

(2011) 03 BOM CK 0255

Bombay High Court (Aurangabad Bench)

Case No: Criminal Appeal No. 237 of 1999

Prakash

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision: March 7, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313, 317(2), 360
- Penal Code, 1860 (IPC) - Section 34, 394

Citation: (2011) 2 Crimes 33

Hon'ble Judges: S.S. Shinde, J

Bench: Single Bench

Advocate: G.V. Wani, for the Appellant; V.D. Rakh, Assistant Public Prosecutor, for the Respondent

Judgement

S.S. Shinde, J.

The appeal is filed by the Appellant accused, challenging the judgment and order dated 26031999 passed by the learned IVth Additional Sessions Judge, Jalgaon in Sessions Case No. 131 of 1992.

2. Brief facts of the prosecution case are as under:

Complainant Nitin (P.W.1) resides with his father Badrinarayan (P.W.2) at Parekh Park area of Jalgaon. In the night between 18th and 19th September, 1990, at about 300 a.m. their bell rang. However, they did not open the door. Thereafter, half an hour again the door bail rang. They suspected that there may be thieves. Both, the father and son, opened the rear door of the house, came out and went towards the entrance door. They saw three persons standing in the premises of their house in front of the door. Two persons fled. They caught the third. He was having a knife in his hand having covered his face with a cloth piece. At that time, he assaulted complainant Nitin with the knife on his head and caused him injuries. He also caused injury to little finger of left hand of Badrinarayan. They shouted for help. The

neighbourers gathered including Arun (P.W.3).

Police of Zilla Peth Police Station were informed by phone. Police Head Constable Kashinath who was on P.S.O. duty at the police station, directed Police Constable Bhaskar to visit the spot. Accordingly, he went there alongwith Police Constable Suklal, in a police jeep. The person apprehended (present accused) was brought to the police station.

Complainant Nitin and Badrinarayan also went there. The knife and cloth piece found with the accused, were produced at the police station and they were seized under panchnama (Exhibit60) by Police Head Constable Kashinath. Both the injured persons were referred to Civil Hospital for medical examination and treatment. The Officer examined them. Badrinarayan was having contused lacerated wound on dorsal aspect of little finger of size 1/4" x 1/4" caused by sharp weapon. Complainant Nitin was having a contused lacerated wound on left side of occiput of size 1/4". subcuic deep. Certificates (Exhs.42 and 43)) were issued.

P.W. Nitin then lodged a complaint (Exh. 51) at the police station. On its basis C.R. No. 340/90 was registered. P.S.I. Liladhar (P.W.7) made investigation of the crime. He visited the spot and conducted spot panchnama (Ex.44). A bicycle brought by the accused persons at the spot belonging to Namrata Cycle Mart, Jalgaon and dagger thrown away by the thieves, who ran away were seized. The blood stained clothes of the injured persons were seized under panachnama (Exh.41). Statements of witnesses were recorded. The accused told his name as "Prakash Madhav Patil" but it was revealed that his name was Raju Sikandar Tadavi. After completion of the investigation, the charge sheet was filed against the accused and absconding accused Sanjay Jairam Jadhav in the Court of the Judicial Magistrate, First Class, Jalgaon.

Initially, the learned Magistrate, Smt. Chitra Deshpande, framed charge against the accused persons. However, when she found that the case was triable by the Sessions Court, it was committed to the Sessions Court. Accused Sanjay did not remain present in the Court and his presence could not be secured, though sufficient efforts were made for it. The case was separated u/s 317(2) of the Code of Criminal Procedure and the case proceeded against the accused. Charge (Exh. 39) was framed against him, to which he pleaded not guilty and claimed to be tried. His defence is of total denial. However, in the statement u/s 313 of the Code of Criminal Procedure he admitted his presence at the spot. But, according to him, he only accompanied the robbers to the spot, who caused injuries to the complainant and his father.

3. The prosecution examined complainant (P.W.1) at Exhibit50, his father Badrinarayan (P.W.2) at Exhibit52. Their neighbour Arun (P.W.3) is also examined by the prosecution at Exhibit 53. Panch witness Supadu (P.W.4)(Exh.54), Police Constable Bhaskar (P.W.5) (Exh.57), Police Head Constable (P.W.6) (Exh.59) and the

Investigating Officer Liladhar (P.W.7) (Exh.61) are the other witnesses.

Panchnama of seizure of clothes (Exh.41), injury certificate of Badrinarayan (Exh.42) and injury certificate of Nitin (Exh.43), spot panchnama (Exh.44), extract of register of Namrata Cycle Mart, Jalgaon (Exh.58) are the documents admitted by the defendant complainant (P.W.1) at Exhibit 50, his father Badrinarayan (P.W.2) at Exhibit 52. Their neighbour Arun (P.W.3) is also examined by the prosecution at Exhibit 53. Panch witness Supadu (P.W.4)(Exh.54), Police Constable Bhaskar (P.W.5) (Exh.57), Police Head Constable (P.W.6) (Exh.59) and the Investigating Officer Liladhar (P.W.7) (Exh.61)ce. Complaint (Exh.51) panchnama of seizure of knife and cloth piece (Exh.60) are proved by the prosecution. No witness has been examined by the defence.

