

Musa Khan and Others

Vs

State of Maharashtra

Criminal Appeal No. 305 of 1971

(P.N. Bhagwati, V.R. Krishna Iyer, Syed M. Fazal Ali JJ)

11.10.1976

JUDGMENT

FAZAL ALI, J. –

1. This appeal by special leave is directed against the judgment of the Bombay High Court dated November 4/5, 1971 dismissing the appeal of the appellants and affirming the convictions and sentences passed on them by the Additional Sessions Judge, Aurangabad. The appellants were accused 4, 7, 8, 9, 11, 12, 20 and 22. The appellants were tried along with other accused persons by the Additional Sessions Judge, Aurangabad who convicted 14 out of 24 accused under various sections of the Indian Penal Code. The High Court acquitted six persons, namely, accused 15, 16, 17, 19, 21 and 24, but upheld the convictions of the appellants. The High Court refused to give a certificate for leave to appeal to this Court, and after obtaining special leave the appellants have filed the present appeal.

2. The appellants were convicted under Section 395 I.P.C. to rigorous imprisonment for two years and a fine of Rs. 100 each, under Section 323/149 to three months' rigorous imprisonment, under Sections 457/149 to one year's rigorous imprisonment, under Sections 435/149 I.P.C. to two years' rigorous imprisonment and a fine of Rs. 100 each, under Sections 457/149 I.P.C. to two years' rigorous imprisonment and under Section 147 I.P.C. to one years' rigorous imprisonment - all the sentences to run concurrently. For the purpose of brevity instead of naming the accused individually they will be referred to in this judgment as 'A' No. so and so. Appellant 1, Musa Khan is A-4, appellant 2 Sardar Khan is A-7, appellant 3 Jani is A-8, appellant 4 Mohd. Fasihuddin is A-9, appellant 5 Mohd. Iqbal is A-11, appellant 6 Abdul Hamid is A-12, appellant 7 Sabir Ali Khan is A-20 and appellant 8 Mohd. Azam Khan is A-22.

3. We might further state that so far as A-4 is concerned he is brother of A-11 and A-12. A-4 was aged about 20 years in 1968 when the occurrence is said to have taken place. A-7 was about 15 years on the date of occurrence and A-9 was about 20 years on the date of occurrence. But other accused were over 25 years of age. We have made a particular reference to this fact, because an important argument was advanced before us that even if the offences are held to have been proved against A-4, A-7 and A-9 this was a fit case in which they should have been proceeded under Sections 4 and 6 of the Probation of Offenders Act, 1958.

4. This is an unfortunate story of a band of ruffians who appear to have entered upon a rabid misadventure and a mischievous expedition by committing acts of vandalism and damage to the properties of rivals and enemies in order to wreck vengeance for boycotting of the National Hotel by the students. The background against which the present dramatic occurrence appears to have shot up

