

(2022) 06 BOM CK 0037
In the Bombay High Court
Case No : Criminal Appeal No. 257 Of 2020

Shamrao

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 10-06-2022

Acts Referred:

Evidence Act, 1872 — Section 27

Indian Penal Code, 1860 — Section 142, 146, 148, 149, 307, 353

Citation : (2022) 06 BOM CK 0037

Hon'ble Judges : Avinash G. Gharote, J

Bench : Single Bench

Advocate : Harshal P. Lingayat, Amit R. Chutke

Final Decision : Allowed

Judgement

Avinash G. Gharote, J

1. The matter was heard and admitted on 21.07.2020. The R & P was called which was received as per the Farad-sheet entry dated 13/08/2020 and the matter was kept thereafter for hearing on the application for suspension of sentence, which came to be rejected by order dated 25.08.2020. The matter, when listed on 08.06.2022, the learned Counsel for the appellant expressed his readiness for final arguments, to which the learned Additional Public Prosecutor Shri Chutke, agreed, as a result of which, the matter has been finally heard.

2. Heard Mr. Lingayat, learned counsel for the appellant and Mr. Chutke, learned APP for the respondent/State.

3. Mr. Lingayat learned counsel for the appellant submits as under:

(i) Even if the appellant was found on the spot of the incident, however his conduct would indicate that at no point of time he was member of any unlawful assembly.

(ii) The village Karka of which the appellant is resident is situated approximately

1 to 2 kms, from the spot of incident. The appellant was found in the jungle with an axe which is a natural circumstance for villagers to be. This position has been admitted by PW-5 Subhash Wadhai (Ex.33 page 70), in his cross- examination (para 3). The axe has also not been seized.

(iii) PW-3 – Rakesh Yengantiwar the panch to the seizure memo under Section 27 of the Evidence Act (Exh.25 page 53) claims that the seizure was effected from village Karka as against which PW-9 Arun Bhoyar the second panch to the seizure memo (Exh.47 page 81) claims that the seizure was effected at village Javeli which is approximately 9 kms, away from village Karka, and therefore, the seizure itself is doubtful.

(iv) The accused was detained at Gadchiroli Police Station, whereas the panch PW-3 and PW-9 are from village Jaravandi which is 90 kms, away from Gadchiroli which would indicate that interested witnesses were procured by the prosecution.

(v) PW-12 Nitin Mohite, Investigating Officer (Exh. 56 page 99), claims that the memorandum under Section 27 of the Evidence Act was recorded first and thereafter the spot panchnama was recorded which is contrary to the record, as the spot panchnama was recorded earlier and the memorandum under Section 27 of the Evidence Act was recorded in the later point of time, which shows that no memorandum was ever recorded.

(vi) The prosecution claims that the discovery was made from the field of the accused, however there is no document placed on record to show that the field from which the discovery was made belongs to the appellant/accused.

(vii) PW-2 and PW-5, the eyewitnesses do not attribute any overt act to the appellant but only say that the accused was hiding at the spot of the incident beneath the trunk of the tree holding an axe.

(viii) There is no injury to any person in spite of the fact that the prosecution claims 149 rounds were fired by the Police Party, apart from which, multiple rounds are claimed to have been fired by the naxalites during the said incident. Only one single empty cartridge has been seized from the spot after four days of the incident (Exh.26 page 56 spot panchnama).

(ix) No common object so as to invoke Section 149 of the Indian Penal Code has been proved on record.

It is therefore submitted, that the conviction rendered by the learned Sessions Court, is merely based upon conjecture and surmises, and therefore, cannot be sustained and is liable to be quashed and set aside and the appellant is entitled to an acquittal.

4. Mr. Chutke, learned APP for the respondent/State submits as under:

(i) The accused was apprehended on the spot.

(ii) One gun was recovered as per the disclosure statement made under Section

27 of the Evidence Act at the instance of the appellant (Exh.29 – Statement) as per the seizure panchnama Exh.30 (page 62), for which there is no explanation forthcoming, and thus indicates involvement of the appellant.

(iii) There is no cross-examination of PW-2 and PW-5 in respect of the presence of the appellant on the spot.

5. With the assistance of Mr. Lingayat, learned counsel for the appellant and Mr. Chutke, learned APP for the respondent/State, I have gone through the record and proceedings of the learned Sessions Court and the evidence led.

