



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 132 OF 2004

Shivaji S/o. Manoharrao Munde,
Age : 32 years, Occu. : Agri.,
R/o. Mandekhel, Tq. Parali – Vaijanath,
Dist. Beed.

... Appellant
(Orig. Accused No.2.)

Versus

The State of Maharashtra

... Respondent

WITH

CRIMINAL APPEAL NO. 206 OF 2004

Sunil Shrirang Phad,
Age : 29 years, Occu. : Agri.,
R/o. Parli Vajinath, Dist. Beed.

... Appellant

Versus

The State of Maharashtra

... Respondent

...

Mr. R. N. Dhorde, Senior Counsel a/w Mr. S. P. Nimbalkar i/b.
Mr. V. R. Dhorde, Advocates for Appellants.
Mrs. Uma S. Bhosale, APP for Respondent -State.

...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 15 JULY, 2024

PRONOUNCED ON : 23 JULY, 2024

JUDGMENT :

1. Both above appeals are offshoots of common judgment and order of conviction passed by Ist Ad-hoc Additional Sessions Judge, Ambajogai, dated 21.02.2004 in Sessions Case No.80 of

2001, recording guilt of the appellants for commission of offence under section 160 of Indian Penal Code (IPC) and section 27(2) of the Arms Act, 1959.

IN BRIEF CASE OF PROSECUTION IN TRIAL COURT

2. On 12.06.1995, between 15:00 to 16:00 hours, both accused, who were members of unlawful assembly, getting armed with knives, committed affray in a public place by disturbing public peace and injuring each other and also a police personnel and thereby committed offence of 143, 147, 148, 353, 333 r/w 149, 326 r/w 149 and 160 of IPC and offence under section 27(1) of Arms Act, 1959.

3. After investigation and gathering evidence, both accused were made to face trial before learned First Ad-hoc Additional Sessions Judge, Ambajogai, i.e. in which they pleaded not guilty.

At trial, prosecution adduced evidence of in all 8 witnesses. Defence denied to lead any evidence. After analyzing and after appreciating the evidence, learned trial Judge acquitted both accused for all the offences except for offence punishable under section 160 of IPC and 27(2) of Arms Act. Judgment to that extent is now subject matter of both the appeals.

As both appeals are heard together, and are answered by learned APP and as both appeals are arising out of common judgment, are dealt and decided by way of common judgment.

EVIDENCE ON RECORD BEFORE TRIAL COURT

4. **PW1** Subhash, pancha to spot panchanama did not support the prosecution.

PW2 Sherkhan, pancha to memorandum of disclosure and recovery, did not support the prosecution.

PW3 Laxman, pancha to memorandum and seizure panchanama, did not support the prosecution.

PW4 Sunil, pancha to spot panchanama, did not support the prosecution.

PW5 Vithal, Police Head Constable testified that, on 12.06.1995, he was on duty at polling station at Zilha Parishad premises. Around 3:30 to 4:00 p.m., there was quarrel between both the accused in front of Jagdish Sweet Mart. He claims that, there was a mob of 30 to 40 persons. He tried to intervene. Both accused had knives in their hands. Somebody assaulted him on hip. He was taken to hospital, where his statement was recorded.

PW6 PSI Sangram Sangle is the Investigating Officer, who conducted investigation and filed charge-sheet.

PW7 Haribhau, another constable stated that, on receipt of call about mob gathering, he and other police officials reached there, saw accused no.2 lying in injured condition. Constable Mokashe to be present there and he had suffered bleeding to the right buttock. He shifted him to the hospital.

PW8 Dr. Balasaheb Arasulkar, Medical Officer, who examine PW5 Vithal and issued injury certificate at Exh.17.

SUBMISSIONS

On behalf of Appellants : -

5. Learned Senior Counsel Mr. R. N. Dhorde, at the outset took a strong objection to the conviction recorded by learned trial Judge for offence under section 27(2) of Arms Act, as according to him, such charge was never framed or explained to the accused and therefore, recording guilt for the same is the patent perversity on the part of learned trial Court. On this count, he invited attention of this court to charge at Exh.23 and then took this court through the operative part of the impugned judgment and further submitted that without affording any opportunity to answer charge under section 27(2) of Arms Act, conviction has been recorded by learned trial court, as such, serious prejudice has been caused to the appellants.

