

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.255 OF 2003

1. Kiran Sahadeo Damne.]
 Age - 32 years,]
 R/A - Dhuri Bhikaji Chawl,]
 Room No.40/2/3, Jawahar Nagar,]
 Golibar Road, Mumbai.]

2. Satguru Chandrakant Mayekar.]
 Age - 29 years,]
 R/A - Choudhari Chawl, Room No.3,]
 Jawahar Nagar, Sai Baba Road,]
 Khar (E), Mumbai - 400 051.]

3. Abdul Rehman Niyasul Haq Ansari.]
 Age - 32 years,]
 R/A - Irani Chawl, Room No.10,]
 Jawahar Nagar, Sai Baba Road,]
 Khar (E), Mumbai - 400 051.]

4. Vikas Pandurang Mahadik.]
 Age - 37 years,]
 R/A - Bhual Singh Chawl No.4,]
 R.No.12, Oshiwara, S. V. Road,]
 Jogeshwari (W), Mumbai - 400 102.]

5. Ajay Ganpat Jadhav.]
 Age - 28 years,]
 R/A - Jaffar Khan Chawl No.1,]
 R.No.2, Jawahar Nagar,]
 Golibar Road, Khar (E),]
 Mumbai - 400 055.]

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| 6. Vilas Laxman Bhathade. |] | |
| Age - 34 years, |] | |
| R/A - Lalji Chawl, Room No.4, |] | |
| Sai Baba Road, Jawahar Nagar, |] | |
| Khar (E), Mumbai - 400 051. |] | |
| 7. Rajesh Kumar Dugdhari Yadav. |] | |
| Age - 29 years, |] | |
| R/A - Suryodaya Chawl, Room No.13, |] | |
| Sai Baba Road, Jawahar Nagar, |] | |
| Mumbai - 400 055. |] | |
| 8. Gangaram Dhula Rathod. |] | |
| Age - 34 years, |] | |
| R/A - K. P. Sharma Chawl No.9, |] | |
| Room No.5, Pipe Line, |] | ... Abated on |
| Jawahar Nagar (E), Mumbai-400 051. |] | 12/11/2008 |
| 9. Virendra Bechhn Singh Thakur. |] | |
| Age - 32 years, |] | |
| R/A - Nityanand Co-op. Society, |] | |
| Room NO.1, Sai Baba Road, |] | |
| Jawahar Nagar, Khar (E), |] | |
| Mumbai - 400 051. |] | ... Applicants |

Versus

The State of Maharashtra.	]	
(At the instance of Nirmal Nagar Police	]	
Station, vide C.R.No.282/92)	]	... Respondent

None for Applicants.
Mr. S. S. Hulke, APP for State.

CORAM :- SARANG V. KOTWAL, J.
DATE :- OCTOBER 23, 2018

JUDGMENT :-

1. This is a Revision Application filed by the original accused nos.1 to 8 and 10 in Sessions Case No.310 of 1996 on the file of the learned Additional Sessions Judge for Greater Bombay. By the impugned Judgment dated 24/10/2003, the learned Additional Sessions Judge was pleased to convict the Applicants for commission of offence punishable under Section 148 of the IPC. Each of the Applicants was sentenced to suffer R.I. for three months. The Applicants were acquitted from the charges of commission of offence punishable under Sections 392 read with 149 of the IPC. The original accused no.9 Sanjay Kadam was convicted for commission of offence punishable under Section 307 of the IPC and he was sentenced to suffer R.I. for four years and to pay a fine of Rs.3,000/- and in default of payment of fine, to suffer further R.I. for one month. Applicant No.8 (original accused no.8) Gangaram @ Gangya Dula Rathod expired on 12/10/2004 during the pendency of this Revision Application and vide the order dated 12/11/2008 passed this Court (Coram : V. K. Talilramani, J.), his Revision stood abated.

2. When the matter was called out, none appeared for the Applicants. The Revision Application is pending for many years. I have gone through the Judgment and the evidence before the trial Court with the assistance of the learned APP Mr. Hulke. I have heard him on behalf of the Respondent i.e. the State of Maharashtra.

3. The case pertains to the incident in respect of which C.R.No.282 of 1992 was registered at Nirmal Nagar Police Station. The date of the incident is 09/12/1992. In December 1992, there were riots in the city of Mumbai and the present incident is one of the many instances where the mobs were attacking each other. In the present case, the incident had taken place, as mentioned, on 09/12/1992 at about 3.30 p.m. at Sai Baba Road, Pipeline, Nirmal Nagar. At that time, two groups of different communities were attacking each other by pelting stones, soda-water bottles, etc. The police officers attached to Nirmal Nagar Police Station were trying to bring the situation under control and had to resort to firing at the mob since the situation was very tense and was getting out of control. In the present case, as mentioned by the prosecution through its evidence, two persons had died in the police firing and one had

suffered injury on his leg. This was one of the many instances of rioting and people suffering injuries during the riots. According to the prosecution case, combing operations were conducted after the mobs were brought under control. At Nirmal Nagar, the present Applicants were arrested as being the members of the assembly who had indulged in violence. According to the prosecution case, the original accused no.9 Sanjay Kadam had attempted to commit murder of one of the police officers by trying to assault him with a chopper. However, the police officer had escaped but the offence was registered at Nirmal Nagar Police Station vide C.R.No.289 of 1992 under Sections 147, 148, 392 and 307 read with 149 of the IPC. The Applicants were arrested during the combing operations and were brought to the police station. After the investigation was over, the charge-sheet was filed and the case was committed to the Court of Sessions at Greater Bombay.

