

(2012) 01 BOM CK 0059

In the Bombay High Court

Case No : Criminal Application No. 5560 of 2011 in Criminal Application No. 5559 of 2011

The State of Maharashtra

APPELLANT

Vs

Sk. Asef and Others

RESPONDENT

Date of Decision : 20-01-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 235, 378
Penal Code, 1860 (IPC) — Section 34, 395, 427, 506
Protection of Civil Rights Act, 1955 — Section 7
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 3

Citation : (2012) BomCR(Cri) 230

Hon'ble Judges : S.B. Deshmukh, J;A.M. Thipsay, J

Bench : Division Bench

Advocate : D.V. Tele, app, for the Appellant;

Final Decision : Dismissed

Judgement

S.B. Deshmukh, J.—Heard Learned A.P.P. Shri. D.V. Tele for the applicant.

2. This is an application filed u/s 378(i)(iii) of the Criminal Procedure Code, 1973 by the State of Maharashtra. There are five respondents in this application.

3. The respondents in this application were tried for the offences punishable under Sections 3(i)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)Act, (7)(i)(d) of Protection of Civil Rights Act and 395, 427 r/w. 34 and 506 (ii) r/w. 34 of Indian Penal Code by the Learned Special Judge and Additional Sessions Judge-II, Jalna. The learned trial Court by the judgment dated 22nd of August, 2011 delivered in Special Case (Atro) No.5 of 2010 acquitted respondents (original accused nos.1 to 5) u/s 235(i) of Criminal Procedure Code for the aforesaid offences. It is this acquittal of the respondents is challenged by the applicant, with a prayer for grant of leave. In short, leave to file appeal against acquittal, is sought by the present applicant.

4. Briefly stated the facts of the case are as under :-

P.W. 1 Shivjai Dabhade lodged oral report at Taluka Police Station, Jalna on 5th of August, 2008. This report is reduced into writing by P.W.6 A.P. Nawale, A.P.I. According to P.W.1 Shivaji Dabhade, he is resident of Chandanzira and belongs to Mahar community, a scheduled caste. He resides at Chandanzira with his family and on the date of lodging report, he was doing business of selling vegetables on his cart in vegetable market at Chandanzira. On the date of occurrence, at about 9.30 p.m., he was selling vegetables at vegetable market. Accused no.2 Shaikh Nadim Shaikh Usman, accused no.1 Shaikh Asef s/o Shaikh Usman, accused no. 3 Shaikh Ibrahim @ Don s/o Shaikh Amir, accused no.4 Shaikh Aziz @ Ajju Chous s/o Shaikh Mohammad, accused no.5 Bandu s/o Devidas Nikalje came to his cart. He claims that he was knowing the respondents (original accused). According to P.W.1 Shivaji Dabhade at the time of incident all the accused came in the Maruti Van near his cart, said vehicle was driven by the driver, unknown to him. Two other persons, unknown to complainant P.W.1 Shivaji Dabhade, were also there in the van. According to report of the complainant P.W.1 Shivaji, all accused alighted from the vehicle and demanded money. On the refusal by him they addressed him " Maharya-Dhedgya Bahut Mastime Aya Kya, Yaha Par Hamara Raj Chalta Hai ". He was also threatened by accused to slay with a sword. It further reveals from his report that accused have searched below gunny bag, spread over the cart and threatened him, if he want to sell vegetables from there, he will have to pay money to them. He also alleges in the report that accused took away Rs.800/-from the pocket of his trouser and threw vegetables on the ground from his cart, causing damage to his goods and cart. He was frightened, closed his business and went to home. He states in report that this incident was witnessed by Pratap, Gajanan and Sunil.

Second occurrence according to his report took place at about 11.00 p.m. on the same day i.e. 4th August, 2008. At that time also, he claims that all accused had been to his house in a Maruti car, called him out of his house and threatened him with life. According to complainant, P.W.1 Shivaji Dabhade, third incident took place on 5th August, 2008 in the morning at about 10.00 a.m. when he started his vegetable business from his cart in the market. All the accused came to him and questioned him that why he is selling vegetables when he was instructed not to do so. He was frightened, closed the business. This incident also has been witnessed, according to him, by Mr. Subhash Borde and Sandip. He claims that he belongs to Mahar, a scheduled caste and accused persons knew this fact. They demanded money, abused him, humiliated and insulted him in terms of his caste. They also robbed him of Rs.800/-, caused damaged to his goods i.e. vegetables and also threatened him not to report the matter to police.

5. Oral report of P.W.1 Shivaji Dabhade was reduced into writing by P.W.6 Ashok Nawale and it is at Exh.41. Based on this report, Crime No. 178/2008 has been registered against the present respondents.

6. The trial Judge has noticed defence of the respondents (accused persons)

which is of total denial and lodging of a false complaint, to take revenge of the incident of one Mr. Kapil Dabhade, just on enmical terms with accused and which is relative of complainant P.W.1 Shivaji Dabhade.