is that there is a National Hotel at Aurangabad which belongs to some of the appellants and which was patronised by the students of the local Engineering College. Some differences arose between the management of the hotel and the students as a result of which the students completely boycotted the National Hotel and transferred their patronage to Bharat Lodge run by PWs 1 and 16. As a result of this change in the attitude of the students the owners of the National Hotel nursed a serious grouse not only against the students but also against the Bharat Lodge which was being patronised by them as a result of which the main business of the National Hotel almost came to a standstill. The immediate provocation for the massive raid conducted by the appellants and others was an incident which happened on August 21, 1968 when some of the students of the Engineering College indulged in a small rioting and caused damage to the National Hotel, Paradise Hotel, cycle shop, a tailoring shop owned by A-16 and A-17 and a dispensary of Dr. Sayeed. The damage caused by the students was in the neighbourhood of Rs. 3000 to Rs. 4000. About two months later i.e. on October 20, 1968 an employee of the National Hotel sustained some injuries and was removed to the hospital in a rickshaw belonging to PW 6 Tukaram which was driven by PW 5 Mehboob. There was some dispute between Masood the employee of the National Hotel and the rikshaw puller regarding payment of dues. In the mean time some students of the Engineering College arrived at the scene and they brought pressure on A-11 Mohd. Iqbal the owner of the National Hotel to pay a reasonable fare as a result of which A-11 had to part with Rs. 10 in order to settle the dispute with the owner of the rikshaw. Encouraged by this short-lived success, the students of the Engineering College jeered at A-11 and passed ironical remarks on him. Thereafter the students went to Shivaji Hotel. Thereafter 20 to 25 persons assembled near the National Hotel and after constituting an unlawful mob these persons moved towards the Shivaji Hotel and A-8 rushed towards PW 10 Anand Muley but the other students who were sitting in the Shivaji Hotel fearing trouble at the hands of the mob ran towards their hostel, but were hotly chased by the mob which entered the hostel premises and caught hold of one of the students, and the mob further armed with stones, ironbars, brickbats, etc. caused damage to the hostel building, by pelting stones and also caused injuries to PW 11 Mangilal who was the watchman of the hostel. Not satisfied with this the mob consisting of several persons proceeded to Bharat Lodge which was owned by PW 1 Prakash and his father PW 16 Vishwanath. Having reached the Bharat Lodge the mob became violent and damaged the furniture, the glass panes and some of the members of the mob went to the extent of stealing away the cash box which was kept in the Lodge. Meanwhile P. S. I. Kakrambe PW 12 who had seen the mob moving towards the Engineering College and the Bharat Lodge rang up the D.S.P. and got the police to the spot. After looting the Bharat Lodge the mob went to a chawl belonging to PW 24 Jogendra Singh and set fire to some of its doors and other property including a scooter. In the meantime PW 1 Prakash and his father PW 16 Vishwanath went to the police station and reported the incident. F.I.R. Ext. 8 was prepared on the basis of the statement given by PW 1 Prakash before the police. In the rampage that had ensued, the mob succeeded in arresting one student Deshmukh of the Engineering College while the students succeeded in arresting A-1 and A-2. All these persons were, however, released when the police came to the spot. The police after usual investigation submitted a chargesheet as a result of which the accused were put up for trial before the learned Additional Sessions Judge and convicted and sentenced as indicated above.

5. The appellants pleaded innocence and averred that they had been falsely implicated due to enmity and had not participated in the riot. Both the courts below have accepted the main facts leading to the occurrence as also participation of the appellants in the rioting. The Additional Sessions Judge as also the High Court, however, do not appear to have made a correct approach in examining the individual cases of the accused, particularly with reference to their actual presence or participation in the incident in question. It is true that having regard to the background against which the events

took place all the incidents starting from the National Hotel and ending with the chawl of Jogendra Singh were parts of the same transaction, nevertheless they were separate incidents in which different members of the mob had participated. In these circumstances, therefore, without there being any direct evidence about the actual participation of the appellants in all the incidents it could not be inferred as a matter of law that once the appellants were members of the mob at the National Hotel they must be deemed to have participated in all the other incidents at the Engineering College Hostel, Bharat Lodge and the chawl of Jogendra Singh. It is well settled that a mere innocent presence in an assembly of persons, as for example a bystander, does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused shared the common object of the assembly. Thus a court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages. Such an evidence is wholly lacking in this case where the evidence merely shows that some of the accused were members of the unlawful assembly at one particular stage but not at another. In these circumstances, therefore, the accused who were not present or who did not share the common object of the unlawful assembly at other cannot be convicted for the activities of the assembly at those stages. In view of this error committed by the High Court it has become necessary for us to examine the evidence on the limited question as to which of the accused had actually participated in the incidents at the Engineering College, Bharat Lodge and the chawl of Jogendra Singh where acts of incendiarism had taken place. It is also common ground that the occurrence had taken place at night and the evidence of the witnesses identifying the accused had to be examined with great caution.

