

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 613 OF 1997

Abdul Gani Kamruddin Mulla]
Presently lodged at Yerwada Jail]
Pune, and permanent resident of Deonar,]
Mumbai.] ..Appellant
(Ori. Accused No. 14)

v/s.

Senior Inspector of Police and Anr.]
Deonar Police Station, Mumbai] ..Respondents
(Ori. complainants)

Mr. Lokesh Zade, Court appointed advocate for Appellant.
Ms. Pallavi N. Dabholkar – APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 10th JUNE 2019.

JUDGMENT

1. The appellant herein is the original accused no. 14 in Sessions Case No. 1254 of 1993 re-numbered as 1472 of 1994 and is convicted for the offence punishable under section 326 of the Indian Penal Code and is sentenced to suffer R.I. for seven years and fine of Rs. 1,000/- (One thousand only), in default, R.I. for three months. The appellant is also convicted for an offence punishable under section 452 of the Indian Penal Code with no separate sentence. Hence, this appeal.

2. Such of the facts necessary for the decision of this appeal are as follows:-

3. This is relating to the riots of the year 1992 after the damage to Babri Masjid at Ayodhya. The incident is dated 7th of December 1992. It is the residential house of PW-1 Balkrishna. It is the case of the prosecution that on 6th December 1992 in the course of Karseva at Ayodhya, some people had caused damage to Babri Masjid and it was demolished. It is alleged that the outcome of the said incident was that, communal riots had erupted all over India in the midnight of 06.12.1992 and 7.12.1992. The incidence of pelting stones and burning of vehicles, public and private, were reported to the police station. The police was busy with maintaining law and order situation in Bombay. The riots had spread across the limits of Deonar Police Station and the rest of Bombay. It is alleged at about 7.00 p.m. on 7th December 1992, PW-1 Balkrishna had seen a mob of Muslim people approaching his house and he had seen one person by name Ramzan Dadhivala collecting people to form an unlawful assembly. The movements of said unlawful assembly were suspicious as they were armed with sword, chopper and other deadly weapons. PW-1 Balkrishana had then instructed his wife to remain indoors and close the door and take care of herself and their children and he had left for the police station to lodge a report against unlawful assembly. It appears that when he reached the police station, the officer In-charge was not present. At about 8.00 p.m. PW-1 Balkrishna had informed the police officer about the said apprehension. PW-7- Patil had then accompanied PW-1 Balkrishana to his house at Baiganwadi,

Govandi. When they reached the house they saw that the wife of Balkrishna PW-2- Prabhavati Patil and his children were on the loft, in injured conditions, that, according to Balkrishna they entered the house from the rear door. Upon enquiry the injured PW-3 Prabhakar had informed PW-1 Balkrishna that the house was ransacked. PW-2- Prabhavati was unconscious, PW-3-Prabhakar had informed PW-1 Balkrishana that 10 to 15 persons had entered into house, ransacked the house, damaged the property and had caused injuries to them by dangerous weapon. The injured were shifted to Shree Hospital at Chembur. PW-5 Dr. Vinod Kurla had examined the injured and had hurriedly admitted the injured to his hospital.

4. It is pertinent to note that the prosecution has not placed on record any material to indicate that on the basis of information given by PW-1 Balkrishna station diary entry was taken or that there was case diary to show, that they had admitted PW-2 and PW-3 in the hospital. It is further pertinent to note that in respect of the said incident dated 7th December 1992, the first information report was reduced into writing by PI. Patil on 17/12/1992 when he had recorded the statement of Balkrishna, the same is placed on record and is marked at 'Exhibit-19'. After illustration of the offence, scene of the offence Panchnama was drawn. The injury certificate was collected from Shree Hospital. 13 people were arrested on different dates. As far as the present appellant is concerned, he was arrested on 21st February 1993. The investigating Agency had arrested 14 people on the basis of the statement of PW-1.

5. The peculiar facts of the case is that Ramzan was the person who was in fact collecting people to form an unlawful assembly, Ramzan is not an accused in the present case. That, the complainant PW-1 Balkrishna was on Inimical terms with accused No.13. The complainant himself was an active member of Shiv Sena Party. The office of Shiv Sena (Shakha) is at a distance of hardly 500 feet from the house of the complainant. The area where incident has occurred was occupied by Hindus and Muslim. Communal riots were unknown to the said area prior to 07/12/1992 except some quarrel between complainant and the accused no. 13. That, all the 13 accused named by PW-1 Balkrishna are acquitted of all the charges levelled against them. There was no charge framed against the present appellant for an offence under sections 452 or 326 of the Indian Penal Code.

