

(1979) 01 BOM CK 0014
In the Bombay High Court
Case No : Criminal Appeal No. 229 of 1977

State of Maharashtra

APPELLANT

Vs

Fakir Mohammad and Others

RESPONDENT

Date of Decision : 31-01-1979

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 379

Citation : (1979) 01 BOM CK 0014

Hon'ble Judges : S.C. Pratap, J

Bench : Single Bench

Advocate : B.Y. Deshmukh, P.P, for the Appellant; V.P. Tipnis, for respondent
Nos. 1, 3 to 5 and H.A. Solkar, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Pratap, J.—This appeal by the State is against the order of acquittal dated 14th May, 1976, passed by the learned Judicial Magistrate, First Class, Shriwardhan Camp, , in Criminal Case No. 474 of 1974. At the trial there were as many as 27 accused persons charged with an offence punishable u/s 379 read with section 34 of the Indian Penal Code. All the said accused were acquitted. This appeal however, is filed only against accused Nos. 1 to 5.

2. The prosecution case, in brief, has been that one old minor bridge at Saver river, Mhasala, had been ordered to be dismantled. The dismantling contract was given to one Saifuddin Ismail Gaye who was a Local Government Contractor and who has been examined in the present case as prosecution witness No. 2. This contractor dismantled the bridge and removed in all 21 beams (gliders), 11 of which were kept by the side of the road and the remaining were lying in the bed of the river. On the night between 5th and 6th September, 1974, P.S.I. Hundekari alongwith his staff was on night patrolling duty in that area. Hearing the noise of the lifting of the beams, the police party went there and found accused Nos. 1 to 27 engaged in the work of loading the beams into truck. Enquiries were made with the accused. Accused nos. 1 to 3 informed the P.S.I. that they had

purchased these 11 beams from the contractor, Saiffuddin, at the rate of Rs. 1,600/- per ton. However, not satisfied with this explanation, all the 27 accused persons alongwith the loaded truck were brought to the Mhasala Police Station. Contractor Gaye and Deputy Engineer Pendse, were also brought to the Police Station. The 11 beams in question were attached along with the truck.

3. After investigation, all the accused persons were charge-sheeted for an offence punishable u/s 379 read with section 34 of the Indian Penal Code. Defence of the accused persons to the said charge was one of complete denial. Accused No. 2 claimed that the contractor, Gaye, had sold the said beams at the rate of Rs. 1,600/- per ton and it was in pursuance of the said contract of sale that the party consisting of the aforesaid accused persons were engaged in the loading of the beams into the truck in question. The defence of the accused was that even an advance of Rs. 1000/- had been paid to Gaye. Further defence was that it was indeed, at the instance of Gaye who wanted to sell these beams, that the contract of sale was entered into. There was no question of any intention of stealing the property. The accused were of the impression and belief that the beams belong to Gaye, the contractor, and under that belief and impression accused Nos. 1 and 2 agreed to purchase the same at the rate of Rs. 1,600/- per ton. Accused No. 1 was a person who was dealing in scrap material at Kalyan, far away from the scene of offence. When Gaye enquired of accused No. 2 if he could find a purchaser for his beams which Gaye is said to have himself purchased from the B & C Department of the State Government, accused No. 2 told him that his relation accused No. 1 at Kalyan, dealing in scrap material, may be interested in the said purchase. In due course, accused No. 2 when he went to Kalyan met the said relation accused No. 1, who agreed to purchase the said material not at the rate of Rs. 1,800/- per ton quoted by Gaye but at the rate of Rs. 1,600/- per ton. Gaye agreed to the said price. It was only, thereafter, that accused Nos. 1 and 2 alongwith accused Nos. 3, 4 and 5 left Kalyan in the truck in question and on way to Indapur took accused Nos. 6 to 27 as labourers for the work of loading of the beams. Coming to Mhasala they met Gaye at his residence, also gave him an advance of Rs. 1,000/- and the party then went to the site for the purpose of loading. When P.S.I. Hundekari met them at night, the accused persons did tell him immediately and on the spot itself that they had purchased these beams from Gaye. Indeed, even after the P.S.I. met them, the accused continued to load the beams into the truck. According to the accused, a false case has been instituted against them. The object of prosecuting the accused persons was, according to the accused, to save the contractor Gaye. Accused No. 2 has also entered the witness box and offered himself for cross-examination inter alia, by the prosecution.

4. Considering the entire oral and documentary evidence on record, the learned Trial Magistrate has come to the conclusion that the prosecution has failed to prove that accused Nos. 1 to 27 or any of them committed theft of the 11 beams in question as alleged by the prosecution. Consequently, all the accused were acquitted. While not challenging the acquittal of accused Nos. 6 to 27, the State

has filed the present appeal challenging nevertheless the acquittal of accused Nos. 1 to 5. In support of the appeal, I have heard the learned Public Prosecutor, Mr. B.Y. Deshmukh. On behalf of accused Nos. 1, 3, 4, and 5, I have heard Mr. V.P. Tipnis, the learned Advocate and on behalf of accused No. 2, I have heard Mr. H.A. Solkar. I have been taken through the evidence of the prosecution witnesses as also through the evidence of accused No. 2 himself who has been examined as defence witness No. 1. Going through the said evidence and considering the various facts and circumstances on record, I am firmly of the opinion that this is not at all a case for reversing the pre-eminently justified order of acquittal passed by the learned trial Magistrate. Indeed, in my view, this was a case where discretion could have been said to have been better exercised if the order of acquittal against all the accused had been accepted instead of filing the present appeal against acquittal of some of them. Considering the evidence and the facts and circumstances, it is impossible to hold any of the accused persons guilty of the offence charged with. Cogent reasons have been given by the learned Magistrate for acquitting the accused persons. Considerable criticism has also been levelled by the learned trial Magistrate against some of the prosecution witnesses as also, indeed, even against the prosecution case itself against the accused persons. I am in full agreement with the said comments of the learned trial Magistrate. According to me, this is not a case where two views are even possible. Further even assuming two views were possible, the well settled principle is that the one in favour of the accused must be upheld. But as stated above, on the evidence and facts and circumstances of the case, it is impossible to take any view in favour of the prosecution. The acquittal is more than amply justified.

