

Kishore Shambhudatta Mishra and Others Prakash Alias Laxminarayan Shambhudatta Mishra

Vs

State of Maharashtra

Criminal Appeals Nos. 508 of 1978 and 215 of 1979

(K. Jagannatha Shetty, A. M. Ahmadi JJ)

14.03.1989

JUDGMENT

AHMADI, J. -

1. Seven members of Shambhudatta Mishra's family were tried for the murders of Kashinath and Sadanand which occurred in their flat no. 7 of Chhaya Building, 15th Road, Khar, Bombay-52 on January 6, 1975 between 7.30 and 8 p. m. This flat no. 7 situate on the first floor of the building comprised of a hall, one bedroom and a kitchen. The entrance to the flat was from the northern door opening in the hall 14 ft. x 10 ft. in size. To the south of that hall was a balcony of 14 ft. x 2 ft. which was virtually an extension of the hall. When the police reached the scene of occurrence they found two bodies, one of Kashinath and the other of Sadanand, lying in the hall; Kashinath was dead while Sadanand was unconscious. Sadanand died in the hospital some time later. The seven members of the family of Shambudatta Mishra wee tried for their murders. The seven members of the family of Shambhudatta Mishra were tried for their murders. The Additional Sessions Judge convicted six of them under Section 302/34, IPC and sentenced them to imprisonment for life and a fine of Rs. 500, in default rigorous imprisonment for six months. Accused 7 Shanti w/o Kishore Mishra was, however, acquitted of all the charges levelled against her. Accused 1 to 6 feeling aggrieved by the said order of conviction preferred an appeal to the High Court. The High Court came to the conclusion that the order of conviction and sentence passed against the three brothers Prakash (accused 1), Kishore (accused 2) and Ashok (accused 3) was unassailable. Their appeal was therefore dismissed. So far as Subhadra (accused 5) is concerned, the High Court took the view that at the relevant time she had left the flat and therefore she could not be held guilty of the charge levelled against her. Her appeal was therefore allowed and she was acquitted. The appeals of Jasodra (accused 4) and Janki (accused 6) were partly allowed in that their convictions under Section 302/34 were set aside and instead they were convicted under Section 304 (Part II) /34, IPC. Accused 4 was directed to suffer rigorous imprisonment for four years. Having regard to her age and the period of imprisonment already undergone, accused 6 was awarded a sentence of the period already undergone. Against this order of conviction and sentence passed by the High Court, the accused persons have preferred the present two appeals by special leave. As both the appeals relate to the same incident, we proceed to dispose them of by this common judgment.

2. Flat no. 7 in Chhaya Building belonged to Shambhudatta Mishra, who was out of Bombay on the date of the incident. His two wives Jasodra and Subhadra, both sisters, were in the flat along with accused 2 and 3, both sons through Subhadra. So far as the presence of accused 1, another son through Jasodra, is concerned the prosecution case is that he was present in the flat while the accused contends that he was then living in his own flat no. 16, Basant Bahar at Juhu Tara Road, Bombay. Besides the aforesaid family members there were four infants living in the flat at the time

of the occurrence.

