
(2012) 03 BOM CK 0046
In the Bombay High Court
Case No : Criminal Appeal No. 213 of 1999

Rajukhan @ Azarkhan Patel

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 09-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 304

Citation : (2012) BomCR(Cri) 562

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : Joydeep Chatterjee in Criminal Appeal No. 213 of 1999 and Mr. S.S. Jadhav in Criminal Appeal No. 140 of 2011, for the Appellant; S.G. Nandedkar, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.H. Joshi, J.—Appellants were charged for offences punishable under Sections 302 r/w 34 of the Indian Penal Code, as well u/s 324 r/w 34 of the Indian Penal Code. Perused the record, and heard both sides.

2. The circumstances, in which the accused persons were charge sheeted and only two out of them were ultimately tried and were convicted, are as follows :-

(a) On 11.10.1997 at about 10.30 a.m. Imtiyazkhan and Fayazkhan went to their field for sowing.

(b)Yahya khan, who was present, noticed that accused Rajukhan, Rashid khan and Mukhtyarkhan were arriving to their field Gat No.16. He, therefore, rushed towards them.

(c) There was altercation between the two groups .

(d) As the prosecution story goes, Mukhtyar khan gave blows with knife on the left side of the chest of Parvez khan and Raju khan hit Yahya khan with knife.

Parvez khan ultimately succumbed to the injuries.

(e) Yahya khan filed the complaint, on which Crime No. 184 of 1997 was registered.

(f) Investigation was conducted by Police Inspector Shri Pandit Kendre PW 10 and he filed charge sheet for offences punishable under Sections 302 r/w 34 and 326 r/w 34 of the Indian Penal Code.

(g) Crime No. 185 of 1997 was registered against Yahya khan and others for offences punishable under Sections 147, 148, 149, 326 and 506 of the Indian Penal Code.

(h) The trial was held in the court of Vth Additional Sessions Judge, Beed and the order of conviction and sentence under Sections 304 Part II r/w 34 and 324 r/w 34 of the Indian Penal Code was passed.

3. Learned Sessions Judge has accepted the fact that the accused had acted in private defense, and held that they had exceeded in it. In the result, they were convicted for the offences punishable u/s 304 Part II r/w Section 34, as well u/s 324 r/w Section 34 of the Indian Penal Code .

4. Appellants have urged in support of following points :-

(a) Accused had suffered injuries.

(b) Those are proved by Exhs.75 and 76.

(c) The injuries suffered are not minor or negligible.

(d) Prosecution has failed to explain the circumstances in which injuries were caused.

(e) Genesis of offence has been withheld and/or is suppressed from the court.

(f) When the accused were put into a situation where the option was to do or die, sense and consciousness on their part as to measure of intensity of an assault in retaliation cannot be expected from the accused who were in the shoe of a victim at that moment.

(g) Therefore, the measure or gauge as regards exercise of defense and retaliation cannot be assessed in a golden scale.

5. Learned advocate for the appellant has placed reliance on the following judgments:-

(a) Amjad Khan Vs. The State,

(b) Braham Singh and Others Vs. State of Uttar Pradesh,

(c) AIR 1972 SC 244 [Hira Rai vs. the State of Bihar]

(d) Lakshmi Singh and Others Vs. State of Bihar,

(e) Mohd. Ramzani Vs. State of Delhi,

(f) Yogendra Morarji Vs. State of Gujarat,

(g) Makwana Takhat Singh Ratan Singh Vs. State of Gujarat,

6. Learned A.P.P. has supported the judgment based on the reasons, as adopted by learned Sessions Judge.

INJURIES TO ACCUSED

7. The prosecution has all through out maintained conspicuous silence on the aspect of injuries suffered by each and every accused.

8. In the cross-examination as well as in the statement u/s 313 of the Criminal Procedure Code the accused have suggested the graveness of assault on them and injuries and had boldly couched the claim of private defense.

9. The accused then sought reliance on the fact of the reasons, as adopted by learned Sessions Judge. the injuries suffered by them by calling the Medical Officer who had examined them as a defense witness.

10. DW 1 Dr. Jaganath rao Talwadkar, Exh.81 Medical Officer had examined Gulam Mukhtar Khan-Accused no.3 and Gulam Azarkhan-Accused no.1.

11. Perusal of record indicates that injuries suffered by accused no. 3-Mr. Gulam Mukhtar (Appellant in Criminal Appeal No. 140 of 2011) are as follows:-

(1) Incised wound right side of the forehead deep to the skull bone 2 cm. x 1/2 cm. deep to the skull bone. Regular edges are undermine and clean with fresh bleeding.