4. After hearing learned A.P.P. and learned defence Counsel and after framing points and recording the evidence, learned IVth Additional Sessions Judge, Jalgaon convicted the Appellant accused for the offence punishable u/s 394 read with Section 34 of the Indian Penal Code and he is sentenced to suffer Rigorous Imprisonment for three years, and to pay fine of Rs. 500/, in default, the accused to suffer rigorous imprisonment for six months. Hence, this appeal challenging the judgment and order dated 26031999 passed by the IVth Additional Sessions Judge, Jalgaon in Sessions Case No. 131 of 1992.

5. Learned Counsel for the Appellant submitted that, the present appeal is filed on the following grounds.

(1) There is no cogent, consistent and legal reasoning assigned while passing the order of conviction.

(2) The Sessions Judge ought to have seen that, the knife which has been alleged to be used by the present Appellant is recovered from the complainant which raises doubt about its genuineness.

(3) The Learned Lower Court ought to have seen that, there is considerably delay in lodging the F.I.R. which has not been considered at all.

(4) The Sessions Judge has not considered at all the vital point that the articles which were seized at the spot i.e. the knife has not been sealed and no panchnama is drawn which goes to the route of the matter.

(5) The learned Lower Court has not considered the vital aspect that the complainant himself was not sure about the identity of the accused which should have been good ground of acquittal.

(6) The learned Lower Court ought to have seen that, even the alleged eye witnesses have not been able to identify the accused who was present in the Court.

(7) The whole approach of the learned Lower Court was from the wrong angle, which has been resulted in injustice towards this present Appellant.

(8). The learned Lower Court ought to have acquitted the Appellant of all the charges levelled against him.

(9) The order passed below is otherwise bad in law.

6. Learned Counsel for the Appellant further submitted that, the prosecution should have conducted identification parade, however, same has not been done. Learned Counsel further submitted that, since the alleged offence had taken place as back as in 1990. After conviction of the Appellant by the trial Court, this Court enlarged the Appellant on bail and since then, he is enjoying the bail. He further submitted that, the Appellant accused has four daughters and two sons to look after, apart from his wife and old mother. Counsel also tendered affidavit of the Appellant accused across the bar which is taken on record. Relying on the said affidavit, learned Counsel would submit that, if this Court confirms the judgment and order of the Sessions Court, in that case, this Court may consider the case of the Appellant herein, in the light of Section 360 of the Code of Criminal Procedure.

7. On the other hand, learned A.P.P. relying on the reasons and findings recorded by the trial Court and also evidence brought on record by the prosecution, would submit that the accused Appellant does not deserve to be acquitted since he was caught hold on the spot by the complainant and his father. Knife recovered from him. Therefore, there is clinching evidence and hence, this Court may dismiss the appeal.

8. I have given due consideration to the submissions of the learned Counsel for the respective parties and perused the impugned judgment and original Record and Proceedings received from the trial Court.

The prosecution, in all examined seven witnesses, complainant (P.W.1) at Exhibit50, his father Badrinarayan (P.W.2) at Exhibit52, their neighbour Arun (P.W.3) at Exhibit53, Panch witness Supadu (P.W.4) at Exh.54, Police Constable Bhaskar (P.W.5) at Exh.57, Police Head Constable (P.W.6) at Exh.59 and the Investigating Officer Liladhar (P.W.7) at Exh.61.

9. It is not necessary to reproduce the entire evidence of P.W. No. 1 Nitin and P.W. 2 Badrinarayan, since the trial Court has dealt with, in detail and therefore, I feel it appropriate to refer the evidence of P.W. Nos. 1 and 2 in brief. P.W. No. 1 Nitin and P.W. No. 2 Badrinarayan, both stated that in the night of the incident, they were in sleep at their house at Parik Park, Jalgaon. At about 300 a.m. the door bail rang and after some time, it ran again. Suspecting that there may be thieves, instead of opening the entrance door, they opened back door and went out and saw three persons outside the house in the court yard. On seeing them, two of them ran away while the third, who had covered his face with cloth piece was caught by them. There was knife with him and he assaulted Nitin on his head with the same knife. Badrinarayan intervened, and at that time, he received injury to the left little finger by the knife. They apprehended him and raised shout. Neighbours gathered on the

spot including P.W. Arun. Witnesses specifically stated that the accused before the Court was the same person apprehended by them. Information was given to police of Zilla Peth Police Station by phone and the police arrived on the spot and the accused was taken to the police station in a jeep.

