

UMESH
SHRINIWAS
MALANI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1086 OF 2003

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The State of Maharashtra

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...Appellant
(Complainant)

Versus

1. Gotiram @ Purushottam Namdev Mirkute,
Aged about 46 years,
R/at – Dahagaon, Tal. Kalyan,
District – Thane.
2. Ramesh Keshav Mirkute
Aged about 22 yrs.,
R/at Dahagaon, Tal. Kalyan,
District – Thane.
3. Damu Namdev Mirkute,
Aged about 34 yrs,
R/at Dahagaon, Tal. Kalyan,
District – Thane.
4. Vishwanath Vasudev Shelar,
Aged about 44 yrs.
R/at Wangani, Tal. Ulhasnagar,
District – Thane.
5. Bhau Rama Mirkute
Aged about 35 yrs.
R/at Dahagaon, Tal. Kalyan
District – Thane.

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...Respondents
(Orig. Accused)

Mr. H. J. Dedhia, APP for the Appellant – State.

Mr. Vaibhav D. Kadam a/w Ms. Kanchan Zire for the Respondent Nos. 1 and 2.

CORAM : PRASANNA B. VARALE &
SURENDRA P. TAVADE, JJ.

DATED : MARCH 18, 2021

JUDGMENT (PER PRASANNA B. VARALE, J)

1. The present Appeal is filed at the instance of present Appellant – The State of Maharashtra challenging the judgment and order passed by the learned IInd Ad-hoc Additional Sessions Judge, Kalyan, dated 06th June, 2003, in Sessions Case No. 73/1996, whereby present Respondents – Original Accused were acquitted for the offences punishable under Sections 147, 148, 149, 307 and alternatively 307, and 34 of the Indian Penal Code (for short “IPC”).

2. During the pendency of the appeal, Respondent Nos. 3, 4 and 5 expired as such by order dated 09.06.2015 the appeal abated against Respondent No. 3 whereas by order dated 20.10.2020 appeal was abated against Respondents No. 4 and 5. In view of these facts, the appeal now survives against the Respondent Nos. 1 and 2 only.

3. Learned APP vehemently submitted that the accused persons by forming an unlawful assembly entered in a bus by which the complainant was traveling. Accused no. 3 armed with sharp weapon like knife. In presence of other passengers who were travelling in the bus the accused persons laid attack

on the complainant and gave the blows on various parts of the body. The incident was seen by the passengers as well as the conductor of the bus. The accused persons after committing the attack fled away from the spot. Learned APP submitted that even though there were eye witnesses to the incident and the prosecution has brought on record the supporting evidence in the nature of recovery of the weapons, the learned Trial Judge failed to appreciate the evidence in its proper perspective and by adopting hyper-technical view the judgment and order of acquittal is recorded. It is also the submission of learned APP that the complainant who was examined before the Court gave the entire version and the sequence of events as they occurred and version of important star witnesses could not have been brushed aside by the learned Trial Judge on some minor omissions. Learned APP, thus, prayed for allowing the appeal by setting aside the judgment and order of acquittal.

4. Per contra, learned Counsel appearing for the Respondent Nos. 1 and 2 vehemently submitted that no error was committed by the learned Trial Judge in appreciation of evidence. It is also submitted by learned Counsel for Respondents that though prosecution claims that there are as many as four witnesses to the incident but, the version of these witnesses runs contrary to each other. It is also submitted by learned Counsel for Respondents that though the complainant is claimed to be an independent star eye witnesses,

the learned Trial Judge on a deep scrutiny of evidence of the complainant found that there are the material omissions in the testimony of these witnesses and the learned Trial Judge was also justified in observing that the version of complainant fails to inspire confidence of the Court. Learned Counsel for the Respondents further submitted that the evidence brought by the prosecution in support of recovery was also not trustworthy and reliable. Learned Counsel, thus, prayed for dismissal of the Appeal.

5. With the assistance of both the learned Counsel appearing for the respective parties, we have gone the entire material and evidence brought on record.

