
(2015) 02 BOM CK 0111

In the Bombay High Court

Case No : Criminal Revision Application Nos. 75 and 158 of 2002

Sambha and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 06-02-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 323

Citation : (2015) ALLMR(Cri) 1577 : (2015) 2 BomCR(Cri) 154

Hon'ble Judges : V.M. Deshpande, J.

Bench : Single Bench

Advocate : M.V. Deshpande, for the Appellant; S.A. Ambad, APP, G.J. Karne and D.R. Shelke, Advocates for the Respondent

Judgement

V.M. Deshpande, J.—The applicants in Criminal Revision Application No. 75 of 2002 were convicted by the learned Judicial Magistrate, First Class, Nanded on 19.3.1999 in Regular Criminal Case No. 734 of 1995.

They were convicted for the offence punishable under Section 148 r/w Section 149 of the Indian Penal Code and on that count they were sentenced for rigorous imprisonment for one month and to pay a fine of Rs.200/-, in default to suffer further rigorous imprisonment for seven days.

They were also convicted for the offence punishable under Section 323 r/w Section 149 of the Indian Penal Code and on that count they were sentenced for rigorous imprisonment for one month and to pay a fine of Rs.100/-, in default to suffer further rigorous imprisonment for seven days.

The applicants were also convicted for the offence punishable under Section 326 r/w Section 149 of the Indian Penal Code and on that count they were sentenced for rigorous imprisonment for two years and to pay a fine of Rs.1000/-, in default to suffer further rigorous imprisonment for one month.

2. Feeling aggrieved thereby, the applicants preferred Criminal Appeal No. 25 of 1995 in the court of the learned Sessions Judge at Nanded. The learned Sessions

Judge, Nanded, though dismissed the appeal, modified the order of conviction. Instead of conviction for the offences punishable under Sections 148, 323, 326 r/w Section 149 of the Indian Penal Code, all the applicants were found to be guilty for the offence punishable under Section 325 r/w Section 149 of the Indian Penal Code and they were directed to suffer rigorous imprisonment for three months and to pay a fine of Rs.2000/-, in default to suffer further rigorous imprisonment for three months. The applicants were acquitted for the offence punishable under Section 326 of the Indian Penal Code.

Against their conviction under Section 325 r/w Section 149 of the Indian Penal Code by the learned Sessions Judge, the present applicants have preferred Criminal Revision Application No. 75 of 2002.

3. Since, learned Sessions Judge acquitted the accused persons for the offence punishable under Section 326 of the Indian Penal Code, the first informant filed a Revision to this court bearing Criminal Revision Application No. 158 of 2002 and prayed for restoration of the order of conviction and sentence passed by the learned trial court.

Since both the Revisions arise from one and the same proceedings, both the Revisions are heard simultaneously and same are decided by this common judgment.

4. I have heard Shri M.V. Deshpande, learned counsel for the applicants/original accused nos. 1 to 5, Shri S.A. Ambad, learned Additional Public Prosecutor for respondent/State and Shri G.J. Karne, learned counsel for respondent/first informant in extenso. With their able assistance, I have gone through the record and proceedings.

5. The first informant Mahadu and the accused persons (hereinafter will be referred by their position in the trial court) are cousins is an admitted fact. Accordingly, agricultural field of the first informant and the agricultural field of accused Sambha are adjacent to each other is also an admitted position.

6. The prosecution case briefly stated is as under:-

On 25.4.1995, first informant Mahadu lodged a first information report with police station Mudkhed (Exh.35). The said was recorded as Crime No. 53 of 1995 for the offences punishable under Sections 143, 147, 148, 324, 323 of the Indian Penal Code. The first information report states that first informant is having his agricultural land at Amdura, which admeasures 8 acres. In the agricultural field Babhul tress are standing. Adjacent to his agricultural field, field of accused Sambha is situated. There is a long standing dispute between him and Sambha on account of Babhul trees.

