

CASE NO.:
Appeal (crl.) 132 of 2008

PETITIONER:
Shaikh Majid and Anr

RESPONDENT:
State of Maharashtra and Ors

DATE OF JUDGMENT: 21/01/2008

BENCH:
Dr. ARIJIT PASAYAT & AFTAB ALAM

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 132 OF 2008
(Arising out of S.L.P.(Crl.) No.2809 of 2007)

DR. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of the Division Bench of the Bombay High Court at Aurangabad, dismissing the appeal filed by the appellants. By a common judgment two appeals were disposed of. Both the appeals were directed against the judgment and order passed by learned Third Additional Sessions Judge, Aurangabad, in Sessions Case No. 39 of 1990. Originally there were 37 accused persons in the Sessions Case who faced trial for offences punishable under Sections 302, 307, 395, 436, 324, 323, 147, 148 and 149 of the Indian Penal Code, 1860 (in short the 'IPC'), Section 25 of the Indian Telegraph Act, (in short the 'Telegraph Act') and Section 3 of Prevention of Damage to Public Properties Act, 1984 (in short the 'Public Property Act') and Sections 3 and 4 of the Religious Institutions (Prevention of Misuse) Act, 1988 (in short the 'Religious Institutions Act'). Learned Trial judge convicted the present appellants who were accused Nos.1 and 26 respectively for the offences punishable under Section 302 read with Section 34 and Section 324 read with Section 34 IPC. Imprisonment for life and fine of Rs.1,000/- with default stipulations and three years imprisonment and fine of Rs.1,000/- with default stipulation were imposed. Appellant No. 2-Shaikh Abbas was also convicted for offences punishable under Section 452 read with Section 149 IPC and was sentenced to five years' rigorous imprisonment and fine of Rs.1000/- with default stipulation. He was also convicted for offences punishable under Section 435 read with Section 149 IPC, and for offences punishable under Section 323 read with Section 149 IPC. The sentences were directed to run concurrently and it was further directed that in case the fine amount was realized, part of it, i.e. Rs.10,000/-, was to be paid to the widow of Jaynarayan (hereinafter referred to as the 'deceased'). Three prosecution witnesses were also directed to be paid compensation of Rs.1,000/-. Law was set into motion on the basis of the statement given by the one Krishna (PW4), Sandu, Police Inspector (PW-11), recorded the statement which was treated as the First Information Report (in short the 'FIR'). The information given by him was to the following effect:

"Krishna PW4 has alleged in the first information report Exhibit 63 that the occurrence in the question took place on 10.10.1989. On that day at about 4 P.M., he along with about 200 villagers had been to a temple for darshana and also for performing pooja on the even of Deshara festival. All of them went to temple and Shami tree near the cremation ground on the outskirts of village Balanagar, Tq. Paithan. As usual, the villagers had been to the place of pooja in a procession with drums etc. After pooja they entered the gate of village (Ves) and had been to the Ram and Maroti temples for offering their prayers. At this time, about 250-300 people from mosque, adjacent to Ram temple, had started pelting stones at them. While pelting stones they were exhorting that it was a time for offering prayer (Namaz) and therefore, these people should leave the place immediately. Krishna PW4, deceased Jaynarayan, Pandharinath, Babasaheb and other villagers have noted the presence of about 3-32 accused persons. According to them, these 32 accused persons along with 200-250 persons assaulted them with sticks, stones, knives etc. the assault was on the people belonging to Hindu religion. PW 4 Krishna had been assaulted by accused No. 1 Shaikh Majid and accused No.26 Shaikh Abbas with knives. Such assault was on his right hand and below shoulder, on right shoulder as well as in the stomach. He suffered wounds. Such stabbing is suffered by Ranganath, Laxman, Harichand, Gorakh, Hanuman, Uttarm, Bhausahab, Badri Narayan and Dr. Gopi Kisan as well as Laxman Shamrao. Other persons also sustained serious injuries.

3. As noted above, on the basis of information given by Krishna, (PW-4) case was registered under Sections 307, 147, 148, 149 and 323 IPC. Investigation was undertaken and on completion thereof charge sheet was filed. At this juncture, it is to be noted that another FIR was lodged at about 6 p.m. by appellant \026accused No.1 against Krishna (PW4) and others. Charge sheet thereafter was filed. Undisputedly, there was order of acquittal in the said case. The trial Court placing reliance on the evidence adduced, held present appellants guilty of offence committed punishable under Section 302 read with Section 34 IPC. They were also found guilty of having committed offence punishable under Section 324 in relation to the injury caused to Krishna PW4. As noted above, appellant-Shaikh Majid was also convicted under various other provisions. The stand of the appellants before the High Court was that the evidence of the so called eye witnesses PWs. 4, 5, 6 & 7 was not consistent. Only one blow was given and that in course of a sudden quarrel, injuries were sustained by the accused persons. The prosecution has, therefore, suppressed the truth. The plea was not accepted and as noted above their appeal was dismissed.

4. The stand taken by the appellant before the High Court was reiterated.

5. Learned counsel for the State supported the judgment of the trial Court as affirmed by the High Court.

6. One of the pleas is that the prosecution has not explained the injuries on the accused. The issue is, if there is no such explanation what would be its effect? We are not prepared to agree with the learned counsel for the defence that in each and every case where the prosecution fails to explain the injuries found on some of the accused, the prosecution case should automatically be rejected, without any further probe. In *Mohar Rai v. State of Bihar* (AIR 1968 SC 1281) it was observed: (AIR p.1284, para 6)

"In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabalise the plea taken by the appellants."

7. In another important case *Lakshmi Singh v. State of Bihar* (1976 (4) SCC 394) after referring to the ratio laid down in *Mohar Rai* case (supra) this Court observed: (SCC p.401, para 12):

"Where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabalise the plea taken by the appellants."

8. It was further observed that: (SCC p. 401, para 12)

"In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

9. In *Mohar Rai* case it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate, not wholly true. Likewise in *Lakshmi Singh* case, it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and

creditworthy and where the court can distinguish the truth from falsehood, the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently, the whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by this Court in Vijayee Singh v. State of U.P. (1990 (3) SCC 190).

10. Non-prosecution of injuries by the prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries. As observed by this Court in Ramlagan Singh v. State of Bihar (1973 (3) SCC 881) the prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries on the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In Hare Krishna Singh v. State of Bihar (1988 (2) SCC 98), it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the court in proof of guilt of the accused beyond reasonable doubt, question of obligation of the prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature.

11. The residual question is the applicability of Section 302 IPC. As noted above it was submitted that only one blow was given and that too in the course of a sudden quarrel.

12. In essence, the stand of learned counsel for the appellant is that Exception IV to Section 300 IPC would apply to the facts of the case.

13. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

14. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the

origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and that there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

15. The above position is highlighted in *Sandhya Jadhav v. State of Maharashtra* (2006) 4 SCC 653).

16. It cannot be said that whenever a single blow is given, that would not attract Section 302 IPC.

17. In the instant case considering the background facts and the nature of the weapon used i.e. small knife the appropriate conviction would be under Section 304 Part I IPC and not Section 302 IPC. Accordingly the conviction is altered, custodial sentence of ten years would suffice.

18. The appeal is allowed to the aforesaid extent.