

KHASHABA MARUTI SHELKE

v.

STATE OF MAHARASHTRA

July 23, 1973

[P. JAGANMOHAN REDDY AND H. R. KHANNA, JJ.]

Indian Penal Code—S. 302 read with ss. 307, 333 and 332 and ss. 3, 4(b), 5 of the Explosive Substances Act, and ss. 25, 27 of the Arms Act—Conviction on circumstantial evidence—When conclusive.

The appellant was convicted by the Sessions Judge for offences under s. 302 I.P.C. on two counts for causing the death of a Head Constable and another and sentenced to death on each count. The appellant was further convicted under s. 307 I.P.C. for attempt to murder a P.S.I. and was sentenced to undergo rigorous imprisonment for a period of 7 years. He was also convicted under ss. 333, 332 I.P.C. and ss. 25 and 27 of the Arms Act and ss. 3, 4(b) and 5 of the Explosive Substances Act and separate sentences were passed. On appeal and reference to the High Court, the judgment of the learned Sessions Judge was affirmed. The High Court maintained the conviction of the appellant relying upon circumstantial evidence.

The appellant came before this Court by special leave.

The prosecution case was that a hand-grenade was exploded in the house of one A when the police party headed by a Sub-Inspector arrived there with a view to apprehend the appellant and as a result of the explosion two persons, including a Head Constable, received fatal injuries and other police officials received serious injuries. The question was whether the appellant possessed the hand-grenade in question and exploded the same, as a result of which, injuries were caused to the two deceased persons and the different police officials.

Allowing the appeal,

HELD : (i) The case against the appellant had not been proved by the prosecution beyond all reasonable doubt and the conviction of the accused, therefore, must be set aside.

(ii) There is no direct evidence as to the fact that the appellant was carrying a hand-grenade or that he exploded the hand-grenade. The circumstances relied upon by the High Court in convicting the appellant do not singly or cumulatively show that it was the appellant who exploded the hand-grenade. From the evidence, there is nothing to rule out the possibility of the hand-grenade having been exploded not by the appellant but by one of his companions. There is no direct evidence as to who exploded the hand-grenade.

(iii) Further, in the F.I.R. there was no mention of a hand-grenade. All that was mentioned in the said report was that there was firing from inside; but the medical evidence revealed that there was no bullet injury on any of the injured persons.

(iv) In order to base the conviction of an accused on circumstantial evidence, the Court must be certain that the circumstantial evidence is of such a character as is consistent only with the guilt of the accused. The circumstances must show that within all reasonable probability, the impugned act must have been done by the accused. If two inferences are possible from the circumstantial evidence—one pointing to the guilt of the accused and the other, also plausible, that the commission of the crime was the act of someone else—the circumstantial evidence would not warrant the conviction of the accused. [273D]

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 223 of 1972.

Appeal by special leave from the judgment and order dated February 10 & 11, 1972 of the Bombay High Court at Bombay in Cr. A. No. 1416 of 1971.

B *M. L. Srivastava*, for the appellant.

