
(1996) 10 BOM CK 0038
In the Bombay High Court
Case No : Criminal Appeal No. 326 of 1983

The State of Maharashtra	Vs	APPELLANT
Abdul Jakir Abdul Dubar Singh and Others		RESPONDENT

Date of Decision : 08-10-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 215, 235, 378(1), 464(1)
Evidence Act, 1872 — Section 114, 3, 45, 9
Penal Code, 1860 (IPC) — Section 149, 324, 326

Citation : (1997) 2 BomCR 111

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

Bench : Division Bench

Advocate : R.S. Deshpande, app, for the Appellant; R.G. Merchant, for the Respondent

Judgement

Vishnu Sahai, J.—By means of this appeal preferred u/s 378(1) of the Criminal Procedure Code, the State of Maharashtra, the appellant, has impugned the judgment and order dated 14th January, 1983 passed by the Additional Sessions Judge, Greater Bombay, in Sessions Case No. 28 of 1981, acquitting the respondents for offences punishable u/s 326 read with 149 I.P.C., etc. As respondent No. 7 Mohamed Sajik Mohamed Hanif could not be served, vide order dated 26-2-90 passed by a Division Bench of this Court, the appeal against him has been separated.

2. Briefly stated the prosecution case runs as under :

Since 7 to 8 years prior to the incident Aliraza Walimohamed P.W. 3, the father of the informant Safian Ahmed, was staying as a tenant in room No. 34 in Loheki Chawl, Madanpura, Bombay. About a year or two prior to the incident the respondents Nos. 2,3,4, and 6 i.e. Nasruddin Hafizulla Khan, Abdul Bari Abdul Rashid, Nasruddin Abdul Latif, and Habib Khan, and Mohamed Sajik Mohamed Hanif (respondent No. 7) whose appeal has been separated, used to also stay in the said room. From the evidence it appears that immediately preceding the

incident Aliraza protested against their staying in the said room. On 8-10-1977, i.e. the day prior to the incident, the said five persons lodged an F.I.R. at the Nagpada Police Station against Aliraza complaining therein that he was restraining them from entering room No. 34 of the said chawl. Pursuant to it Aliraza was arrested. The evidence is that he was released on bail after spending about 4 days in custody.

The incident in question is alleged to have taken place the following day i.e. 9-10-1977 at about 3 p.m. It is said that the informant Safian Ahmed along with his maternal uncle Mainuddin P.W.2 and constable Isaq Chandsaheb Sayyed was sitting outside room No. 34. Aizaz Ahmad was also there. It is said that Aliraza's wife and three daughters were inside the said room which had been locked from outside; the key being with Safian Ahmed. At the said time 10 to 15 persons, including the 8 respondents came. They were said to be armed with lathies, bamboos and iron bars. They started breaking open the lock which was fixed on the door. The evidence is that one Mohamed Asfaq (absconding accused No. 9) who was armed with an iron hammer broke open the lock of the room. In the meantime Police Constable Isaq Sayyed P.W. 4, who was on duty intervened but it appears that he could do nothing much. The respondents and others with their weapons are alleged to have launched an assault on Safian Ahmed, Aizaz Ahmed and Mainuddin. In his evidence Mainuddin P.W.2 categorically stated that respondent No. 2 Nasruddin Hafizulla Khan with a cycle chain and respondent No. 6 Hafijullah Habib Khan with a lathi assaulted him.

It is further alleged that after the assault Safian Ahmed, Aizaz Ahmed and Mainuddin rushed to the Nagpada Police Station where PSI Prakash Vibhute P.W. 5 was present. PSI Vibhute sent them to J.J. Hospital for medical examination.

3. The injuries of Safian Ahmed, Aizaz Ahmed and Mainuddin were medically examined at J.J. Hospital by Dr. Jahagirdar, the same day. At the time of giving of evidence Dr. Jahagirdar was not available and prosecution examined Dr. Ramesh Wamanrao Pande P.W. 6 of the said hospital to prove the register wherein the injuries of the said persons were recorded.

On the person of Mainuddin the doctor found two incised wounds, both of them being skin deep. One of them was on the front parietal region and the other on the left maxillary region.

On the person of Safian Ahmed Aliraza the doctor found in all three injuries, their break up being; swelling with tenderness in an area of 8 cms. x 6 cms., accompanied by contusions, on the lower right forearm, and two contusions out of which one was on the left iliac bone and the other on the left ring finger. The doctor also noted that there was crack of proximal part of the second phalanx. He advised x-ray.

