
(1996) 10 BOM CK 0003

In the Bombay High Court

Case No : Criminal Appeal No. 245 of 1993 with Cri. Application No. 560 of 1996

Ankush Nivrutti Ghorpade and others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-10-1996

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 147, 148, 149, 164, 302

Citation : (1996) 10 BOM CK 0003

Hon'ble Judges : V.K. Barde, J;N.P. Chapalgaonker, J

Bench : Division Bench

Advocate : A.H. Kapadia, for the Appellant; K.B. Choudhary, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V.K. Hardk, J.—The Second Additional Sessions Judge, Osmanabad, has convicted the appellants-accused in Sessions Case No. 15/1993 for offences punishable under sections 302 read with 149, 148 and 147 of Indian Penal Code. Hence, this appeal against conviction and sentence.

2. Madhukar Bendkale of village Mahalingraiwadi, which is also called as Yenegurwadi, on 20-8-1992 at about 9.00 a.m. was sitting in front of his house. The seven accused went there and demanded explanation from him as to why he was making false allegation against them. The seven accused then beat Madhukar with fist blows and kicks and left the place. Rajendra s/o Madhukar who was in the field returned home after some lime and he learnt about the beating. Then he and his father went to the lane where the accused were residing to ask them as to why Madhukar was beaten. The seven accused then beat Madhukar and Rajendra. They gave fist blows, kicks, also used stone for beating. The accused-Ankush was having Sattur and he hit Madhukar on left leg with Sattur. Madhukar received bleeding injury. The accused Devidas was having wooden handle of spade and he hit Madhukar with the wooden handle. Accused

Umrao was having cycle chain and he beat Madhukar with cycle chain. Rajendra tried to rescue Madhukar by throwing himself on person of Madhukar. All the accused beat Rajendra also with kicks, fist blows, stone and handle of spade. Itihas Jagtap, maternal uncle of Rajendra intervened and stopped the beating.

3. Head Constable Katke was at Out-Post, Yenegur. He received information from Trimbak Daji Bendkale at about 9.15 a.m. on 20-8-1992 that Ankush Ghorpade and others had assaulted his brother and the maramari was going on. Venkal Dattu Jadhav, another person, also reported about the maramari at the Out-Post. So Head Constable Katke went to Mahalingraiwadi in the company of Constable Chavan and Sarpanch Venkat Jadhav. He saw that Madhukar Daji Bendkale was lying in front of house of Krushna Bhure in injured condition. Wife and two daughters of Madhukar were sitting beside and were weeping. He put Madhukar in Jeep. Madhukar told that Rajendra was also injured. Rajendra was lying in another lane. So he was also taken in the Jeep and they were taken to Rural Hospital, Murum, for medical treatment. Head Constable Kalke then went to Police Station, Murum and reported the matter to the P.S.I.

4. P.S.I. Ranjankar then went to hospital at Murum. Madhukar was not in a position to give any statement. He recorded statement of Rajendra, treated that as F.I.R. and registered Crime No. 94/92.

5. P.S.I. Ranjankar look up the investigation. During the course of investigation. Madhukar died. So the offence punishable u/s 302 of Indian Penal Code was added. All the accused were arrested and then charge-sheet was submitted before the Judicial Magistrate, First Class, Omerga.

6. As the offence punishable u/s 302 of Indian Penal Code being exclusively triable by Court of Session, Judicial Magistrate, First Class, Omerga, committed the case to the Sessions Court, Osmanabad.

7. The learned Additional Sessions Judge framed charge against the seven accused for offences punishable under sections 147, 148, 149 read with 302 and 149 read with 324 of Indian Penal Code.

8. All the accused pleaded not guilty and their defence is that the case is false.

9. The learned Additional Sessions Judge after recording evidence of the prosecution witnesses, statements of the accused and after hearing arguments of both the sides, held that the prosecution has proved that the accused committed the offences punishable under sections 149 read with 302 of Indian Penal Code and sentenced all the seven accused to life imprisonment and to pay fine of Rs. 500/- in default of payment of fine, further rigorous imprisonment for two months. He also held that all the seven accused committed offence punishable u/s 148 of Indian Penal Code and sentenced them to rigorous imprisonment for two years and to pay fine of Rs. 500/- in default of payment of fine, further rigorous imprisonment for two months. The learned Additional Sessions Judge convicted the accused for offence punishable u/s 147 of Indian Penal Code, but did not

pass any separate sentence for the same. However, the learned Additional Sessions Judge acquitted all the accused for offence punishable u/s 324 read with 149 of Indian Penal Code.

