
(1982) 10 BOM CK 0012
In the Bombay High Court
Case No : Criminal Appeal No. 1422 of 1979

Sitaram Kondi Talap and Another

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-10-1982

Acts Referred:

Penal Code, 1860 (IPC) — Section 104, 148, 307, 324, 326

Citation : (1982) 1 BomCR 938

Hon'ble Judges : R.A. Jahagirdar, J

Bench : Single Bench

Advocate : A.P. Mundargi, for the Appellant; S.S. Phanse, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

R.A. Jahagirdar, J.—In Sessions Case No. 37 of 1979 tried by the learned Additional Sessions Judge of Kolhapur, five persons were prosecuted for offences punishable under sections 307, 326 and 324 read with sections 148 and 34 of the Indian Penal Code. Of the five accused, accused Nos. 1 and 2 are brothers while, accused Nos. 3 and 5 are the wives of accused Nos. 1 and 2 respectively. Accused No. 4 is another lady related to the other accused. The facts leading to the prosecution have been set out in great details in the judgment of the learned Additional Sessions Judge and it is unnecessary to refer to them again. The backdrop of the incident which gave rise to the prosecution is the neighbourhood of the two pieces of land owned by the party of the complainant on the one hand, and by the party of the accused, on the other. In between, but on the land of the accused, is a bund which, it has now been held, is of the ownership of the accused. The prosecution evidence itself shows that there are decisions of the revenue authorities that the bund is not only of the ownership of the accused, but it is in the land of the accused themselves. One should not, therefore, forget this basic fact which forms the bedrock of the defence of the accused, which I will mention shortly.

2. On the day in question, namely 14th of April, 1978, at about 10 a.m. the incident, in which several person were injured and which led to the present prosecution, took place. The prosecution case was that, accused No. 1 and the other accused forming an unlawful assembly attacked P.W. 3 Kamal Ganpat Talap and P. W. 4, Mahadeo Natha Talap with lethal weapons causing them several injuries and in particular grievous injury to Mahadeo Natha. That gave scope for framing the charges under sections 307 and 326 of the Indian Penal Code. Investigation was carried out pursuant to the first information report at Exhibit 41 lodged by P. W. 3, Kamal Ganpat. It is unnecessary to refer to the further steps taken in the investigation or to the other, evidence brought on record by the prosecution, because the incident itself has been admitted by the accused themselves. They have however, pleaded the right of private defence by contending that P.W. 4, Mahadeo and others started damaging the bund which was being constructed by them and in order to prevent further mischief to the bund they took steps to prevent Mahadeo and others from damaging the bund any further. The short question, therefore, that fell for determination before the Court below and that falls for determination before me is whether the accused caused injuries to the members of the complainant's party in exercise of their right of private defense both of their property and of their person.

3. The learned Additional Sessions Judge has, in paragraphs 31 to 33 of his judgment, dealt with this question. He proceeded to reject the defence case that they had a right of private defence on the ground firstly, that greater number of injuries have been caused to the members the complainant's party, while on the side of the accused Sitaram, accused No. 1, alone had received injury. He also held that, even if the accused acted in exercise of their self-defence, they exceeding in inflicting so many injuries on so many victims including the womenfolk. He has discussed this question of exceeding the exercise of private defence in paragraph 33 of his judgment. The reasoning contained in the said paragraph is highly unsatisfactory because, it proceeds on a non-examination of the relevant provision of the Indian Penal Code, namely section 104. Consistent with the view which he thus took, the learned Additional Sessions Judge, by his judgment and order dated 18th October, 1979, convicted the accused No. 1 of the offence punishable u/s 326 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for one year and to pay a fine of Rs. 1,000. In default of the payment of fine, rigorous imprisonment for six months was awarded. The learned Sessions Judge also convicted accused No. 2 of the offence punishable u/s 324 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for three months. Accused Nos. 3, 4 and 5, who are ladies, were convicted of the offence punishable u/s 323 of the Indian Penal Code and were admonished u/s 3 of the Probation of Offenders Act, instead of being sentenced. All the accused were acquitted of the other offences, charges in respect of which had been framed against them.

