
(1996) 11 BOM CK 0032

In the Bombay High Court

Case No : Criminal Appeal No. 327 of 1983 with Criminal Revision Application No. 63 of 1983

State of Maharashtra and etc.

APPELLANT

Vs

Harishchandra Tukaram Awatade

RESPONDENT

Date of Decision : 02-11-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 378(1)
Penal Code, 1860 (IPC) — Section 307, 324, 326, 34, 427

Citation : (1997) CriLJ 612

Hon'ble Judges : Vishnu Sahai, J;A.S.V. Moorthy, J

Bench : Division Bench

Advocate : D.G. Bagwe, app, for the Appellant; Sachin Shetye, holding for S.C. Dharmadhikari and P.M. Menghane, for the Respondent

Judgement

Vishnu Sahai, J.—Since both these matters arise out of a common incident and the same impugned judgment, they are being disposed off together.

2. A perverse judgment of acquittal dated 3rd December 1982 passed by the Assistant Sessions Judge, Solapur, in Sessions Case No. 109 of 1982 acquitting the respondents for offences punishable under Sections 307, 326, 324 and 427, all read with Section 34, I.P.C., has prompted the State of Maharashtra to prefer this appeal u/s 378(1), Cr.P.C., in this Court.

The same consideration has prompted the original complainant Dinkar Krishnaji Patil to prefer Criminal Revision Application No. 63 of 1983.

3. Briefly stated the prosecution case runs as follows :

The informant Dinkar Krishnaji Patil P.W. 3 was residing at the time of the incident, along with his wife Shashikala P.W. 6 and children, in House No. 741 in South Kasba area, of Solapur. There was enmity between him on the one hand and respondents Harishchandra Tukaram Awatade and Prabhakar Tukaram Awatade, both real brothers, on the other. The other two respondents viz. Shivaji

alias Kaka Namdeo Awatade and Ashok Namdeo Awatade both real brothers were nephews of Harishchandra Tukaram Awatade and Prabhakar Tukaram Awatade, inasmuch as their father Namdeo was the cousin of Harishchandra Tukaram Awatade and Prabhakar Tukaram Awatade.

According to the complainant the land of Harishchandra Tukaram Awatade and Prabhakar Tukaram Awatade was adjoining his land. The former had encroached upon his land resulting in his filing a suit against them in the Civil Court, in Mohol. That suit was decreed in favour of the complainant and it created a rift between the complainant and the respondents.

On 7-10-1981 at about 7.30 p.m. the complainant returned home on a motor cycle from the house of his friend Rajaram Benjarpe. He had parked the motor cycle in front of his house. He told his wife Shashikala that he wanted to go out for taking meals. Thereafter he came out from the house. At that time his 9 year old son Harshad was also inside the house. Harshad followed him when he came out of the house. While he was about to start his motor cycle two persons assaulted him on his head with iron bars, from back. He turned around and saw the respondents armed with iron bars behind him. All of them then began assaulting him with iron bars as a consequence where of he lost control of his motor cycle and fell down on the ground. Even thereafter the respondents went on assaulting him. He tried to get up but could not since the responsible were dragging and beating him. According to the prosecution, the attack on the informant was seen by his son Harshad, his wife Shashikala and Nagnath Sopan Babar. Finally the complainant succeeded in his endeavour of getting up. He entered inside the house of Nagnath which was at a distance of about 10 to 15 ft. from the place of the incident. There Nagnath tied a towel around his head. Thereafter he along with his wife Shashikala and Shirish Pandurang went in a rickshaw, to the house of Kishore Kale P.W. 8 in Sidheshwar Peth and informed him about the manner of assault and the names of the assailants. From there he went to the Civil Hospital.

4. The injuries of the victim/complainant were examined the same day, within half an hour, i.e. at 8 p.m. in Civil Hospital, Solapur by Dr. Dhanpal Parisa Ainapure, P.W. 5. The doctor found the following injuries on his person : 5 contused lacerated wounds, 2 bruises and 7 abrasions. Two of the contused lacerated wounds were situated on the head and one on the face.

In the opinion of Doctor Ainapure the said injuries were attributable to blows of iron bars and were caused within three hours.

It appears that x-ray examination was also conducted in respect of some of the injuries sustained by the victim and the following fractures were detected.

- (a) Dislocation of inter phalangeal joint of right thumb;
- (b) Fractures of the 8th, 9th, 10th and 11th ribs on the right side; and
- (c) Fracture of fibula upper 1/3 on left side;

It is pertinent to mention that the x-ray reports of the complainant were proved by Dr. Ainapure.