10. Heard Shri A. H. Kapadia, learned counsel for the appellants-accused and Shri K. B. Choudhary, learned Additional Public Prosecutor for the State.

11. The learned counsel for the appellants-accused has argued that the important witnesses-Rajendra s/o deceased Madhukar (P.W. 4) who filed the F.I.R., Uttambai w/o Madhukar (P.W 5) and Shobha (P.W 6) d/o Madhukar have not at all supported the prosecution case. Thus, there is no reliable evidence to hold that the accused had formed unlawful assembly with the intention of committing murder of Madhukar. The evidence of the prosecution witnesses-Sangitabai (P.W. 12), other daughter of deceased Madhukar and Kirtikumar (P.W. 13), brother-in-law of Sangitabai cannot be relied upon because they are not only near relatives of deceased Madhukar, but their names are not appearing as the eye-witnesses in other evidence on record. It is also argued by the learned counsel for the appellants-accused that there was no reason for the seven accused to come together to form an unlawful assembly and to cause murder of Madhukar. The prosecution has not produced any evidence as to why there should be such assault by these persons. It is also argued that though there are various injuries on the person of Madhukar as described in the medical evidence, there is no injury on vital part of the body. No dangerous weapon was used to cause any of the injuries. It is not alleged that all the accused were having some sort of weapon and such weapon was used to cause injury to Madhukar. So it cannot be said that there was a common object to commit murder of Madhukar. Charge for offences punishable under sections 147, 148 and 149 of Indian Penal Code is not at all made out by the prosecution. When there was no intention to cause murder of Madhukar, it cannot be said that the accused committed offence punishable u/s 302 of Indian Penal Code.

12. The learned A.P.P. Shri Choudhary has argued that there were 20 injuries on the person of deceased Madhukar. The doctor has opined that the cause of death was shock and haemorrhage due to subdural hematoma with multiple injuries on body and limbs, fracture of left radius and ulna and injury to both lungs. The medical evidence, thus, clearly shows that the death was homicidal. He also argued that even if the three prosecution witnesses have not supported the prosecution case, evidence of Kirtikumar and Sangitabai is sufficient to hold that the prosecution has proved its case. They have no reason to give false evidence against the accused. Their evidence cannot be discarded merely because they happen to be near relatives of deceased Madhukar. The learned A.P.P. also argued that the other evidence brought on record fully corroborates the evidence of Sangita and Kirtikumar and, therefore, the appeal be dismissed.

13. Rajendra (P.W. 3) is the son of deceased Madhukar. He filed the F.I.R. which is at Exh. 36. He has stated in his deposition at Exh. 35 that on the date of incident at about 9.00 a.m., he returned home from the field. On the way, he

learnt from the villagers that there was stone throwing at his father. He went to Ghorpade lane. His father was there. Many persons were pelting stones at his father. He fell on the body of his father to save him. At that time, he also was hit by the pelted stones. He has also stated that the accused before the Court were not in the group of persons who were pelting the stones. On cross-examination by the learned A.P.P., he admitted that he had filed the F.I.R. When it was read over to him, he stated that it was true and he had signed it. He also admitted that he signed the F.I.R. because the contents were correct. Thus, very contradictory statements are made by him and it is apparent that he is not a reliable witness.

14. Uttambai (P.W. 5) in her deposition at Exh. 38 has stated that on the day of incident at about 9.00 a.m., she was cooking in the house. Her husband had gone outside and she has stated that her husband died in quarrel but she does not know with whom the quarrel had taken place. She was contradicted with her statements before the Police but she had stated that she did not state to that effect before the Police.

15. Shobha (P.W. 6), daughter of Madhukar, has also not supported the prosecution case in her depositions at Exh. 39. Her statement was recorded by Judicial Magistrate, First Class, Omerga, under sub-section (5) of section 164 of the Criminal Procedure Code. She was contradicted with her statement before Police and statement before Judicial Magistrate, First Class. She has admitted that she made the statement before the Judicial Magistrate, First Class, but stated that she made such statement at the instance of the Police. Thus, the three important witnesses have not supported the prosecution case.