6. Without, therefore, going into any further detail, we proceed now to examine the evidence against each individual accused to find out to what extent he is liable. To begin with, we might add as a preface that so far as the incident which took place in the Bharat Lodge is concerned some of the members of the mob had allegedly committed a dacoity which was the most serious offence alleged against them. The evidence of PW 16 Vishwanath one of the owners of the Bharat Lodge, however, shows that the mob attacking the Bharat Lodge consisted of three distinct parts - one part standing on the road, the other part indulging in mischief and damage of the property of the Lodge and the third part was merely concerned with the looting of the cash box. In this connection PW 16 deposed as follows :

The persons in the mob were armed with iron bar, sticks, bricks. Some persons in the mob were breaking the show cases in the Lodge, some persons in the mob were trying to take the counter to the road. Accused No. 11 Iqbal, accused No. 22 Azam Miya, accused No. 7 Sardar Khan, accused No. 20 Shabir were armed with sticks and iron bars and they were breaking the glass panes of the show cases. The same persons were taking out the counter. They took the counter to the road.

It would appear from the evidence of this witness that out of the mob the only persons who had actually participated in removing the cash box and committed dacoity were A-11 Mohd. Iqbal, A-7 Sardar Khan, A-20 Sabar Ali and A-22 Mohd. Azam. This admission of the witness, therefore, completely excludes the possibility of any other appellant having taken part in this separate incident of dacoity. It is not uncommon that an unruly crowd on the rampage may contain some miscreants

who may go beyond the common object and commit ad hoc crimes graver than the mob had as its objective. As, however, the number of persons who took part in the alleged dacoity were only four, it is obvious that the charge under Section 395 I.P.C. must fail, and even if the accused are proved to have taken part in removing the cash box, they will be guilty only of an offence under Section 392 I.P.C.

7. Taking A-4 we find that he was a young man of 20 years in 1968 when occurrence took place and he is the brother of A-11 and A-12. The only evidence of his participation in the incident at the Bharat Lodge consists of PW 1 Prakash and PW 16 Vishwanath. So far as PW 16 is concerned his evidence has been rejected as he was not able to identify the appellant at a test identification parade. Further more, in view of the evidence of PW 16 extracted above, it would appear that he does not mention A-4 as one of the persons who had taken part in removing the cash box from the counter. In these circumstances, therefore, A-4 can only be convicted at the most under Sections 149/425 I.P.C. As this appellant does not appear to have taken any part either in the raid which was made at the Engineering College hostel or at the chawl he can only be responsible for the mischief which was caused at the Bharat Lodge. As his conviction under Sections 395/149 fails, the appellant can only be convicted under Sections 149/425 I.P.C. The other convictions and sentences recorded against him are set aside. As, however, the appellant was a boy of 20 years, his case clearly falls within the purview of the Probation of Offenders Act, 1958. The Probation of Offenders Act is a social legislation which is meant to reform juvenile offenders so as to prevent them from becoming hardened criminals by providing an educative and reformatory treatment to them by the Government. Unfortunately, though the provisions of Section 6 of the Probation of Offenders Act are mandatory, the Courts do not appear to make wise use of these provisions which is necessary to protect our younger generation from becoming professional criminals and, therefore, a menace to the society. It may be that the appellant A-4 was not dealt with under the provisions of Section 6 of the Probation of Offenders Act because of the charge under Section 395 I.P.C. but that charge having failed, there is no impediment now in his being dealt with under the provisions of Section 6 of the Probation of Offenders Act. In these circumstances, therefore, we would set aside the convictions and sentences imposed on A-4 Musa Khan and direct that he be released on his entering into a bond with two sureties of Rs. 500 each for a period of one year in order to keep the peace and be of good behaviour. The appellant will report to the Probation Officer appointed within the jurisdiction of the place where he resides.

