
(1956) 09 BOM CK 0010
In the Bombay High Court
Case No : Criminal Appeal No. 459 of 1956

Sitaram Dhaku Chawan

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 20-09-1956

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 297
Penal Code, 1860 (IPC) — Section 302, 324, 34

Citation : AIR 1958 Bom 439 : (1957) 59 BOMLR 39 : (1958) CriLJ 1380 :
(1957) ILR (Bom) 114

Hon'ble Judges : Vyas, J;Dixit, J

Bench : Division Bench

Advocate : Y.V. Chandrachud, for the Appellant; V.H. Gumaste, Addl. Asst. Govt.
Pleader, for the Respondent

Judgement

Dixit, J.—The case from which this appeal arises was tried by Mr. B.C. Vakil, Additional Sessions Judge, Greater Bombay, with the aid of a jury of 9. Two accused persons, Sitaram Dhaku Chavan and Keshav Shankar, were charged with having committed an offence of murder of one Kisan Shankar u/s 302 read with Section 34 of the Indian Penal Code. Keshav was also charged with having committed an offence of hurt having been caused by him to Govind Shankar, brother of Kisan, an offence punishable u/s 324 of the Code. At the end of the trial, the jury returned in favour of the two accused persons an unanimous verdict of not guilty in respect of the charge u/s 302 read with Section 34. But the jury, by a majority verdict of 7 to 2, returned a verdict of guilty against accused No. 1 for an offence u/s 302. The jury returned an unanimous verdict of not guilty in favour of accused No. 2 in respect of the charge u/s 324. The learned Judge accepted the verdict of the jury convicted accused No. 1 of the offence u/s 302 and sentenced him to suffer imprisonment for life. As regards accused No. 2, he was acquitted. Accused No. 1, feeling aggrieved by the conviction and the sentence imposed upon him, has come up in appeal.

2. Now, the trial being with the aid of a jury we must be satisfied before we set

aside the verdict of the jury that there are, in the Judge's charge to the jury, misdirections or non-directions amounting to misdirections and Mr. Chandrachud, appearing for the first accused, has contended that the learned Judge's charge to the jury suffers from misdirections and also non-directions in several places and has further urged that the charge is also based upon what is called conjectures, generalisations and speculative reasoning. In support of his contention, he has referred us to a decision of the Supreme Court reported in the case of *Mushtak Hussein Vs. The State of Bombay*, . It is, I think, enough to quote para 1 of the head-note to that case which is as follows :

"A charge to the jury cannot be said to be a fair charge if it directs the jury to reach its decision by exercise of its own ingenuity and by having recourse to conjectures and speculative reasoning."

At the outset, it may be stated that a Court of Appeal should not examine a charge too critically and two Judges dealing with the same evidence may not give a charge in identical form and this is quite obvious. But it will, I think, be conceded that the charge must be a fair charge in the sense that the Judge puts before the jury the main points in the prosecution evidence; also the points in the evidence favouring the defence; also the defence of the accused and, last but not the least, the explanation of the accused in respect of the prosecution evidence. This is not to suggest that what I have stated above is exhaustive; but it merely indicates what a fair charge should be like and I think it will be conceded that, while the appellate Court will not examine a charge too critically, the Court is bound to see that the charge is a fair charge in the sense that the case is put before the jury fairly and squarely, that is, all the points favouring the prosecution and all the points favouring the defence are brought before the jury and the jury is left to decide the case according to its best judgment.

3. Mr. Chandrachud opened the case by suggesting first that the learned Judge did not deal with the law bearing upon Section 34. He suggested that the learned Judge should have put to the jury that where circumstantial evidence supports a common intention, that circumstantial evidence must lead to only one inference and to no other and this contention does not, we think, admit of any doubt or difficulty. Common intention implies acting in concert, the existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. But, in this case, the appellant has been convicted of the offence of murder u/s 302 for his individual act, so that the jury, while dealing with that aspect of the matter, is not concerned with the question of common intention. The charge makes it perfectly clear that it was Sitaram, accused No. 1, who caused the death of Kisan and when this was pointed out to Mr. Chandrachud, he very fairly, and we think, properly, stated that he would be unable to pursue the point.