First information report further proceeds that on 25.4.1995 at 3.00 p.m. first informant went to his field to cut Babhul trees and at that time when he was keeping those cut wood in the bullock cart, that time all the accused persons came to him and challenged as to why he has cut the Babhul trees standing in

their agricultural field. The first information report further states that first informant was chased by the accused persons and they overpowered him in the agricultural field of one Mahadu Bhivji Pawar and they all assaulted him by means of Babhul sticks on his head, left leg and right hand. He narrated in the first information report that this incident occurred at 6.00 p.m. and the incident was seen by his brother Datta. At the time of assault, his nephew Kailash tried to intervene, however, he was also assaulted. Due to hue and cry his sons Vilas and Avinash came and they also witnessed the incident.

After completion of the usual investigation, charge sheet was filed against all the accused. The charge was framed by the learned Magistrate and it was explained to the accused persons. They denied the charge and claimed for their trial.

In order to bring home the guilt, the prosecution examined eight witnesses and also relied upon the documents which were proved during the course of trial.

Learned trial court, on appreciation of the evidence recorded a finding of guilt against each of the accused persons and sentenced them to suffer imprisonment as observed in the opening paragraph of this judgment.

7. After hearing the respective counsel and after having gone through the entire record, following questions arise for my determination.

(1) Whether all the accused persons are responsible for the injury suffered by first informant Mahadu, and consequently, all of them should be convicted for the offence punishable under Section 325 r/w Section 149 of the Indian Penal Code ?

(2) Whether the appellate court was justified in acquitting the accused persons for the offence punishable under Section 326 of the Indian Penal Code ?

8. The incident in question is dated 25.4.1995. According to the first information report, the incident occurred at 6.00 p.m. The first informant Mahadu was referred to the Primary Health Centre, Mukhed by police. He was examined by Dr. Syed Maqbool Syed Najir Ahmed (PW 2). He examined Mahadu at 10.25 p.m. On examination, Dr. Syed Maqbool (PW 2) found following injuries on the person of Mahadu.

(1) A contusion wound measuring 15 x 10 cm. on lower 1/3rd of R.F. laterally.

(2) A contusion wound 12 x 8 cm. on left side of back above renal angle.

(3) A contusion wound 10 x 6 cm. on left parietal area laterally.

(4) A contused lacerated wound 6 x 3 cm. into muscle deep on upper part of 1/3rd of left leg anteriorly.

(5) A contused wound admeasuring 10 x 4 cm on right foot laterally.

Dr. Syed Maqbool issued medical certificate (Exh.39). Since the doctor was of the opinion that injury no.1 must have been fracture, therefore, the said fact was mentioned by him in the certificate.

According to Dr. Syed Maqbool, each of the injury was within six hours. According to him, injury nos. 2 to 5 were simple. The injuries were caused by hard and blunt object. He referred injured for further medical treatment at Civil Hospital, Nanded.

During his evidence, PW 2 Dr. Syed Maqbool produced the x-ray plates, which he has obtained from Civil Hospital, Nanded. The report was prepared by Dr. Khadse in his presence (Exh.40). Dr. Syed Maqbool is very specific on examination of x-ray plates that Mahadu suffered fracture to his right ulna bone and according to him, injury no.1 was grievous one. His evidence would reveal that at the time when he examined patient he was not sure about fracture on the left leg, therefore, it was not mentioned in his certificate, however, the x-ray shows that Mahadu suffered fracture on the left foot also.

9. The prosecution has examined Vijaykumar Hashanna Bhusawar (PW 6), who was working as x-ray technician in Gurugobindsingh Memorial Hospital, Nanded, where the x-ray was done. He proved the x-ray plates of Mahadu. Those are at Exhs. 49 to 51.

10. A specific suggestion was given to PW 2 Dr. Syed Maqbool during his cross-examination that the injuries appearing on the person of Mahadu are possible if the person falls on the ground due to intermingling of his legs. The said suggestion was stoutly denied by the doctor.

11. From the medical certificate (Exh.39), x-ray plates (Exhs. 49 to 51) and the evidence of PW 2 Dr. Syed Maqbool, it is amply clear that Mahadu suffered the injuries and fracture and those injuries and fracture cannot occur due to fall on the ground by a person himself nor it is the case that the injuries are self-inflicted one.

Consequent to this, the further question is, who is the author of the said injuries caused to Mahadu the first informant. According to the prosecution, all the persons are responsible.