4. Accused Nos. 1 and 2 have preferred this appeal against their convictions and Mr. Mundargi, the learned Advocate appearing for them, has taken me through

all the relevant evidence on record. He has repeated the contentions, which contentions were urged with sufficient tenacity in the Court below, that the accused were forced to inflict the injuries found on the persons of the complainant's party in exercise of their right of private defence, both of person and property. That there is a bund between the two lands of the accused and the complainant is an admitted fact. It was thus necessary for Mr. Mundargi to show that the bund, for the protection of which accused exercise the right of private defence, was of the ownership of the accused and also that it was situated in their land. With this object in view he took me through the relevant evidence on record.

5. P.W. 3, Kamal Ganpat, who has lodged the first information report at Exhibit 41, is naturally an important witness while deposing to the origin of the incident and other relevant factors. She is a relative, though not a very close one, of Mahadeo (P.W. 4). She has mentioned that, on the day in question she had gone with other persons for working on a bund. Along with her were Balabai and Sakubai. P.W. 4, Mahadeo was also present. She has mentioned that accused Nos. 1 to 5 and deceased Shama were already working on the construction of the bund. It may be mentioned that Shama was one of the persons originally implicated in the incident but before the trial started he had expired. Kamal has then proceeded to mention that while accused Nos. 1 to 5 were doing the work of the construction of the bund, Mahadeo told the accused to construct the bund on the boundary of their own land whereupon accused No. 1 inflicted an axe-blow on the head of Mahadeo. She has thereafter mentioned that Shamrao inflicted injuries on the person of Mahadeo with a stick.

6. In the cross-examination she has mentioned that the accused were already doing the work of construction on the bund and that, they had supported the bund with clods of earth. She has also mentioned that the work of the bund upto two cubits remained to be done. She has admitted that Mahadeo asked the accused not to carry on the work of the construction of the bund though she has denied the suggestion that Mahadeo obstructed the accused from carrying on the construction work. One does not understand as to why the witness Mahadeo should merely give a verbal suggestion without taking an overt step for preventing the construction for the bund by the accused which, according to him, was not justified. However, later she has given an admission which admission is supported by a subsequent admission of Mahadeo to which I will refer in a short while. That admission is in the following terms :---

"The bund which belongs to the accused is in their possession since long. The dispute took place about that bund."

This clearly establishes that the bund in respect of which the dispute took place was in the land of the accused since a long time. In other words, the possession of the bund was a settled possession which could not have been disturbed by any act on the part of the complainant's party without taking due course of law.

7. In fact Mahadeo has taken due recourse to law and he has mentioned in his evidence that the decisions so far in respect of the bund have gone against him. For example, in paragraph 5 of his deposition he has mentioned that since last 5 or 6 years there has been a dispute over the bund. He has given an application to the Plant Officer about this dispute. The matter was decided by the Plant Officer against him obviously because he has preferred an appeal against the said decision. He has thereafter unequivocally admitted that at present the bund is in the land of Sitaram, namely accused No. 1. Read this in the light of the admission given by Kamal that the bund belongs to the accused and that it is in their possession since long, the picture is complete, namely that the bund has always been in the land of accused No. 1 Sitaram and that it is they, who were constructing the bund. If this is so, the complaint's party could not pretend to have any right to interfere with the construction of the bund that was being made by accused No. 1 and others.

8. The next question is whether there was any interference with the construction of the bund or an attempt on the part of Mahadeo and others to destroy the bund. The nature of the injuries suffered by accused No. 1 Sitaram necessarily shows that the members of the party of the complainant were themselves armed. Dr. Suryavanshi (P.W. 2) has, in clear-cut terms, admitted that the injury on the hand of Sitaram, accused No. 1, could be caused by an axe like Article 15 before the Court. Sitaram has also suffered another injury to his hand which is in the form of tenderness and which, according to him, was caused by a spade which was thrown at him by Balabai (P. W. 5). None of the prosecution witness has referred to the injury suffered by accused No. 1. The prosecution has avoided explaining the injury suffered by accused No. 1. The effect of this failure on the part of the prosecution to explain the injury on the accused will be considered by me shortly.

