

(1996) 10 BOM CK 0045
In the Bombay High Court
Case No : Criminal Appeal No. 517 of 1983

The State of Maharashtra

APPELLANT

Vs

Sampat Balvant Magar and Others

RESPONDENT

Date of Decision : 31-10-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 378

Evidence Act, 1872 — Section 3, 32

Penal Code, 1860 (IPC) — Section 147, 148, 149, 324

Citation : (1997) 2 BomCR 42

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

Bench : Division Bench

Advocate : J.S. Pawar, APP in Cr. A. 517 and Neelima Pawar, for R.S. Bhonsale, V.R. Bhosale and Sujata Mogare, in C.R.A. No. 321 of 1983, for the Appellant; J.S. Pawar, Assistant Public Prosecutor, for the respondents No. 14 in Cr. R. A. 321 of 1983 and M.R. Katikar (Saraf), for the respondents in Cr. A. 517 and for respondents Nos. 1 to 13 in Cr.R. A. 321 of 1983, for the Respondent

Final Decision : Allowed

Judgement

Vishnu Sahai, J.—Since both these matters arise out of same set of facts and a common impugned judgment, we are disposing them of by one judgment.

2. A perverse judgment of acquittal dated 18-4-1983 passed by the Judicial Magistrate, First Class, Malshiras, District Solapur, in Criminal Case No. 159/1978 acquitting the respondent Nos. 1 to 3, 6 to 13 for offences punishable u/s 147, 148, 325, r/w 149 and 504 of I.P.C. and respondent Nos. 4 and 5 for the said offences (but, in place of section 325 I.P.C., convicting each of them u/s 324 I.P.C.) has prompted the State of Maharashtra to prefer the Criminal Appeal No. 517 of 1983.

Some consideration has prompted the original complainant Prabhakar Tulshiram Magar to file Criminal Revision Application No. 321 of 1983.

3. Briefly stated the prosecution case runs as under :---

The informant Prabhakar Tulshiram Magar P.W. 2 and 13 respondents namely, 1) Sampat Balvant Magar, 2) Gulab Bhagwan Magar, 3) Krishna Damu Magar 4) Nanasaheb Annasaheb Magar 5) Nagnath Baburao Magar 6) Annasaheb Yeshwant Magar 7) Prabhakar Sopan Magar 8) Ravsaheb Vithoba Magar 9) Janardan Kondi Magar 10) Namdeo Sopan Magar 11) Shrimant Sopan Magar @ Shrikant Kashinath Magar, Maruti Kashinath Magar 12) Nanasaheb Vithoba Magar 13) Appa Dada Magar are residents of the same village namely Nimgaon. The allegation is that there was an enmical strain between the parties.

On 19-7-1977, at about 3 p.m. the informant was in his land situate in village Nimgaon, Taluka and Police Station Malshiras, District Solapur. He was having sugarcane seedlings planted in his land by labourers Prahlad Magar, P.W. 4 and some others. At that time, the 13 respondents came there. The respondent Nanasaheb Annasaheb Magar and Nagnath Baburao Magar started assaulting him from the handles of axe on his head. They also abused him for having involved them in respect of murder of Bhimrao Yadu Magar. As a consequence of the assault made by the said respondents the informant fell down. Thereafter, he got up and ran towards the vasti. The respondents started chasing him and near the well, all of them overpowered him and started assaulting him by sticks, iron bars etc. As a consequence of the assault, the informant sustained injuries on various parts of his body. He became unconscious. Apart from the informant, the incident was also witnessed by Pralhad Shripati Magar P.W. 4 and some others. After assaulting the informant, the respondents are said to have run away.

3A. Servants of the informant brought a cart and first took him to the vasti. Thereafter, in a cart, brought by Bajrant Pawar, he was taken to Malshiras Police Station. There he was given a yadi addressed to the Medical Officer in the Hospital, for medical examination. The evidence is that there was no Medical Officer in the Hospital when the informant reached there. Thereafter, the informant was taken to Akulj Government Hospital. At the said Hospital, he was given first aid and thereafter immediately shifted to the Civil Hospital Solapur, as his injuries were serious in nature. The same day at 11.30 p.m. he was medically examined by Jagadevappa Nagappa Karande, P.W. 1. Dr. Karande found on his person 14 injuries which are enumerated below :----

In the opinion of the doctor, these injuries were inflicted within 12 hours and were attributable to a hard blunt object.

