

(2015) 09 BOM CK 0164

In the Bombay High Court

Case No : Criminal Appeal No. 81 of 2001 and Criminal Revision Application No. 56 of 2001

Sudhakar and Others

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 02-09-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 307, 323, 324, 325, 34

Citation : (2015) ALLMR(Cri) 4448

Hon'ble Judges : M.T. Joshi, J.

Bench : Single Bench

Advocate : V.N. Damle, Advocate i/b. V.G. Sakolkar, Advocate, for the Appellant; B.B. Gunjal, APP, for the Respondent

Judgement

M.T. Joshi, J.—Heard both sides.

2. Both present proceedings have arisen out of the same judgment and order dated 6th December, 2000 passed by learned Addl. Sessions Judge, Latur in Sessions Case No. 83 of 1998.

Four accused were tried by learned Sessions Court for the offences punishable under Section 307 , 323 , 324 , 504 read with 34 of Indian Penal Code. Learned Addl. Sessions Judge came to the conclusion that accused No. 4 - Kashinath (respondent No. 5 in Criminal Revision Application) is not proved to have committed any offence. He was, therefore, acquitted of all the offences. Hence the revision application by the original complainant.

As regards rest of the accused, learned Addl. Sessions Judge came to the conclusion that the individual acts committed by them was not in furtherance of their common intention. It was also found that the offence punishable under Section 307 was not committed, but it was an offence punishable under Section 324 of Indian Penal Code as regards witness Manmath, by accused No. 1 - Sudhakar (appellant No. 1), since deceased. Therefore, he was convicted for the

offences punishable under Section 323 and 324 of Indian Penal Code and sentenced to suffer simple imprisonment till rising of the Court and to suffer rigorous imprisonment for six months, respectively, on each count, with direction to pay fine.

Accused No. 2 (appellant No. 2 - Madhav) was convicted for the offences punishable under Section 323 and 324 of Indian Penal Code and sentenced to suffer simple imprisonment till rising of the Court and to suffer rigorous imprisonment for six months, respectively, on each count, with direction to pay fine.

Accused No. 3 - Basavraj (appellant No. 3), since deceased, was convicted for the offences punishable under Section 323 and 324 of Indian Penal Code and sentenced to suffer simple imprisonment till rising of the Court and to suffer rigorous imprisonment for six months, respectively, on each count, with direction to pay fine.

In the circumstances, the Criminal Appeal filed by these three accused is abated as regards appellant No. 1 - Sudhakar and appellant No. 3 - Basavraj and survives as regards appellant No. 2 - Madhav only. (The appellants and respondent No. 5 in revision application would be termed as accused as arrayed before the learned Sessions Judge.)

3. In view of the Criminal Revision Application filed by the complainant, the issue would be whether, appellant No. 2 - Madhav is required to be acquitted from the offences for which he has been convicted, or he, along with respondent No. 5 in Criminal Revision Application, is required to be convicted for the offences punishable under Section 307 , 323 , 325 , 504 , read with 34 of Indian Penal Code, as canvassed by the revision petitioner.

4. There is a long standing feud between the complainant's party and the appellants/accused being brethren, over the partition of an agricultural land. The record would show that a civil suit was filed by accused - Kashinath against the complainant PW 1 - Shivraj regarding the agricultural property in dispute. The said suit was dismissed. Therefore, during the period of the present incident, the appeal filed by accused No. 4 was pending in the District Court. On the day of the incident i.e. on 29th July, 1997, certain officials of the concerned authority, were scheduled to visit village Chigli for measurement of the land. In the situation, according to the prosecution, at about 8:30 a.m., the following incident occurred.