6. The case mainly rests upon the evidence of PW-1, PW-2, PW-3, PW-5, PW-7 and PW-8.

7. PW-1 Balkrishna in his evidence had deposed before the Court that he had waited at the police station till 8.00 p.m. for the arrival of police P.I. Patil. After his arrival, he accompanied P.I. Patil to his house and they found his wife and son injured and with the help of police they were taken to the hospital. PW-1 has specifically stated that he could not file the complaint till 17th December 1992. He has proved the contents of the F.I.R. In the cross examination there is a specific admission that he is an active member of Shivsena. He knew the address of most of the accused except the appellant. It is

admitted that the office of Shiv Sena is at 500 feet away from his house and he used to visit the said office frequently being the active member of the party. There is an admission that there were quarrels between himself and the accused no. 13 and a criminal case was also registered. Accused no. 13 was acquitted in the said case.

8. According to him, his wife and son were admitted in the hospital for about 15 days and he was visiting them everyday. It is also admitted that the police used to visit the hospital during those 15 days. He had been to the police station on more than 2 to 4 occasions during the period 07/12/1992 to 17/12/1992. There are inherent omissions to the extent that he had not stated in the F.I.R. 'Exhibit-19' that he had seen that unlawful assembly approaching his house and therefore apprehended some danger.

9. At this stage the learned counsel, appointed for the appellant has submitted that in the said eventuality PW-1-Balkrishna had no reason to rush to the police station to lodge a complaint that he had apprehended danger to his life at the hands of the mob. The learned counsel has also submitted that conduct of PW-1-Balkrishna appears to be unnatural. In the first place, he could have visited the office of the Shiv Sena as he was an active member of that party and moreover, he would not have left his house endangering the safety of his family members. Moreover, he had waited at the police station for more than half an hour for the police officer. Thereafter, they had been to his house to see the injured person, and then taken them to the hospital and even on the following day or the day after there was

no report in respect of the said incident on any police record. At this stage, it may be seen that PW-7-Patil has specifically stated that he has maintained the record of more than 100 cases during the period, approximately 17 to 20 cognizable offences during the period 7th December 1992 to 17th December 1992. It is also admitted by PW-1-Balkrishna that even during that period whenever he visited the police station, one officer was present. However, his statement in respect of the incident dated 7.12.1992 was not recorded. PW-1 has further stated that his wife and son were admitted in the private hospital and that he had admitted them on his own. He has not specifically mentioned the name of PW-7-Patil to indicate that PW-2-Prabhavati and PW-3 Prabhakar were admitted in the hospital of PW-5 Dr. Karkare.

10. PW-2 Prabhavati happens to be the wife of PW-1 Balkrishna. Her examination-in-chief begins in the following words:
“Is there any person by name Ramzan Dadhiwala staying in your neighbour-hood?”

11. It appeared to be a leading question and therefore, the same was disallowed by the Court. In fact there was no reason for asking this question as Ramzan was not accused. His name had not appeared in the course of investigation and therefore, no charge-sheet was filed against him. Neither there was an application by the prosecution under section 319 of Cr.PC, after recording of the evidence of PW-1-Balkrishna. It is pertinent to note that PW-2-Prabhavati has also categorically stated that she has seen Ramzan

Dadhiwala near her house at the relevant time. She had also seen him leading an unlawful assembly and she in fact knew all the persons who had assembled near Ramzan Dadhiwala and has submitted that she would be able to identify all those persons and that some of them are present before the Court. In the course of identification in the court PW-2-Prabhavati has identified only PW-13 and PW-14 as members of the unlawful assembly. It needs to be noted that accused no. 13 is acquitted.

12. The learned counsel for the appellants submits that in fact PW-1 at the time of lodging F.I.R. had also stated that it was Ramzan Dadhiwala who was the focal point for forming an unlawful assembly. However, the papers of investigation do not show any report under section 169 of Cr.P.C. nor there was any specific investigation neither charge-sheet was filed against him. She has deposed before the Court that after her husband had left for the police station to lodge a report, the unlawful assembly has attacked her house from both the sides i.e. from the main door as well as rear entrance. They had entered the house through rear entrance. They almost ransacked the house. They damage household articles including tape recorder, television set as well as the V.C.R. She and her children were watching the acts of the accused from the loft of the house. Since she apprehended some danger to the house. She came down then she saw accused no. 14 i.e. present appellant setting her house on fire by means of the gas cylinder. According to her, she made an attempt to extinguish the flame. She has further categorically stated that the accused no. 14 had set the house on fire

and had inflicted a blow of knife on her left forehead. She had sustained injury on her forehead and nose and she was also assaulted by hockey-stick and thereafter she had fallen unconscious. According to her, she knew the accused nos. 13 and 14 as they were residing in her neighborhood.

