
(2001) 01 BOM CK 0012

In the Bombay High Court

Case No : Criminal Appeal No. 739, 761 of 1985 with Criminal Revision
Application No. 455 of 1985 with Cri.A. No. 57 of 1986

Walu @ Walmik Popat Khairnar and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-01-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235
Evidence Act, 1872 — Section 45, 59, 61
Penal Code, 1860 (IPC) — Section 148, 149, 309, 325

Citation : (2001) ALLMR(Cri) 829 : (2001) 5 BomCR 604 : (2001) CriLJ 1322

Hon'ble Judges : Vishnu Sahai, J;Pratibha Upasani, J

Bench : Division Bench

Advocate : B.G. Vaidya, in Cri.A. No. 739/1985, Shahaji Shinde, APP in 57/1986, P.N. Joshi, in Cri.A. No. 761/1985 and R.S. Mohite, in Cri.R.A. No. 455/1985, for the Appellant; Shahaji Shinde, Assistant Public Prosecutor for respondent No. 8 in Cri.A. No. 739 and 761 of 1985 and in Cri.R.A. No. 455/1985, P.N. Joshi, for respondent Nos. 1 to 3 in 57/1986 and in Cri.R.A. No. 455/1985, B.G. Vaidya, for respondent Nos. 4 to 7 in Cri.R.A. No. 455/1985 and for respondent Nos. 4 to 7 in Cr.A. No. 57 of 1986, for the Respondent

Final Decision : Dismissed

Judgement

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

2. Seven persons namely Ramji Vithal Deore, Murlidhar Kolhe, Yashwant Pandit Khole, Walu @ Walmik Popat Khairnar, Kacharu Sukdeo Khairnar, Dattu Sukdeo Khairnar and Popat Mahadu Khairnar were tried by the Additional Sessions Judge, Nasik in Sessions Case No. 87 of 1985 for offences punishable under sections 148 and 302 r/w 149 I.P.C.. The learned trial Judge found each of them guilty for offences punishable u/s 148 I.P.C. and 325 r/w 149 I.P.C. On the former count, he sentenced each one of them to undergo one year R.I. and on

the latter two years R.I.

The seven persons named above challenged the aforesaid convictions and sentences by preferring Criminal Appeal Nos. 739 of 1985 and 761 of 1985. Criminal Appeal No. 739 of 1985 has been preferred by Walu & Walmik Khairnar, Kacharu Khairnar, Dattu Khairnar and Popat Khairnar.

Criminal Appeal No. 761 of 1985 has been preferred by Ramji Deore, Murlidhar Kolhe and Yashwant Kolhe.

Criminal Revision Application No. 455 of 1985 has been preferred by Smt. Sonyabai Khairnar (wife of the deceased) and Thakunath Jagannath Khairnar (son of the deceased) against the acquittal of the said seven persons for offence punishable u/s 302 r/w 149 I.P.C. Another prayer made therein is that the sentence of the seven persons for the offence punishable u/s 325 r/w 149 I.P.C. be enhanced.

Criminal Appeal No. 57 of 1986 has been preferred by the State of Maharashtra against the acquittal of the said seven persons for the offence punishable u/s 302 r/w 149 I.P.C.

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

The seven appellants and the deceased Jagan alias Jagannath Khairnar were residents of village Andarsul Taluka Yeola, District Nasik. There was enmity between them and the deceased Jagannath Khairnar and some civil and criminal litigations were instituted by both the sides against the other.

