

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.642 OF 2003**

The State of Maharashtra)Appellant/Complainant

V/s.

1. Deelip Asharam Gavali, 32 years	)	
R/o. Bendri, Tal. Tasgaon, Dist. Sangli	)	
2. Sanjay Asharam Gavali, 28 years	)	
R/o. Bendri, Tal. Tasgaon, Dist. Sangli	)	
3. Asharam Yeshwant Gavali, 65 years	)	
R/o. Bendri, Tal. Tasgaon, Dist. Sangli	)	
4. Lilabai Asharam Gavali, 60 years	)	
R/o. Bendri, Tal. Tasgaon, Dist. Sangli	)	Respondents/Accused

Ms. Pallavi Dabholkar, APP for State.

Ms. Heena Suvarnakar i/b. Mr. Kuldeep S. Patil for respondent nos.1 and 2.

**CORAM : K.R.SHRIRAM, J.
DATE : 29th NOVEMBER 2019**

ORAL JUDGMENT :

1 This is an appeal filed by the State impugning an order and judgment dated 30th January 2003 passed by the Judicial Magistrate First Class, Tasgaon acquitting accused nos.1 to 4 of the offences punishable under Section 143 (*Punishment*), Section 147 (*Punishment for Rioting*), Section 148 (*Rioting armed with deadly weapon*), Section 323 (*Punishment for voluntarily causing hurt*), Section 324 (*Voluntarily causing hurt by dangerous weapons or means*), Section 427 (*Mischief causing damage to the amount of fifty rupees*) read with Section 149 (*Every member of unlawful assembly guilty of offence committed in prosecution of common object*) of Indian Penal Code and Section 135 (*Penalty for contravention of rule or directions under Sec. 37, 39 or 40*) of the Bombay Police Act.

2 Before I proceed further, we can narrow down the subject matter of the appeal. Having considered the evidence, it is led only against four accused persons. For “unlawful assembly” under Section 143, the assembly should be of five or more persons. Therefore, the charge levelled under Section 143 can be discarded.

Section 147 deals with punishment for rioting. Rioting under Section 146 means whenever force or violence is used by an unlawful assembly or by any member thereof, i.e., member of the unlawful assembly. Since I have already held that unlawful assembly itself is not proved, the charge levelled under Section 147 also to be discarded.

Section 148 deals with rioting with deadly weapon. Again prosecution has to prove rioting and for rioting force and unlawful violence must be used by an unlawful assembly and as there has been no unlawful assembly, even charge levelled under Section 148 has to be discarded.

Similarly charge under Section 149 also has to be discarded as it deals with every member of unlawful assembly guilty of offence committed in prosecution of common object.

Prosecution has not made any effort to prove offence under Section 135 of the Bombay Police Act. Therefore, that charge also has to be discarded.

3 What now requires to be seen is only whether prosecution has proved the charges levelled under Section 323, 324 and 427 of the Indian Penal Code.

4 There are four accused, viz., Deelip Asharam Gavali (Accused no.1), Sanjay Asharam Gavali (Accused No.2), Asharam Yeshwant Gavali (Accused No.3) and Lilabai Asharam Gavali (Accused No.4). Accused no.4 is the wife of accused no.3 and accused nos.1 and 2 are their sons.

5 Prosecution has led evidence of 11 witnesses and the names are as under :

PW-1	Dattajirao Gavali – Father of the complainant
PW-2	Namdeo Sonawane – Father in law of PW-3 and retired Police Inspector
PW-3	Jitendra Gavali – son of Dattajirao (PW-1) and son in law of Sonawane (PW-2)
PW-4	Ashok Shinde – panch witness
PW-5	Surendra Gavali – Complainant (son of PW-1 and PW-6 and brother of PW-3)
PW-6	Shakuntala Gavali – Mother of complainant and wife of PW-1 and mother of PW-3 and PW-5
PW-7	Ashok Hariba Jadhav – panch witness
PW-8	Dr. Padmini Rajput
PW-9	Vishwajit Bulbule – P.S.I. Miraj City Police Station/Investigating Officer
PW-10	Dr. Mahesh Velankar – Medical Officer
PW-11	Dr. Rajivkumar of Sion Hospital, Mumbai