(2) Incised wound left side of the forehead 3 cm. x 1/2 cm. in to the deep and skulled bone. Regular, edges clean and undermine.

(3) Incised wound right parietal region 3 cm. x 1/2 cm. into deep a skulled bone, regular edges of clean and undermine.

(4) Per orbital inflammatory oedema left side.

(5) Two contusion marked at right and left scapular area 6 cm. x 3 cm. respectively.

All the injuries were within 24 hours. Injuries 1 to 3 were caused by hard and sharp object like a pointed iron bar while injuries4 and 5 were caused by hard and blunt object like a stone or stick. Injuries 1, 2, 4, 5 were simple in nature while injury no.5 is of grievous nature.

[quoted from page 119 of the paper book]

12. It is seen that four amongst five injuries suffered by Gulam Mukhtar Khan-Accused no.3 are simple.

As regards injury no. 3 DW 1 Talwadkar has opined as follows :-

Injury no.3 can be fatal if sufficient and adequate treatment was not given to the injured, he would have died. Forehead is vital part of the body. Injuries 1 to 4 are on vital part of the body. I have referred the patient to Civil Hospital, Beed for further treatment.

[quoted from page 120 of the paper book]

13. Injuries suffered by Gulam Azar Khan, though simple, are caused by hard and blunt object and are at vital organs/sites and are described by DW 3 as follows :-

(1) Contusion mark left renal angle 4 cm. x

4 cm. circular in shape.

(2) Incised wound left side of the forehead, 3 cm. x 1/2 cm. regular edges, undermine and clear.

(3) Contused lacerated wound left partial area, 2 cm. x 1/2 cm. x 1/2 cm. irregular.

(4) Inflammatory oedema right elbow joint.

[quoted from page 120 of the paper book]

14. DW 1 Talwadkar was suggested in the cross-examination the possibility of injuries caused to Gulam Mukhtar by fall. In reply to the question suggesting accidental injury, PW 1 has stated as follows:-

Injuries nos. 4 and 5 are not possible by fall on hard and blunt surface. Not corrector suggest that, I mentioned age of the injuries as within 24 hours because after examining the injuries I was not able to specify the shorter period/duration.

[quoted from page 122 of the paper book]

15. As regards injury no.3 suffered by Gulam Mukhtar being fatal, stated by DW1 Talwadkar, the prosecution even did not suggest that opinion given by DW 1 was incorrect, by any question or suggestion in the cross-examination.

16. The version of PW 10 Pandit Kendre, Police Inspector, is as follows :-

1.

At Pachegaon bus stand Raju khan and Mukhtyar khan were found amongst public by us. Their clothes were blood stained and they had sustained injuries. Two panchas were called and panchanama of their condition was drawn by me. Accused nos. 1 to 3 are the same persons present before the court. Panchanama Exh. 22 now shown to me is same, it bears my signature and that of the panchas, contents are correct.

2. Accused no.1 Raju khan was brought to the Georai police station, while accused no.3 Mukhtyar, as he was injured, was first sent to P.H.C. Georai and then to Civil Hospital, Beed.

3. On the same day at 5.00 p.m. the F.I.R. of Yavya khan, inquest panchanama of deceased Parvej and other papers were received by the P.S.O., Georai. A.S.I. Pandit registered offence under Crime No. 184/97 and handed over the papers to me for further investigation.

4. Since accused no.1 Raju khan was already present in the police station, he was arrested and his blood stained clothes were seized by me under a panchanama, in presence of the panchas. The panchanama now shown to me is same, it bears my signature and that of the panchas, contents are correct, it is at Exh. 23. The clothes are at article nos. 1 and 2. P.C. Andhra B. No. 708 on the same day brought the clothes of the deceased Parvej, which came to be seized under the panchanama. The panchanama now shown to me is same, it bears my signature and that of the panchas, contents are correct, it is at Exh.24. The clothes are at article nos. 3 to 6.

[quoted from page nos. 97 and 98 of paper book]

17. The investigating officer has admitted in his examination-in-chief itself that :-

(a) He went to Pachegaon bus stand after receiving the wireless message.

(b) There he found that Rajukhan and Mukhtyarkhan had blood stains on their clothes.

(c) They had sustained injuries.

(d) Panchanama of blood stained clothes was drawn and those clothes were brought before the court and he had identified those.