16. Trimbak (P.W. 4) is the brother of deceased Madhukar. He has stated in his deposition at Exh. 37 that on the day of incident at about 10.00 a.m., quarrel was going on in front of house of Madhukar. So he went there. He saw that Madhukar had fallen on ground. He was being beaten. Venkat, Lahu, Maruti, Devidas and Madhukar were beating his brother. He has stated that all the accused sitting before the Court were the same persons who were beating his brother. Trimbak has further stated that he and other two persons from the village besides the accused were there. Out of fear of the accused, he left that place immediately and went to Police Out-Post at Yenegur. He informed Police about the beating. He has also stated that he cannot read and write. So he could not give any written application. However, the Police asked him to sign a paper. He signed it and the Police then went to his village and he himself went to Ashta to his sister's house and from there he went to Murum.

17. In the cross-examination, this witness has admitted that about 50 persons had gathered near Vithal Rukmini temple at a short distance from the house of Madhukar. It is brought on record in the cross-examination that in his statement before the Police, he had not given the names of accused Nos. 2 to 7 as the assailants of his brother.

18. This witness, thus, is not giving clear evidence regarding the part played by the accused at the time of the incident. His deposition is very vague. Furthermore, he is speaking about the incident which took place earlier in front of the house of Madhukar.

19. As per the prosecution story, seven accused had gone to the house of Madhukar at about 8.30 to 9.00 a.m. There they beat Madhukar and then went away. Some times thereafter, Rajendra reached home. He learnt about the beating to Madhukar. Then he went to Ghorpade lane where the accused reside. That place is about one furlong from the house of Madhukar. Madhukar accompanied Rajendra.

20. In similar fashion, Sangita, the other daughter of Madhukar, has narrated about the incident in her deposition at Exh. 65. On the day of incident at about 8.30 a.m., when she was in her house, she heard hue and cry. So she went into the door of her house. Her sister and Kirtikumar were in the chowk. The accused -Arun, Devidas, Umrao, Madhukar, Ankush, Lahu and Maruti were assaulting her father Madhukar Bendkale. She has further stated that her father was sitting on the platform of Pimpal tree. Her brother-in-law and sister Shobha were intervening to stop the quarrel, but the accused pushed them aside. Afterwards, the accused left the place. She has further stated that her brother Rajendra returned home from the field and then he talked with father that they should make enquiry with the accused as to why they assaulted. She has stated that then her father and her brother Rajendra went to Ghorpade lane. She did not go there.

21. In Ghorpade lane, altercation took place between Madhukar and the accused persons. The accused then again beat Madhukar and incidentally beat Rajendra. The learned Additional Sessions Judge has framed charge against the accused regarding the second incident which took place in Ghorpade lane. There is no charge against the accused regarding the incident which took place earlier in front of house of Madhukar.

22. Considering the prosecution story as it is, it will have to be held that there were two separate incidents. One in front of house of Madhukar and another in Ghorpade lane. The accused beat Madhukar in front of his house and then dispersed. So there was no unlawful assembly once beating at the house of Madhukar had taken place. Some times thereafter, Madhukar and Rajendra went in Ghorpade lane and there again they were beaten, but it was not continuation of the first incident. So it cannot be said that the common object which the assembly of the accused was having when they were at the house of Madhukar was continued to be so, when Madhukar and Rajendra went in Ghorpade lane after the first incident. There is no nexus in between the two incidents to show that the same common object was there when the two incidents took place.

23. The only witness who is stating about the incident in Ghorpade lane in front of house of Krishna Bhure is prosecution witness No. 13-Kirtikumar. He has

stated in his deposition at Exh. 66 that Madhukar and Rajendra went to Ghorpade lane. The seven accused were standing in front of house of Krushna Bhure and there was exchange of words between Madhukar and the accused. It means that as Madhukar picked up quarrel by going to Ghorpade lane, then the other incident had taken place. If Madhukar had not gone to Ghorpade lane, the other incident would not have taken place.

24. Hence, whatever evidence prosecution has brought on record through Trimbak, Sangita and Kirtikumar regarding the first incident in front of house of Madhukar, it will have to be considered as the background regarding the second incident which took place in Ghorpade lane in front of house of Krushna Bhure.

25. Another point raised by the learned counsel for the accused-appellants is regarding which report to the Police should be treated as F.I.R. can be disposed of presently. It is in evidence of Trimbak that when he saw maramari in front of house of Madhukar, he immediately rushed to Police Out-Post at Yenegur and made a report to the Head Constable at the Police Station. He has also stated that he did not make any report in writing but his signature was obtained on some paper by the Police.

