

(1996) 06 BOM CK 0020
In the Bombay High Court
Case No : Criminal Appeal No. 1080 of 1981

Adhikrao Vithal Desai and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 11-06-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 235, 313
Evidence Act, 1872 — Section 3, 32, 45, 59
Penal Code, 1860 (IPC) — Section 304

Citation : (1996) 4 BomCR 560

Hon'ble Judges : Vishnu Sahai, J;S.S. Parkar, J

Bench : Division Bench

Advocate : Shamrao G. Samant, Nos. 1 to 3, for the Appellant; M.I.P. Galeria, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Vide Judgment and order dated 27th November, 1981 passed in Sessions Case No. 31 of 1981 the Additional Sessions Judge, Satara convicted each of the three appellants u/s 304 Part (II) of the Indian Penal Code. He sentenced the appellants in the manner stated hereinafter:--

Appellant Adhikrao Vithal Desai:--- to three years R.I. and to pay a fine of Rs. 500/- in default to further undergo R.I. for three months;

Appellant Mahadeo Vithal Desai:---to suffer R.I. for seven years and to pay a fine of Rs. 100/- in default to undergo R.I. for two months; and

Appellant Parvatibai:---to six months R.I. and to pay a fine of Rs. 100/- in default to undergo R.I. for one month.

Through this appeal the appellants have challenged the aforesaid conviction and sentences.

2. The prosecution case in brief is as under:---

Informant Nivrutti Kundalika Desai and witnesses of this case are residents of a

common village viz. Paparde. Deceased Shankar was the younger brother of the informant. Both of them lived in different portions of the same house. Partition between them had taken place about nine years prior to the incident. There was a field near Dombarkhadicha Dongar. In that field Mango, Shewari and Jambul trees were standing and it belonged to the deceased. Adjacent to the land of the deceased was that of father of the appellants Adhikrao and Mahadev, sons of the appellant Parvatibai.

3. On 28-4-1980 Shankar left his house early in the morning to cut the Shevari tree. He instructed his wife Dropadabai P.W. 8 to follow with food and water. At that time he was wearing a banyan and half pant. While he was cutting the Shevari tree, the appellants objected on the ground that it stood in their field and hence he should not cut it. Appellant Adhikrao with a bamboo stick, appellant Mahadev with a crowbar and appellant Parvatibai with kicks and fists started assaulting Shankar. This incident was seen by Dnyandeo Rau Kumbhar P.W. 9 and Dnyandeo Tukaram Patil P.W. 10. They are said to have been harrowing the land of Tukaram which is in immediate proximity of the place of the incident. It is said that these witnesses wanted to intervene but on account of the threats of the appellants they did not dare to do so. It is further said that the appellants also told them not to give water to the deceased nor to disclose the incident and their names to anybody. They told them that in case they did the same they would meet similar fate. Thereafter, the appellants are said to have run away.

This incident is alleged to have taken place some time round about 9 a.m.

It so happened that one Dadu Dnyanu Suryavanshi P.W. 6, resident of Sangwad at about 9 a.m. happened to reach the place of incident on way back from Soniaichewadi where he had gone to see the previous day his ailing brother-in-law. At that time he found a person lying beneath a Mango tree. That person, who was not known to him, asked him to inform his brother Nivrutti that he was lying beneath the Mango tree in Deshpande's land. Dadu Suryavanshi gave the aforesaid message to Nivrutti. Nivrutti thereupon called Ganpat Tukaram Desai P.W. 7 and the two of them went to the place of the incident. There they found that Shankar was lying beneath a Mango tree. Soon thereafter Dropadabai P.W. 8 wife of the deceased also came. Shankar is alleged to have made a oral dying declaration to them, in terms that the appellant Adhikrao with a stick, appellant Mahadev with a crowbar and appellant Parvatibai with kicks and fists assaulted him. Thereafter Shankar is alleged to have succumbed to his injuries.

4. The informant Nivrutti Kundalika Desai P.W. 11 after death of his brother on the asking of Ganpat P.W. 7 proceeded to Police Station Patan which he reached at about 2.30 p.m. At the aforesaid Police Station he lodged his F.I.R. The F.I.R. was recorded by P.S.I. Krishna Dagadu Mohol P.W. 13. On its basis at 6 p.m. he registered a case u/s 302 read with 34 I.P.C. against the appellants. F.I.R. is Exhibit 36.