6. He next submitted that, out of 8 witnesses except testimony of PW5 Vithal and PW7 Haribhau, who are police personnel, none of the other prosecution witnesses have supported prosecution version. He pointed out that, even evidence of PW5 Vithal and PW7 Haribhau is not full proof, trustworthy and reliable. He raised serious objection in the prosecution version for not proving very scene of occurrence. Apart from pointing out that spot pancha did not support, he would submit that, in FIR, spot is shown to be inside the sweet shop, but in substantive evidence witnesses are naming the spot to be outside and below the stairs. He hastened to add that, in cases of charge of affray, at the outset, it is incumbent upon prosecution to demonstrate that the incident had taken place in a public place. According to him, going by the contents of FIR regarding occurrence taking place inside the shop, it is his submission that, then obviously it is a private place and hence offence of affray cannot be said to be made out. He pointed out that, further prosecution also did not demonstrate that there was disturbance of public peace and tranquility, which according to him, is also a *sine qua non* for recording guilt of affray.

7. He next submitted that, even when prosecution witnesses, who claimed to be present, states about existence of mob of 30 to 40 persons, but there is no independent evidence. He

pointed out that, not only the sweet shop owner who was best witness, no other member of public was examined by prosecution to establish its case. Consequently, he would submit that, here, there was no convincing or legally acceptable evidence apart from essential ingredients for attracting the charge to be patently missing.

8. Learned counsel took this court through the testimony of PW5 Vithal and PW7 Haribhau and would submit that, there are allegations that both accused armed with knives, but only one is seized. He further pointed out that, one police personnel admits that, there was no knife at the spot. He further pointed out that, pancha to memorandum of disclosure and seizure, have not supported and interestingly even said recovery of single knife is from a open space and accessible to all. For such reasons, he questions the recovery part also.

9. He further pointed out that, case of prosecution is that, accused no. 2 has also suffered injury and was shifted to hospital, but even he is not examined by prosecution in spite of being injured witness. Thus, according to learned counsel, there are serious lapses on the part of investigating machinery.

10. Taking this court through the impugned judgment, learned Senior Counsel pointed out that, there is apparently improper appreciation of evidence and non consideration of legal requirements. He pointed out that, out of 8 charges, there is acquittal for offence under sections 143, 147, 148, 353 r/w 149, 333 r/w 149, 326 r/w 149 of IPC. Learned Senior Counsel expressed serious reservations and objections to the findings of trial court about charge being made out for 160 of IPC, when according to him, learned trial court itself had held that rioting has not been proved. Thus, according to him, when trial court did not accept the case of prosecution, for above charges, conviction for offence under sections 160 of IPC and 27(2) of Arms Act, was itself not sustainable. He pointed out that, even charge of 149 of IPC has been accepted by learned trial Judge.

11. Under such circumstances, he questions further findings of trial court. Learned Senior Counsel took this court through the findings and observations of trial court in paragraph nos. 15, 16, 17, 18, 20 and 22 and according to him, if such are the observations and findings, then how conviction for 160 of IPC would at all be held to be made out.

12. As regards to conviction for offence under section

27(2) of Arms Act is concerned, he submitted that, even if case of prosecution about recovery of knife is believed, without admitting the credibility of recovery, he pointed out that, the articles seized is not demonstrated and substantiated to be falling on the category of arms spelt out in the rules framed under Arms Act. Therefore, for such count also, he criticizes the impugned judgment under challenge, branding it to be not sustainable in the eyes of law. Lastly, he pointed out that, appellant is now gripped with serious ailments. For all above reasons, he takes exception to the judgment and order of conviction and prays to interfere by allowing the appeal.

On behalf of Respondent - State :-

13. Learned APP would strongly supported the judgment of trial court and also took this court through the testimonies of PW5 Vithal and PW7 Haribhau and would submit that, they both are direct eye witnesses to the occurrence. That, there is prompt lodgment of complaint. PW5 Vithal himself is an injured and both these witnesses are consistent on the point of occurrence. That, their testimonies have not been disturbed during cross examination. Precisely, such aspects are appreciated by learned trial court while accepting the case of prosecution for under section 160 of IPC and section 27(2) of Arms Act. According to her, the appreciation is in consonance with the quality of evidence.

Findings are supported by sound reasons and so she prays to not to disturb the said findings.