On the person of Aizaz Ahmed the doctor found one swelling on the left side of the lower back. It may also be mentioned that Dr. Jahagirdar the same day, at 3.15 p.m. had examined accused No. 9 Mohamed Asfaq and found on his person

a contused lacerated wound 5 cms. x 1 cm. x bone deep, over scalp and haematoma 7 cms. x 5 cms.

In the opinion of Dr. Pande the contused lacerated wounds could be caused by a hard and blunt substance like lathies and iron bars and the incised wounds of Mainuddin could be caused by an iron cycle chain, in case its edge came in contact with the part of the body struck.

It is true that Dr. Pande has stated that he was not familiar with the hand writing of Dr. Jahagirdar who had medically examined the injured, but we are inclined to agree with the learned trial Judge that since the injuries were mentioned in medico - legal register, which was kept in regular course of business and which has been proved by Dr. Pande the medical evidence can be looked into by the Court.

4. After sending Safian Ahmed and others to J.J. Hospital, PSI Vibhute himself also proceeded to J.J. Hospital where he recorded Saifan's F.I.R. at 3.15 p.m. on the same day. On the basis of the F.I.R. he registered a case u/s 326 I.P.C. etc. against all the respondents.

After recording the F.I.R., PSI Vibhute went to the place of the incident. He found the articles scattered in room No. 34. He also noticed on the place of the incident 7 lathies, two iron bars and a cycle chain which he took into possession, under a panchanama. The same day he recorded the statements of Mainuddin P.W.2 and Aliraza Walimohamed P.W. 3 After completing the investigation PSI Vibhute submitted the charge sheet against the eight respondents. The other persons could not be apprehended as they were absconding.

5. The case was committed to the Court of Sessions in the usual manner. In the trial Court the respondents were charged on a number of counts; the main amongst them being u/s 326 read with 149 I.P.C. To the said charges they pleaded not guilty and claimed to be tried.

During trial in all the prosecution examined as many as 6 witnesses. They included three eye witnesses viz. Aizaz Ahmed, Mainuddin and Isaq Sayyed, P.Ws. 1,2 and 4 respectively. In defence no witnesses were examined.

The learned trial Judge after considering the evidence on record and hearing submissions of learned Counsel for the parties, concluded that the prosecution had failed to bring home the guilt of the respondents beyond reasonable doubt and consequently acquitted them vide the impugned judgment.

Hence this appeal.

6. We have heard Mr. R.S. Deshpande for the appellant, State of Maharashtra, and Mr. R.G. Merchant for respondents 1 to 3,5 and 6. Although respondents 4 and 8 were served they have not engaged any Counsel. Hence we requested Mr. Merchant to place material which was relevant to them. He acceded to our request. For that we are grateful to him. As mentioned in para 1 the appeal

preferred against respondent No. 7 Mohamed Sajik Mohamed Hanif has been separated.

7. At the very outset we have cautioned ourselves, that we are examining the matter in an appeal against acquittal wherein we only interfere if the view of acquittal is perverse either on account of being wholly untenable on facts or vitiated in law. We are alive to the fact that simply on account of assessment of evidence a view other than that taken by the trial Court can be arrived at would be no ground to interfere in an appeal against acquittal.

8. The grievance of Mr. Deshpande, learned Counsel for the appellant is that the incident took place in broad day light; the respondents were very well known to the witnesses; and for very innocuous reasons the learned trial Judge has acquitted the respondents. Mr. Deshpande urged that all the three eye witnesses namely, Aizaz Ahmed, Mainuddin and Isaq Sayyed emphatically stated that the respondents armed with bamboo sticks, lathies, and cycle chain assaulted them (Aizaz, Mainuddin and Safian). He further urged that there are corresponding injuries on their person which corroborate the version furnished by them.

9. In paragraph 3 of this judgment we have set out the injuries of the three injured viz. Safian Ahmed, Aizaz Ahmed and Mainuddin. Mr. Deshpande submitted that the statements of the eye-witnesses as well as the evidence of Dr. Pande shows that they were attributable to the aforesaid weapons. We also do not dispute the correctness of Mr. Deshpande's submission that since it was a broad day light incident and the respondents were known to the witnesses there would have been no difficulty in recognising them.