6 The facts in brief are that one Dattajirao Gavali (PW-1), who is also the father of complainant – Surendra Gavali (PW-5), is the brother of accused no.3. Admittedly, there has been disputes between the brothers going on for a very long time and each have filed complaints against each other and have also filed suits against each other. The dispute between the two brothers relates to partition of the ancestral land. It is the case of the

prosecution that on 12th April 1997 there was a village fair going on at about 5.00 p.m. Surendra Gavali (PW-5) was carrying a festive umbrella which shows an element of importance to the family in the village. It is alleged that Sanjay (Accused no.2) took objection to the complainant carrying the festive umbrella, there was a scuffle between the two and stick holding the umbrella got broken. Admittedly, because it was the village fair, there were many witnesses who were present at that time. It is stated that next date, i.e., 13th April 1997, at about 5.00 p.m. when PW-1 was resting inside his house he heard some noise and also heard shattering of glass. It seems he rushed out and found that the windshield/windows of his Maruti car were broken. According to PW-1 he saw accused nos.1 and 2 and two unidentified persons were breaking glasses of his Maruti car. When PW-1 went near accused nos.1 and 2, they hit him on his head with a stick called "Ghoda" and when he was about to hit him again, PW-1 defended himself with his hand which resulted in injury to his finger. When accused no.2 was to give a third blow, wife of PW-1 (PW-6) intervened as a result of which she sustained a hit on her head with a stick. According to PW-1, even thereafter, accused no.2 continued to beat and PW-2 and one Kashinath Mali intervened. Kashinath Mali is not a witness. Thereafter, accused no.2 broke the rear side door of his house by kicking at the door, then climbed on the roof and broke the tiles of the roof. At that time, accused nos.3 and 4 were standing on one side and accused no.4 was holding chilly powder and a bottle containing acid. When accused no.2 had climbed on the roof, people

gathered and asked accused no.2 as to why he is causing damage and also police came at that time. Accused thereafter, ran away. Police took complainant and PW-1 to the Police Station, sent them for medical treatment at Tasgaon dispensary from where they went to Sangli Civil Hospital for treatment. PW-1 and PW-6 stayed in the Sangli Civil Hospital for three days and on their suggestion, went to Sion Hospital in Mumbai.

7 There are innumerable contradictions. As far as role of accused nos.3 and 4 in the commission of the offence is concerned, PW-2 – Namdeo Sonawane, who is the father in law of PW-3, has stated that he was sitting near the car and he does not say anything about accused nos.3 and 4 damaging the car. PW-1 states accused no.4 was holding chilly powder and acid. This fact has not been proved as the articles were neither recovered nor seized from the possession of accused no.4. PW-3 states that accused nos.3 and 4 were instigating by saying “Hana, Mara” while complainant – PW-5 says that accused no.4 was instigating to burn the house. Therefore, the exact allegation is not proved. PW-2, who was sitting near the car, which was supposed to have been damaged and who also claims to be an eye witness, has categorically stated that accused nos.3 and 4 have done nothing at the time of incident. Therefore, all the witnesses are contradicting each other. What is the basis for the witness to say that accused no.4 was holding chilly powder and that accused no.4 had acid in her hand is also not explained. Hence, there can be no case against accused nos.3 and 4.

8 As per the version of complainant, it was accused no.2 who broke the tiles of the roof of complainant's house by climbing on the roof. This is what complainant says in the examination in chief but in the cross examination, complainant admits that there is no mention in his complaint about accused no.2 – Sanjay climbing on the roof. In the examination in chief, complainant says it was accused no.2 who assaulted his father – PW-1 but in the statement given to the police on 13th April 1997 complainant says “at that time, Deelip Ashsram Gavali assaulted by hook of stick in his hand on my father Dattaji's head”. Deelip is accused no.1. Complainant also admits that his house is on main road. According to PW-3, who is the son of PW-1 and brother of PW-5 and son in law of PW-2, when accused no.2 climbed on the roof and tried to remove the tiles, many people gathered and asked him to get down or else they would throw stones at him. Thereafter, Sanjay – accused no.2 and Deelip – accused no.1 sat in the trax vehicle and went towards temple. Per contra, PW-1 says when accused no.2 climbed on the roof, people gathered and asked him as to why he was causing damage. PW-1 does not say that people threatened to throw stone at accused no.2. PW-1 also says police also came, which is not stated by any of the other witnesses, but the accused ran away. If accused no.2 had really climbed on the roof of the house and so many people gathered and police also had arrived there, how could accused no.2 have escaped.