6. The incident is dated 30.05.2017, when PW-2 Rakesh Ramsu Hichami who at that time was the Naik Police Constable attached with the unit known as C-60 at about 04.00 p.m. (1600 Hrs) alongwith 3 Officers and 65 Police personnel had reached Karka Forest Area and while they were proceeding for search, were fired upon near a nullah from the east side, whereupon they took shelter and retaliated by counter firing. There was firing for 15-20 minutes. After it stopped, a search was made, whereupon the appellant was found sitting beneath the stump of a tree holding an axe near the nullah from where he was arrested. It is further contended, that on a search at the spot, 6 live cartridges, 3 pittus, 1 green coloured shirt, 1 claymore detonator attached with wire, 1 radio and one pressure cooker was found on the spot. The Bomb Detection Squad was summoned, which reached the spot at 10.00 p.m. (2200 hrs), whereupon they found that the pressure cooker was containing blasting material. On the next morning, the Bomb Detection Squad made it useless. It is stated, that there were about 30-35 naxalites in the said incident and were calling names to each other, such as Mahesh, Ranjit, Joganna, Madhu, Shamrao and also uttering "cover the policemen". The naxalites thereafter fled away in the jungle.

7. It is contended, that the material on the spot was seized under seizure panchnama at Exh. 24 (page 52) to which PW-3 Rakesh Bhikaji Yengantiwar (Exh.25, page 53) and PW-9 Arun Charandas Bhoyar (Exh. 47, page 81) are the panch witnesses. There is a further seizure under Section 27 of the Evidence Act at the instance of the appellant at Exh.29 (page 62) under which it is claimed that one Bharmar Rifle has been seized at the instance of the appellant from underneath a heap of hay (Tanas) from the field claimed to be owned by the appellant. The seizure memo is at Exh. 30 (page 63), of which PW-3 and PW-4 are the witnesses. The two seized guns are claimed to have been sent for analysis to the Regional Forensic Science Laboratory and the examination report at Exh. 51 (page 86), dated 04.07.2017 and Exh. 52 dated 12.07.2017 (page 88) states that the single barrel muzzle loading gun was in working condition and residue of fired gun powder was detected in barrel washing showing that the gun was used for firing prior to its receipt in the laboratory.

8. It is on the basis of the aforesaid five witnesses and the seizure memos and memorandum panchnama, that the appellant has been convicted for the offence under Sections 307 read with Section 149, 353 read with Sections 149, 148 of

the Indian Penal Code and sentenced by the learned Sessions Court.

9. PW-2 and PW-5 are claimed to be the eye-witnesses. A perusal of the evidence of PW-2 Rakesh Hichami (Exh.21 page 40) indicates, that it is as sketchy as possible. There are no details as to in which portion of the Karka Forest, the incident took place. The only statement is that when the Police party reached Karka Forest area and were proceeding for a search, a firing was opened near nullah from east side. For the purpose of identification, the forest is divided into various blocks, there is no mention of any particular block of the Karka Forest in which this incident is alleged to have been taken place. He also does not name any nearby village, so that the place of the incident could be identified by a directional method. PW-2 admits that the firing lasting for 15-20 minutes and after the firing stopped, when they started searching the place, they found the appellant sitting beneath a tree stump near the nullah. Admittedly, nothing has been found on the person of the appellant. The axe which he was holding is not seized. Though, it is stated that one rifle was lying near him, the make, bore of the rifle is not stated, nor is the rifle described by this witness. There is no mention of the distance between the rifle and the appellant, considering that it is claimed that Karka forest is a thick forest. Though, it is also claimed that in the search, six live cartridges, 3 pittus, 1 green coloured shirt, one clay-more detonator attached with wire, one radio and one pressure cooker were found on the spot, however, the distance between the location at which the appellant was found and the place from where the aforesaid seizure was made is also not mentioned. Though it is stated by PW-2 that there was intense firing going on for 15-20 minutes, he claims to have heard the opposite party calling various names. He, however admits, that the naxalites fled away in the jungle. The examination-in-chief of PW-2 is rife with a number of inconsistencies as indicated above. In cross-examination, PW-2 admits, that though while lodging the report, he had stated that a rifle was lying near the accused, that sentence was absent in his report, which would take away the veracity of the claim, that a rifle was found lying near the appellant. He further admits, that Karka forest is a dense forest and the village Karka is about 2-2½ kms, away from the spot and generally the forest dwellers used firewood from the jungle. He also admits, that after firing all the naxalites fled away.

