

SNS

**IN THE HIGH COURT OF JUDICATURE AT MUMBAI
APPELLATE CRIMINAL JURISDICTION
CRIMINAL APPEAL NO.115 OF 1990**

1 Pramod alias Pamyia Barkya Gavale
an Adult Indian Inhabitant aged
about 28 years, residing at
Kavale Wadi, Prabhadevi,
Bombay

2 Sambha Nana alias Narayan Talekar
an adult aged about 32 years,
residing at Yadav Patil Wadi,
near Siddhivinayak Prabhadevi
Bombay
(Dismissed against appellant no.2 as per
Court's order dated 18.11.1997)

...Appellants.

v.

The State of Maharashtra

...Respondents.

Mr. R.S.Dave, adv. For the Appellant.

Mr.Y.M.Nakhwa, APP for the Respondent/State.

**CORAM : J.H. BHATIA, J.
DATED : NOVEMBER 30, 2010**

ORAL JUDGMENT:

1 Appellant no.1, who was accused no.1 in the sessions case No.662 of 1985 alongwith seven other accused persons, was convicted for the offences punishable under Sections 143, 144, 147, 148, 452, 427 and 326 r/w Section 149 of the I.P.C. For the offences punishable under Sections 143, 144, 147, 148 varying sentences of only imprisonment for two months or 6 months were awarded; For section 452, R.I. for six

months with fine of Rs.500/-, for the offence punishable under Section 427, R.I. for four months with fine of Rs.200/- and for the offence punishable under Section 326, R.I. for one year with fine of Rs.750/- was awarded to him. He has challenged his conviction and the sentence by this appeal.

2 Prosecution case, in brief, is that all the eight accused persons and one absconding accused Sudha N. Bhatkar were members of unlawful assembly on 20.11.1984 at about 2.45 p.m. Previously, these accused persons happened to be friends of P.W.9 Ravikant @ Gundya son of Vasant Kesarkar. He was also involved in several criminal cases. Ravikant @ Gundya was married a few days before incident of this case but accused were not invited to attend the marriage. Therefore, accused persons were annoyed that they were not invited for the said marriage. To teach him lesson, accused persons allegedly formed unlawful assembly, went to his house and damaged property in the house. At that time father, sister and wife of Ravikant were present in the house. Thereafter, they went out. Meanwhile, P.W.9 Ravikant and his brother P.W.1 Ashok were informed that the accused persons had come to their house to assault and to cause damage to their property. Meanwhile, all the accused persons came out from the house and it is alleged that

accused no.7 John and absconding accused Sudha fired from the revolvers, as a result of which P.W.6 Prakash More and P.W.8 Prakash Borkar sustained injuries on the neck and chest. It is contended that other accused persons were armed with swords, sickles and sticks. After firing and causing injuries, all the accused persons ran away from the spot. Injured Prakash More and Prakash Borkar were taken to the hospital where they were examined and given treatment. P.W.1 Ashok, who is brother of Ravikant, lodged report at the police station and on the basis of that report, Crime No.1044 of 1984 came to be registered at Dadar Police Station. After that the accused persons were arrested on different dates. After investigation charge-sheet was filed against accused nos.1 to 8 and absconding accused Sudha. Case was committed to the Court of Sessions. Accused pleaded not guilty. On behalf of the prosecution in all 16 witnesses were examined to prove charges and to bring home guilt to the accused persons. Trial Court acquitted only accused no.2 Murarji while all other accused persons were convicted of all the charges and varying sentences were awarded to them according to the role played by them. Accused no.7 John, who had himself fired and caused grievous hurt was awarded sentence of R.I. for 7 years with fine for the offence punishable under Section 326 r/w

Section 149 of the I.P.C. and besides, sentences for the other offences.