Dr. Karande also stated that the X-ray of skull, chest and forearm was done; that of skull showed depressed fracture of the left frontal bone and that of forearm showed fracture of ulna middle third. He also opined that depressed fracture of skull was possible by assault by the butt end of an axe.

4. Next day i.e. on 20-7-1977, statement of the informant was recorded at the Civil Hospital, Solapur, as a dying declaration. The same is at Exhibit 34. The said dying declaration was received by Police Head Constable Pandit Shamrao Deshmukh P.W. 6, while he was camping at Nimgaon. He sent the same to

Malshiras Police Station and on its basis, C.R. No. 179/1977 under sections 147, 323, 504 and 149 I.P.C. was registered.

5. The investigation of the case was conducted by Police Head Constable Pandit Deshmukh P.W. 6. On 22-7-1977, along with two panchas, he went to the place of the incident which was the land of the complainant and recovered therefrom blood stained clothes and one stick. The same day, he recorded statement of some witnesses, including Pralhad Shripati Magar, P.W. 4. On 23-7-1977, he handed over the investigation to P.S.I. Chougule. On 3-8-1977, per orders of the P.S.I., he recorded the supplementary statement of the complainant and attached his blood stained clothes under a panchanama Exhibit 47.

On 28-6-1978, P.S.I. Phadke submitted a charge sheet in the Court.

6. In the trial Court, the respondents were charged on four counts namely 147, 148, 325, r/w 149 and 504 I.P.C. To the said charges, they pleaded not guilty and claimed to be tried.

In the trial Court, in all, the prosecution examined 6 witnesses, two of them namely Prabhakar Tulshiram Magar P.W. 2 and Pralhad Shripati Magar, P.W. 4 were examined as eye-witnesses. In defence, no witness was examined.

After recording the evidence adduced by the prosecution; questioning the respondents u/s 313 Cr. P.C., and hearing the learned Counsels for the parties, the learned Magistrate recorded the impugned judgment.

7. We have heard Ms. J.S. Pawar for the appellant and Mr. M.R. Katikar for the respondents in Criminal Appeal No. 517/1983. We have heard Ms. Neelima Pawar for the petitioner (original complainant), Mr. M.R. Katikar for respondent Nos. 1 to 13 and Ms. J.S. Pawar, for the respondent No. 14 in Criminal Revision Application No. 321/1983. We have also perused the depositions of the prosecution witnesses, statement of the respondents recorded u/s 313 Cr.P.C. and the impugned judgment. After giving our anxious consideration to the matter, we are squarely satisfied that Criminal Appeal No. 517/1983 deserves to be allowed and Criminal Revision Application No. 321/1983 should be disposed off in terms of our judgment in Criminal Appeal No. 517/1983.

8. Ms. Pawar, Additional Public Prosecutor strenuously urged that the impugned judgment of acquittal is manifestly perverse and warrants to be reversed. There is no quarrel with the proposition that if the judgment of acquittal passed by a subordinate Court is perverse, the Appellate Court would have powers to reverse it. In our view, no authority is really required in support of this proposition. However, it would be useful to refer to the observations contained in para 7 of the judgment of the Apex Court, reported in State of Punjab Vs. Ajaib Singh, , which are to the following effect :---

"We agree that this Court is not precluded or the Court hearing the appeal against acquittal is not prevented from examining and reappreciating the evidence on record. But the duty of a Court hearing the appeal against acquittal

in the first instance is to satisfy itself if the view taken by acquitting Court exercising appellate jurisdiction was possible view or not. And if the Court comes to conclusion that it was not, it can on re-appreciation of evidence reverse the order."

Ms. Pawar strenuously urged that the evidence of both the eye-witnesses namely Prabhakar Tulshiram Magar, P.W. 2 and Prahlad Shripati Magar, P.W. 4, inspires implicit confidence and has been rejected on the most filmsy reasons, which are wholly untenable in law.