5. While PW 1 - Shivraj was in front of his house at about 8:30 a.m., at that time, accused No. 2 - Madhav challenged the complainant by asking as to why, he has started the court proceedings. In the verbal exchange, accused No. 2 - Madhav gave an axe blow over the head of the complainant. In the meantime, PW 2 - Manmath arrived on the spot. Accused No. 1 - Sudhakar assaulted PW 2 - Manmath with an axe over his head. Accused No. 3 - Basavraj assaulted Manmath with a stone. Accused No. 4 - Kashinath also assaulted the complainant

with a stone. According to the complainant, since his brother Manmath was injured seriously, at the time of filing of FIR, he was admitted to the Government Hospital.

6. The injuries on the person of the complainant and relatives mentioned in the FIR, were proved as under by PW 6 - Dr. Vijay Jadhav, the then Medical Officer of Rural Medical Hospital:--

"Injuries on the person of complainant PW 1 -Shivraj:--

1. CLW on the right parietal area in AP direction, 8x3 bone deep.
2. Abrasion on rt. Knee 4 cm. In dimension, transversely placed. Movements are normal.

Injuries on the person of PW 2 - Manmath:--

1. Contused lacerated wound on lt. Frontal area behind the hair line in anterior, posterior direction, 6x2x1 cm. in dimension. Bleeding positive.
2. CLW on left parietal area, transversely placed lateral to mid-line, 6x2x1 in dimension. Bleeding positive.
3. CLW on the frontal area in mid-line in AP direction, 5x2x1 cm. In dimension. Bleeding positive.
4. CLW transversely placed, behind the hair line on lt. side 3x2x1 cm. in dimension.
5. Incised wound on the rt. parietal area in AP direction 6x2x1 bone deep, just lateral to mid-line.
6. CLW on right parietal area on posterior aspect in AP direction, 4x2x1 cm. in dimension. Bleeding positive."
7. PW 2 - Manmath was referred to Vivekanand Hospital at Latur for C.T. scan. The Civil Hospital, Latur had received the report of C.T. scan which, according to PW 7 - Dr. Sanjay Warad, Medical Officer of the hospital, would show depressed fracture of skull bone of frontal and left parietal region.

8. The prosecution examined five witnesses, either as injured eye witnesses or eye witnesses simplicitor to the alleged incident. PW 1 - Shivraj was complainant himself and PW 2 - Manmath was his brother and injured. PW 3 - Ram Pate, PW 4 - Vithal Shingale and PW 5 - Shantiveer Birajdar i.e. son of PW 1 - Shivraj were claimed as eye witnesses.

9. Learned Addl. Sessions Judge has appreciated the evidence of these five witnesses in detail. He disbelieved the entire version of PW 3 - Ram Pate and PW 5 - Shantiveer. It was further found that the injuries on the person of PW 2 - Manmath were not to the extent as likely to cause death in normal course of a person. It was, therefore, held to be hurt by a dangerous weapon, the offence

punishable under Section 324 of Indian Penal Code.

10. Learned Addl. Sessions Judge further found that the prosecution evidence would show that there was no meeting of the minds of the appellants/accused, at the time of the incident and therefore, each of the individual accused were convicted for the offences committed by them.

11. The defence also tried to brought on record that during the said incident, accused No. 1 - Sudhakar, accused No. 2 - Madhav and accused No. 3 - Basawraj received injuries either of axe or of pelting of stone by complainant PW 1 - Shivraj, PW 2 - Manmath, PW 5 - Shantiveer and one Gajendra. Accused No. 2 - Madhav, as defence witness, deposed that in exercise of the right of private defence, all of them snatched the arms of these prosecution witnesses and thereafter, assaulted them. The FIR of said incident was filed by accused No. 2 - Madhav and a sessions case was pending with learned Sessions Judge. Certified copies of the necessary injury certificates regarding the injuries on the person of these accused, were also filed. Learned Addl. Sessions Judge, however, disbelieved the evidence of private defence.