ANALYSIS AND SUMMATION

14. After considering the respective submissions advanced by both the sides and here though prosecution has rested its case on evidence of as many as 8 witnesses, crucial evidence is that of PW5 Vithal, PW6 PSI Sangram Sangle and PW7 Haribhau, who are police personnel and PW8 Dr. Balasaheb Arasulkar is Medical Officer. Remaining witnesses are panchas, who have not supported the prosecution.

15. Before advertng to the evidence on record and when conviction recorded by trial court is only for commission of offence under section 160 of IPC and section 27(2) of Arms Act, it would be profitable to enumerate essential requirements for attracting each of the charge and what prosecution is expected to prove to bring home the charges.

Section 160 of IPC provides for punishment for committing "Affray". As to what amounts to affray, it has been dealt by section 159 of IPC and the purport of the same, is as under:-

“When two or more persons, by fighting in a public place, disturb the public peace, they are said to ‘commit an affray’.”

Punishment provided for above offence is imprisonment of either description for a term which may extend to one month.

Thus, above provisions postulate participation of more than two persons, which comprises of fight amongst themselves and such incident must occur in a public place and moreover, the episode or incident should further, in consequence, disturb public peace.

16. Having borne above legal requirements in mind, as stated above, evidence of PW5 Vithal, PW6 PSI Sangram Sangle and PW7 Haribhau needs to be visited.

According to informant PW5 Vithal, the incident took place at around 4:00 p.m., was a quarrel between both accused in front of Jagdish Sweet Mart. He deposed that, at such time, 30 to 40 persons rushed there. His evidence does not suggest such persons to be not from general public, but to be supporters of each of the above co-accused. According to him, when he intervened, anonymous person assaulted him, causing him injury, PSI Joshi took him to the hospital as well as accused no.2 Shivaji, also an injured.

17. As pointed out by learned Senior Counsel for appellants, while in witness box, this witness, who set law into motion, described the incidence to be taking place in front of Jagdish Sweet Mart, but in Exh.46/C report, he has defined the place of occurrence as quarrel going inside the sweet mart and he himself going inside the shop. While under cross at the hands of accused no.1, he answered that, quarrel took place at the steps of the shop. In report, he gave information that, both, present appellants were armed with knife. But, only one is recovered before the court. Even as pointed out, accused no.2, who was also injured, had taken along with this witness to the hospital, has not been examined. Even police Inspector Joshi, who shifted above witness, is not examined. Spot pancha has not supported, though spot panchanama got proved through Investigating officer.

18. The Investigating Officer PW6 PSI Sangram Sangale, in paragraph no. 3 of substantive evidence deposed that, spot is situated in front of Jagdish Sweet Mart on the road. This Police Officer was not present at the time of incident, because PW5 Vithal injured police official merely gave name of PSI Joshi and not PSI Sangram Sangale. With such material on record, there is force in the submission on behalf of learned Senior Counsel that, here, in view of distinct places being named by PW5 Vithal in FIR and in

substantive evidence, actual scene of occurrence has not been cogently and firmly proved beyond reasonable doubt. It was essential for prosecution to prove it for the simple reason that, the essence of the provision is occurrence taking place in a public place. Admittedly, no independent member of public has been examined by prosecution. Though there was said to be fight between two persons, it was expected of prosecution to further prove that, there was disturbance to public peace in consequence to said episode. Again as pointed out by learned Senior Counsel, learned trial Judge has already discarded and refused prosecution case regarding commission of offence under sections 143, 147 and 148 of IPC.

19. PW7 Haribhau, another crucial witness for prosecution is examined at Exh.66. His testimony shows that, when they reached and saw accused no.2 lying on the step of shop, has deposed only about coming across PW5 Vithal having suffered bleeding injury. Therefore, apparently, he is not an eye witness to the alleged occurrence which took place between two accused. In cross examination, he admitted that, he did not see any knife lying on the spot.

20. Consequently, here, in view of above discussion, prosecution has not substantiated beyond reasonable doubt that,

firstly, there was occurrence in a public place and occurrence was of such nature in a public peace and tranquility. Above discussed material also creates doubt as to whether incident took place inside the private shop or outside the shop on the steps or on the public road. Resultantly, as essential ingredients for attracting section 160 of IPC not being shown to be available, said charge cannot be said to be proved.

21. The second attack and criticism of learned Senior Counsel was as regards to recording guilt for offence under section 27(2) of Arms Act.

