

(1999) 08 BOM CK 0042
In the Bombay High Court
Case No : Criminal Appeal No. 567 of 1995

Anant Dagadu Bhalerao

APPELLANT

Vs

The State of Maharashtra and another

RESPONDENT

Date of Decision : 03-08-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235, 374
Evidence Act, 1872 — Section 3, 45, 59, 61, 8
Penal Code, 1860 (IPC) — Section 299, 304

Citation : (2000) 5 BomCR 37 : (2000) BomCR(Cri) 37 : (1999) 3 MhLj 518

Hon'ble Judges : Vishnu Sahai, J; T.K. Chandra Sekhara Das, J

Bench : Division Bench

Advocate : A.P. Mundergji, for the Appellant; Ms. Usha Kejariwal and Mrs. G.K. Jadhav, for the Respondent

Judgement

Vishnu Sahai, J.—Through this appeal the appellant challenges the judgment and order dated 1st September, 1995 passed by the IInd Additional Sessions Judge, Raigad, Alibaug, in Sessions Case No. 59/95 convicting and sentencing him to undergo 7 years R.I. and to pay a fine of Rs. 2000/-, in default to undergo & months R.I. for the offence u/s 304 part 1, I.P.C. Along with the appellant were tried-

1. Yeshwant Arjun Bhalerrao
2. Dagadu Dharma Bhalerao
3. Ishwar Damu Bhalerao
4. Arjun Mahadu Bhalerao
5. Dame Ambu Bhalerao
6. Prakash Arjun Bhalerao
7. Vishwas Damu Bhalerao

but they have been acquitted vide the impugned order.

2. In short the prosecution case runs as under:

The deceased Moreshwar Jadhav, the injured witnesses, the appellant and the acquitted accused reside in the same village viz. Mothe Vengaon, Baudha Wada, Taluka Karjat, Dist. Raigad. On 30-10-1990 at about 8.30 to 9 p.m. the appellant and the acquitted accused came to the house of the deceased Moreshwar Jadhav. They started abusing him. When he asked them as to why they were abusing him they told him that he was doing black magic. On that Moreshwar Jadhav told them that they were free to take action in law against him. On that the appellant inflicted a blow of pharshi (small axe) blow on the head of Moreshwar Jadhav resulting in his falling down. When Moreshwar Jadhav's son Vasant Moreshwar Jadhav P.W. 1 mother Radhabai Pandurang Kamble P.W. 2, wife Janabai Moreshwar Jadhav P.W. 3, daughter Rohini Moreshwar Jadhav P.W. 4, brother in law Ananta Gavale P.W. 5, and Hirabai Janardan Jadhav P.W. 6 intervened the appellant and others assaulted them. Thereafter they went away.

3. The evidence of the injured eye-witnesses shows that after the appellant and others ran away they along with Moreshwar Jadhav proceeded to Karjat Hospital where they were medically examined by Dr, Ghanshyam Hari Nazirkar P.W. 13 (from 9.40 p.m. onwards), who found on their person the following injuries:

- i) Moreshwar Jadhav-- a laceration on the skull of dimension 2" x 1/2", sub coetaneous on vertex oblique;
- ii) Janabai Jadhav-- a laceration on left side of forehead;
- iii) Vasant Jadhav-- a laceration;
- iv) Radhabai Kamble-- a laceration on occipital left side; and
- v) Ananta Gavale-- a laceration.

4. The evidence of P.S.I. Dinkar Yashwant Khiste P.W. 11 shows that when Moreshwar and others reached Karjat Hospital, he received a phone call from the hospital that some fighting had taken place in village Mothe Vengaon and some injured persons were admitted in the hospital. Consequently he went there and issued a yadi, on the basis of which Moreshwar Jadhav and others were examined. His evidence further shows that he thereafter recorded the F.I.R. of Vasant Jadhav P.W. 1 and on the basis of it registered an offence vide C.R. No. 71.90.

5. Since the condition of Moreshwar Jadhav was deteriorating he was transferred to Sion Hospital, where he died on 2-11-1990.

6. The autopsy on the corpse of Moreshwar Jadhav was conducted by Dr. Nitin Maheshwar Gadgil P.W. 12 who found on it a contused lacerated wound on occipital region. On internal examination Dr. Gadgil found fracture of skull over occipital-region. In his opinion the deceased died on account of fracture of scalp

with intra carnial hemorrhage. He also stated that the injury of the deceased was possible by pharshi shown to him.