5. The evidence is that at 9.35 p.m. an information was received on telephone at Fouzdar Chawadi Police Station from Civil Hospital Sholapur to the effect that Dinkar Krishnaji Patil (the complainant) had sustained injuries and was admitted in the said hospital. The said information was entered by P.S.O. Khandappa Shivalappa Kotane P.W. 9 in the station diary at Exhibit 22, P.S.O. Kotane directed Head Constable Noor Mohamad Akbar Mujawar P.W. 10 to proceed to Civil Hospital.

6. The FIR of the incident was recorded by Head Constable Mujawar the same day, in Civil Hospital, Solapur on the dictation of the victim Dinkar Krishnaji Patil. In the FIR the respondents are named and the manner in which they assaulted the victim has also been stated. After recording the FIR PHC Mujawar obtained the thumb impression of the complainant on the same.

7. The investigation was conducted by PSI Vasant Jaisingrao Dhumal P.W. 11. On 8-10-1981 he went to Civil Hospital and saw the injured complainant. Thereafter he made panchanama of the scene of occurrence on the same being shown by Nagnath Babar. He recorded the statements of Nagnath Babar, Shirish Korawar and five others. On 9-10-1981 he recorded the statements of Shashikala and 4 others. On 11-10-1981 respondent Nos. 1 to 3 were arrested. On 12-10-1981 respondent No. 4 was arrested. On 13-10-1981, during the course of interrogation respondent No. 1 Harishchandra, expressed his willingness to get the weapons of assault viz. the iron bars, recovered. Consequently under a panchanama, in the presence of public panchas, two iron bars were recovered from the shrubs, by the side of the road near Pune naka.

We do not propose going into the details in respect of the evidence pertaining to recovery of iron bars because that for very plausible reasons, stated in paragraph 28 of the judgment, has been disbelieved by the learned trial Judge.

It appears that the chargesheet in the instant case was submitted on 14-12-1981 by P.S.I. Honarao.

8. The case was committed to the Court of Sessions in the usual manner. In the trial Court the respondents were charged on the counts mentioned in paragraph 2 of out judgment. They pleaded not guilty to the charges.

9. In the trial Court in all the prosecution examined as many as 11 witnesses; 3 out of them viz. Dinkar Krishnaji Patil, Nagnath Babar and Shashikala P.Ws. 3, 4 and 6 respectively were examined as eye-witnesses. In defence respondents 1 and 2 examined themselves. Their plea was that of denial.

After recording the evidence and hearing learned counsel for the parties the learned trial Judge passed the impugned judgment which has been taken offence to by the State of Maharashtra and the original complainant; the former has preferred Criminal Appeal No. 327 of 1983 and the latter Criminal Revision

Application No. 63 of 1983.

10. We have heard Mr. D. G. Bagwe for the appellants and Mr. Sachin Shetye for the respondents in Criminal Appeal No. 327 of 1983. It appears that the counsel for the petitioner/original complainant in Criminal Revision Application No. 63 of 1983 was Mr. Bhimrao N. Naik on whose elevation to the Bench of this Court a notice was sent to the petitioner but in spite of the same he has not engaged any counsel. Consequently there was none on behalf of the petitioner in the said revision. Mr. P. M. Menghane who was counsel for the respondents 1 to 4 in the said (respondent No. 5) revision represented them and the State was represented by Mr. D. G. Bagwe, the learned APP.

11. We have perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statements of the respondents recorded u/s 313, Cr.P.C.; and the statements of respondents 1 and 2 who examined themselves as defence witnesses. We have also gone carefully through the impugned judgment. We are squarely satisfied that an offence u/s 326 read with 34 I.P.C. is squarely brought home against the respondents and the learned trial Judge acted perversely in acquitting them on the said count.

12. Before returning the conclusion recorded in the preceding paragraph we have cautioned ourselves that we are examining the matter in an appeal against acquittal. As we understand the law is that the appellate Court in such an appeal should only interfere if appreciation of evidence is grossly unreasonable or acquittal is vitiated by a manifest illegality. In our view, the learned trial Judge acted wholly perversely in rejecting the evidence of the victim Dinkar Krishnaji Patil.

13. It is well settled that evidence has to be weighed and not counted. It is on this salutary principle that the provisions contained in Section 134 of the Indian Evidence Act, "that no particular number of witnesses shall in any case be required for the proof of any act.", are founded.

14. We have set out the prosecution case in paragraph 3 of this judgment, on the basis of the recitals contained in the statement of the complainant Dinkar Krishnaji Patil and no useful purpose would be served by repeating the same in entirety. In short the complainant stated that on 7-10-1981 at about 7.30 p.m. when he had returned to his house and had parked his motor cycle in a land near his house and was about to start the same, after coming out from his house, the four respondents attacked him with iron bars. He stated that at first an assault was launched by two of them from his back side and as a result he fell down. The respondents even thereafter continued to assault him with iron bars. He tried to get up but his effort was thwarted by them. He was then dragged by the respondents. Ultimately he got up and ran inside the house of Nagnath P.W. 4, who tied a towel on his head. From there he along with his wife and Shirish Korwar, on a rickshaw, first went to the house of Kishore Kale P.W. 8 and thereafter to Civil Hospital, Solapur, where he was medically examined and he

dictated his FIR.

