
(1995) 06 BOM CK 0051
In the Bombay High Court
Case No : Criminal Appeal No. 525 of 1993

Sampat Ramrao Shelke	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 27-06-1995

Acts Referred:

Evidence Act, 1872 — Section 101, 105, 114, 3, 59
Penal Code, 1860 (IPC) — Section 149, 304

Citation : (1996) 1 BomCR 224

Hon'ble Judges : Vishnu Sahai, J;G.R. Majithia, J

Bench : Division Bench

Advocate : V.M. Thorat, P.N. Patil and Ratnakar Singh, for the Appellant; R.Y. Mirza, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Vishnu Sahai, J.—The appellant aggrieved by the judgment and order dated 31-7-1993, passed by the Additional Sessions Judge, Baramati, in Sessions Case No. 20 of 1992 convicting and sentencing him to under-go 7 years Rigorous Imprisonment and to pay a fine of Rs. 5,000 and in default to further suffer 2 years rigorous imprisonment, u/s 304, Part I I.P.C., has come in appeal before us.

2. The prosecution case in brief runs as under :

The informant Rajendra (P.W. 1) runs a grocery shop known as "Tushar Kirana Stores". The aforesaid shop is located in village Khamgaon, Taluka : Daund, District Pune. On 5-3-1991 and 6-3-1991 there was a fair in the informant's village. On 6-3-1991 between 7.30 and 8.00 p.m. while the informant was in his grocery shop, the acquitted accused Ashok Baban Nagawade and his friends came there and started threatening him and his brother Sanjay who also happened to be there. Sanjay is alleged to have lodged an F.I.R. at Police Station Yewat pertaining to this incident.

At about 3.00 p.m. on 13-3-1991 when the informant, deceased Sanjay,

informant's father Ramchandra and his relations Haribhau and Rajaram were sitting on the platform in front of their shop, the acquitted accused Shamrao Shelke, the brother of the appellant came there. He started abusing the informant and the deceased on the ground as to why the deceased had lodged an F.I.R. against the acquitted accused, Ashok. Thereafter he is alleged to have threatened them to the effect that he would teach them a lesson. The informant is alleged to have asked Shamrao to leave the place as there were guests in his house. When Shamrao started leaving for his house, the present appellant along with his brothers Rajendra, Shivaji Ramrao Shelke and his father Ramrao Dashrath Shelke (all acquitted accused) is alleged to have come there. It is said that whereas the appellant and Shamrao Ramrao Shelke were holding knives, Ramrao Dashrath Shelke, Rajendra Ramrao Shelke, and Shivaji Ramrao Shelke were holding lathies. The allegation is that the appellant, Shivaji, Rajendra, Shamrao and Ramrao started assaulting the informant and the deceased with their weapons. It has been specifically alleged that the appellant inflicted a knife blow on the left side of the chest of the deceased Sanjay and Shamrao Ramrao Shelke assaulted the informant with a knife on his abdomen. It is also the specific case of the prosecution that the acquitted accused Ramrao, Rajendra and Shivaji assaulted the informant and the deceased with lathies. As a result of the assault launched on them, there was bleeding from their injuries. After the assault, the acquitted accused persons and the appellant are alleged to have run away.

Subhash Dinkar, Shivaji Laxman and Ravikant Laxman are alleged to have carried the informant and Sanjay first to Yewat Police Station and thereafter to Primary Health Centre. There the doctor declared Sanjay to be dead. He sent the informant to the Sasoon Hospital Pune for treatment.

3. The injuries of the informant Rajendra (P.W. 1) were medically examined at 1.40 a.m. on 13-3-1991 by Dr. Jayker of Sasoon Hospital, Pune. The doctor found a stab injury 1" x 1/2" on the abdomen 4" left to the umbilicus. In his opinion, the aforesaid injury was dangerous to life.

4. The F.I.R. of the incident was lodged sometimes about midnight on the night of 12th/13th May, 1991 by the Assistant Police Inspector R.D. Thorat of Police Station Yewat on the statement of Rajendra (P.W. 1) recorded at Sasoon Hospital, Pune. It bears the endorsement of the doctor to the effect that he was in a position to give the statement.