7. The learned trial Judge has considered the evidence of P.W.2 Jagannath as to the first incident, dated 4th August, 2008, allegedly occurred at 9.30 p.m. and also has considered the evidence of P.W.3 Subhash Borde as to incident dated 5th August 2008 occurred at about 10.30 a.m. The learned trial Judge was of the opinion that P.W. 3 Subhash Borde, was passing from the place of incident and noticed presence of some other persons at the shop / cart of the complainant. This witness, according to learned trial Judge, states that accused persons abused complainant in terms of mother and sister, however, there is no specific evidence (there is no reference to caste of the complainant).

P.W.4 is Meena Dabhade wife of complainant Shivaji Dabhade. According to learned trial Judge, this witness is relating to the incident dated 4th August, 2008, allegedly occurred at 11.00 p.m. This incident pertains to threatening only by the accused persons, not to report the matter to the police. Learned trial Judge opined that on inquiry of P.W. 4 Meena Dabhade, as to why accused persons were abusing him, he had disclosed earlier incident to her in the vegetable market. The learned trial judge has also considered the evidence of P.W. 5 Subhash Sadavarte, a panch witness of spot panchanama. P.W.6 Ashok Nawale is formal witness, who reduced a report of complainant at Exh.41. P.W.7 Sub Divisional Police Officer Ravindra Sonwane carried out part of the investigation of the crime in question. Learned trial judge, on appreciation of the evidence, reached a conclusion that the evidence of Jagannath Chavan corroborated the evidence of complainant, P.W.1 Shivaji Dabhade up to some extent. According to complainant, accused persons abused him in terms of his castes and in the words like " Maharya-Dhedgya Bahut Mastime Aya Kya " and then snatched Rs.800/-from his pocket. The trial Court found the contrary evidence of P.W.2 Jagannath Chavan, who states that he was passing through vegetable market at the relevant time. The trial Court also noticed altercation amongst accused and the complainant, the demand of money was made by the accused persons from the complainant and the accused had also abused complainant in terms of his castes. The trial Court opined that specific insulting, humiliating words i. e. " Maharya -Dhedgya " were not stated specifically by this P.W.2 Jagannath Chavan. The learned trial judge, therefore, did not believe the evidence of P.W.2 Jagannath Chavan. The trial Court has also noticed that P.W.2 Jagannath Chavan was a chance witness and was not able to state which customers he was going to attend at that time. The trial Judge has also observed that this witness was having cordial relations with the complainant and reached a conclusion that said witness is interested witness.

8. The learned trial Judge recorded incident of 9.30 p.m. on 4th August, 2008, and has observed that this incident was not disclosed by P.W.1 Shivaji Dabhade (complainant) even to his wife P.W.4 Meena Dabhade who was examined in the

Court. This non disclosure of the incident by P.W.1 Shivaji Dabhade till 11.00 p.m. according to learned trial Judge discredits the evidence of P.W.1 Shivaji Dabhade. Delayed disclosure of this incident at 11.00 p.m. to Meena Dabhade has been seriously considered by the trial Court. The trial Court observed that though P.W.4 Meena Dabhade was examined, neighbours gathered or independent witnesses were not examined. The trial Court has also observed that P.W.4 Meena Dabhade had conceded that there was dark and she could not identify the neighbours present at the spot. The learned trial Judge disbelieved P.W.4 Meena Dabhade since she could not identify neighbours.

9. The trial Judge has also appreciated evidence of P.W.3 Subhash Borde, this witness has been disbelieved by the trial Court on the ground that he belongs to same caste Mahar i.e. of the complainant and was having cordial relations with the complainant. The learned trial Judge after appreciating evidence in the case on hand, reached a conclusion that accused did not intentionally humiliated and insulted the complainant in terms of his caste and in the public view. The trial Court recorded the finding that prosecution failed to establish that accused persons were knowing the complainant as belonging to Mahar caste or person belonging to scheduled caste. The learned trial Judge, has further observed that complainant had no occasion earlier to these instances, to deal with accused persons or had no occasion to have interaction with them. The trial Court has also noticed delay in lodging report and reached a conclusion that prosecution has failed to prove the offences with which accused persons were charged.

10. With the assistance of Learned A.P.P. Mr. D.V. Tele we have re-examined and re-appreciated the entire oral evidence on record. There is no dispute that P.W.1 Shivaji Tukaram Dabhade is a person belonging to Mahar caste i.e. belonging to schedule caste. His caste certificate is at Exh.40. Learned A.P.P. has fairly conceded that evidence on record do show that respondent no.5 Bandu s/o Devidas Nikalje himself is belonging to Matang caste i.e. belonging to schedule caste and therefore could not have been tried for offence u/s 3(i)(x) of Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, Section 7(i)(d) of Protection of Civil Rights Act.

