

(2019) 01 BOM CK 0148

In the Bombay High Court

Case No : Criminal Appeal No. 132, 326 Of 2013

State Of Maharashtra

APPELLANT

Vs

Ganesh Shrawan More And Ors

RESPONDENT

Date of Decision : 08-01-2019

Acts Referred:

Indian Penal Code, 1860 — Section 147, 148, 149, 302, 307
Arms Act, 1959 — Section 4, 25

Citation : (2019) 2 BCR(Cri) 279

Hon'ble Judges : P.N. Deshmukh, J;Rohit B. Deo, J

Bench : Division Bench

Advocate : K.S. Joshi, A.K. Tripathi, A. Deshpande, P.V. Navlani, Vaishali Khadekar, K.S. Joshi

Final Decision : Dismissed

Judgement

P.N. Deshmukh, J

(1) Criminal Appeal No.132/2013 is preferred by State and Criminal Appeal No.326/2013 is filed by complainant. Both these appeals take exception to the judgment and order dated 30/10/2012 passed by learned Additional Sessions Judge, Achalpur in Sessions Trial No.116/2006 whereby all the accused nos.1 to 9 came to be acquitted of the offences punishable under Section 302 read with Sections 149, 147 and 148 of Indian Penal Code and Section 4 read with Section 25 of the Arms Act.

(2) In brief, the case of prosecution can be stated as under : On 4/3/2006 at 11 p.m. P.W.1 Rukhmabai, complainant and mother of deceased Gajanan, was standing in the courtyard of her house when her son Gajanan came near the gate, who was followed by accused no.6 Pappu, accused no.4 Vikas, accused no.7 Deepchand, accused no.5 Ashok, accused no.1 Ganesh, accused no.2 Gajanan and accused no.3 Raghunath and after abusing her son, dragged him to the road where accused no.6 Pappu assaulted him by sword on his head and other accused assaulted him by sticks and ran away from the spot leaving

Gajanan lying on the road in a bleeding condition. P.W.3 Nandkishor and others took him to Hospital while P.W.1 Rukhmabai visited Police Station and lodged report (Exh. 77), which was recorded by P.W.15 Vijay Kasar, PSI and on the basis of same, registered Crime No.26/2006 for the offences punishable under Sections 307, 147, 148 read with Section 149 of Indian Penal Code against accused and carried out investigation, during the course of which he deputed one Police Constable to Rural Hospital, Anjangaon and handed over requisition memo (Exh. 157) to Medical Officer to examine deceased Gajanan, if he was in a position to make a statement and had also issued requisition memo (Exh.158) requesting Medical Officer to opine about injuries sustained by deceased Gajanan. However, deceased Gajanan was referred to Civil Hospital, Amravati where he succumbed to injuries on 5/3/2006 while undergoing medical treatment. As such, no statement of deceased Gajanan could be recorded.

(3) On 5/3/2006 offence punishable under Section 302 of Indian Penal Code came to be added in the present crime by the Investigating Officer and by visiting spot, spot panchanama was drawn as per Exh. 105 and at the same time, two wooden stumps, blood stained earth and plain earth came to be seized under panchanama. Investigating Officer also got obtained ten photographs vide Exhs. 160 to 169. After effecting arrest of accused on 7/3/2006, blood stained clothes of accused no.5 Ashok were seized as per seizure panchanama (Exh. 94), of accused no.1 Ganesh along with one stick came to be seized as per Exh. 95, of accused no.2 Gajanan with one stick came to be seized as per Exh.96, of accused no.3 Raghunath with one stick came to be seized as per Exh. 97 and of accused no.4 Vikas came to be seized as per Exh. 98. On effecting arrest of accused no.7 Deepchand on 8/3/2006, his clothes and one stick were seized as per Exh. 99. On the same day, clothes and one sword as produced by accused no.6 Pappu came to be seized as per Exh. 100. All the seized muddemal articles came to be forwarded to Chemical Analyser for analysis.

