
(2013) 10 BOM CK 0181

In the Bombay High Court

Case No : Criminal Appeal No. 620 of 1994

Subhash Yetal Wagh

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-10-2013

Acts Referred:

Citation : (2013) 6 ABR 458 : (2013) ALLMR(Cri) 4221

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : Prashant Patil, for the Appellant; A.A. Mane, APP, for the Respondent

Final Decision : Allowed

Judgement

A.H. Joshi, J.—Heard Advocate for the appellant and A.P.P. Perused the impugned judgment and record. In all 13 accused persons were charged for various offences under sections 147, 148, 307 read with 149, 120B of Indian Penal Code and u/s 135 of the Bombay Police Act.

In the course of the incident Dilip Thongre (P.W. 11) was assaulted and he suffered severe injuries.

2. Considering the evidence led by the prosecution the learned Sessions Judge convicted accused no. 1 for offence punishable u/s 307 of IPC and sentenced him to suffer rigorous imprisonment for three years and fine amount of Rs. 5,000/- and acquitted all accused including appellant for all other remaining offences.

3. In this appeal against conviction the ground put forward by appellant is summarised as below:-

(a) The reasons due to which the accused nos. 2 to 13 are acquitted in relation to all other charges the appellant no. 1 as well is entitled for acquittal from all charges including for the offence u/s 307 of IPC.

(b) Since the victim who has proved the assault is liable to be believed since that

principle of "falsus in uno falsus in omnibus", is not applicable in India, however, in present case the victim did not restrict to singular lie and rather chose to tell one after other.

(c) Had it been a case of an isolated and singular falsehood in the testimony of P.W. 11, said testimony should not be discarded. In fact, major portion of testimony of P.W. 11 consists lie or falsehood except the fact that he suffered injuries and that some one amongst the accused has assaulted him which caused the hurt.

(d) The statement of P.W. 1 that accused no. 1 assaulted may also be regarded as truth, however, the manner in which the scuffle began is totally suppressed by the prosecution in the process of investigation and consequently before the court. In this manner, the truth is withheld from the court.

(e) The prosecution has suppressed genesis of offence. Once the truth is withheld from the court the benefit of doubt ought to go in favour of the accused and he is entitled for acquittal. Hence the appellant cannot be convicted.

4. P.W. 6 has deposed in relation to the incident and learned Judge has referred to version of P.W. 6 in paragraph 119 as follows:-

119..... PW 6 Ajinath had stated that he saw accused no. 1 Subhash Wagh, accused no. 5 Ganpat Mali, accused no. 2 Rajendra Ragade, accused no. 9 Chandu Ragade, accused no. 4 Dhanu Mali, with weapons in their hands and they were assaulting Dilip, he saw swords in the hands of accused no. 1 Subhash accused no. 4 Dhanuj Mali was having in his hand swords and others were having steel rod and flat axe, though he had stated about these accused, before the court, when this statement was recorded he had not stated the names except the accused no. 1 and thus in court he had improved his story. The Investigation Officer had also stated that the said witness had not stated the names of accused no. 4 Dhanu Mali, the accused no. 9 Chandu Ragade and the accused no. 2 Rajendra Ragade, also he had not stated that the accused no. 4 Dhanu Mali was having sword in his hand. Thus the said witness had made improvement in respect of material piece of evidence.

(quoted from page 450 of paperbook)

5. P.W. 13 is discarded as hearsay witness as seen in paragraph 122 as regards the investigation. The learned Judge has recorded finding in paragraph 126 and even elsewhere which shall suffice to quote paragraph 126 which reads thus:

126. Under these circumstances, as suggested rightly by the defence counsel, then it becomes a sweet choice of the investigation agency and the said witness to take names of any person as assailant. Hence this evidence of the prosecution regarding disclosure of names of some of the accused by PW 11 Dilip to Ashok does not stand to the test of acceptability.

(quoted from page 452 of paperbook)

6. Perusal of the judgment reveals that the learned Judge has observed in various paragraphs of the judgment which needs reference by quotation as follows:-

111. As discussed earlier even ante timed FIR does not disclose the names of the accused no. 3 Dnyandeo Yetal Wagh, the accused No. 4. Dhanaji Eknath Mali, the accused No. 12 Dnyaneshwar Gore, the accused No. 13 Madhav Gore and I find on this background, the prosecution could not establish their presence.

112. P.W. 11 Dilip Thonge had attributed chain to the accused No. 7 Kisan Mali as well as the accused No. 13. Madhav Gore but the medical certificate do not shown any chain marks or no any chain is recovered, on this background the prosecution could not establish their presence.

