
(2014) 10 BOM CK 0054
In the Bombay High Court
Case No : Criminal Appeal No. 316 of 2001

Shivsing

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-10-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 308

Citation : (2016) ALLMR(Cri) 178 : (2015) 1 BomCR(Cri) 14

Hon'ble Judges : S.B. Shukre, J

Bench : Single Bench

Advocate : A.V. Gupta, Advocate for the Appellant; N.P. Mehta, Additional Public Prosecutor, Advocate for the Respondent

Judgement

S.B. Shukre, J.—This is an appeal preferred against the judgment and order dated 09/10/2001 passed by learned Sessions Judge, Buldana, thereby convicting the appellants of the offences punishable under Sections 147, 148, 307 and 324 read with Section 149 of the Indian Penal Code.

2. Briefly stated, the facts of the case are as under.:

The incident has occurred at about 8.30 to 9.00 a.m. on 18/5/1999 in the agricultural field of the complainant. At that time, Shamrao Solanki, the main injured person, and his two brothers Vithoba and Bhimrao were sitting under a common mango tree for having their breakfast when the appellants and two other accused person, who have been acquitted by the trial Court, namely accused No.5 Santosh Solanki and accused No.7 Navalsing Solanki, came there and started plucking mangos from the tree. Shamrao Solanki and his two brothers objected to this action of the accused persons, but they did not pay any heed to them and continued with plucking of mangos. A quarrel ensued between the accused persons on the one hand and the three brothers on the other in which the accused persons assaulted three brothers by axes and sticks, thereby causing them serious injuries. Shamrao Solanki sustained serious hurt and he was required to remain hospitalized for the treatment of his injury for a period of

about one month.

Meanwhile, a report was lodged with Police Station, Chikhli by the complainant - Anil, son of Shamrao Solanki. On the basis of complaint, the offences punishable under Sections 147, 148, 307, 323 and 324 read with Section 149 IPC were registered against the appellants and two more accused persons. The investigation was carried out and after completion of the investigation, a charge sheet was filed against all the accused persons to which they pleaded not guilty for the said offences and claimed to be tried. Accordingly, the accused persons were tried and after considering the evidence available on record and the arguments of rival sides, the learned sessions Judge found the appellants as guilty of the offences punishable under Section 147, 148, 307 and 324 read with Section 149 IPC and sentenced them to various terms of imprisonment and also fine amounts as per the judgment and order dated 09/10/2001. The maximum sentence awarded was for the offence punishable under Section 307 read with Section 149 IPC and it was of the rigorous imprisonment for the period of four years together with fine amount of Rs.1,000/- each. Accused No.5 Santosh Solanki and accused No.7 Navalsing Solanki were acquitted of all the offences with which they were charged. Not satisfied with the same, the appellants have preferred this appeal.

3. I have heard Shri Gupta, learned Counsel for the appellants and Smt. Mehta, learned Additional Public Prosecutor for the respondent -State. I have carefully perused the impugned judgment and order and also record of the case.

4. Shri Gupta, learned Counsel for the appellants has submitted that the prosecution has not come out with the true facts of the case and the prosecution witnesses have suppressed the origin of the quarrel which took place between the complainant's side on the one hand and the side of the accused persons on the other in the morning of 18/5/1999 and as a result, the whole prosecution case against the appellants has become doubtful in nature. He submits that the Investigating Officer has admitted that at about 11.15 a.m. on 18/5/1999, accused No.6 Bhagwan Solanki (P.W. -5) had come to the Police Station, Chikhli and had lodged a report against Shamrao (P.W. -4) the main injured person, Anil son of Shamrao, Vithoba and Bhimrao the brothers of Shamrao alleging that these persons had assaulted Bhagwan and other accused persons and caused them injuries. Even, Dr. Tarangtushar (P.W. -5) has admitted that Bhagwan (accused No.6) and Navalsing Solanki (accused No.7) were brought to her for their medical examination and upon examining them, she found Bhagwan to have sustained bleeding injury, which was contused lacerated wound over parietal region of the head and that Navalsing was referred by her for his X -ray examination, but she did not receive any report from the radiologist.

5. Learned Counsel for the appellants further submits that the complaint lodged by the victims is later in point of time than the complaint filed by the accused persons and, therefore, the appellants cannot be said to be aggressors in the incident and as such deserve to be acquitted of all the offences with which they

have been convicted by the learned Sessions Judge by giving benefit of doubt. The learned Counsel alternatively, submits that if it is assumed that the appellants had assaulted the victims in this case and caused them serious injuries, considering the admissions given by the witnesses, namely, P.W. -4 Shamrao and P.W. -9 Vithoba, it cannot be said that the appellants had any intention to cause death or knowledge that injuries will result in death and at the most, this may be a case of slightly exceeding right of private defence. He, therefore, submits that then this case would fall within the scope and ambit of Section 308 of the Indian Penal Code.

