
(1987) 01 BOM CK 0027

In the Bombay High Court

Case No : Criminal Appeal No. 686 of 1983

Raghunath Krishna Mujumale and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-01-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162
Penal Code, 1860 (IPC) — Section 302, 323, 34

Citation : (1988) 1 BomCR 346 : (1987) 89 BOMLR 204 : (1987) MhLj 412

Hon'ble Judges : V.V. Vaze, J; S.N. Khatri, J

Bench : Division Bench

Advocate : Deepak More, for the Appellant; V.S. Jadhav, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Khatri, J.—This is an appeal by the original accused from the order of the learned Additional Sessions Judge, Pune, (Shri S.S. Pathak) convicting them under sections 302/34 and 323/34 I.P.C. and sentencing them to life imprisonment and R.I. for six months and a fine of Rs. 300/- or in default R.I. for one month on the two counts.

2. The first three appellants- Raghunath, Popat and Baban—are real brothers. Appellant No. 4 Leelabai is wife of the 1st appellant. The deceased Laxman Ramchandra Mujumale is their Kinsman. The incident in question occurred at Kondhapur, Haveli Taluka in Pune District on 5th February, 1983 around 9 in the field of one Baban Gangaram Mujumale (hereinafter called B.G.M. to distinguish from appellant No. 3). The appellants own agricultural land at village Kondhapur. They have their residential hut in the land itself. To the North of this hut at a distance of about 50 feet is situated a well. To the further North of the well, is the land of the deceased. There he used to reside in his hut with his wife Indubai (P.W. 2), mother Laxmibai (P.W. 3) and his children. Admittedly the appellants and the deceased were owners of the well. Both sides had right to take water

from it to irrigate their respective fields.

3. The prosecution case is that on the fateful morning, the deceased had gone to the well along with his wife and mother. While he was arranging the implements on the well for drawing water from it, the four appellants were seen by his wife Indubai coming running towards the well. Appellants Nos. 1 and 4 were armed with sticks and appellants 2 and 3 with iron bars. As soon as Indubai saw these persons, she alerted the deceased to run away from the well. The deceased fled to the field of B.G.M. He got stuck up in that field in the wal crop and fell down. The four appellants are alleged to have mercilessly battered him to death with their weapons. While the assault was still in progress, the prosecution allege, appellant No. 3 suddenly went running to his hut and fetched an axe. He is said to have given a few blows with it on and around the head of the deceased. Indubai and Laxmibai in vain tried to save him. In the process the two women themselves received blows from the appellants. The deceased breathed his last on the spot itself.

4. Thereafter the two women with the help of Subhash (10 year old son of the deceased) brought the dead body near their hut and placed it under a mango tree. Head Constable Vijay Kadam (P.W. 3) was contacted at the Shivapur Outpost. He rushed to the scene of offence and recorded the F.I.R. (Exh. 16) of Indubai (P.W. 2). Usual steps in the investigation followed. Autopsy over the dead body was held by Dr. Banerji (P.W. 9) on the night of 5th/6th February, 1983. He found 24 injuries on the body all ante mortem with extensive fractures of practically all the ribs and rupture of pleura on both sides and also of the upper lobes of both lungs.

5. Indubai and Laxmibai were also examined by Dr. Salve (P.W. 10) Six injuries were found on each of the two women. Recovery of weapons was made at the instance of some of the appellants. We shall refer to them while discussing the evidence.

6. All the four appellants pleaded not guilty to the charges under sections 302/34 and 323/34 I.P.C. They deny their complicity in the crime in toto. The pith of their defence is that on the material morning there had been a Maramari at the well between Laxmibai and Indubai on the one hand and appellants 3 and 4 on the other, in which the two women assaulted the latter without any justification whatever. Coming to know of the incident, the deceased rushed to the well and started abusing the appellants and their three labourers. A fight ensued between the deceased and the labourers who battered the deceased to death. The names of labourers are, however not disclosed in the defence. Under the circumstances the appellants claim a clean acquittal.