4. During trial, the prosecution examined 7 witnesses. PW 7 Banti Sidhu was a pancha for spot panchanama. PW 6 PI Shivaji Lahade was the Investigating Officer and all the other 5 witnesses were members of the police squad who were trying to control the

situation at Nirmal Nagar. At the end of the trial, the present Applicants were convicted and sentenced as mentioned earlier.

5. Since the learned Additional Sessions Judge had sentenced the Applicants for three months, the Applicants preferred the present Revision Application challenging the impugned Judgment and Order convicting and sentencing the Applicants. Therefore, I have examined the impugned Judgment to test the legality, correctness and propriety as are the requirements of Section 401 read with Section 397 of the Cr.P.C.

6. PW 1 PSI Amar Desai was attached to Nirmal Nagar Police Station. On 09/12/1992, he, along with 5 other officers of Nirmal Nagar Police Station, were on bandobast duty at Nirmal Nagar. He has deposed that two groups belonging to different communities were attacking each other. He has deposed that he warned them not to commit breach of peace and to disperse from the place. However, they did not pay any heed. He has further deposed that, at about 2.30 p.m., the original accused No.9 Sanjay Kadam tried to attack HC Bobhate with a chopper but he evaded the blow. HC Bobhate opened

fire on the mob due to which the said Sanjay Kadam suffered injury on his leg. PW 1 has further deposed that he apprehended all the accused who were found assembled at the spot. He has further deposed that he thereafter started combing operations and at that time, one Anil Sutar tried to assault him with a chopper and therefore, he fired at him in self defence. In the incident the said Anil Sutar succumbed to his injuries before he could be admitted to the hospital. PW 1 took all the accused to the police station and lodged his FIR. The FIR was recorded by PI Lahade.

In the cross-examination, PW 1 has deposed that all the accused were residents of the locality near Sai Baba Road. They were residing in a hutment area. He has admitted that there was a huge crowd consisting of more than 500 to 600 persons. The FIR lodged by him is produced on record at Exh.17. He has mentioned names of 7 accused persons who were taken in custody by him.

7. PW 2 PN Shivaji Shinde was patrolling in the area where the present incident took place. He has deposed that the miscreants attacked the police with soda-water bottles, tubelights, stones, etc. and there were 60 to 70 persons. Even this witness opened fire to

bring the situation under control. He fired 4 rounds. According to him, the incident lasted for about 2 hours and thereafter they started combing operations. PW 2 has identified accused no.8 Gangaram and accused no.10 Virendra as the persons who were present at the time of the incident. PW 2 could not identify the other accused before the trial Court. His evidence was recorded on 02/02/2002. He has categorically admitted that the accused were arrested in the combing operations.

8. PW 3 PC Charles Pinto was attached to Nirmal Nagar Police Station and was a member of the police party who were trying to control the situation. He has deposed that the situation was brought under control and he himself had fired 4 rounds. He has deposed that after the situation was brought under control, the combing operation was undertaken where they had apprehended many persons. PW 3 identified accused nos.8 and 10 before the Court.

During cross-examination, he has deposed that there were 500 persons clashing in groups at different points and accused nos.8 and 10 were amongst them.

9. PW 4 PSI Sanjeev Jadhav was also one of the members of the police party and he has deposed on the similar lines as those of PW 1, PW 2 and PW 3. He identified accused nos.1, 2, 4 and 5 before the trial Court. He was not cross-examined on behalf of accused nos.1 to 10 except accused no.4, as their Advocates were absent. In the cross-examination on behalf of the accused no.4, he has admitted that the accused were apprehended in the combing operations and that the accused were hiding in one building.

10. PW 5 PN Prakash Bobhate was attached to Nirmal Nagar Police Station. According to him, accused Sanjay Kadam had tried to assault him with a chopper. PW 5 chased and fired at him below his knee due to which he had suffered a bullet injury on his leg. PW 5 has further deposed that after the situation was brought under control, they started combing operations and conducted search in Vishwakarma building. At that time, one person attacked PSI Amar Desai with a chopper and injured him. In self defence, PSI Desai fired at him due to which he died before he could be admitted to the hospital. PW 5 has identified accused no.1 as the as the person who had tried to assault this witness with a chopper. However, the

evidence shows that it was the original accused no.9 who had tried to assault PW 5 due to which PW 5 had fired at him and accused no.9 had suffered injuries. Therefore, the identification of accused no.1 by this witness PW 5 is not correct even as per the prosecution case. PW 5 has further deposed that during the combing operations, 7 to 8 persons were arrested and he has identified accused nos.8 and 10 as the persons who were arrested during the combing operations. He has deposed that the mob consisted of about 400 to 500 persons. He has also admitted that the accused no.4 was arrested from Vishwakarma building.