H. R. Khanna and *S. P. Nayar*, for the respondent.

The Judgment of the Court was delivered by

C KHANNA, J.—Khashaba Maruti Shelke (33) along with eight others was tried in the court of Sessions Judge Sangli for offences under section 302/34, 307/34, 324/34 and 333/34 Indian Penal Code, section 25 of Arms Act read with section 34 Indian Penal Code, section 27 Arms Act read with section 34 Indian Penal Code, section 3 Explosive Substances Act read with section 34 Indian Penal Code, section 4 Explosive Substances Act read with section 34 Indian Penal Code, section 5 Explosive Substances Act read with section 34 Indian Penal Code and section 6 Explosive Substances Act read with section 34 Indian Penal Code. In the alternative, there were charges against the accused for the above offences read with section 149 Indian Penal Code. Learned Sessions Judge acquitted the other eight accused and convicted the appellant for offences under section 302 Indian Penal Code on two counts for causing the death of Head Constable Yesade (45) and Smt. Balkabai (70) and sentenced him to death on each count. The appellant was further convicted under section 307 Indian Penal Code for attempt to murder PSI Mardur and was sentenced to undergo rigorous imprisonment for a period of seven years. The appellant was also convicted under section 333 Indian Penal Code for causing injuries to police constable Madane and was sentenced to undergo rigorous imprisonment for a period of three years. Conviction was also recorded against the appellant under section 332 Indian Penal Code for causing injuries to police constable Huza'e, Havaladar Savant and More and he was sentenced to undergo rigorous imprisonment for a period of two years on that count. The appellant was convicted under sections 25 and 27 of the Arms Act and was sentenced to undergo rigorous imprisonment for a period of one year on each count. Conviction was also recorded against the appellant under sections 3 and 4(b) of the Explosive Substances Act and he was sentenced to undergo imprisonment for life on each count. In addition to that, the appellant was convicted under section 5 of the Explosive Substances Act and he was sentenced to undergo rigorous imprisonment for a period of three years. The sentences of imprisonment, if necessary, were ordered to run concurrently with the sentence imposed upon the appellant in another case under section 307 Indian Penal Code. On appeal and reference to the High Court, the judgment of the learned Sessions Judge was affirmed. The appellant thereafter has come up in appeal to this Court by special leave.

H The prosecution case is that the appellant was wanted in two murder cases of 1962 and 1966 but he could not be apprehended as he was absconding from 1962. From March 1967 to May 1971 Sub

Inspector Ramchandra Mardur (PW 58) was posted in Sangli District and his main duty was to trace the absconding accused and to detect the offenders involved in property offences.

On July 24, 1970, it is stated, an informant informed Sub Inspector Kumbhar of police station Radhanagari in Kolhapur District that the appellant, who is a resident of village Kameri, was present in village Kavathe-Piran in District Sangli. Kavathe-Piran is seven miles from Sangli. Sub Inspector Kumbhar thereupon left for Sangli to inform the Superintendent of Police. On July 25 Head Constable Naik (PW 18) of Police station Radhanagari along with three others went to village Kavathe-Piran and met the informant there. They concealed themselves inside a house and through the chinks of a door saw the appellant going on the road. The appellant was then carrying a gun and a bandolier containing cartridges. Head Constable Naik and others thereafter went to Sangli and informed Superintendent of Police Krishnan about the whereabouts of the appellant.

On July 26, 1970 Sub Inspector Mardur was directed by Superintendent of Police Krishnan to arrange a raid party for the apprehension of the appellant. A party of 30 armed constables along with a tear gas squad of three constables then went to the outskirts of village Kavathe-Piran and reached there at 9 p.m. At about 10 p.m. the members of the police party were informed that the appellant had fired at Jaising Patil (PW 21) of village Kavathe-Piran at the latter's house and thereafter had run away. Superintendent of Police Krishnan then split the police party into three groups. Two groups were sent in other directions, while the third group headed by Sub Inspector Mardur proceeded towards the house of Ananda in village Kavathe-Piran. Ananda too was arraigned as an accused at the trial along with the appellant but was acquitted. The group headed by Sub Inspector Mardur contained Head Constables Yesade deceased, Naik (PW 18) and Lavate (PW 55) and 10 police constables, including Madane (PW 30), Huzare (PW 29), Savant (PW 47), Havaladar (PW 44) and Pimpri (PW 45). Head Constable Lavate was directed to keep a watch on the back door of Ananda's house. Sub Inspector Mardur went to the cattle shed of the house of Ananda and called out Ananda. Ananda came out and soon thereafter the door of the house was closed from inside. On Sub Inspector Mardur's enquiry, Ananda replied that his mother only was inside the house. Sub Inspector Mardur, however, heard some foot-steps and a whispering sound from inside. This aroused the suspicion of Sub Inspector Mardur. He accordingly after alerting the other members of the police party kicked open the door. As soon as the door was opened Sub Inspector Mardur heard the sound of firing from inside the house. It was dark inside. The Sub Inspector had a torch in his left hand and he flashed it while holding a revolver in the right hand. Head Constable Yesade then entered a room of the house. Sub Inspector Mardur was following Head Constable Yesade when there was an explosion and the Sub Inspector saw huge flames. The Sub Inspector felt that he had been injured. He accordingly returned to the cattle shed and asked the police party to fire. The members of the police party then fired two