113. P.W. 11 Dilip Thonge had stated that the accused No. 1-Subhash Yetal Wagh inflicted blow of sword on the lower portion of the right leg below knee. The accused No. 4 Dhanaji Mali inflicted blow by his axe on his head. The accused no. 2 Rajendra Ragade inflicted blows by sword on his right hand. The accused No. 5 Ganpat Ganu Mali inflicted blows by sword on his left leg below knee. He also inflicted by sword on thumb of a left hand. The accused no. 3 Dnyandev inflicted blows by iron bar on left side of my chest and other accused also assaulted him with whatever weapons in their hands.

114. Though the same theory of detailed version of attack do not find in FIR. But the names of the accused nos. 1, 2 and 5 are seen in ante timed FIR. If the accused nos. 3 and 4 had played such role in the attack, their names and their role must have been find place even in the ante timed FIR.

(quoted from page 447 & 448 of paperbook)

7. The learned Sessions Judge has made very serious and grave observation as regards lapse in the investigation and while doing so recording the finding in paragraph 153 which reads thus:

154. As far as lapses in investigation is concerned less said is better.

155. The station diary produced on record shown that some pages are torn from station diary, only at the relevant juncture on which station diary of 7.10.1991 is written and I have made observation about the same when station diary was produced and I have brought this fact to the notice of A.P.P. but there is no any explanation for that.

156. There is no any investigation as regards doctor from Jawahar Hospital, Barsi where the injured was first admitted. As far as ante time F.I.R. Is concerned, I have already made observation. The Investigation Officer had not attended the Court properly and as per my observation on Exh. 25 I find that the approach of the investigation officer must disgusting. The blood of the accused was not collected and sent to C.A. Pune. Another lapse on the part of investigation agency F.I.R. u/s 154 of Cr.P.C. Sent to the Judicial Magistrate F.C., Barsi with an

inordinate delay, the case diary of 7.10.1991 is not recorded on that day.

(quoted from page 464 of paperbook)

8. Thus, it turns out to be case where the learned Judge was not satisfied with:

(i) Mode and manner in which the investigation was carried out.

(ii) Mode and manner in which the investigation papers were tampered with by removing certain documents.

(iii) P.W. 6 eye witness was declared hostile.

(iv) P.W. 13 was hearsay witness.

(v) Original medical case papers where accused no. 1 was admitted were not traced and no effort was made to find out what was first and foremost version of the accused.

9. In the background of voluminous reasons causing distrust on the entire prosecution case in view of observations referred by the learned Judge in Paragraph 153, the learned Sessions Judge was satisfied that it is a fit case for acquittal of accused nos. 2 to 13, however, found the accused no. 1 as guilty.

10. Considering that doctrine of falsus in uno falsus is omnibus does not apply in India, this court has to see as to whether it is a case of falsus in uno or falsus in omnibus.

11. Testimony of P.W. 11 reveals that he does not disclose the real transaction or events which had led to the incident. He involves 13 accused persons in commission of assault. He attributes assault by various weapons other than sword.

12. The medical evidence does not support assault by other persons. Medical evidence does not prove that internal organs in the abdomen were injured or damaged, which would led to the medical expert to form an opinion that cavity deep injury to abdomen was fatal, and hence section 307 would apply.

13. It is not proved that what was period and what was the treatment given to the victim. The doctor has admitted that injury was possible if the victim falls down from a bicycle, and even according to the version of the prosecution, bicycle and falling were the facts of the incident. One thing is sure that not only P.W. 11 but by everyone involved in the case including medical evidence, conscious effort is made to withheld the truth from the court.

14. In this background, where entire incident is portrayed as hazy and uncertain picture the conviction appears to be a gravely risky proposition. P.W. 11 ? injured witness cannot be believed to be statue of gospelity. On the other hand positive conclusion is propelled, namely, that conscious, deliberate and calculated effort is made by each and every person to withheld truth from the court.

15. Now the question to be considered is as to whether a witness who has suppressed the genesis, and suggested untrue version, should be believed by the court to base the conviction. It turns out to be a case of "suppressions facto and suggestio veri".

Thus the prosecution wants to prosecute an order of conviction by playing fraud on court.

16. In this situation the only conclusion that can be emerged is that the appellant is entitled for relief as prayed for. The appeal is allowed. The order of conviction and sentence is set aside. The appellant is set at liberty forthwith. Fine amount if any paid be refunded.