18. Exh. 23/C is the arrest panchanama pertaining to accused Raju khan @ Azar khan s/o Gulam Abbas khan Patel. The clothes i.e. pant and shirt of accused are noted to have blood stains.

It is not proved that blood found on the clothes of accused matched with the blood group of any or more amongst prosecution witnesses and not belonging to that of the accused persons.

19. From the evidence quoted and discussed in foregoing paragraphs, it is evident beyond any room of suspicion that the prosecution story suffers from the defect of deliberate act of prosecution to suppress the genesis of offence; while prosecution has a duty to pursue the prosecution case.

20. Prosecution ought never be partisan to either groups in clash, for favoring one and condemning the other.

21. Particularly in the background, that the genesis of the offence is suppressed, partial revelation as to injuries on the person of accused persons did not wash

away in totality the act of suppression. Due to initial act of suppression without disclosing the reasons and cause of serious injuries to accused persons, the trial court was led to assess the weight of the evidence brought by prosecution against the weight of probability of right of private defense by use of a golden scale. The weighing device of learned Sessions Judge was heavily exposed to the winds of bias blown by the partisan prosecution.

22. Had the prosecution explored and disclosed the genesis of incident, the Sessions Judge who was adjudicating the charge could have been better equipped with facts.

23. The prosecution had become selective-rather partisan and favoured the group of prosecution witnesses. In the result, the gauging device of court was exposed to influence due biased act of prosecution, who had selected and couched the story.

24. The finding that the defense was exceeded by the accused is thus vitiated due to act of the prosecution of influencing mind of the Judge by suppression of genesis of offence.

25. The trial Court was required to fathom and form an opinion, as to what should have been the force and intensity-impact of retaliation for self defense. While doing this job involving fine judgment was dragged by the prosecution in the field of speculation and subjectivity, which could have remained objective had all facts and genesis come before the court.

26. The degree, intensity and impact of retaliation would depend on -the basic rule in physics -the science of matters, that every action has equal and opposite reaction which as well applies to the mind, whether human or animal. Human and animal mind may show some difference in reflex, however, said rule of action-reaction certainly applies.

27. Therefore, Reaction i.e. retaliation by accused in defense i.e. exercise of right of private defense cannot be expected to be judged by any one, including a judge unless the action done by prosecution witnesses against the accused is brought on record by 14 cra213.99 the prosecution by proof of facts forming the genesis of offence.

28. In absence of proof of fact as to acts of injured prosecution witnesses or others which had led to injury to accused, opinion as to what was the threat, its degree and intensity, its perception by accused such as a threat of life on account of injuries on the vital organs of the body, is left to speculation.

29. Victims who are accused in present case are/were not expected to tolerate, endure and even suffer the assault, then like a judge gauge its magnitude, its degree and form an opinion as regards force with which the retaliation should be done and thereafter to apply it with arithmetic and mechanical precision.

30. It shall suffice to say that neither the accused acting in defense nor the court

would be sitting with the weighing device, such as used in scientific weighing devices aimed at accuracy in microns.

31. Only precision expected at this stage is of every effort required to save one's own life. Effort to prevent the loss of life of the aggressors who are victims of retaliation in defense would be ideal.

32. In the situation where a judgment is to be made by a sufferer of attack is to do or to die. Doing is rule of preference. The situation of do or die does not allow any such calculation and gauging with precision tools.

33. The judgment as to where the situation at the time of incident was that do or die, has to be made objectively. The objectivity would be possible and imperative if evidence is brought before the court impartially. Since the genesis is suppressed resultantly court got misled. Discovering suppression was not impossible, as was obvious, yet fact remains that learned Sessions Judge got misled, and accused reconvicted.

34. On considering the version of the investigating officer PW 10, learned Sessions Judge should have smelt and perceived foul and should have concluded existence of foul after reading the evidence of DW 1 Talwadkar and ought to have held that the genesis was suppressed by the prosecution.

35. This court, therefore, holds that the right of private defense having been recognized by the learned Sessions Judge, its excess as found by the learned Sessions Judge, is an error of law. The error is patent. Prosecution is guilty of duty to be fair to law. Prosecution has suppressed the genesis of offence.

36. In the result, appeal succeeds. Appeal is allowed. The judgment and order of conviction and sentence is set aside. The appellants/accused are acquitted of the offences with which they were convicted. Their bail bonds stand cancelled. Fine amount, if any, be refunded to them.