
(2003) 06 BOM CK 0062

In the Bombay High Court

Case No : Criminal Appeal No. 345 of 1987

Hari Balasaheb Yadav, Pradhu Murlidhar Yadav and Balasaheb
Maruti Yadav

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-06-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 324, 326, 34

Citation : (2003) BomCR(Cri) 1562

Hon'ble Judges : V.G. Palshikar, J;D.B. Bhosale, J

Bench : Division Bench

Advocate : Ramrao Adhik, Peter Lobo and F.E. Mane, for the Appellant; P.H. Kantharia, APP, for the Respondent

Judgement

Palshikar, J.—Being aggrieved by the judgment and order of conviction dated 4th April 1987 passed by the learned III additional Sessions Judge, Solapur, in Sessions Case No. 217 of 1986 convicting the accused Nos. 1, 2 and 3 for offence u/s 302 read with 34 of IPC and also convicting the accused Nos. 1 and 2 only for offence u/s 324 read with 34 of IPC, and for the offence of murder the accused have been punished to suffer imprisonment for life and to pay a fine of 1000/-, the appellants/original accused have preferred this appeal.

2. With the assistance of the learned counsel Shri Ramrao Adhik appearing on behalf of the accused and the learned A.P.P. Ms. Kantharia, for the State we have scrutinised the record and re-appreciated the evidence therein. Mr. Adhik the learned counsel appearing on behalf of the accused took us through the evidence of two eye witnesses and pointed out that it is not liable to be accepted because of several contradictions and omissions that exists. According to the learned counsel, the evidence on record was grossly insufficient to warrant conviction of the accused persons. Then taking us through the evidence in detail he pointed out that in any event, no overt act is attributed to accused No. 3, who is more than 70 years old now. There is no evidence by the prosecution that his

accompanying the accused Nos. 1 and 2 was after sharing common intention with them. These submissions of Mr. Adhik were countered by A.P.P. Ms. Kantharia who explained the discrepancies and omissions as immaterial and pointed out to us that the evidence of two witnesses if cohesively read its worthy of credence and has been rightly accepted by the learned trial Judge, who also pointed out certain evidence, which corroborates the statement made by the eye witnesses. She therefore claimed that the judgment and order of conviction is liable to be maintained.

3. We have already pointed out that the reappraisal of evidence is on the submission made across the bar. P.W.1 is one Vyanketesh who had prepared the map of the scene of offence and has proved it before the court. Factually there is no dispute regarding the occurrence and place where it occurred. P.W.2 is one V.E. Chaugule. He was a panch witness in the panchanama of the dead body and he proves the panchanama Exh.13. P.W.3 Narayan S. Yadav is another panch witness who proves panchanama Exh.15. Under this panchanama the blood stained articles were sent for Chemical Analysis. He is also the panch to the spot panchanama and that panchanama is also duly proved by him as Exh.5.

4. P.W.4 is the first eye witness examined on behalf of the prosecution. He is related to the deceased Jayawant, who was his brother and though they were residing jointly in the Vasti but are preparing food separately. This witness states that they are cultivating the agricultural land jointly. He then gives the description of his family and then stated that he knows all the accused persons. Accused No. 1 is the son of accused No. 3 and accused No. 2 is the nephew of accused No. 3. The field of the accused is adjacent to that of the complainant and therefore both the families know each other. He then proceeds to give description of the locality where the offence occurred. He has also stated that the well of one Borkar is visible from his house and there is electric light in the area of that Borkar and that light reaches till their abode. He then proceeds to describe the quarrel which preceded the attack and which was between the women of both the families and was rightly ignored by the family of the complainant. The cause of that quarrel was pelting of stone on the dog of the accused by somebody in the complainant's family. Thereafter the witness describes the assault by the accused persons. He gives a very clear description of how the assault took place. At mid night when he woke up to give fodder to the cattle, he saw accused No. 1 along with two persons going to accused No. 1's residence. The way to the house of accused No. 1 goes from the front of the abode of the complainant. He therefore slept again and was awakened from the sleep by creaking noise. He got up to see what had happened. He saw the child sleeping with Jayawant also started crying and also heard Jayawant complaining that he was attacked while he was asleep. He mentioned the name of accused No. 1 Hari and was asking him why Hari was attacking him when he was sleeping. Therefore, the witness rushed to the place where deceased was sleeping and saw all the three accused were standing by the cot of Jayawant. Accused No. 1 was standing in between accused No. 2 and 3. He was armed with