5. Immediately after the lodging of the F.I.R. P.S.I. Krishna Mohol took over the

investigation of the case. He visited the place of the incident and on the date of the incident itself recorded statements of Ganpat Desai P.W. 7, Dropadabai Desai P.W. 8 and some others. He performed inquest over the dead body of the deceased on the morning of 29-4-80. Inquest report is Exhibit 16. Thereafter he sent the dead body for autopsy. He also prepared the spot panchanama (Exhibit 26). He found on the place of the incident that entire Shevari tree was cut. He attached some branches of the Shevari tree, blood stained earth and plain earth. Same day 29-4-80 he interrogated both P.W. 9 Dnyandeo Rau Kumbhar and P.W. 10 Dnyandeo Tukaram Patil. That very day he also interrogated Tukaram Patil, (not examined) whose field they were harrowing along with some others, at the time of the incident. The same day he arrested appellants Adhikrao and Mahadev. Adhikrao told him that he could take them to the place where crowbar was hidden and have the same recovered. On the pointing of appellant Adhikrao vide panchanama (Exhibit 23) crowbar was recovered from a distance of 150 ft. from a place situate on the western bank of streamlet. The crow bar was recovered after appellant Adhikrao had dug some ground. It is alleged that appellant Mahadev was putting on a blood stained pajama at the time of his arrest and the same was also attached under a panchanama (Exhibit 17). On the next day i.e. 30-4-80 the saree which appellant Parvatibai was wearing was attached vide panchanama (Exhibit. 15). That very day appellant Mahadev produced weapon of appellant Adhikrao (Stick) from the roof of his house. It was attached under a panchanama (Exhibit 12). Also that day clothes on the dead body were attached under a panchanama Exhibit. 14. During the course of investigation he sent recovered articles to the Chemical Analyser. Finally after completing the investigation on 31-12-1980 he submitted the charge-sheet.

6. Going backwards the autopsy on the dead body of deceased Shankar Kundalika Desai was conducted on 29-4-80 between 4 p.m. and 5.50 p.m. by Dr. Pradip Yeshwant Kasbekar P.W. 3. On the dead body Dr. Kasbekar found the following ante-mortem injuries:-

- "1. Abrasion 1" x 2" on the right shin.
2. Abrasion 1" x 1/2" above right knee.
3. Abrasion 1" x 1/2" on the left shin.
4. Abrasion 2" x 1" on the supra sternal notch.
5. Parallel contusion marks on back. Black in colour.
6. Parallel contusion marks on calf of both legs, with sub coetaneous hematoma .

Doctor Kasbekar also found:---

- "1. Simple fracture right radius and ulna.
2. Simple fracture left radius and ulna.
3. Simple fracture neck of left femur.

4. Simple fracture right patella.
5. Simple fracture left patella.
6. Simple fracture left lateral malleolus

In the opinion of Dr. Kasbekar the ante-mortem injuries of the deceased were attributable to an iron bar (Article No. 1) and a stick (Article No. 8). He also opined that the aforesaid injuries could have cumulatively caused the death of the deceased and they were sufficient to cause death. In his opinion each injury was attributable to a separate blow.

7. Case was committed to the Court of Sessions in the usual manner.

In the trial Court the appellants were charged u/s 302 read with 34 I.P.C. They pleaded not guilty and claimed to be tried.

In the trial Court apart from tendering some documentary evidence, prosecution examined as many as 13 witnesses. In defence two witnesses viz. Dr. Gajanan Maruti Bhosale D.W. 1 and Adhikrao Vithal Desai (appellant) D.W. 2 were examined. The former was examined to prove the blood group of appellant Mahadev and deposed that his blood group is "ARH Positive". The latter was examined to prove that the Shevari tree which the deceased was cutting at the time of the incident did not belong to him; it belonged to appellants; and that the appellants were not present on the place of the incident when the incident took place.

The learned trial Judge rejected the defence of the appellants; believed the evidence adduced by the prosecution and passed the impugned order.

Hence this appeal.

8. We have heard Mr. S.G. Samant for the appellants and Mr. M.I.P. Galeria for the respondent. We have also perused the evidence adduced by both the prosecution and the defence as well as the impugned judgment. After giving our anxious consideration to the matter we find that on merits there is no substance in this appeal. However, we feel that the sentence awarded to the appellants is grossly excessive and warrants our interference.

9. The evidence adduced by the prosecution in the instant case can be classified under three heads:---

(a) Ocular testimony of Dnyandeo Rau Kumbhar and Dnyandeo Tukaram Patil, P.Ws. 9 and 10 respectively;

(b) Oral dying declaration which is said to have been made by the deceased shortly before his death to Ganpat P.W. 7, Dropadabai P.W. 8 and Nivrutti P.W. 11; and

(c) The evidence of recovery of blood stained saree from appellant Parvatibai, blood stained pajama and stick from appellant Mahadev and blood stained

crowbar on the pointing out of appellant Adhikrao.