10. A perusal of the report lodged by PW-2 (Exh.22 page 43) reveals that the same states that a 12 bore rifle was seized from the spot. The seizure memo at Exh. 24 (page 52), does not indicate seizure of any 12 bore rifle. What Exh. 24 - the seizure memo indicates is the seizure of a single shot country made rifle, which is different than what is claimed to have been seized by PW-2 in the complaint dated 01.06.2017 (Exh.22, page 43). That apart, the date of seizure of Exh.24 (page 52) is 08.06.2017, whereas the date of the incident is dated 30.05.2017 and there is a substantial time lag of 9 days between the date of the incident and the date of the seizure (Exh. 24), which in my considered opinion destroys the credibility of the seizure itself. Moreover, there was no necessity of any time gap for seizure whatsoever for the reason that the aforesaid material is

claimed to have been found on the spot of 30.05.2017 and taken into custody, that being so, the seizure ought to have been recorded on 30.05.2017 itself and not on 08.06.2017. Moreover, the seizure memo (Exh. 24) indicates, that the seizure has been made not from the spot of incident but from PW-2 at Police Station Jaravandi. This clearly indicates a serious infirmity which vitiates the entire seizure, thereby casting the so-called disclosure and seizure under Section 27 of the Evidence Act into disrepute. Mr. Lingayat, learned counsel for the appellant, has rightly relied upon *Amarjit Singh Alias Babbu Vs. State of Punjab*, 1995 SCC (Cri) 828, in which, while considering the seizure of a weapon i.e. a revolver, it was found that it was never sealed on the spot but was handed over by the Sub Inspector of Police to some other person who had not been examined and who used to visit the Police Station, it was held, that considering the aforesaid position the non-sealing of the revolver on the spot was a serious infirmity because the possibility of tampering of the weapon could not be ruled out. As indicated above, in the instant case, the entire material which is claimed to have been seized under Exh. 24, he is from the custody of PW-2 and at the Office of the Special Unit at Gadchiroli and not from the spot and that too nearly 8 days after the date of the incident, which clearly vitiates the entire seizure. What is also material to note as indicated above is that in the complaint at Exh. 22, (page 44) what is claimed to be found on the spot is a 12 bore rifle, whereas what has been seized under Exh. 24 was a single shot country made rifle, which are two different things all together.

11. That apart, insofar as the discovery under Section 27 of the Evidence Act is concerned, the memorandum panchnama at Exh. 29 and 30 states, that a Bharmar gun was found at the instance of the appellant (page 64). The evidence of PW-3 merely indicates, that what has been seized under the memorandum panchnama under Section 27 of the Evidence Act is one country rifle (article 2), as against which PW-9 the other panch witness to the seizure at Exhs. 29-30 does not identify article 2. It is also material to note, that both the panchas i.e. PW-3 and PW-9 to the seizure memorandum under Exhs. 29 and 30 are not from the near vicinity of village Javeli from where the alleged seizure has been made, but are residents of Jaravandi which is approximately 72 Kms, from Gadchiroli and village Javeli in turn is 80 to 85 Kms, from Gadchiroli as has been admitted by PW-9 in his cross-examination (page 81). The record does not disclose as to why PW-3 and PW-9 who are resident of Jaravandi which is quite distance away from Gadchiroli were taken as witnesses.

12. There is one yet another circumstances which destroys the credibility of the Section 27 memorandum inasmuch as, Exh. 29 states, that the appellant is the resident of Karka (Khurd) Tahsil Etapalli, District Gadchiroli, and the disclosure is to be made at Mouza Javeli, which as per the memorandum under Section 27 (Ex. 27) is made from Mouza Javeli (page 64). In this context, if the evidence of PW-3 is considered, in reference to Exh. 29 he states, that the accused/appellant took the party to village Karka to his field where the rifle was produced from beneath the paddy fodder. Nowhere, PW-3 who is witness to Exh. 29 states, that

Police party had gone to Mouza Javeli which is the place stated in Exh. 29 as the place of discovery. PW-9 on the other hand states, that after Exh. 29 was recorded the Police party has proceeded to Javeli village where the seizure was made. It is thus apparent, that there is total contradiction between the evidence of PW-3 and PW-9 both panch witnesses to Exh. 29 regarding the place from which Article-2 is claimed to have been seized. It has not been brought on record by the prosecution, that the appellant owns any agricultural land at Mouza Javeli but what has come on record is that the appellant was resident of Karka (Khurd), which also is one of the circumstances which affects adversely the credibility of the disclosure memorandum and seizure at Exhs. 29 and 30.

13. It is thus apparent, that the involvement of the appellant, in the said crime is not established by the evidence of the so called eye witnesses PW-2 Rakesh Ramsu Hichami and PW-5 Subhash Anandrao Wadhai. Neither is the Section 27 seizure has any credibility, as indicated above, so as to even on that ground indicate any involvement of the appellant.

