.P.C. is concerned but he convicted accused No. 1 u/s 307 I.P.C. and directed him to undergo R.I. for four years and to pay fine of Rs. 100/- in default R.I. for three months. Similarly, he convicted accused No. 1 u/s 452 I.P.C. and directed him to undergo R.I. for one year and to pay fine of Rs. 100/- in default R.I. for one month more. Similarly he convicted accused No. 1 under sections 147 and 148 I.P.C. and directed him to undergo R.I. for six months under each sections. He directed all these substantive sentences to run concurrently. He convicted accused No. 2 u/s 307 with 149 I.P.C and directed him to undergo R.I. for four years and to pay fine of Rs. 100/- in default R.I. for three months. He convicted accused No. 2 u/s 452 I.P.C. and directed him to undergo R.I. for one year and pay fine of Rs. 100/- in default R.I. for one month and similarly he convicted him under sections 147 and 148 I.P.C. and directed him to undergo R.I. for six months under each of these sections. He directed all these sentences to run concurrently. Feeling aggrieved by this order of conviction and sentence, accused Nos. 1 and 2 have preferred this appeal.

5. Mr. S.C. Bora appearing on behalf of appellants seriously challenged the order of conviction and sentence recorded against the appellants by the trial Court. Mr. Bora urged that this was a case falsely cooked up against these appellants in order to suppress the union activities of the appellants. According to him, accused are innocent and illiterate persons and they have not committed these offences. For the present, I shall confine myself to the prosecution case so far as accused No. 1 is concerned. Mr. S.G. Deshmukh, appearing on behalf of the State contended that the evidence given by Mani is reliable and, therefore, the conviction of the accused is quite legal and proper. Now it cannot be disputed that most important witness in this case is Mani P.W. 7. As already stated first of all, I shall confine myself to the order of conviction of accused No. 1.

6. It is not disputed that there was unrest amongst the labourers because the

labourers wanted to form one union and it is also not disputed that the workers wanted the management to recognise the union and the management wanted that the workers should have recourse to law to get their union recognised. The relation between the management and workers were, therefore, strained. The evidence of P.W. 4 Shetty goes to show that one Trade Unionist P.P. Joshi had delivered a lecture sometime before this incident that the management would not yield to the demands of the workers unless the workers resorted to violence against the officers of the management. The evidence of Shetty further goes to show that actually some 10 or 15 workers had decided to assault the officer of the management and that was on 16-11-78 i.e. on the date of incident itself. If we go to the evidence of Mani we find that Mani has fully supported the prosecution story narrated by me earlier. Mani stated that he was with Shetty in his house till about 10.30 p.m. and then he sent Bhikaji to bring cigarettes and asked Ramesh to warm up his food. He stated further that he had taken beer and was smoking by sitting on a sofa and at that time five or six person suddenly entered in his bungalow. He stated that he had a glimpse at them and he could identify Gawali accused No. 1 and Sonawane accused No. 2. He stated further that this Gawali i.e. accused No. 1 all of a sudden hit him by means of iron bar on his head with a result that he sustain bleeding injury and became unconscious. There is no reason why this evidence of Mani should be discarded. There were 120 labourers in the factory of which Mani was the manager and if Mani wanted to falsely involve the labourers he could have named some more labourers also in order to pressurise the workers against forming of union. It will be seen that although there were six accused before the trial Court, Mani did not implicate even remaining four accused in his sworn testimony before the trial Court. It is significant to note that Mani deposed only against accused Nos. 1 and 2. We also find that Mani stated that it was accused No. 1 who alone assaulted him with iron bar. If at all Mani wanted to falsely implicate the workers he could say that accused No. 2 gave him first blows or gave him kicks etc. but he has not falsely implicated accused No. 2 by stating against him. Hence in spite of the divergence between the management and the workers about the formation of union. I do not see any reason why the evidence of Mani should be rejected. Mr. Bora merely commented that Mani is not trustworthy witness and according to Mr. Bora Mani was an injured person. That is not the ground on which his evidence should be rejected. In fact, it is a well known fact that an injured person would not implicate an innocent person and he would not absolve the real assailant from the suit. It is true that while implicating persons, he may implicate innocent person also with real assailants. This does not mean that the evidence of an injured person should be rejected outright. No contradiction whatsoever is brought out in the cross-examination of Mani and, therefore, it will be seen that the story of Mani is consistent right from the beginning. No particular reason is assigned as to why Mani should implicate accused Nos. 1 and 2. Hence I do not find any force in the comment of Mr. Bora that Mani should be disbelieved.