3 Heard the learned counsel for the appellant as well as the learned APP. The main contention of the learned counsel for the appellant is that there is no reliable evidence to show that the present appellant was member of the unlawful assembly, was armed with any weapon and that he had participated in the commission of crime by the alleged unlawful assembly. He contended that in the house of Ashok and Ravikant besides their sister, P.W.3 Mangala and their father, P.W.5 Vasant, wife of Ravikant were also present but she was not examined. It is contended that witnesses, who were examined also had not stated before the police that accused was either present or that he was armed with any weapon and, therefore, prosecution must fail and accused is entitled to be acquitted. On the other hand, the learned APP contends that in view of the evidence on record, it appears that unlawful assembly of 9 members was formed to commit various offences. While accused John and absconding accused Sudha were armed with revolvers, other accused persons were armed with sharp and cutting weapons like swords and sickles. He pointed out that the accused no.1 Pramod Gavale, who is the appellant, was armed with sickle at the time of incident. He contended that even though he does not appear to have played any specific role in

the commission of crime either in the house of Ravikant or outside, he is liable to be convicted for different offences punishable with help of Section 149 of the I.P.C. He also contends that the learned trial Court having taken into consideration role played by the present appellant had taken lenient view while awarding the sentence, therefore, neither accused is entitled to be acquitted nor this Court should interfere in the sentence awarded to him.

4 Before coming to any conclusion about the role of the present accused, it will be necessary to scan prosecution evidence about the said incident. According to the prosecution, offence was committed on 20.11.1984 in the afternoon. Evidence of P.W.2 Ashok and P.W.9 Ravikant @ Gundya are brothers inter-se. P.W.5 Vasant is their father and P.W.3 Mangala is their sister. Their evidence indicates that Ravikant was a friend of accused persons and he used to be involved in several criminal activities. He was also arrested in different cases. Not only that he was also detained under Maintenance of Internal Securities Act for his criminal activities, which were dangerous for the public order and security. A few days before 20.11.1984, Ravikant was married to one Usha. As per the evidence of these witnesses, it was a private function for which only family members were present. Friends of Ravikant were

not invited. Accused persons got annoyed mainly because they were not invited for the marriage and they wanted to spoil atmosphere in their family. Evidence of Ashok and Ravikant shows that on 20.11.1984 in the afternoon, both of them were playing marbles in front of chawl no.1. At about 2.45 p.m. their younger sister P.W.3 Mangala came there and informed them that John, Pramod and Nitin had come in fiat car in the wadi from the side of the temple and that John was carrying revolver while Pramod was having sickle and others were armed with swords and knives in their hands. After getting this information, Ashok and Ravikant rushed towards their house. According to Ashok, he saw accused no.7 John challenging Ravikant @ Gundya to stop. He also fired one shot from his revolver but Gundya escaped from the lane between Shri Krishna Oil Mills and chawl no.1 and was saved. Ashok ran into the house of one Dicholkar for safety. After five minutes, he left that house and went towards Appasaheb Marathe Marg near the temple. At that time, he saw that all the accused persons were entering into the car and said car went away from Appasaheb Marathe Marg towards Century Bazar. However, accused persons again came from the side of Ravindra Natya Mandir to Appasaheb Marathe Marg and accused no.7 John and Sudha fired from their revolvers towards Pushpagandha Society

Building, due to which P.W.6 Prakash More sustained injury on his neck while P.W.8 Prakash Borkar sustained injury on his chest. After that accused persons went away towards the Century Bazar side. Both injured Prakash More and Prakash Borkar were removed to the hospital where they were treated. Concerned medical officers were examined to prove that these two persons had suffered injuries with bullet on their neck and chest and these injuries could have been dangerous to their life. In view of this, the trial Court came to conclusion that offence under Section 326 of the I.P.C. was committed. Evidence of P.W.6 Prakash More and P.W.8 Prakash Borkar is also about firing by John and his friends and causing injuries to them. Their evidence also shows that John, Sumbha and some of their friends had come armed with revolvers, swords, etc. They had come by car and they had also ran away by the car. In the present appeal, we are mainly concerned with the presence and role of the present appellant, Pramod, who was accused no.1.