7. On consideration of the evidence before him, the learned trial Judge believed in its entirety the evidence of the two eye-witnesses which stood duly corroborated by the medical evidence. The learned Judge rejected the defence as "palpably false". He held that the four appellants had battered the deceased to

death in furtherance of their common intention to kill him. As regards Indubai and Laxmibai, he held that the appellants had caused simple hurts to them in furtherance of their common intention. Accordingly the Court recorded conviction u/s 302/34 and 323/34 I.P.C and sentences as indicated in the opening paragraph of this judgment.

8. Shri More for the appellants does not dispute, and in our opinion rightly, that the deceased met with homicidal death on the morning of 5th February, 1983. Apart from the account of the two eye-witnesses, the evidence of Dr. Banerji (P.W. 9) and the Inquest panchanama establish the fact of death and of its nature being homicidal. We now straight go to the evidence, connecting the appellants with the crime.

9. Shri More has taken up practically through the evidence of all the witness with particular accent on the two eye witnesses. Both these women have deposed to the details of the occurrence in the same sequence as stated in para 3 supra. According to them Appellants 1 and 4 were armed with sticks and Nos. 2 and 3 with iron bars. They came running from their hut towards the well where the deceased was fixing up the wheel to the pole of the well. Indubai alerted the deceased who started running towards the field of B.G.M. There was wal crop in field. The deceased got his feet entangled in the creepers and fell down. After he fell down, the appellants started battering him with sticks and iron bars in their hands. The two women unsuccessfully tried to cover the body of the helpless deceased with their own bodies. While the assault was in progress, appellant No. 3 dropped the iron bar in his hand and went running to his hut. He returned back with an axe and dealt blows with it to the deceased on the forehead, nape of the neck, left ear and right leg. The two women affirm that when the deceased opened his mouth, appellant No. 2 thrust his iron bar into his mouth exclaiming decisively drink water, drink water. In the process the two women also received injuries. When Subhash brought a pot of water and tried to give water to the deceased, appellants 2 and 4 are said to have kicked at the pot, breaking it into pieces. They further affirm that the appellants stayed at the spot to make sure that the deceased had really breathed his last. They left the place only after making themselves sure of his death.

10. Bhamabai (P.W. 8) is the daughter of Laxmibai and the sister of the deceased. Haribhau is husband of Bhamabai. On coming to know of the death of the deceased. Bhamabai and Haribhau went to the Police Chowkey and broke the news to Head Constable Kadam P. W. 13. He came to the scene of the offence and recorded Indubai's F.I.R., Exhibit 16.

11. We pause here a little to take stock of the injuries by the deceased, complainant and Laxmibai (P.W. 3) Dr. Banerjee's evidence shows that the deceased had sustained the following 25 ante mortem injuries:

1. Contused and lacerated wound present over top of head back, and mid line measuring "2 x 1" bone deep. The Margins were contused but clear cut and

edges retracted. Antemortem blood clots present.

2. Linear incised wound present over left side of forehead to measuring 3" x 1/3" x muscle deep. The margins contused but clear cut and edges retracted. Antemortem clots present.

3. Incised stab wound present in the web in between right third and forth finger measuring 1 1/2" x 1/2" into bone deep. Margin slightly contused, clear-cut, and edges reacted. Antemortem clots present.

4. Small C. L.W. present over left lower job middle third and inner surface measuring 1/4" x 1/4 " into muscle deep. The Margin contused regular and edges retracted Antemortem clots were present.

5. Big ecchymes is present over right arm upper 1/2 measuring 5" x 4". On section antemortem clots present.

6. Small C.L.W. present in right forearm and right elbow back each measuring 1/4" x 1/4" into muscle deep. Margins contused irregular and edges retracted. Antemortem clots present.

7. Nine small irregular abrasions present over right forearm posterior surface and upper 2/3, each measuring "1/4 x "1/4 cuticle deep. Antemortem clots present Whole right forearm was swollen up.

8. Abrasion present over right side buttock back measuring 1/2" x 1/2" cuticle deep. Antemortem clots present.

9. Linear contusion present over right thigh upper third and posterior surface measuring 4" x 1/2" on section. Antemortem blood clots present.

