

Balu Raosaheb Navale and Gopinath Raosaheb Navale Vs The State of Maharashtra

Court: Bombay High Court

Date of Decision: June 15, 2004

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 428
Penal Code, 1860 (IPC) â€” Section 300, 302, 304, 307, 324

Citation: (2005) CriLJ 366

Hon'ble Judges: R.S. Mohite, J; R.M.S. Khandeparkar, J

Bench: Division Bench

Advocate: S.v. Kotval, for P.N. Joshi, for the Appellant; P.H. Kantharia, APP, for the Respondent

Judgement

R.S. Mohite, J.

This is an Appeal filed by the Appellants (hereinafter referred to as accused Nos. 1 & 2) seeking to quash and set aside a

Judgment and order dated 21.12.1991 passed by the Sessions Judge, Pune in Sessions Case No. 255/1991, whereby the trial court convicted

accused No. 1 of an offence punishable u/s 302 and 326 of Indian Penal Code and convicted accused No. 2 for the offence punishable u/s 302

r/w 34 of Indian Penal Code and Section 326 r/w of Indian Penal Code. By the impugned Judgment and Order, accused No. 1 was sentenced to

suffer imprisonment for life and pay fine of Rs. 1000/-, in default, to suffer rigorous imprisonment for a period of 2 years, for the conviction u/s 302

of Indian Penal Code. For the offence punishable u/s 326, he was sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.

1000/-, in default to suffer rigorous imprisonment for one year. In so far as accused No. 2 was concerned, for the offence punishable u/s 302 r/w

34 of Indian Penal Code, he was sentenced to suffer imprisonment for life and to pay a fine of Rs. 1000/-, in default, to suffer rigorous

imprisonment for 2 years. Accused No. 2 was also sentenced to suffer rigorous imprisonment for a period of 5 years and to pay fine of Rs. 1000/-

, in default, to suffer rigorous imprisonment for one year for the offence punishable u/s 326 r/w 34 of Indian Penal Code. All the substantive

sentences of accused Nos. 1 and 2 were directed to run concurrently and benefit of set off u/s 428 of the Criminal Procedure Code was given to

them.

2. The brief facts of prosecution case were as under :-

(a) that accused Nos. 1, 2, & 3 were real brothers and were the cousin brothers of injured witness Bhaskar Navale (PW 8). The deceased Satish

was the nephew of Bhaskar Navale (PW 8) as well as other eye witnesses were all residents of village Karegaon, Dist. Pune.

(b) One Gulabrao was the elder brother of Bhaskar Navale (PW 8) and he had been insulted by accused No. 2 Gopinath Navale during the talks

preceding the settlement of marriage of Gopinath.

(c) On 29.12.1990 accused No. 1 Balu Navale was going along the road situated in front of the house of Bhaskar Navale (PW 8). He was

passing by the house at about 8.00 P.M. in the evening. At that time, Bhaskar Navale (PW 8) asked accused No. 1 as to why his elder brother

Gulabrao had been insulted by accused No. 2 during the talks preceding the settlement of this marriage. On being so asked, accused No. 1 got

angry and threatened Bhaskar Navale (Pw 8) that he would see him and thereafter, he left the place.

(d) On the evening of 29.12.1990 the deceased Satish had come to the residence of Bhaskar Navale and Stayed there overnight.

(e) On 30.12.1990 at about 7.00 A.M. Bhaskar Navale (PW 8) and Satish awoke and at 9.30 A.M. they were standing on the front side of the

residence of Bhaskar Navale (PW 8). AT that time, accused Nos. 1, 2, and 3 came there from the side of their residence. Accused No. 1 was

armed with a knife, while accused Nos. 2 & 3 were armed with stones. There was exchange of words between Bhaskar Navale (PW 8) and the

deceased Satish on one hand and accused Nos. 1, 2, & 3 on the other hand. Accused No. 2 Gopinath hurled a stone towards deceased Satish,

while accused No. 3 hurled a stone towards injured Bhaskar Navale (PW 8). Accused No. 1 Balu then assaulted Bhaskar by means of a knife on

his back. As a result of this assault, Bhaskar fell on the road with a bleeding injury on his back. Bhausaheb Navale (Pw 9) who had come there on

hearing the cries alongwith one Laxman Deshmukh carried the injured Bhaskar to the side of the road. At that time, accused No. 2 Gopinath

hurled a stone towards Satish, while accused No. 1 Balu assaulted Satish by means of knife in his back. On hearing the commotion, other persons

from the vicinity gathered there. They halted a car on the highway and the deceased Satish was taken in an injured condition in the said Car to the

