

(1998) 07 BOM CK 0052
In the Bombay High Court
Case No : Criminal Appeal No. 47 of 1997

Shri Cruz Pedro Pacheco

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-07-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 162, 313
Evidence Act, 1872 — Section 145, 3, 59
Penal Code, 1860 (IPC) — Section 436, 506

Citation : (1998) 5 BomCR 521 : (1998) CriLJ 4628

Hon'ble Judges : J.A. Patil, J

Bench : Single Bench

Advocate : S.D. Lotlikar, for the Appellant; S.B. Faria, Special Prosecutor, for the Respondent

Judgement

J.A. Patil, J.—This appeal by the original accused is directed against the judgment dated 4th November, 1997, passed in Sessions Case No. 41/95 by the Sessions Judge, South Goa, Margao. The learned Judge acquitted the accused of the offence punishable u/s 506(II) of the Indian Penal Code, but convicted him of the offence punishable u/s 436 of the Indian Penal Code, and sentenced him to suffer rigorous imprisonment for 6 months and to pay a fine of Rs. 20,000/- in default to suffer further simple imprisonment for one year. The learned Judges further directed that fine, if realized, the same shall be paid to P.W. 2 Joaquim by way of compensation. Feeling aggrieved thereby, the accused has preferred this appeal.

2. Briefly stated the prosecution case is that the accused and P.W. 2 Joaquim are brothers. P.W. 1 Marcelina is the wife of P.W. 2 Joaquim. According to the prosecution, the relations between the accused and P.W. 2 Joaquim are strained and that the former had on previous occasions given the latter abuses and threats and also assaulted him. However, P.W. 2 Joaquim did not make any complaint against the accused. It appears that on account of strained relations with the accused, P.W. 2 Joaquim and his wife P.W. 1 Marcelina have been

residing separately in their own house at Kindlebag, Canacona. The accused, however, resides with his parents in the ancestral house, which is at a distance of about 100 meters from the house of P.W. 2 Joaquim, Adjoining the front portion of the house of P.W. 2 Joaquim, there was a shed, which was thatched with palm leaves. The said shed was being used for keeping certain articles including a scooter.

3. The incident in question took place on 22nd August, 1995. On that day at about 3.30 p.m., the accused alongwith P.W. 7 Shrikant Pagui went to the house of P.W. 2 Joaquim. On the request of the accused, P.W. 7 Shrikant Pagui gave a call to P.W. 2 Joaquim. However, P.W. 2 Joaquim did not come out as he was not keeping well. Therefore, his wife, that is, P.W. 1 Marcelina came out of the house. On seeing her, the accused started giving abuses, he also gave a threat that he would set fire to the house of P.W. 2 Joaquim. It appears that after giving abuses and threats, the accused left the place. At about 5.00 p.m., the accused again came to the house of P.W. 2 Joaquim and started giving him abuses and threats. At that time one Daniel and P.W. 4 Datta Pagui were present in the house. It is alleged that the accused took out a matchbox and lit a matchstick and set fire to the front shed of the house of P.W. 2 Joaquim. Thereafter the accused stood near the shed with a knife in his hand and threatened to kill if anybody tried to put off the fire. However, P.W. 1 Marcelina with the help of others, tried to put out the fire by pouring water. In the meantime the entire shed was gutted by fire causing damage to the scooter, chairs and other articles kept therein. According to the prosecution, damage amounting to Rs. 20,000/- was caused due to the mischief committed by the accused.

4. When the shed was on fire, several people in the locality had gathered there. Among them was P.W. 3 Premanand Pagui, who is a reporter. He immediately rushed to the Canacona Police Station and gave information in writing Exhibit P.W. 3/A that the shed adjoining the house of P.W. 2 Joaquim was on fire. In response to the said information, the police immediately rushed to the spot. At that time the accused was present on the road in front of the house of P.W.2 Joaquim. The police caught him and seized from his possession a matchbox and a knife. On the same evening at 6.45 p.m., P.W. 1 Marcelina lodged her formal complaint Exhibit P.W. 1/A in the police station. On the basis of the said complaint, Police Inspector P.W. 10 Mohan Naik registered the offence as Cr. No. 48/95 for the offences under sections 436, 506(II) of the Indian Penal Code, against the accused. A panchanama of the burnt shed was drawn by the police. After due investigation, the accused came to be charge-sheeted.