Witnesses have further stated bicycle and a dagger were left on the spot by the associates of the present Appellant accused. It has come on record from their evidence that, the cloth piece and the knife used by the accused were produced before the police by complainant Nitin. Their evidence further shows that they were examined at Civil Hospital, Jalgaon in the morning. They have further stated that complaint (Exh. 51) was lodged by Nitin at the police station. But, P.W. 2 Badrinarayan made positive statement before the Court that, the person before the Court is the same accused, who was caught hold on the spot. The evidence of complainant before the Court and the contents of the complaint have corroborated and there is no any discrepancy, as such in the evidence of P.W. 1 before the Court and what he had stated in the complaint. There is also evidence of P.W.2 Badrinarayan which corroborates the evidence of P.W.1 Nitin. It is not in dispute that P.W. Nos. 1 and 2 sustained injuries. To that effect, the medical evidence is brought on record by the prosecution. The injuries sustained by P.W. Nos. 1 and 2 are brought on record by the prosecution by placing injury certificates, which are at Exhibits 42 and 43. Said documents are admitted by the defence. Knife is also recovered from the Appellant accused. Panchnama of recovery of knife and yellow coloured cloth piece is at Exhibit 50. P.W. 3 Arun stated that he is neighbour of the complainant and during that night, he heard shouts and then went towards spot. According to him, thief was caught by the complainant and his father. He also stated that both of them were having injuries.

10. Police Head Constable Kashinath P.W. 6 stated that in the night of incident, he was Station diary in charge of Zilla Peth Station, Jalgaon. He received phone call from the complainant at about 330 a.m. about catching thief at the complainant's house and accordingly, P.W. 6 directed Police constables Bhaskar and Suklal to go to the spot to bring the thief and accordingly, after some time, accused was produced at police station by those policemen. He has also stated that the complainant also came in the police station.

Another Police Constable Bhaskar, who was attached to Police Station, Zilla Peth, Jalgaon, has also supported the prosecution case. He stated that, in the night of the incident, he was at the police station and as per directions of the Police Head Constable Kashinath, he went to the house of the complainant with Police Constable Suklal. According to him, the accused was apprehended by the complainant party and he was taken to the police station. He also stated that the injuries were sustained by the complainant Nitin. His evidence also shows that the knife which was with the accused was produced at the police station by P.W. Nitin. This witness was not cross examined by the defence and therefore, the evidence of this witness

went unchallenged. There is also other evidence collected by the prosecution and ultimately, relying on the evidence brought on record by the prosecution, the trial Court convicted the accused Appellant for the offence punishable u/s 394 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 500/-. The trial Court, in detail dealt with other evidence including panchnama (Exhibit 41), which shows that the payjama of Badrinarayan and a half shirt of Nitin having blood stains were seized by the police.

The important aspect in this matter is that, the accused Appellant in his statement recorded u/s 313 of the Code of Criminal Procedure, has admitted his presence on the spot while replying Question No. 21 i.e. Do you want to say anything more about this case? and answered that, I had gone to the spot with my companion. Therefore, the accused himself admitted his presence on the spot and knife and cloth are recovered from him. P.W. Nos. 1 and 2 have sustained injuries. The prosecution has brought on record their injury certificates. The evidence of P.W. 3 Arun and Police Constable supports the prosecution case that P.W. Nos. 1 and 2 were injured because of the assault by the accused by knife. P.W. 2 Badrinarayan has identified the accused before the Court. Therefore, in the facts and the circumstances of this case, it has to be concluded that there is cogent, sufficient and clinching evidence brought on record by the prosecution, to sustain the conviction of the Appellant accused for the offence punishable u/s 394 of the Indian Penal Code. Therefore, the impugned judgment and order needs no interference and same stands confirmed. As a result, the appeal stands dismissed.

However, still the question remains whether the Appellant accused could be directed to undergo remaining part of sentence. The Appellant accused has filed affidavit on record stating therein that he is enlarged on bail. The alleged incident had taken place in the year 1990 in Jalgaon. He is 42 years old and earning his livelihood by doing sundry labour work. He is married 18 years back and have four daughters and two sons to be looked after apart from his wife and his old aged mother. He further stated in the affidavit that, except the Sessions case mentioned above, there had been no offence registered against him even before the said incident and till today. He further stated that, in fact, the alleged incident had first incident in his life and he is trying to support his family by doing labour work. He further stated that, there is no other criminal case pending against him and he has no criminal antecedents and, therefore, lenient view may be taken and he may be given opportunity to improve his life and lead his life in a peaceful manner.

On perusal of the contents of the affidavit filed by the Appellant accused, I feel that the case of the accused Appellant can be considered under the provision of Section 360 of the Code of the Criminal Procedure. However, to ascertain whether the Appellant accused is involved in any other crime, he has been conducted under any other offence or his conduct after release is not worthy to entertain his prayer for release him on probation of good conduct, I feel it appropriate to direct the District

Probation Officer, District Jalgaon to make inquiry within five week from today on the aforesaid aspects and submit report to this Court within five weeks from today. Depending upon the report of the District Probation Officer, this Court will consider the prayer of the Appellant accused to take lenient view and to release him on probation of good conduct. Till such report is received by this Court and this Court passes further order on the said report, the impugned judgment and order assailed in this appeal and further which is confirmed by this Court, may not be acted upon till then.