6. Mrs. Mehta, learned A.P.P. for the State submits that all these aspects have already been considered by the learned Sessions Judge, as can be seen from the detailed discussion of the evidence made by the trial Court and, therefore, no interference with the impugned judgment and order is warranted. She further submits that there was no reason for the appellants to continue to pluck mangos when they were sought to be prohibited from doing so by the victims as the victims were also claiming their respective shares in the mangos and the fact that in spite of a dispute over the shares in the fruits of mango trees, the appellants went ahead with plucking of the mangos would itself show that the appellants were aggressors and were bent upon achieving their object by hook or by crook and, therefore, the learned Sessions Judge has rightly found the appellants guilty of the afore stated offences and convicted them appropriately.

7. Upon going through the evidence available on record, particularly of P.W. -5 Dr. Tarangtushar, P.W. -11 Raghunath, the Investigating Officer, P.W. -4 Shamrao the main injured person and P.W. -9 Vithoba the brother of Shamrao, I find that there is great substance in the argument canvassed before me on behalf of the appellants and there is no merit in the argument advanced by the learned Assistant Public Prosecutor for the State.

8. From the evidence of P.W. -9 Vithoba and P.W. -4 Shamrao, it can be very well seen that there was already a dispute between the victims and the party of the appellants over the shares in the fruits of mango trees. P.W. -4 Shamrao has admitted that there was dispute between himself and the accused persons prior to the incident in this case and it was about plucking of mangos. He has admitted that in this dispute, he and his brothers had said to the accused persons that they should not pluck the mangos but the accused persons did not obey their command and because of that, P.W. -4 Shamrao and his brothers Vithoba and Bhimrao and his son Anil were annoyed with the accused persons. He also admits that till the date of the incident, names of himself and his two brothers were not recorded in 7/12 extract as sharers in the fruits of mango trees and that the names of the accused persons except accused No.1 Shivsing, were recorded as sharers in the same. Same admissions have been given by P.W. -9 Vithoba.

9. From the evidence of P.W. -4 Shamrao and P.W. -9 Vithoba, it becomes clear that there was a dispute between these brothers on the one hand and the accused persons on the other over plucking of mangos and that when these

brothers tried to prevent the accused persons from going ahead with plucking operation, some quarrel between these two parties occurred as a result of which the possibility of a scuffle having taken place between these two sides cannot be ruled out. In fact, the probability that there must have been a scuffle between the members of the two sides appears to be more, if we consider the evidence of P.W. -4 Dr. Tarangtushar and P.W. -11 P.S.I. Raghunath, the Investigating Officer. P.W. -11 -P.S.I. Raghunath has given clear admission that at about 11.15 a.m. on 18/5/1999 Bhagwan had lodged a report against Shamrao, his son Anil and brothers Vithoba and Bhimrao alleging that these persons had assaulted the accused persons in which accused No.6 Bhagwan and accused No.7 Navalsing sustained injuries. He also admitted that these two persons were referred for their medical examination to the doctor and the doctor to whom they were referred is P.W. -5 Dr. Tarangtushar. P.W. -5 Dr. Tarangtushar admits that she had examined both these accused persons and found that Bhagwan had sustained simple injury over parietal region of his head, which was a contused lacerated wound, while she referred accused No.7 Navalsing for his X -ray examination, but no report of the Radiologist was received by her. The report lodged by accused No.6 Bhagwan was prior in point of time than the report lodged by the complainant Anil. This evidence probablises the defence of the appellants that the incident did not take place in the manner as alleged by the complainant or the injured persons P.W. -4 Shamrao and P.W. -9 Vithoba and that the genesis of the incident was actually a dispute over the shares in the mangos and as this dispute took a serious turn, a scuffle between the members of two sides took place in which both the sides indulged in assaulting each other. P.W. -4 Shamrao admittedly sustained injuries in this assault due to an axe blow given by a member of the appellants" party. Axe is a cutting instrument and therefore the offence punishable under Section 324 IPC would be certainly made out against all the appellants with the aid of Section 149 I.P.C. But, the question is, whether the injuries caused to P.W. -4 Shamrao were of such a nature as would have resulted in his death and were caused to him with an intention or knowledge requisite for constituting the offence of murder?

10. The answer to the question posed in the previous paragraph would have to be given as in the negative for the reason that the evidence discussed earlier would show that there was a high degree of probability of scuffle having taken place between the two sides and in this scuffle, the appellants, while defending themselves, may have caused some injuries, one of which was apparently serious in nature but that injury could not be said to have been caused with an intention to commit murder or with knowledge that in all probability, it would result in death of the person to whom it was caused, but for the providential intervention. The reason being that the assault by the appellants was in all probability more an act of defence than a consequence of premeditation or prior culpable knowledge on their part. It would then follow that this case, as rightly submitted by the learned Counsel for the appellants, would fall within the scope and ambit of Section 308 I.P.C.. which punishes an attempt to commit culpable

homicide not amounting to murder.