(4) On 11/3/2006 the seized muddemal sword, wooden logs and four sticks were forwarded to Medical Officer as per Exh. 170 to seek his opinion with reference to injuries sustained by deceased Gajanan, which was received on the back side of requisition vide Exh. 125. On 12/3/2006 after arresting accused no.8 Prashant, his blood stained clothes along with one stick were seized as per Exh. 101. On the same day requisition was sent to Deputy Engineer, Maharashtra State Electricity Board, Anjangaon Surji to certify if in the night of 4/3/2006 there was electricity supply or there was load shedding in the night hours, which was replied as per Exh. 137. On collecting inquest panchanama and post mortem notes, further investigation was transferred to P.W.14 Gulab Choudhari, P.I., who issued letter to Chemical Analyser and forwarded all the muddemal articles for analysis as per Exh. 140 through Police Constable and collected viscera bottles from Civil Hospital, Amravati on 22/3/2006 and sent the same for analysis to Chemical Analyser vide requisition (Exh. 143), of which Chemical Analyser's reports are on record (Exhs. 146 to 152). On completion of investigation, he submitted charge-sheet in the Court of learned Judicial Magistrate, First Class,

Anjangaon Surji. In the course of time, case came to be committed for trial before learned Additional Sessions Judge, Achalpur. Charge was framed against accused vide Exh. 48 for the aforesaid offences, to which they pleaded not guilty and claimed to be tried. Defence of the accused was of false implication and total denial.

(5) To establish the charge, prosecution has examined 15 witnesses and commenced its evidence by examining P.W.1 Rukhmabai, complainant and mother of deceased Gajanan, P.W.2 Savita, wife of deceased Gajanan, P.W.3 Nandkishor, brother-in-law of deceased Gajanan, P.W.4 Atmaram, maternal uncle of deceased Gajanan, P.W.5 Manish, cousin of deceased Gajanan, P.W.6 Gunwant, panch on seizure of clothes of accused nos.6 and 7, P.W.7 Laxman and P.W.8 Gajanan, panchas on seizure panchanama of clothes of deceased Gajanan, who, however, did not support the case of prosecution, P.W.9 Rameshwar, panch on seizure panchanama on clothes of accused nos.1 to 7, P.W.10 Dr. Amol Banayit, who examined deceased Gajanan at Rural Hospital, Anjangaon, P.W.11 Dr. Chandrashekhar Patil, who performed autopsy, P.W.12 Ramkrushna, panch on inquest panchanama (Exh. 129), P.W.13 Vinod, Junior Engineer from Maharashtra State Electricity Board, who has certified about availability of electric supply in the night of 4/3/2006, P.W.14 Gulab Choudhari and P.W.15 Vijay Kasar, both Investigating Officers. Considering evidence led by prosecution, learned trial Court acquitted all the accused. Hence, these appeals are preferred by State and complainant.

(6) Heard Smt. Joshi, learned Additional Public Prosecutor for appellant/State, Smt. Khadekar, learned Counsel for appellant/ complainant and Shri Navlani and Shri Tripathi, learned Counsel for accused.

(7) Smt. Joshi, learned Additional Public Prosecutor has submitted that evidence of P.W.1 to 5, who are all eye witnesses to the incident, establishes involvement of all the accused as assailants of deceased Gajanan in the night of 4/3/2006, however, their evidence is discarded by learned trial Judge without any reason. It is contended that evidence of all these witnesses is further found substantiated from Chemical Analyser's report and since there is nothing to disbelieve these witnesses, though they are relations of deceased Gajanan, appeal of State be allowed.

(8) Smt. Khadekar, learned Counsel for appellant/ complainant P.W.1 Rukhmabai, mother of deceased Gajanan, has supported the submissions advanced by Smt. Joshi, learned Additional Public Prosecutor and prayed that all the accused be convicted according to provisions of law.

(9) On the other hand, Shri Navlani and Shri Deshpande, learned Counsel for accused, have submitted that evidence of P.W.1 to 5 relied by prosecution is not at all convincing as their material evidence on the point of assault on deceased Gajanan by accused is by way of omission. It is contended that even if there is other evidence, in the absence of substantive evidence on record, evidence in the

nature of Chemical Analyser's report, etc. is of no consequence. It is also pointed out that though there were independent witnesses available, they were not examined and only near relations of deceased Gajanan were examined. It is, therefore, submitted that case of prosecution fails on this count also.