3. The prosecution case was that the deceased Kashinath had won a 'Matka' bet and was entitled to the bet money which accused 1 avoided to pay. On January 6, 1975, at about 7 p. m. Kashinath, his friend Sadanand and PW 3 Laxman went to accused 1 at his table on 15th Road near Chhaya Building to recover the dues. Accused 1 asked Kashinath to accompany him to his flat in Chhaya Building to receive the amount. All the four persons went to flat no. 7. Kashinath and Sadanand entered the flat along with accused 1 and PW 3 stayed back. As soon as Kashinath and Sadanand entered the flat a woman threw chilli powder in the eyes of Kashinath. Due to smarting of the eyes Kashinath sat down. He was immediately assaulted. PW 3 objected to the assault but accused 1 threatened him whereupon he ran away. Thereafter, the door of the flat was closed. After some time those outside heard sounds of a quarrel and shouts from within. There is a controversy whether these shouts were of 'Bachav, Bachav' only or of 'Bachav, Bachav, Chor, Chor'. Be that as it may, the fact is that accused 5 came out of the room and rushed to flat no. 14 on the third floor to request PW 5 Hari Prasad to telephone the police. PW 5 informed the police that a commotion was in progress in the flat and police help was needed. He also telephoned the Bandra Police Station and informed them about the commotion. Before the arrival of the police, it is alleged that accused 1 scaled the compound wall of Chhaya Building and left in a taxi. Thereafter, the police mobile van arrived at the scene of occurrence at about 8.20 p. m. On arrival the police got the door of the flat opened. They found two persons lying on the floor of the hall, one dead and the other unconscious. Arrangements were made to remove Sadanand to the hospital for treatment. When he was being carried on a stretcher to the hospital, a crowd of 50 to 60 persons collected in the compound of Chhaya Building. At about that time accused 1 came in a taxi and he was manhandled by the crowd. He was rescued and taken to the flat. He had received an injury on his forehead and was bleeding. The crowd also started pelting stones at flat no. 7. Thereupon, PW 2, Police Jamadar, Narayan Kadam sent a further message to the Bandra Police Station for police help. On the arrival of the police party headed by PW 27, API Kurdur the crowd dispersed. The dead body of Kashinath was sent for post-mortem examination. Thereafter, the investigation proceeded on the usual lines and all the seven members of the family were charge-sheeted.

4. The defence of accused 1 was that he was not present in the flat when the incident occurred. According to him he had come to give some money to his mother and was manhandled by crowd and detained by the police. The defence of the remaining accused was that at about 7.30 p. m. when accused 3 had gone out for marketing and the other accused were in the flat Kashinath and Sadanand knocked at the door and on accused 5 opening the same they entered the hall, caught hold of accused 5 and demanded cash and jewellery from her. When accused 2 went to rescue his mother, Sadanand pushed him in a corner and tried to assault him. Accused 2 (sic 3) and 4 entered the hall from the other room to assist their brother but Kashinath caught him by the hair and assaulted him. While the two intruders were thus engaged in an altercation with accused 2 and 4, accused 5 slipped out of the flat and went to PW 5 Hari Prasad on the third floor to telephone the police for assistance. On her say, PW 5 informed the Control Room as well as the Bandra Police Station about the commotion (Mara mari) in flat no. 7. He also telephoned PW 8 Motilal to come to the flat with two or four persons. In the meantime, accused 6 had also entered the hall to rescue accused 4. Kashinath's wrath turned to accused 6. He caught her by the hair and pulled her in his direction whereupon she shouted 'bachav, bachav, chor, chor'. In the meantime, accused 3 came from outside and he tried to help accused no. 6. At this point of time three outsiders also entered the flat and assaulted Kashinath and Sadanand. When Kashinath and Sadanand pulled out knives one of the three outsiders picked up a thali containing chilli powder and threw the same at them. In the fight that ensued between Kashinath and Sadanand on the one hand and the three outsiders on the other

the former received injuries. Accused 2 and 3 had also received injuries and their clothes were stained with blood. After causing fatal injuries to Kashinath and Sadanand, the three strangers fled away.

5. The learned trial Judge came to the conclusion that all the six family members barring accused 7 Shanti had Assaulted Kashinath and Sadanand and rejected the defence theory regarding participation of three outsiders in the crime. In regard to accused 7 he took the view that as she was in an advanced stage of pregnancy it was not possible to believe that she too had participated in the commission of the crime. He, therefore, convicted accused 1 to 6 as stated earlier. On appeal, the High Court found the prosecution version projected through PW 3 as regards the genesis of the crime unacceptable. It rightly negated the prosecution theory that accused 1 had planned to kill Kashinath and with that in view he enticed Kashinath to his flat holding out a bait to pay his dues. In other words the prosecution case that the deceased was a victim of decoy was rejected. The High Court accepted the evidence of PW 3 that Kashinath and Sadanand had gone to accused 1 for collecting the bet money. Relying mainly on the evidence of PW 4 Dev Chandra, PW 6 Vipin, PW 7 Govind, PW 9 Gaffoor, PW 11 Babu and the recovery of blood-stained knives and other articles from the flat, the court came to the conclusion that when Kashinath and Sadanand went to the flat to collect money the inmates of the flat attacked them and caused the fatal injuries. It convicted the appellants as stated earlier.

