
(2012) 07 BOM CK 0126
In the Bombay High Court
Case No : Criminal Appeal No. 482 OF 2010

Sahebrao Shejul and Ramesh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-07-2012

Acts Referred:

Bombay Police Act, 1951 — Section 137
Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 143, 144, 147, 148, 149

Citation : (2013) 2 ABR 775 : (2012) BomCR(Cri) 612

Hon'ble Judges : A.V. Nirgude, J;A.H. Joshi, J

Bench : Division Bench

Advocate : Satej S. Jadhav, for the Appellant; V.D. Godbharle, Assistant Public Prosecutor State, for the Respondent

Judgement

A.V. Nirgude, J.—This appeal challenges the judgment and order passed by the learned Additional Sessions Judge-2, Jalna, in Sessions Case No. 72 of 2009, dated 30th October, 2010, convicting the appellants for offences punishable under Sections 302 and 324 read with Section 34 of the Indian Penal Code. They were ordered to suffer imprisonment for life and to pay a fine of Rs. 1,000/- with a default clause for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code. They were also separately sentenced for the offence punishable u/s 324 read with Section 34 of the Indian Penal Code and were directed to undergo R.I. for six months and to pay a fine of Rs. 500/- each with a default clause. The facts leading to the litigation can be stated as under:-

There were in all four accused before the learned Sessions Court. They were charged for the offences punishable under Sections 143, 147, 148, 302, 324, 504, 506 read with Section 149 of the Indian Penal Code and for the offence punishable u/s 137 of the Bombay Police Act.

2. The incident of riot and assault took place on 11th March, 2009, at about 08.00 to 08.30 p.m. in the vicinity of village Borgaon Khadak, Taluka Bhokardan,

District Jalna. It is alleged that the appellants and their companions assaulted first Subhash, the deceased, with arms such as sticks, iron rods, axes and stones. Besides the four accused including the appellants who faced the trial, there were three more named assailants, viz. Sunil Shejul, Sandip and Sunil Vishwanath. While this was going on, PW 4 Raju (brother of Subhash) rushed to his brother's help, but he too was assaulted. Soon Subhash's other family members, such as PW 6 Bhaurao (father), PW 7 Devidas (his brother) and PW 11 Latabai (his wife) rushed to the spot and they too tried to rescue Subhash. But, they were also assaulted by the appellants and their companions. In the melee, Subhash sustained injuries on his head and collapsed on the ground. Devidas-PW 7 as well as Raju-PW 4 also sustained minor injuries. On one hand, Subhash was taken to hospital by some of his relatives, and on the other hand, PW 4 rushed to the police station and lodged his report, which was registered as Crime No. 10 of 2009, initially for the offence punishable under Sections 323, 324, 504, 506 read with Section 34 of the Indian Penal Code, at 22.45 hours.

3. Subhash, the deceased, was in injured condition and was taken to hospital at Aurangabad, but he died on the next day. The police therefore recorded supplementary statement of PW 4 and added offences, such as punishable under Sections 302, 143, 144, 147, 148 read with Section 149 of the Indian Penal Code, to the previous crime. The investigation then proceeded.

4. As said above, after the trial, the appellants were convicted not for offences of rioting, but for the offence of murder having committed with common intention with other accused. The learned Judge held that this was not a case of riot and that the prosecution could not prove that the appellants and others were members of unlawful assembly which had a common object of committing murder and causing hurt to the victims.

5. The learned counsel for the appellants therefore argued that if the other two accused were acquitted for not sharing the intention with the other accused, the present appellants would also fall in similar category and should have been acquitted. We, therefore, have to examine as to whether the evidence against the appellants is sufficient to hold that they shared common intention of committing murder and causing injuries.

6. The prosecution mainly relies upon eye-witness account of five prosecution witnesses i.e. PW 4, PW 6, PW 7, PW 11 and PW 14.

7. PW 4 very clearly deposed that he saw all the accused including the assailants who were not accused in the trial court assaulting his brothers Subhash and Devidas. He said, they -assailants- were armed with sticks and iron rod. He then said, his brother Subhash fell down after suffering a bleeding injury on his head and mouth. He added that the appellants assaulted him too. He described this assault saying that appellant No. 1 Sahebrao caught his hands and appellant No. 2 Ramesh dealt blows of axe handle and stick on his waist and head. He said, he and other accused Kishor threatened and abused him.

However, in cross-examination, it was brought on record that this witness while describing the incident to the police earlier had stated that juvenile offender Sunil had given stone blows on Subhash's head and back. He further stated to the police that other juvenile offenders Sandip and Sunil Vishwanath dealt blows of iron rod on Subhash's head and back. It is thus clear from his deposition that this witness did not attribute any specific role to the appellants as regards causing injuries to Subhash. On the contrary, the fatal injury on Subhash's person, as per his indication, was caused by other accused. He also added during his cross-examination that appellant Sahebrao had stone in his hand.