11. PW 6 PI Shivaji Lahade had recorded the FIR and had conducted the investigation. He has admitted in his cross-examination that the accused were residents of the same locality.

12. PW 7 Banti Sidhu was a pancha in whose presence the spot panchanama was conducted. There is not much dispute about the spot of incident and about the fact that stones, broken pieces of glass etc. were lying at the spot. After recording the evidence and the statements of the accused and after hearing both sides, the learned

trial Judge passed the impugned Judgment and Order, as mentioned earlier. The learned Judge accepted the version of the prosecution witnesses and convicted the accused no.9 under Section 307 of the IPC and the present Applicants for commission of offence punishable under Section 148 of the IPC. In paragraph 16 of the impugned Judgment, the learned Judge has observed that all the witnesses had supported the prosecution case and that the prosecution has proved that the accused / Applicants were members of the unlawful assembly and took active part in committing rioting armed with the weapons like stones, soda-water bottles, brickbats and tubelights, etc. The learned Judge has recorded his finding that the present accused / Applicants did not share common intention with accused no.9. The accused no.9 was convicted for attempting to commit murder of one of the police officers. He has based his reasoning mainly on the ground that the accused nos.1 and 7 were apprehended immediately after the riot in the combing operations from their hideouts. According to the learned Judge, this fact points to their involvement. He has further observed that deposition of the witnesses that they had seen the accused taking active part in the riot, was acceptable.

13. One important aspect of this matter is that the incident had taken place on 09/12/1992 and the evidence of these witnesses was recorded in the year 2002. No identification parade was held before that. Though the accused nos.1 to 7 were brought to the police station by the police officers, there is no evidence to show that the police officers were knowing these accused. No independent witnesses were examined by the prosecution. Though it is difficult to get the eye witnesses to such incident when the situation was out of control, there is no cogent evidence to show as to who were the accused who were actually apprehended by the police officers at the spot. There is no consistency in the evidence of the prosecution witnesses as to when exactly and from where these accused were arrested. Some of the police officers have deposed that after the situation was brought under control, the accused were arrested during combing operations whereas PW 1 has deposed that he had apprehended all the accused who were found assembled at the place of incident. PW 2, PW 3, PW 4 and PW 5 have deposed that the accused were arrested after the situation was brought under control and after the mob had dispersed and that the accused were arrested during the combing operations. That means that the accused were not

apprehended on the spot, according to PW 2 to PW 5. The injured who had suffered bullet injuries because of police firing were taken to hospital first and then the combing operation was undertaken.

14. PW 1 has deposed that the mob consisted of about 500 to 600 persons. PW 2 has deposed that there were 60 to 70 persons. PW 3 has deposed that there were 500 persons. PW 4 has deposed that the accused were hiding in one building. Thus, there is no consistency about the actual incident; but from the evidence, it is quite clear that the accused were arrested when they were found hiding in one building. This fact, by itself, does not show that they were members of an unlawful assembly. According to the Investigating Officer himself, all the Applicants were residents of that very locality. It was not unusual for the accused to take shelter in one building to protect themselves from the violence which had gone out of control. Therefore, just because they were found in one building in the same locality, the learned Judge was not correct in recording his finding that they were members of the unlawful assembly. The learned Judge has already acquitted them from the allegations of commission of offence punishable under Section 392 read with 149 of

the IPC. They were not even convicted for the act committed by the original accused no.9 Sanjay Kadam. The evidence on record is not sufficient to draw an inference that these accused had taken part in the actual riot. Though the accused were brought to the police station, there is no cogent and consistent evidence to show as to under what circumstances they were arrested. As mentioned earlier, PW 1 and other witnesses differ on this aspect. Therefore, it is not safe to conclude that the accused were members of the unlawful assembly and had actually taken part in the riot. The witnesses have not consistently identified all the accused before the trial Court. As mentioned earlier, there was a gap of about 10 years between the incident and recording of the evidence. Therefore, identification of the accused in Court is not of much significance, particularly in the light of the fact that there were about 500 to 600 persons in the mob. No specific role is alleged against any of the Applicants. Considering all these aspects, in my opinion, the learned trial Judge should have extended benefit of doubt to the accused and therefore, this is a fit case calling for interference by this Court.

15. With the result, the following order is passed.

ORDER

- (i) Revision Application is allowed.
- (ii) Rule issued on 15/07/2003 is made absolute in terms prayer clause (a).
- (iii) The Applicants are acquitted from all the charges faced by them in Sessions Case No.310 of 1996 on the file of the learned Additional Sessions Judge for Greater Bombay.

(SARANG V. KOTWAL, J.)