5. The investigation of the instant case was conducted by A.P.I. R.D. Thorat P.W. 10. He performed the inquest on the dead body of the deceased. On 13-3-1991, at about 5.00 a.m. the appellants Shamrao, Ramrao, Rajendra and Shivaji were arrested. Their arrest panchanama is Exh. 69. The clothes on the person of Shamrao were seized and he was sent for medical examination as there was an injury on his nose. He then went to the place of the incident and prepared the spot panchanama Exh. 63. He interrogated as many as 13 witnesses. On 15-3-1991, the appellant was arrested and his clothes i.e. pant and banian were

seized vide panchanama Exh. 58. The appellant, co-accused Shamrao and Shivaji stated to the police that they could get the weapons which they had used in the incident, recovered. At the pointing out of the appellant and co-accused Shamrao Ramrao Shelke knives are said to have been recovered; while at the pointing out of Shivaji three sticks were recovered. After completing the investigation A.P.I. Thorat submitted the chargesheet against the appellant and co-accused persons.

6. Going backwards, the autopsy of the dead body of the deceased was conducted on 13-3-1991 between 1.45 a.m. and 2.15 a.m. by Dr. Ashok Sawant (P.W. 2). On the dead body the doctor found the following external injuries :

1. Contusion plus colour changed to pinkish - blackish 1" x 4" two marks on right scalp, horizontal in direction.

2. Incised wound 1/2" x 1" into Oval shape, deep into internal organ. Direction from left to right side. Injury was between 8th and 9th rib son left side - 1/2 to 3/4th inch away from the zxi phisternal region. Injuries were ante-mortem".

On internal examination, the doctor found the right lower lobe of the lung cut, heart and pericardium partially cut. He also found that the diaphragm had been cut. In his opinion, the deceased died on account of shock due to injuries to the right lung, diaphragm and pericardium. The knives recovered at the pointing out of the appellant and Shamrao were shown to the doctor and he stated that the injury No. 2 of the deceased could be caused by them. He also stated that the incised wound was sufficient in the ordinary course of nature to cause death.

We may mention that in his cross examination the doctor stated that the colour of the contusion remains red for a day. In this case, the post mortem examination was performed within six hours of the incident and that being so, the colour of the contusion of the deceased should have been red. However, the doctor found its colour to be pinkish blackish. This obviously means that the contusion was not received by the deceased during the incident but, sometimes prior to it.

7. The case was committed to the Court of Sessions in usual manner. In the trial Court, charges on a number of counts, including 302 read with section 149 I.P.C. were framed against the appellant and the acquitted accused. To the aforesaid charges, they pleaded not guilty and claimed to be tried.

8. The defence of the appellant was that on 13-2-1991, at about 8.00 to 9.00 p.m. while he was present in his house, he heard shouts of brother Shamrao (acquitted accused) and saw that the deceased Sanjay, Rajendra (P.W. 1) \\ and two others were assaulting him; Sanjay and Rajendra with knives and others with sticks. When he went to the rescue of Shamrao, Ramchandra inflicted a stick blow on his person. The deceased Sanjay assaulted Shamrao with a knife. He snatched the knife from P.W. 1 Rajendra and while defending himself and his brother Shamrao the other side sustained injuries.

9. During trial, apart from tendering voluminous documentary evidence, the

prosecution adduced the evidence of as many as 11 witnesses. Out of these, 11 witnesses, three namely Rajendra P.W. 1, Shivaji Laxman Nagavade P.W. 3 and Subhash Dinkar Nagavade P.W. 7 furnished ocular account of the incident. The remaining witnesses, included Dr. Ashok Sawant, P.W. 2 who performed the autopsy on the dead body of the deceased. Dr. Jayker (P.W. 11) who examined the informants; and A.P.I. R.D. Thorat P.W. 10 who conducted the investigation. Out of the other witnesses some deposed about the recoveries of weapons at the pointing out of the appellant and co-accused persons and some merely gave formal evidence.