7. The investigation was conducted in the usual manner by P.S.I. Dinkar Yashwant Khiste P.W. 11. On 7-11-1990, he recovered Pharshi and three sticks at the instance of the appellant under a panchanama. He thereafter handed over the investigation of the case to P.S.I. Kadam who submitted the charge-sheet against the appellant and others.

8. The case was committed to the Court of Sessions in the usual manner where the appellant and others were charged on a number of counts, including 302 read with 149 I.P.C. They pleaded not guilty to the charges and claimed to be tried- Their defence was of denial but they examined no witnesses to substantiate it.

9. During trial the prosecution examined 13 witnesses, six out of them, viz, Vasant Jadhav, Radhabai Kamble, Janabai Jadhav, Rohini Jadhav, Ananta Gavale and Hirabai Jadhav P.Ws. 1, 2, 3, 4, 5 and 6 respectively were examined as eye-witnesses. The learned trial Judge believed their evidence vis-a-vis the appellant and convicted and sentenced him in the manner stated in para 1. He however, acquitted the co-accused persons who were tried along with the appellant on the ground that there was no cogent evidence for holding them guilty.

Hence this appeal.

10. We have heard learned Counsel for the parties and perused the entire material on record. In our view this appeal deserves to be partly allowed.

So far as the involvement of the appellant in the incident is concerned we are satisfied that it has been established beyond doubt through the ocular account rendered by the six eye-witnesses mentioned above. We have earlier seen that five of them, viz. Vasant Jadhav P.W. 1, Radhabai, P.W. 2, Janabai Jadhav, P.W. 3 Rohini Moreshwar Jadhav P.W. 4, and Ananta Gavale P.W. 5 were injured witnesses. These injured witnesses as also eye-witness Hirabai Jadhav have categorically stated that the appellant inflicted a pharshi blow on the head of Moreshwar Jadhav. This claim of theirs is corroborated by the evidence of the autopsy surgeon Dr. Sadgil who candidly stated that the injuries sustained by the deceased could be caused by the pharshi shown to him.

Since the appellant was known to the eye-witnesses from before the incident they would have hardly had any difficulty in recognising him. We find it necessary to mention this because in the evidence of some of the witnesses it has come that there was darkness when the incident took place. In this connection it would be necessary to advert to para 4 of the decision of the Supreme Court rendered in the case of Kirpal Singh Vs. State of Uttar Pradesh, wherein in para 4 the Supreme Court has observed that even in the absence of light known people can be recognized by their gait, timbre of voice etc.

11. In our view the learned trial Judge acted correctly in finding that the

appellant inflicted a fatal pharshi blow on the head of deceased Moreshwar Jadhav.

12. The question which remains is that of the offence. In our view the learned trial Judge erred in convicting the appellant for the offence u/s 304 part I, I.P.C. We feel that he should have convicted him for that u/s 304 part II, I.P.C. The evidence of the eye-witnesses shows that it was the firm belief of the appellant that the deceased was practicing black magic which made him to assault him. It also shows that prior to assault an exchange of abuses and heated altercation took place between the appellant and the deceased. If in such a factual matrix the appellant inflicted a solitary blow from the blunt side of the pharshi (we say this because a contused lacerated wound was found on the person of the deceased by the autopsy surgeon) it would be proper to hold that when he inflicted the blow he had the knowledge that it was likely to cause the death of the deceased. Consequently the case of the appellant would fall within Clause Thirdly of section 299 I.P.C., the breach of which is punishable u/s 304 part II, I.P.C.

13. Coming to the question of sentence in our view the ends of justice will be satisfied if the appellant is directed to undergo a sentence of 5 years R.I. coupled with a fine of Rs. 2000/- in default to suffer 6 months R.I. for the offence u/s 304 part II, I.P.C.

14. In the result this appeal is partly allowed. Although we acquit the appellant for the offence u/s 304 part II, I.P.C. and set aside his conviction and sentence of 7 years R.I. and a fine of Rs. 2000/- and 6 months R.I. in default thereunder but we find him guilty for the offence u/s 304 part II, I.P.C. and sentence him to undergo 5 years R.I. and to pay a fine of Rs. 2000/- in default to suffer 6 months R.I. thereunder.

If the appellant pays the fine of Rs. 2000/- it shall be paid in entirety as compensation to Janabai Moreshwar Jadhav P.W. 3 the widow of the deceased.

The appellant is in jail (although he was granted bail at the time of admission of his appeal but the record and proceedings show that he has not availed of it). He shall remain there and serve out his sentence.

15. Appeal party allowed.