12. In the present case, prosecution has examined Kailash Pawar (PW 3), Avinash Pawar (PW 4) and Datta Pawar (PW 5) as eye witnesses. Their evidence show that they claim that they are the witnesses to actual occurrence of the incident.

PW 3 Kailash is nephew, PW 4 Avinash is son and PW 5 Datta is brother of injured Mahadu. Thus, these witnesses are closely related witnesses to the injured and are interested one.

Merely because a witness is in close relation with the injured or having interest with the first informant, his evidence is not required either to be discarded or viewed with tainted glasses. However, at the same time, while appreciating such evidence more care and caution is required. The court should search for the other attending circumstances available in the prosecution case for corroboration.

13. Keeping in mind the above principles, let us examine and scrutinize the evidence of these eye witnesses in the light of the evidence of first informant Mahadu (PW 1) and the first information report (Exh.35).

14. PW 3 Kailash, PW 4 Avinash and PW 5 Datta claim that they were with Mahadu (PW 1) in the field at the time of cutting of Babhul trees and when they were putting the cut wood in the bullock cart and were about to proceed towards village, all of a sudden all the accused persons appeared on the scene armed with sticks. Therefore, they ran away from the field, however, they were chased by the accused persons and they saw the incident of assault on Mahadu.

15. The first information report (Exh.35) is completely silent about the fact that these eye witnesses were accompanying Mahadu when he proceeded to the agricultural field at 3.00 p.m. Further, the first information report is also silent that these persons were with first informant and/or they also cut Babhul trees. It is also not stated in the first information report that these persons helped Mahadu in putting the cut wood in the bullock cart.

The first information report is not an encyclopedia of the prosecution case, however, non-mentioning the presence of these three eye witnesses in the first information report assumes importance. Normally, the first informant will not forget to mention presence of his son, brother and nephew in the first information report to the effect that they were with him when he proceeded in the agricultural field.

No doubt true that there is a reference of presence of these persons in the first information report as the witness to the occurrence of the incident, however, the court cannot keep a blind eye on the aspect that the incident has occurred at 6 O' clock in the evening when the matter was reported to the police in the night at 11.25. Thus, there was ample time available with the first informant.

16. Even from the substantive evidence of PW 1 Mahadu the court has reason not to believe the eye witnesses. In the examination-in-chief itself Mahadu has narrated as under :-

Due to injuries I became unconscious. After about one hour I regained consciousness. Then I went to my house and from there to police station. I lodged report at the Mudkhed police station. None of the eye witnesses deposed before the court that Mahadu was unconscious. Further, if Mahadu was unconscious and these three witnesses were present with him, it is really hard to believe that they will allow Mahadu to remain there in such condition for a period of one hour. All these eye witnesses are very close relatives of Mahadu. Allowing Mahadu to remain in unconscious state for a period of one hour by these eye witnesses is most unnatural and it creates serious doubt about their presence itself at the spot and nearby as claimed by them to witness the incident in question.

Further the evidence of these three witnesses would reveal that they were

cutting Babhul trees with Mahadu and they were having axe in their hands. It is not the prosecution case nor any of the eye witnesses including the injured Mahadu state that at the relevant time the accused persons were armed with axe. On the contrary, on chorus they state that the accused persons were armed with Babhul sticks.

It is really hard to believe that the four persons armed with axe will not resist and will run away from the spot in view of the chase by the accused persons who were not armed with any deadly weapon. Further, there is nothing in the prosecution case to show and suggest that the accused persons were having their own terror in the village so that even a person armed with axe will frighten to face the accused persons.

Further, according to the prosecution case, as reported in the first information report and also from the evidence of PW 3 Kailash, Kailash tried to intervene, however, he was assaulted by accused Saheb on his hand and he sustained injury. In cross-examination, Kailash states that he suffered bleeding injury. Worth to note in the light of this tall claim; (1) Kailash was not referred for his medical examination by police nor there is anything to suggest what type of injury was caused to him, also no injury certificate to that effect is on record; (2) Kailash claims that he sustained bleeding injury, however, his clothes were not stained with blood.

In so far as eye witness Kailash is concerned, his evidence would reveal that after the challenge from accused persons he also ran away from the spot, however, he admitted in his cross-examination that while recording his police statement he did not state to the police that he also ran away from the spot.