6. The learned counsel for the appellants submitted that the High Court had committed a grave error in ignoring certain vital pieces of evidence which supported the defence theory that the two deceased persons had entered the flat and had demanded cash and ornaments from the inmates of the flat. It was submitted that even though the appellants did not say in so many words that they had a right of private defence, it is settled law that if the facts and circumstances on record reveal that the accused had acted in self-defence, the court is bound to give the benefit thereof to the accused. They submitted that immediately after Kashinath and Sadanand entered the flat something happened which made the inmates to shout 'bachav, bachav, chor, chor' and accused 5 rushed to the flat of PW 5 with a request to call the police for assistance. At her request, PW 5 informed the Control Room as well as Bandra Police Station on telephone that a commotion was taking place in flat no. 7 and police assistance was forthwith required. The evidence of PW 12 shows that the first message was received at the Control Room by about 7.47 p. m. PW 13 says that the message was picked up by the mobile van at about 7.50 p. m. The evidence of PW 2, PW 13 and PW 14 shows that the mobile van had reached the place of occurrence by about 8.20 p. m. Exs. 20 and 22 show that the message was that the injured persons had come to the flat demanding money by force and three strangers had assaulted them. The evidence of PW 2, PW 13 and PW 14 shows that at the earliest point of time accused 5 had disclosed to the police that two persons had entered the flat and had demanded ornaments and cash from her. The learned counsel therefore argued that these vital pieces of information which were extracted from accused 5 before she had any chance or opportunity to confer with others had been wholly ignored by the High Court while appreciating the evidence of the prosecution witnesses on whom reliance is placed. Lastly, it was said that in regard to the presence of accused 1 also the evidence of PW 2, PW 10 and PW 13 that accused 1 came to the flat after they had reached there and he was manhandled and beaten by the crowd before they rescued him was ignored. This evidence, counsel submitted, clearly established the fact that accused 1 arrived at the scene of occurrence after the event. Counsel submitted that if the prosecution caused the injuries to protect their person and property from the deceased, Kashinath, who was a known bully. The learned counsel for the State argued that the evidence was properly scrutinised by the High Court and this Court ought not to reassess the evidence in exercise of power under Article 136 of the Constitution. He submitted that although the jurisdiction of this Court under Article 136 is

wide, this Court had stated, time out of number, that it would be loath to review or reassess the evidence unless it was satisfied that the High Court's view was so palpably wrong that to allow it to stand would be to acquiesce in miscarriage of justice. In our view this is one of those cases in which this Court feels compelled to interfere.

7. We may at the outset notice the antecedents of Kashinath, Sadanand and some of the prosecution witnesses. Kashinath, an ex-military man was facing criminal charges and was known in the locality as a Dada (bully). PW 19 says he was stoutly built and was working as a watchman in a nearby building. His friend Sadanand was serving as a gatekeeper in a cinema and indulged in Matka-betting along with Kashinath. His father PW 20 says that he got involved in 'mara mari' quite frequently. It must be so common that he did not go to the hospital even after he learnt that his son was injured and admitted to the hospital. The medical evidence further shows that both Kashinath and Sadanand had consumed liquor before they went to the flat. His friends, PW 3 and PW 4 were also facing murder charges on the date of the incident. PW 4 was serving as a watchman with PW 1 in the adjacent building which was then under construction.

8. PW 22 Melethin, a resident of Basant Bahar Building has deposed that accused 1 was residing in 16, Basant Bahar Building in Wing B with his family since 1972. The panch witness PW 17 Subhash has deposed that the police had taken him to the flat of accused 1 in Basant Bahar Building on January 11, 1975 at about 2.15 p. m. From there one pant, a leather belt and a bush-shirt, Articles 41, 42 and 43 which were blood-stained were attached. All of them were hanging on the pegs and were not concealed. Admittedly accused 1 was apprehended on the same day i. e. January 6, 1975 and yet the prosecution would have us believe that the residence of accused 1 was not searched till January 11, 1975. It is surprising that the family members of accused 1 allowed the three articles to remain on the pegs, though blood-stained, and made no effort to dispose them of even though they had full five days to do so. The discovery of these articles and the existence of blood and chilli powder thereon on January 11, 1975 therefore seems to be highly suspect.