Government hospital at Shirur. One Mahadu Navale accompanied the deceased Satish in the said Car to the hospital. The injured Bhaskar was

taken by Bhausaheb (PW 9) and Laxman Deshmukh to the same Govt. hospital and by that the Medical officer has examined the deceased Satish

and declared that he was no more. On 30.12.1990 PSI Kunjir (PW 12) had gone to Nhavare phata at about 8.00 A.M. for checking motor

vehicles. This Nhavare phata is situated at a distance of 5 Kms. from Shirur. One person who was going towards Shirur told him that an incident of

Maramari"" was going on at Karegaon. This Police officer then rushed to karegaon alongwith his staff. On reaching the place of the incident, he

noticed that there was a pool of blood by the side of Nagar-Pune road and one knife was lying there. He proceeded towards the Govt. hospital at

Shirur where the deceased Satish and the injured had been taken. On reaching the hospital he learned that the deceased Satish had expired and

that the injured Bhaskar was being examined. After obtaining the endorsement of the Medical officer, he recorded the statement of the injured

Bhaskar and treating the said statement as FIR, on returning to police station Shirur, registered an offence under C.R. No. 76/90 under Sections

302, 307 r/w 34 of Indian Penal Code. He learned that accused Nos. 1 & 2 were hiding in village Karegaon. However, on the way to the village,

he saw accused Nos. 1 & 2 and hence he brought them back to police station Shirur and put them under custody. He called panchas and

prepared inquest panchanama (Exh. 10) of the dead body of the Satish. The blood stained shirt on the person of Bhaskar was attached under

Panchanama (Exh. 11). He sent injured Bhaskar to Sassoon hospital Pune alongwith Head constable Javale. He visited the scene of the offence

and prepared a scene of the offence panchanama (Exh. 33). Under this panchanama, a bent knife article-2, blood stained earth and samples of

plain earth were attached. On the same day he recorded the statements of Bhausahab Navale and 3 others. Accused Nos. 1 & 2 were arrested

under a Panchanama at (Exh.16) at 4.00 P.M. and on their arrest the shirt of accused No. 2 was attached. The Investigating officer again called 2

panchas and in their presence, accused No. 1 Balu expressed that he had concealed his shirt and kept it below the trunk at his residence.

Accordingly, accused No. 1 led the investigating officer and panchas towards his residence which was found locked. Accused No.1 un-locked the

door and took one blood stained shirt below the trunk and produced the same. Investigating officer conducted a search for accused No. 3 in the

village but he was not traced. On 31.12.1990 the Investigating officer recorded a statement of another eye witness Sunil and 5 others. Accused

No. 3 was traced on 4.1.1991 and arrested under a Panchanama (Exh.14). A shirt being article-11 was attached from his person. Statement of 2

other witnesses were recorded. On 7.1.1991 the Investigating officer sent the muddemal articles to the office of the Chemical Analyser, Pune. On

14.1.1991 he received the post mortem report. He then filed the charge-sheet in the court of the J.M.F.C., Shirur.

3. After the committal of the case, the court of sessions Pune framed the charge under Sections 302 r/w 34 and 307 or Section 307 r/w 34 of the

Indian Penal Code Against the 3 accused.

4. On behalf of the prosecution, 12 witnesses were examined. In their 313 statements, the 3 accused expressed a desire to file written statements

and the written statement of accused Nos. 1, 2, & 3 were separately taken on record and exhibited at Exh.49, 50 & 51 respectively. accused No.