We may straight away mention that no blood was found on the crow bar and saree by the chemical analyst. The chemical analyst however found blood of "A" group on the pajama recovered from the appellant Mahadev. We may also mention that "A" group is the blood group of the deceased and that the blood group of appellant Mahadev as deposed to by D.W. 1 Dr. Gajanan Maruti Bhosale is "ARH Positive".

10. The short question in this appeal is whether the evidence adduced by the prosecution is credible enough to sustain the conviction of the appellants.

We would first like to begin with the ocular account furnished by P.W. 9 Dnyandeo Rau Kumbhar and P.W. 10 Dnyandeo Tukaram Patil. Both these witnesses have deposed that on the date and time of the incident, along with some others they were harrowing the field of one Tukaram Desai which is situated practically in the immediate proximity of the field on which the deceased Shankar was cutting Shevari tree. Their evidence is that from Tukaram Desai's field, place of incident was visible. Both these witnesses have stated that they saw deceased Shankar going to his field. After some time the appellants went after him. They heard cries from the side of the deceased's field. Naturally their attention was attracted towards that direction. They saw that the deceased was beneath the Mango tree and appellant Adhikrao with a stick, appellant Mahadev with a crowbar and appellant Parvatibai with kicks and fists were assaulting him. They also found that Parvatibai was instigating the other two appellants to assault Shankar. It appears that these witnesses wanted to intervene but the appellants Adhikrao and Mahadev asked them not to come forward and threatened them with dire consequences in case they did the same. All the appellants also asked them not to give water to the deceased nor to disclose anything in the village. They also threatened that in case they did the same, they would meet the same fate. Thereafter the appellants ran away.

The question is whether the evidence of both these witnesses is trustworthy or not? We are inclined to answer this question in the affirmative. The manner of the incident given out by these witnesses is corroborated by the nature of injuries received by the deceased. We have mentioned in some detail about the medical evidence in Para 6 of our judgment. Perusal of the aforesaid paragraph would show that the deceased sustained injuries attributable to stick, crow-bar, kicks and fists. Hence the mode of assault deposed to by these witnesses is corroborated by medical evidence.

The evidence of both these eye witnesses that the incident took place at the place alleged by them and in the manner deposed to by them is also corroborated by recovery of cut branches of shevari tree and plain and blood stained earth by the Investigating Officer P.S.I. Mohol, from the place of the incident.

It is worth emphasising that these witnesses were promptly interrogated by the

Investigating Officer P.S.I. Mohol P.W. 13 u/s 161 Cr.P.C. P.S.I. Mohol has stated in his deposition that he interrogated these witnesses the following day i.e. on 29-4-1980. Prompt interrogation u/s 161 Cr.P.C. has a definite significance. To a considerable degree it eliminates the possibility of manufacturing ocular account and the averments contained in the same. We are also impressed by the circumstance that both these eye witnesses are wholly independent witnesses and had no axe to grind against the appellants. No plausible reason could be pointed out by the learned Counsel for the appellants as to why these witnesses are falsely deposing about the participation of the appellants in the incident. We have gone through the statements of both these eye witnesses and find them to be truthful witnesses.

11. Mr. S.G. Samant, learned Counsel for the appellants vehemently urged that the conduct of both these eye witnesses in remaining mute till they were interrogated by the Investigating Officer on the next day of the incident is a circumstance which reflects that they did not witness the incident and are got up witnesses. Mr. Samant urged that it is impossible to believe that as a result of the threat given by the three appellants, out of whom Adhikrao was aged about 16 and 1/2 years at the time of the incident, Mahadev was aged about 21 and 1/2 years at the time of the incident and Parvatibai was a lady, the two witnesses would have kept quiet. He urged that it is impossible to believe P.W. 10 Dnyandeo Tukaram Patil when he deposed in paragraph 12 that although in his house there was his wife and three children but he did not even mention the incident to them. He also urged that when along with these witnesses there were at least two other persons viz. Prakash Patil and Narayan More, there was no question of these witnesses being frightened by the threats given by appellants. We have given our anxious consideration to the submission of Mr. Samant and we regret that we do not find any substance in it. In matters such as this there are no set of forms of human reaction. Different people react differently in a given situation. What the Criminal Courts have to examine is whether the reaction is probable or not. To us there appears to be nothing improbable in the statement of these two eye witnesses when they say that on account of threat given by the appellants that they would also meet the same fate like the deceased, in case they disclosed the incident to anyone they did not disclose the same. In this connection it should be remembered that both these witnesses had seen the merciless manner in which the deceased had been assaulted. It was so severe that immediately afterwards the deceased died. If in such a situation when they depose that on account of being frightened they did not speak about the incident to anyone till the Investigating Officer interrogated them the next day, we find nothing strange.

