

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.290 OF 2015

Aba s/o Rajebhau Giri
Age 35 years, Occ. Labour,
R/o Kendrewadi, Tq. Ambajogai,
District Beed

... **APPELLANT**
(Orig. Accused)

VERSUS

The State of Maharashtra
through Assistant Superintendent
of Police, Sub-Divisional Police
Officer, Kaij, Tq. Kaij, Dist. Beed
(Copy to be served on the
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad)

... **RESPONDENT**

.....
Shri P.P. Khandagale, Advocate for appellant
Mrs. V.N. Patil (Jadhav), A.P.P. for respondent/ State
.....

CORAM: A.I.S. CHEEMA, J.

DATED: 20th July, 2016.

Date of reserving judgment : 1st July, 2016
Date of reserving judgment : 20th July, 2016.

J U D G M E N T :

1. The appellant – original accused (hereinafter referred as “accused”), has been convicted by Additional Sessions Judge, Majalgaon in Special Atrocities Case No.4/2012, on 3.2.2015 for offence punishable under Sections 435, 323 and 504 of the

Indian Penal Code, 1860 (I.P.C. in brief). He was charged with offence punishable under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 also, however, he has been acquitted of the offence under that Section. Thus this appeal against the conviction and sentence passed.

2. The case of prosecution in short is as follows :

- (a) On 30.11.2011, complainant Gopinath Tarkase (P.W.2) (hereinafter referred as "complainant") filed F.I.R. Crime No.119/2011 at Police Station, Dharur, District Beed at 2.30 p.m. He complained that, on that day, in the previous night at 00.15 Hrs., he was sleeping with his family in Kotha in field Survey no.159, which is Kendrewadi Shivar. At about 500 ft., there is residence of the accused. Accused came to the complainant and called out to him if he has slept. Complainant came out. At that time, accused said that, he had told the complainant not to build Kotha on the road, still, why did he construct Kotha on the road. So saying, the accused abused complainant calling him out as "Dhedgya, Mahardya" and said that he will show him his value. After so

saying, accused gave two slaps and one kick blow to the complainant and immediately put fire to another Kotha which had been built by the complainant by use of match stick. When the Kotha started burning, complainant started shouting and nearby residents Dayawan Vitkar and Ramesh Pune came there and saw the Kotha burning. By that time, the accused had left. Complainant told those persons these facts at that time itself that after burning his Kotha the accused had left. The Kotha was constructed with the help of Bamboos, sticks and grass. It burnt off in 10-15 minutes. As there was no water nearby, complainant could not put out the fire. In the Kotha, there was an old cycle, flexible pipe, one old dress and in the dress Rs.4500/- as well as old note books of children and two beddings. Articles worth Rs.8000/- were destroyed. Thus, the complainant.

- (b) Receiving complaint, as above, the offence came to be registered. Investigation was taken up by S.D.P.O., Kaij Shri Akhilesh Kumar Singh (P.W.6). He went to the spot on 1.12.2011 at about 12.00 – 12.30 p.m. and did panchanama (Exh.22). Statements of witnesses were recorded. Complainant submitted his caste certificate which

was collected by the police. Complainant claimed to be "Mahar" by caste. Accused is stated to be of "Gosavi" community. After investigation, charge sheet came to be filed. The accused has been tried for the sections mentioned above.

3. Prosecution brought on record evidence of 6 witnesses. The trial Court, after considering evidence, acquitted the accused of the offence punishable under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. For Sections 435, 323 and 504 of the IPC, however, he has been convicted as mentioned above.

4. I have heard counsel for the appellant – accused and the learned A.P.P. for State. It has been argued by the learned counsel for the accused that, if the spot panchanama recorded in the matter and the evidence of spot panch (P.W.1) Venkat is read with the evidence of complainant, the evidence does not match. According to the counsel, the complainant was suppressing truth. It is stated that, the F.I.R. shows that, there was dispute because the complainant dug up the road going from Kendrewadi village to Sonawala and because of such dispute, the complainant has brought about false case showing as if on the spot there was some structure and which has been burnt down.

It has been argued that, the F.I.R. does not show presence of anybody else other than complainant on the spot when the incident took place. However, in evidence, his wife was introduced and although P.W.5 Dayawan is shown to have reached the spot, he did not support the prosecution that complainant told him anything about the accused at that time. It is argued that, the medical certificate shows only one injury which does not match with the evidence of the complainant. There was also delay of 14 hours in filing of the F.I.R. Various contradictions and omissions were proved, but still trial Court wrongly accepted the evidence and convicted the accused.

5. Per contra, the learned A.P.P. submitted that, there is consistent evidence of the witnesses and presence of the accused on spot was proved. The cattle shed had been constructed in the field near road. The accused claimed that it was on road and thus, the incident took place. The A.P.P. supported the conviction awarded by the trial Court.

