

**SUPREME COURT OF INDIA**

State of Karnataka

Vs.

Bhaskar Kushali Kotharkar

Crl.A.No.498 of 1998

(K. G. Balakrishnan and Dr. A. R. Lakshmanan JJ.)

19.08.2004

**ORDER**

1. The State of Karnataka has filed this criminal appeal challenging the acquittal of respondents 1 to 4 for the offence punishable under Section 304 Part II read with section 149, IPC and Section 324/148, IPC and Section 143, IPC. Respondents 1 to 4 were found guilty by the Sessions Court, Karwar and aggrieved by the same they filed criminal appeal before the High Court and the appeal was allowed.

2. The prosecution case was that the respondent 1 to 4 along with three others went to the residence of deceased Prakash Manjunath Talekar at about 7.30 p.m. on 20-9-1993. These respondents and others were armed with cycle chains, belts and clubs. Deceased Prakash was dragged out of his house by the first respondent and another to a distance of 75 feet where he was attacked by the accused with belts, cycle chains and clubs. PW-1, Shobha, the wife of the deceased Prakash came to the rescue of her husband and she was assaulted by the accused. PW-2 Tarabai who was present in the house of deceased at the time of incident was also assaulted by the accused. Prosecution alleged that PW-10 Sithabai who was coming after attending some function was attacked by these accused on her way to her house. Prakash died about 10 minutes after the incident. PW-1 was afraid to go to the police station and on the next day morning she went to the nearby police station and gave FI statement. Her statement was recorded and the case was registered.

3. On the side of the prosecution PW-1 to PW-11 were examined. The post mortem of deceased Prakash was conducted by PW-11. There were as many as 22 injuries on his body and most of the injuries were abrasions and the internal injuries show that there were fractures to the 7th, 8th, 9th and 10th ribs on the left side. There were blood clots surrounding entire left kidney. PW-11 who conducted the post mortem deposed that all injuries were ante mortem and that the injured died of shock and haemorrhage caused due to multiple injuries sustained by him.

4. The Sessions Court relied on the evidence of PW-1, PW-2 and PW-10 and held respondents 1 to 4 guilty. In the appeal preferred by them, the learned Judge of the High

Court reversed the conviction and sentence solely on the ground that the investigating officer and constable who recorded the FI statement were not examined as prosecution witnesses. As regards the evidence adduced by eye-witnesses, no adverse comments were passed by the learned Single Judge.

5. The counsel for the State submitted that the acquittal of the accused is not sustainable in law as the accused had not suffered any prejudice because of the non-examination of the investigating officer and the constable who recorded the FI statement.

6. In the instant case, the Sessions Judge issued summons to these two witnesses but these police officers did not turn up for giving evidence and Sessions Judge closed the prosecution case as one of the accused had been in prison as an under-trial for fairly long period. The counsel for the respondents 1 to 4 though contended that they were seriously prejudiced by the non-examination of the investigating officer, this plea could not be substantiated by cogent facts and circumstances. It is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious sessions trial was being held against the accused. If any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161, Cr.P.C or if there is any omission of certain material particulars, the previous statement of these witnesses could be proved only by examining the investigating officer who must have recorded the statement of these witnesses under Section 161, Cr.P.C. In the present case, no such serious contradiction is pointed out in respect of the evidence of the important, eye witnesses PW-1, PW-2 and PW-10. So also the non-examination of head constable who recorded FI statement is not of serious consequence as PW-1 was examined to prove the fact that she had given the statement before the police. The learned Single Judge was not justified in reversing the order of the Sessions Court by holding that the non-examination of investigating officer and the constable who recorded the FI statement had caused prejudice to the accused.

7. The learned Single Judge did not consider the evidence of two eye witnesses and that of PW-10 in detail. The appeal was disposed of on technical grounds. PW-1 is none other than the wife of the deceased. PW-2 is a neighbour who happened to be at the place of incident for purchasing some grocery items. PW-1 deposed that respondents 1 to 4 and others came to her house at about 7/7.30 p.m. on 20-9-1993. First accused Bhaskar Kushali Kotharker and the 5th accused Dattaran Kushali Kotherkar dragged her husband and thereafter all the accused caused various injuries on his body. She identified these respondents and we do not find any infirmity in her evidence.

8. The counsel for the respondents pointed out that there was long delay in giving the FI statement to the police. PW-1 stated that she was afraid to go to the police station and she went only, on the next day. It is submitted by the counsel for the respondents that the parents-in-law of PW-1 and several other relatives were staying in the nearby houses and she could have sought assistance of one of them and as she had not done so, her evidence is suspicious and cannot be relied on. We do not think that the evidence of this witness can be rejected on this ground especially when her evidence is corroborated by the evidence of PW-2. PW-2 also deposed that all these respondents and others came to the place of incident and

attacked the deceased Prakash, herself and PW-1. It is important to note that PW-2 sustained more than seven injuries and these injuries might have been caused at the time of the incident at the hands of the assailants. PW-1 sustained injuries on the right thigh and on the right side of the foot.

9. PW-10 is another important witness who sustained injuries by the respondents and other accused when they were going back from the place of incident. PW-10 is the mother of deceased Prakash. She had gone to attend the Ganesh Festival and at about 8 p.m. when she was returning to her house, all the seven accused came and accused number seven attacked her with a cycle chain. She had sustained grievous injuries and lost two of her teeth.

10. There is very strong and convincing evidence to prove that these respondents along with others had attacked deceased Prakash, PW-1 and PW-2. The Sessions Judge had given valid reasons for finding these respondents guilty. The Single Judge was not justified in reversing the conviction and sentence solely on the ground that investigating officer was not examined by the prosecution. As the respondents were not prejudiced by the non-examination of the investigating officer and also the constable who recorded the FI statement. The finding of the learned single Judge is erroneous, therefore, we set aside the same.

11. In *Behari Prasad and others v. State of Bihar*<sup>1</sup> this Court held that non-examination of the investigating officer is not fatal to the prosecution case especially when no prejudice was likely to be suffered by the accused. In *Bahadur Naik v. State of Bihar*<sup>2</sup> this Court held that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for prosecution was of no consequence and under such circumstance no prejudice had been caused to the accused by such non-examination.

12. In the result, we allow the appeal preferred by the State and restore the finding of conviction awarded by the Sessions Judge. The respondents were acquitted by the High Court Judgment in the year 1996 and the incident took place in 1993. Having regard to these facts and circumstances of the case, the sentence of imprisonment of seven years is reduced to five years. The respondents 1 to 4 are directed to surrender to their bail bonds to serve out the remaining period of sentence.

Appeal allowed.

<sup>1</sup>1996 (2) SCC 317

<sup>2</sup>2000 (9) SCC 153