8. A-7 Sardar Khan was even younger than A-4 and was only 15 years on the date of occurrence. He has been identified by PWs 1, 10 and 16. PW 10 Anand Muley has identified him as being present at Shivaji Hotel, but as no incident of violence took place there A-7 could not be guilty of any criminal act there. As regards his presence at the Bharat Lodge is concerned, A-7 has been identified by PWs 1 and 16 as being a member of the mob there. In view of the evidence of PW 16 Vishwanath as extracted above and having regard to the fact that no overt act has been attributed against him, nor has it been alleged that he took part in stealing away of the cash box the charge under Sections 149/495 I.P.C. fails and he can at most be convicted under Sections 149/425 I.P.C. and Section 147 I.P.C. As both these offences are not punishable with rigorous imprisonment for life, the provisions of Section 6 of the Probation of Offenders Act will undoubtedly apply and like A-4 the appellant will also have to be dealt with under that section. We therefore set aside all convictions and sentences imposed on A-7 Sardar Khan and direct that he be released on his entering into a bond with two sureties of Rs. 500 each for a period of one year in order to keep the peace and be of good behaviour. The appellant will report to the Probation Officer appointed within the jurisdiction of the place where he resides.

9. A-8 Jani has been identified by PWs 1, 7, 8, 10 and PW 22 Waman Rao. The High Court has rejected the evidence regarding identification of this accused, by PW 1 Prakash and PW 22 Wamanrao. So far as the evidence of PW 7 Hardayal Singh is concerned he merely proves the presence of A-8 at the National Hotel. The mob appears to have emerged from the National Hotel and the first act of vandalism which started was in the Engineering College Hostel and nothing happened in the National Hotel. The mere fact that the appellant was present in the mob which emerged from the National Hotel cannot lead to the logical conclusion that he must have been present even at the Engineering College hostel, unless his presence at the hostel was proved as a separate and independent fact. So far as PWs 1, 8 and 10 are concerned they have only proved the presence of this appellant at the Shivaji Hotel but as no act of violence or mischief took place in that hotel, the presence of the appellant was innocuous and he cannot be held to be guilty of any offence. For these reasons, therefore, we are clearly of the opinion that the evidence does not at all connect the appellant with any unlawful act committed by him, nor can he be said to be member of an assembly which became unlawful at any stage. For these reasons the appellant A-8 Jani is entitled to an acquittal of all the charges framed against him.

10. A-9 Mohd. Fasihuddin who was only 20 years of age at the time of occurrence was identified only by two witnesses, namely, PW 1 Prakash and PW 22 Wamanrao. The Court below have, however, disbelieved PW 22 Wamanrao and so we are left with only uncorroborated testimony of PW 1 Prakash. The case of this appellant is also similar to that of A-4 Musa Khan inasmuch as he also had not taken any part in removal of the cash box from the counter. The only overt act alleged against him is that he had hit Krishnamurthi with a crow bar as a result of which Krishnamurthi sustained a simple injury. He has thus committed offences under Sections 147 and 323 I.P.C. and his case falls within the protection afforded by Section 6 of the Probation of Offenders Act. For these reasons, therefore, the convictions and sentences imposed on this appellant are set aside and he is directed to be released on his entering into a bond two sureties of Rs. 500 each for a period of one year in order to keep the peace and be of good behaviour. The appellant will report to the Probation Officer appointed within the jurisdiction of the place where he stays.

11. A-11 Mohd. Iqbal has been identified by PWs 7 and 10 as being a member of the mob which visited the Shivaji Hotel. As, however, nothing happened in that hotel the evidence of these two witnesses does not incriminate the accused. PW 1 Prakash and PW 16 Vishwanath undoubtedly prove his presence in the mob which raided the Bharat Lodge. The evidence of PWs 1 and 16 unmistakably proves that he is one of the accused who had actually participated in stealing away the cash box from the Lodge. In those circumstances, therefore, the convictions and sentences imposed on this accused are altered from those under Sections 149/395 I.P.C. to that under Section 392 I.P.C. and his sentence is reduced to one year's rigorous imprisonment under Section 392 I.P.C. There is no doubt that he was a member of the mob which indulged in damaging and doing mischief at the Bharat Lodge and, therefore, he must be held guilty of an offence under Sections 147 and 149/425 I.P.C. so far as that matter is concerned. PW 12 Kakrambe has further proved that this appellant was one of the persons present in the mob which started from the Engineering College hostel and went to the Bharat Lodge.

