

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
APPEAL NO.1358 OF 2004**

The State of Maharashtra	)	..Appellant
V/s.		
1. Sambhaji R. Mane, 36 yrs	)	
2. Pralhad Krishna Thorat, 25 yrs	)	
3. Vilas Rajaram Deokar, 25 yrs	)	
4. Balu Rajaram Deokar, 27 yrs	)	
5. Dattatraya Rajaram Mane, 35 yrs	)	
6. Bhimrao Dagdu Thorat, 38 yrs	)	
7. Rajendra Dinkar Thorat, 23 yrs	)	
8. Randhir Ramchandra Thorat, 18 yrs)		
9. Vinod Lalasaheb Thorat, 19 yrs	)	
10. Balasaheb Hariba Kengar, 35 yrs	)	
11. Satish Vilas Shinde, 23 yrs	)	..Respondents

Mrs. Anamika Malhotra, APP for State
Mr. Sumit Kate i/b Mr. Uday Warunjikar for Respondents

**CORAM : K.R.SHRIRAM, J.
DATED : 26th OCTOBER 2020**

ORAL JUDGMENT :

1 This is an appeal impugning an order and judgment dated 22-7-2004 passed by JMFC, Indapur, acquitting 11 accused, who are respondents to the appeal, of offences punishable under Sections 147 (*Punishment of rioting*),

148 (*Rioting, armed with deadly weapon*), 149 (*Every member of unlawful assembly guilty of offence committed in prosecution of common object*), 323 (*Punishment for voluntarily causing hurt*), 504 (*Intentional insult with intent to provoke breach of peace*), 506 (*Punishment for criminal intimidation*) of Indian Penal Code. Charge under Section 325 (*Punishment for voluntarily causing grievous hurt*) of IPC was filed subsequently.

2 With the assistance of Learned APP and Mr. Kate, I have gone through the records and proceedings and the impugned judgment.

3 Complainant-PW.-2 and respondents belong to the same village Gholapvadi and in effect, are neighbours. Complainant has three brothers and also a sister Shubhangi. All brothers are living with their family in an around the spot of the incident. Complainant was working in Gholapvadi Co-op Dairy, as Secretary.

4 At the time of the alleged incident, Shubhangi who was 14 years of age, was studying in 9th Standard in Chatrapati High School, Mankarvadi. There was a boy Ganesh Sambhaji Mane s/o accused no.1, who was also studying in the same class as Shubhangi. It seems on 3-4-1995, Shubhangi went to school to write the annual examination. Shubhangi left home at about 10.00 a.m. and while going to the school, saw on the school water tank the following words: “Shubhangi Kare. Ganesh Mane I Love You”. Upset with that, Shubhangi went home crying and narrated the incident to complainant. Complainant took Shubhangi on a motorcycle to the school and informed the Head Master of the incident. Head Master read the

writing on the water tank and pacified Shubhangi. A peon was told to erase the writing from the water tank. On 4-4-1995, at about 9.00 a.m., complainant went to the house of Sambhaji Mane-accused no.1, and father of Ganesh Mane and narrated the incident to him. It seems, accused no.1 assured complainant that such things will not be repeated by his son. In the night, complainant was sleeping in front of his house with some of his relatives. At about 11:30 p.m., accused appeared there and started shouting. Complainant and his brother asked accused as to why they are shouting and they could talk about the issue in the morning, but accused started hitting complainant with a stick. As the stick hit complainant on his right hand he started shouting in pain. Immediately, his brothers also came around to rescue him but then accused, who were all present got hold of one or the other complainant's siblings and assaulted them. Some of accused used cycle chain to hit complainant and his family members, some used iron pipe, etc. Next day complainant and family members, who were injured went to the Primary Health Care Center and after getting treatment, went to the police and lodged complaint. Investigation was conducted, statements recorded and charges came to be filed. Following an application by APP to add Section 325 of IPC on 7-8-1999, the Trial Court, on 14-9-2000 charged the accused under Section 325 of IPC also. By then evidence of 5 witnesses had already been recorded.

5 To prove the charge, prosecution led evidence of 11 witnesses. P.W.-2-complainant, P.W.-4 brother of complainant, P.W.-7 eye witness and

P.W.-10 brother of complainant, were all injured. P.W.-1, P.W.-3, P.W.-5 were panch witnesses. P.W.-6, though brother of complainant, was not injured. P.W.-9 was eye witness and P.W.-11 was Doctor, who was examined to prove the injuries. P.W.-8 is Shubhangi. Investigating Officer was never examined. P.W.-1, who was the panch witness for recovery of weapons, turned hostile. P.W.-1 has categorically stated in his evidence that no item, which prosecution has alleged were used in the assault by accused, were recovered in his presence. Prosecution has not bothered to call the other panch witness.