But the cross-examiner for the appellants could not wipe out one vital allegation made by this witness in respect of the appellants, when he said that the appellants attacked him and gave axe handle blows on his person.

The question is, whether this witness suffered corresponding injuries? In order to find out that, we went through the deposition of PW 2 Dr. Samina Kausar. She said that on 11th March, 2009, witness PW 4-Raju had come to her for medical treatment. She said that she found one C.L.W. on Raju's head and one contusion on back of his shoulder. The witness clearly gave authorship of these two injuries of appellant No. 2 Ramesh, and as said above, this allegation made by him in examination-in-chief is not disturbed even after extensive cross-examination.

8. PW 7-Devidas is the second most important witness, who stated that when he heard alarm near Vishnu's shop where Subhash had gone, he and his family members rushed to there. He said, that spot was about 50 to 60 feet away from his house. He then said, he saw the appellants Sahebrao and Ramesh giving axe blows on the head of his brother Subhash. He also said that he saw Sahebrao assaulting Raju-PW 4 with axe. He said, his mother was also assaulted in the melee. He then said specifically that he himself was assaulted by appellant No. 1 with axe and stone.

In the cross-examination, it was proved that this witness had not stated before the police earlier that appellant No. 1 Sahebrao had given axe blow on the head of the deceased or that appellant No. 1 had assaulted PW4-Raju with axe. He even had not stated to the police that he himself was assaulted by appellant No. 1 Sahebrao with a stone. On the other hand, he admitted that he had informed to police that juvenile offenders Sunil and Sandip had assaulted Subhash on his head with stick and iron rod. With these admissions, his allegation that the appellants dealt axe blows on the head of Subhash, is eliminated and same cannot be believed. Even his allegation that appellant No. 1 assaulted him with axe and stone would fade into insignificance and cannot be believed.

This witness too had suffered injuries and PW 2 proved them by saying that she found one CLW on Devidas's head and one contusion on his back. She said, both these injuries are possible with wooden stick etc. However, this witness did not really give authorship of his own injuries to any accused much less the appellants. This witness also confirmed the earlier version of Raju-PW 4 that the

juvenile offenders Sunil and Sandip were the assailants and authors of fatal injuries sustained by Subhash.

9. PW 1 the medical officer stated that at about 09.45 p.m. on that day Subhash was brought to him at P.H.C. Hasnabad. He said, Subhash had suffered head injury and was unconscious. He said, as per his notes in his M.L.C. register, he could show that Subhash had suffered two contused lacerated wounds on his head.

10. In addition to this, PW 3 Dr. Mahesh Jambhure another medical officer stated that on 12th March, 2009, Subhash's dead-body was brought before him for postmortem examination. He confirmed that Subhash had sustained two injuries on his head. He also stated that there were five more injuries on his person, but they were not fatal ones. He clearly mentioned that on internal examination he found that the injuries on his head caused fracture of skull and further damage to the brain. He then stated that the cause of death was head injuries.

It is thus clear from this evidence that Subhash died due to two head injuries which he suffered at the time of incident. The depositions of two witnesses which we discussed earlier clearly gave authorship of these injuries to the other accused.

11. Let us now examine the evidence of other eye witnesses. The third eye witness is Bhaurao Shejul (PW6). He is the father of the deceased. He stated that when he heard alarm, he rushed to Vishnu's shop. He said that appellants exchanged blows with Subhash. He said very clearly that the appellants gave axe blows to Subhash. He also said that appellant Sahebrao threw stone on Subhash's chest. He also said that he saw appellant No. 1 Sahebrao assaulted Raju-PW 4. He said, he too was assaulted by other accused and sustained injuries.

But, in the cross-examination, he admitted that when his statement was recorded by police, he disclosed to them that Subhash was assaulted by other accused Sunil, Sandip and Sunil Vishwanath. He also admitted that his accusation that the appellant Sahebrao assaulted Subhash with axe and pelted stone on his chest and that he further assaulted PW 4 with axe was not recorded in his police statement. He tried to suggest that he had stated those facts to the police and pleaded ignorance as to why the police did not record them. This witness's cross examination thus nullified his allegation that it was the appellants who assaulted Subhash with axes. He admitted that he informed the police that other three accused assaulted Subhash. He thus impliedly gave authorship of fatal injuries of Subhash to other accused.

12. PW 11 is Latabai wife of late Subhash. She said, on hearing alarm she went running towards Vishnu's shop. She said that she saw appellant No. 1 Sahebrao giving axe blow on Subhash's head. She also added that appellant No. 2 Ramesh dealt axe blow on Subhash's head. She also added that accused Sunil assaulted her husband by means of stick. Accused Sandip also assaulted her husband. She

said, her husband fell down. She said, appellant No. 1 then threw a big stone on her husband's chest.