6. True it is, the learned Trial Judge recorded the judgment and order of acquittal on following points i.e. firstly, the version of so called eye witnesses fails to inspire confidence of the Court and the versions of complainant suffers from material omissions and lacunae and is full of improbabilities. Secondly, the prosecution for the reasons best known to it, withheld the material evidence namely, not examined the witnesses who were referred to in the version of eye witnesses and also failed to examine the medical officer which is a major lacunae in the prosecution case. Thirdly, the prosecution failed to establish even its basic case of formation of an unlawful

assembly and the evidence brought by the prosecution falls too short to establish that there were five members right from the beginning of the incident. On the contrary, there is a ambiguity about the number of accused persons though, the witnesses are the passengers who were traveling from same bus and there is no uniformity about the five accused persons entering in the bus and participating in the attack over the complainant. Fourthly, there is also an ambiguity about the role played by each of the accused persons and also ambiguity as to weapon being carried by them. Fifthly, so called recovery is wholly unreliable. Sixthly, the prosecution also failed to establish the identify of the accused persons. Lastly, it was an admitted fact that the complainant as well as the accused were having cross terms. There was a rivalry on two counts i.e. firstly, the complainant was an accused in the murder case of brother of Gotiram. At the relevant time the complainant was released on bail. Secondly, the complainant and the accused persons were supports from different political parties.

7. On the backdrop of these facts, now we may refer to the case of prosecution and the evidence brought by the prosecution.

8. It is the case of prosecution that on 21.12.1987 Krushna Mirkute (complainant) had been to Ambarnath where he was working in a private

company as a temporary employee. He reached in the company at about 03.00 pm. The manager informed him that he may get his salary after two days as such, he came to Kalyan bus stop so as to return to his house situated in village Dahagaon, Tq. Kalyan. He took up his scheduled bus at 08.30 pm for his village. In the same bus other villagers from his village namely, Damu Mirkute (A 3), Ramesh Mirkute (A 2), Pandurang Mirkute, Kashinath Mirkute, Vitthal Mirkute, Natha, Bandhane were traveling. Subsequently, it is revealed that name of brother-in-law of Gotiram is Vishwanath Shelar (A 4). The bus reached at a stop known as Raita bus stop. A person Gotiram Mirkute (A 1) from the village of complainant entered in the bus with his brother-in-law i.e. Vishwanath Shelar (A 4). Then bus proceeded further and turned to Dahagaon phata. It was 09.00 p.m. The brother-in-law of Gotiram by one hand caught hold the neck of the complainant and assaulted with a knife on the back of the complainant. One Ramesh Mirkute (A 2) gave blow on the left hand of the complainant. Damu Mirkute (A 3) gave blow on the right arm and Gotiram Mirkute (A 1) laid a blow of knife on the left shoulder of the complainant. The complainant in an attempt to save himself from the attack bend down under a seat. Brother-in-law of Gotiram then made an attempt to gave a blow of knife. To save the blow complainant pushed his left hand and when brother-in-law of Gotiram again gave the blow of knife, the complainant

caught hold hand of brother-in-law of Gotiram with his left hand. Due to which four fingers of the complainant suffered injury. Then all these five accused persons snatched the complainant and gave the kick and fist blows. Then they pulled the complainant from the bus and threw him on the road. Under an impression that the complainant is dead the accused fled away from the spot. The other passengers as well as conductor of the bus were frightened due to the incident they were also fled away from the spot.

9. The incident was informed to the police by the conductor of the bus. On receipt of the information, police rushed to the scene of occurrence. Complainant was then shifted to the hospital for treatment. His statement was recorded and the same was treated as complaint. On the basis of the said complaint, crime was came to be registered. Investigating officer immediately took the necessary steps in the process of investigation. Certain statements were recorded on the same day. Arrest of the accused nos. 1 to 2 were also effected on the same day. The blood stained clothes of the complainant were seized by drawing panchnama. Panchnama of the S.T. bus was also drawn on the same day. In the late hours arrest of accused no. 5 was also effected. Then on next day certain steps in the investigation were effected such as, seizure of the blood stained clothes of accused no. 4 from the house one Kondiram, seizure of blood stained clothes of accused nos. 2 and 3 from the house of one