sword, accused No. 2 was armed with sickle and accused No. 3 as not armed, but was holding the head of deceased. He then emphatically states that accused No. 1 and 2 was attacking the deceased with the sword and sickle on the body of the deceased below his waist. He then admits accused No. 1 and 2 had already given 4 to 5 blows on the body of the deceased before he reached the spot. He then states that the wife of the deceased Malanbai (P.W.12) got up and tried to save the deceased Jayawant, calling accused No. 1 Hari not to attack her husband. However accused No. 1 pushed her away and accused No. 2 attacked Malanbai on her forehead near eye brow. after which she fell down on the ground. Then the accused ran away into the sugar can crop. He says that there were in all 14 injuries on the body of the deceased. He then names the persons, who had assembled at the scene of offence. He then narrates how the victim was taken to the hospital and pronounced dead.

5. He has been extensively cross examined on behalf of all the accused persons. The entire emphasis of the cross examination appears to be on establishing previous quarrel between the ladies and subsequent repetition of that quarrel in the night. It was also suggested that accused No. 2 was not at the place at all as he was outside at some other place. Certain minor contradictions and omissions have been brought on record of this witness. But his evidence including the omissions and improvements or contradictions are to be appreciated in the light of the facts that he was deposing of an incident which occurred 11 months ago in which his real brother was brutally assaulted by the accused persons. The injuries were so clear as will be seen from the evidence of medical expert, that the deceased was stunned and it was in that condition that his statement was recorded by the police. He is deposing about what he saw 11 months ago in a better and calm atmosphere and he could remember graphically what transpired at the time of assault. Some such description may not find in the statement recorded by the police immediately. In such circumstance existence of contradictions, is not a sufficient ground to discard the entire testimony of this witness, who had misfortune of witnessing the killing of his own brother. Similarly the omissions and improvements are liable to be explained on this basis. Apart from that we have carefully considered the omissions, contradictions or improvements and we are of the opinion that the evidence of witness i.e. P.W.4 has to be read in its entirety and cohesively. So read these contradictions etc. are not material enough to require rejection of his evidence.

6. P.W.5 Murlidhar is also a panch witness who proves the panchanama of arrest of the accused persons. PW.6 is Dr. Shivappa. He conducted the post mortem and has submitted the post mortem report. He proves the report. He has described 14 injuries on the person of the deceased. He states that the injuries have been caused by sharp cutting weapon. All these injuries, according to him, are antemortem. He opines that the death was caused due to shock and haemorrhage due to the cut of the bigger blood vessels of both thighs, fracture of a right femur, tibia and fibula on the right leg and tibia of left leg. He states that all the injuries were grievous. From the evidence of this expert, it is clear

that the injuries caused on the person of deceased were so severe that a major blood vessel were cut completely, bleeding was profuse and the death was almost instantaneous. There is no doubt therefore that the death was homicidal. The challenge is, the prosecution has failed to prove that this homicidal death was caused intentionally by the accused persons.

7. P.W.7 is the medical officer Dr. Dnyaneshwar at Solapur and he examined Malanbai P.W.12 who was injured by the attack from the accused Nos. 1 and 2. He gives description of the injury and stated that it was serious. In his cross examination he states that no part of organ on the face of the injured was missing.

8. This statement in the cross examination is sought to be relied upon heavily by the learned counsel appearing for the accused, stating that the evidence of P.W.12 is liable to be rejected because she makes a positive statement that in the attack on her face, a slice of her eye brow was fell on the ground, which is liable to be rejected in view of this statement in the cross examination of doctor, though the doctor has opined that no part of any organ was missing. The testimony that the eye brow was cut off, need not be disbelieved, as eye brow is not an organ or part thereof. There is also evidence in the spot panchanama which shows that such cut off piece of flesh was recovered from the spot.