6 Ms. Malhotra submitted that the Trial Court has not dealt with the charge under Section 325. I have to note that the witness no.11-Doctor, has in his cross-examination has stated that all injuries mentioned in Exhibit 148 are simple in nature. Therefore, nothing much turns on that.

7 Spot pancha witness, PW-3, also turned hostile. He states that he has no knowledge about panchanama and the contents of panchanama were already written by the police and after which his signature was taken and he has no personal knowledge about the contents of panchanama. P.W.-9, who is an eye witness was also declared hostile by the court. Though, P.W.-9 has stated that he saw a scuffle between accused and Khare, without identifying which Khare, he also says he was not aware whether 50 to 60 persons had gathered after the incident because it was dark and he was unable to state the name of persons who were gathered on the spot and he does not know who all were present. P.W.-9 also stated police never recorded his statement.

P.W.-5, who was also a spot panch witness states that he was a close relative of Rajendra Gholap. According to prosecution, there was a political rivalry between the Mane's with Rajendra Gholap's family and Khare works for Gholap.

8 Coming to the main person, i.e., P.W.-8 Shubhangi, I have to note that the incident happened on 4-4-1995 but her statement for the first time has been recorded only on 17-6-1995. Shubhangi also admits that there was political rivalry between her brother and accused no.1. She has stated that she and her brother went to the Head Master on 3-4-1995, narrated the entire incident of writing on the wall and the Head Master directed a peon to erase those writings. Neither Head Master nor that peon has been examined though they would have been the best witnesses for laying the foundation in the matter. Origin of the fight is the alleged writing "Shubhangi Kare. Ganesh Mane I Love You" in the school water tank and, neither the Head Master nor the Peon has been examined. Even the name of the Head Master or the peon does not appear anywhere in the evidence. P.W.-8 Shubhangi further states that at the time of lodging complaint she has not personally stated to the police about the incident of 3-4-1995 and 4-4-1995. She also says she has no personal knowledge about the identity of the people in the village.

9 All the other witnesses were related witnesses. P.W.-2 complainant,

PW-4, PW-6, PW-10 were all brothers. They are interested witnesses and admittedly there was political rivalry between complainant's family and family of accused.

10 Even the Doctor – PW-11, who has been examined states that injuries mentioned in the report can be caused if a person falls from motor cycle. PW-11 further states that all injuries mentioned in Exhibit 148 were simple in nature and the patients did not inform him the name of assailants. He also states that Doctors in Public Health Care Center are available 24 hours a day. Medical report of PW-10 says he was examined at 10.15 a.m., of PW-2 says he was examined at 10.30 a.m. and of PW-7 says he was examined at 5.00 p.m., all on 5-4-1995, When the alleged incident took place at 11.30 p.m. on 4-4-1995. In fact even the FIR was lodged only around 2.00 p.m. on 5-4-1995.

11 Further and most importantly, Investigating Officer has not been examined. This in my view causes a major dent in the case of prosecution. The relevance of Section 114 of the Indian Evidence Act comes into play. Illustration (g) of Section 114 of the Indian Evidence Act, 1872 provides the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. The fact that the Investigating Officer also has not been examined would show that if examined, his evidence would have been unfavourable to complainant. Non-examining the Investigating Officer as a witness, in the circumstances of the case, would have caused grave prejudice to the

accused. The Apex Court in *Habeeb Mohammad V/s. The State of Hyderabad*¹ observed that it was the bounden duty of the prosecution to examine the Investigating Officer, who is a material witness in the case particularly when no allegation was made that if produced, he would not speak the truth and in any case, the Court would have been well advised to exercise its discretionary powers to examine the witness.

12 Therefore, adverse inference arises against the prosecution's case from its non-production of the Investigating Officer as a witness. The Investigating Officer is the principal architect and executor of the entire investigation. He is a crucial witness for purposes of establishing that there are omissions and contradictions but more importantly, it is always open to the defence to question the honesty and caliber of the entire process of investigation. It is well settled law that where an investigation is defective, insufficient or dishonest, those factors prove fatal to the prosecution. In the given instance, the accused was totally precluded from an opportunity of being able to establish the further infirmities in the prosecution's case and on this ground alone, the order of acquittal will have to be confirmed. His non-examination, thus, materially affects the case.

13 In this case, panch witnesses who were independent witnesses have also turned hostile. In addition school Head Master or the peon were not called as witnesses Therefore, the credibility of the prosecution is dented. The defence case of political rivalry, therefore, gains more credence.

¹ AIR 1954 SC 51

Trial Court after going through the evidence has acquitted all the accused.

14 The Apex Court in *Chandrappa & Ors. V/s. State of Karnataka*² 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.”

2 (2007) 4 SCC 415

15 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, need not be interfered with.

16 Appeal dismissed.

(K.R. SHRIRAM, J.)