

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.608 OF 1997

Kakasaheb Vithalrao Malshikare & .. Appellants
Ors.

Versus

The State of Maharashtra .. Respondent

...

Mr.Yuvraj P. Narvankar for the Appellants.

Mr.S.R.Agarkar, A.P.P. for the State/Respondent.

Mr.Gurudas Gorwadkar h/f Mr.Sujay Gangal for the
Respondent No.2/Complainant.

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CORAM: BHARATI DANGRE, J.

DATED : 07th September, 2023

JUDGMENT :-

1. Six accused persons came to be charged under Sections 147, 148, 149, 307, 323, 341 of the Indian Penal Code (for short, "**the IPC**"), when it is alleged that on 12/10/1991, at around 4.30 p.m., in the weekly market at village Korale Budruk, Taluka Baramati, District Pune, they formed an unlawful assembly and in prosecution of the common object, assaulted Kashinath Tukaram Malshikare, the Complainant, by deadly weapons, with an intention and knowledge to commit his murder.

Kashinath was taken to the hospital and on being examined by Dr. Mahadeo Swami (PW 8), the Medical Officer in Rural Hospital, he was found to have sustained the following injuries :-

1. CLW of 5.5 cm x 1.5 cm x 1 cm at right parietal region of scalp. Bleeding present tenderness;
2. 2.3" incised and punctured wounds of size 3.5cm x 2cm and 1cm in length and 0.5 to 1 cm in breadth and 1 cm to 2 cm in depth on Antero lateral aspect of mid 1/3 of left leg bone deep. Multiple bony pieces palpable & abdominal mobility at mid 1/3 of this leg & palpable crepitus;
3. 6" incised comminuted wounds of size 2cm x 06cm in length 0.5 cm to 1 cm in breadth at Anterior medical aspect of distal 1/3 of right leg bleeding plus tenderness bone deep;
4. Erythematous oblique contusion of 20cm x 1.5cm tenderness plus in right subcostal epigastric region of abdomen, abdomen soft, peristalsis is present;
5. Oblique erythematous contusion of 12 cm x 2cm at left subcostal region of abdomen, local temp. tenderness;
6. 10C x 10cm erythematous linear contusion marks all back size varying from 10 cm to 25 cm length and 105 cm to 2 cm in breadth irregular in directions tenderness plus no palpable evidence of fracture of underlined bone;
7. Oblique erythematous contusion of 6 cm x 1.5 cm on antero medial aspect of proximal 1/3 of left thigh tenderness plus no evidence of fracture of underlined bone."

In the said incident, one Shivaji Ghode (PW 2) also sustained injuries and the injuries sustained by him are certified as under :-

- “1. CLW 6cm x 1cm bone deep over right fronto-parietal region, bleeding plus, oblique in direction. No fracture;

2. Contusion 4cm x 1 cm over right leg lower third part anteriorly bluish discoloration tenderness plus;
3. Linier erythematous contusion of size of 30 cm x ½ cm over back over both lower 1/3 scapular region cross at level of D5 vertebral tenderness plus;
4. CLW of 3cm x 1cm over bone deep over right temporo parital region. Bleeding plus.

2. Since, all the accused persons pleaded not guilty, they faced the charge in Sessions Case No.02 of 1992 before the Additional Sessions Judge, Baramati.

3. In order to establish it's case, the prosecution examined 10 witnesses and the statements of the accused persons under Section 313 of Cr.P.C. were recorded.

On concluding the evidence and on hearing the prosecution and the learned counsel for the accused, Accused No.2 and Accused No.5 came to be acquitted for the charges levelled against them and the remaining accused stood convicted as under :-

<u>Section</u>	<u>Punishment Awarded</u>	<u>Fine Amount</u>	<u>In default of fine, Punishment Awarded</u>
147	R.I. for one year	Rs.200/-	R.I. for six months
148	R.I. for two years	Rs.500/-	R.I. for six months
326 149	r/w R.I. for five years	Rs.500/-	R.I. for nine months
323 149	r/w R.I. for six months	Rs.200/-	R.I. for one month
341 149	r/w S.I. for one month	Rs.100/-	S.I. for five days

The substantive sentences are directed to run concurrently.

4. Being aggrieved by the aforesaid judgment of conviction and imposition of sentence, six Accused being Accused Nos.1, 3, 4, 6, 7 and 8 filed an Appeal, which came to be admitted on 09/10/1997 and the Appellants were released on bail.

On 14/02/2018, the Complainant moved an application to assist the prosecution and it came to be granted on 14/02/2018.

During the pendency of the Appeal, Appellant No.2- Tulshiram Sadhu Bhagat (Accused No.3) passed away on 25/06/2019 and the Appeal stood abated against him in terms of the order dated 03/03/2022.