9. P.W.8 is Jainuddin. He has turned hostile and his evidence consequently is inconsequential.

10. P.W.9 is Pradip. He is also declared hostile by the prosecution. He is a witness to the panchanama of seizure of cloth of injured Malanbai.

11. P.W.10 Laxman is also declared hostile. He was the witness to the panchanama of recovery. But he denied that any such statement was made by the accused.

12. P.W.11 Madhukar has deposed in unequivocal terms that in the night of the incident a bulb of 100 W. was lighting on his well on the wooden pole. He has been cross examined which is of no consequence. In fact the evidence of this witness is not material for any other purpose but to show that in the night of the incident at 3.00 p.m. sufficient light was available for the complainant to identify the assailants. Added to this is the fact that the learned trial Judge himself visited the spot and verified existence of light in the surroundings. It is proved beyond doubt by the prosecution that there was sufficient light at the time of occurrence for the complainant and witnesses to identify the accused persons.

13. P.W.12 is the 2nd eye witness Malanbai who herself was injured and was wife of deceased Jayawant. She also deposed about the first quarrel between the ladies of the family over stone throwing by one, on the dog of another. She reported the quarrel to her husband but the husband ignored it. She then proceeds to describe the assault. She states that after midnight her husband shouted that accused No. 1 Hari committed treachery by attacking him with

deadly weapon when he was in sleep. She woke up on hearing his shouts. She saw accused No. 3 towards the head of the deceased, accused No. 2 towards the legs of the deceased and accused No. 1 in between them. The accused No. 1 was armed with sword and the accused No. 2 was armed with stickle and both of them were attacking the deceased with the weapons below his waist. Accused No. 3 had caught the hands of the deceased. Then she describes how the accused ran away. She tells that the accused could well be identified by her because of the light coming from the well of Madhukar Borkule. When she rushed against accused No. 1 Hari, he pushed her aside and accused No. 2 attacked her with his sickle, cutting injury on her eyebrow. A piece of eye brow was cut and fell on the ground. She then proceeds to give further details of how the husband was removed to hospital and declared dead, and how she was treated by the doctors etc. She has been extensively cross examined and in the cross examination she has admitted that she did not see any weapon in the hands of accused No. 3. Certain contradictions are also brought out along with omissions from this witness. We have given elaborate reasons why such contradictions and omissions etc. are not fatal, if they are not material while accepting the evidence of P.W.4. By the foregoing reasons, we are of the opinion that the contradictions etc. are not material and therefore are not sufficient to discard the evidence of P.W.12. We have analysed the deposition of both the P.Ws.4 and 12 and we find that there is very much support in their deposition and the statement made by them in the court. Both of them say that the accused attacked the deceased below waist and gave severe blows. Their testimony has further corroborated by the medical evidence, which in terms says that the attack on them was so brutal, the main big blood vessels were completely cut. There were four fractures. Their narration of how the incident started is also borne out by other witnesses who are not eye witnesses. In our opinion therefore, the evidence of these two eye witnesses duly corroborated by the testimony of medical expert and his report further strengthened by the spot inspection note by the learned trial Judge himself and we have no doubt that the accused persons are guilty of killing Jayawant.

14. However, we have to consider seriously the submission made by Shri Adhik the learned counsel that the entire scrutiny and reappreciation of the evidence on record discloses no over tact on the part of accused No. 3. It must be borne out from the submission of Shri Adhik that there is no evidence of common intention of killing the deceased between the accused Nos. 1, 2 and 3. Even if the accused No. 1 and 2 had intended to finish the deceased, knowledge of that intention to accused No. 3 or contribution of that intention by accused No. 3 is missing. The possibility of the accused No. 3 following them to the place of occurrence to justify them or to prevent them from doing some extremely serious act cannot be overruled. None of the witnesses including the eye witnesses made any grievance about the action of the accused No. 3. He therefore contended that the maximum common intention that can be attributed to the accused No. 3 is assaulting the deceased with the intention to teach him a lesson. The intention to commit murder by assault, cannot be attributed to

accused No. 3. The learned A.P.P. appearing for the State submitted that the attack was so brutal and were so severe that all accused must be prosecuted to have the knowledge that such attack in all probability would cause death. The intention to cause such injuries is there with regard to accused No. 1 and 2, but merely because there is no overt act on the part of accused No. 3 the fact that he has not shared the common intention, cannot be ruled out. She however accepted the fact that there was no overt act on his part and that he was of 77 years old.