15. We have gone through the statement of the informant and we find that the same inspires implicit confidence. The manner of assault as disclosed by him is corroborated by the statement of Dr. Dhanpal P.W. 5 who candidly stated that the injuries of the informant could be caused by iron bars.

In the earlier part of our judgment we have mentioned the injuries sustained by the informant and are squarely satisfied with the evidence of the medical witness. It is common knowledge that iron bars cause contusions, abrasions and contused lacerated wounds. Again the statement of the informant that he was dragged and first assaulted from the back by two persons is also corroborated by the medical evidence. Out of the 14 injuries which the informant sustained as many as 7 were abrasions. It is common knowledge that abrasions are caused invariably because of dragging. The two bruises, namely injuries No. 9 and 10 were on the back and they lend assurance to the informants statement of being assaulted from back by two persons.

16. Apart from the medical evidence there are some other circumstances which lend tremendous assurance to the statement of the complainant. One of them is that even the hostile witness Nagnath P.W. 4 deposed about the place and the time of the incident. This witness also stated that subsequent to the assault launched on him the complainant entered inside his house and he tied a towel on his head.

The circumstances that the injuries of the informant were medically examined within half an hour of the incident i.e. at 8 p.m. also lends assurance to the statement of the informant that he was assaulted at 7.30 p.m.

The circumstances which removes even an iota of doubt from our minds about the truthfulness of the claim of the informant that the respondents assaulted him with iron bars and he recognised them, is the FIR which he dictated the same night at Civil Hospital, Solapur, to PHC Mujawar. He not only nominated the respondents therein but also stated that they assaulted him with iron bars and the assault was initiated by two of them by assaulting him from the back side.

Criminal Courts attach great importance to the prompt lodging of the FIR. The same substantially reduces the possibility of improvements and embellishments in the prosecution case.

17. The learned trial Judge has disbelieved the evidence of Shashikala P.W. 6, the wife of the informant. In our view the reasons given by him are not plausible. A perusal of paragraph 21 of the impugned judgment would show that the learned trial Judge was influenced by the circumstance that Shashikala's name is not mentioned in the FIR. He seems to have completely lost sight of the fact that at the time of narrating the FIR the complainant was hovering between life and death and if in such a situation he did not mention her name in the FIR this circumstances should not be blown out of proportion.

18. Even assuming that Shashikala's evidence did not inspire confidence the learned trial Judge lost sight of the fact that the solitary statement of the complainant who was an injured witness, was sufficient for recording the conviction of the respondents. The reasons which have weighed with the learned trial Judge for not accepting the statement of the complainant are mentioned in para 19 of the impugned judgment. They are mainly omissions. It is well settled that an innocuous omission is inconsequential. Omissions amounting to contradictions that militate against the meat or core of the prosecution case are alone material. Bearing this in mind we examined the said omissions and we found them to be wholly inconsequential. In our view the complainants evidence was sufficient for convicting the respondents.

19. The learned trial Judge has also been influenced by the circumstances that the incident took place on 7th October at 7.30 p.m. and for want of light the recognition of the respondents was not possible. He is wrong. There was electric light. The learned trial Judge has observed in para 17 that the assumption that the respondents were known to the complainant from before is baseless. We regret that this finding is contrary to the weight of evidence on record. The evidence is that between the respondents Harishchandra and Prabhakar (respondents Nos. 1 and 2) on the one hand and the informant on the other there was a protracted civil litigation which saw the light of the day in two Courts. That being so there was no difficulty on the part of the informant in recognising the two responsible or their nephews (respondent Nos. 3 and 4) by their gait or the timbre of their voice. The learned trial Judge also lost sight of the dictum laid down by the apex Court in the case of Kirpal Singh Vs. State of Uttar Pradesh, . In paragraph 4 of the said judgment Their Lordships of the apex Court have accepted that known persons can be recognised by the timbre of their voice and gait. They rejected the submission to the contrary which appears was canvassed, by the defence counsel.

20. Mr. Sachin Shetye, learned counsel for the respondents made every possible endeavour to persuade us to hold that the evidence of the complaint was neither acceptable nor truthful. His main submission is that the complainant has stated that he became unconscious. Hence he could not say who assaulted him. What Mr. Shetye seems to have lost sight of, is the fact that the evidence of the informant is that he only became unconscious after receiving injuries at the hands of the respondents and not before. His evidence shows that he recognised them.