5. I have heard the learned counsel Mr.Yuvraj Narvankar for the Appellants, Mr.Gurudas Gorwadkar for the original Complainant and the learned A.P.P. Mr.S.R.Agarkar for the State.

6. The case of the prosecution can be discerned through the record and is summarized as under :-

There exist a family feud between the Complainant and Accused No.1/Appellant No.1 over a bund. There are cross chapter cases filed against each other. Admittedly, there are two rival political factions in village. The Complainant belongs to faction of Sharad Khomane, whereas Accused No.1 belongs

to faction of Ramchandra Bhagat. On Bailpola festival, Accused Nos.1, 6, 7 and 8 visited the house of the Complainant and threatened him and his wife. However, due to festive season, no complaint was lodged by the Complainant.

A day prior to the incident i.e. on 11/10/1991, Accused Nos.1, 7 and 8 again threatened the Complainant and, therefore, he lodged the complaint, which came to be recorded as NC.

The alleged incident occurred on 12/10/1991 at about 4.30 p.m., when the Complainant was returning home from the market on his motorcycle M-80. The accused persons are alleged to have encircled him and beaten him with iron rods and sticks. He tried to flee, but was chased and beaten.

In the incident, the Complainant sustained injuries on his head, legs, stomach and back and while he was lying on the spot, Shivaji Ghode (PW 2), a bystander approached him and offered water. Accused Nos.1, 4, 7 and 8 also assaulted PW 2, who sustained injuries.

Some persons informed the incident to Vadgaon Nimbalkar Police Station, which deputed PSI Kashinath Salvi (PW 10), who on reaching, found the Complainant lying in injured and unconscious condition. He was admitted to the hospital, where the Chief Medical Officer (PW 8) treated him. The statement of the Complainant came to be recorded in the hospital and F.I.R. came to be registered against the accused persons.

7. The case of the prosecution has surfaced through the four witnesses, two being the injured and two independent eye witnesses.

Kashinath (PW 1), after referring to the previous rivalry, refer to the incident dated 12/10/1991, when on a market day, he was going to his vasti through Korale village and recount that at one end of the market, all the accused persons had assembled. He named all the accused persons and has deposed that they were armed with sticks and iron bars. He recall that he was riding on a motorcycle, when he was encircled by the accused persons, who mounted assault on him and when he attempted to flee by dismounting from his bike, he was dragged and made to fall. He was assaulted on head, legs, stomach and back and when PW 2 came to his rescue, even he was assaulted. He was taken to the hospital and was treated, but had to be hospitalized for 20 to 25 days, as he had sustained fracture.

8. The version of PW 1 is corroborated by PW 2, who was present in the market and was watching the incident of assault mounted on PW 1 from a distance of 10 ft.. When PW 1 asked for water, he approached him with a glass, when Accused Dattu, Tanaji, Kaka and Bala assaulted him with iron rod. He specifically allege that Dattu, Tanaji and Kaka were holding iron rods whereas Balu was holding stick and he was assaulted on leg and head. He somehow managed to flee away from the spot and was taken to the hospital.

9. PW 3 and PW 4 are the independent witnesses. The testimony of PW 3-Prakash Dhaygude, which run counter to the prosecution case, has been rightly discarded by the trial Court.

As far as PW 4-Baban Mahangade is concerned, he was acquainted with the Complainant (PW 1) and the accused persons and was present in the weekly market, when the incident of assault on the Complainant took place. PW 4 corroborated PW 1, by stating that the accused persons assaulted Kashinath with sticks and stones and he specifically deposed that Accused Kaka, Dattatraya and Tanaji were armed with iron rods/bars, whereas Tulshiram, Dhananjay and Balasaheb were holding sticks. According to the witness, PW 1 was made to fall on the ground and when Shivaji Ghode came to offer him water, even he was assaulted.

10. The version of the three prosecution witnesses established the assault on PW 1 and PW 2. The accused persons are well known to the witnesses and, hence, there is no difficulty in their identification and the aforesaid witnesses have referred to the assembly of the accused persons and make a categorical reference to the assault mounted on them.

The extensive cross-examination of PW 1, 2 and 4 has not shaken their credibility. PW 1 specifically denied the suggestion that while he was driving the vehicle, he fell down on losing it's control and sustained injury. Though the suggestion was given that the injuries are sustained by PW 1 on account his fall and the omissions, which are attempted to be proved, are not material enough to affect their credibility.

11. The submission of the learned counsel for the Appellants about the inconsistency in the version of PW 1 and PW 2 has not impacted their credibility, though PW 2 has admitted in his cross-examination that he had not told to the police that he had witnessed the incident from a distance of 10 ft. Even PW 2 denied a suggestion that he alongwith Kashinath (PW 1) were under the influence of liquor and, rather it is this witness, who has disclosed that Kashinath was accompanied by PW 3 on his M-80 motorcycle.