Ms. Pawar vehemently urged that this was a broad day-light incident, which occurred at 3 p.m. on 19-7-1977. She rightly urged that at the said time, there would have been no difficulty for both the eye-witnesses in recognising the respondents who were known to them by name. She also urged that presence of the witnesses, on the place of the incident, was natural and probable. She urged that the incident had taken place in the field of Prabhakar Tulshiram Magar, P.W. 2. She further urged that Prabhakar Magar and Prahlad Shripati Magar have given plausible reasons for their presence on the place of the incident, at the time alleged by the prosecution. The evidence of Prabhakar Magar shows that sugarcane seedlings were being planted in the field, and Shripati Magar was one of the labourers who was involved in the said job. Hence it was wholly natural for them to be there.

Ms. Pawar, also urged that the account pertaining to the assault on the victim Prabhakar Magar, as contained in his evidence and in that of Shripati Magar, is corroborated by the medical evidence and probabilities. We find weight in her submission. Evidence of both the eye-witnesses is that the respondent Nanasaheb Annasaheb Magar and Nagnath Baburao Magar assaulted Prabhakar Magar (P.W. 2) on his head with handles of axe. As a consequence of the assault, Prabhakar Magar fell down. Thereafter, he got up and started running. All the respondents started chasing him, and when he had reached near the well, all of them belaboured him with sticks, iron bars etc.

The said account furnished by the two eye-witnesses is corroborated by the presence of injuries attributable to handles of axe on the head of the victim Prabhakar Magar and a large number of injuries attributable to sticks, iron bars, etc. on other parts of his body. Statement of Dr. Karande, P.W. 1 also shows that the injuries of Prabhakar Magar could be caused by iron bars, sticks handles of axe etc.

Apart from the medical evidence, some circumstances also lend assurance to the truthfulness of the eye-witnesses. One such circumstance is that the account of the complainant and Shripati Magar, to the effect that the incident took place in the field of the complainant appears to be truthful because from the same, the Investigating Officer recovered bloodstained stones and a stick. Another circumstance which lends assurance to the ocular account, is the existence of a plausible motive on the part of the respondents to have assaulted the victim

Prabhakar Magar. As stated earlier, according to the prosecution, there was an enmical strain between the parties and the same resulted in this incident. Even, the trial Magistrate in para 10 of the impugned judgment, admitted that the respondents and the witnesses belong to two rival groups. He however, construed this circumstance as being responsible for false implication of the respondents. We regret that we are not able to accede to this logic of the trial Magistrate.

9. The trial Magistrate, has been completely oblivious to the fact that Prahlad Magar, P.W. 4 had no axe to grind against the respondents and had they really not launched an assault on Prabhakar Magar, he would not have falsely deposed to this effect. We have been taken through his evidence by Ms. Pawar and we find that not only the same reflects absence of any bias on the part of this witness against the respondents but also appears to be in tune with probabilities and the medical evidence. We are not prepared to accept the contention of Mr. Katikar, Counsel for the respondents, that inasmuch as this witness was the servant of Prabhakar Magar, between whom and the respondents, there was enmity, he falsely implicated them. The said circumstance would only make this Court evaluate his testimony with caution and not mechanically reject the same. Even after exercising caution, we find the same to be reliable.

10. In our view, evidence of both Prabhakar Magar and Prahlad Magar, inspires implicit confidence and the learned Magistrate blundered in rejecting it.