9 As regards Exhibit 62, which is the seizure panchnama, the same also is not duly proved because panch witness Ashok Shinde (PW-4)

turned hostile. PW-4 has denied that accused no.2 Sanjay gave two sticks in his presence to police and police seized those sticks. Infact PW-1 has in his examination in chief itself stated that the two sticks, which were shown to him before the Court, were not the same by which accused beat him. According to PW-1, the stick with which he was beaten had a hook at one end. PW-2 – Namdeo Sonawane, who is a retired Assistant Police Inspector and father in law of PW-3, has given a detailed description of the stick which was used during the commission of offence. According to PW-2, PW-1 Dattajirao, was beaten by a stick called “Ghodechi Kathi” and there was a chain to the said stick. According to PW-2, the other stick had a knob (koyanda). The two sticks, which were produced in Court, were actually pieces of bamboo, one was of 4 ft. and the other of 3 ½ ft. length and both did not have a chain or a knob attached.

10 According to complaint, accused no.1 Deelip assaulted PW-1, father of complainant, and accused no.2 Sanjay assaulted PW-6, the mother of complainant. In his deposition, however, PW-5 complainant states that both his parents were assaulted by accused no.2 Sanjay. In his entire deposition, PW-5 has not uttered a single word against accused no.1 Deelip. If one sees the other evidence, nobody has said any word against Deelip, accused no.1, either. None of the witnesses stated before the Court that Deelip, accused no.1, assaulted anybody with stick. Deelip's role, therefore, has not been proved. PW-6 Shakuntala in her deposition has stated that Sanjay accused no.2 assaulted her husband with stick of bullock cart having

hook and thereafter, he assaulted her with the same stick. In her cross examination, PW-6 admits that her husband received injuries not because of stick but because of hook of the stick. The sticks produced before the Court do not have any hook.

11 The Medical Officers, i.e., PW-8 and PW-11, admit in their cross examination that they did not examine the patients, i.e., PW-1 and PW-6, personally. They also admit that details of injury like age of injury, cause of injury, etc. are not mentioned in the certificates issued by them, which are at Exhibit 57 and 72, respectively. Therefore, both these certificates have no evidentiary value. The third Doctor – Dr. Velankar (PW-10) had examined both the injured PW-1 and PW-6 much earlier than PW-8 or PW-11 and issued medical certificate, which are at Exhibit 65 and 66, respectively. PW-10 admits that PW-1 and PW-6 were referred to Civil Hospital at Sangli for further treatment. PW-10 also says in his cross examination that no additional injuries were found in Sangli Hospital and hence, no additional injuries were shown in his certificate. PW-10 also admits that injuries shown of PW-1 and PW-6 were not so grave, which was dangerous to life. PW-10 also says that if a stick was used for beating, the marks of the stick would appear on the body. In case of both the patients PW-1 and PW-6 such stick marks were absent. PW-10 says, therefore, stick was not shown as an object for the cause of injury in his medical certificate. If one carefully examined the certificate issued by PW-10, which are at Exhibit 65 and 66, respectively, the x-ray of skull of both the patients were taken and no skull fracture is

noted. Names of two other Doctors, viz., Dr. Shahapurkar and Dr. Shinde appears at Exhibit 65 and 66, respectively, but they have not been called to give evidence to support the case of prosecution. Instead PW-8 and PW-11 were called who never examined PW-1 or PW-6.