11. We have considered the evidence of P.W.1 Shivaji Tukaram Dabhade. According to him regarding incident allegedly occurred at 9.30 p.m. on 4th August, 2008 all the accused came near his cart, threatened him not to place his cart in the market and demanded money (hafta) from him. Thereafter he states that he was addressed like " Maharya - Dhedgya Bahu Mastime Aya Kya ". The words Maharya, Dehdgya, allegedly addressed to complainant, are significant and material. However, on this background P.W.1 complainant failed to establish that his caste was known to accused nos.1 to 4 and with an intention to cause insult and humiliation to P.W. 1 Shivaji, these words were uttered by accused nos.1 to 4. These facts are not established by P.W.1 Shivaji in his examination in chief. His emphasis seems to be on demand of money and snatching of Rs. 800/- from his pocket. He also claims that damage to goods i.e. vegetables and cart

was caused by the respondents. He specifically claims that Jagannath Chavan, Pratap Lahane, Sunil Nanabhau Admane had witnessed the incident. Mr. D.V. Tele, Learned A.P.P. fairly admits Mr. Pratap Lahane, Sunil Nanabhau Admane have not been examined on behalf of prosecution. Regarding this incident alleged to have been occurred at 9.00 to 9.30 p.m. on 4/08/2008, we have considered evidence of P.W.2 Jagannath Karbhari Chavan Exh. 42. It reveals from his evidence that this witness was acquainted with complainant Shivaji and accused persons and is resident of Chandanzira locality of Jalna town. From his evidence it appears that at the 9.30 p.m. on 4th August 2008, he was passing through vegetable market and noticed altercation of accused persons and P.W.1 Shivaji. However, according to him accused persons were threatening P.W.1 Shivaji to give money to them or else he would be stained. However he states that accused had abused Shivaji in terms of caste. It is matter of significance to notice that specific abuse allegedly hurled by accused nos.1 to 4 to Shivaji, have not been stated by this witness. Act of overturning vegetable or cart is testified by this witness and snatching of some amount is also testified by this witness. In cross examination this witness has admitted the fact that he was running electric shop on the road, in Chandanzira area. This witness was unable to say about the customers, proceeding at that time from that area. This witness has fairly conceded that he was having cordial relations with complainant Shivaji. He also admits that he did not intervene in the quarrel and simply watched incident by standing. From the evidence of this witness, it appears that he was neighbour of P.W. 1 Shivaji, the complainant and resident of area since 27 years. This witness also admits that P.W.1 Shivaji was known to him since last 20 years. On this background his callousness to intervene the quarrel, is additional ground for disbelieving presence of this witness at the time of occurrence. We have also noticed that this witness has denied friendship with Shivaji. In our opinion, this witness cannot be said to have corroborated the evidence of P.W.1 Shivaji in its entirety.

12. We have also considered the evidence of P.W.3 Subash Borde regarding the incidence alleged to have been occurred at 10.00 - 11.00 a.m. on 5th August 2008. At the relevant time he was passing through vegetable market and has noticed presence of many persons near vegetable shop of Shivaji. He has heard the words addressed by accused persons as to why complainant has placed his vegetable cart, even though he was instructed not to do so. This witness however, testified regarding hurling of abuses by accused persons to Shivaji in terms of mother and sister and not insulting, humiliating the complainant regarding his caste. Specific utterances on castes have not been stated by this witness. From cross examination, it appears that this witness is knowing the complainant since last 20 years and was maintaining cordial relation with Shivaji as well as belonging to caste of the complainant himself. This witness admits in cross examination that he did not intervene or tried to separate the warring parties. This does not appear to natural conduct. The learned trial Court has rightly disbelieved the evidence of this witness.

13. With the assistance of Learned A.P.P. we have considered the evidence of P.W.4 Meena Dabhade wife of the complainant regarding incident dated 4th August, 2008, allegedly occurred at 9.30 p.m. It appears from her evidence that the said occurrence was not disclosed by P.W.1 Shivaji to this witness his own wife. She talks about incident dated 4th August, 2008, allegedly occurred at 11.00 p.m. i.e threatening by the accused to her husband near her house. According to her, she was standing in the door of her house. On her inquiry, it appears that P.W.1 Shivaji disclosed her the earlier incident. There seems to be two statements of this witness i.e first statement u/s 161 of Cr.P.C. and thereafter supplementary statement. In cross examination, she admits presence of the neighbours, however, she could not identify and say their names. She also fairly concedes that prior to that nights incident, she had not seen any of the accused persons.

14. We have given due consideration to the submissions of Learned A.P.P. We have also considered the judgment of the trial Court. In our opinion, on re-appreciation of the evidence it cannot be said that judgment of the trial Court, is perverse. The judgment and order of acquittal is well reasoned and passed on the admissible evidence brought on record. We do not find any perversity warranting any inference.

We do not find any perversity for converting acquittal of the respondents into a conviction, apart from the fact that respondent no.5 could not have been prosecuted for offence u/s 3(i)(x) of Atrocities Act. In our opinion there is absolutely no substance in this criminal application. We are inclined to dismiss the criminal application.

15. In the result, application is dismissed. Leave to file appeal is refused.