21. For the said reasons we believe the evidence of the complainant, corroborated by that of his wife and in parts by that of Nagnath. It is true that Nagnath became hostile but the law is that the testimony of a hostile witness is not to be rejected altogether. To the extent to which the testimony of such a witness is corroborated by that of a reliable witness, it is acceptable. The evidence of the complainant corroborative that of Nagnath on :-

(a) the place of the incident;

- (b) the time of the incident;
- (c) that he went inside the house of Nagnath subsequent to the assault; and
- (d) that his wife took him to the hospital;

The circumstance that the blood stained clothes of the wife of the victim were seized during investigation, in our view, clinches her presence on the place of the incident.

22. For the said reasons we are squarely satisfied that the learned trial Judge erred in acquitting the respondents. We have gone through the evidence of the respondent Nos. 1 and 2. That of the former shows that they had a motive to assault the complainant. That of the latter, who stated that they did not assault him, is false.

23. The question now remains is what is the offence which is made out against the respondents. The respondents with iron bars launched a very ruthless assault on the informant, causing injuries all over his body. Three of those injuries were grievous in nature. We have mentioned them in paragraph 4, above.

24. The next question is whether bearing in mind the motive and the nature of the injuries received by the informant can it be said that the respondents are guilty of an offence punishable u/s 307 read with 34, I.P.C. in *The State of Maharashtra Vs. Bodaya Ramji Patil*, it has been laid down that unless the injuries are capable of causing death it would not be proper to infer that an offence u/s 307, I.P.C. has been committed.

In the instant case we have gone through the statement of Dr. Ainapure P.W. 5 who medically examined the complainant. He has nowhere stated that his injuries were either dangerous to his life or capable of causing his death. It would thus be hazardous to convict the respondents for an offence u/s 307 read with 34, I.P.C.; all the more so because the injuries sustained by the complainant on his head were simple in nature.

However, we are implicitly satisfied that an offence u/s 326 read with 34, I.P.C. is squarely brought home against the respondents.

25. The question which remains is as to what should be the quantum of sentence that should be awarded to the respondents.

Mr. Sachin Shetye contended that bearing in mind that the impugned judgment of acquittal was passed more than 15 years ago and there is nothing to indicate that the respondents are either previous convicts or are having any criminal antecedents it would be expedient in the interest of justice to reduce their jail sentence to the period already undergone by them and impose some fine on them.

We are very candid in observing that on the first blush we were not inclined to accept this submission because the respondents caused injuries in a most

merciless manner on the informant but what really made us change our minds was the circumstances that the record shows that each of the four respondents were in jail as under trials for a period of about 10 months. The record shows that the respondents were released on bail on 9-8-1982 and that whereas the 1 to 3 were arrested on 11-10-1981, respondent No. 4 was arrested on 12-10-1981. In such a situation we find that the more equitable order would be to impose a substantial fine on each of the respondents and direct the same to be paid as compensation to the complainant, instead of sending them to jail. Bearing in mind the extremely callous manner in which they assaulted the complainant it would be equitable if each of the respondents is ordered to pay a fine of Rs. 10,000/-, within a period of 6 months from today in the trial Court. In case the fine is paid the trial Court shall immediately inform the complainant Dinkar Krishnaji Patil PW. 3 about this compensation. In case he is no more then the compensation amount shall be paid to his legal heir/heirs, as the case may be, who shall be informed by the trial Court without any loss of time.

26. In the result Criminal Appeal No. 327 of 1983 is allowed partly. The impugned judgment so far as it pertains to the acquittal of the four respondents namely, (1) Harishchandra Tukaram Awatade, (2) Prabhakar Tukaram Awatade, (3) Shivaji alias Kaka Namdeo Awatade and (4) Ashok Namdeo Awatade for the offence u/s 326 read with 34 IPC. is set aside. Instead each of them are convicted for the offence u/s 326 read with 34 IPC. On the said count their jail sentence is reduced to the period already undergone by them and each of them is directed to pay a fine of Rs. 10,000/- on the said count. This fine shall be deposited by them within a period of 6 months from today in the trial Court failing which they shall undergo a sentence of 2 years R.I. in default of its payment.

The fine deposited shall be paid as compensation to Dinkar Krishnaji Patil PW 3. In case he is not alive then to his legal heir/heirs, as the case may be. In case the fine is paid the trial Court shall immediately inform Dinkar Krishnaji Patil P.W. 3 about this compensation. In case he is not alive then the compensation shall be paid to his legal heir/heirs as the case may be, who shall be informed by the trial Court without any loss of time. The acquittal of the respondents on the remaining counts is maintained.

Criminal Revision Application No. 63 of 1983 is disposed of in the above terms.

Before parting with this judgment we would be failing in our fairness if we do not record our appreciation for the assistance rendered to us by the learned counsel for the parties.

In case an application for certified copy of this judgment is made the same shall be issued expeditiously.

27. Order accordingly.