6. Before discussing the oral evidence, regarding incident, it would be appropriate to keep in view the spot where incident is alleged to have taken place. P.W.1 Panch Venkat was examined to prove the spot panchanama Exh.22. P.W.6 S.D.P.O. Akhilesh has also deposed about recording of such spot

panchanama. The panchanama Exh.22 also has a sketch as part of it. The panchanama and the sketch show that the spot where it is alleged that Kotha of the complainant was burnt, has boundaries with land of complainant on east as well as on the west. If the sketch is seen, in the north-west direction, at some distance from the spot of occurrence, there is residential Kotha of the complainant. Thus, the complainant appears to have land to the east of the spot and on the western side in the north-west direction, he had residential Kotha at some distance. Further, away, on the western side, there appears to be land of Narayan Kendre. According to the spot panchanama, where the occurrence took place, towards north there is road going to Sonawana and to the south there is road going to Kendrewadi village. According to the evidence of complainant, from the spot village Kendrewadi is 1 – 1 ½ Km. away. The spot panchanama clearly mentions that, place of occurrence is in field Survey No.159, on the road, going from the field and that it is near the Kotha of complainant. On the spot, what was stated to be Kotha of the complainant, at the time of panchanama there were some burnt wood pieces. It is stated that, roof of grass had burnt down. There were some half burnt big pieces of wood lying on the spot. There was a burnt cycle there, as well as burnt school books. Nothing was seized from the spot.

7. Keeping above spot panchanama in view, if the evidence of P.W.1 Venkat is seen, it clearly shows that, the spot was of Kendrewadi Sonawala road and the complainant had dug one pit on the said road. The witness accepted that at the place of occurrence there was neither house nor cattle shed. According to this panch, the cattle shed and the house of complainant was 50 ft. away from the spot. Although complainant P.W.2 Gopinath did not admit the suggestion that his cattle shed was 50 ft. away from the Kendrewadi Sonawala road, he did admit that his cattle shed was not on the said road. Keeping this in view, if the spot is appreciated, what appears is that, Kendrewadi Sonawala Road has gone from the field of complainant. It appears, he dug up a pit across the road and at the time of recording of spot panchanama, showed police burnt cycle, wooden pieces and other articles like note books to the north of such pit claiming that at that place he had a Kotha which was burnt down by the accused. If the F.I.R. is read carefully, (which I have referred above), it shows the complainant claiming that, in the night concerned, he was sleeping in his Kotha constructed in the field and after interaction with the accused, according to F.I.R., the accused burnt "*Dusra*" i.e. "other" Kotha which he had constructed.

8. Now, proceeding to consider the oral evidence of

complainant and his wife, what appears is that, the complainant claimed that he was residing in his field erecting a cattle shed. He claimed that, he was sleeping in his house which is in the field and at that time, the accused came and asked him why he erected cattle shed on the road. This led the accused abusing him on the caste, it is claimed. Then the complainant claimed that, the accused gave him kicks as well as hit him by stick on his back and also slapped him. His evidence is that, the accused then removed match box from his pocket and set on fire his cattle shed. Thereafter he and his wife shouted attracting adjacent land holders Dayawan Vitekar and one Ramesh. Complainant deposed that, seeing those persons, the accused ran away.

9. If this evidence is appreciated, in plain words, what the complainant deposed was that, he was residing in his field erecting a cattle shed in his field and accused came and abused and beat him and put the cattle shed to fire. There is no reference to other Kotha, which has been referred in the F.I.R. If the evidence of P.W.4 Sunita, the wife of complainant is seen, she claimed that, she along with her husband and son were sleeping in their cattle shed which is in the field, and her evidence is that, the accused came and called out to her husband. Her evidence is that, the accused beat her husband by

kick blows as well as fist blows and abused on caste asking why the cattle shed was on the place of road. She then deposed that, the accused took a match box and set the cattle shed on fire. She also claimed that, the adjacent land holders Dayawan and Ramesh came after they shouted. Thus, in oral evidence, this husband and wife have tried to show that, they have constructed a Kotha or cattle shed in their field where they were living and the accused came and quarreled and put the same on fire. This, however is not correct if the evidence of spot, as discussed above, is seen. Case of prosecution brought was that, when P.W.2 and P.W.4 shouted, P.W.5 Dayawan and one Ramesh reached the spot and complainant told them that accused has burnt his Kotha, however, at that time of oral evidence, P.W.5 Dayawan, who was examined, supported the prosecution to the limited extent that, in the night concerned, the incident of fire took place. This witness deposed that, in the said night, the complainant came to his house and therefore, he woke up. The complainant told him that, his cattle shed is burnt. He deposed that, he went there and noticed that, only 2-3 wooden pieces were burning. This witness was declared hostile and was confronted with his police statement, which he declined and which has been marked Exh.32. In the cross-examination by accused of this P.W.5 Dayawan, he stated that, the cattle shed of the complainant was rather 50 ft. away from Kendrewadi

Sonawala Road and that the complainant had dug a pit on the said road. His evidence is that, there was no cattle shed of the complainant on the road. Even if it was to be said that, P.W.5 was a hostile witness, still these facts are stated also by P.W.1 Panch Venkat, who is witness of the prosecution, who, in spite of his evidence in cross-examination, was not declared hostile by the State. He has also stated, as mentioned, that, the cattle shed and house of the complainant was 50 ft. away and on the spot, there was neither house nor cattle shed.

