

(1997) 03 BOM CK 0011
In the Bombay High Court
Case No : Criminal Appeal No. 1002 of 1984

The State of Maharashtra

APPELLANT

Vs

Vithal alias Balu Narayan Patale and others

RESPONDENT

Date of Decision : 14-03-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 378
Evidence Act, 1872 — Section 100, 104, 3, 45, 9
Penal Code, 1860 (IPC) — Section 100, 104, 149, 302, 34

Citation : (1998) BomCR(Cri) 79 : (1997) CriLJ 3277 : (1997) 2 MhLj 454

Hon'ble Judges : Vishnu Sahai, J; R.P. Desai, J

Bench : Division Bench

Advocate : Ms. Jyoti Subhash Pawar, Addl.P.P, for the Appellant; Tanaji Mane, for the Respondent

Judgement

Vishnu Sahai, J.—The appellant aggrieved by the judgment and order dated 11-10-1984, passed by the III Additional Sessions Judge, Solapur, in Sessions Case No. 63 of 1984, acquitting the respondents for offences punishable u/s 302, read with 149 I.P.C. etc. has come up in appeal before us.

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

Respondent Nivrutti is the father of respondents Vithal, Madhu and Govind. Respondent Subhash is the servant of respondent-Vithal. Respondent Maruti is the nephew of Respondent Nivrutti.

The respondents on one hand and the deceased Jubedabi and others on the other used to live in immediate proximity in village Khandali, Taluka Malshiras, District Solapur. There was a long standing enmity between the complainant and his family members on the one hand and respondents on the other on account of a open pace on the western side of the house of the complainant Gulshanbi, P.W. 1. To the western side of the open pace was the cattle-shed of respondent Vithal. On 26-8-1983, at about 8 a.m. respondent Vithal was in the cattle shed milking cow and the other respondents were also there. The informant came at that lime

and started collecting cow dung from the contiguous place where her cattle were tethered. The respondent Vithal, Madhu and Nivrutti asked the informant to remove the cattle from that place. When the informant refused, a quarrel ensued between them. The respondents abused the informant. It is said that the respondent Nivrutti was armed with an iron peg; respondent Vithal was armed with stick; and respondent Madhu was armed with an iron bar. The said respondents assaulted the complainant with their weapons. The other respondents pelted stones on her. On the cries of the informant, the deceased Jubedabi, Paigambar, Hajarat Rukhsana, Shahbuddin, Jehangir and Amir who were in the house came. Jubedabi was first to reach. She asked the respondents to release Gulshanbi but, they paid no heed to her. Instead they started assaulting her. It is said that the respondents-Nivrutti, Madhu and Vithal gave blows on the head of Jubedabi with the weapons which they had. Other respondents are alleged to have thrown stones at her. While she was being assaulted, her children and Shahbuddin came there and intervened. It is said that the respondents assaulted Paigambar and Rukhsana when they tried to rescue Jubedabi. The respondents Vithal, Madhu and Nivrutti also assaulted Jehangir and Amir.

It is said that one police head constable P.W. 7, Krishna Dhavale who was attached to Akluj Police Station happened to be passing by the road at the said time. He went to the scene of the offence and saw the informant and her relations in an injured condition. He made arrangements for a truck and on the same, removed Jubedabi and all the injured persons to Akluj Primary Health Centre and Rural Hospital. He sent a message to P.S.I. Pawar, of Akluj Police Station, about the injured persons being brought to the hospital. On receiving the telephonic message, P.S.I. Pawar of Akluj Police Station immediately came to the Primary Health Centre and Rural Hospital, Akluj.

3. The injuries of the victims were medically examined the same day from 9.15 a.m. onwards at Rural Hospital, Akluj by Dr. Nandkumar Deodikar, P.W. 2.

On the person of Jubedabi, the doctor found two contused lacerated wounds and a swelling. The said injuries were situated on the head. On medically examining Paigambar Mulani, the doctor found one contused lacerated wound, multiple contusions on the back and one abrasion.

On the person of Shahidabi Abbas, the doctor found a contused lacerated wound, two abrasions and tenderness over right shoulder.

On the person of Kuttubddin Ismail Mulani, the doctor found tenderness at three places and one contusion. On screening the chest, he found fracture of 6th and 7th rib.