26. Head Constable Katke in his deposition at Exh. 47 has stated that Trimbak and Sarpanch Venkat Jadhav made a report about the incident of maramari but he did not record their statements because they were very much frightened and were insisting that the Police should visit Yenegurwadi immediately. It means that no specific complaint regarding cognizable offence was given either by Trimbak or by Venkat Jadhav before the Police at Yenegurwadi. No doubt, report regarding maramari was made but the evidence on record does not show that it was a report which could be treated as F.I.R.

27. Furthermore, whole of this evidence shows that Trimbak and Venkat had seen only the incident which took place in front of house of Madhukar. The other incident took place after they had left Yenegurwadi to make a report to Police. Therefore, they could not have made complete report about what had happened in the village on that day. So it cannot be said that the Police have suppressed the F.I.R. and have substituted Exh. 36 as F.I.R. Rajendra made a full report about both the incidents giving names of the persons who committed assault. So Exh. 36 has to be treated as F.I.R.

28. Kirtikumar (P.W. 13) is the only witness stating about what happened in front of house of Krushna Bhure in Ghorpade lane. He has stated that there was exchange of words between accused and Madhukar and the accused Ashok then hit Madhukar on left leg with Sattur. Madhukar fell down. He was shouting. Then accused No. 2 gave repeated blows to Madhukar all over body with cycle chain and the accused Devidas hit Madhukar with handle of the spade. He has stated that other accused were assaulting Madhukar with kicks and fist blows. He tried to intervene but he was pushed aside. He has also stated that Rajendra was lying on the body of Madhukar and accused Umrao gave repeated blows to Rajendra

with cycle chain. Wife of Madhukar and Shobha d/o Madhukar also tried to intervene. After causing the beating, the accused left the place.

29. Practically, this is the only witness who is stating about the incident which took place in front of house of Krushna Bhure. The learned counsel for the appellants-accused has argued that Kirtikumar is interested person. He is close relative of Madhukar. He had quarrel with the accused and, therefore, he has given false evidence against the accused. When Rajendra, Shobha and Uttambai are not stating anything against the accused, no reliance can be placed on the evidence of Kirtikumar. The learned Additional Sessions Judge erred in relying on the evidence of Kirtikumar.

30. The learned A.P.P. argued that Kirtikumar may be near relative of Madhukar but he is a kinsman of the accused. So it cannot be said that he has interest in one side only. He also pointed out that there was no enmity between Kirtikumar and the accused of such a nature that Kirtikumar could falsely involve the accused in such serious offence. Merely because other witnesses who were present at the place of incident as per the prosecution case have not supported the prosecution case, the evidence of this witness cannot be discarded.

31. Sangita is daughter of Madhukar. Kirtikumar is brother of husband of Sangita. So it cannot be said that he is very close relative of Madhukar. In evidence of Kirtikumar, it is brought on record that he is kinsman of accused also being from Ghorpade family. So the evidence of Kirtikumar cannot be discarded only on the ground that he is relative of deceased Madhukar.

32. It is suggested to Kirtikumar that the way to the land of the accused passes from above the bund of land of Kirtikumar and quarrel had taken place between him and the accused when the cattle belonging to the accused strayed in the crop of Kirtikumar. Kirtikumar has denied that there were any quarrel on that ground and that he was on inimical terms with the accused because of that quarrel. The very nature of suggestion shows that there might be some minor disputes between accused and Kirtikumar but those disputes were not such that Kirtikumar would take revenge by falsely involving the accused in the present case.

33. The evidence on record shows that Kirtikumar was at village Yenegurwadi on the date of incident because he was on leave. His house is adjacent to the house of Madhukar. The incident took place at about 9.00 a.m. in the presence of villagers in large number. So Kirtikumar was also naturally present there. There is nothing on record to indicate that he falsely stated that was present when the incident took place.

34. The learned counsel for the accused argued that name of Kirtikumar is not given in the F.I.R. Madhukar and Rajendra went together to Ghorpade lane. Kirtikumar might have followed him and when actual beating started, Rajendra might not have seen Kirtikumar. The statement of Kirtikumar indicates that he had not gone very close to Rajendra and Madhukar when they were being beaten

by the accused. So if Rajendra had not seen Kirtikumar and for that reason if he had not mentioned his name in the F.I.R. it cannot be said that Kirtikumar was not present there and he had not witnessed the incident.