10. In the cross-examination of the complainant, various omissions were brought on record reading his evidence with the F.I.R. Exh.25, which he had filed. Complainant accepted that, he had not mentioned in his report:-

- (a) that he told accused that he had not erected cattle shed on the road;
- (b) that, the accused beat him by means of stick on his back;
- (c) that, at the time of incident, his wife also shouted loudly;
- (d) that, seeing Dayawan and Ramesh coming, the accused had run away and
- (e) that, after incident, he had gone to Kendrewadi to tell about the incident to people.

11. Reading the evidence, what appears is that, the complainant dug up the road going from his field which went North-South, by making a "Khud" East to West and in front of that "Khud" on the northern side, he showed police that there was Kotha, which has been burnt. In evidence, P.W.2 and P.W.4 did not claim that their residential house or Kotha was different and the Kotha which was burnt, was different and what was burnt and shown to police were some pieces of logs, old cycle, old text books with further claim that, there was one dress in Kotha with Rs.4500/- which was burnt. It is little difficult to accept that when from alleged spot of occurrence complainant has a residential Kotha at 50 ft., he would, along with other old articles, leave a shirt hanging with Rs.4500/- in other Kotha. The evidence of complainant is not inspiring confidence.

12. Looking to the omissions referred of the complainant, which show exaggeration, there is further material to show that it would be risky to rely on such complainant and his wife. In the F.I.R. Exh.25, he claimed that, at the time of incident, the accused gave him two slaps and one kick blow and then suddenly put the Kotha to fire. In evidence, however, the complainant claimed that the accused beat him by kicks (See Marathi portion) as well as by means of stick on his back and also gave him one

slap. Thus, although in the F.I.R. there is no mention of accused beating the complainant by stick, in evidence, this was introduced. P.W.4 Sunita went ahead to add that, the accused beat her husband not only by kicks but also by fist blows. She, however, did not say that, her husband was beaten with the help of stick. If the evidence of P.W.3 Dr. Balasaheb is seen, he did not find so many injuries on the person of complainant, but noticed only one contusion 2 x 1 cm. over his back on left scapular region, which was possible by hard and blunt object. Thus seen, it cannot be said that the oral evidence regarding incident and the medical evidence match.

13. The learned counsel for the appellant – accused has rightly argued that, in this matter there is delay in filing of the F.I.R. and the same has not been explained. The complainant P.W.2 claimed the incident to have occurred at 00.15 Hrs. of 30.11.2011. This would be night between 29th and 30th November 2011. The F.I.R., however, was registered only at 2.30 p.m. on 30.11.2011. Although the complainant deposed that, after the incident he went to the Kendrewadi village and told people about the incident and claimed that, thereafter he went to Police Station, Dharur, why there was delay till 2.30 p.m. is not clear. Again if the F.I.R. had been registered at 2.30 p.m., P.W.6 Akhilesh Kumar went to prepare the spot panchanama

only in the afternoon of 1.12.2011. The cross-examination of complainant shows that, Kendrewadi comes in the jurisdiction of Outpost of Adur, which is hardly 4-5 Kms. from Kendrewadi. Looking to all these aspects, I find it risky to rely on the bare testimony of the complainant and his wife to convict the accused. In oral evidence, the complainant did not claim that when Dayawan and Ramesh came to the spot, he told them about what the accused had done. His wife P.W.4 also does not say so. Thus, what is claimed in F.I.R. that the complainant immediately told people about the incident, cannot be said to have been established. Although the spot panchanama shows that, at some distance from the place of occurrence the complainant had residential Kotha, in evidence, complainant conveniently claimed that, there was no water nearby and so no effort was made to put out the fire, which had been put to the another Kotha. I find it risky to rely on the complainant and his wife.

14. I have gone through the judgment of the trial Court. The Trial Court simply picked up the evidence witness-wise and accepted the evidence, instead of making comparative analysis of the spot as well as various witnesses and if the claim of the complainant was reasonably possible. Thus, I do not concur with the trial Court that the accused deserves to be convicted.

15. For the above reasons, the appeal is allowed. The conviction of the appellant - accused under Sections 435, 323 and 504 of the Indian Penal Code, 1860, as imposed by the trial Court is quashed and set aside.

The appellant-accused is acquitted of the offences punishable under Sections 435, 323 and 504 of the Indian Penal Code, 1860. The appellant-accused be set at liberty forthwith unless his presence is required in any other offence. Fine, if paid, be refunded to him.

(A.I.S. CHEEMA, J.)