12. Mr. Damle, learned counsel for the appellant, submitted that the prosecution has failed to explain the injuries, which were suffered by some of the accused persons in the said incident. He took me through the record and forcefully submitted that in fact, it was the accused family, which had initiated the civil proceedings for getting their grievance regarding the land, sorted out, as against the recitals in the FIR that they questioned the complainant, as to why, he had initiated the civil proceedings.

13. He further submitted that the record would show that PW 2 - Manmath, who was residing at Amravati, and had already parted with the land, was purposely camping in the village so as to remain present on the day of the measurement of the land. In the circumstances, relying on the ratio laid down in the case of Sarjerao Sahadeo Gaikwad and another Vs. State of Maharashtra, , Mr. Damle submitted that the surviving accused No. 2 - Madhav is required to be acquitted even of the offences punishable under Section 323 read with 34 of Indian Penal Code by allowing the Criminal Appeal and that the Criminal Revision Application deserves to be dismissed.

14. On the other hand, learned A.P.P. and learned counsel for the revision petitioner Mr. Manale, submitted that learned Addl. Sessions Judge has committed mistake in arriving at the conclusion that the offence punishable under Section 307 of Indian Penal Code is not made out. The offences were not committed, in furtherance of the common intention, by all the accused and that accused No. 4 - Kashinath has been wrongly acquitted by learned Addl. Sessions Judge.

15. Since, the issue, as to whether, the surviving accused No. 2 - Madhav is required to be convicted for the offence punishable under Section 307 read with 34 of Indian Penal Code, would depend on two facts : (i) whether the injuries

received by PW 2 - Manmath are sufficient, in ordinary course of nature, to cause death of a person or to cause such bodily injury, which is likely to cause death; and (ii) whether, there was a common intention between all the accused. In my view, the second issue as to whether, there was common intention between all the accused, becomes of prime importance as, the first of the issue i.e. application of offence punishable under Section 307 of Indian Penal Code, would arise later, as according to the prosecution, head injury on PW 2 - Manmath was caused by deceased accused No. 1 and not the surviving accused No. 2.

The reason is obvious. The head injuries on the person of PW 2 - Manmath, according to the prosecution, were not caused either by present surviving accused No. 2 - Madhav or accused No. 4 - Kashinath.

16. The prosecution evidence itself would show that initially, the dispute had started between PW 1 - Shivraj, complainant and accused No. 2 - Madhav. Upon hearing their voices and shouts, one after another, either the prosecution witnesses or accused came on the spot and the incident has further progressed. The FIR itself would show that the incident had started as accused No. 2 - Madhav questioned PW 1 - Shivraj, complainant as to why, he had initiated the civil proceedings and the deceased accused - Sudhakar had hit PW 2 - Manmath by an axe over his head, which is a cause of attracting charge for the offence punishable under Section 307 of Indian Penal Code. Learned Addl. Sessions Judge, therefore, has rightly held that the common intention between the accused, is not proved and each of the accused, except accused No. 4 - Kashinath, were convicted for the respective offences.

17. The issue, therefore, as to whether the offence punishable under section 307 of the Indian Penal Code is attracted against the deceased appellants, has abated in view of their death. The issue, therefore, would remain, as to whether the conviction of appellant No. 2/accused No. 2 -Madhav and acquittal of respondent No. 5/accused No. 4 in Criminal Revision Application, is sustainable.

18. It is true that the prosecution witnesses did not explain the injuries found on the person of some of the accused, as detailed hereinabove.

In the case of Sarjerao (cited supra), the defence, during cross-examination of the eye witnesses, has suggested that one of the prosecution witnesses had assaulted the accused with a crow bar while, his wife and daughters assaulted him with stick. In the circumstances, the accused in the said case, was required to snatch the crow bar from the prosecution witness and assault him. The prosecution did not explain injury on the person of the accused. In the circumstances, it was held by the Division Bench of this Court that in the light of the evidence, the prosecution was duty bound to explain the injury on the person of the accused and it's failure to do so, has resulted in acquittal of the appellant therein.