9. From the above evidence it appears that accused 1 was residing in the above flat with his family since 1972. PW 10 Ramswarup also deposed that accused 1 was residing at the above flat since the last five or six years. On the date of the incident he had seen him at about 8.30 p. m. near his laundry properly dressed. He engaged a taxi and invited the witness to accompany him. On the way accused 1 told him that he was going to his mother to give her some money. When the taxi halted at Chhaya Building he noticed a few persons who had gathered there. One of them came to the taxi and asked accused 1 to get down. As soon as accused 1 got down he was pulled by the collar and assaulted. PW 13, Head Constable vishnu Karande deposes that while he and his companions were at the place of occurrence accused 1 came from outside with a bleeding injury on his forehead. There was blood on his clothes. The crowd outside was pelting stones and was demanding that accused 1 should be sent out. The mob was dispersed with the help of police assistance. The panch witness PW 16 Madhavrao in whose presence the clothes of accused 1 articles 15 to 17 were attached also says the accused 1 had an injury on his forehead. All this evidence shows that when accused 1 came to Chhaya Building from outside he was belaboured by a mob and had sustained an injury on his forehead. This evidence also supports his case that on the date of the incident he was staying in Basant Bahar flats and was apprehended by the police when he went to the Chhaya Building flat at about 8.30 p. m.

10. The learned counsel for accused 1 submitted that false evidence regarding the find of blood-stained clothes articles 42, 43 and 44 was created to support the prosecution case that accused 1 had left the Chhaya Building flat after the event in a taxi and had returned to the flat after changing his

clothes. If accused 1 was careful enough to change his clothes would he be so negligent as to leave blood-stained clothes on the peg in his Basant Bahar flat and would his family members also be so in different about their existence on the pegs even though they had five days to remove them? The fact that accused 1's Basant Bahar flat was searched as late as January 11, 1975 speaks for itself. The High Court, after rejecting the evidence of PW 3 Laxman in regard to the allegation that accused 1 had decoyed Kashinath to the flat in accordance with a pre-planned scheme, fell into an error in believing that when Kashinath passed by his shop he told the witness that he was going to collect his bet money from accused 1. The High Court discussed the evidence of PW 3 elaborately but found his evidence unacceptable because his version was unnatural, his subsequent conduct was also unnatural his statement was recorded after 27 hours, his explanation of having met ASI Desai was false and he himself was under a shadow being an undertrial. If the High Court doubted the very foundation of his version which included his chance meeting with the deceased at his shop we fail to understand how a part of the intergated story could be accepted for the limited purpose of showing that both the deceased had gone to collect the bet money from accused 1.

11. PW 11 Bhawoo Sawant has deposed that accused 1 was indulging in Matka-betting activity. He claims that on January 6, 1975 at about 5.00 or 5.30 p. m. accused 1 had visited the Bandra Police Station and had complained that Kashya Dada was harassing him. Since he wanted to lodge a complaint, the witness directed him to go upstairs. It is not known if accused 1 lodged a complaint as desired. This evidence would show that accused 1 was being harassed by the deceased. Far from establishing the presence of accused 1 at the time of the incident, this evidence indicates the possibility of the deceased having gone to the flat to demand money. The prosecution has further relied on the evidence of PWs 4, 6, 7 and 9 in support of its version regarding the incident. It is pertinent to note that PWs 4, 6 and 7 do not speak about the presence of accused 1 in the flat. They claim to have seen Kashinath trying to jump out of the balcony of the flat and accused 2 and accused 3 pulling him back. PW 4 and PW 9 who were working as watchmen in a building under construction claim to have seen the incident from the second floor of the building after hearing shouts of 'Bachav, Bachav'. They do not claim to have seen accused 1 in the flat where the incident occurred. However PW 9 would have us believe that after the incident he saw accused 1 engaging a taxi and proceeding towards Khar. His companion PW 4 does not say so. PW 4 was himself an undertrial and was even otherwise a friend of the deceased. PW 9 also admits that the deceased was his friend. Besides, both witnesses were working as watchmen on 16th Road like the deceased Kashinath. Their evidence would therefore, have to be scrutinised with care. In the absence of any corroboration it is difficult to believe PW 9 when he claims to have seen accused 1 leaving in a taxi shortly after the incident. No other prosecution witness says so. Besides, if he had actually seen accused 1 surreptitiously leaving the place, he would certainly have raised a shout since several persons had collected outside the flat on hearing the shouts of 'Bachav, Bachav'. The High Court has readily accepted this part of the prosecution case which cannot stand scrutiny. Even PW 6, the next door neighbour, has admitted that accused 1 lived elsewhere but visited his family members occasionally. In the face of all this evidence we fail to see how the High Court came to accept the presence of accused 1 at the time of the incident. In criminal cases to accept the presence of accused 1 at the time of the incident. In criminal cases the prosecution is under an obligation to prove the presence beyond reasonable doubt and if there is any doubt its benefit must go to the accused. Here there is no evidence except the bare statement of PW 9 that he saw accused 1 leaving the scene of occurrence after some time in a taxi, a statement which is difficult to accept. We, therefore, find it difficult to agree with the High Court that accused 1's presence is well established.