12. PW 2 has brought on record the presence of the accused persons on the spot and he has corroborated PW 1, when he deposed that he was present in the market at a distance of 10 ft. and was watching the incident and when PW 1 fell to the ground and was asking for water, he approached him. His credibility is not at all shaken by the suggestions given to him in the cross-examination and as far as PW 4 is concerned, though he was subjected to cross-examination and it has come on record that his brother contested Grampanchayat election on behalf of Khomne group and Rajabhau, belonging to opposite faction, has defeated his brother, no case for false implication is made out at the instance of the accused persons.

13. The prosecution has also examined the Medical Officer (PW 8), who had medically examined PW 1 and PW 2 and he admitted that he had issued the Injury Certificate (Exh.44) and about the injuries sustained by PW 1, he has specifically deposed as under :-

“2.Looking to the injury no.1 and other injuries, on the person of Kashinath Malshikare, I can definitely say that if he would not have been treated at the earliest, he would have died because of those injuries.

3. Injuries nos.1, 5, 6 and 7 may be cause by hard blunt object like stickes and injuries nos.2 and 3 might have been caused by sharp cutting pointed object. Police report was given when injured were brought in the hospital. That report is on record bearing signature of HC Chitrav. It is at **Exh.45**”

14. PW 8 also deposed about the injuries sustained by PW 2 and admitted that Injury Certificate (Exh.46) was issued by him.

He has specifically deposed that the injuries could be caused by long, hard and blunt object. He deposed that Kashinath was admitted in the hospital from 12/10/1991 to 04/11/1991 and even thereafter, he was given treatment as OPD patient, whereas Shivaji came to be admitted on 12/10/1991 and discharged on 25/10/1991. Thereafter, he was treated as an outdoor patient.

The cross-examination of the Medical Expert did not, in any way, created any dent in the prosecution case, as he denied the suggestion that injury No.1 caused to Kashinath was simple, but he assert that the injury may be grievous. The doctor was also given a suggestion that the injury was possible by falling on ground, but in response, he deposed as under :-

“If there would have been simple fall, there would have been simple abrasion and not like injury no.1. Injury no. 3 depicts minor crack. It is possible by simple fall from hard substance. It is not true to say that injury nos.4, 5, 6 and 7 are possible by simple fall. Injury no.2 and 3 are possible like sharp cutting objects like axe, spears and Barcha.”

He specifically denied the suggestion that injury No.3 could be caused by falling from the vehicle.

15. The submission of the learned counsel for Appellant is, the prosecution has failed to prove the recovery of the weapon, as the learned Judge has failed to accept the version of PW 10, as the panchnama (Exhs.42A and 42B) did not bear his signature. Expressing suspicion about the evidence of PW 10 about recovery of the sticks and iron rods concealed near the distributories, and though they were found to be stained with human blood of group 'A', since the panch did not support the prosecution case, the recovery was not believed.

Merely because the weapon of crime is not recovered, the case of the prosecution does not lose its credence, when the assault and injuries sustained are conclusively proved through eye witnesses and the medical report. In any case, the accused are acquitted under Section 307 of IPC.

16. The prosecution, through the three witnesses, has conclusively proved the incident dated 12/10/1991. The consistent version of the prosecution witnesses has brought on record the presence of the accused persons on the spot and, since, the persons, who formed the unlawful assembly, had caused injuries to PW 1 and PW 2, they have been found guilty of rioting, on being armed with deadly weapon. As the prosecution has established its case, by leading cogent evidence, that the accused persons formed an unlawful assembly with the common object of attacking and assaulting

the Complainant with deadly weapons like iron bars and sticks and they mounted assault on him and injured him, each member of the unlawful assembly, who had acted in furtherance of the common object, is guilty of committing the offence of rioting, on being armed with deadly weapons. On appreciating the evidence on record, the conviction was awarded to six accused persons.

17. On going through the evidence placed before the trial Court and on perusal of the impugned judgment delivered, based on the said evidence, I am not impressed by the submission advanced on behalf of the Appellants about their innocence and about failure of the prosecution to prove it's case beyond reasonable doubt.

Hence, upholding the judgment of conviction dated 06/10/1997, passed by the learned Additional Sessions Judge, Baramati in Sessions Case No.02 of 1992, the Appeal is dismissed.

The Appellants, who are presently on bail, are directed to surrender before the Sessions Court, Baramati within a period of eight weeks from the date of uploading of the Judgment. Their bail bonds shall stand cancelled, on expiry of said period of eight weeks, and, if there is failure on their part to surrender as directed, the learned Additional Sessions Judge, Baramati, shall take appropriate steps to effect their arrest, so that they shall be made to undergo the sentence imposed by the trial Court and confirmed by this Court.

(SMT. BHARATI DANGRE, J.)