Rajaram Vishe, seizure of blood stained clothes of accused no. 1. On 21.12.1987, accused nos. 1, 2 and 3 were referred to the medical officer, Kalyan for their clinical examination. On 22.12.1987, requisition letter was forwarded to Medical Officer for obtaining blood samples of accused Nos. 1 to 5. On 23.12.1987 weapon knife was seized at the instance of accused no. 2 and on the same day a knife used by accused no. 4 was seized from the house of one Baliram Mirkute. On 19.01.1988 clothes of complainant, blood sample of accused, footwear, clothes and weapons were forwarded for chemical analysis. On 02.02.1988 chargesheet came to be filed in the Court of Judicial Magistrate F.C. Kalyan. As the offence being exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions, Thane and subsequently, on establishment of Sessions Court at Kalyan, the case was transferred to Sessions Court, Kalyan. The accused persons pleaded not guilty. The defence of the accused persons was of total denial and false implication. On appreciation of the evidence and material place on record, the learned Trial Judge acquitted the accused persons.

10. At the outset, it must be stated here that though the incident in question was of year 1987 the witnesses were examined after a long gap of 14 years. Be that as it may, now we may refer to the testimony of the witnesses.

11. Krushna Mirkute (PW 3) is the star witness, as the prosecution was set in motion on the complaint lodged by him and he is the victim of the alleged assault at the hands of the accused persons. It is also interesting to note here that even after 15 years of the incident, this witness provides material details in sequence. This witness makes reference to five persons assaulting him namely, Gotiram Mirkute (A 1), brother-in-law of Gotiram resident of Varangi Village (A 4), Bhau Mirkute (A 5), Ramesh Mirkute (A 2), Damu Mirkute (A 3). In the examination-in-chief this witness states that he also received injury to his testicles. He further stated that accused persons after an assault over him pulled him from the seat and threw him out of the bus. He further stated that the accused then went away. Thereafter, he got up and went to Raita bus stop.

In the cross-examination, this witness stated that he was sitting on the second seat ahead of the seat of conductor. Accused Ramesh was sitting on another seat on the line of his seat. Accused Damu was sitting on the bench behind the seat of Ramesh. He further stated that other three accused persons were sitting on his back side. He further stated in his testimony that brother-in-law of Gotiram, Gotiram Mirkute, Ramesh Mirkute, and Damu Mirkute have inflicted knife blow. At this stage, it must be stated that though this injured star witness of the prosecution refer to four knives being used for

attack by four accused persons, the investigating agency could recover only two knives. Then this witness gave description of the knives as one of the knife was Rampuri, other knives were 9-10 inch in length and one knife was having push button. He further stated that one knife was having grip of brass and another knife was having grip of wood. It is very interesting to note that this witness stated that when the incident of assault on him was going on he raised no shouts but the other passengers raised shouts. Then he also admits in the cross-examination that none of the co-passengers tried to intervene in the assault so as to save him. He further admits in the cross-examination that the distance between village Raita and approach road is about 1 k.m. Then initially he stated that a police jeep arrived at the approach road of Raita and he went to village Raita. Then in the next breath he stated that he was taken to the hospital by police in S.T. Bus.

12. Apart from this witness, i.e., Krushna Mirkute (PW 3), the prosecution has relied on version of other eye witnesses namely, Natha Bandhane (PW 1), Pandurang Mirkute (PW 2) and Mohan Kadam (PW 8).