3 who has been acquitted by the trial court, claimed the defence of total denial. Accused Nos. 1 & 2 however, admitted their presence at the

scene of the offence on the day and time when according to the prosecution, the incident had occurred. Accused No. 2 stated in his Written

statement that on 30.12.1990 he was to join his duty in the Indian Navy at Lonavala and hence he was proceeding towards the bus stand. When

he was proceeding, the deceased Satish and injured Bhaskar accosted him on the way and deceased Satish threw chilly powder in his eyes and

accused No. 2 Gopinath was beaten by these 2 persons by kicks and fists. they also injured his head with stones and due to a serious injury

inflicted on his head, accused No. 2 fell unconscious with serious bleeding. When he regained consciousness he found that his father had brought

him into his house. Within a short time his brother Balu alongwith PSI Kunjir were came there and took him to Shirur in a Jeep. He stated that his

eyes were paining badly as chilly powder has been thrown at them. That in the hospital he was in a state of semi-consciousness and hence he was

not understanding what the police were asking. His injury on the head was stitched by the Doctor and a big bandage was tied on his head. Doctor

gave him an injection and later he was kept in the lock-up till and was produced on the next day before the court. It was his case that he had

been assaulted by deceased Satish and injured Bhaskar to take revenge over an earlier incident which had occurred on 28.12.1990. That on this

date, the deceased Satish and Bhaskar had assaulted his parents and hence the mother of deceased Satish had called her husband Gulabrao who

had castigated his son and driven him away from the house. Gulabrao had also scolded complainant Bhaskar using harsh words. In the written

statement filed by accused No. 1 Balu it was his defence that on 30.12.1990 accused No. 2 Gopinath had gone towards the stand along with his

father where he was beaten mercilessly by the deceased Satish and the injured Bhaskar due to which, Gopinath fell unconscious. The father of

accused No. 2 came and told him about the incident and hence he went to the spot. While he was lifting Gopinath, deceased and injured were

standing on the door step of Bhaskar's house. He asked them that why they had committed this act, upon which the deceased Satish and the

injured Bhaskar rushed towards him and beat him saying that he would also meet the same fate as accused No. 2. He claimed that deceased tried to

throw chilly powder in his eyes. The Injured Bhaskar caught him from the front side and the deceased caught him from the back side. At that time,

Bhaskar (PW 8) went running into his house and brought a knife and tried to assault him. He tried to evade the assault and in his efforts to evade

the assault, deceased Satish received a knife blow on the left side back. Due to the sudden assault, deceased Satish gave a powerful jerk as

Bhaskar had caught hold knife tightly it bent. The injured Bhaskar also sustained injury to his hand when he was taking out the knife from the body

of deceased Satish. That in this melee he escaped and started running towards his house. The injured Bhaskar (PW 8) started pushing him with

knife in his hand. When he came near the house of one Harihar he turned and pushed Bhaskar. Bhaskar fell down on the curved iron strips used to

prepare a cot in front of the house of Harihar. One thick strip was curved towards upper side and Bhaskar was fell on this iron strip. That since

Gopinath was lying in unconscious condition, he proceeded towards Shirur to give information and reached Nhavare Phata by Boarding a Lorry.

There he narrated the incident to PSI Kunjir (PW 12) and returned back to village Karegaon alongwith the said PSI.

5. The trial court while partly accepting the version given by the 3 eye witnesses, did not accept the defence version. In our view, the defence

version pertaining to the incident has been rightly rejected by the trial court. It appears that there might be some truth about the origin of the

incident as narrated by accused No. 2 and which pertains to assault on him, since there was some corroboration to his version in the form of

medical evidence. However, whatever may be the defence version, the burden to prove the prosecution case rests only upon the prosecution and

unless the prosecution established its own case on its merits, the mere falsity of a defence version will not help in sustaining of conviction.