13. It is elicited in the cross examination that her statement was recorded by the police after a fortnight of the incident she had personally been to the police station. According to her she was admitted in the hospital for about 14 days and that she was unconscious till the next day. According to her she had told the police in the hospital that she was assaulted by the people known to her.

14. At this juncture, it would be relevant to mention the recitals of the scene of offence panchnama which does not show any damage caused by fire to the house. There is no mention of any damage to the articles. The house was in order. In short there is no material on record to indicate that the house was ransacked by miscreants neither the witnesses state that after the incident they had set the house in order. Hence, the act of the miscreants have not been proved by the prosecution by bringing any material on record.

15. PW-2-Prabhavati has admitted that she does not know how her son PW-3 Prabhakar got injured. There are inherent omissions. According to her she has stated before the police that the accused persons had snatched her Mangalsutra. The said version

does not find place in the F.I.R. She has attributed act of assault upon her only by accused no. 14. According to her she was assaulted with a chopper and not a knife. However, she maintained that she was also assaulted by a hockey-stick. It is a matter of record that the appellant herein was not armed with a hockey-stick and therefore it can be said that some other members of the unlawful assembly had assaulted her with a hockey-stick. At the end of the deposition she has also maintained that the accused no. 14 i.e. present appellant was residing on plot no. 4 in her locality.

16. PW-3 Prabhakar happens to be the son of PW-1-Balkrishna and PW-2-Prabhavati, he has corroborated version of PW-2 to some extent and even according to him the members of the unlawful assembly had removed all the articles such as V.C.R., T.V etc. from his house. He has added by saying that they had also ransacked the cupboard and taken cash amount from the cupboard as well as cooking utensils. He has clarified that he and his mother have suspected that due to the act of the unlawful assembly the gas cylinder may have exploded and there was fire therefore they rushed to the kitchen and saw fire and they extinguished the fire by pouring water. Needless to reiterate that there was no evidence to show that the house was set on fire and neither it is stated so by PW-1. He has stated that they were admitted in Shree hospital at Chembur. Even according to PW-3-Prabhakar they reside on plot no. 10 whereas the Shiv Sena Shakha (Branch) is on plot no. 12. It is pertinent to note that the offices of B.J.P and Congress party are also situated in closed visitation. Even according to PW-3 he and his mother were

assaulted by hocky-stick. It is also a matter of record that PW-2 and PW-3 have categorically stated that they had identified the accused persons in the police station and not in test identification parade. In any case they have claimed that they are residing in close vicinity and PW-3 had seen him living in the locality prior to the incident as the appellant happens to be famous person in that locality. There are several improvements in the evidence of PW-3 to the extent that not only the Mangalsutra of his mother but Gold Chain from his neck was also snatched.

17. PW-5 Dr. Vinod Karkare is the owner of Shree Hospihal where PW-2 and 3 were admitted. According to the prosecution he has placed on record the copies of two certificates which are collectively at Exhibit-24-25. His evidence was recorded on 3rd of September 1997 and on the basis of memory he has stated that he had found that there was fracture of left hand fingers and a wound on the scalp by knife or chopper on the person of PW-2. He has found several incised wounds on her face and she was in shock due to loss of blood. Whereas PW-3 was conscious. According to him the hospital maintained the record in respect of admission, type of the treatment and discharge of patient. However, in the present case he has not produced a single record to show that the witnesses PW-2 and 3 were admitted in his hospital on 7th December 1992. In fact he has specifically admitted that for want of records he would not be in a position to say for how many days the patients were admitted in hospital. He has admitted that number of injuries are not mentioned in the certificate. It would be relevant to refer to the injury