10. Be that as it may, the truth of the matter remains that it is a riot case. The time honoured view in such cases is only to convict those accused persons to whom prosecution witnesses assign specific roles and that too only if the necessary corroboration is forthcoming by medical evidence. This is a rule of prudence and not an inflexible requirement of law. The rationale in case of such a rule is that often on lookers are confused or mistaken for actual assailants. This rule applies all the more in this case because the informant Safian, Mainuddin and Aizaz Ahmad were inimical to respondents; being relations of Aliraza P.W. 3

11. Bearing in mind the said rule of appreciation of evidence we examine the case of each of the respondents. We find that neither Aizaz Ahmed P.W. 1 nor Isaq Sayyed P.W. 4 assign any specific role to any of the respondents. The specific role in the instant case has only been assigned by Mainuddin P.W.2. He has categorically stated in his deposition in the trial Court that respondent No. 2 viz. Nasruddin Hafizulla Khan with a cycle chain and respondent No. 6 Hafijullah Habib Khan with a lathi. So far as assault of lathi on him is concerned the same is rendered doubtful by the fact that no contused or lacerated wound was found on his person. So far as the use of cycle chain is concerned it is corroborated by the incised wounds found on his person. Dr. Pande has categorically stated that the incised wounds could be caused if the edge of the cycle chain came in

contact with the part of the body it struck.

12. In our view the participation of respondent Nasruddin Hafizulla Khan in the instant case stands corroborated by the medical evidence. Another circumstance which corroborates his participation is the factum of his being interrogated u/s 161 Cr.P.C. on the date of the incident itself. Criminal courts attach great importance to the prompt interrogation of the witnesses u/s 161 Cr.P.C. since the same largely shuts out the possibility of a false witness being inducted by the investigating agency; a possibility which only has an academic value, when the witness in question is an injured witness, as is the case here.

One more circumstance which lends assurance to his involvement is that he had a very strong motive to commit the crime. He was inimical to Safian, Mainuddin and Aizaz, all relations inter se, because Saifan's father Aliraza P.W. 3, immediately before the incident, had made him vacate room No. 34, wherein he was staying about a year or two prior to the incident.

We may also make a passing reference to the fact that in the F.I.R. of the incident, which was lodged within twenty minutes of the incident taking place, by Safian Ahmad, an injured eye witness, this respondent (Nasiruddin Hafizulla Khan) has not only been named but the role of assaulting Mainuddin with a cycle chain has been assigned to him. We are aware that technically we cannot look into the F.I.R. because the same has not been proved, as during trial the informant was not available on account of being in Saudi Arabia. However, it is well settled that the F.I.R. can only be used to contradict or corroborate the maker. Even after ignoring the F.I.R., as we are bound to do so in law, in our view, the circumstances mentioned above are sufficient to convict him for an offence punishable u/s 324 I.P.C.

13. In our view, the learned trial Judge acted perversely in acquitting Nasiruddin Hafizulla Khan respondent No. 2. As we have mentioned earlier since Mainuddin did not sustain any lathi injury it would be unsafe to accept his statement that respondent No. 6 Hafizulla Habib Khan assaulted him with a lathi in spite of the fact that he may have assigned him a specific role and books on medical jurisprudence provide that some times a blunt weapon injury on a bony part of the body (as is the case here) is confused for an incised wound.

14. Pursuant to the above discussion we are squarely satisfied that the view of acquittal of respondents Abdul Jakir Abdul Dubar Singh, Abdul Bari Abdul Rashid, Nasruddin Abdul Latif, Mohamed Hasan Jaifull, Hafijullah Habib Khan, and Sherabali Azmi Shaikh recorded by the trial Judge vide the impugned judgment cannot be faulted as perverse. Apart from the reason that respondents Abdul Jakir Abdul Dubar Singh, Abdul Bari Abdul Rashid, Nasruddin Abdul Latif, Mohamed Hasan Jaifull, Hafijullah Habib Khan, and Sherabali Azmi Shaikh have been assigned no specific role we may make a casual reference to another circumstance which shows that the case against the said respondents was doubtful. In the F.I.R. of the incident these respondents have been only assigned

the specific role of instigation. Experience shows that in a planned assault instigation or exhortation is not required and the said role is used as a ploy by the prosecution to inflate the number of accused persons. On this proposition no authority is required but those who owe a fanatical allegiance to authorities may refer to the observations made by Their Lordships of the Apex Court, in the case reported in *Dhanabal and Another Vs. State of Tamil Nadu*, wherein in paragraph 7 Their Lordships observed thus :

"The first accused who actually caused injury is the eldest brother. It is difficult for us to accept that before he actually caused the injury, he needed the instigation of the second appellant."