On 6-4-1985, the marriage of the daughter of Jagan's brother Eknath was to take place. Preparations for the marriage were going on. Jagan's tractor with trolley had already reached the vasti of Eknath on the night of 4-4-1985. Namdeo P.W. 7, the driver of Jagan was told to go to Eknath's vasti on the morning of 5-4-1985. Jagan went to Eknath's vasti early in the morning of 5-4-1985. He was in a jeep and directed Eknath's sons to follow him to village Andarsul for collecting utensils for the marriage and articles for the marriage pendal. Consequently, Jagan proceeded in a jeep driven by Namdeo P.W. 7 towards Andarsul village. He was followed in a tractor by Gopinath P.W. 6 and Sudam P.W. 8, the sons of Eknath. At about 7.30 a.m. when Gopinath and Sudam had crossed the bridge of the canal, they noticed Jagan's jeep lying in a ditch on the left side of the road behind the canal on Andarsul road. They and Namdeo further saw that Jagan was being assaulted by the seven appellants who were armed with wooden sticks. Seeing them, the appellants ran away.

Thereafter, Jagan was taken by Gopinath and Sudam in the jeep driven by Namdeo to Yeola Municipal Dispensary. Gopinath proceeded to the taluka Police Station, Yeola reaching there at 8.30 a.m. and took a yadi from P.H.C. Bhaskar Thorat P.W. 8 for medical examination of Jagannath. P.H.C. Thorat gave the said yadi.

4. The evidence of Dr. Prakash Aher P.W. 4 shows that on 5-4-1985 at about 8 a.m. while he was on duty as Medical Officer at Municipal Dispensary, Yeola, Jagannath Khairnar (Jagan was also referred by the name of Jagannath) was brought for treatment. He examined him and found on his person the following injuries:---

"1. Swelling over right wrist joint with evidence of fracture of radius and ulna lower end with a CLW of size 20 cm x 1/2 cm x 1/2cm.

2. Contusion above left wrist joint evidence of fracture of lower end of radius ulna.

3. Abrasion on right knee 1" diameter.

4. Abrasion over the left knee 2" in diameter.

5. CLW over right leg size 2 cms. x 1 cms into bone deep.

6. Abrasion over right shoulder in area about 2" in diameter.

7. Contusion over right elbow 6 cm diameter.

8. Contusion over right arm 3" x 2".

9. Contused area over left shoulder about 5 cms in diameter.

10. Abraded contusion over left big toe 1 cm in diameter".

The evidence shows that he advised that Jagannath be sent for treatment to Medical College at Aurangabad. He also informed the police.

5. The evidence of P.H.C. Thorat shows that after giving the yadi to Gopinath, he proceeded to the Municipal Dispensary, Yeola and recorded the F.I.R. of Jagan Exhibit 48. It was counter signed by the Medical Officer. He thereafter returned to the taluka Police Station and registered on its basic C.R. No. 31 of 1985.

6. The evidence shows that same day at 1.40 p.m. Jagannath succumbed to his injuries.

The autopsy on the corpse of Jagannath was conducted on 5-4-1985 by Dr. Ramkrishna Dusale P.W. 5 who found on it the following ante mortem injuries:--

"1. Stitched wound left wrist dorsal surface 2 stitches seen. The length was 2.5 cms. The wound was reddish in appearance.

2. Abrasion over both knees each size 1.5 cm x 2 cm reddish in colour and fresh.

3. Contused lacerated wound over right shin of tibia (i.e. rt leg below knee) size 1.5 cm x 1 cm x bone deep. Edges irregular and reddish.

4. Multiple abrasion seen over the right shoulder on lateral surface each size 1 cm x 1 cm and reddish.

5. Contusions seen over rt. elbow on anterior lateral, and medial surface. They

were continuous over the area of 6 cm x 4 cm bluish in colour and subcutaneous tissue showed haemorrhage with dislocation of right elbow joint.

6. Contused deformity seen over right lower 1/3 fore arm crepitates felt. Fracture of lower 1/3rd of radius, ulna. Subcutaneous tissue showed haemorrhage fractured edge showed infiltration staining reddish colour.

7. Contusion over lower half region of right arm bluish in colour crypts felt with fracture lower 1/3 of humerus. Subcutaneous tissue showed haemorrhage, fractured edges showed infiltration staining.