35. The real test would be whether evidence given by Kirtikumar finds corroboration from other evidence on record and whether deposition of Kirtikumar as a whole appears truthful. There is no doubt that Madhukar was severely beaten on the day of incident at about 9.00 a.m. The accused themselves have not denied contention of the prosecution that on that day, Madhukar was beaten in the village. The medical evidence brought on record clearly supports the conclusion that Madhukar was beaten on the day of incident at about 9.00 a.m. The medical evidence also clearly indicates that the injuries were caused with weapons like cycle chain, Sattur and handle of spade. Dr. Deshpande (P.W 1) is cross-examined at great length, but there is nothing to dislodge his evidence regarding nature of injuries and the weapons used for causing the injuries. So the medical evidence fully corroborates the evidence of Kirtikumar.

36. Prosecution has examined Gautam Kamble (P.W 7) Exh. 41. He is the panch witness with respect to the panchanamas regarding recovery of weapons. He has stated that he and the other panch were called in Police Station. Accused Ankush was there. He asked accused Ankush whether he was ready to produce any article and accused Ankush showed willingness to produce Sattur. He has stated that then memorandum of his statement was prepared. The same is at Exh. 42. The witness has stated that then accused took the Police and panchas to his house and there he produced from behind corn-bin one Sattur and one shirt having blood stains. Those articles were attached as per the panchanama. Thus, this witness has proved that these articles were recovered at the instance of the accused.

37. The learned counsel for the accused has argued that the articles were not hidden at any place and it cannot be said that those were traced out because of the statement made by the accused. So it cannot be said that it is a recovery u/s 27 of the Indian Evidence Act. However, the evidence of Gautam and panchanama clearly indicates that the articles were not kept in open place or usual place in the house. The blood stained shirt and the blood stained Sattur were behind bin. So the articles were hidden there and those could be recovered only because the accused Ankush pointed out those articles.

38. The shirt and the Sattur were sent to Chemical Analyser along with other articles for examination and report as slated by P.S.I. Ranjankar in his deposition. Sample of blood of Madhukar and blood stained clothes from dead body of Madhukar were sent to Chemical Analyser. The report of Chemical Analyser (Exh. 20) indicates that the clothes taken from dead body of Madhukar were having stains of human blood of "B" group. The Chemical Analyser has also reported that the sample of blood of Madhukar indicated that it was of "B" group. There were stains of human blood of "B" group on the Sattur and the shirt

attached at the instance of accused-Ankush.

39. This clearly indicates that the Sattur was used to assault Madhukar. The accused Ankush produced that Sattur. The shirt produced by accused Ankush was also having blood stains of human blood of "B" group and it means that there is full corroboration of evidence of Kirtikumar from this evidence.

40. Kirtikumar has stated that accused No. 2-Umrao assaulted Madhukar with cycle chain. The medical evidence does indicate that there were injuries caused by cycle chain on the person of Madhukar. The cycle chain was recovered from accused No. 2-Umrao as per the evidence of panch witness Gautam. The memorandum of statement of Umrao and the panchanama regarding production of cycle chain are at Exh. 43. So this evidence also connects accused Umrao with the alleged incident and this evidence corroborates the evidence of Kirtikumar.

41. Panch witness Gautam has also stated that the accused No. 3-Devidas agreed to produce handle of spade. The memorandum of his statement was prepared and then he produced handle of spade which was kept under the tin roof of the house of accused Devidas. The memorandum and the panchanama are at Exh. 44. So this evidence corroborates evidence of Kirtikumar and connects accused Devidas with the incident.

42. It is argued by the learned counsel for the accused that evidence of panch witness Gautam cannot be relied upon because he is acting as panch witness of Police in various cases. However, the witness has denied this suggestion. He was not interested in any of the accused or injured person. He is from village Murum. So his evidence can be held reliable to hold that the three accused produced the three weapons before the Police.

43. The learned counsel for the appellants-accused argued that Kirtikumar has shown undue interest in the matter. He came before the Court after the prosecution had closed its case and filed application for examining him as witness for the prosecution. The record does show that when the matter was fixed for judgment, the witness appeared before the Court before the delivery of the judgment and filed application that he be examined as witness. He also pointed out that he was not served with summons because he was at Chandigarh and not at his village. In this circumstance merely because the witness offered himself as prosecution witness, his evidence cannot be discarded. The application of the witness was properly considered by the learned Additional Sessions Judge and he was examined as prosecution witness. So this circumstance cannot be held against the witness.