9. On probabilities, it does not appeal to reason that Mahadeo and others stopped short of damaging the bund and only advised accused No. 1 not to proceed with the construction work. It is worth repeating that the bund is of the ownership of the accused and is in the land of the accused. It would be inconceivable that accused No. 1 would damage his own bund for the purpose of spiting the complainant. If , therefore, there is acceptable evidence on record to show that damage has been caused to the bund, one can reasonably infer that the said damage has been caused by Mahadeo and others because they have always insisted that the bund belongs to them and that the accused had no right to build or repair or strengthen the same in any manner.

10. That the bund was considerably damaged, can be easily seen from the evidence of Head Constable, Kumbhar examined as P. W. 11. In paragraph 4 of his position, which is in the cross examination, he has mentioned as follows :---

"The bund is about 143 feet in length. Seven feet of its portion appeared to have been not in the same order. The clods supporting the bund were lying scattered."

This gives a picture of the bund having been damaged. Panchanama of the scene of offence (Exhibit 26) gives a similar picture. The following recitals are to be found therein about the bund :---

"The bund is at a distance of 3 feet from the Wapha and it is South-North. The mud hills on the bund are fallen in a space of 7 feet and the rest is newly-constructed".

This recital in the panchanama, which has been taken on record by consent and which has been otherwise proved by the Investigating Officer, clearly shows that a new bund had been constructed and that about 7 feet of the same had been damaged. The prosecution witnesses have conveniently failed to explain as to how the bund constructed by the accused got damaged.

11. Kamal (P.W. 3) has mentioned that the accused had supported the bund with clods which are now found to be scattered all over the place according to the recitals in the panchanama. Mahadeo has also mentioned that he asked the accused as to why they were supporting the bund with clods. So from the prosecution evidence itself, it is clear that the accused had already constructed the bund and that they were supporting the same with clods. In my opinion, therefore, on the prosecution evidence itself it is sufficiently established that there was a bund which was of the ownership of the accused and which was standing in the land of the accused. They were entitled to protect the same from any damage. Before the incident took place there was some exchange of words. There is enough material to show that it was the party of the complainant and in particular, Mahadeo who interfered with the construction of the bund by trespassing into the land of the accused and did in fact damage the bund. In order to prevent causing further damage to the bund, the accused had a right u/s 104 of the Indian Penal Code to cause any injury to the trespassers, short of causing them death. Section 104 of the Indian Penal Code specifically mentions that if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer, of any harm other than death. In the instant case, the evidence clearly establishes that the members of the complainant's party themselves were armed. If this is so, I do not see how a line could be drawn beyond which the accused could not go in exercise of their right of private defence. Of course they could not cause death and they have not caused death in exercise of their right of private defence under 104 of the Indian Penal Code.

12. Returning to the failure of the prosecution to explain the injuries suffered by the accused, one must remember what the Supreme Court has said in *State of Gujarat Vs. Bai Fatima and Another*. When the prosecution fails to explain the injuries on the person of an accused, three results follow : firstly, the exercise of right of private defence is established; secondly, the prosecution version itself is

rendered doubtful; and thirdly, it would not affect the prosecution at all. On the facts of this case it is seen that the prosecution witnesses themselves were armed. If this is so, the failure of the prosecution to explain the injuries suffered by the accused must necessarily lead to the first of the three mentioned in Bai Fatima's case.

13. In the result, the appeal succeeds and is accordingly allowed. The order of conviction recorded by the learned Additional Sessions Judge of Kolhapur against the present appellants (original accused Nos. 1 and 2) in Sessions Case No. 37 of 1979 is set aside. Also set aside is the order of sentence imposed on them.

Bail bonds of the accused are cancelled. Fine, if paid, shall be refunded.