12. A-12 Abdul Hamid has been identified by PWs 1, 16, 7, 10 and 12. Pws 1 and 16 clearly proved his presence in the mob which attacked the Bharat Lodge and the appellant was also armed with an iron bar. PW 7 Hardyal Singh proves his presence at the National Hotel while PW 10 proves his presence at the Shivaji Hotel, where no violence ever took place. Their evidence, therefore, does not at all implicate this accused. The evidence of PWs 1 and 16 is, however, corroborated by PW 12 Kakrambe who is a police officer and, therefore, an independent witness who deposes that he had

seen the appellant in the mob while it was coming from the Engineering College and proceeding to Bharat Lodge. In fact in view of the conversation which took place between this appellant and Kakrambe as deposed to by PW 12 it is clear that this appellant must have taken part in the incident at the Engineering College hostel also. As, however, the allegation that he took part in stealing away the cash box has not been proved he is acquitted of the charge under Sections 149/395 I.P.C. and cannot also be convicted under Section 392 I.P.C. His conviction, therefore, under Sections 149/427 is upheld but his sentence is reduced to three months rigorous imprisonment. His conviction under Section 147 is maintained and the sentence passed under that section is also reduced to three months rigorous imprisonment. Both the sentences are ordered to run concurrently.

13. So far as A-20 Saber Ali Khan and A-22 Mohd. Azam Khan are concerned they have been expressly named by PWs 1 and 16 as being members of the mob which attacked the Bharat Lodge and which actually participated in stealing away the cash box. Both these accused had attacked the counter along with two others and had forcibly removed the cash box containing few hundred rupees and, therefore, they cannot escape conviction under Section 392 I.P.C. even if the charge under Sections 149/395 fails. We might like to mention that it was not at all necessary for the learned Additional Sessions Judge to have framed a charge under Sections 149/395 I.P.C. because an offence under Section 395 I.P.C. comes into existence only when an act of dacoity is committed by five or more persons jointly, and therefore, the question of applying Section 149 I.P.C. is a mere surplusage. At any rate, since the number of persons who have been proved to have stolen the cash box is less than five, the charge under Section 395 I.P.C. as also that under Section 149 I.P.C. must necessarily fail. We, therefore, alter the conviction of A-20 Saber Ali Khan and A-22 Mohd. Azam from from that under Sections 149/395 I.P.C. to that Section 392 I.P.C. simpliciter and reduce their sentence under this section to one year's rigorous imprisonment each while maintaining the fine imposed on them by the trial Court. The conviction and sentences on other counts are set aside.

14. On a consideration, therefore, of the evidence and circumstances of the case, we allow this appeal to this extent that A-8 Jani is acquitted of all the charges framed against him and is directed to be set at liberty forthwith. A-4 Musa Khan, A-7 Sardar Khan and A-9 Mohd. Fasihuddin are dealt with under Sections 4 and 6 of the Probation of Offenders Act and their convictions and sentences are set aside and they are directed to be released on their executing a bond with two sureties of Rs. 500 each for a period of one year in order to keep the peace and be of good behaviour and all of them will report to the nearest Probation Officer in their range. The conviction of A-12 Abdul Hamid under Sections 149/427 I.P.C. is upheld but his sentence is reduced to three months rigorous imprisonment. His conviction under Sections 149/395 I.P.C. is set aside while his conviction under Section 147 I.P.C. will stand. The convictions under Sections 149/395 I.P.C. as against A-11, Mohd. Iqbal, A-20 Saber Ali Khan and A-22 Mohd. Azam Khan are altered to that under Section 392 I.P.C. and their sentence is reduced from two years to one year's rigorous imprisonment under this section. As there is no reliable evidence to prove the participation of any of the appellants in the incident of arson at the Chawl of Jogendra Singh, the convictions and sentences imposed on all the appellants under Sections 149/435 I.P.C. are hereby set aside. The other convictions as also the sentences passed on these appellants are confirmed. In respect of all the accused the sentences are ordered to run concurrently.

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