12. The facts discussed above show that Kashinath was sore that accused 1 was not paying his bet-money. It seems he and Sadanand, who had both consumed liquor, went to the flat and something

happened which prompted the inmates to raise cries of 'Bachav, Bachav'. PW 6 and PW 7 depose to have heard shouts of 'Bachav, Bachav, Chor, Chor' from flat no. 7. None was asked whether the voice was of a male or female. The High Court rightly held that the shouts of 'Bachav, Bachav, Chor, Chor' could never be by the two deceased. But the High Court points out that the contemporaneous version in the form of entries Exs. 20 and 22 show that accused 5 had merely conveyed that two persons had entered the flat the demanded 'money' by force. It also points out that immediately after the incident, on being questioned, accused 5 had stated to PWs 2, 13 and 14 that two persons had demanded cash. Of course PW 14 adds that she had mentioned cash and ornaments. From this the High Court observes that at the earliest point of time the version was in regard to demand of cash only and thought such a demand was only natural as accused 1 had failed to pay the bet-money to Kashinath. But the High Court overlooks the fact that in the entries Exs. 20 and 22 what is stated was that the demand was forcible. It must also be realised that at that stage the priority was to secure police assistance and not to state the detailed version. The detailed version was given immediately after the occurrence and before she could be tutored to PWs 2, 13 and 14. To them she stated that the two persons demanded of the inmates to had over cash ornaments and whatever they had. But even if we confine ourselves to the demand for cash, so long as it was sought to be recovered forcibly, the effect of the demand in law will be the same, namely, extortion of money by the use of criminal force. We are, therefore, unable to agree that the demand for cash alone would not justify retaliation, if any, by the inmates of the flat. The visit of the deceased cannot, therefore, be considered to be an innocent or normal one. The shouts of 'Bachav, Bachav, Chor, Chor' by the inmates of the flat and the conduct of accused 5 to send for the police without loss of time are consistent with innocence and not guilt. The totality of circumstances probabilise the defence version that the two deceased who were under the influence of alcohol came armed to the flat and forcibly demanded money from he inmates. As a result thereof there was a commotion with the inmates calling for help. In the course of the incident whatever came handy including chilli powder was used by the inmates to protect themselves. The find of locks of hair belonging to one or the other accused near the body of one of the deceased would show that the intruders had pulled the inmates by the hair. Having regard to the antecedents of both the deceased, the possibility of their being armed with knives cannot be ruled out. The use of chilli powder also shows that the inmates were trying to ward off the intruders. That was a perfectly defensive action. The find of blood-stained articles from the flat is only natural and so also it is natural to find the clothes of the inmates stained with blood. In these circumstances we feel that the High Court erred in holding that two innocent persons were done to death merely because they went to collect the dues. The inmates clearly had a right of private defence against the intruders who tried to extract money by force. However, since the exact role played by each inmate is not known, it is difficult to hold any one of them guilty for exceeding the right of private defence.

13. In the result we hold that the High Court failed to appreciate certain vital pieces of evidence in the correct perspective and, therefore, reached a wrong conclusion. We, therefore, set aside the conviction and sentences imposed on the appellants, give them the benefit of doubt and acquit them of all the charges levelled against them. The bail bond of those of on bail will stand cancelled while those in custody will be set at liberty at once unless required in any other case.

</html