5 About the incident at the house of Ashok and Ravikant, first witness is P.W.3 Mangala. According to her at about 2 or 2.15 p.m. she and her friend Vilasini were talking near a temple near chawl. At that time, one car came and several persons got down from the car. Said persons included Sumbha, Nitin, the present appellant Gavale, John and

Morya. According to her, John was holding revolver, Pramod was holding sickle or koyta. Other persons were armed with swords. These persons were going towards the house of Mangala. Gundya and Ashok were playing with marbles at some distance. According to her these persons had entered into the house and had caused damage to the property and the house. She could gather it from the sound of breaking different articles in the house. After 5-10 minutes culprits left their house and proceeded towards chawl no.1.

6 As per her evidence, her father P.W.5 Vasant and Usha wife of Ravikant @ Gundya were in the house at the time of incident. Evidence of P.W.5 Vasant shows that he and his daughter-in-law were present in the house. He himself was present in the kitchen while his daughter-in-law was in the outer room. At about 2.35 p.m. John, Sumbha, Nitin and Shekhar entered into their house. Their remaining companions, who were 3 or 4 in number were standing outside. Sumbha shouted as to where Gundya had gone. According to him, John was holding revolver while Sumbha, Nitin and Shekhar were holding swords. He identified the present appellant Pramod Gavale as a person, who was standing outside the house and he was armed with sickle. According to him, four persons, who had entered into the house caused damages to

different articles in the house. Thereafter, they left the house. Mangala came there about 10-15 minutes after the incident and Ashok came 5 minutes after that. Next witness to show the presence of the present appellant Pramod is P.W.9 Ravikant @ Gundyia. According to him, he was playing alongwith his brother Ashok where Mangala came and informed that John and others had came to their house and causing damage to their property. She also told them not to wait but to run away ,therefore, they ran away towards the lane. According to him, he saw John near the lavatory block near chawl no.2 with revolver in his hands while Sambha had a sword in his hand and the present appellant was armed with Koyta or sickle. Shekhar had a sword and Nitin was armed with knife (Sura). These persons saw P.W.9 Ravikant and John and Sambha shouted 'Gundyia Thamb'. They started chasing him. He also heard gun shots within 5 to 7 minutes. Later on, he came to know that Prakash More and Prakash Borkar were injured in firing. He returned home after about an hour and half. He came to know from his father and wife Usha about the damage caused in the house by the culprits.

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The learned counsel for the appellant tried to point out some material omissions in the evidence of these witnesses. He pointed out

that as far as P.W.5 Vasant is concerned, he had not stated before the police that he had seen the accused Pramod with sickle. This omission was proved. As far as P.W.3 Mangala is concerned, she has shown presence of the accused Pramod but in her police statement she had not stated that he was armed with koyta. Omission was only about the weapon in his hand and not about his presence in the house. It appears that in the cross-examination of P.W.9 suggestion was given to him that in the police statement he had not stated that Pramod was having sword. He was asked as to whether he can assign any reason as to why this fact was not recorded in the police statement. He could not offer any explanation about the same. On the basis of that the learned counsel contended that he had not stated before the police about the presence of the accused Pramod. However, on perusal of the record, particularly, police statement of P.W.9 before the police as well as evidence of Investigating Officer, it appears that infact, he had stated that at the time of incident the present appellant Pramod was present and he was having sword in his hand. Thus, there is no material omission in the evidence of P.W.9 Ravikant about the presence of the present appellant. As noted above, P.W.1 Ashok refers to the presence of the present appellant but that is based on the information given by P.W.3 Mangala. He himself