During cross-examination, it was found that this witness did not state to the police that appellant No. 1 Sahebrao dealt axe blow on Subhash's head and that he threw stone on his chest. She further admitted that in her statement recorded by the learned Judicial Magistrate, First Class, u/s 164 of Cr.P.C., she had not stated that appellant No.2 Ramesh dealt axe blow on Subhash's head. This cross-examination thus clearly eliminated the accusations made against the appellants that they authored head injuries of Subhash.

13. PW 14 is Gajanan Parve, said, at the time of incident he was present at Vishnu's shop. He said, he saw crowd in front of the shop and quarrel was going between Subhash and appellants & others. He said, appellants Sahebrao and Ramesh and others were assaulting Subhash, Devidas, Bhaurao with sticks and axe. He said, he saw Subhash lying unconscious on the spot. He said, he tried to pacify the assailants, but, he said, it was in vain. Despite cross-examination, nothing come on record to indicate that this witness was not present at the time of incident and did not witness it. However, this witness did not disclose the details of the incident. He did not state that the appellants were authors of Subhash's head injury.

14. Taking over all view of the depositions, it is seen that the other accused Sunil, Sandip and Sunil Vishwanath authored the injuries on Subhash's head. The appellants did not author these fatal injuries. Beside, there is no specific allegation that the appellants caused any particular injury suffered by the deceased. It can therefore be said safely that the appellants were not party to causing fatal injury to Subhash. It can therefore be said that they did not share the intention of the other assailants of Subhash for causing fatal injury on his head.

15. In our view, the learned Judge of the trial Court on this aspect committed grave error that he believed deposition of PW 4-Raju that it was the appellants who assaulted his brothers Subhash and Devidas. This witness clearly admitted in cross-examination that Sunil, Sandip and Sunil Vishwanath had assaulted Subhash. This admission brought in his deposition is erroneously ignored by the learned Judge. Despite of this admission, the learned Judged picked up PW 4's omnibus statement that he saw the appellants assaulting his brothers Subhash and Devidas. We discussed earlier that Subhash died due to two injuries caused on his head. These injuries were not authored by the appellants, and therefore, they deserved benefit of doubt as far as assault on Subhash is concerned.

16. The learned Judge also erroneously held that PW 6-Bhaurao Shejul stated that appellants assaulted Subhash. However, as discussed above, this allegation against the appellants was a material omission. The learned Judge ought to have ignored this damning aspect of the deposition of this witness.

17. The learned Judge even made an error in appreciating the deposition of PW 7-

Devidas Shejul. He said that he would believe this witness when he categorically deposed that appellant No. 2 dealt a blow of axe on Subhash's head. This allegation was a material omission and the same was conveniently ignored/forgotten by the learned Judge. Even this witness admitted that other accused Sandip and Sunil assaulted Subhash with iron rod and stick on his head.

18. We are of firm view that the learned Judge did not appreciate the evidence properly as far as it relates to the appellants. We also hold that if the learned Judge did not believe the prosecution evidence against the other two accused Kishor and Nana while holding that they did not share any intention of committing murder of Subhash, the same finding ought to have been recorded in respect of the appellants. Thus, the appellants deserve acquittal of the offence punishable u/s 302 read with Section 34 of the Indian Penal Code.

19. The question is, whether the appellants deserve acquittal for offence punishable u/s 324 read with Section 34 of the Indian Penal Code? The answer is in negative. PW 4 very clearly stated and we discussed it in earlier part our judgment that these appellants assaulted him and caused injuries which were proved by PW 2. There is practically no cross-examination on this aspect of the case. PW 4 thus proved that appellant No. 1 caught his hands and appellant No. 2 dealt blows with handle of axe on his head and back. We are, therefore, inclined to believe this part of the evidence. We have no hesitation to hold that the appellants should be convicted for the offence punishable u/s 324 read with Section 34 of the Indian Penal Code.

However, as the appellants are in custody, we would hold that they deserved imprisonment to the extent of period which they have already undergone for this offence.

ORDER

1. The appeal is partly allowed.
2. The appellants are acquitted of the offence punishable u/s 302 read with Section 34 of the Indian Penal Code.
3. The appellants are convicted for the offence punishable u/s 324 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for the period which they have already undergone and to pay a fine of Rs. 500/- each. In default of payment of fine amount they shall further undergo rigorous imprisonment of three more months.
4. If fine amount is already deposited by the appellants, same shall be paid to PW 4 Raju s/o Bhaurao Shejul.
5. Muddemal property, being worthless, be destroyed after appeal period is over.