7. Then Mani was sought to be disbelieved on the strength of evidence of

Ramesh P.W. 1. Mr. Bora has taken me through the evidence of Ramesh and I am satisfied that this Ramesh is nothing but a false witness. In his sworn testimony before the Court, Ramesh has given a totally different story and I have already pointed out that F.I.R. in this case is lodged by Ramesh. Although Ramesh gave a different story in his sworn testimony before the trial Court, he stated in his examination-in-chief itself that he gave oral complaint which was reducing to writing in accordance with his narration and that bears his signature. He admitted that the contents of this complaint were read over to him and then he signed. He admitted further that the complaints are correct. I do not propose to use the complaint as authentic piece of evidence because the F.I.R. is not a substantive piece of evidence but this F.I.R. clearly goes to show that it is contrary, to the substantive evidence given by Ramesh in the trial Court and on this ground I say that Ramesh is a false witness and I am not going to rely on the evidence of Ramesh to disbelieve Mani.

8. Then there is medical evidence of Dr. Mangala Sonavane and she is P.W. 5. She stated that she examined Mani at 2.50 A.M. on 17-11-78 and Mani had lacerated wound 6" x 3" x 1" on the scalp and this injury was cross shaped extending backwards from frontal eminence. According to her this injury was bone deep. Thus the story narrated by Mani is corroborated by the medical evidence. Mr. Bora tried to rely upon a portion of evidence of Dr. Mangala Sonavane, wherein she stated that Mani was conscious. Catching this thread, it was urged by Mr. Bora that the complaint of Mani ought to have been recorded and he posed a question as to why the complaint of Mani was not recorded. It is significant to note that Dr. Mangala Sonavane herself stated in the very next sentence that although Mani was conscious he was crying. Now the nature of injury goes to show that it was not a very ordinary minor injury and the bleeding must have been profuse. The first thing that Shetty and others were actually required to do was to see that Mani was treated and that is why a memo was obtained from Kranti Chowk Police Station so as to enable these persons to admit Mani in medical college hospital. Hence Mr. Bora can not derive any advantage from the fact that the complaint of Mani is not obtained by police. Mani was in agony on account of grave injury and was crying. I, therefore, find that there is nothing wrong in relying upon the evidence of Mani. I, therefore hold that at the material time accused Nos. 1 and 2 entered the house of Mani and accused No. 1 assaulted Mani on his head with an iron bar.

9. Then this takes me to the nature of offence that is committed by accused No. 1. Dr. Mangala Sonavane stated that the injury of Mani was not in the ordinary course of nature sufficient to cause his death. This admission itself clearly takes the case out of the ambit of section 307 I.P.C. Mr. S.G. Deshmukh invited my attention to the judgment of the trial Court and according to Mr. Deshmukh the reasoning of the trial Court is correct. I am unable to agree with his submission. In my opinion, the trial Court has clearly committed an error in holding that accused No. 1 was guilty u/s 307 I.P.C. The learned Judge has observed as follows :---

"The question is about the intention or the knowledge. They can be gathered from the manner in which the entry in the bungalow was made and from the manner in which Mani was assaulted. If not the intention to cause the death, the blow on the vital part and that too by means of an iron bar would necessarily impute the knowledge that the person would be killed by such a blow."

The intention or knowledge has to be ascertained from the nature of injury that is caused and I have already pointed out that the doctor clearly stated that the injury was not sufficient in the ordinary course of nature to cause death. If death cannot be caused by such an injury there is no question of accused being liable u/s 307 I.P.C. and in my opinion the only offence that is established against accused No. 1 is u/s 324 I.P.C. Accused No. 1 entered the house of Mani having made preparation to cause him injury and so he is guilty u/s 452 I.P.C.