44. Kirtikumar is cross-examined, but there is nothing in his cross-examination indicating that he is falsely implicating the accused. It is worth noting that only with respect to accused Nos. 1, 2 and 3, he has stated about the weapons used by them. So far as remaining accused, he states that they gave fist blows and kicks to Madhukar. Nowhere he has exaggerated and, therefore, it can be said that he is a truthful witness. The learned Additional Sessions Judge who had

opportunity to see the witness while recording his deposition has relied on his evidence and there is nothing to give any other opinion regarding this witness.

45. Thus, evidence of Kirtikumar which is corroborated by other evidence on record, as shown above, indicates that seven accused beat Madhukar when he went in Ghorpade lane in front of house of Krushna Bhure. The background of the case, as brought on record by the prosecution, shows that the seven accused had previously beaten Madhukar short time before the incident. So when Madhukar again went before the accused and started to abuse them, the seven accused got angry with him and they assaulted him. Because of the act of Madhukar," the common object developed amongst the accused and they beat him. The accused Nos. 1, 2 and 3 were having the weapons. They used those weapons - Sattur, cycle chain and handle of the spade, while other accused gave fist blows and kicks to Madhukar. The circumstances clearly indicate that there was the common object of beating Madhukar.

46. The seven accused when were in front of house of Krushna Bhure were not forming any unlawful assembly because at that time they were not having any illegal intentions but when they assaulted Madhukar with their common object of beating him, the assembly of the seven accused turned into an unlawful assembly. So the beating to Madhukar took place by the unlawful assembly of the seven accused.

47. The question is as to what was the common object of this unlawful assembly. Madhukar died due to the various injuries he received on his person and especially the injuries on head and chest. But merely because Madhukar died, it cannot be said that the accused had the common object of committing murder of Madhukar. As per the prosecution case, the seven accused had assaulted Madhukar short time before this incident, but even at that time no injury was caused to him which was likely to cause death. He was given a good thrashing and the accused left that place. It means that they did not have intention of committing murder of Madhukar.

48. When they assaulted second time, even at that time, it appears that there was no intention of committing murder of Madhukar. The accused Ankush was having Sattur which is a cutter used for cutting sugarcane. The description of the weapon given in the panchanama clearly shows that it was having a big blade with one sharp edge. But the medical evidence shows that the injury on the shin was not with the sharp edge of the Sattur. Ankush hit Madhukar on left leg with Sattur, but he used blunt edge of the Sattur and not the sharp edge. Ankush selected the spot of lower limb to give the blow of Sattur. This clearly indicates that there was no intention of causing murder.

49. The medical evidence indicates that there were abrasions at outer can thus of right eye and near outer can thus of the left eye. This injury has caused hematoma at temporal and frontal region and subdural hematoma all over the brain. Considering the description of the injury, it appears that a blow was given

with hard and blunt object probably the handle of the spade and, therefore, the injury was caused near the eyes which resulted in injury to brain. But here again only one blow with the handle of the spade was given. No serious external injury was caused and, therefore, it cannot be said that there was intention of committing murder by giving such a blow.

50. The other weapon used by the accused is cycle chain. It appears that the repeated blows with cycle chain were given to Madhukar and he received injuries on back which caused contusion on both lungs on posterior aspect, the internal injury No. 3 described by Dr. Deshpande.

51. The doctor has also stated that there was fracture of radius and ulna of the left arm and the injuries were caused by cycle chain. So the grievous hurt was caused by using cycle chain as weapon but it cannot be said that the accused had the knowledge that they were likely to cause such an injury which was likely to cause death by giving blows with cycle chain or that accused were having the intention to cause death of Madhukar by giving blows with cycle chain.

52. The accused Nos. 4 to 7 only gave fist blows and kicks to Madhukar. They did not use any weapon and this also shows that none of the member of unlawful assembly was having intention of committing murder of Madhukar. There was the intention of causing grievous hurt to Madhukar. The grievous hurt was caused by using dangerous weapons like Sattur, handle of the spade and the cycle chain. So it has to be held that the accused had committed the offence punishable u/s 326 of Indian Penal Code in furtherance of their common object. The death took place not because accused intended to commit murder of Madhukar, but unfortunately Madhukar received injuries on vital part because of the blows given with handle of the spade and the cycle chain. Even when the accused were having such weapons, they had not intentionally given any blow on vital part, but it appears that in the melee when Madhukar fell down, he received blows on vital part. The conclusion drawn by the learned Additional Sessions Judge that the common object of the unlawful assembly was to commit murder, therefore, cannot be sustained.