On the person of Rukhsana, the doctor found two abrasions, one contusion, and tenderness over left shoulder.

On the person of Jehangir Mulani, the doctor found tenderness at some places.

On the person of Gulshanbi Mulani, the doctor found tenderness at two places and abrasion.

In the opinion of Dr. Deodikar, the injuries of the victims could be caused by hard and blunt substance like iron bars, sticks and stones.

4. The evidence is that since the injuries of Jubedabi were serious, she was shifted to the Civil Hospital, Solapur, where she succumbed to her injuries the same day.

5. After being medically examined, the informant Gulshanbi came to Akluj Police Station where she lodged her F.I.R. which was recorded by P.S.I. Jadhav. On the basis of the F.I.R., C.R. No. 140 of 1983 was registered at 11.30 a.m. at police station, Akluj, the same day.

6. The investigation was conducted in the usual manner by P.S.I. Jadhav. Alongwith the complainant, P.S.I. Jadhav came to village Khandali, and visited the place of the incident. He drew up the panchanama of the place of offence, Exhibit 51. From the place of the incident, he seized blood-stained earth. He also took into possession the blood stained clothes of Paigambar, and Gulshanbi the same day. During the course of investigation, he took into possession the blood stained clothes which were worn by respondent Vithal. Some of the recovered articles were sent by him to the Chemical Analyst. After completion of the investigation, the respondents were charge sheeted.

7. Going backwards, the autopsy on the dead body of the deceased Jubedabi was conducted by Dr. Ashok Kanaki, PW. 3, on 27-8-1983. Dr. Kanaki found two sutured wounds over scalp at parietal region which were parallel to each other and each of them were 2" in length. On internal examination, Dr. Kanaki found that there was crack fracture of coronal suture 7" in length with fracture of left parietal bone. In the opinion of Dr. Kanaki, the injuries were sufficient to cause death in the ordinary course of nature.

8. It would be pertinent to point out that a counter-F.I.R. with respect to the same incident was lodged the same day by the respondent Vithal at Police Station Akluj. A perusal of para 54 of the impugned judgment, shows that the counter F.I.R. was lodged immediately after the incident.

The case as unfolded by Vithal in his F.I.R. is that at about 8.30 a.m. he was milking his cow in the cattle shed. The deceased Jubedabi, complainant and others came and picked up a quarrel regarding the open place, and asked him to take away the cattle. In fact, they started taking away the cattle. Vithal asked them not to take the cattle. Thereupon, Jubedabi caught hold of his private part and pressed it. In the meantime, Paigambar Mulani and Hazarat Mulani came there and assaulted him with stick and iron bar respectively. Vithal's brother Madhu also came there, and tried to rescue him but the informant's party assaulted him.

8A. It is also relevant to point out that immediately after Vithal had lodged the

F.I.R., the injuries suffered by him and Madhu were medically examined by Dr. Deodikar.

On the person of Vithal, Dr. Deodikar, found the following injuries :---

- 1) C.L.W. on left side of face over left maxillary region oblique about 1" x 1/4" x 3/4" deep, with irregular edges fresh bleeding and swelling.
- 2) Contusion over right occipital region extending from occipital to one-third of upper neck about 3" x 1" with swelling and tenderness.
- 3) Contusion over right arm on lower one-third 3" x 1" reddish and tender.
- 4) Tenderness over both scrotum region with swelling and tenderness and redness of left scrotum."

In the opinion of Dr. Deodikar, injuries 1 and 4 were grievous. He opined that whereas injuries 1 to 3 were caused by a hard and blunt object injury No. 4 was possible due to physical violence.

On the person of Madhu @ Baliram Patale, Dr. Deodikar found the following injuries:--"

- (1) Contusion over back at dorso lumber region, horizontal x 3" x 1" reddish with swelling and tenderness.
- (2) Tenderness over both thighs at the level of lower one-third of femur."

9. The case was committed to the Court of Sessions in the usual manner. In the trial Court, the respondents were charged u/s 302 r/w 149 I.P.C. etc. To the said charges, they pleaded not guilty and claimed to be tried.

10. During trial, the prosecution examined eight witnesses. Four out of them, namely Gulshanbi, Paigambar, Kuttubddin, and Baban, P.Ws. 1, 4, 5 and 6 respectively were examined as eye-witnesses. In defence, no witness was examined.