10. The learned trial Judge believed the evidence vis-a-vis the appellant and convicted and sentenced him in the manner stated above. He however, acquitted co-accused Rajendra Shelke, Shamrao Ramrao Shelke, Ramrao Dashrath Shelke, Shivaji Ramrao Shelke, and Ashok Baban Nagawade.

Since the acquittal of the aforesaid persons has not been challenged by the State of Maharashtra, the same has become final.

11. We have heard Mr. B.N. Patil and Mr. Ratnakar Singh for the appellant and Mr. R.Y. Mirza learned Additional Public Prosecutor for the State of Maharashtra. We have also perused the oral evidence adduced by the prosecution and the material exhibits tendered by it. We have also examined the defence of the appellant and the suggestions made on behalf of the defence to the prosecution witnesses. After giving our anxious consideration to the matter, we are of the opinion that this appeal must succeed.

12. At the very outset, we would like to emphasise that there appears to be some substance in the defence case to which we have referred to in paragraph 8 of this judgment.

In the instant case, we find that the Investigating Officer A.P.I. Thorat P.W. 10 in his deposition in the trial Court has stated in para 3 that acquitted accused Shamrao was arrested on 13-3-1991 at 5.00 a.m. (i.e. within eight hours of the incident taking place) and was sent for medical examination. He also admitted that Shamrao had an injury on his nose. However, he stated that Shamrao's injury was like an abrasion. In paragraph 7 of his statement, during cross examination in the trial Court, he conceded that "the report of the Medical Officer about the injury found on the person of accused No. 1 Shamrao is not produced on record". In other words, it becomes explicit from his statement that acquitted accused Shamrao had injuries on his nose. The nature of those injuries would have been very material for this Court to decide as to whether there is substance in the plea of self-defence raised on behalf of the appellant and also whether the right of self-defence extended to causing the death of deceased Sanjay. However, to our dismay, we find that the prosecution has suppressed the injury report of Shamrao. No explanation, much less a cogent explanation, is forthcoming from the side of the prosecution for not tendering the injury report of Shamrao and for not examining the Medical Officer who examined his injuries. In such a situation

this Court is left with no other option but, to draw the adverse legal inference provided by sub-clause (g) of section 114 of the Evidence Act against the prosecution. The aforesaid provision reads thus :

"114. Court may presume existence of certain facts. The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations - The Court may presume -

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it".

The conduct of the prosecution in feeling shy of both producing the injury report of Shamrao and in examining the doctor who examined his injury shows that in all probability, the injury suffered by Shamrao was serious in nature.

13. In the instant case, we find that all the three eye witnesses of the incident viz. Rajendra (P.W. 1), Shivaji (P.W. 3) and Subhash (P.W. 7) have not explained the injury sustained by the accused Shamrao. The defence case which has been referred to in paragraph 8 was categorically put to the eye witnesses but, they denied the same and did not admit that anyone from their side caused injuries to the acquitted accused Shamrao (the own brother of the appellant). The informant Rajendra in paragraph 12 of his cross examination, in the trial Court, categorically stated that they did not cause any hurt either to Shamrao or to the appellant. In other words there is no denial of the fact that all the three eye-witnesses have completely failed to explain the injuries sustained by Shamrao. In para 11 of its decision reported in Lakshmi Singh and Others Vs. State of Bihar, , the Apex Court (at page 1742) observed thus :

"It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences :

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version.

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which

competes in probability with that of the prosecution one".

14. Looking to the facts and circumstances in the instant case our view is that the inferences (1) and (2) as laid down in the above decision can be plausibly and reasonably drawn. It may be, as suggested by the defence to the eye-witnesses that the informant Rajendra, deceased Sanjay and others were the aggressors and the appellant assaulted them in exercise of the right of private defence of person, both of his person and that of his brother, Shamrao. The failure of the witnesses to explain the injury of Shamrao goes a long way to discredit their credibility and truthfulness and makes the defence case plausible.