12 There has been, admittedly, past enmity between the parties. The witnesses say there were houses around the spot and there were many people walking around, some witnesses say many people gathered when they heard the commotion but none of them have been called to depose before the Court. Only interested parties have been called, apart from the Doctors. The manner in which the evidence has been created raises a suspicion that the complaint has been lodged only to get back at accused nos.1 to 4 due to previous enmity. PW-3 Jitendra Gavali admits in his cross examination that his father in law Namdeo Sonawane (PW-2), who was a retired Police Officer, tried his best to lodge this criminal proceeding. PW-2 Sonawane in his cross examination admits that complainant Surendra (PW-5) is the brother in law of his daughter. PW-2 further admits that he was a retired Police Sub Inspector and when he went to Tasgaon Police Station alongwith the complainant, he disclosed his identity as retired PSI to Tasgaon Police. PW-2 also admits that he also went to dispensary with the injured persons. Therefore, it can be reasonably assumed that Sonawane (PW-2) used his influence on the Police as well as the Medical Officer.

13 PW-5 complainant admits in his cross examination that Ashok Hariba Jadhav (PW-7), who was a panch witness, is the tenant in the

agricultural land of PW-1 while Kashinath Mali, who is the other panch witness but not examined, is a merchant, who used to purchase flowers from the land belonging to PW-1. Ashok Hariba Jadhav (PW-7) who acted as panch witness for spot panchnama also admits that for the last five years he has been cultivating land of complainant as the family of PW-1 could not personally cultivate. The incident, we must note, took place at about 4.45 p.m. on 12th April 1997. It is an admitted fact that there was a fair in the village and the spot is located on the main road. I wonder why a third party, who was unconnected to the family of complainant, was not called as a panch witness. Vishwajit Bulbule (PW-9), Investigating Officer admits in his cross examination that the names of the witnesses were given by PW-1, who is the father of the complainant (PW-5). PW-9 also admits that the names of all the witnesses, who were examined by him, are not mentioned in the FIR. PW-9 also admits that though the house of complainant is surrounded by houses of his close relatives (Bhaubandhu) their statements were not recorded by him. Therefore, a reasonable inference can be drawn that only selected and interested witnesses were chosen notwithstanding the fact that many people had gathered at the spot at the time of the incident.

14 Panch witness Jadhav (PW-7) cannot be called as independent witness as he is cultivating land of the complainant (PW-5). It is strange that during evening hours, at the time of fair and wrestling competition, when the house of the complainant is situated on the main road and surrounded by other houses, no independent eye witness or panch was available to

complainant. It is trite that if relatives of the complainant are the only available eye witnesses, then their testimony shall not be discarded. We have to, however, consider the entire facts and circumstances of the case. It does indicate that deliberately independent witnesses were kept away and only interested witnesses were produced to settle the case of the prosecution. The interested witnesses have also been giving different stories about the incident and each are not entirely corroborating each other. On the contrary, I find there are many contradictions. Thus in all respect, the prosecution has failed to prove the guilt of the accused beyond reasonable doubt.

15 As regards Section 427, there is no evidence regarding the damage to the roof of the house. As regards the Maruti car, PW-1 does not say what was the damage, except to say he saw accused nos.1 and 2 and two unidentified persons were breaking glasses of his Maruti car and were causing damage to his car. PW-2 states that damage to the tune of Rs.10,000/- to Rs.15,000/- was caused to Maruti car. What is the basis? There are no survey reports of the vehicle or photographs of the vehicle to show the extent of damage to car or which glass of the car was broken. PW-3 also states that accused nos.1 and 2 started breaking glasses by stick of their Maruti car. Which glass, what is the extent, no evidence. PW-7 says there was damage of the vehicle of Rs.10,000/- approximately, Rs.250/- to the door of the house and Rs.200/- of the roof tiles. How they have arrived at this figure, no explanation and no evidence. In the circumstances, even Section 427 is not proved.

16 The Apex Court in *Chandrappa & Ors. V/s. State of Karnataka*¹ in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under :

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

17 There is an acquittal and therefore, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, accused having secured acquittal, the

1. (2007) 4 SCC 415

presumption of their innocence is further reinforced, reaffirmed and strengthened by the Trial Court. For acquitting accused, the Trial Court observed that the prosecution had failed to prove its case.

18 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, cannot be interfered with. I cannot find any fault with the judgment of the Trial Court.

19 Appeal dismissed.

(K.R. SHRIRAM, J.)