A rounds into the house. The Sub Inspector also heard reports of firing from inside. Blood then started coming out of the injuries of Sub Inspector Mardur and he also felt giddy. The Sub Inspector then came out of the house and took shelter behind a wall. As the Sub Inspector was seriously injured, he directed the members of the party to stop firing and to watch if some one came out of the house of

B Ananda. During the course of this occurrence, Head Constable Lavate, who had been posted on the backside of the house, saw one man emerging out of the house from the back door. Head Constable Lavate directed a police constable to fire at that man, but that man escaped without being hit. Another man thereafter emerged from the back door of Ananda's house and escaped. Superintendent of

C Police Krishnan then arrived at the house of Ananda and took steps to send Sub Inspector Mardur to the hospital for medical treatment. The police constables, who too were injured, were also sent along with Sub Inspector Mardur.

Under the directions of Superintendent of Police Krishnan tear-gas shells were burst out inside the house of Ananda for flushing out inmates. Ananda and one other person then came out of the house. Superintendent of Police then entered Ananda's house and saw Head

D Constable Yesade lying injured in a small room adjoining the cattle shed of the house. Yesade was brought out for medical treatment but he breathed his last in a short while. Balkabai, mother of Ananda accused, was also found lying dead in a room of the house. On the following morning at about 9 a.m. Head Constable Naik made report Ex. 52 at the police station regarding the present occurrence.

E On the night of occurrence Appa Kesre (PW 23) was present in his house. Appa Kesre's house is at a distance of two houses from that of Ananda in village Kavathe-Piran. At about 11 or 11.30 p.m. Appa Kesre heard some tumult and got up. After the tumult had subsided, Appa Kesre saw the appellant and Ramchandra who too was an accused in the case, come inside the house of Appa Kesre. The appellant on arrival disclosed his identity and told Appa Kesre

F not to make noise. The appellant and Ramchandra thereafter concealed themselves inside the house of Appa Kesre. On the following morning Appa Kesre went out to ease himself. His wife also went out from the house. Enquiries were made by the police from Appa Kesre regarding the whereabouts of the appellant but when Appa Kesre pleaded ignorance, he was detained. The appellant and Ramchandra were later apprehended from the house of Appa Kesre at about

G 1.30 p.m. The appellant was found to have abrasions on his person and his underwear had stains of blood. The underwear was taken into possession. Sub Inspector Sadashiv (PW 64), who investigated this case, found that some tiles of the roof of the central room of Ananda's house had been removed in the south-east corner. A 303 rifle Ex. article 9 was found dangling in the roof. Its butt was broken. Three empty cartridges were also found in the room. An iron pin

H too was seen lying in one of the rooms.

The house of Ananda was examined by Senior Inspector of Explosives Birendranath De (PW 53) on July 30. The Senior Inspector

of Explosives took into possession the various articles lying there and came to the conclusion that a handgrenade had been exploded there. The handgrenade was of service origin and was of fragmentation type used by service people only. It had been manufactured in 1964.

Post mortem examination of the dead bodies of Head Constable Yesade and Balkabai was performed by Dr. Govind Jathar (PW 48) on July 27, 1970. Balkabai was found to have 12 lacerated wounds besides a large number of abrasions on the various parts of her body. There was blackening at the site of the different injuries. The injuries, in the opinion of the doctor, could have been caused by material flying as a result of the explosion of a hand-grenade. Yesade had three lacerated wounds besides a large number of abrasions. The doctor extracted one metal piece from the cavity of the chest of Yesade. Aorta of Yesade was found to have been punctured. The injuries of Yesade could be caused by hard and blunt substance flying with velocity. There was no bullet injury on the bodies of Balkabai and Yesade.