15. In the instant case, we find it all the more difficult to believe the three eye witnesses, Rajendra, Shivaji and Subhash (P.Ws. 1, 3 and 7 respectively), when they allege that the prosecution party did not assault Shamrao and the appellant for the simple reason because, we find from their evidence that they have falsely implicated three persons viz. Ramrao Dashrath Shelke, the father of the appellant, Rajendra Ramrao Shelke and Shivaji Shelke, the real brothers of the appellant in the instant case. All these witnesses categorically stated in examination in chief of their depositions recorded in the trial Court that the aforesaid three persons assaulted both the deceased Sanjay and the informant with lathis. However, in the instant case we find that neither the deceased Sanjay nor the informant Rajendra received any injury attributable to a lathi.

We have noted in the earlier part of our judgment that the informant Rajendra had a solitary injury on his person which was a stab wound, 4" left to the umbilicus. It is true that the autopsy report of the deceased shows that he had two injuries viz. one contusion and one incised wound. However, in paragraph six of our judgment, we have mentioned, on the basis of the evidence of the autopsy surgeon Dr. Ashok Sawant, P.W. 2 that the contusion sustained by the deceased was not caused to him during the course of the incident but, sometimes prior to it.

In our view, if the three eye witnesses can be unscrupulous enough to falsely implicate the father and two brothers of the appellant what is the guarantee that they are not falsely suppressing their aggression in the instant case. It may be that in order to save their own skin they are alleging that a one sided assault was launched by the appellant, his three brothers and his father.

16. In our judgment, the failure of the prosecution to explain the injuries of the accused becomes all the more grave and serious in a case where it has been categorically found that some of the co-accused persons have been falsely implicated by the eye witnesses. As observed above, in such a situation, it becomes very unsafe and hazardous to accept the claim of the same eye witnesses that they did not cause any injuries to the accused. In such cases, there is a lurking suspicion in the mind of the Court that the eye witnesses in order to suppress their aggression are denying that the accused persons received injuries. On account of that suspicion it becomes very unsafe to accept their

evidence.

17. It is a trite that whereas u/s 101 of the Indian Evidence Act, the legal obligation on the prosecution is to prove its case beyond reasonable doubt, the obligation on the accused u/s 105 of the Indian Evidence Act is to only show by a preponderance of probability that their case may be true. In other words whereas the burden on the prosecution is to prove that its case must be true, the burden on the defence is only to show that its case may be true. In our view that burden has been discharged by the defence.

We say this for four reasons :

(a) The defence case, as quoted in the earlier part of our judgment has been suggested to all the three eye-witnesses;

(b) The defence version is to be found in the written statement of the appellant filed in the trial Court and in the statement of Shamrao, recorded u/s 313 of the Cr. P.C.;

(c) A.P.I. Thorat, P.W. 10, the Investigating Officer in his statement, in the trial Court, admitted that Shamrao was arrested on 13-3-1991 at 5.00 a.m. (within 8 hours of the incident) and had an injury on his nose; and

(d) The prosecution has suppressed the injury sustained by Shamrao and has neither chosen to produce the injury report of Shamrao nor examine the doctor who medically examined the injuries of Shamrao.

18. Since the injury of Shamrao was caused by knife and its situs was nose, (vital part of the body), in our opinion, it can safely be held that in view of the provisions contained in section 97 I.P.C., and section 100 I.P.C., the appellant's right of private defence of person extended to causing the death of Sanjay.

Section 97 of the I.P.C. provides that :

"every person has a right, subject to the restrictions contained in section 99 to defend-

First - His own body, and the body of any other person, against any offence affecting the human body..."

Section 100 I.P.C. reads thus ""The right of private defence of the body extends under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely :

First - Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.

Secondly - Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault..."

In our view, when Shamrao was assaulted on his nose by knives by the deceased Sanjay and the informant Rajendra, the appellant could have reasonably apprehended that there was danger of his being killed or at least of grievous hurt being caused to him and therefore, he acted within the province of his right of private defence of person when he inflicted a solitary knife blow on the person of the deceased.