10. This then takes me to the offence under sections 147 and 148 I.P.C. The charge against all these accused was that of unlawful assembly consisting of these six persons only and the trial Court has held that the presence of the other four accused is not proved. Hence it cannot be said that there was any unlawful assembly at all. It is true that it is open to this Court after appreciating the evidence to hold that the presence of other accused is proved and as such the offence of unlawful assembly is established. The only impediment in the way of this Court will be that in the absence of any appeal by the State against remaining accused, this Court can not convert their acquittal into conviction. But it is open to this Court to come to the conclusion that the presence of those accused is proved and then to hold that the unlawful assembly is also proved. There is no charge against the accused that there were some unidentified person alongwith accused Nos. 1 and 2 and hence in the absence of any charge to this extent, even if I come to the conclusion that there were 3 or 4 other persons alongwith accused Nos. 1 and 2, I can not record conviction against accused No. 1 for offence under sections 147 and 148 I.P.C. and hence in my opinion order of conviction of accused No. 1 under sections 147 and 148 has got to be set aside and the sentence on those counts also has got to be set aside.

11. This then takes me to the case against accused No. 2. Relying upon Mani, I hold that accused No. 2 had come there at that time. A mere entry of accused No. 2 would not constitute any offence. As already stated charge of unlawful assembly cannot be sustained against any of these accused and accused No. 2 is convicted u/s 307 read with section 149 I.P.C. As the charge of unlawful assembly itself is not proved, order of conviction and sentence u/s 307 read with section 147 I.P.C. must also fail. There is no charge against accused No. 2 for offence, under sections 307 with 34 I.P.C. and hence although I hold that accused No. 2 was present there, Mr. S.G. Deshmukh has not been able to show any authority to the effect that conviction can be recorded against accused No. 2 under sections 307 read with 34 I.P.C. I have already pointed out that mere entry of accused No. 2 would not constitute offence u/s 452 I.P.C. It cannot constitute offence u/s 448 I.P.C. also against him. His conviction under sections

147 and 148 cannot be upheld and the result is that accused No. 2 deserves to be acquitted of all the charges levelled against him and his appeal deserves to be allowed.

12. I have already pointed out that the accused No. 1 deserves to be convicted only under sections 324 and 452 I.P.C. So far as the sentence is concerned, Mr. S.G. Deshmukh appearing on behalf of State urged that the sentence ought to be deterrent. Mr. Bora appearing for accused No. 1 contended that looking to the facts of this case leniency should be shown to accused No. 1. Looking to the assault in this case, it is clear to my mind that it is an act of cowardice committed by accused No. 1 to have entered with a weapon in the house of an officer of the management at mid night and to assault him merely for the purpose of union. It is significant to note that he entered the house at 12.00 midnight. This Act must be condemned altogether and does not deserve any mercy or leniency and as urged by Mr. Deshmukh the maximum sentence provided u/s 324 I.P.C. must be imposed upon this accused.

13. The result is that the appeal filed by accused No. 2 deserves to be allowed and he is entitled to be acquitted, whereas the appeal filed by accused No. 1 deserves to be partially allowed. His conviction and sentence under sections 147 and 148 I.P.C. deserves to be set aside and he deserves to be acquitted of these charges. The conviction and sentence u/s 307 I.P.C. is set aside but the accused deserve to be convicted u/s 324 I.P.C. His conviction and sentence u/s 452 I.P.C. deserve to be confirmed.

14. The result is that the appeal filed by accused No. 2 is allowed and the order of conviction and sentence passed against him under all sections is set aside and accused No. 2 i.e. appellant No. 2 is acquitted of all the charges levelled against him. He is reported to be on bail. He need not surrender to his bail. His bail bond stands discharged.

15. The appeal filed by accused No. 1 is partially allowed. The conviction and sentence passed against him under sections 147 and 148 I.P.C. is hereby set aside and he is acquitted of these two charges. The order of conviction and sentence u/s 452 I.P.C. is confirmed. The order of conviction and sentence u/s 307 I.P.C. is hereby set aside but the accused No. 1 i.e. appellant No. 1 is convicted u/s 324 I.P.C. and he is directed to undergo R.I. for three years and to pay fine of Rs. 100/- in default of payment of fine to undergo R.I. for three months more. The substantive sentences to run concurrently. The accused No. 1 should surrender to bail within one month from today.