5. The learned Sessions Judge charged the accused for the offences under sections 436 and 506(II) of the Indian Penal Code. The accused pleaded not guilty. Although in his statement the accused admitted his presence at the relevant time, he denied the charge of having set the shed on fire. According to him, he had gone to the house of his brother P.W. 2 Joaquim to demand the money which he had lent. The accused did not examine any witness in his

defence nor did he examine himself on oath. In support of its case, the prosecution examined as many as 10 witnesses, who included two eye witnesses, namely, P.W. 1 Marcelina and P.W. 4 Datta Pagui. The learned Judge upon consideration of the evidence on record found the same proved so far as the charge u/s 436 of the Indian Penal Code, was concerned. He found that the charge for the offence u/s 506(II) was, however, not proved. In this view of the matter, the learned Judge proceeded to convict and sentence the accused as indicated above.

6. Shri S.D. Lotlikar, the learned Advocate for the appellant/accused contended before me that the prosecution story is inherently improbable and the learned Judge erred in believing the same. Shri Lotlikar submitted that having discarded the prosecution evidence in respect of the charge of criminal intimidation, it was not proper for the learned Judge to have accepted the evidence of the same witness in respect of the charge of mischief by fire. Shri Lotlikar further submitted that no motive for committing the alleged offence was set out by the prosecution. He pointed out certain discrepancies in the evidence of the eye witnesses. Shri Lotlikar further emphasised the fact that the important eye witness, namely, Daniel was not examined by the prosecution. He also pointed out that the complaint filed by P.W. 1 Marcelina cannot be treated as first information report since the report given by P.W. 3 Premanand Pagui is earlier in point of time. Lastly Shri Lotlikar submitted that the scooter which was burnt did not belong to P.W. 2 Joaquim. According to him, the scooter belonged to the accused. Shri S.B. Faria, the learned Special Public Prosecutor for the State, supported the judgment and submitted that the evidence on record is sufficient to hold the accused guilty of the offence u/s 436 of the Indian Penal Code. He pointed out that the presence of P.W. 4 Datta Pagui at the relevant time was not challenged either in his evidence or in the evidence of P.W. 2 Joaquim.

7. As regards the contention of Shri Lotlikar, that the prosecution evidence does not disclose any motive, it may be stated that motive becomes irrelevant and immaterial when direct evidence regarding commission of the offence is forthcoming. In the instant case there is direct evidence of PW. 1 Marcelina and P.W. 4 Datta Pagui who speak about the actual act of the accused of setting fire to the shed. Apart from that the evidence of both PW. 1 Marcelina and her husband P.W. 2 Joaquim clearly shows that the relations between them and the accused were not cordial as the latter had opposed their love marriage which took place in 1991. Other evidence further shows that even on prior occasions the accused had come to their house and given them abuses and threats. This evidence, is, therefore, sufficient to indicate that the relations between the parties were not cordial. Consequently the submission made by Shri Lotlikar does not carry any force and has, therefore, to be rejected.

8. The main incident which took place at about 5.00 p.m. was preceded by an incident of giving abuses and threats by the accused at about 3.30 p.m. The evidence of P.W. 1 Marcelina and P.W. 2 Joaquim shows that the accused had

come to their house in the afternoon and he was giving them abuses and threats by standing outside their house. It appears that P.W. 2 Joaquim was not keeping well and, therefore, he had not come out of the house. There is absolutely no reason to discard this part of the evidence for two reasons. The first is that P.W. 7 Shrikant Pagui alongwith whom the accused had come to the house of P.W. 2 Joaquim has also clearly stated that on his request he gave a call to P.W. 2 Joaquim but his wife came out and told that Joaquim was sick. Shrikant Pagui has further stated that the accused thereafter started giving abuses to P.W. 1 Marcelina and further threatened that he would set the house on fire. It is material to note that there is nothing in the cross-examination of Shrikant Pagui to show that he was having any animosity against the accused. In fact, his relations with the accused appear to be quite normal, because it was he, who, on the request of the accused, brought the latter on his bicycle to the house of P.W. 2 Joaquim. The second reason is that the accused himself has admitted to have visited the house of his brother P.W. 2 Joaquim in the afternoon. Therefore, that evidence in respect of this incident deserves to be accepted. This incident has a material bearing to the main incident because the threat given by the accused to set the house on fire is alleged to have been brought into action in the subsequent incident which took place at about 5.00 p.m.

9. So far as the main incident of setting the shed on fire is concerned, the accused does not dispute his presence at the relevant time. As pointed out above there are two eye witnesses, namely, P.W. 1 Marcelina and P.W. 4 Datta Pagui, who speak about the actual act of the accused. So far as P.W. 4 Datta Pagui is concerned, his version is that he was present inside the house. According to him, the accused opened the gate and came in the compound. P.W. 4 Datta Pagui has further stated that the accused then set fire to the front verandah of palm leaves. He has also stated that the accused had a knife in his hand. P.W. 4 Datta Pagui has stated that he left the house from the back door in order to call someone. The cross-examination of this witness, however, shows that there is a material omission amounting to contradiction in his police statement.