Mr. Samant with his customary fairness pointed out that there was no other infirmity in the ocular account furnished by these witnesses on the basis of which he could persuade us to discredit the same.

12. Pursuant to the above discussion we are clearly satisfied that both these

witnesses did witness the incident as urged by them and are wholly reliable witnesses. In our view their evidence alone is sufficient for sustaining the conviction of the appellants.

13. We now take up the evidence of oral dying declaration which was made by the deceased immediately prior to his death to Ganpat, Dropadabai and Nivrutti, P.Ws. 7, 8 and 11 respectively. Mr. Samant learned Counsel for the appellants vehemently urged that this evidence should not be believed because it saw light of the day for the first time in the belated F.I.R. of the incident which was lodged by Nivrutti Desai. In this connection he invited our attention to paragraph 4 of Nivrutti's statement wherein he has stated that he reached the Police Station at about 2.30 p.m. He also invited our attention to the original F.I.R., a perusal of which shows that the F.I.R. was actually lodged at 6.00 p.m. at P.S. Patan. He contended that this time gap of 3 and 1/2 hours was utilised at Police Station Patan in concocting a false case against the appellants and in manufacturing the evidence of oral dying declaration. He also urged that Dropadabai's name is not mentioned in the F.I.R. In our view the latter circumstance itself shows that the F.I.R. was not lodged after deliberations. Had there been deliberations then Dropadabai's name would have been mentioned in the F.I.R. However, even if by way of abundant caution we ignore on the point of oral dying declaration the evidence of Dropadabai and Nivrutti because being wife and brother of the deceased respectively they are highly interested witnesses, there remains that of Ganpat P.W. 7. We have been taken through his evidence and we do not find that the same suffers from any infirmity. In his statement in the trial Court he has explained his presence by stating that along with Nivrutti at about 9 to 10 a.m. he came to the place of the incident and the deceased made an oral dying declaration to him. We have gone through his entire statement. We find that the same appears to be very natural and in tune with probabilities. No ostensible reason has been suggested to this witness for falsely implicating the appellants. The oral dying declaration deposed to by this witness viz. that the deceased told him that Adhikrao with stick, Mahadev with iron bar and Parvatibai with kicks and fists blows assaulted him is also corroborated by the nature of the injuries suffered by the deceased. We have mentioned the injuries in Para 6 of the judgment.

14. Further corroboration to the prosecution case is forthcoming by the circumstance that when the appellant Mahadev was arrested on 29-4-1980 he was found putting on a blood stained pajama. The genuineness of the panchanama pertaining to the recovery of the pajama has been admitted by the defence. The said pajama was sent to the Chemical Analyst and on the same, human blood of blood group "A" which is the blood group of the deceased was found by the Chemical Analyst. Since in the instant case it is clear from the evidence of D.W. 1 Dr. Gajanan Maruti Bhosale that the blood group of appellant Mahadev was "ARH Positive", this would be a very clinching circumstance against the appellant Mahadev. This circumstance was put to Mahadev in his statement u/s 313 Cr.P.C. and apart from merely denying it he could offer no other

explanation. This denial of his we are not prepared to accept.

15. Mr. Samant also submitted that the F.I.R. in the instant case is inordinately belated and this ground by itself is sufficient for acquitting the appellants. In this connection he invited our attention to Para 4 of the statement of informant Nivrutti Desai wherein he stated that he reached Police Station, Patan at 2.30 p.m. and to the original F.I.R., a perusal of which shows that the same was registered at 6.00 p.m. Even if it is assumed that there has been some delay in lodging of the F.I.R. that would not prove fatal. Firstly, because, as we have mentioned earlier, that had there been consultation and deliberation prior to filing of the F.I.R., the name of Dropadabai P.W. 8 would have been mentioned therein. Secondly it is well settled that the F.I.R. is not a substantive piece of evidence and can only be used to contradict or corroborate the maker.

15A. Coming to the defence witnesses we find that evidence of D.W. 2 Adhikrao (appellant) does not inspire confidence. He has not been able to establish that Shevari tree which the deceased was cutting at the time of the incident belonged to them, as deposed to by him. His claim that the appellants did not participate in the incident is not founded on any cogent basis and deserves to be rejected in view of the overwhelming evidence adduced by the prosecution in support of their participation. As regards the evidence of Dr. Bhosale D.W. 1 who was examined to prove blood-group of appellant Mahadev from a perusal of Para 14 of this judgment we find that instead of helping the defence it actually helps the prosecution.