5. Going through the evidence of prosecution witness No. 1, Madhukar Vishnupant Pendse, working as Deputy Engineer at the relevant time, it fails to inspire any confidence in the Court. Worse is the position when one goes through the evidence of prosecution witness No. 2 Saiffuddin, the contractor in question. It may at this stage be also noted that this witness Gaye, has a very dismal life history. He was involved in several criminal cases as also in chapter cases. Indeed, he was also an externee for 5 years. He admits that before going to the Police Station when he was called on the night of the incident, he first went to Pendse, the Deputy Engineer, who was at the Rest House, and only thereafter he went to the Police Station. He also admits that out of the beams in question, actually 2 beams he had himself used for the construction of an approach road for the house of Penkar. He admits in his evidence that he has been purchasing old materials from B and C Department of the State Government. He has also been purchasing some old materials from Z.P., Mhasala. The defence story put to him in his cross-examination about the sale has been sought to be denied by him. But in the context of the other factors and circumstances, it is not possible to accept this denial. Indeed, if he had nothing to do with the matter and if he had not agreed to sell and if the call from the Police Station came to him as a surprise, there was no reason for him to directly go to the Police Station instead

of first going to the Rest House to meet the Deputy Engineer Pendse, and only after certain discussion with him go to the Police Station in question. Suggestion was made to him in his cross-examination that he went to the Deputy Engineer in question but could not succeed in manipulating the documents. His evidence further show that he was a "C" Grade contractor.

6. The next witness who is the Investigating Officer, P.S.I. Hundekari, admits that accused Nos. 1 and 2 had told him that they had purchased the beams in question from Gaye at the rate of Rs. 1,600/- per ton. He also admits that he had come to know that Gaye had taken the contract for dismantling the bridge. It is significant to note that he admits that he did not even ask the Deputy Engineer to show that him the papers relating to the contract. He admits that he did not make panchanama on the spot and made the same only at the Police Station. In cross-examination on behalf of accused Nos. 4 to 27, the Investigating Officer has stated that accused No. 4 was the driver and accused No. 5 was the cleaner of the truck in question and accused Nos. 6 to 27 were labourers and residents of Indapur. Prosecution witness No. 5, Shankar Jagannath Pol, who was alongwith P.S.I. Hundekari on patrol duty on the night in question, also admits that accused No. 1, on enquiry, did tell them that he had purchased the beams from Gaye, the contractor, at the rate of Rs. 1,600/- per ton.

7. None of the prosecution witnesses examined in the present case inspite any confidence in the Court. On the contrary, the admission given by some of the witnesses clearly go to show that the accused had no intention of committing any offence. At the very first instance, they had informed the Police Officer as also his party that they had in fact, purchased the beams in question from the contractor Gaye, at the rate of Rs. 1,600/- per ton. The probabilities of the case also go to completely corroborate this defence of the accused. The scene of offence is at Mhasala which is about 150 Miles from Kalyan at which place accused No. 1 has been carrying on his trade and business as a scrap dealer. The defence of the accused is also very natural defence and it is consistent with the facts which emerged even from the evidence led by the prosecution.

8. There is no dispute that Gaye was given the contract for dismantling the bridge in question. Evidence also indicates that Gaye had been taking contracts orally without any published public auctions in that behalf by the concerned Department. Evidence also indicates that he has also been purchasing old materials in public auction. It is not the prosecution case that Gaye was not concerned with the dismantling of the bridge in question. The prosecution also do not controvert the important fact that it was Gaye who had, out of the beams in question, utilised 2 beams for an approach road leading to the house of Penkar. In the above circumstances, I do not think that a person staying at Kalyan would travel a distance of 150 Miles openly in a truck with more than 25 other persons to commit a theft on a public street.

9. The other significant fact which has emerged from the record is that even

after the Investigating Officer questioned the accused and then left, the accused persons continued their work of loading the beams. Indeed, even in the presence of the said officer himself, the work of loading was going on. This conduct on the part of the accused persons, also to a very great extent, in my opinion, is inconsistent with their guilt and is consistent with their genuine and bona fide impression and belief that they are loading the beams which have been purchased from the owner Gaye, on payment of consideration. All the beams in question had been, in due course, loaded into the truck.

10. The record gives an impression that there has been some sort of a fishy dealing by the contractor Gaye, prosecution witness No. 2, with some one or the other connected with B and C Department of the State Government. The unexpected development that took place on the night in question must have given a surprise to the contractor, Gaye. His conduct, thereafter, also indicates some doubt. Though called by the police, he does not straightway go to the Police Station but first goes to the Rest House where prosecution witness No. 1, the Deputy Engineer, Pendse was residing at that time and only after talk and discussion with him, he has chosen to go to the Police Station.

11. Good and cogent reasons have been given by the learned trial Magistrate for acquitting all the accused persons. It is not necessary to reiterate the same here. Suffice to State that there is not a single compelling circumstance which can warrant this Court to interfere with an otherwise pre-eminently justified order of acquittal passed by the learned trial Magistrate. As stated by me hereinabove, this was, indeed, a case where discretion could have been better exercised by not filing the present appeal at all and by accepting the correct order of acquittal passed by the learned trial Magistrate.

12. In the result, this appeal fails and the same is dismissed.

13. Bail bonds of the accused shall stand cancelled.