10. Linear obliquely placed contusions present over right thigh middle and front measuring 3" x 1/2 " on section antemortem clots present.

11. Abrasions present on right leg upper front measuring 1" x " 1/4 cuticle antemortem clots present.

12. Two contused and lacerated wound present over right leg middle third and front each measuring 1" x 1/4" x muscle deep. Margins were contused, irregular and edges retracted. Antemortem clots present

13. Four small irregular abrasions present over right leg inner surface and lower third each measuring 1/4" x 1/4" x cuticle deep. Antemortem clots present.

14. C.L.W. present over right foot dorsum and middle measuring 1/2" x 1/2" x muscle deep. Margins were contused irregular and edges were retracted, antemortem clots present.

15. Six small irregular abrasions present over left arm lower third and back each measuring 1/2" x 1/4" x cuticle deep. Antemortem clots present.

16. C. L. W. present over left elbow joint upper back measuring 1/2" x 1/4" x

muscle deep. The margins were contused and edges were retracted. Antemortem clots present.

17. Two small C.L.W. present just below left elbow back, each measuring 1/4" x 1/4" x muscle deep. Antemortem clots present.

18. C.L.W. present over left wrist joint inner part measuring 1" x 1/2" x bone deep associated with fracture dislocation left wrist joint. The margins were contused. Irregular and edges were retracted. Antemortem blood clots present.

19. Abrasions over left thigh upper part and posterior surface measuring 2" x 1/2" x cuticle deep. Antemortem clots present.

20. Three linear contusions present over left thigh third and posterior surface each measuring 4" x 1/2" on section antemortem clots present.

21. Vertically placed linear contusion over left thigh upper third and middle third and front measuring 5" x 1/2". On section antemortem clot present.

22. Abrasions present over left knee joint inner front measuring 1" x 1" x cuticle deep. Antemortem clots present.

23. C.L.W. present over left leg middle third and front measuring 1" x 1/4" x muscle deep. The margins were contused, irregular and edges were retracted. Antemortem clots present.

24. C.L.W. present over left ankle back on left heel outer and back measuring 1" x 1/2" x muscle deep. Margins were contused, irregular and edges retracted. Antemortem clots present.

The external examination of the body disclosed fracture of body of sternum middle, of left wrist and left ankle joint. There were extensive fractures of the right 7th, 8th and 9th ribs and left ribs 3 to 9. Upper lobes of both lungs with pleura were ruptured. In the opinion of the Doctor the death had resulted from traumatic and hemorrhage shock resulting from the multiple fractures and other injuries.

12. The claim of the two women that the deceased was extensively battered with sticks and iron bars is corroborated by Dr. Banerji's evidence. According to him there were as many as 17 contused lacerated wounds/ contusions, apart from more than a dozen of multiple abrasions. The fact that an axe was also used in the course of the assault, receives corroboration from the find of contused lacerated wound over the back of the head and linear incised wound on the forehead and an incised stab wound in the web between the third and fourth fingers of the right hand (injuries 1 to 3). Thus although there may be some discrepancies in the evidence of the two women as to the exact number of blows given by appellant No. 3 with the axe or the place where they exactly landed, the position remains unassailed that their evidence receives substantial corroboration from the medical evidence.

13. Dr. Salve (P.W. 10) who was at the material time posted Sassoon Hospital, Pune, examined Indubai and Laxmibai on 5-2-1983 around 10 p.m. Laxmibai had the following injuries on her person:

- (i) C.L.W. on left parietal region 1 1/2" x 1/4" x scalp.
- (ii) Contusion on left elbow suspected fracture on medial condyle of humerus left side.
- (iii) Weal mark on the back 6" x 1"
- (iv) Weal mark on the thigh and anteriorly 3" x 1/2".
- (v) Weal mark on right thigh anteriorly 3" x 1/4".
- (vi) Contusion on left buttock 3" x 2" reddish in colour.