Cumulative effect of afore said discussion creates serious doubt in the mind about the presence of Kailash and his attribution to the assault by accused Saheb on him. Therefore, his evidence is not trustworthy and has to be discarded.

17. Avinash (PW 4) is son of Mahadu. He claims that he has seen the occurrence from 100 feet, however, it appears to be the improvement. His evidence would reveal that his uncle Ganesh reported the matter to police, then police reached to the spot and they took his father in jeep to police station. There is no iota of reference to these events in the evidence of PW 1 Mahadu. The first information report is lodged by Mahadu and not by Ganesh as claimed by Avinash. In that view of the matter, it is crystal clear that this witness is not witness to the truth. Likewise, the evidence of Datta needs to be rejected for the afore said reasons only.

18. Thus, the entire case of the prosecution is dependant on the evidence of PW 1 Mahadu. There is no doubt in my mind that Mahadu was assaulted.

19. The accused persons are convicted with the aid of Section 149 of the Indian Penal Code. Section 149 of the Indian Penal Code creates a specific, distinct and substantive offence. Therefore, there ought to be clear finding as to what was

the object of unlawful assembly and if so whether the object was unlawful. In the present case, there is no such evidence on record. It appears that there was a long standing dispute between Mahadu and accused no.1 Sambha. The first information report clearly reflects about such dispute only with Sambha. There is nothing in the first information report that other accused persons, though they are brothers of Sambha were having joint cultivation. Even from the witness box Mahadu does not state in respect of jointness of the accused persons and/or his dispute with them. Thus, it is crystal clear that the dispute in respect of Babhul trees was going on in between first informant and accused no.1 Sambha alone. In that view of the matter, there is no doubt in my mind that the author to the injuries appearing on the person of Mahadu is only accused no.1 Sambha. Roping and/or implicating the other accused persons at the hands of Mahadu, therefore, cannot be ruled out completely, especially when there is no evidence at all whatsoever in nature to show that the other accused persons were sharing common object with Sambha. Therefore, the accused nos 2 to 5 cannot be convicted with the aid of Section 149 of the Indian Penal Code.

Resultantly, I hold that it is accused no.1 Sambha Baburao Pawar alone who is responsible for the assault on injured Mahadu.

20. In so far as Criminal Revision Application No. 158 of 2002 filed by Mahadu is concerned, it will be useful to have the reference to Section 326 of the Indian Penal Code. Same is as under :-

326. Voluntarily causing grievous hurt by dangerous weapons or means Whoever, except in the case provided for by Section 335, voluntarily, causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Thus it is clear that in order to attract the provisions of Section 326 of the Indian Penal Code. The grievous injury must be caused by dangerous weapon or means. Further, the learned lower appellate court has rightly observed that in absence of evidence to show that the sticks were mounted with some sharp blade or sharp point or heavy metal, the same cannot be regarded as lethal weapon.

According to the learned appellate court on the available material on record the stick which was used was not lethal weapon. Therefore, learned lower appellate court, in my view, has rightly acquitted the accused persons for the offence punishable under Section 326 of the Indian Penal Code. I see no reason to differ with the reasoning given by the learned Sessions Judge.

21. The upshot of the afore said discussion leads me to pass the following order.

ORDER

- (i) Criminal Revision Application No. 75 of 2002 is partly allowed.
- (ii) The conviction of applicant no.1 Sambha Baburao Pawar for the offence punishable under Section 325 of the Indian Penal Code and sentence of three months as awarded by the appellate court is hereby confirmed.
- (iii) The applicant no.1 Sambha shall surrender to his bail bonds.
- (iv) The trial court is directed to take necessary steps to secure presence of applicant no.1 Sambha Baburao Pawar for serving out the jail sentence.
- (v) Applicant no.2 Saheb Baburao Pawar, applicant no.3 Bapuji Baburao Pawar, applicant no.4 Gandhi Baburao Pawar and applicant no.5 Keshav Dhondiba Pawar are hereby acquitted for the offence punishable under Section 325 r/w Section 149 of the Indian Penal Code. Their bail bonds stand cancelled. Fine amount, if any paid by them, be refunded to them.
- (vi) Criminal Revision Application No. 158 of 2002 is hereby dismissed.