4. It was next urged by him that the learned Judge did not put to the jury that circumstantial evidence must be consistent and consistent only with the guilt of the accused. But, if circumstantial evidence is consistent with any other rational

hypothesis, that is a circumstance the benefit of which must be given to the accused. In this connection, he referred to the evidence which suggested that the chappals found at the place of the offence belonged to accused No. 1. Now in this case, the evidence against the appellant was not, only circumstantial evidence. The prosecution relied upon direct testimony and circumstantial evidence and the evidence was not circumstantial in the strict sense of the term, because the evidence of witnesses was that accused No. 1 threw away the chappals. There was, therefore, direct evidence, if accepted, of accused No. 1 having thrown the chappals. Moreover, the case did not rest merely upon circumstantial evidence. In addition to this circumstantial evidence, there was direct testimony. In our view, therefore, there is not much substance in this contention. It may be, that the learned Judge had not put it to the jury that the jury has got to be satisfied that the chappals belonged to accused No. 1 and accused No. 1 only and did not belong to anyone else. But merely because that was not stated in so many terms, would again be examining a charge rather far too critically.

5. He then urged that the learned Judge did not put to the jury that there was no motive for the accused to commit this crime. In the statement of the accused before the Court below, accused No. 1 stated that there was no enmity between him and Govind or Kisan. Kisan is the deceased, Govind being his brother. He said, therefore, that it was the duty of the Judge to put before the jury that the accused had no motive to commit this crime. But, here one has to remember that the prosecution did not rely, in the first instance, upon motive as a circumstance against the accused. If the prosecution had relied upon the evidence of motive as a circumstance against the accused, then we think it was the duty of the Judge to place before the jury the absence of circumstance bearing upon the evidence of motive. Inasmuch as the prosecution did not rely upon that circumstance, it was not necessary for the Judge to mention to the jury that there was no motive for the accused to commit this crime. Apart from this, the jury knew what the statement of the accused was and the jury could not be taken to have forgotten what was told by the accused in his statement before the Court. What is to be put to the jury is a material circumstance which, if not put before the jury, is likely to affect its verdict. In our opinion, there is not much force in this contention either.

6. It was then suggested by Mr. Chandrachud that in this case there were two accused persons, that is, accused Nos. 1 and 2, accused No. 1 being the brother-in-law of accused No. 2, and the cases of accused Nos. 1 and 2 were not put to the Jury separately. Now, it is a well accepted principle that where there is in a case more than one accused person, it is necessary to put before the jury the case of each accused separately, the reason being that the jury must have the advantage of the evidence against each individual accused in one place so as to enable it to concentrate its attention upon the evidence in the case as against that particular accused. But, as we read the charge, we find the learned Judge has put the cases of the two accused separately. There is not, therefore, much substance in that contention also.

7. It was then urged that apart from these infirmities, which, we think, are without substance, there is a very serious infirmity in the Judge's charge to the jury which is occasioned by his having indulged in what may be called matters of conjecture or speculative reasoning. Now, it is difficult to attain the standard of a perfect charge. If the charge strictly adheres to the review of the evidence in the case, it is characterised as a colourless charge, If, on the other hand, a Judge, while giving a charge to the jury, embellishes the charge with a few observations innocent of any effect, it is often suggested that it is a colourful charge which cannot be characterised as a fair charge. I think, therefore, the safe rule is that so long as a charge is a fair charge in the sense I have described above, the Court of Appeal would not be unduly critical of a charge. But, in this case, there are some difficulties in saying that the charge is free from infirmities so as to ultimately vitiate the verdict of the jury. If a charge indulges in generalisations or in matters of conjecture or speculative reasoning, it is possible that the members of the jury may be confused, and the effect may be just the opposite of what is intended. Neither should the charge be an amusing one. As an illustration, I cannot help quoting a passage which occurs at page 75; "It is not always the case that there are hundred per cent. Harishchandras or hundred per cent; liars before you". If I may say so with respect to the learned Judge, a person called Harishchandra is not to be found upon the record of the case nor is there any evidence suggesting that Harishchandra was a person who spoke 100 per cent, truth. Neither does the record show as to who are hundred per cent, liars. In saying this, it is not my intention to criticise what the learned Judge said. My object is only to point out that the jury's mind may be unwittingly swayed by considerations other than what is germane to the case; and, I think, it would not be out of place to say that this may well have been avoided in the charge.