After recording the evidence adduced by the prosecution; the statement of the respondents u/s 313 Cr.P.C.; and hearing the learned Counsel for the parties, the learned trial Judge acquitted the respondents vide the impugned judgment. Hence, this appeal.

11. We have heard Mrs. Jyoti Subhash Pawar for the appellant and Mr. Tanaji Mane for the respondents. We have also perused the depositions of the prosecution witnesses; the F.I.R. lodged by the respondent Vithal, the injuries sustained by both the sides; the statements of the respondents recorded u/s 313 Cr.P.C.; and the impugned judgment. After thoughtfully reflecting over the matter, we are implicitly satisfied that there is no merit in this appeal and it deserves to be dismissed.

12. In a very well-written judgment the trial Judge has lucidly spelt out the

reasons for acquitting the respondents- The trial Judge has held and rightly in our judgment, that the crucial question would be that who was in possession of the premises wherein the incident took place. He has dealt with this aspect in para 47 of the impugned judgment and has observed that the prosecution to substantiate its possession, is only relying on the bald statement of the eye-witnesses. He has observed, and again rightly in our judgment, that the admissions made by the complainant Gulshanbi, in her cross-examination show that the premises where the incident took place belonged to the respondent Vithal. In her cross-examination, Gulshanbi admitted that since 1975, on the place in question, there was the cattle-shed of the respondent Vithal. The trial Judge has given some other reasons in the same para as also in para 48 which establish that the possession of the premises wherein the incident took place was of respondent Vithal. We find them to be plausible, and are not advertent to them because, that would only result in swelling the bulk of this judgment.

13. The trial Judge has also not placed reliance on the testimony of the eye-witnesses. He has taken the view and rightly in our judgment, that the witnesses Gulshanbi, Paigambar, and Kuttubddin are highly interested and although witness Baban is independent, but he entertained grave doubts regarding his presence. This is apparent from a perusal of para 61 of the impugned judgment wherein he has held that Baban's name is not mentioned in the F.I.R. and witnesses Paigambar and Kuttubddin have said nothing about his presence.

There is another reason as to why in our judgment, the testimony of these four witnesses warrants to be rejected and that is they have not plausibly explained the injuries sustained by the respondents Vithal and Madhu. We have mentioned their injuries in para 4. Gulshanbi in her statement tried to explain the injuries of Vithal by stating in her cross-examination, in para 14, that while Vithal was coming out, from the cattle-shed he sustained injuries.

We are not impressed with this explanation. At any rate, the said explanation does not explain injury No. 4 sustained by Vithal.

Vithal has stated that the said injury was a consequence of Jubedabi catching hold of his private part and pressing it. To us this appears to be tenable.

We also find that there is no explanation with respect to the injuries sustained by the respondent Madhu.

14. The trial Judge in the impugned judgment, has rightly held that the prosecution side were trespassers when they entered into the cattle shed belonging to the respondent Vithal. Section 104 I.P.C. provides that against an offence of criminal trespass, right of private defence of property extends to causing harm short of death. In other words, when Jubedabi and others entered the cattle shed of the respondent Vithal, he and other respondents had the right to cause them harm short of death. In the instant case, the prosecution has not been able to adduce evidence as to which of the six respondents were responsible for the fatal injuries sustained by the deceased. It is significant to

point out that according to the prosecution, the Respondent Nivrutti with an iron peg; respondent Vithal with a stick; respondent Madhu with an iron bar; and other three respondents with stones assaulted the deceased. The post-mortem report of the deceased shows that she had sustained two contused lacerated wounds and one swelling; all three on the head. It also shows that there was a crack fracture of the coronal suture 7" in length with fracture of left parietal bone. The eye-witnesses have not been able to pin-point in their evidence as to who amongst the respondents was actually responsible for inflicting the three injuries sustained by the deceased, Jubedabi.

14A. We would like to emphasise that wherein the issue of exceeding the right of private defence of property or person is involved sections 149 and 34 of I.P.C. would have no application. It is the prosecution which has to specify through cogent and trustworthy evidence as to which of the accused exceeded the right of private defence of person or property.

The rationale for this is that persons who act in the exercise of the right of private defence of person or property are doing a lawful act and for sections 149 and 34 of the I.P.C. to have application it has to be respectively established that an assembly was unlawful or a criminal act was being committed. Section 149 would only have application if the assembly is unlawful and section 34 if a criminal act is committed by several persons in furtherance of the common intention of all.