Dr. Chokakakar (PW 52) examined the injuries of Sub Inspector Mardur as well as those of police constables Madane, Huzare, Savant, Havaladar and More. Those injuries, in the opinion of the doctor, were the result of an explosion. Five of the injuries of Sub Inspector Mardur were found to be dangerous to life. The appellant and Ananda accused were also examined by Dr. Chokakakar. The appellant had seven abrasions on the different parts of his body. The above injuries could be caused by a hard and blunt substance. Ananda had four punctured wounds which could be caused by splinters in an explosion.

At the trial the plea of the appellant was denial *simpliciter*. According to the appellant, he had left his village because he was afraid of one Shankar Bhima Patil. Shankar Bhima Patil was stated to be a relation of an accused in a murder case and the father of the appellant had appeared as a prosecution witness against that accused. As regards the injuries on his person, the appellant stated that he was apprehended by the police in a field at about noon time on July 27, 1970. It was stated that the injuries on the person of the appellant had been received by him during the course of grappling with the police officials. No evidence was produced in defence.

The trial court convicted the appellant as mentioned above because it was of the view that the appellant had exploded the hand-grenade and had caused the different injuries. The High Court on appeal and reference substantially agreed with the trial court.

We have heard in appeal Mr. Srivastava on behalf of the appellant and Mr. Khanna on behalf of the State, and are of the view that the case has not been proved against the appellant beyond all reasonable doubt. The fact that a hand-grenade was exploded in the house of Ananda when the police party headed by Sub Inspector Mardur arrived there with a view to apprehend the appellant cannot be disputed. Likewise, it cannot be disputed that Yesade and Balkabai received fatal injuries and Sub Inspector Mardur and other police officials received serious injuries as a result of that explosion. The

A crucial question which arises for determination in the present case is whether the appellant possessed the hand-grenade in question and exploded the same, as a result of which injuries were caused to the two deceased persons and the different police officials. There is no direct evidence on this point as none of the witnesses has deposed about his having seen the appellant carrying a hand-grenade or about his having exploded the hand-grenade. The High Court in maintaining the conviction of the appellant has relied upon the following pieces of circumstantial evidence :

B (1) The fact that the appellant was absconding before the occurrence in two murder cases.

C (2) The fact that the appellant was seen carrying a gun and cartridges in village Kavathe-Piran by Head Constable Naik on July 25, 1970.

(3) The fact that the appellant fired at Jaising at 9 p.m. on July 26, 1970 in village Kavathe-Piran.

D (4) The fact that the appellant sought shelter in the house of Appa Kesre at about mid-night hour after the explosion of the hand-grenade.

(5) The fact that the appellant had abrasions on his person at the time of his arrest and his underwear was found to be stained with blood.

E In our opinion, the circumstances enumerated above taken singly or cumulatively do not go to show that it was the appellant who exploded the hand-grenade. It is in the evidence of Jaising (PW 21) that the appellant on the night of occurrence was accompanied by four other persons, namely, Ramchandra, Mane Shankar and Sadashiv. Out of them, Shankar and Sadashiv were strangers. Ramchandra and Mane were also charged for the various offences for which the appellant was charged, but they were acquitted. There is nothing to rule out the possibility of the hand-grenade having been exploded not by the appellant but by one of his companions. The fact that the appellant was an absconder in two earlier cases would not necessarily show that it was the appellant who exploded the hand-grenade and not one of his companions. For even if the appellant was interested in preventing his apprehension and might have for that object exploded the hand-grenade, it is equally possible that the explosion of the hand-grenade might have been the work of one of the companions of the appellant with a view to prevent the apprehension of the appellant and facilitate his escape. The presence of abrasions on the person of the appellant or of the blood-stains on his underwear would not also show that it was the appellant and not one of his companions who had exploded the hand-grenade. The further fact that the appellant and Ramchandra accused later sought shelter in the house of Appa Kesre would not also lead to the inference that it was the appellant and not one of his companions who had exploded the hand-grenade. Likewise, no inference can be drawn from the fact that the appellant had fired at Jaising earlier on that night, that the hand-grenade too was exploded by him.