53. Thus, the prosecution has established that the seven accused formed an unlawful assembly when Madhukar abused them in front of house of Krushna Bhure. The members of the unlawful assembly of accused Nos. 1, 2 and 3 were having the weapons like Sattur, cycle chain and handle of the spade which if used with sufficient force could have endangered the life of any person. The accused actually beat Madhukar with these weapons and also gave him fist blows and kicks and, thus, the accused committed offences punishable under sections 147, 148 and 149 read with 326 of Indian Penal Code. The accused are being convicted for these offences. However, the accused are being acquitted for offence punishable u/s 149 read with 302 of Indian Penal Code.

54. The circumstances show that the accused Nos. 1, 2 and 3 used dangerous weapons and caused injuries to Madhukar. The injury caused on head and chest

turned out to be fatal while there was fracture of ulna and radius of left arm but other accused gave only kick blows and fists. The involvement of the accused Nos. 4, 5, 6 and 7, therefore, is not that much as that of the accused Nos. 1, 2 and 3. No doubt u/s 149 of Indian Penal Code, when it is established that the offence was committed in furtherance of the common object, then all the members of the unlawful assembly are liable to be punished for the offence which is committed in furtherance of the common object. But that does not mean that each and every accused must be awarded same punishment. The Court can award lesser sentence to those members of the unlawful assembly who had taken lesser part in the incident.

55. In this respect, the Apex Court in the case Dalip Singh and Others Vs. State of Punjab, , has observed,

"In cases where the facts are more fully known and it is possible to determine who inflicted blows which were fatal and who took a lesser part, it is a sound exercise of judicial discretion to discriminate in the matter of punishment."

56. Similar view was taken by the Apex Court in the case of Tukaram Dnyanu Gurav and Others Vs. State of Maharashtra, . Their Lordships observed,

"Their conviction for an offence u/s 307 read with section 149 of the Indian Penal Code is, thus, well founded but the fact that it is not proved that any of them actually used their respective weapons during the assault is certainly a mitigating circumstance."

57. Thus, so far as accused Nos. 4, 5, 6 and 7, it can be held that when they caused injuries only by fist blows and kicks, though they were members of the unlawful assembly, having the common object of causing grievous hurt to Madhukar, they did not actually cause any grievous hurt to Madhukar and this is a mitigating circumstance to consider while awarding the sentence. Hence, the following order.

58. The appeal is partly allowed. The appellants-accused are acquitted for offence punishable u/s 149 read with 302 of Indian Penal Code. However, the accused are convicted for offence punishable u/s 149 read with 326, 147, and 148 of Indian Penal Code. The accused No. 1-Ankush Nivrutti Ghorpade, accused No. 2-Umrao Shivaji Ghorpade and accused No. 3-Devidas Dama Ghorpade are sentenced for offence punishable u/s 149 read with 326 of Indian Penal Code to suffer rigorous imprisonment for five years and to pay fine of Rs. 500/- each, in default of payment of fine, further R.I. for two months. The sentence as against accused Nos. 1 to 3 for offence punishable under sections 147 and 148 of Indian Penal Code is maintained as per the sentence passed by the Additional Sessions Judge.

59. The accused No. 4-Arun Maruti Ghorpade, accused No. 5-Lahu Nivrutti Ghorpade, accused No. 6-Madhukar Dama Ghorpade and accused No. 7-Maruti Nivrutti Ghorpade, are sentenced for offence punishable u/s 149 read with 326 of

Indian Penal Code to the term of imprisonment already undergone and to pay fine of Rs. 500/- each, in default of payment of fine, further R.I. for two months. The accused Nos. 4 to 7 are sentenced for offence punishable under sections 147 and 148 of Indian Penal Code, to the term of imprisonment already undergone and to pay fine of Rs. 500/- each, in default of payment of fine, further R.I. for two months.

60. The substantive sentences against all the accused to run concurrently.

61. The accused No. 3-Devidas Dama Ghorpade is on bail. On oral prayer of the learned counsel Shri Kapadia for the accused-appellants, time granted to accused No. 3-Devidas Dama Ghorpade till 20-11-1996 to surrender bail.

62. As the appeal is partly allowed and sentence is reduced, no order is necessary on Criminal Application No. 560/1996.