

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 425 OF 2003

The State of Maharashtra

....Appellant
(Orig. Complainant)

V/s.

1. Deepak Eknath Bhatkar, 32 years
2. Eknath Sitaram Bhatakar, 57 years
Both r/at & post Pawas,
Bhatiwadi, Tal. & Dist. Ratnagiri

...Respondents
(Orig. Accused nos.1 & 2)

* * * * *

Mr. Sooraj S. Hulke, APP for the appellant.

Mr. Ganesh Gole a/w. Mr. Ateet Shirodkar and Mr. Ritesh Ratnam, Advocate for respondents no.1 and 2.

Coram : Sandeep K. Shinde, J.

Tuesday, 30th October, 2018.

JUDGMENT :

1. This appeal against acquittal is preferred by the State under Section 378(1) Criminal Procedure Code, 1973 (Cr.P.C. for short).

2. In all, six accused were prosecuted for committing the offences punishable under Sections 147, 148, 353, 336, 323, 332, 325, 427, 506 read with Section 149 of the Indian Penal Code and Section 30 of the Indian Arms Act. Accused nos. 3 to 6 were acquitted by the Learned Judicial Magistrate First Class in Regular Criminal Case No. 196 of 1994 vide judgment and order dated 14th January, 2002 and convicted accused nos.1 and 2. Against this conviction, accused nos.1 and 2 had preferred Criminal Appeal No. 4 of 2002. The said Appeal was allowed by the Learned Additional Sessions Judge, Ratnagiri vide order dated 18th December, 2002. It is against this order of acquittal, the present Appeal is preferred by the State.

3. Heard, learned the learned Additional Public Prosecutor for the State and learned Counsel for the respondents-original accused nos.1 and 2. Perused evidence.

4. It is the prosecution's case that, accused in furtherance of common object with intent to deter and prevent the public servants from discharging their duties assaulted them with weapons. As such, six accused were prosecuted for committing the offences punishable under Sections 353, 325, 332 read with Section 149 of the Indian Penal Code and Section 30 of the Indian Arms Act.

FACTS :

5. On 8th September, 1994 officers of Excise Department were informed, that in the Village-Bhatyewadi, some persons were engaged in illicit business of producing and selling illicit liquor. On this information, Officers (P.W.1 and 2) proceeded to the said village in the jeep. In the course of the search, they seized illicit liquor stored in drums, hidden in shrubs. Since drums filled with liquor could not be moved, P.W.1 drew samples of the liquor, and upon drawing panchanama destroyed the seized liquor on the spot

between 12 noon to 1 p.m. on 8th September, 2014. It is the prosecutions' case that, accused no.2 (respondent no.2 herein) runs a country liquor shop. Soon before the search, the raiding party had seen the accused passing through the shrubs where the illicit liquor was hidden. Be that as it may, after seizure and destroying the illicit liquor when the raiding party was attempting to make further search, group of about seven to eight persons attacked the raiding party. It is alleged that, accused no.2 was armed with a double barrel gun and deterred P.W.1 and 2 from discharging duty on gunpoint. It is unfolded in the evidence that P.W. 2 in defence held the service revolver in self defence which accused no.1 tried to snatch but could not succeed. In the course of this transaction, it is alleged that accused no.2 pelted stones and dealt lathi blows on the members of the raiding party. Resultantly, the three raiding members sustained injuries.

6. P.W.1-Officer of Excise Department reported the

incident to Ratnagiri Gramin Police Station on 8th September, 1994 and on his expression, Crime No.104 of 1994 came to be registered against the respondents herein under Sections 353, 332, 147, 148, 149 of the IPC and Section 30 of the Arms Act.

7. It may be stated that, chargesheet and charge was framed against six accused. The Learned Magistrate while answering point no.1, which relates to formation of “unlawful assembly” held that prosecution has proved, only the accused nos. 1 and 2 in furtherance of their common object prevented the raiding party members from discharging their duty. Thus, accused nos.1 and 2 were convicted and accused nos.3 to 6 were acquitted by the trial Court. Resultantly, when the appeal was preferred by accused nos. 1 and 2 against the conviction, the number of members of assembly had reduced to less than five persons.