14. Complainant Indubai had the following six injuries on her person:

- (i) Abrasion on left knee 1" x 1/4".
- (ii) Abrasion on left leg below knee lateral side 1/2" x 1/4".
- (iii) Abrasion on right thigh just above knee joint 1/2" x 1/4".
- (iv) Abrasion on left elbow back 3" x 1".
- (v) Weal mark on left infrascapular region 3" x 1".
- (vi) Weal mark on right infrascapular region 3" x 1".

15. As the complainant was suspected to have sustained fracture she was referred to the surgical department. However, the suspected fracture was not confirmed. Resultantly it will have to be held, as rightly done by the lower Court, that these women had suffered simple hurts only, six each. Now again the nature of injuries, their description and location corroborates the claim of the women that they were with sticks.

16. Shri More has pointed out some omissions in the F.I.R. (Exh. 16) of Indubai P.W. 1 and the police statements of the two women. According to him, these omissions are material and cast doubt on the claim of the two women that appellant 4 was armed with any weapon and further that they were injured during the course of the incident. We do not agree. It is true that in the first part of the F.I.R complainant has not in so many words stated that appellant No. 4 was also carrying a stick in her hands. However, while giving details of the incident she has stated that appellants Nos. 1, 2, 3 and Leelabai (appellant No. 4) came and started beating him (Laxman) with sticks and iron bars..... The above named persons started beating me and my mother-in-law." No omission, as suggested much less a material one, is made out, when the F.I. R. is read as a whole in a reasonable way.

17. According to Shri More, the complainant has not referred to this particular

aspect even in her statement recorded by the police later on. Similar omission is attributed to Laxmibai also in her police statement. We do not agree with Shri More, or the Sessions Judge that these omissions actually exist in the aforesaid statements of the two witnesses. In her Police Statement complainant Indubai specifically states, "Baban, Raghunath and Leelabai (appellants Nos. 3, 1 and 4) and so Popat (appellant No. 2) came running towards the well with sticks and iron bars." So also after naming all the four appellants, Laxmibai has stated in her police statement that appellant No. 1 had a stick in his hands and the others had iron bars with them. Had the learned Judge taken due care, he would have seen that these so-called omissions did not amount to contradictions as contemplated by the Explanation to section 162 Cri.P.C. As our experience goes, quite a few Magistrates and even Sessions Judges are not fully alive to the implications of this provision and admit a number of omissions which do not amount to contradictions. We would discuss the correct legal position in this regard at some length.

18. The Explanation to section 162 Cri.P.C. runs:

"An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to a contradiction, if the same appears to be significant and otherwise relevant, having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

In order attract this provision, an omission must in the first place appear to be "significant". Then it must be otherwise relevant, having regard to the context in which it occurs.

Lastly any question whether an omission amounts contradiction in the particular context has to be decided by the trial Judge as a question of fact on a plain reading of the Explanation. It is evident that it is only when all these requirements are fulfilled, that the omission can be treated as a contradiction and allowed to be proved.

19. To appreciate why this Explanation was incorporated in the Criminal Procedure Code of 1973 we have to go to Tahsildar Singh and Another Vs. The State of Uttar Pradesh, . Before this decision, there was a difference of opinion amongst the High Courts in the country, whether an omission amounts to a contradiction, merely because it is a material one. Some High Courts took the view that if the omission was material, it amounted to a contradiction and could be brought on the record as a contradiction. Other High Courts took a strict view that an omission, howsoever material, could never amount to a contradiction. In Tahsildar Singh, the Supreme Court by a majority of 4 to 1 endorsed the latter view and held that an omission, unless by necessary implication can be deemed to be part of an express statement, cannot be treated as a contradiction. The Supreme Court pointed out three possible situations in which an omission could by fiction amount to a contradiction. These situations are listed below with

illustrations:

"(i) when an recital is necessarily implied from the recital or recitals found in the statement: illustration: in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but in the witness-box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word " only can be implied i.e. the witness saw A only stabbing B;

(ii) a negative aspect of a positive recital in a statement: illustration in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness-box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexion man but also that he was not of fair complexion; and

(iii) when the statement before the police and that before the Court cannot stand together: illustration : the witness says in the recorded statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing i.e., at the same point of time, towards the northern lane, as well as towards the southern lane, if one statement is true, the other must necessarily be false."