13. Natha Bandhane (PW 1) stated in his examination-in-chief that when the bus stop at village Raita quarrel took place. Complainant Krushna (PW 3) was sitting in the bus and the accused persons started quarreling with

him. Then he stated that accused Vishwanath (A 4) was beating Krushna. It is very interesting to note that this witness i.e., Natha (PW 1) was also a co-passenger of Krushna (PW 3) but in his testimony particularly, in the examination-in-chief itself refers to only knife blow at the instance of accused Vishwanth (A 4) and he stated that Vishwanath (A 4) inflicted knife blow on the back of Krushna. He further stated that S.T. conductor stopped the bus by giving bell. He got down from the bus and he went to home. In his examination-in-chief he stated that accused Ramesh, Damu and, Gotiram were beating Krushna along with accused Bhau. In the cross-examination this witness admits that he was sitting on the last bench of the bus whereas Krushna was sitting two to three rows ahead of bus conductor. He also admits that as he was sitting on last bench he was not aware who were sitting on the front benches. Then an important admission comes on record through this witness that he does not know due to confusion who were standing near Krushna and who was beating him and the passengers were running here and there. This witness further admits that on the day of his evidence before the Court, he attended the Court with complainant. He further admits that due to the confusion and passengers were running here and there and he had not seen the knife and it was Krushna who disclosed him that he was injured with knife. This witness then admits in the cross-examination that after he went to

his house he had not disclosed the incident to anyone.

14. Then there is another eye witness i.e. Pandurang Mirkute (PW 2). This witness stated that on 20.12.1987 he came to Kalyan bus stand at 08.00 p.m. and took 08.30 bus for his village. At village Raita Gotiram, Damu and Bhau entered in the bus. Then the bus went to the approach road of village Dahagaon. Then accused no. 4 got up from the seat and stood behind complainant and then after sometime he took out knife and gave knife blow to Krushna. Then Gotiram, Ramesh and Bhau tried to caught hold Krushna. Then this witness makes a reference to one Shahid Mulla and stated that at that time Shahid Mulla sitting behind him. Then he shouted that why they are quarreling in the bus to which Gotiram replied that no one should try to intervene as it is their internal matter. Then conductor stopped the bus by giving bell. All the passengers were got down. He also got down from the bus. He further stated that though all the passengers got down from the bus but, Krushna was inside the bus and assault was going on him. He further stated in the cross-examination that he was only hearing the shouts from inside but was unable to see what was going on in the bus. Then he went to his house.

It is very interesting to note here that the Krushna (PW 3) refers to only four accused persons entering in the bus. Then he refers to an assault of knife by accused no. 4 only. He specifically stated that the other accused

persons tried to caught hold Krushna whereas accused no. 4 gave knife blow to him. Though this witness refers to one Shahid Mulla but Shahid Mulla was not examined by the prosecution.

In the cross-examination this witness admits and states that he had not seen who assaulted Krushna except Vishwanath and with which weapon he assaulted. He further stated that he is unable to identify the knife with which the Krushna was assaulted. He further stated that it is true that he had not seen the knife due to crowd gathered in the bus. Then certain omissions are brought on record. This witness then admits that Krushna was a worker of a political party namely, Shivsena whereas one Tanaji who was relative of accused and Krushna was an accused in murder case of Tanaji and Tanaji was worker of another political party i.e. congress.

15. Now the another eye witness is Mohan Kadam (PW 8) who was working as conductor of the bus in MSRTC Depot at Kalyan at the relevant time. He stated that at Raita bus stop 3-4 passengers entered in the bus. Then he gave bell and bus proceeded for onward journey. Then he started issuing tickets to the passengers. When the bus turned at Kalyan – Murbad road he saw that one passenger was being beaten by some persons. Then he gave bell to stop the bus. The bus was stopped. When he asked the passengers what is going on?, one of the passenger in the bus warned him asking him to keep

mum. He further stated that as soon as the bus stopped, all the passengers except the person who was being beaten and the assailants, all got down from the bus. One passenger advised him that he should also get down from the bus. Then this witness and driver of the bus got down behind the bus in the darkness without making any noise. It is interesting to note here that this witness specifically stated that after getting down from the bus he had no occasion to watch what was going on the bus. He further stated that the assailants then thrown the victim outside the bus and went away. Then in the examination-in-chief itself, this witness admits that he is unable to state as to whether any of the accused present before the Court was amongst those assailants and he identified only accused no. 1 i.e. Purushottam @ Gotiram as a person present in the bus and warning him to keep mum. This witness stated that he had an acquaintance with accused no. 1 as accused no. 1 was a social worker of village Dahagaon. Then he stated that he and the driver of the bus returned with the bus to Kalyan taluka police station and gave information to the police about the incident. Then he himself, driver and police again returned to the spot by the same bus and found that victim who was thrown from the bus was not there but he was at a distance about 1 furlong. Then police made inquiry to that person and that person was carried in the same bus so as to shift him in a corporation hospital at Kalyan.