14. Though, it is stated that the Police party on the date of the incident comprised of 65 Police personnel plus three Officers in three different units, not a single person is claimed to have seen the appellant at that time of the incident, much less any overt act is attributed to him. The theory that PW-2 has heard the names of various persons being called during the course of firing also appears to be far fetched as the distance between the two firing parties, has not been brought on record nor has the frequency of the firing being spoken of by any single person. What has been seized as claimed under the seizure memo at Exh. 24 are 6 rounds of 12 bore cartridges and nothing else. There are no empties or for that matter any record how many bullets were fired from either side. Nobody speaks about it. It is thus unbelievable, that if the firing was as intense as is claimed to be, considering that Exh. 22 the complaint dated 01.06.2017 states, that as much as 149 rounds were fired by the Police party itself, PW-2 hearing the names of various persons including that of the appellant appears improbable and even presuming otherwise that PW-2 may have heard the name Shamrao, it ought to have been established that it related to the appellant alone, considering what has been stated by PW-2 that all the naxalites had run away.

15. PW-4 Mahesh Dama Gawde and PW-7 Vitthal Devu Gotami, both have turned hostile. The evidence of PW-1, 6, 8, 10, and 11, are formal in nature as PW-1 is the muddemal carrier, PW-6 is the person who has drawn the imaginary sketch map of the spot (Exh. 36 Page 73), PW-8 is the Investigating Officer IO, who has made the investigation, PW-10 is the person who has brought the C.A. report and PW-11 is the person who has registered the crime. Though, PW-13 is the sanctioning authority, however, considering what has been discussed above regarding the very veracity of the story put forth by the prosecution being doubtful in my considered opinion nothing turns upon the sanction accorded or the evidence of the PW-13.

16. A perusal of the impugned judgment, would indicate that what has been

relied upon is the evidence of PW-2 and PW-5 and the FSL report at Exhs. 51 and 52, and so also the memorandum panchnama Exh. 30 to hold that the appellant was guilty. The FSL report Exhs. 51 and 52 could only be taken into consideration if the memorandum under Section 27 at Exhs. 29 and 30 was found to be truthful, which in my considered opinion, in light of the discussion above does not inspire any confidence whatsoever. Contradictory evidence of PW-3 and PW-9 in respect of the same totally destroys its credibility. The evidence of PW-2 and PW-5 is also contradictory and does not in my considered opinion bring home the guilt to the appellant. The entire discussion as is apparent from the impugned judgment, is in paras 24 to 29 and does not consider the infirmities as pointed above. It is necessary to note, that when the Court is considering the question of innocence or guilt of the accused the chain of sequence of events has to be clearly established which, in the instant case has not been so done beyond reasonable doubt. Since, it is not disputed that the appellant was a resident of village Karka which was approximately 2 - 2 ½ Kms, from the spot of the incident, it cannot be said to be unreasonably or improbable, that the accused may have gone to the jungle to collect firewood or for some other purpose, more so when PW-5 in his cross-examination has admitted that the appellant Shamrao was hiding himself in the forest with an axe in his hand and has further admitted that whenever there use to be firing in the forest, pubic use to run helter-skelter or hide themselves in the forest.

17. It is thus apparent, that the prosecution has failed to bring home the guilt of the accused. In order to convict a person under Section 148 of the Indian Penal Code, it has to be established that the said person was armed with the deadly weapon and was rioting (Section 146 of the Indian Penal Code), which in turn requires an unlawful assembly. In the instant matter, the evidence of PW-5 categorically establishes the appellant was found alone hiding under the stump of a tree and though it is stated that he was holding an axe there is nothing on record to indicate its use in any manner. So also there is nothing on record to link the appellant with the Naxal party, which is stated to have fled away. The requirement of Section 142 of the Indian Penal Code thus is not satisfied at all, and therefore, the conviction under Sections 148 and 149 of the Indian Penal Code cannot be sustained.

18. It is thus apparent, that the impugned judgment does not consider the evidence of PW-2 and PW-5 in the proper perspective, nor does it consider the evidence of PW-3 and PW-9 vis-a-vis the seizure panchanama and memorandum Exhs. 29 and 30, resultant to which, in my considered opinion the same cannot be sustained. The judgment dated 19.12.2019 passed by the learned Sessions Court, Gadchiroli, is therefore quashed and set aside. The appellant is acquitted of the charge under Section 307 read with Section 149 of the Indian Penal Code, Section 353 read with Section 149 of the Indian Penal Code and Section 148 of the Indian Penal Code. The appellant be forthwith released if not required in any other offence.

19. The criminal appeal is allowed in the above terms.