15. We have, therefore, no hesitation in coming to the conclusion that the conviction and sentence of accused Nos. 1 and 2 is proper. The motive is to take action of earlier assault and earlier disputes over the land. There are two eye witnesses to the putting into the action of this motive. There is immediately disclosure by the deceased to P.W.13 Madhukar. There is ample evidence that though it was late night there was ample light and the witnesses had no difficulty in identifying the accused persons. Apart from that the families were known for years and therefore no question of any difficulty in the matter of identity.

16. There is also sufficient circumstantial evidence. The C.A. report states that the accused Nos. 1 and 3 had "B" blood group and the blood group of deceased and his wife was "A". The clothes of the accused persons were stained with blood which is of "A" group. Sickle was stained with "A" blood group, and the sword was also stained with blood. In the spot panchanama there is a clear mention that the cut portion of eye brow was found on the site. This corroborates the claim of P.W.12 in her deposition that her eyebrow was cut. The learned trial Judge has normally considered all these aspects while convicting the accused persons. We affirm the finding in relation to accused Nos. 1 and 2. The attack by them was so brutal and the intention behind the attack is so clear that they did intend to cause death of the deceased. We have therefore no hesitation in confirming the sentence awarded to them also.

17. However, the position in regard to accused No. 3 is little different. As submitted by Mr. Adhik, there is no evidence of any overact on the part of accused No. 3. Apart from that though he had the common intention of teaching a lesson to the family of deceased for their earlier assault on the dog, by the female members of the family of the accused, there is nothing to show that he has intention to cause such bodily injuries as in all probabilities would result in death. If he had that intention like accused No. 1 and 2 he would have also armed with like accused No. 1 and 2. The very fact that he was unarmed and the very fact that he had not committed any overact, goes to show that he shared the common intention with accused Nos. 1 and 2 only to the extend of teaching the family of the deceased a lesson. Even if he had the intention of providing brutal attack, all possibility of his stunt by the manner of attack also cannot be overruled. The evidence as it stands in our opinion, is not sufficient for us to hold that accused No. 3 is also proved to have the intention to commit the offence of murder. We therefore find on appreciation of evidence on record that accused No.

3 did not have the common intention of committing murder. He certainly had no intention of causing any bodily hurt to P.W.12 Malanbai. Having held therefore the accused No. 3 father did not share the intention of committing murder with the accused No. 1 and 2, but the possibility of sharing the intention of teaching a lesson to the family of the complainant cannot be overruled. Since there was no overact on the part of accused No. 3 and he had no knowledge that the accused Nos. 1 and 2 would cause so serious bodily injuries which would likely to result in death, he can be convicted only u/s 326 read with 34 of IPC. The accused has been in jail for sometime pending trial. He is now 77 years old. In the circumstances, we see no justifiable reason to require him to go back in jail to suffer some more punishment. At this age punishment of his son and nephew suffering imprisonment for life is itself and adequate punishment to him.

18. We therefore dismiss the appeal in toto as made by accused No. 1 and 2. We allow the appeal in part in so far as accused No. 3 is concerned. we hold him guilt of committing offence punishable u/s 326 read with 34 of IPC and sentencing him to undergo imprisonment for such period as he has already undergone during trial. He has already submitted bail bond. His bail bond stands cancelled. The bail bonds of accused Nos. 1 and 2 are also cancelled and they are liable to be taken back into custody to undergo remaining sentence of imprisonment. We request the District Judge, Solapur in issue appropriate direction to police authority in that respect to see that the accused Nos. 1 and 2 are taken into custody and sent to jail to suffer their remaining sentence. The appeal is accordingly disposed off.