Although he claims to have stated before the police that he had seen the accused setting fire to the house, such a statement does not find any place in his police statement. The said contradiction is duly proved by P.W. 10 Police Inspector who recorded his statement.

10. Shri Faria, the learned Special Public Prosecutor, submitted that the cross-examination of P.W. 4 Datta Pagui does not show that he was given any opportunity to explain the omission in his police statement. According to him, in the absence of such an opportunity, no importance could be attached to the said omission so as to discredit the witness. Shri Lotlikar, the learned Advocate for the appellant-accused, on the other hand, contended that there is no obligation on the accused while contradicting the witness with his former statement, to obtain to the disadvantage of the accused an explanation for the contradiction. According to Shri Lotlikar, neither section 162 of the Criminal Procedure Code,

nor section 145 of the Evidence Act, contemplates giving of such an opportunity to the witness. The controversy raised before me in this respect is of general importance and it is commonly found that proper procedure is not followed by the subordinate courts while bringing contradictions on record. It, therefore, becomes necessary to deal with the question raised before me. Before turning to consider this question, it would be proper to know how, in the instant case, the contradiction occurring/in the evidence of P.W. 4 Datta Pagui has been recorded. It is to the following effect :--

"I have seen with my eyes the accused setting fire to the house. I had stated to the police that I had seen the accused setting fire to the house. Confronted with the statement where it is not so recorded."

11. There can be no doubt that the omission of the fact that P.W. 4 Datta Pagui had seen the accused setting fire to the house, occurring in his police statement is of basic and vital nature since it goes to the root of his claim of having seen the accused committing the mischief. The said omission, though not a statement can be used for the purpose of contradicting the said witness. Section 162(1) of the Criminal Procedure Code, creates a general bar against the use of police statement in any inquiry or trial. The proviso to section 162 is, however, an exception to this general bar and permits a limited use of such statement to contradict the concerned witness in the manner provided by section 145 of the Evidence Act. One of the modes stated in section 155 of the Evidence Act, to impeach the credibility of a witness is:-

"By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

Section 145 permits cross-examination of a witness as to his previous statements in writing without such writing being shown to him. It, however, further states that if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

12. It is of no use in merely pointing out the contradiction and confronting the witness with it. The whole object of doing this exercise is to impeach the credibility of the witness. The credibility of a witness will not stand impeached by merely bringing on record the contradiction. It will have further to be shown that the statement made by the witness before the Court is not only contradictory to that made by him in his police statement but also that it is a deliberate attempt to change or improve on the original statement to the prejudice of the accused. This would naturally require the witness to be given an opportunity to explain the contradiction. The witness may have some plausible or valid explanation with regard to the contradictory statement. As for instance, it may be his say that he had stated the particular fact or detail to the Police Officer who recorded his statement and that such officer, however, failed to record that fact or detail in his statement or incorrectly recorded it or told him that it was not material or

relevant. It may be that the witness may admit to have not stated the particular fact or detail to the Police Officer or he may have even no explanation for the omission/discrepancy. In any event the credibility of the witness can be impeached only after obtaining his explanation for the contradictory statement and by pointing out that the explanation given by him is not true or satisfactory. Then only the Court will be in a position to consider whether and how far the credibility of that witness is affected on that count. Therefore, in my opinion, it is absolutely necessary to give the witness an opportunity of explaining the alleged contradiction. It must be borne in mind that the trial has to be fair not only to the accused but also to the witness who may be the aggrieved party himself.

13. In *Bhagwan Singh Vs. The State of Punjab*, , it was observed :--

"All that is required is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner."

In *State of Madhya Pradesh Vs. Kalu Kachru Keer*, , it was observed :--

"Before the contradictory statement can be used as evidence against the prosecution and also to discredit the witness, the attention of the witness has to be called to that particular part and his explanation sought. It, therefore, follows that calling attention to the whole of that statement and showing that the contradictory portion does not exist is not enough. What is necessary to put to the witness is what he actually stated to the police with regard to the particular detail of the incident and what he stated in Court. And when these two statements are either not reconciled by the explanation offered by the witness or are irreconcilable then contradiction may be said to exist."

In *Dasu and others Vs. State of Maharashtra*, , a Division Bench of this High Court comprising of Kurdukar and Tated, JJ., observed:-

"Before using any prior statement of a witness to contradict him, attention of the witness should be drawn to the relevant portion and he should be given an opportunity of explaining any apparent discrepancy. This is more so in the case of contradiction by omission."