In the cross-examination this witness admits that as there was hue and cry in the bus his attention was attracted. He also admits that he had not personally seen or heard of a dispute between the injured person and the other passengers in the bus. In the cross-examination this witness admits that he was not called by the police at any point of time for conducting test identification parade of the accused persons. It is also interesting to note that this witness makes a reference to 3-4 person entering in the bus.

16. On perusal of version of the so called eye witnesses as claimed by the prosecution, we find considerable merit in the submission of learned Counsel for Respondents that the version of these witnesses runs contrary to each other. There is a vast variance in so far as the number of the assailants, weapons carried by them, the acts committed by them, sequence of assault as alleged by the prosecution.

17. Now we may refer to the version of Sahadev Ghanekar (PW 11) the investigating officer. In examination-in-chief this witness deposed before the Court that in December, 1987 he was attached to Kalyan Tal. Police Station on temporary basis as PSI. On 21.12.1987 he was present in the police station since morning till night. He further deposed that on the day of incident ST driver Kadam had been to police station and informed him that

one passenger was assaulted and that passenger was thrown on road leading towards villager Dahagaon. Then this witness, ST driver and his staff went towards spot in a police jeep. Then he was one injured person lying near road. Then they took him to Rukminibai Hospital, Kalyan. He further deposed that he has admitted the injured in Rukminibai Hospital, Kalyan along with requisition letter. Then he recorded the complaint of the injured in presence of medical officer as the injured was having number of injuries. Then he further stated about the steps taken by him in the process of investigation such as, drawing the panchnama, effecting the arrest of accused persons, then preparing seizure panchnama, drawing the panchnama of seizure of blood clothes of victim etc.

It is very interesting to note that, in the examination-in-chief and in cross-examination also this witness refers to Mohan Kadam (PW 8) as ST driver whereas Mohan Kadam (PW 8) itself stated in his examination-in-chief before the Court that he was working as conductor in MSRTC depot at Kalyan. It is very important to note at this juncture that, this witness in the cross-examination admitted that he brought injured i.e. Krushna (PW 3) in the hospital in his police jeep not in ST bus.

18. Though, there is an evidence in the form of panch witnesses the panch witnesses fails to support the case of prosecution. In so far as the

testimony of these panch witnesses is concerned, the learned Trial Judge was justified in observing thus:

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Besides this vague, inconsistent, oral testimony there is other circumstantial evidence that lead by the prosecution. (PW 4) Dasu Thombe Panch witness on seizure panchnamas Exh. 72 & 73 turned hostile to the prosecution except admitting his signature. Same is the case of (PW 6) Ram Veer. (PW 7) Laxman Gaikwad only admits his signature on Exh. 83 to 91. He too declared hostile. Then there is only supporting witness in the form of (PW 5) Kaluram Zate. According to him, two knives were recovered by IO from accused No. 2 Ramesh and accused No. 4 Vishwanath by preparing recovery Panchnamas reveals that the weapons were not seized on the spot and even IO (PW 2) also failed to depose about this fact. This witness too denied the status of complainant as a member of Shivsena party though he admitted that he is President of Rural Unit of Shivsena party but he is acquainted him since his childhood. So why he failed to recognize the complainant as member of Shivsena? Only one inference can be drawn is that he want to keep him allot, to impose himself as

independent witness. Further timing on Exh. 76, 78 and 77, 79 are written in different ink which also creates a doubt that those documents were being manipulated. Moreover as per Exh. 53, the property is not available for identification. Further statement of Rajaram Vishe for whose house clothes of accused No. 2 Ramesh and accused No. 3 Damu were seized was not recorded. Same is the case of Kondiram Tembhe from whose house blood stained cloth of accused No. 4 were recovered. One knife was seized from the house of Baliram Mirkute, but he is also not examined by prosecution to prove nexus in between this person and accused no. 4.