As correctly pointed out that, here, charge at Exh.23 shows that, both accused were called upon to answer charge framed for offence under sections 143, 147, 148, 353 r/w 149, 333 r/w 149, 326 r/w 149, 160 of IPC and 27(1) of Arms Act, 1959. Apparently and evidently no charge under section 27(2) of IPC has been framed and explained to the accused. According to learned Senior Counsel, it was not open for trial court to record guilt for charge which was not at all explained to the accused. They had no opportunity to offer their explanation for the said charge, but on account of conviction recorded for unexplained charge, serious prejudice has been caused and as such conviction cannot be sustained.

22. Learned Senior counsel in support of above contention seeks reliance on following rulings :-

1] Kiran Arjunsingh Rathod v. State of Maharashtra, 2022 (3) ABR (CRI) 377

2] State of Maharashtra v. Shankar Krisanrao Khade 2008 (6) AIR Bom R 43 (DB)

3] Alizar Pereira v. State of Goa 2014 (3) ABR (CRI) 187

4] State of U.P. v. Munna, 1973 CRI. L.J. 1708 (V 79 C 518)

5] Gyasuddin Khan alias Md. Gyasuddin Khan v. State of Bihar, AIR 2004 SC 210

6] Gadadhar Guru and Anr. v. State of Orissa, 1989 SCC OnLine Ori 130.

23. On visiting charge at Exh.23, it is noticed that, no charge under section 27(2) of Arms Act has been framed or even explained to the accused. It is fairly settled legal position that, trial court can always convict a person for a charge which is not framed and explained, provided it is for lesser offence. Guilt for a charge constituting higher charge cannot be fastened without anything explained to the accused. Here, apparently both accused were explained only charge for offence under section 27(1) of Arms act, 1959, which is punishable with imprisonment for three years but which may extend to seven years. Therefore, obviously, accused persons are entitled to assume that they have been called upon to answer only charge of 27(1) of Arms Act and therefore, it was not

necessary for them nor there was any opportunity for them to meet the evidence of prosecution relating to offence under section 27(2) of Arms Act. They were only called upon to answer charge under section 27(1) of Arms Act. They were only expected to offer explanation on above charge and were entitled to rebut only the charge of 27(1) of Arms Act. The foundation of prosecution case in trial court was 27(1) of Arms Act only. Therefore, they had no opportunity to deal with or answer section 27(2) of Arms Act, which is punishable with imprisonment for seven years but which may extend to imprisonment for life.

In the considered opinion of this court, taking the above position into consideration, also, the impugned judgment and order cannot be allowed to be sustained for serious prejudice has been caused.

24. Further, out of two knives with which appellants were said to be armed, only one is seized. The other one is seized from open space which is accessible to one and all. Therefore, the very purport of recovery evidence is also under shadow of doubt.

25. As pointed out, clause V of Schedule I of Arms Act contemplates deadly weapon as a weapons with blades longer than 9" or wider than 2". Admittedly, length of blade of the article seized

in this case, is not measured by using scale. There is only reference that it is six fingers long. Thus, there is ambiguity. Taking such materiel into consideration, it cannot be said that the provision under section 27(2) of Arms Act are violated.

26. To sum up here, on re-appreciation, it is noticed that, firstly very scene of occurrence is not cogently proved in view of above discussed material. Secondly, no members of public were examined including the very shop owners, which were located at the scene of occurrence. Conviction is recorded for a charge which is not explained and thus serious prejudice has been caused to the appellants. Therefore, interference is called for. Hence, I proceed to pass the following order :-

ORDER

- I) Both the appeals stand allowed.
- II) The conviction awarded to appellants, namely, (i) Shivaji S/o. Manoharrao Munde and (ii) Sunil Shrirang Phad in Sessions Case No.80 of 2001 by the Ist Ad-hoc Additional Sessions Judge, Ambajogai, District Beed on 21.02.2004 for the offence punishable under section 160 of Indian Penal Code and section 27(2) of the Arms Act, 1959, stands quashed and set aside.
- III) The appellants stand acquitted of the offence punishable under section 160 of Indian Penal Code and section 27(2) of the Arms Act, 1959.

- IV) The bail bonds of the appellants stand cancelled.
- V) The fine amount deposited, if any, be refunded to the appellants after the statutory period.
- VI) It is clarified that there is no change as regards the order in respect of disposal of *muddemal*.

(ABHAY S. WAGHWASE, J.)