(10) Perusal of evidence of P.W.1 Rukhmabai reveals that on 4/3/2006 at 11 p.m., she was sitting in the courtyard of her house with P.W.2 Savita, wife of deceased Gajanan, when deceased Gajanan rushed towards house and when he was at the gate of his house, accused no.6 Pappu, accused no.5 Ashok, accused no.1 Ganesh, accused no.2 Gajanan, accused no.3 Raghunath, accused no.4 Vikas and accused no.7 Deepchand all rushed towards him and assaulted him by sticks. On her raising shouts, P.W.3 Nandkishor, P.W.4 Atmaram and Pankaj Gaigole arrived on the spot while accused ran away. She has further deposed that she thereafter visited Police Station, Anjangaon Surji and lodged her report while P.W.3 Nandkishor and P.W.4 Atmaram took Gajanan to Rural Hospital, Anjangaon Surji.

(11) Perusal of report (Exh. 77) lodged by P.W.1 Rukhmabai reveals that same is not corroborating to her oral version as according to its contents, at the above mentioned time and place, accused persons arrived in front of her house holding sticks in their hands and after abusing deceased Gajanan, dragged him till road where all of them assaulted her son by sticks and stones and accused no.6 Pappu committed assault on his head by sword. Her oral version is silent with regards to accused persons dragging deceased Gajanan from gate towards road and assault by them also with stones. Her oral version also does not disclose any assault by accused no.6 Pappu by sword on the head of deceased Gajanan. In that view of the matter, we find that report (Exh. 77) does not corroborate the evidence of P.W.1 Rukhmabai. Moreover, her evidence of she being present in the courtyard with P.W.2 Savita is also material improvement when she claims to have stated said fact in her statement to Police, however, she is unable to assign any reason as to why same is not mentioned in her statement. As such, presence of P.W.2 Savita with her is doubtful since it is material improvement, which is got duly proved by defence on record. Her evidence is also by way of omissions when she claims to have stated in her statement to Police that accused no.6 Pappu was armed with stick and she had not seen said accused assaulting deceased Gajanan by sword on his head as according to her, one amongst accused was armed with sword. In view of her admission as aforesaid, her evidence of accused no.6 Pappu assaulting deceased Gajanan on head by sword also needs to be kept out of consideration, which evidence in fact, according to post mortem report, is material in view of the fact that Gajanan died of head injury. However, from evidence of P.W.1 Rukhmabai, it cannot be said who is author of the said injury. In fact, it is further admitted by P.W.1 Rukhmabai that in her statement to Police, she had not stated that accused no.6 Pappu gave blow of sword on the head of deceased Gajanan and having been confronted with said statement in her report (Exh. 77) expressed her inability to state as to how the same is mentioned in it. Even otherwise, further admission of P.W.1 Rukhmabai

demolishes her entire evidence when she has stated that on 4/3/2006 when she was inside her house, Gajanan was assaulted and, therefore, she immediately rushed to the spot of incident and found her son lying having sustained bleeding injuries and he was even unable to speak and others had already reached the spot and were arranging for vehicle to shift the injured.

(12) Above admission of P.W.1 Rukhmabai in fact requires no further evidence of her to be scrutinised as from her admission as aforesaid, it has come on record that she arrived at the spot after incident of assault. Though prosecution on obtaining permission had re-examined the witness, nothing material could be elicited from her evidence as while being cross-examined, she has stated that her earlier version that deceased Gajanan after he reached the gate of his residence was followed by accused and was assaulted near gate is incorrect.

(13) In view of her admission as aforesaid, we find much substance in defence when it is submitted on behalf of accused that when her evidence as aforesaid is read with her admission that at the time of incident, she was in the house and reached the spot after knowing the incident doubts her to be relied as an eye witness to incident of assault. Even otherwise, her evidence, for the reasons aforesaid, since is full of material omissions, it is required to be kept out of consideration.

(14) Evidence of P.W.2 Savita though is also relied by prosecution as a witness to the incident, from above evidence of P.W.1 Rukhmabai since her presence in the courtyard prior to incident itself is doubtful as she has admitted that she arrived on the spot after knowing about the incident, presence of P.W.2 Savita with her, therefore, also is doubtful though according to P.W.2 Savita she along with P.W.1 Rukhmabai was present in the courtyard of their house prior to incident on 4/3/2006. She has further stated that at 11 p.m. deceased Gajanan arrived at the gate of compound wall of their house and he was followed by accused nos.1 Ganesh, 2 Gajanan, 3 Raghunath, 4 Vikas, 5 Ashok, 7 Deepchand and 8 Prashant, who started assaulting him by sticks and abused him when P.W.1 Rukhmabai raised shouts, due to which deceased Gajanan was dragged by accused beating him and was taken near shop styled as Nivedan Tailor when he was subjected to assault by sticks and wooden stumps, due to which he sustained bleeding injuries on his head and other parts of his body. It is further deposed by P.W.2 Savita that thereafter she and P.W.1 Rukhmabai raised shouts, upon which P.W.4 Atmaram, P.W.5 Manish and neighbours rushed to the spot and snatched blood stained sticks and wooden stumps from some of the accused while other accused threw such weapons on ground and all of them ran away. She has stated that at that time accused no.9 Kashiram was instigating accused by shouting "Gajanan La Maroon Taka, Jivant Sodu Naka". According to her evidence, her husband was referred to Hospital where he succumbed to his injuries.