20. The consequence of this decision was that unless an omission fell under one or other of these three descriptions, it could not be brought, on record, although it was material in itself. To mollify the rigour of this interpretation and put the law on an even keel, the Explanation was added to section 162. Now the materiality of an omission decides whether it amounts or does not amount to a contradiction. All the same, in order to decide the materiality, even now the Court has to be satisfied that the omission is significant, and that it is otherwise relevant having regard to the context in which it occurs. In other words, if an omission is insignificant it simply does not amount to a contradiction and should just not be allowed to be brought on record. If and only if a particular omission appears to the trial Judge to be "significant" and otherwise relevant in the context in which it appears, should he allow it to be proved. Only thereafter the question will arise at the final stage of the appreciation of the evidence, as to what extent, such significant omission casts doubt on the credibility of the witness. This then would be the approach while dealing with omission in police statements.

21. We would like to stress that Public Prosecutors also owe a duty to trial courts in this regard, to raise legitimate objection to the admission of insignificant or otherwise irrelevant omissions. Most often than not, the job is left exclusively to the trial Judge who may also-consciously or unconsciously be tempted to choose the path of least resistance by admitting all sorts of omissions on record. Needless to point out, such expedients often cause miscarriage of justice, apart from being against the provisions of law. We would also like to advert to the last

part of the proviso to section 162(1) Cri.P.C. which empowers a Prosecutor to use any part of the police statement in the re-examination of a witness, for the purpose of explaining any matter brought forth by the defence in cross-examination by providing a contradiction. It is worthwhile to reproduce the proviso in full, with emphasis on the concluding portion.

"Provided that when any witness called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872; and when any part of such statement is so used any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

22. We have seldom come across any case in which this salutary provision has been availed of by a Prosecutor, in order to restore the right perspective to a contradiction brought forth in the cross-examination of a prosecution witness. Obviously the sense in which the Court reads the testimony of such a witness, often gets distorted. At times, this may jeopardise the course of justice—particularly, where the contradiction is in the form of an omission. Such occasions might be rare. But then this palliative would not justify rendering the wholesome provision a dead letter. We hope the Prosecutors in trial Courts shall practise more alertness while dealing with omission and contribute their due share in sound dispensation of justice.

23. Reverting back to the omissions in the statements of Indubai and Laxmibai, we find that there are only two significant omissions amounting to contradictions: (1) In the F.I.R., Exh. 16, Indubai has omitted to say that she herself had covered the body of her husband, although she did state that Laxmibai had done so. (2) Both women have omitted to state in their statements that Subhash had brought a pot of water and that appellants Nos. 2 and 4 kicked the pot and broke it into pieces. Now to our mind these omissions are not material enough to cast any doubt on the overall credibility of the two witnesses. After all F.I.R. is not catalogue of all events. Some omissions are bound to be there, particularly when the informant is not in a composed state of mind. The omissions banked upon by Shri More do not impress us.

24. We shall now refer to the evidence of recovery of incrimination articles from some of the appellants. Blood group of appellants 1, 2, and 4 is "B". The evidence shows that at the instance of appellant No. 2, two iron bars (Articles 13 and 14) were recovered from under a heap of fodder near his house, This was done pursuant to the earlier information given by him. Similarly on a statement made by appellants No. 3, (Exh. 22) that he had buried an axe blade under a teak tree near his house, the blade of the axe (Article 15) was recovered. Chemical Analyser's Certificate Exh. 53 shows that the iron-pipe, Article 13, bears "B" group blood while Articles 14 and 15 bear human blood. Its group could

not be determined. The evidence of panch Vidyasagar (P.W. 4) on these recoveries has been rightly believed by the lower Court. Simply because this witness happened to be posted as a clerk in Tahsil office, in which campus is also located the police station, it will not be justified to infer that he is under the thumb of the police. Recovery of these instruments at the instance of the aforesaid two appellants is also a corroborative circumstance.