We are fortified in our view by two decisions of the Apex Court reported in 1971 Cri. L.J. 105, Deo Narain Vs. The State of U.P., , Deo Narain v. State of U.P. In the former case, the deceased had picked up a stone of dangerous dimensions and the Apex Court held that there was an apprehension of grievous hurt to the appellant and consequently his right of private defence of person extended to causing the death of the deceased. In the latter case, the deceased had raised a stick towards the accused who inflicted a solitary spear blow on his person and the Apex Court again held that there was apprehension of grievous hurt and the act of the accused was completely protected by his right of private defence of person.

19. Mr. R.Y. Mirza, learned Additional Public Prosecutor vehemently contended that the defence case which is to the effect that apart from Shamrao, the appellant also sustained injuries during the course of incident appears to be a tissue of lies because the appellant did not get his injuries medically examined.

In our view, the circumstance that the appellant did not get his injuries medically examined does not necessarily lead to this inference. Sometimes out of fear people do not get their injuries examined. It requires a lot of courage to admit one's presence on the place of the incident and plead self-defence. Even assuming for arguments sake, that it is false that the appellant received injuries during the incident, in our judgment, it would make no difference. In a criminal case, the partial falsity of defence would in no way ensure to the advantage of the prosecution. At the best what could be said is that both the prosecution and the defence are not coming out with the whole truth and each side is suppressing its wrongs; the prosecution :the fact that Shamrao sustained injury. In such a situation, the gainer is not the prosecution, because it is an axiom of Criminal Law that the prosecution has to swim or sink on its own legs and not bank upon weaknesses of the defence case.

In a criminal case, when both sides suppress their aggression and brand the other as the aggressor and it becomes impossible for the Court to decipher as to which out of them is speaking the truth, the Court has no option but, to acquit the accused persons.

Our view is reinforced by the observations made by their Lordships of the Apex Court in paragraph 12 of the decision reported in Jamuna Chaudhary and Others Vs. State of Bihar, . In the aforesaid paragraph Their Lordships observed thus :

"Where neither the prosecution nor the defence come out with the whole and unvarnished truth, to enable the Court to Judge where the rights and wrongs of

the set of incidents lay or how one or more incidents took place, in which so many persons, including the deceased and one accused person, were injured, Courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case".

We may also mention that a similar view was taken by a Division Bench of the Allahabad High Court in the case reported in 1959 A.L.J. 423, Shubrati and others v. State. In the aforesaid case Their Lordships observed thus :

"It is well settled principle of Criminal Law that an accused can be convicted only when on the evidence produced the Court is in a position to come to a definite conclusion beyond the possibility of reasonable doubt that the accused committed the offence with which he stood charged. No conviction can be based on mere possibilities. Nor is it permissible for the Court to speculate as to what had really happened. If both the parties come to Court with untrue facts and conceal the real truth they have themselves to blame and they cannot expect the Court to arrive at any definite conclusion on the unreliable evidence produced either for or against either of the parties. In such a case the Court will certainly attempt to separate the grain from the chaff but only if it is possible to do so. In certain circumstances it may be found to be an impossible task. That is particularly so when the evidence of both the parties is thoroughly unreliable and cannot be accepted even in part with safety. In such a case it is not open to the Court to make out a third case which is different from the case set up by both the parties. In such a case the Court can only say that the matter is doubtful in the extreme and it is not possible to arrive at any conclusion one way or the other. The result of such a finding may be that all the persons who stand as accused in the case may have to be given the benefit of doubt. But that cannot be helped. The defective investigation and the conduct of the parties themselves are equally responsible for that regrettable result. In such a case there can be no question of recording any conviction".

20. For the aforesaid reasons it cannot be ruled out that the appellant acted in the exercise of his right of private defence of person and that of his brother Shamrao. Hence, he deserves the benefit of doubt. Consequently the impugned judgment and order convicting the appellant u/s 304 Part I I.P.C. and sentencing him to under-go 7 years R.I. and to pay a fine of Rs. 5,000/- and in default to further undergo 2 years R.I. is set aside. The appellant is acquitted of the offence u/s 304, Part I of I.P.C. He is in jail. He shall be released forthwith unless wanted in some other case. In case the appellant has paid the fine the same shall stand refunded to him.

Office to communicate the operative part of our judgment to the appellant immediately.