8. Multiple contusions seen over left shoulder, left fore arm, each of size 8 cm x 1.5 cm with bluish colour and subcutaneous tissue showed haemorrhage.

9. Abraded contusion over left big toe size 1 cm x 1 cm and bluish.

In the opinion of Dr. Dusale, the deceased died due to haemorrhagic shock due to fracture of right arm and fore - arm, dislocation of right elbow joint with multiple contusion all over the body and injuries were cumulatively sufficient in the ordinary course of nature to cause death.

7. The investigation was conducted in the usual manner. During the course of investigation, on the pointing out of the appellants- Ramji Deore, Murlidhar Kolhe, Yashwant Kolhe, Walu Khairnar, Kacharu Khairnar and Dattu Khairnar, sticks were recovered in the presence of public panchas under panchanamas. However, we are not entering deeper into the recovery of these sticks because, the same were effected from a open place and for valid reasons contained in para 21 of the impugned judgment, have not been relied upon by the learned trial Judge.

On completion of investigation, the seven appellants were charge sheeted.

8. The case was committed to the Court of Sessions in the usual manner where the appellants were charged for offences punishable under sections 148 and 302 r/w 149 I.P.C. to which charges they pleaded not guilty and claimed to be tried.

The defence of the appellants was of denial.

The appellant Ramji Deore set up a counter version in his statement recorded u/s 313 Cr.P.C. He stated therein that on 5-4-1985 early in the morning, he had gone for the darshan of Lord Hanuman on a cycle. He met the appellant-Murlidhar on the way. While they were going on foot, the jeep driven by the deceased Jagan dashed against them. As a result thereof, the jeep fell down in the ditch on the left side of the road. He thereafter went to the Police Station and lodged a F.I.R. (Exhibit 53).

The learned trial Judge for plausible reasons stated in para 23 of the impugned judgment, rejected the said defence. Two of the reasons given by the learned trial Judge in the said para are that serious damage would have been caused to the cycle of the appellant-Ramji and had the incident taken place in the manner

given by him, the injuries sustained by Jagan would not have been caused. Apart from the said reasons, in our view, the jeep being much heavier than a cycle, it appears to be extremely improbable that as a consequence of the impact with the cycle, the jeep would have fallen in the ditch as contended by appellant-Ramji in his statement u/s 313 Cr.P.C.

The learned trial Judge believed the evidence of the three eye-witnesses examined by the prosecution namely Gopinath P.W. 6, Namdeo P.W. 7 and Sudam P.W. 8 and convicted and sentenced the appellants in the manner mentioned earlier.

9. We have heard learned Counsel for the parties. In our view, whereas Criminal Revision Application No. 455 of 1985 and Criminal Appeal No. 57 of 1986 deserve to be dismissed, and Criminal Appeal Nos. 739 of 1985 and 761 of 1985 deserve to be partly allowed.

10. So far as the involvement of the appellants in the incidents is concerned, we do not even have an iota of doubt in our minds. In our view the evidence of the three eye-witnesses of the incident namely Gopinath P.W. 6, Namdeo P.W. 7 and Sudam P.W. 8 inspires confidence. They are natural witnesses of the incident in as much as they have explained their presence on the place of the incident. As we have seen in para 3, the marriage of the daughter of Eknath, the real brother of the deceased Jagannath was to take place on 6-4-1985 and preparations had already started. In connection with the preparations, Jagannath had called his jeep driver Namdeo in the vasti of Eknath in the morning of 5-4-1985. Same morning he also reached Eknath's vasti. Thereafter, he proceeded in the jeep driven by Namdeo and directed Eknath's sons Gopinath P.W. 6 and Sudam P.W. 8 to follow him in the tractor for collecting the utensils and material for making pandal from village Andarsul. As about 7.30 a.m. when the tractor of the said witnesses had reached the canal in between the vasti of Eknath and village Andarsul, they found the jeep lying in the ditch. They and Namdeo saw the seven appellants with sticks assaulting Jagannath. On seeing them, the appellants ran away.