25. We need not refer at length to the evidence on motive. We agreed with the learned Judge that the appellants did not relish the deceased taking water from the common well, although he admittedly had four annas share in it. The evidence in the present case connecting all the four appellants with the crime is so cogent that even in absence of proof of motive, we would have acted on it without any hesitation.

26. Considering all the facts and circumstances cumulatively, we are more than satisfied that Indubai (P.W. 2) and Laxmibai (P.W. 3) are witnesses of truth. We accept as trustworthy, the core of their evidence implicating all the four appellants as the perpetrators of the assault on the deceased and themselves in the manner deposed to by them.

27. At this stage we may refer to the defence of the appellants, only to be rejected. The names of the three labourers alleged to have caused the death of the deceased, remain undisclosed. It is highly improbable to use the words of the learned trial Judge, "palpably false" that the three casual labourers had gone to the extent of killing a man and injuring two woman. At any rate there is no material whatever to raise such an inference. The participation of all the four appellants in the occurrence is established by the two eye witnesses, Dr. Sangale (D.W. 1) is examined by the defence to show that appellants No. 3 and 4 had also sustained injuries. Indeed, this fact lends support to the evidence of the eye witnesses. The defence has been rightly rejected by the lower Court.

28. Shri More submits that there is no adequate material on record to draw an inference against all the four appellants that they had the common intention to kill the deceased. In this regard he mainly relies on the prosecution evidence to the effect that appellant No. 3 had in the midst of the incident left the place, gone to his hut and brought the axe with him. It is only thereafter that he is alleged to have given blows with axe on the head and other parts of the deceased. According to him at the best appellant No. 3 could be assigned the intention to kill, but certainly not Appellant Nos. 1, 2 and 4. We find ourselves unable to agree with this contention. As many as 24 injuries (quite a few of these are multiple) were sustained by the deceased during the incident. The evidence of Dr. Banerji leaves no doubt whatever that the axe injuries on the head did not prove to be fatal at all. The death resulted from the rupture of the upper lobes of both lungs, pleura and fracture of the ribs. These fatal injuries could not have conceivably been caused by an axe. Indeed, as the evidence goes, there are absolutely no visible external marks of these injuries. Assault on the chest must obviously have been perpetrated by blunt objects and not by a sharp weapon.

Shri More points out that Article 15 (blade of the axe) is not sharp and could cause the damage, without leaving any external marks. Again we cannot agree. We have inspected this Article 15 in Court. Its blade, although not perfectly sharp, is also not entirely blunt. We have no doubt that Article 15 would have necessarily left some external marks on the chest, had it been wielded on that region. The assailants must have used iron bare and/or stick (not Article 15) for causing the injuries on the chest, which have ultimately proved to be fatal. Thus the circumstance relied upon by Shri More that appellant No. 3 had brought the axe from the hut in the midst of the incident loses much of its sting.

29. To recapitulate the duly established facts, the four culprits came running towards the well, armed with sticks and iron bars. On being alerted the deceased flees from the well. Unfortunately his feet get entangled in the wall creepers and he falls down. The four culprits give him a hot chase and assault him mercilessly, with iron bars and sticks. When the two women try to come to the rescue of the deceased, the four appellants do not spare them, and inflict half a dozen of injuries on each of them. While the assault is still in progress, appellant No. 1 drops the iron bar from his hand, goes running to this hut, fetches an axe and deals further blows with it, on the scene of offence for a couple of minutes to make sure that the deceased was really no more. The conclusion is inescapable that the common intention of all the four appellants was to kill the deceased and cause hurt to the two women. The lower Court has rightly convicted the four appellants under sections 302/34 and 323/34 I. P. C. We confirm the sentences also.

30. In the result this appeal is dismissed. Appellants Nos. 1, 2, and 4 are on bail. They are given time up-to 31st March, 1987 to surrender. Their bail bond shall stand cancelled after surrender. The appellant No. 3 is already serving his sentence.