(15) We find that evidence of P.W.2 Savita is totally inconsistent with the evidence of P.W.1 Rukhmabai as evidence of P.W.1 Rukhmabai about assault by

all the accused upon deceased Gajanan by sticks as well as wooden stumps is silent. Similarly, P.W.1 Rukhmabai has nowhere stated that after beating, deceased Gajanan was dragged by giving beating to him near the shop of Nivedan Tailor when he was further assaulted and has also not stated about instigation by accused no.9 Kashiram as deposed by P.W.2 Savita. When according to the case of prosecution P.W.1 Rukhmabai and P.W.2 Savita were together and had witnessed the incident at the same time and place, there has to be consistency in the evidence of these two witnesses. However, we find same to be inconsistent on material aspect of assault and as such, is not worthy to be relied upon.

(16) Even otherwise, evidence of P.W.2 Savita is also by way of material improvement when she claims to have informed the Police at the time of recording her statement that on 4/3/2006 at 11 p.m. she was present in front of her house with P.W.1 Rukhmabai when all the accused arrived with sticks and wooden stumps and committed assault on her husband while he was about to enter the gate of their house. She also claims to have stated in her statement to Police that after committing assault, deceased Gajanan was dragged by accused towards shop of Nivedan Tailor where he was further assaulted. However, she is unable to assign any reason as to why such facts are not mentioned in her statement. Defence has got said omissions duly proved from the evidence of P.W.15 Vijay Kasar, Investigating Officer. In that view of the matter, we find that evidence of P.W.2 Savita is by way of improvement so as to suit the case of prosecution. We reiterate that in view of material admission of P.W.1 Rukhmabai of reaching the spot on hearing about incident, presence of P.W.2 Savita with her in the courtyard of their house is also doubtful. In the circumstances, P.W.1 Rukhmabai and P.W.2 Savita do not appear to be truthful witnesses.

(17) Evidence of P.W.3 Nandkishor, who is also relied as an eye witness to the incident, reveals that he arrived on the spot hearing hue and cry from the side of the house of deceased Gajanan and on reaching near his house saw accused no.1 to 7 armed with sticks and wooden stumps when accused nos.4 Vikas and 5 Ashok assaulted deceased Gajanan on his head by sticks and other accused were instigating them saying "Mara Mara, Yala Marun Taka". He further claims to have made an attempt to snatch wooden stumps from accused nos.4 Vikas and 5 Ashok. However, they ran away. According to P.W.3 Nandkishor, at that time apart from P.W.1 Rukhmabai and P.W.2 Savita, incident is witnessed by P.W.4 Atmaram, P.W.5 Manish and others.

In his cross-examination, P.W.4 Nandkishor claims to have stated in his statement to Police about all the accused except accused nos.4 Vikas and 5 Ashok instigating by shouting "Mara Mara Marun Taka". However, he is unable to assign any reason why same is not mentioned in his statement and why there is no mention of accused no.6 Pappu having armed with stick in his statement recorded by Police.

(18) Evidence of P.W.3 Nandkishor is full of doubts and as such, he is not the

witness, who can be relied upon as on being confronted with portion "A" of his statement dated 5/3/2006 that he had seen accused no.6 Pappu giving blow by sword on the head of deceased Gajanan, he states that such contents are incorrect contending that no such statement was made by him and has expressed his inability to state as to why such fact is appearing in his statement. Similarly, having been confronted with portion "B" of his statement, it is admitted by him that he has not stated that accused nos.1 Ganesh, 2 Gajanan, 3 Raghunath and 7 Deepchand had given blows by sticks on the head of deceased Gajanan and he is unable to state any reason why such fact is mentioned in his statement.