6. The prosecution has sought to establish its case by examining 3 eye witnesses. They are Bhaskar Navale (PW 8) who has lodged the complaint

(Exh.37), Bhausahab Navale (PW 9) and Sunil Oswal (PW 10). Of these, Bhaskar (PW 8) and Bhausahab (PW 9) are both the uncles of the

deceased Satish. Since they belonged to the same family of deceased, we have scrutinised their evidence with some extra care. Sunil Oswal (PW

10) also claims to be a close acquaintance of the family of the deceased Satish. The learned Advocate for the accused first contended that the

police was not certain about its own case. That the version given by Bhaskar (PW 8) was at variance with the evidence of Bhausahab (PW 9) and

Sunil Oswal (PW 10). He brought to our notice the two major differences between the 2 versions given by Bhaskar (PW 8) on one hand and

Bhausahab (PW 9) and Sunil (PW 10) on the other. The essential differences in these two versions are as under :-

(a) That while Bhaskar (PW 8) deposed to an assault by accused Nos. 1 & 2 alone, Bhausahab (PW 9) and Sunil (PW 10) spoke about an

assault by accused Nos. 1, 2, & 3.

(b) That the sequence of the assault was also different. That while (PW 8) talked about accused No. 1 first assaulting the deceased Satish and later

assaulting Bhaskar (PW 8) on his back, the other 2 witnesses talked about accused No. 1 first assaulting Bhaskar (PW 8) on his back and

subsequently assaulting deceased Satish with a knife on his back.

7. In our view, the discrepancies which are pointed out to us would by themselves be insufficient to dis-carded the entire evidence of these 3

prosecution eye witnesses. It is not in dispute that the entire incident took hardly 4 to 5 minutes and it is possible that Bhaskar (PW 8) may not

have seen everything or may have made a mistake relating to the sequence of events. It is true that Bhausahab (PW 9) and Sunil (PW 10) had

made an attempt to involve accused No. 3 though Bhaskar (PW 8) does not state about the presence of accused No. 3 nor does he attribute any

overact to accused No 3. However, accused No. 3 has been given the benefit of doubt in view of such discrepancies in the evidence. We do not

feel that the evidence of these eye witnesses should therefore, be dis-carded in its entirety .

8. It was then argued by the learned Advocate for the accused that the witnesses were not telling the entire truth and had distorted the motive as

well as genesis of the incident. Our notice was brought to the fact that accused No. 2 Gopinath had suffered a bleeding head injury which

according to the Advocate would only be consistent with the defence version. We have perused the evidence of Dr. Machhindra Tukaram

Sonalkar (PW 3) who had not only conducted the post mortem and examined Bhaskar (PW 8) but he had also examined accused No. 2

Gopinath. In so far as injury to accused No. 2 Gopinath is concerned, the nature of the injury was a CLW over the right parieto temporal region,

irregular in shape 7 x 1 cm. The said injury was simple in nature caused by a hard and blunt object. The doctor admitted that eight stitches were

required to be given on the head of accused No. 2 while suturing the said injury and that thereafter, he had bandaged the said injury. He further,

admitted that accused No. 2 was complaining of pain in both the eyes. It can be seen from the medical certificate itself that the accused was

complaining of pain in his eyes. From the aforesaid evidence it is clear that the 3 eye witnesses have omitted in their evidence to explain the head

injury caused to accused No. 2 Gopinath. It is clear from the evidence that accused No. 2 had suffered the injury during the said incident and the

injury suffered by him though simple, was on a vital part and one which required 8 stitches.

9. The fact that accused No. 2 Gopinath sustained an injury on his head during the incident coupled with the fact that none of the eye witnesses

state anything about causing of the said injury, caused us to look most carefully at the prosecution evidence in order to find out if there was any

material to indicate that a sudden fight has taken place. In this regard, we find that Bhausahab (PW 9) has stated in his evidence that there was

exchange of words between injured and deceased on one hand and accused Nos. 1 to 3 on the other hand, before accused Nos. 2 & 3 hurled

stones at Bhaskar and Satish. In his cross-examination he admitted that both the accused Nos. 1 & 3 on one hand and Bhaskar and deceased

Satish on the other hand started abusing each other. He admitted that they had exchanged such abuses for about 2 to 3 minutes before accused

Nos. 2 & 3 started hurling stones towards the deceased Satish and Bhaskar. Though he denied that Satish and Bhaskar also hurled stones in

return, the head injury suffered by Gopinath is eloquent testimony to the fact that some stones must have been hurled back. Sunil Oswal (PW 10)

in his Examination-in-chief itself stated that there was a scuffle between accused No. 1 and the injured Bhaskar, during which, Bhaskar fell down

after he received the injury by knife in his back. In his cross-examination, he denied the fact that when accused Nos. 1 & 3 started abusing

Bhaskar and Satish, in turn, they both also started abusing accused Nos. 1 to 3. This version given by this witness is contrary to the version given

by Bhausahab (PW 9).