It will thus be seen that a witness can be contradicted as to his police statement in the manner provided by section 145 of the Evidence Act, and section 145 contemplates giving of an opportunity to the concerned witness to explain the contradiction.

14. In the instant case, such an opportunity was obviously not given to P.W. 4 Datta Pagui but the question is as to who is bound to give an opportunity to the witness to offer his explanation with regard to the contradiction occurring in his own statement. Whether it is the accused on whose behalf the witness is cross-examined or the prosecution for whom the witness deposes. In my opinion, it is for the accused to give a witness an opportunity to explain the contradiction because it is the accused who seeks to impeach the credibility of that witness.

That does not, however, mean that if no such opportunity is given to the witness during the cross-examination, the contradiction can be ignored. It is also the duty of the prosecution to see that through re-examination proper explanation of the witness for the said contradiction is brought on record. After all, the witness is examined for and on behalf of the prosecution to prove its case. In the instant case, both, the learned Advocate for the accused who cross-examined P.W. 4 Datta Pagui as well as the learned Assistant Public Prosecutor who examined-in-chief the said witness on behalf of the prosecution failed to obtain any explanation from him as to the material contradiction in question. In such an eventuality, it becomes the duty of the Judge to exercise his power u/s 165 of the Evidence Act and to see that the witness is afforded an opportunity to explain the contradiction. However, in the instant case, the learned Judge did not exercise his power by asking a suitable Court question to the witness in relation to the contradiction. The result is that an omission of a vital fact amounting to contradiction has gone on record without there being any explanation by P. W. 4 Datta Pagui for the same. The prosecution cannot, however, get any advantage of such a situation because a material contradiction creating a serious doubt about the claim of Datta Pagui of having seen the accused setting fire to the shed is recorded. Therefore, the benefit of such a situation will obviously go in favour of the accused. In my opinion, the contradiction pointed above is of such a basic nature that it negatives the claim of P.W. 4 Datta Pagui that he had seen the accused setting fire to the shed. Therefore, on this count alone, his evidence is liable to be discarded.

15. There is yet another reason for which no reliance can be placed on his evidence. It is material to note that P.W. 1 Marcelina, who is an eye witness to the incident, does not speak anything about the presence of P.W. 4 Datta Pagui. Shri Faria, the learned Special Public Prosecutor, pointed out from the evidence of P.W. 2 Joaquim that there is a reference in his evidence to the presence of P.W. 4 Datta Pagui. It is, however, material to note that P.W. 2 Joaquim does not say anything to the effect that P.W. 4 Datta Pagui had seen the accused setting the shed on fire. It may be recalled that according to P.W. 4 Datta Pagui, he and P.W. 2 Joaquim saw the accused when he came in the compound and set fire to the shed of palm leaves. Having regard to the evidence of P.W. 1 Marcelina and P.W. 2 Joaquim it becomes very doubtful if P.W. 4 Datta Pagui had actually seen the accused setting fire to the shed. He might have been present inside the house but that does not necessarily mean that he had seen the accused committing the mischief.

16. When the evidence of P.W. 4 Datta Pagui is thus discarded, what remains on record is the solitary testimony of P.W. 1 Marcelina. She had stated about both the incidents, that is, the incident of giving abuses and threats by the accused in the afternoon and the incident of setting the shed on fire by the accused. In the first instance the presence of P.W. 1 Marcelina at the relevant time cannot be doubted since it is quite natural and proper. Moreover, the same is not specifically challenged. It is a fact that the shed was burnt on that evening. There is

absolutely no reason as to why P.W. 1 Marcelina should falsely name the accused as being the miscreant. Moreover, her version to the commission of offence is duly corroborated by the F.I.R. Exhibit P.W. 1/A which she lodged in the same evening.

17. In this respect reference needs to be made to the submission of Shri Lotlikar, who contended that Exhibit P.W. 1/A cannot be treated as an F.I.R. in this case. He pointed out that the complaint of P.W. 1 Marcelina was recorded at 6.45 p.m. whereas much before that, that is, at 5.20 p.m. the police had recorded the report Exhibit P.W. 3/A of P.W. 3 Premanand Pagui. I have gone through both the documents and it must be said that the report lodged by P.W. 3 Premanand Pagui cannot be treated as an F.I.R. for the simple reason that it does not contain the information relating to the commission of a cognizable offence. It purports to report that the shed in front of the house of P.W. 2 Joaquim had caught fire and that people were trying to put out that fire. The said report further states that P.W. 3 Premanand Pagui does not know as to how the shed had caught fire and who had set it on fire. Therefore, in substance the report lodged by P.W. 3 Premanand Pagui does not come out with anything more than a mere information to the police. This is, however, not so with regard to the complaint lodged by P.W. 1 Marcelina, who has specifically alleged that it was the accused who had set the shed of her house on fire. Therefore, the complaint of P.W. 1 Marcelina is the First Information Report, in this case and the same can be used for the purpose of corroborating her version before the Court.