Though there is no need to repeat the proposition of law that the accused need not put his defence and on the basis of the evidence available on record itself,

the defence can be gathered, in the present case, the defence did not put any theory of right of private defence while cross-examining the prosecution witnesses.

19. Mr. Damle also relied upon the ratio laid down in the case of *Rehmat Vs. State of Haryana*, . In the said case, the plea of self defence appeared to be true to the Court in absence of the explanation from the prosecution about the injuries sustained by the accused along with other glaring fact like non-disclosure of name of the assailant to the Doctor etc.

20. The defence suggested to complainant PW 1 - Shivraj that the fighting between him and accused No. 2 - Madhav was going on and after that chaos, three persons each came from the side of the injured witnesses and the accused. It was further suggested that the complainant and PW 2 - Manmath received injuries at the time of son's intervening the quarrel. It was suggested to PW 2 - Manmath that he saw the complainant and the accused No. 2 - Madhav fighting with each other and, thereafter, he intervened in the incident and was injured while rescuing PW 1 - Shivraj.

Specifically, to PW 3 - Ram Pate, the suggestion was given that a scuffle was going on between accused No. 2 - Madhav as well as the complainant and the chaos arose. In this view of the matter, the evidence does not show at all, that common right of private defence was exercised by accused No. 2 - Madhav or any of the accused. In the circumstances, the ratio laid down in the case of *Sarjerao* (cited supra), is not applicable in the present case.

21. The statement of PW 1 - complainant coupled with the injuries on his person, would prove beyond the reasonable doubt, that accused No. 2 - Madhav was the author of the injuries on the head of the complainant - Shivraj along with injuries on the person of PW 2 - Manmath.

22. Mr. Damle submitted that the FIR filed by PW 1 - Shivraj does not show that accused No. 2 - Madhav had assaulted PW 2 - Manmath with axe and, therefore, he cannot be convicted for the offence punishable under section 324 of the Indian Penal Code.

It is, however, to be noted that as per the prosecution case as well as the defence, number of persons from both groups had gathered on the spot. In the circumstances, when in the immediately filed FIR, PW 1 - Shivraj, complainant, though was confirm regarding the assault and the assailants as regards himself, the statement of PW 2 - Manmath, the injured, cannot be doubted for absence of such recitals in the F.I.R. In that view of the matter, the conviction of present surviving accused No. 2 - Madhav for the offences punishable under Section 323 and 324 of Indian Penal Code, needs no interference.

23. As regards the issue of acquittal of accused No. 4/respondent No. 5 in revision, Kashinath, the prosecution has claimed that he had assaulted complainant Shivraj and PW 2 - Manmath with stick blows on their legs and

hands. The medical evidence does not corroborates this case. In that view of the matter, learned Addl. Sessions Judge has held that there is no convincing evidence as against this accused No. 4 - Kashinath. In my view, he has been rightly acquitted by the learned Addl. Sessions Judge.

24. In the circumstances, the offences committed by the respective accused were proved to be individual acts of the respective accused and, therefore, none of the convicted accused would be liable for conviction for the offence punishable under section 34 of the Indian Penal Code with the substantive offences. The reasoning of the learned Addl. Sessions Judge, therefore, cannot be termed as perverse in that regard also.

25. In the circumstances, the following order:--

"A] Criminal Appeal No. 81 of 2001, as regards appellant Nos. 1 - Sudhakar s/o. Kashinath Biradar and 3 - Baswaraj s/o. Kashinath Biradar, is hereby disposed of as abated.

B] The appeal as regards appellant No. 2 - Madhav s/o. Kashinath Biradar, is hereby dismissed.

C] Appellant No. 2 - Madhav to surrender to his bail bonds and serve the remaining sentences, if any.

D] Disposal of muddemal property shall be carried in the light of the directions issued by the learned Addl. Sessions Judge, Latur.

E] Criminal Revision Application No. 56 of 2001, is hereby dismissed."