certificates *“The date of issuance of certificates is 16.12.1992. Prabhavati B Patil was admitted in my hospital following an alleged assault with very sharp object, in a state of shock and severe bleeding. She has several facial wounds with intricate problems. She may need further operations and treatment before all wounds heal. She is likely to have disfigurement of face DUE TO THESE INJURIES sustained on 07/12/1992”*. In the certificate issued in respect of Prabhakar Patil it is stated that *“he was admitted in his hospital on 7th December 1992 following an alleged assault with sharp object. He has healing wound over scalp (head). He has fractured left hand fingers. He was still under my treatment”*. The said certificates are the photocopies of the original. According to the prosecution the original certificates were given to Srikrishna Commission. In fact, the photocopies could not have been exhibited unless they were taken on record as secondary evidence. PW-8 had investigated the offence at the initial stage and has obtained the certificates from PW-5-Vinod. That, he had produced the original medical certificates in the High Court. It is true that Justice Srikrishna was then the sitting High Court Judge and hearing used to take place in the High Court building. Be that as it may, the evidence of PW-5 Dr. Karkare seems to have been obtained subsequently. The certificates were taken on 16/12/1992 and endorsed by assistant medical officer, Surgery Hospital, Govandi on 16/02/.1993. In all probabilities in the course of investigation.

18. PW-7-Bhagavatrao Patil and PW-8-Arun Sakharkar are investigating officers. There is no plausible explanation by PW-7 as

to why there was no record in respect of reporting the incident on 7th December 1992. There is no doubt that there is a delay of 10 days in registration of the offence, although police had admitted the injured in hospital on the same day. The scene of offence panchnama is drawn after 10 days and yet there is nothing on record to show that the house was set on fire or it was ransacked or there was damage to the property.

19. In case of *Thulia Kali vs. The State of Tamil Nadu* reported in 1973 AIR 501, the Hon'ble Apex Court has observed as follows:-

"The first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as, the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of after thought. It is therefore essential that the delay in lodging the report should be satisfactorily explained."

20. In the present case one can understand the situation on 7th December 1992 where there were several instances of communal riots in Mumbai. The investigating officer PW-7 Patil has also admitted that he had maintained the record of more than 20 cognizable offences and several other non-cognizable cases during

the period 07.12.1992 to 17.12.1992. Even if, the police has not actually registered the offence forthwith, the fact that there is no station diary to that effect also causes grave prejudice. More so, the court cannot be oblivious of the fact that the first informant had approached police station only out of apprehension that unlawful assembly may attack his house. He had actually seen that his wife and son were injured. There is no medical record, no scene of offence panchanama, no station diary entry. No case diary to show that there was a riot or a house was ransacked on plot no. 10 in Bhivandi area. Hence, it can be said that the prosecution has not satisfactorily explained the delay for registration of F.I.R. More so PW-1-Balkrishan had been visiting the police station during the period from 7.12.1992 to 17.12.1992 The police had also visited the hospital during that period, coupled with the fact that certificates issued by the hospital is dated 16.12.1992 i.e. prior to registration of the offences.

21. Learned APP submits that in the given circumstances it cannot be said that there is failure on the part of the prosecution to explain delay since there was law and order situation in question and therefore as far as the injuries sustained by PW-2 and PW-3 is concerned, the prosecution only relied upon the oral evidence of PW-2 and PW-3 and therefore it would be difficult to record a finding of conviction of the appellant for causing injuries to PW 2 and 3. Moreover the identity of the persons who had assaulted by hockey-stick is not mentioned. Except the appellant no other accused has been convicted. Another important aspect is that although the

accused was arrested in February 1992. The memorandum for recovery of weapon under section 27 of The Evidence Act is of October 1993 i.e. 05/10/1993. The learned counsel appointed for the appellant at this stage submits that this recovery has been foisted upon the appellant by the investigating agency at a belated stage. Needless to say that in October 1993 the accused appellant was in judicial custody and not in police custody. This Court has observed non compliance of section 27 of The Evidence Act by the Investigating Agency in the State of Maharashtra and same has been brought to the notice of the agency on several occasions. However, till today there is hardly a case where conviction can be sustained on the basis of valid legal memorandum of recovery and recovery from the accused.

22. It would be necessary to refer to the charge framed against the accused. A composite charge was framed against the accused no. 1 to 14.

23. The charge was framed against all the accused under section 141, 147, 148, 149, 427 read with 120 b, 452 read with 420 b, 307 read with 120b of the Indian Penal Code and yet accused no. 1 to 13 have been acquitted of all the charges levelled against them and the appellant is the only one who has been convicted for the offence punishable under Sections 326 and 452 of the Indian Penal Code. It is the case of the PW- 1, PW-2 and PW-3 that 14 persons alongwith other miscreants had entered into their house, ransacked the house caused injuries upon PW-2 and PW-3 had also removed

valuable articles from their house, snatched the valuable ornaments from their neck.