8. One finds another passage at page 74 : "You will have to consider for yourselves what must have happened after stones were pelted; what accused No. 1 as an organiser of the Pooja in Appuwala lane must have thought with regard to the pelling of the stones." This passage is open to the criticism that the learned Judge is asking the jury just to speculate or to make a conjecture of what must and must not have happened. The evidence is that there was first a pooja at about 7.30 p. m. followed by a drama which started at about 9.30 p. m. which concluded with the organisers being garlanded at about 12.15 a. m. when stones were pelted while accused No. 1 was present and was being garlanded. It is suggested in this passage that the jury might consider for itself as to what must have happened after the stones were pelted. There is no evidence as to what happened after the stones were pelted, save that there was an incident resulting in the death of Kisan; and as the evidence shows, there was a maramari or a free fight. Again, this passage may well have been avoided in the Judge's charge to the jury. It is for the Judge first to place the facts before the jury and then to ask the jury to draw its own conclusions and inferences from those facts. But here the learned Judge told the jury to consider for itself as to

what must have happened after the stones were pelted. This is landing in a region of conjecture or speculation. Again, the jury is asked to enter into matters of conjecture when the jury were told as to what accused No. 1 as an organiser of the Pooja must have thought with regard to the pelting of stones. At least, the accused has given no explanation as to what he thought. The jury is again left in doubt as to what was in the mind of the Judge and it will not be an exaggeration to say that the conjecture may be of nine different kinds in nine different jury men.

9. Another passage in the charge may be quoted. The learned Judge observes thus at page 74:

"If they had some reason to believe that stones are being pelted or thrown by some persons, then it is for you to consider whether they would have been actuated to teach a lesson to the persons whom they believed were throwing the stones."

This suggests that accused Nos. 1 and 2 may well have been actuated by a feeling to teach a lesson to the persons whom they believed as throwing stones. Now, the evidence shows that stones were pelted. But, there is no evidence to show as to who pelted the stones. Unless one knows as to the persons who pelted the stones, it is difficult to say as to whether the accused were actuated by a particular motive or not. Another passage at the same page may be mentioned :

"Now if some person from the Appuwala lane was to go to the Hanuman lane and found some persons on the other side, you will have to exercise your worldly experience and prudence as to what might take place."

I mean no disrespect to the learned Judge and one may be pardoned for saying that this is again a province of conjecture or speculation. Then again at the same page the learned Judge observed:

"Now, gentlemen, when you have to assess the oral evidence of witnesses you have to bring to your assistance your worldly experience and knowledge of your own".

Now, it is true that, while the members of the jury are dealing with a specific case, they have to call in aid their experience of worldly affairs; that is how a man in a similar situation would or would not act by placing the members of the jury in the position as to how they would have acted if a similar situation had arisen. But it is difficult to understand as to what is meant by suggesting that the members of the jury are to bring to their Assistance knowledge of their own.

10. Two passages at page 75 may be quoted:

"You must have in your worldly experience seen persons telling you what they have exactly seen with their own eyes and persons who are drawing on their imaginations and relating to you something which they have not seen but what

they are conjuring up. Then at another place :

"A witness who has been selling prohibited liquor in this State will not say from his own mouth that a particular person had come to him to buy liquor because it will involve him."

In our view, it is better to deal with specific evidence than to ask the jury to draw upon its own imagination.