Reference has been made by Mr. Khanna to the fact that Jallandar, brother of the appellant, was previously employed in the army and that Jallandar is untraceable since July 26, 1970 when the present occurrence took place. It is pointed out that the hand-grenade was of service origin. This circumstance, in our opinion, is far from showing that the appellant alone could be in possession of the hand-grenade and that it was he who exploded the same. If one was out to procure a service hand-grenade by illegal means, it was not necessary for one to have a brother in the army to secure such a hand-grenade. One might as well have obtained such a hand-grenade through other sources.

Reference has also been made by Mr. Khanna to police entry Ex. 139 and entry in crime handbook Ex. 162, according to which intelligence had been collected that the appellant carried a hand-grenade. The contents of these documents cannot be of much value as there is nothing to show that the person who made these entries had any direct knowledge of the possession of hand-grenades by the appellant. On the contrary, the entries show that the above information had been derived from some other persons. Those persons have not been examined as witnesses in the case. There is no substantive evidence of any one on the record that he had seen the appellant carrying a hand-grenade. The two documents referred to above, in our opinion, can be no substitute for the substantive evidence of witnesses on the point that the appellant had in his possession a hand-grenade.

The appellant was convicted on August 23, 1971 by Additional Sessions Judge Sangli for an offence under section 307 Indian Penal Code in connection with the incident relating to the firing at Jaising on the night of July 26, 1970. A sentence of rigorous imprisonment for a period of seven years was awarded to the appellant on that count. The appellant was also convicted for offences under sections 25 and 27 of the Arms Act in that connection and was sentenced to undergo rigorous imprisonment for a period of one year and three years for those offences. As the appellant has already been convicted for the offences under the Arms Act for being in possession of the rifle and the cartridges, he cannot be convicted again for being in possession of the same rifle and cartridges on that day. It also cannot be said that the appellant caused any injury with the rifle to the two deceased persons or the other police officials because no bullet injury was found on any one of them.

It may be mentioned that though the prosecution seeks the conviction of the appellant on the allegation that he exploded a hand-grenade, in the first information report relating to the present occurrence which was lodged by Head Constable Naik there is no reference to a hand-grenade much less to the explosion of a hand-grenade by the appellant, although there is a reference in it to the bursting of tear gas shells by the police party. It appears that the police party was taken by surprise when the hand-grenade exploded and no one realised as to what had happened and how the different persons had been injured. This apparently accounts for the fact that there is no mention

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A of the explosion of a hand-grenade or a bomb in the first information report lodged by Head Constable Naik. All that was mentioned in the said report was that there was firing from inside even though medical evidence reveals that there was no bullet injury on any of the injured persons.

B It is rather unfortunate that in a case like the present wherein two persons were killed and a number of others were injured, no direct evidence could be produced as to who had exploded the hand-grenade which caused the injuries to the deceased persons and other members of the police party. The difficulty in procuring the direct evidence can be traced to the fact that the police chose to arraign as accused the different inmates of Ananda's house. None of them could consequently be examined as a witness although those inmates **C** could be in a position to depose as to who had exploded the hand-grenade.

In order to base the conviction of an accused on circumstantial evidence the court must be certain that the circumstantial evidence is of such a character as is consistent only with the guilt of the accused. If, however, the circumstantial evidence admits of any other rational **D** explanations, in such an event an element of doubt would creep in and the accused must necessarily have the benefit thereof. The circumstances relied upon should be of a conclusive character and should exclude every hypothesis other than that of the guilt of the accused. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances must show that **E** within all reasonable probability the impugned act must have been done by the accused. If two inferences are possible from the circumstantial evidence, one pointing to the guilt of the accused, and the other, also plausible, that the commission of the crime was the act of someone else, the circumstantial evidence would not warrant the conviction of the accused. In case the circumstantial evidence relied upon by the High Court for maintaining the conviction of the accused **F** for an offence entailing capital punishment does not satisfy the above requirement, an interference would be called for by this Court.

It would be apparent from what has been discussed above that the circumstantial evidence relied upon by the prosecution in this case is not of such a character as can be held to be consistent only with the guilt of the appellant.

G We, therefore, accept the appeal, set aside the conviction of the appellant and acquit him.

S.C.

Appeal allowed.