does not claim to have seen accused no.1 Pramod . P.W.3 Mangala and P.W.5 Vasant and P.W.9 Ravikant claim to have seen Pramod but it appears that P.W.5 Vasant had not shown presence of Pramod in his police statement. If his evidence is left out, only evidence of P.W.3 Mangala and P.W.9 Ravikant shows presence of the present appellant. Mangala did not state before the police that accused was armed with any weapon and particularly, Koyta and, therefore, her evidence is limited only to the presence of the present appellant Pramod at the spot of the incident alongwith other accused. P.W.9 Ravikant is specific that Pramod was present and he was armed with sword. Thus, two witnesses show the presence of Pramod. Incidentally evidence of Ravikant about the holding of sword by the appellant Pramod is inconsistent with the prosecution case that he was armed with Koyta or sickle. It is difficult to believe that Ravikant, who himself was in the field of crimes, could not make difference between koyta and sword. Therefore, it is doubtful if the present appellant was armed with any weapon though he had come alongwith other accused in the car. As he was with them at the time of commission of crime, it can be held that he also shared common object of committing crime alongwith other accused.

attributed any specific role to the present appellant. P.W.5 Vasant also deposed that the appellant Pramod was standing outside the house while other four persons entered into the house and caused damages to the property. If Vasant is to be believed, the present appellant did not enter into their house and, therefore, he did not cause damage to the property himself. In second part of the incident, it is clear that only accused no.7 John and absconding accused Sudha fired from their revolvers and injured Prakash More and Prakash Borkar. In that incident also, no specific role was played by the present appellant. From these facts, it is clear that accused himself had not committed any offence with his own hands but he is liable to be convicted only because he was member of unlawful assembly with common object of committing offence.

9 From the sentence of imprisonment awarded for different offences to the present appellant, it appears that maximum sentence of imprisonment was of one year for the offences punishable under Section 326 of the I.P.C. The learned counsel for the appellant vehemently prayed for leniency. According to him, incident had occurred 26 years before . Appeal itself is pending for the last 20 years. At the time of incident, he was a young man. Now he is old person. He has also undergone open heart surgery. After the incident of this case, he was

never involved in any criminal activities and he is living peaceful life. He contends that he was in custody immediately after the incident and when his appeal was previously dismissed in default he was arrested and was in custody till he was released on bail on restoration of his appeal. He contends that the imprisonment, which he has already undergone in two spells should be sufficient in the given circumstances. According to him, no useful purpose will be served if he is sent to the jail now after about 26 years. The learned APP also called information from the concerned police and about the antecedents and behaviour of the appellant after the incident. On the basis of report submitted by the Senior Police Inspector, Dadar Police Station, it is confirmed that after this case no other criminal case was ever registered against the present appellant. It shows that for the last about 26 years, he has been living peaceful life and has never indulged in any criminal or anti social activity.

10 Record reveals that on 10.12.1984 he was arrested and was released on bail on 10.1.1985. After conviction, his sentence was suspended under Section 389 of the Cr.P.C. He preferred this appeal, which was admitted. However, in 1997 because none was present on his behalf, appeal was dismissed in default. In view of this, he was arrested

on 25.5.2001. Then application for restoration of appeal and for bail was filed. Appeal came to be restored and he was also granted bail. Jail record reveals that he was actually released on 25.7.2001. Thus, in two spells, he was actually in custody for three months. Taking into consideration the circumstances noted above, I am of the opinion that no purpose will be served now by sending him to jail at this stage, therefore, instead of sending him to the jail, fine amount may be suitably increased.

11 For the aforesaid reasons, appeal against the conviction stands dismissed. However, sentence of imprisonment for the offences punishable under Sections 144,147,148, 452, 427 is reduced to R.I. For three months, for the offence under section 326 r/w 149 I.P.C., he is sentenced to undergo R.I. for three months and to pay fine of Rs.5,000/-; in default to pay fine he shall undergo further R.I. For six months. Substantive sentence of imprisonment on all the counts to run concurrently and as he has been already in custody for a period of three months from 10.12.1984 to 10.1.1985 and from 25.5.2001 to 25.7.2001, he shall not be required to go to the jail again provided he pays fine. He

will deposit fine amount before the trial Court within 15 days from this date.

(J.H. BHATIA,J.)