11. We have gone through the statements of Gopinath, Namdeo and Sudam and we find that they inspire implicit confidence. Credence to their claim of having seen the incident is lent by the circumstance that they stated that the seven appellants assaulted Jagannath with sticks and both Dr. Aher P.W. 4 who examined Jagannath in his life time and Dr. Dusale P.W. 5 who performed his autopsy candidly stated that the injuries of Jagannath could be caused by sticks. We are inclined to accept the evidence of these two doctors because, it is common knowledge that swelling, contusions and abrasions which were found on the person of Jagannath could be caused by sticks. We have earlier mentioned that these witnesses have explained their presence on the place of the incident.

We make no bones in observing that although they were subjected to extensive cross-examination but, nothing could be extracted therefrom which could

disprove their claim of having seen the incident.

We are not oblivious to the fact that Gopinath and Sudam being the real nephews of the deceased and Namdeo being his driver are interested witnesses but, it is too late in the day to argue and neither has it been argued, that the evidence of a interested witness has to be mechanically rejected. Law only requires that it should be scrutinised with caution. We have exercised the said caution and find it to be credible.

12. For the said reasons, in our view, the learned trial Judge acted correctly in finding the appellants guilty for the offences punishable under sections 148 I.P.C and 325 r/w 149 I.P.C.

We are not impressed with the submission of Mr. Shahaji Shinde, learned Counsel for the appellants (State of Maharashtra) in Criminal Appeal No. 57 of 1986 that the learned Judge erred in acquitting the seven appellants (respondents in the said appeal) for the offence punishable u/s 302 r/w 149 I.P.C. In our view, the learned trial Judge acted correctly in acquitting them on the said count. In para 30 of the impugned judgment, he has given reasons which prompted him to do so. We find merit in the said reasons.

It is pertinent to mention that the injuries suffered by the deceased Jagannath were only distributed between his hands and legs and no injury was inflicted on any vital part of his body. It is equally pertinent to mention that the two fractures sustained by him related to radius and ulna on the right hand. In our view, had the common object of the respondents been to commit Jagannath's murder, they would have inflicted grievous injuries on vital parts of his body.

13. Mr. Shinde, Additional Public Prosecutor, for the respondents urged that since the evidence of the Autopsy Surgeon Dr. Dusale P.W. 5 is to the effect that the injuries suffered by the deceased were sufficient in the ordinary course of nature to cause death, the learned trial Judge should have convicted the respondents for the offence u/s 302 r/w 149 I.P.C.

We make no bones in observing that in view of the injuries sustained by the deceased, this opinion of Dr. Dusale is untenable. On the converse, we are inclined to accept the evidence of Dr. Aher P.W. 5 who examined Jagannath in his life time and who stated in his cross-examination that in the normal course, the injuries found on the deceased would not have caused his death, although sometimes death takes place due to fractures.

13-A. The golden rule in criminal cases is to prefer the probable to the possible. In our view, since Dr. Aher stated that in the normal course the injuries found on the person of Jagannath could not have caused his death and a perusal of the injuries of Jagannath in our view, also leads to the same inference, it would be safer to hold that no offence u/s 302 r/w 149 I.P.C. would be made out against the respondents. In our view, the trial Court rightly held that the common object of the respondents was to cause grievous hurt to Jagannath and since their

common object was to cause grievous hurt to Jagannath, only an offence u/s 325 r/w 149 I.P.C. would be made out against the respondents.