11. The learned Magistrate has acquitted the respondents Nos. 1 to 3 and 6 to 13 on most flimsy reasons, the prime of which is based on a misreading of evidence. The learned Magistrate has held that the evidence indicates that the said respondents were merely present on the place of the incident and the witnesses did not assign to them any overt acts. In such a situation, the learned Magistrate felt that they did not share the common object and the ratio laid down by the Apex Court in the oft-quoted case of Baladin and Others Vs. State of Uttar Pradesh, , would have application. The finding of the learned Magistrate that the said respondents were merely present and did not assault the victim, is contrary to the weight of evidence on record. Both the eye-witnesses namely the victim Prabhakar Magar, P.W. 2 and Prahlad Magar, P.W. 4, have categorically stated that all the accused chased the victim (Prabhakar Magar) and assaulted him with sticks, iron bars, and handles of axe. Evidence of both the eye-witnesses unmistakably shows that assault on the victim was committed by the said respondents in furtherance of the common object of unlawful assembly which was to inflict injuries on the victim Prabhakar Magar. Hence they would be liable u/s 324/149 I.P.C. In addition, the learned Magistrate has also observed that since there was an enmical strain between the informant and these respondents, they may have been falsely implicated. The learned Magistrate forgot that the said circumstance was the motive in the instant case. He also forgot that the medical evidence probablised the assault by the 13 respondents on the victim. Some of the injuries sustained by him were multiple.

Further, the learned Magistrate became wholly oblivious to the fact that Prahlad Magar, P.W. 4 was an independent witness and had no axe to grind against these respondents.

The learned Magistrate has assigned another reason for acquitting the respondents namely that the dying declaration was not the F.I.R. He completely lost sight of the fact that the F.I.R. is not substantive evidence. Its evidentiary value is limited to the extent that it can only be used to contradict or corroborate the maker. The substantive evidence is the evidence of the witnesses in Court and that is reliable. And once that is so, he blundered, in our judgment, in acquitting said respondents, for offences punishable under sections 324/149, 147 & 148 I.P.C. because the evidence of the eye-witnesses was that they were members of an unlawful assembly within the meaning of section 141 I.P.C. and the assault on the victim Prabhakar Magar was made in the prosecution of the common object of the unlawful assembly. In our view, the said respondents are guilty under sections 324/149, 147 and 148 of the Indian Penal Code. He, however acted correctly in acquitting the said respondents u/s 504 I.P.C. in view of the reasons mentioned by him in paragraph 11 of the impugned judgment. He was also right, in acquitting these respondents for an offence u/s 325 r/w 149 I.P.C. because, the X - ray plates of the victim which showed that he had sustained a fracture on his head and fracture of ulna bone were not produced by the prosecution. However, in our judgment, there would be no difficulty in convicting the said respondents for an offence punishable u/s 324 read with 149 I.P.C., because the said offence is a minor offence in relation to the offence of section 325, r/w 149 I.P.C. and consequently, no prejudice would be caused even if there was no charge for an offence u/s 324 read with 149 I.P.C. We have the definite evidence of both the eye-witnesses that all these respondents assaulted Prabhakar Magar with sticks, iron bars, handles of axe etc. in prosecution of the common object of the unlawful assembly. Sections 215 and 464 of Cr.P.C. provides that only if prejudice is caused or there has been a failure of justice, in view of the infirmity, in the charge would the trial be vitiated. That is not the position here. The learned Counsel for the respondents could not show us, that any prejudice was caused to them.

The acquittal of respondents Nanasaheb Annasaheb Magar and Nagnath Baburao Magar for offences u/s 147 and 148 I.P.C. would also have to be reversed by us. Section 147 I.P.C. deals with offence of rioting. Section 148 I.P.C. deals with the offence committed by a person who is guilty of rioting being armed with a deadly weapon or with anything which used as a weapon of an offence is likely to cause death. Rioting has been defined in section 146 I.P.C. The said section reads thus :---

Rioting :

"Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting."

A perusal of section 146 I.P.C would show that the offence of rioting would only be made out if force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the common object of such an assembly.

Unlawful assembly has been defined in section 141 I.P.C. and the opening words of the said section are that an assembly can only be unlawful, if the members are five or more.

Since after acquitting the respondent Nos. 1 to 3, and 6 to 13, the number of persons who remained became less than five, the trial Magistrate felt that no offence u/s 147 I.P.C. (rioting simpliciter) and section 148 I.P.C. (rioting with a deadly weapon) was made out. Since we have already held that the acquittal of respondent Nos. 1 to 3, and Nos. 6 to 13, for offences under sections 147 and 148 I.P.C. is vitiated in law, it would follow as a logical corollary that the acquittal of the respondents Nanasahab Annasaheb Magar and Nagnath Baburao Magar would also have to be set aside for offences punishable u/s 147 and 148 I.P.C. The trial Court has already convicted these respondents for offence u/s 324 I.P.C. For the reasons mentioned in para 11 of the impugned judgment, the trial Court was justified in acquitting these respondents for an offence u/s 504 I.P.C.