Our view is reinforced by the observations contained in para 9 of the judgment of the Apex Court reported in State of Bihar Vs. Nathu Pandey and Others, , respondent, which read thus :--

".....The object of the respondent's party was to prevent the commission of theft of the mahua fruits in exercise of their right of private defence of property. This object was not unlawful. Nor is it possible to say that their common object was to kill Ramdhari and Ramswarup. Those who killed them exceeded the right of private defence and may be individually held responsible for the murders. But the murders were not committed in prosecution of the common object of the assembly or were not such as the members of the assembly knew to be likely to be committed in prosecution of the common object. The accused respondents cannot be made constructively responsible for the murders u/s 302 read with section 149....."

As mentioned above, in this case, the prosecution witnesses have not been able to specify as to which of the six respondents caused the fatal injuries of the deceased.

We however, hasten to add that even if they had, there was no question of exceeding the right of self-defence of person and property which accrued to the respondents because in view of the grievous injuries sustained by the respondent Vithal, the right of private defence of person, by virtue of Clauses Firstly and Secondly of section 100 I.P.C., read with section 104 I.P.C. extended to causing

Jubedabi's death. 15. Mrs. Jyoti Pawar, learned Additional Public Prosecutor strenuously urged that the omission on the part of the respondents to explain the injuries sustained on the prosecution is a death-knell to their case and shows the falsity of the defence version. We regret we are not able to accede to her contention for the reason stated hereinafter :---

Since the deceased and others were trespassers, the respondents had a right to cause them harm, short of death, by virtue of the provisions contained in section 104 I.P.C. It is true that the said right has been exceeded by some of the respondents in-as-much as fatal injuries were caused to Jubedabi to which she succumbed the same day. But, as we have seen above, and as has been laid down in State of Bihar Vs. Nathu Pandey and Others, , it is incumbent on the prosecution to pin-point the accused who exceeded the right. Here it has failed to do so. In that view of the matter, none of the respondents would be liable for exceeding the right of private defence. Since in law they had a right to cause injuries which they caused on Jubedabi and others, it hardly matters that the respondents have not explained their injuries.

15A. We would like to point out that omission of a party to explain the injuries, only assumes significance where on the facts of a given case, it is necessary to explain them. Where however, the facts in a given case show, as is the case here, that the right of private defence of person or property, available to a party, extended to causing injuries which have actually been caused, omission of a party to explain those injuries is inconsequential.

16. At any rate, the position which would emerge on account of the failure of the respondents to explain the injuries on the prosecution side, would be that both the prosecution and the defence are coming out with untrue versions; versions in which each side is suppressing its own aggression. In such a situation, the gainer is not the prosecution because, the settled law is that the prosecution does not thrive on the frailties of the defence but, swims or sinks depending on the strength or weaknesses of its own case. If both the parties come to the Court with untrue versions, the regretful result would be acquittal. The proposition in our judgment, does not require amplification by way of authorities but, those who have a fetish for one, would be well-advised to peruse the observations contained in para 12 of the judgment of the Apex Court, reported in Jamuna Chaudhary and Others Vs. State of Bihar, , which read thus:-

"As neither the prosecution nor the defence have, in the case before us, come out with the whole and unvarnished truth so as to enable the Court to Judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place, in which so many persons, including Laldhari and Ramanandan, were injured. Courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits, to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case."

17. When the said infirmities in the prosecution case are borne in mind, in the background of the fact that we are examining the matter in an appeal against acquittal wherein we can only interfere with the impugned judgment if it is either grossly unreasonable on facts or vitiated by some illegality it becomes crystal clear that the impugned judgment warrants no interference. The view of acquittal in the instant case, was a perfectly plausible view, in our judgment.

18. In the result, this appeal is dismissed. The impugned judgment acquitting the respondents on all the counts is confirmed. The respondents are on bail. They need not surrender. Their bail-bonds stand cancelled and sureties discharged.

Before parting with this judgment, we would like to put on record our appreciation for the assistance rendered to us by the learned Counsel for the parties; particularly Mrs. Jyoti Subhash Pawar who has argued this matter with a rare combination of fairness and tenacity.

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

19. Appeal dismissed.