14. For the said reasons, in our view, there is no merit in either Criminal Appeal No. 57 of 1986 or in the first prayer in Criminal Revision Application No. 455 of 1985, namely that the acquittal of the (respondents) for the offence u/s 325 r/w 149 I.P.C. be set aside and they be held guilty for the offence u/s 302 r/w 149 I.P.C. In our view, there is also no merit in the second prayer made in the aforesaid Criminal Revision Application namely that the sentence of the respondents for the offence u/s 325 r/w 149 I.P.C. be enhanced. We have reached this conclusion not only because the grievous injuries sustained by Jagannath related to non vital parts of his body and it has not been specified by the eye-witnesses as to which of the seven respondents were responsible for causing them but, also because 16 years have elapsed since the incident took place and there is nothing to indicate that the respondents have any criminal antecedents or adverse criminal history. Apart from the above, we have also borne in mind the ratio laid down by the Supreme Court in para 15 of the oft quoted case of *Bedraj v. State of U.P.*, In the said paragraph, it has held that the question of sentence is primarily a question of discretion of the trial Court and unless the discretion has been capriciously exercised and the sentence awarded is manifestly inadequate, the Appellate Court would not be justified in enhancing it.

When the said ratio is applied to the facts of this case, the sentence awarded to the respondents cannot be stigmatised as manifestly inadequate and consequently does not warrant to be enhanced.

Since in enhancement the norms applicable to Appellate Court would be equally applicable to a revisional Court we have followed the said decision.

15. This only leaves us with one question namely whether the sentence of the appellants for offences under sections 148 and 325 r/w 149 I.P.C. be maintained or as urged by their Counsel, their substantive sentence on the said counts be reduced to the period already undergone by them and a fine be imposed on them for the offence u/s 325 r/w 149 I.P.C. and the same should be directed to be paid as compensation to the widow of the deceased and in case she is not alive to the legal heirs of the deceased. We find merit in the submission of the Counsel for the appellants because, the incident took place nearly 16 years ago and there is nothing to indicate that the appellants have any adverse criminal history. Apart from the said reasons, in our view, a cumulative sentence of two years R.I., which each of the appellants have been directed to serve cannot be said to be deterrent and apart from uprooting them from the mainstream of life, after a period of nearly sixteen years, would serve no useful purpose. In our view, in the event of compensation being paid to the widow of the deceased Jagannath, she would have some means to sustain her livelihood.

We have reflected over the quantum of fine and in our view, a fine of Rs.

10,000/- on each of the seven appellants would meet the ends of justice.

16. IN THE RESULT :

(A) Criminal Appeal Nos. 739 of 1985 and 761 of 1985 are partly allowed. Although we confirm the convictions of the appellants on both the counts namely under sections 148 and 325 r/w 149 I.P.C, but we reduce their sentence on the former count to the period already undergone by them and on the latter count (section 325 r/w 149 I.P.C.) also to the period already undergone by them provided each one of them deposits a fine of Rs. 10,000/- (Rupees Ten Thousand only) within nine months from today in the trial Court failing which the defaulting appellant/appellants, as the case may be, would suffer the substantive sentence of two years R.I. awarded by the trial Court for the offence u/s 325 r/w 149 I.P.C.

The entire amount of fine deposited by the appellants shall be paid as compensation to the widow of the deceased Smt. Soniyabai Jagannath Khairnar (petitioner in Criminal Revision Application No. 455 of 1985) and in case she is not alive to the legal heirs of the deceased. As soon as the fine is deposited, the trial Court shall inform Smt. Soniyabai Jagannath Khairnar or the legal heirs of the deceased, as the case may be, about this compensation and pay the same to her or them, as the case may be.

It is made clear that in case the fine is not deposited within the stipulated time, the defaulting appellant/appellants, as the case may be, shall be taken into custody to serve out the sentence.

It is also made clear that in case the appellant/appellants, as the case may be, deposit the fine within the stipulated period, their bail bonds shall stand cancelled and sureties discharged.

(B) Criminal Revision Application No. 455 of 1985 and Criminal Appeal No. 57 of 1986 are dismissed. In the latter, the respondents are on bail. Their bail bonds shall stand cancelled and sureties discharged.