15. We would be failing in our fairness if we do not repeat that the F.I.R. in the instant case has not been proved and hence we cannot place reliance on it. For that reason we have only made a casual reference to it.

16. Now only one question remains and that is as to what is the offence made out against the respondent No. 2 Nasruddin Hafizulla Khan. The said respondent has been assigned the role of assaulting Mainuddin with a cycle chain. Mainuddin received two incised wounds both being skin deep; one on the scalp and the other on the maxillary region. These injuries were simple in nature. In our view they clearly make out a case u/s 324 I.P.C. against him. It is true that he was not charged u/s 324 I.P.C. But as he was charged u/s 324 read with 149 I.P.C. and in his statement u/s 313 Cr.P.C. it has been specifically put to him that he was armed with a cycle chain and assaulted Mainuddin who received injuries attributable to cycle chain no prejudice would be caused to him and neither will there be a failure of justice by our convicting him u/s 324 I.P.C. Sections 215 and 464(1) Cr.P.C. provide that unless it is shown that on account of an incorrect framing of charge there has been a failure of justice it would not vitiate the trial.

17. The question which remains is that pertaining to sentence. We have thoughtfully reflected over it. We feel that a jail sentence is not called for, and a sentence of fine would meet the ends of justice, for the reasons enumerated hereinafter :

(a) The incident took place nearly 20 years ago;

(b) the evidence is that from about one or two years prior to the incident respondent Nasruddin Hafizulla Khan was living in room No. 34 (the bone of contention between both the sides) and immediately before the incident he was forced to leave the premises. Naturally in a place like Bombay, when he was forced to vacate the premises the problem of a roof over his head must be staring him on his face and it was in such a mental state, out of exasperation, he assaulted Mainuddin;

(c) the injuries sustained by Mainuddin were simple in nature; and

(d) there is nothing to indicate that the respondent has any adverse criminal history or bad antecedents.

The question is as to what should be the quantum of fine which we should impose. We have thoughtfully reflected over the matter and in our view the ends of justice would be amply satisfied if the respondent No. 2 Nasruddin Hafizulla Khan is sentenced to pay a fine of Rs. 7,500/- (Rupees seven thousand and five hundred only) and in default to undergo one year's RI u/s 324 I.P.C. This fine would be deposited by the said respondent within a period of 6 months from today in the trial Court. In the event of his depositing it, the whole of it would be paid as compensation to Mainuddin Walimohamed P.W.2. In case he is no more then it would be distributed in equal proportion to his legal heir / heirs, as the case may be. The trial Court on the fine being deposited shall immediately inform the person / persons entitled to receive the compensation.

18. In the result this appeal is partly allowed and partly dismissed. This appeal is dismissed so far as respondents Abdul Jakir Abdul Dubar Singh, Abdul Bari Abdul Rashid, Nasruddin Abdul Latif, Mohamed Hasan Jaifull, Hafijullah Habib Khan and Sherabali Azmi Shaikh, i.e. respondents 1,3 to 6 and 8 respectively. The acquittal of the said respondents on various counts recorded vide the impugned judgment is confirmed. They are on bail. They need not surrender. Their bail bonds stand cancelled and sureties discharged.

This appeal succeeds in part against respondent No. 2 Nasruddin Hafizulla Khan. We sustain the acquittal of the said respondent on counts, other than 324 I.P.C. We find him guilty for an offence punishable u/s 324 I.P.C. and direct him to pay a fine of Rs. 7,500/- (Rupees seven thousand and five hundred only) in default to undergo one year's RI. This fine would be deposited by the said respondent within a period of 6 months from today in the trial Court. In the event of his depositing it, the whole of it would be paid as compensation to Mainuddin Walimohamed P.W.2. In case he is no more the whole of it shall be paid in equal proportion to his legal heir / heirs as the case may be. The trial Court shall inform the person / persons entitled to receive the compensation, as soon as the fine is deposited.

In case respondent No. 2 Nasruddin Hafizulla Khan does not deposit the fine of Rs. 7,500/- (Rupees seven thousand and five hundred) within a period of 6 months from today, he shall be taken into custody to serve out the sentence of one year's rigorous imprisonment which we have imposed in default of its payment.

As mentioned earlier the appeal against respondent No. 7 Mohamed Sajik Mohamed Hanif has been separated pursuant to the orders of this Court dated 26-2-1990.

Before parting with this judgment we would be failing in our fairness if we do not put on record the enormous assistance which we have received from the learned counsel for the parties in the disposal of this appeal.

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