24. Little can be said as to how the appellant alone can be convicted for Sections 326 and 452 of the Indian Penal code when there was no specific charge framed against the accused. Section 223 of Cr.pc. reads as follows. Charge be framed as follows:

(a) persons accused of the same offence committed in the course same transaction;

(b) person accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) person accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last- named offence;

25. The learned counsel appointed for the appellants submits that since no solitary act was attributed against the accused appellant. Conviction for sections 326 and 452 of Indian Penal Code would not be sustainable. Hence, there is failure of justice.

26. Reference would have to be made to the case of *Darbara Singh V/s. State of Punjab* (2012) 10 SCC Case No. 476 where the Hon'ble Apex Court has held that:

“20. The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 Cr.P.C., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

27. In the present case there was no question of raising any objection for framing of charge at that stage or during the trial because it was only after the judgment that the accused had been apprised of the fact that he alone is responsible for ransacking house and causing injuries to the witnesses PW-2 and PW-3. In fact, the prosecution case commenced with the disclosures of communal riots on 7th December 1992 as a result of demolition of Babri Masjid. The complainant had also approached the police station with the apprehension that his house may be ransacked in the communal riots by Muslim-Hindus. The door was broke open also by more than 15 persons, the valuables were taken away by more than 15 persons. The conviction of the appellant alone in the given facts of the case in the absence of the record to show that he alone had criminally trespassed into house and assaulted members of the family is not sustainable.

28. In the case of *Darbara Singh* (Supra) the apex court has further observed thus:-

“ 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court”.

29. The prosecution has only taken the shelter of circumstances prevalent at that time and at the trial also there are several lacunas and the same has caused prejudice to the accused.

In the land mark judgment of *Willie(William) Slaney Vs State of Madhya Pradesh*, Justice Vivian Bose has observed as follows:-

“Section 233 is a mandatory provision and the force of its direction is not weakened by the fact that another provision of the Code permit a conviction of an accused for an offence with which he had not been charged. In such a case no question of illegality or irregularity arises, as the conviction is expressly authorized by the Code. The conviction is valid because of the statute itself and not because of section 535.

The framing of a charge in trial of crimes in which a charge is required to be framed, is one of the important elements in the mode of a trial. On the charge framed, after it has been explained to the accused, the plea of guilty or not guilty is recorded. If the accused pleads guilty, certain consequences follow. If he pleads not guilty, the trial must proceed according to law. When a charge is not framed, obviously no plea of the accused with reference to it is taken and the trial has proceeded without such a plea. Is the framing of a charge and the recording of the plea of the accused merely a ritual or a fundamental provision of the Code concerning procedure in a criminal trial? I think is it the latter. Are the express provisions of the Code as to the manner in which a trial is to proceed to be ignored, or

considered as satisfied, merely because the Court explained to the accused as to what he was being tried for? I apprehend not. For to do so is to replace the provisions of the Code by a procedure unwarranted by the statute itself. In my opinion, a total absence of a charge from start to finish in a case where the law requires a charge to be framed, is a contravention of the provisions of the Code as to the mode of trial and a conviction of the accused of an offence in such a case is invalid and the question of prejudice does not arise. None of the decisions of the Privy Council suggest that in such a case the conviction will be deemed to be valid by virtue of the provisions of section 535, unless the Court is satisfied that there has been a failure of justice”.

30. In the present case accused nos. 1 to 13 have been granted clear acquittal and not with the aid of benefit of doubt. The appellant alone could not have been held liable for the act of causing assault upon PW-2 and PW-3.

31. It is pertinent to note that at this stage that the Sessions court while recording the conviction of the appellant alone, in Para 45 has observed that *“the overt act of the rest of the accused is not proved hence they deserve to be acquitted. The Court has lost sight of the charge framed”*.

32. In view of the above mentioned observations the appellant herein deserves to be acquitted with the aid of benefit of doubt.

ORDER

- i) Appeal stands allowed and disposed of.

ii) The conviction of the appellant for the offence punishable under Sections 326 and 452 of Indian Penal Code is hereby quashed and set aside.

iii) Bail bonds of the appellant shall stand cancelled. In the event fine is paid, the same shall be refunded.

iv) It would be difficult to part with the judgment without recording appreciation of Mr. Lokesh Zade, appointed advocate for Appellant who put in his best efforts to espouse the cause of the appellant. Hence, his professional fees are quantified as per rule to be paid to him by High Court Legal Aid Services Committee, Mumbai.

(SMT. SADHANA S. JADHAV, J)