10. In our view, the eye witnesses do not appear to be telling the truth relating to the genesis of the incident. The version given by the Complainant

about the motive also appears to be un-natural. It would not be safe to accept the version of the witnesses relating to the reasons and manner in

which the assault was commenced.

11. In our view, this is a case where the assault appears to have been committed without premeditation in a sudden fight in the heat of passion

upon a sudden quarrel. It cannot be lost sight of that the assault had taken place on the road near the house of Bhaskar (PW 8) and in this assault,

accused No. 2 did suffer an head injury, which though simple was on the vital part of the body and required eight stitches. As referred to here-in-

above, there is also some material to indicate that parties were abusing each other for some time prior to the assault and that there also scuffle

which preceded the actual assault. The fact that the manner in which accused No. 2 suffered injury, was sought to be suppressed by the 3 eye

witnesses is also important and a relevant factor in concluding that there was a sudden fight between the 2 groups.

12. Under the explanation to exception-4 of Section 300 of Indian Penal Code, it is immaterial in such cases as to which party caused

provocation. We have scrutinised the evidence to find out if the accused can be said to have taken undue advantage or acted in a cruel or unusual

manner. We find that it will be difficult to conclude so in view of the fact that only one serious injury has been caused to deceased Satish and

injured Bhaskar. In so far as injury to Bhaskar (PW 8) is concerned, the depth of the injury was not given in the medical certificate. It was also not

mentioned in the medical certificate as to whether this injury was grievous. In so far as injury to the deceased in concerned, though the single injury

on his body is grievous, the doctor has opined and has admitted in his cross-examination that only the surface of the lung was cut. Be that as it

may, even if there is no clear evidence to show intention to cause death yet it must be held that act could only be said to have been done with the

knowledge that it was likely to cause death.

13. Taking in over all view of the evidence on record, in our view, accused No. 1 has committed the offence of "Culpable homicide not amounting

to murder" punishable u/s 304 part-II of the Indian Penal Code. In relation to the injury which he has caused to Bhaskar (PW 8) he has committed

offence punishable u/s 324 of Indian Penal Code.

14. In so far as accused No.2 is concerned, since the conviction has been turned to one u/s 304 part-II of Indian Penal Code, and in view of our

conclusion that the evidence relating to intention to cause death was doubtful, we do not think that it will be proper to convict him with the aid of

Section 34 of Indian Penal Code. There is no direct overt act which is attributed to accused No. 2 except to say that he threw a stone, we find no

corroborative evidence of injury and therefore, accused No. 2 will have to be acquitted.

15. In consequence, the order convicting the accused and sentencing them as passed by the Sessions Judge, Pune is set aside and the following

order is passed in place thereof :-

ORDER

(A) That appellant No. 2 i.e. original accused No. 2 is acquitted of all charges.

(B) That appellant No. 1 i.e. original accused No. 1 is held guilty of committing an offence punishable u/s 304 part-II of Indian Penal Code and

section 324 of Indian Penal Code. For the offence u/s 304 part-II, he is sentenced to suffer rigorous imprisonment for a period of 2 years and to

pay fine of Rs. 10,000/- in default, to undergo further rigorous imprisonment for a period for six months. For the offence u/s 324, he is sentenced

to suffer rigorous imprisonment for a period of one year and to pay a fine of Rs. 5,000/-, in default, to suffer rigorous imprisonment for a period of

three months. Of the fine, an amount of Rs. 15,000/- will be paid to the nearest legal representative of the deceased Satish.

(C) Both these sentences are to run concurrently. Accused No. 1 would be entitled to set of u/s 428 of Criminal Procedure Code and he will

surrender forthwith to under-go his sentences. The bail bonds of accused stand cancelled. The Appeal stands partly allowed in the aforesaid terms.