11. If, in a quarrel between the two sides, some persons from one side launch an attack on the persons from the other side, the persons being attacked, are bound to retaliate in some way or the other in order to save themselves from the attack and that would be in exercise of their right of private defence. While doing so, if some serious injuries are caused to some of the persons in the party which had launched first attack, the injury cannot be said to be made with an intention of causing death or with knowledge that in all probability it would cause death, though it may be a case of some crossing of limit while exercising right of private defence but without any intention to overstep the boundary. The reason is not too far to seek. At such a time, the person causing serious injury to the other person, cannot be expected to weigh in golden scales the means he adopts or the force he uses and it would be inappropriate to adopt test of detached objectivity which would be so natural in a Court room. (See *Jai Dev Vs. The State of Punjab*, . If he were to do so, the possibility that he himself would perish in the attack can turn into a reality. Therefore, " the Courts are expected to administer the law of private defence in a practical way with reasonable liberality so as to effectuate its underlying object, bearing in mind that the essential basic character of this right is preventive and not retributive" as held in the case of *Gottipulla Venkatasiva Subbrayanam and Others Vs. The State of Andhra Pradesh and Another*, by Hon"ble Apex Court in paragraph 19. This is another reason why do I find that this case falls within the purview of Section 308 IPC.

12. Upon perusal of the impugned judgment and order, I find that the learned Sessions Judge has not taken into consideration the aspect of the scuffle between the two sides probabalised by the afore stated admissions given by P.W. -4 Shamrao and P.W. -9 Vithoba and also the evidence of P.W. -11 P.S.I. Raghunath and P.W. -5 Dr. Tarangtushar on the point of lodging of prior report by accused No.6 Bhagwan against the victims and sustaining of injuries by accused Nos. 6 and 7 and accordingly wrongly concluded that the offence punishable under Section 307 read with Section 149 IPC was made out against the appellants. This finding of the learned Sessions Judge, therefore, needs to be substituted by a finding that the prosecution has only established beyond reasonable doubt the offence punishable under Section 308 read with Section 149 of the Indian Penal Code against the appellants for which they deserve to be convicted and sentenced appropriately. As regards the other offences, namely, the offences punishable under Sections 147, 148, 324 read with Section 149 I.P.C., there is no reason for me to interfere with the positive findings of guilt recorded by the learned Sessions Judge and those findings deserve to be maintained. However, the sentences handed out for them, for the reasons stated in subsequent paras, require a review.

13. At this stage, I have heard Shri Gupta learned Counsel for the appellant and Mrs. Mehta, learned A.P.P. for the State on the point of sentence.

14. Learned Counsel for the appellants submits that the appellants are close

relatives of victims; Shamrao, Bhimrao and Vithoba and that over a period of time they have worked out their differences and have come closer to each other. He further submits that after this appeal was admitted and the appellants were released on bail pending final disposal of the appeal, the appellants have been residing in the same village with the said three brothers and there has been no untoward incident, misconduct or misbehaviour from the appellants and reported by the side of the victims. He further submits that the whole incident had occurred due to some differences existing between the parties at that time because of which both the parties attacked each other and now that the differences being no longer existing, the ends of justice would be met if the appellants are sentenced to suffer an imprisonment for the periods of detention already undergone by them.

15. Learned A.P.P. submits that in the facts and circumstances of this case, appropriate sentences of imprisonment be imposed on the appellants by this Court.

16. In support of the submissions made on behalf of the appellants, the learned Counsel for the appellants has produced before me three affidavits of three brothers; Shamrao, Bhimrao and Vithoba, which are taken on record and marked as documents, "X", "Y" and "Z" for the purpose of identification. A perusal of these affidavits shows that the party of the appellants and the party of the complainant have patched up their differences and now have come closer to each other and they are also living peacefully in the same village. I have already found that there was no intention on the part of the appellants to cause such injuries as would result in death. I have also found that there was likelihood of the injuries being caused may be due to some crossing of limit by the appellants. The appellants are not rank criminals, who would require differential treatment to correct the imbalance in their personality as well as in societal order. These are all mitigating circumstances and therefore relevant factors enabling me to take a view that this is a case wherein leniency should be the order of the day. A useful reference in this regard may be made to the case of Gopal Singh Vs. State of Uttaranchal Criminal Appeal No. 291 of 2013 arising out of SLP (Criminal) No.9897 of 2012 decided by Hon"ble Apex Court on 08/02/2013. Accordingly, I find that the sentences of imprisonment imposed upon the appellants by the impugned judgment and order need to be substituted by the sentences of imprisonment for the period of detention already undergone by each of the appellants.

In the result, the appeal is partly allowed and it is directed that the sentences of imprisonment of one year each for the offences punishable under Sections 147, 148 and 324 read with Section 149 of the Indian Penal Code and sentences of imprisonment of four years for the offence punishable under Section 307 read with Section 149 of the Indian Penal Code imposed upon the appellants are hereby quashed and set aside and substituted by the sentences of imprisonment for the period of detention already undergone by each of the appellants

respectively, which periods of detention have been specifically stated in the impugned judgment and order.

The remaining parts of the impugned judgment and order are hereby confirmed.