The only question which survives is as to what should be the quantum of sentence which should be awarded to the respondents. Our first reaction, bearing in mind, the injuries received by the victim, was to award a jail sentence to the respondents. But, on a deeper reflection of the matter, we are inclined to accede to the submission of Mr. Katikar that considering the circumstance that the impugned judgment of acquittal was passed nearly 19 ? years ago, and in this period, the respondents must have first recovered from the trauma of a protracted trial, then settled down in their vocations and in the Rythm of family life, it would be expedient in the interest of justice if instead of sending them to jail, some fine is imposed upon them and the same is directed to be paid as compensation to the victim. The delicate question is as to what should the quantum of this fine. Mr. Katikar urged that bearing in mind the over all circumstances, it should be token. On the converse, Ms. Pawar urged that taking into consideration the number of injuries and the parts of body on which they have been inflicted a token fine would be wholly inadequate to meet the ends of justice. She urged that the fine should be substantial. We have deliberated over this vexed issue. In our view, the ends of justice would be squarely satisfied if each of the respondents are ordered to pay a separate fine of Rs. 100/- under sections 147 and 148 I.P.C. and the respondents Nos. 1 to 3 and Nos. 6 to 13 are directed to pay a fine of Rs. 300/- each u/s 324 read with 149 I.P.C.

14. In the result, these two connected matters are disposed off in the following manner :---

Criminal Appeal No. 517 of 1983 is allowed. Respondents Nos. (1) Sampat Balvant Magar (2) Gulab Bhagwan Magar (3) Krishna Damu Magar (6) Annasaheb Yeshwant Magar (7) Prabhakar Sopan Magar (8) Ravasaheb Vithoba

Magar (9) Janardan Kondi Magar (10) Namdeo Sopan Magar (11) Shrimant Sopan Magar @ Shrikant Kashinath Magar (12) Nanasaheb Vithoba Magar (13) Appa Dada Magar, are held guilty for offences punishable under sections 147, 148 and 324 read-with 149 I.P.C. Whereas u/s 147 and 148 I.P.C., each one of them is directed to pay a separate fine of Rs. 100/- and to undergo a separate sentence of one month R.I. on each of the two counts, in default of payment of fine, they are directed to pay a fine of Rs. 300/- each and to undergo three months R.I. in default of payment of fine u/s 324 read-with 149 I.P.C.

Respondent Nos. 4 and 5 namely Nanasaheb Annasaheb Magar and Nagnath Baburao Magar are convicted under sections 147 and 148 I.P.C. and on each of the said counts, are directed to pay a separate fine of Rs. 100/- and in the event in default, of its payment, they shall undergo a separate sentence of one months R.I. under each of the two counts.

The fine shall be paid by the 13 respondents within a period of three months from today in the trial Court and the whole of it i.e. Rs. 5,900/- (Five thousand nine hundred) shall be paid as compensation to the victim Prabhakar Tulshiram Magar, P.W. 2 and in case he is not alive, then to such legal heirs of his, who are entitled in law to receive it. Immediately on the fine being deposited, the trial Court shall inform Prabhakar Tulshiram Magar, P.W. 2 his legal heirs, as the case may be about this compensation.

In case the respondents do not pay the fine in the time stipulated by this Court, they shall suffer imprisonment which we have imposed in default of its payment.

Criminal Revision Application No. 321 of 1983 is disposed off in terms of the judgment passed in Criminal Appeal No. 517 of 1983. Before parting with this judgment, we would be failing in our fairness, if we do not record the enormous assistance which we have received from the learned Counsel for the parties in the disposal of these matters.

In case an application for certified copy of this judgment is made, the same should be issued on an expedited basis.