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19. There is also a remarkable factor reflected from perusal of version of the witnesses. Admittedly, the incident took place in the bus in the late hours i.e. in the night hours. Generally, while traveling in the night hours the lights in the bus are either off or they only provide deem light. There is no other source of light brought on record by the prosecution. Now there is a vast variance in the version of the witnesses on the number of assailants, the weapons being used, the role being played and in addition when there is no specific source of light brought on record by the prosecution the version of only complainant that five accused persons entering in the bus assaulting him

with the weapon knife and the sequence as disclosed by the complainant creates suspicion over the prosecution case. It is also an admitted fact that the complainant and the accused persons were having enmity and enmity is admittedly a double edged weapon.

20. It is very interesting to note that Mohan Kadam (PW 8) the bus conductor specifically stated that he got down from the bus along with driver and he was standing in the darkness at a distance away from the bus. Then he stated that after the incident he and driver came to the spot in the same bus. Initially they did not find Krushna Mirkute (PW 3) at the spot and he was away at a furlong from the spot. Then he was taken up in the bus and was shifted in the hospital for treatment. As stated above, to this version in the cross-examination, Krushna (PW 3) initially stated that a police jeep arrived at approach road of Raita and then he went to village Raita. Then in the next breath Krushna (PW 3) stated that he was taken to the hospital by the police in the S.T. Bus.

21. There is no justifiable explanation coming forth as to why the prosecution failed to examined the important witnesses and why these witnesses were withheld namely, the medical officer and one Shahid Mulla whose reference made in the evidence of Pandurang (PW 2). Though it is

referred in the prosecution case that the weapon knife and certain blood stained clothes of accused no. 4 were recovered from the house one Kondiram, and blood stained clothes of accused nos. 2 and 3 were recovered from the house of one Rajaram Vishe. These persons from whom the recovery is made namely, Kondiram and Rajaram Vishe are not examined. Then in the version of Krushna (PW 3) he stated that when he resisted to the knife blow given by Vishwanath (A 4), in that process four fingers of Krushna (PW 3) suffered cutting injuries.

22. On the backdrop of the above-referred version of Krushna (PW 3) if one perused the testimony of Sahadev Ghanekar (PW 11), the investigating officer, it reveals that the Sahadev (PW 11) stated before the Court that he had forwarded the requisition letter to the medical officer for issuing the injury certificate of Krushna (PW 3). Now apart from this requisition letter, there is nothing on record to show what injuries were caused to Krushna (PW 3).

23. There is also another interesting factor revealed from perusal of cross-examination of Mohan Kadam (PW 8) that Mohan Kadam (PW 8) stated before the Court that he along with driver of bus reached to place of incident. Initially they found that Krushna (PW 3) was not there and he was

away from the distance of one furlong. Then he was taken up in the bus and was shifted in the hospital for treatment.

In contrast to this version of Mohan Kadam (PW 8), the Sahadev Ghanekar (PW 11) admitted in the cross-examination that Krushna (PW 3) was shifted to the hospital in police jeep. Thus, all these factors show that the prosecution story is neither consistent nor reliable.

24. On perusal and the scrutiny of the evidence, we find that the learned Trial Judge had properly assessed and scrutinized the evidence. Learned Trial Judge was justified in observing that there are serious *lacunae* in the prosecution evidence. Learned Trial Judge was also justified in observing that though the prosecution claims that there are as many as four eye witnesses including the injured eye witness the version of those eye witnesses fails to inspire the confidence of the Court. On the contrary, the version of witnesses runs contrary to each other.

25. On appreciation of the evidence, the learned Trial Judge adopted one of the possible views. We are unable to find any illegality or perversity in the judgment of the learned Trial Judge. Appeal, thus, being merit-less deserves to be dismissed. Accordingly, Criminal Appeal is dismissed.

(SURENDRA P. TAVADE, J.)

(PRASANNA B. VARALE, J.)