In view of above stated evidence and reasons, we do not find it safe to rely upon evidence of this witness also.

(19) In addition to above evidence, which appears to be full of doubts, prosecution has relied upon evidence of P.W.4 Atmaram and P.W.5 Manish as eye witnesses to the incident. However, their evidence is by way of omission on the point of assault as P.W.4 Atmaram has deposed that he has seen accused persons giving blows of sticks to deceased Gajanan and continuing beating while taking him towards the shop of Nivedan Tailor and claims to have intervened in the assault saying "Soda Soda", however, accused nos.1 Ganesh, 3 Raghunath, 5 Ashok, 6 Pappu, 8 Prashant and 9 Kashiram continued the assault, due to which Gajanan fell down lying in a pool of blood. However, his above evidence is by way of omission, which has been duly proved by P.W.15 Vijay Kasar, Investigating Officer.

The evidence of P.W.5 Manish is on the similar lines as aforesaid. He claims to have witnessed the incident, which took place in front of Nivedan Tailor situated at a distance of 20 feet from his house and saw accused nos. 1 Ganesh, 2 Gajanan, 3 Raghunath and 7 Deepchand armed with sticks while accused nos.4 Vikas and 5 Ashok armed with wooden stumps assaulting to deceased Gajanan and further claims to have seen accused no.6 Pappu armed with sword. However, he has not attributed any overt act to accused no.6 Pappu and has stated that due to assault, Gajanan fell down in a pool of blood sustaining head injury. He further states that accused no.9 Kashiram was instigating accused by shouting "Maroon Taka Maroon Taka" and claims P.W.1 Rukhmabai, P.W.2 Savita, P.W.3 Nandkishor and P.W.4 Atmaram to be present on the spot.

However, his entire evidence as aforesaid is by way of omissions, which are brought on record and duly proved by the evidence of P.W.15 Vijay Kasar, Investigating Officer. With regards to his evidence of accused no.6 Pappu having armed with sword, he admits to have not paid any attention if said accused had assaulted deceased Gajanan on his head and claims to have mentioned said fact in his statement recorded by Police. However, he is unable to put forth any reason why same is not accordingly recorded.

P.W.15 Vijay Kasar, Investigating Officer in clear terms admits that P.W.5 Manish

had not stated him of his seeing crowd near Nivedan Tailor nor had stated to have seen accused no.6 Pappu having armed with sword or about assault by accused persons on deceased Gajanan and of their running from the spot by throwing sticks on the spot.

(20) Moreover, it is also material to note that in spite of the fact that apart from above eye witnesses, other residents in neighbourhood had arrived on the spot, prosecution has not examined any independent eye witnesses. Even otherwise, for establishing presence of independent witnesses on the spot of incident, defence has examined defence witnesses. This fact of non examination of independent witnesses raises serious doubt with regards to presence of P.Ws.1 to 5 on spot, which doubt is found to be substantiated as prosecution has not given any reason for non examination of any independent witnesses.

In the light of above facts, we do not find it safe to rely upon evidence of above witnesses, which is full of material improvements, as no conviction can sustain on the testimonies of such eye witnesses, who do not inspire confidence.

(21) P.W.6 Gunwant and P.W.9 Rameshwar are examined by prosecution as panchas on seizure of clothes of accused no.2 Gajanan, P.W.7 Laxman and P.W.8 Gajanan are examined as panchas on seizure of clothes of deceased Gajanan while P.W.12 Ramkrushna and P.W.13 Vinod are examined as panch on inquest panchanama and on the aspect of load shedding, however, we need not go into the evidence of these witnesses as there is no substantive evidence on record.

(22) In view of above discussed evidence and the reasons, we find it useful to refer to the case of Chandrappa and others vs. State of Karnataka {(2007) 4 SCC 415}, in which while considering the appeal against acquittal, five principles are laid down by the Hon'ble Apex Court, which read thus :

"(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is

proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

Hence, even though we are of the opinion that in an appeal against acquittal, powers of the appellate Court are as wide as that of the trial Court and it can review, re-appreciate and reconsider the entire evidence brought on record by the parties and can come to its own conclusion on facts as well as on law, in the present case, the view taken by the trial Court for acquitting the accused was possible and plausible.

(23) In that view of the matter, we do not find any reason to interfere with the impugned judgment and order passed by the learned trial Court. The appeals are, therefore, dismissed.