18. There are other cases of evidence which go to corroborate the version of P.W. 1 Marcelina. The evidence of P.W. 7 Shrikant Pagui shows that on the request of the accused he brought him on his bicycle to the house of P.W. 2 Joaquim. He has further stated that on the say of the accused he gave a call to P.W. 2 Joaquim whose wife (P.W. 1 Marcelina) came out and told that her husband was sick. Shrikant Pagui has further stated that the accused then started giving abuses to P.W. 1 Marcelina and threatened that he would set the house on fire. It may be noted that this incident took place at about 3.30 p.m. and immediately within one and half hour or so the main incident of setting fire to the shed took place. There is absolutely no reason as to why P.W. 7 Shrikant Pagui, who is neither interested in the complainant nor inimical to the accused should make such a statement. Therefore, his version about the threat given by the accused to set the house on fire in a way lends assurance to the evidence of P.W. 1 Marcelina that the accused had actually set fire to the shed.

19. Another important circumstance which gives a little corroboration to the version of P.W. 1 Marcelina is that soon after the incident, the accused was apprehended just on the road in front of the house in question and that a knife and a matchbox were seized from his possession. This fact is deposed to by P.W. 8 Devidas Pai, who is a panch, as well as by P.W. 9 Shrikant Naik, who is a Head Constable. It is material to note that it is nowhere disputed or challenged that the accused was present near the house of the complainant when it was on fire.

20. The last but not the least piece of corroborative evidence is to be found in the conduct of the accused himself. According to the accused, the scooter which was burnt belonged to him. In reply to question No. 8 in his statement u/s 313 of the Criminal Procedure Code, the accused has stated that he was on the road waiting to tell the police that his scooter was burnt. It is significant to note that nowhere it was suggested to any of the prosecution witnesses nor did the accused state in his statement u/s 313 of the Criminal Procedure Code, that he also joined the people in putting out the fire. When the scooter, which the accused claimed to be his own, was in the shed which was on fire, then in all probability he would have tried to put out the fire or remove the scooter immediately. The evidence on record, on the contrary shows that when the shed was on fire, the accused was standing on the road with a knife in his hand and giving threats to kill if anybody tried to put out the fire. This conduct on his part confirms the truth of the ocular version of P.W. 1 Marcelina.

21. As regards the contention regarding non-examination of Daniel, it appears that he could not be examined as a witness since he was abroad. Therefore, from his non-examination no adverse inference can be drawn against the prosecution.

22. Thus taking into consideration the above position, I am of the opinion that the learned Judge was quite right in holding the accused guilty of the offence punishable u/s 436 of the Indian Penal Code. The conviction of the accused, therefore, deserves to be maintained. As regards the amount of fine, the learned Judge has imposed a fine of Rs. 20,000/- probably because the total damage caused by the fire was estimated at Rs. 20,000/-. This obviously includes the value of the scooter, which was burnt. The claim of the accused that the scooter belonged to him does not appear to be true and correct since no such case was made out during the cross-examination of any of the witnesses. At the same time it is pertinent to note that neither the complainant Marcelina nor her husband Joaquim has stated that the scooter which was burnt belonged to them. The shed which was burnt was thatched by palm leaves and as such it was not of much value. Having regard to all these facts, I think the amount of fine imposed on the accused is rather disproportionate. The learned Judge has given a direction to pay the amount of fine to P.W. 2 Joaquim by way of compensation. I think that so far as the sentence of fine and the said direction to pay the amount of fine to P.W. 2 Joaquim is concerned, needs a suitable modification.

23. In the result, the appeal is partly allowed. The conviction and sentence of the appellant-accused for the offence u/s 436 of the Indian Penal Code, are hereby maintained. The sentence of fine is, however, modified. Instead of fine of Rs. 20,000/-, a fine of Rs. 10,000/- is imposed on the accused. In default of the payment of the said fine, the accused shall undergo simple imprisonment for one year. Out of the fine of Rs. 10,000/-, if recovered from the accused, a sum of Rs. 5,000/- be paid to P.W. 2 Joaquim. The accused shall immediately surrender his bail.

24. Appeal partly allowed.