11. Then another passage at page 76 may be pointed out:

"Gentlemen, so far as Sundrabai and Kashi-nath are concerned, you will have, when you are assessing their story, visualised how they gave their evidence."

Was it suggested that they did not give their evidence in a frank manner? Was it suggested that the witnesses were prevaricating? Was it suggested that the witnesses were faltering in their statements? One is at a loss to understand as to what is exactly meant by telling the jury that the jury would visualise how these persons gave their evidence.

12. In our view, the passages quoted above will show that this charge comes within the principle laid down in Mushtak Hussain's case (A). What has been stated above is not by way of criticising the learned Judge for what he said. Our object is merely to point out the danger and the risk of embellishing a charge with matters which are not matters of evidence, but which are matters of conjecture or speculation or generalisation. We have, therefore, come to the conclusion that we must set aside the verdict of the jury and go into the merits of the case.

13. On the merits of the case, the position, if analysed, is not difficult to understand. That there was a pooja on the night of 3rd June, 1955 is clearly established on the evidence. That this pooja was followed by a drama which commenced at about 9 or 9.30 p.m. is also established on the evidence. The evidence also shows that the drama was concluded with garlanding certain persons including accused No. 1. The point of controversy arises from that point of time and it is easy to summarise the contentions of Mr. Chandrachud for the appellant and Mr. Gumaste for the State in just a few words. Mr. Chandrachud says that there is no doubt that Kisan was assaulted. There is no doubt again that in the assault Kisan received injuries of which injury No. 1 was fatal and which resulted in his death. But he says that the first accused was not the assailant of Kisan. He says that accused No. 1 was hit with a stone while the ceremony of garlanding was in progress and as a result of his being hit with a stone, he fell down and he knows nothing about the assault upon Kisan or about the injuries caused to him or about the injuries having resulted in his death. Mr. Gumaste, on the other hand, contends that accused No. 1 went up to a place in front of witness Sundrabai's room where Kisan was sleeping and there accused No. 1 assaulted Kisan with a knife, and although accused No. 1 was seen injured, accused No. 1 got the injury not when he was alleged to have been hit with a

stone but when he was seen at the place after assaulting Kisan.

14. On the point of assault, the prosecution relies upon the evidence of three witnesses : (1) Govind, the brother of Kisan; (2) Sundrabai and (3) Kashinath. The prosecution also relies upon circumstantial evidence afforded by the chappals. But the evidence is not clear that the chappals did belong to the first accused and that evidence may be left out of consideration because there is nothing to distinguish or to connect the chappals as being the chappals of the first accused. There is evidence in the case of Sub-Inspector Khan, of constable Anandrao, of constable Appa and of constable Babaji, which goes to show that there was a free fight.

15. It will be convenient to refer to this evidence first. (After discussing the evidence his Lordship concluded :) There is no clear and satisfactory evidence to show that it was the hand of accused No. 1 which resulted in the death of Kisan. The evidence about the maramari or a free fight renders the prosecution case extremely difficult to accept. That there was a maramari or a free fight is clear from the evidence. It is not shown that the maramari took place subsequently to the assault upon Kisan, nor is it shown by satisfactory evidence that the two incidents were separated in point of time. If, therefore, the evidence of eye-witnesses is not believed, then there is no question that accused No. 1 is not shown to have committed the offence with which he has been charged. At least, it is safe to say that the case is one of reasonable doubt. That a doubt arises reasonably in this case is suggested by the fact that both Sundrabai and Kashinath speak of one assault and one injury while the medical evidence shows that there were more injuries than one. This suggests again that the injuries might have been caused in the course of a free fight and if injuries were received by Kisan in the course of the free fight, it is difficult to say that accused No. 1 was the assailant of Kisan.

16. For all these reasons we must hold that accused No. 1 is not shown to have committed the crime of which he has been convicted and sentenced.

17. The result is that this appeal will be allowed, the conviction recorded against accused No. 1 for an offence u/s 302 will be set aside and the sentence of imprisonment for life imposed upon him will also be set aside and he will be acquitted and discharged.

18. Accused acquitted.