8. The learned Counsel appearing for the

respondents submitted, that when out of six accused, four were acquitted, charge against the remaining accused was not sustainable under Section 149 IPC. In support of his contention, he has relied on the judgment of the Supreme Court in the case of **Ramanlal and Anr. V/s. State of Haryana, reported in (2015) 11 SCC page 1** where the Supreme Court has dealt with similar situation and thus held in para-9 as under :

“9. In dealing with the question as to the applicability of S.149 in such cases it is necessary to bear in mind the several categories of cases which come before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where S.149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under S.149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under S.302/149 if the charge is that the persons before the Court, along with others named constituted an unlawful assembly; the other persons so named may

not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the court and others number more than five in all and as Such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under S.149 it is not necessary that five or more persons must necessarily be brought before the court and convicted. Similarly, less than five persons may be charged under s. 149 if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and unnamed assailants or members composed an unlawful assembly, those before the Court, can be convicted under section 149 though the unnamed. and unidentified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving, before the court less than five persons to be tried, then s. 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more

persons is composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases the acquittal of one or more persons named in the charge does not affect the validity of the charge under section 149 because-on the evidence the court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly un-named and unidentified may conceivably raise the point as to whether prejudice would be caused to the persons before the Court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the court of facts from holding that though the charge specified only five or

more persons, the unlawful assembly in fact consisted of other persons who were not named and identified. That appears to be the true legal position in respect of the several categories of cases which may fall to be tried when a charge under section 149 is framed.” (emphasis supplied).”

9. Herein charge and evidence was confined to persons named in the charge and out of the persons so named, two were acquitted leaving before the Court less than five persons to be tried and thus Section 149 could not be invoked.

10. It may be stated that, accused no.2 was convicted by the trial Court for committing the offence punishable under Section 30 of the Arms Act. The Learned APP has taken me through the evidence and urged that the Learned Appellate Court has not appreciated the evidence in right perspective.

11. I have gone through the evidence relating to

recovery of the weapons allegedly used by accused no.2 for which he was charged under the provisions of the Arms Act. It is unfolded in the evidence that, after registration of crime, the Investigation Officer proceeded to the spot and drew panchanama which is at Exhibit-106. It is unfolded in the evidence that the said panchanama was drawn between 9 p.m. to 10 p.m. on 8th September, 1994. It appears from the panchanam that, one double barrel gun was seized and recovered and in support thereof, prosecution had examined one, Mr. Khatu as witness no.6. I have gone through the evidence of P.W.6. The said panch witness P.W.6, Mr. Khatu, stated in his evidence that, he was called by the police in the police station and it did not happen that he was summoned by the police in the courtyard, where the alleged recovery was made. Thus, the panch witness did not support the recovery weapon. Be that as it may, no evidence was lead to show that recovery of weapons was made voluntarily by accused, while in police custody. Thus,

even if, evidence of recovery is ignored, there is no evidence of independent witness to corroborate evidence of member of raiding party. That as such, there is no material infirmity or perversity in the finding recorded by the Learned Appellate Court.

12. That so far as the charge under Section 353 is concerned, it is the prosecution's case that the accused in furtherance of their common object used criminal force to deter and prevent the public servants from discharging their duty. It appears from the evidence that, the raiding party of the Excise Department proceeded to Village-Bhatyewadi in response to the telephonic message whereby they were informed that some persons in the said village were indulging into the activity of manufacturing illicit liquor. Admittedly, the raiding party found illicit liquor in drums hidden under the shrubs and it was destroyed by them. Admittedly, the raiding party through P.W.2 reported this fact to the police and thereupon offence came to be

registered under the provisions of the Bombay Prohibition Act against unknown persons. On the backdrop of these facts, the Learned Counsel for the respondent has rightly pointed out that the prosecution has not proved the nexus between the accused and illicit liquor seized by the raiding party. It is, however, the case of the prosecution that, soon they destroyed the illicit liquor, the accused in furtherance of their common object to deter and prevent the public servants, attacked the raiding party with weapons and assaulted them. In these circumstances, the prosecution ought to have proved that the stock of illicit liquor was either owned and/or possessed and/or lying in the property belonging to either of the accused and being aggrieved, they resisted the action of raiding party. Having not proved this link/nexus, in my view, the prosecution has failed to attribute motive to the accused for committing the offence under Section 323 of the IPC. Thus, on all counts, prosecution has failed to prove the charge against the

accused.

13. Thus, taking into consideration the evidence that was adduced, in my considered opinion, the view taken by the Appellate Court is probable and possible view. This being Appeal against acquittal, the accused having secured their acquittal, the presumption of innocence is further reinforced, reaffirmed by the Appellate Court. In the result, no interference is called for. The Appeal fails and is dismissed accordingly.

(SANDEEP K. SHINDE, J)