16. In our view the learned trial Judge acted correctly in finding the appellants guilty for committing the offence of culpable homicide not amounting to murder. We however find that he has committed a technical mistake. In the absence of evidence as to which of the appellants caused the fatal injuries of the deceased in our view instead of convicting the appellants u/s 304 Part (II) simplicitor the trial Judge should have convicted them u/s 304 Part (II) read with 34 I.P.C. Since no prejudice is being caused to the appellant we are doing it.

17. The sole question which survives is the question of sentence. Mr. Samant, learned Counsel for the appellants urged that the sentence awarded to the appellants is disproportionately excessive. He urged that considering the circumstance that appellant Adhikrao was aged about 16 and 1/2 years at the time of the incident and the role played in the incident by appellant Parvatibai, it would be far-far too harsh to send them back to jail after a time gap of more than 16 years. In this connection he also urged that there is nothing to indicate that either of these appellants have to their discredit any criminal history or previous conviction. He also urged that although appellant Mahadev assaulted the deceased with a crowbar, but the sentence awarded to him is also excessive. We have given our very anxious consideration to the submission canvassed by Mr. Samant and we find that the same is pregnant with substance. A perusal of the statement of Adhikrao u/s 313 Cr.P.C. shows that it was recorded on 22-10-1981. This means that on the date of the incident which was 28-4-1980

Adhikrao was aged about 16 and 1/2 years. In the decision reported in Raisul Vs. State of U.P., , the Apex Court has held that the estimate of the age given by the accused in statement u/s 313 Cr.P.C. should be accepted as true. In view of the aforesaid decision we believe that appellant Adhikrao was aged about 16 and 1/2 years at the time of the incident. His participation to us appears to be on account of raw youth and immaturity. It appears that appellant Adhikrao acted under the moral influence of his mother Parvatibai and brother Mahadev. In this view of the matter we feel that the ends of justice would be squarely satisfied if the jail sentence of appellant Adhikrao is reduced to the period already undergone by him provided in lieu of the unserved portion of the jail sentence he pays a fine of Rs. 2500/-. This would be in addition to the fine of Rs. 500/- imposed by the learned trial Judge. We also feel that considering the role of appellant Parvatibai, the ends of justice will be amply satisfied if her jail sentence is reduced to the period already undergone and in lieu of the remaining period she also pays a fine of Rs. 2500/-. This would be in addition to the fine of Rs. 100/- imposed by the trial Court.

Regarding appellant Mahadev Vithal Desai we find that the role assigned to him is a grave one. He is alleged to have assaulted the deceased with an iron bar. Post mortem report of the deceased shows that he sustained as many as 7 fractures. To us it appears that most of these fractures were caused by iron bar. In view of this and bearing in mind that he was of a sufficiently mature age at the time of the incident we are not inclined to accede to Mr. Samant's submission of also reducing his sentence to the period already undergone provided he pays some fine. However, there is no getting away from the fact that the incident took place more than 17 years ago and he has no previous conviction to his discredit. In our view the ends of justice would be amply satisfied if his jail sentence is reduced from 7 years R.I. to 4 years R.I. and that of fine is maintained.

18. In the result this appeal is partly allowed and partly dismissed. We convert the conviction of the appellants from section 304 Part II simplicitor to one u/s 304 Part II read with 34 I.P.C. We direct that the jail sentence of appellant Adhikrao Vithal Desai be reduced to the period already undergone by him provided in lieu of the unserved portion he pays a fine of Rs. 2500/- which shall be in addition to the fine of Rs. 500/- imposed by the trial Court. In case this appellant does not pay the fine within a period of six months from today, he shall undergo two years R.I. in default. The jail sentence of appellant Parvatibai Vithal Desai is also reduced to the period already undergone and in lieu of the unserved portion she is ordered to pay a fine of Rs. 2500/- which shall be in addition to the fine of Rs. 100/- imposed by the trial Court. In case she does not pay the fine within a period of six months from today she would undergo a sentence of four months R.I. Jail sentence of appellant Mahadev Vithal Desai is reduced from seven years R.I. to four years R.I. and the sentence of fine imposed on him is maintained. Fine shall be deposited in the trial Court. In case the fine is deposited, the trial Court shall send a notice to the legal heirs of the deceased

and the entire amount awarded by this Court viz. Rs. 5000/- would be paid as compensation to the said legal heirs.

In case appellants Adhikrao and Parvatibai do not pay the fine within six months from today, they shall be taken into custody to serve out their sentences. Appellant Mahadev Vithal Desai, who is on bail, shall be forthwith taken into custody to serve out his sentence.