

(1996) 09 BOM CK 0062
In the Bombay High Court
Case No : Criminal Appeal No. 779 of 1982

The State of Maharashtra

APPELLANT

Vs

Irphan Khudada Bardi and Others

RESPONDENT

Date of Decision : 10-09-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 378
Evidence Act, 1872 — Section 3, 59, 8
Penal Code, 1860 (IPC) — Section 149, 302, 304, 34

Citation : (1997) 1 BomCR 584

Hon'ble Judges : Vishnu Sahai, J; V.R. Datar, J

Bench : Division Bench

Advocate : I.S. Thakur, app, for the Appellant; Vijaymala Raja Bhonsale, for Respondents No. 1 to 6, 8 and 9, for the Respondent

Judgement

Vishnu Sahai, J.—A perverse judgment of acquittal dated 29th April 1982 passed by the IVth Additional Sessions Judge, Thane, in Sessions Case No. 221 of 1980 acquitting the respondents for offences punishable under section. 302 I.P.C. read with 149 I.P.C., in the alternative u/s 302 read with 34 I.P.C.; 324 read with 149 I.P.C.; 324 read with 34 I.P.C.; 147 I.P.C.; and 148 I.P.C. etc. has prompted the State of Maharashtra to file an appeal u/s 378(1) Cr.P.C.

2. We may straightway mention that the appeal against respondent No. 7, Ikbāl Gulam Rasul Kharabe, stands abated in view of the order dated 1-11-1993 passed by a Division Bench of this Court comprising of M.L. Pendse, J. (as he then was) and M.F. Saldanha, J.

3. Briefly stated the prosecution case runs as under :---

31-5-1980 was the day of General Elections. The atmosphere in Bhiwandi, especially in the locality of Kasaiwada was tense. The two main contestants in the fray were candidates of Congress (I) party and Janata party. The respondents belonged to the Congress (I) party and the victims to the Janata party.

It has come in the evidence of Sakinabi, P.W. 11 that the office of the Congress (I) party was situated at a distance of about 10 feet from her house which was situated in Kasaiwada, Bhiwandi, Thane. It has also come in evidence that the deceased Mohd. Aslam Quereshi and the injured also resided in Kasaiwada. From the suggestion given by the defence to P.W. 9 Riyaz Ahmed, though denied by him, it emerges that their house was situated at a distance of 300 to 400 feet from Sakinabi's house.

It is alleged that at about 2 p.m. the respondents armed with sticks came near Sakurulla - a Building in Kasaiwada. They were abusing people from Kasaiwada. Sakinabi P.W. 11 tried to pacify them. Respondent Parvej Mahanudmiya Don injured Sakinabi, P.W. 11 by hurling a tile on her. It is also said that P.W. 10 Mukhtar Ahmed, who at that time was nearby, went to rescue Sakinabi but respondents Shabir and Ikbal Kharabe assaulted him with sticks. P.W. 14 Ali Azgar who lived nearby on seeing Mukhtar Ahmed being assaulted rushed to his rescue but respondents Shabir and Faruk assaulted him with stick and wooden log respectively.

At about 2.30 p.m. the same day the respondents armed with sticks and wooden logs came to the house of Mukimabi, P.W. 4, the mother of the deceased, P.W. 7 Abdul Khalik, P.W. 8 Ali Akbar and P.W. 9 Riyaz Ahmed. At that time Abdul Khalik was sitting in the ota (open veranda) of the house. Respondent Shabir Mohd. Amin Bardi pulled him. Respondents Irphan Khudada Bardi, Mirhasan Mohd. Amin Bardi and Khudada Gulam Husen Bardi inflicted stick blows on him. His brother Aslam came to his rescue but he was assaulted by respondents Irphan, Khudada Bardi and Shabir Bardi on his head by sticks. His mother Mukimabi came there and she was assaulted by respondent Mirhasan Mohd. Amin Bardi. His brothers Ali Akbar and Riyaz Ahmed ran to their rescue. Respondent Parvej assaulted Ali Akbar and respondent Irphan injured Riyaz Ahmed by sticks. Apart from the said injured persons Rafik Ahmed, P.W. 15 also witnessed the incident.

After assaulting Aslam and others the respondents ran away. Some of them are said to have left their sticks and wooden logs on the place of the incident.

4. The evidence on record is that immediately after the incident a police van came on the spot and the injured were taken in it to Bhiwandi Hospital where they were examined by Dr. Madhukar Patil, P.W. 13.

On the person of Mohammad Aslam Quereshi the doctor found the following injuries :-

"(1) Contused lacerated wound over the left frontal and parietal region transverse 3" x 1 1/2" x bone deep, red.

(2) Contused lacerated wound over the left occipital region oblique 2" x 1 1/2" x bone deep, red.

(3) Contusion over the back oblique 5" x 1" with parallel margins surface, red.

(4) Contusion over the left shoulder top 1/2" x 1/2", red, irregular.

(5) Abrasion over right forearm on annular border near wrist 1" x 1/2", red, irregular.

(6) Abrasion over the right forearm at the middle 1" x 1", red, irregular.

(7) Abrasion over right forearm near elbow 1" x 1", red, irregular".

On the person of Mukhtar Ahmed Mohd. Momin the doctor found no external injury but noted in the injury report that he complained of pain.

On the person of Sakinabi the doctor found the following injuries:-

"(1) Abrasion over left leg anterior vertical 6" x 1/2" x vertical, red.

(2) Complaints of pain over the chest. Tenderness present."

On the person of Riyaz Mohd. Ramzan Quereshi, the doctor found the following injury:

"Contused lacerated wound over the vertex 2.5" x 1" bone deep, red bleeding."

On the person of Mukimabi Ramzan Quereshi the doctor found a contused lacerated wound over right forearm on ulnar border at middle vertical. 1.5" x 1/2" x 1/2", red, bleeding. He also noted that she complained of pain.

On the person of Ali Akbar Ramzan Quereshi the doctor found a contused lacerated wound over the frontal region oblique in the middle line 2" x 1/2" x bone deep, red, bleeding. He further noted that he complained of pain in abdomen.

On the person of Ali Azgar the doctor found the following injuries:-

"(1) Contused lacerated wound over the frontal region of scalp in middle line 1.5" x 1/2" x muscle deep, red and bleeding.

(2) Swelling over the left forearm posteriorly near elbow 2" x 1" red. Tenderness present.

(3) Abrasion over right side of scalp above the ear 1/4" x 1/4", red, irregular.

(4) Contusion over right eye on anterior surface vertical 7" x 1" x parallel margins, surface red, at the middle line.

(5) Abrasion over the right leg on lateral surface, vertical 2" x 1/4" at upper third, red."

On the person of Abdul Khalik Ramzan Quereshi the doctor found the following injuries:-

"(1) Contused lacerated wound over the right side over head vertical 1" x 1/2" x bone deep.

(2) Contusion over the right scapula oblique 5" x 1" with parallel margin. Surface was noticed red.

(3) Contusion over right side below the scapula 6" x 1" with parallel margin, surface red."

In the opinion of Dr. Madhukar Patil the injuries of all the victims were fresh and were attributable to articles 1 and 2, sticks and logs.

5. The F.I.R. of the incident was lodged by Rafik Ahmed Dost Mohd. Quereshi, P.W. 15 on the same day (31.5.1980) at 3.30 p.m. at Police Station Nizampura. In the said F.I.R. the respondents and one Shahanawaj, who till the conclusion of the trial was absconding were named. On the basis of the F.I.R. Police Inspector Shankarrao Pawar, P.W. 16, registered an offence under sections 147, 148, 452 and 149 I.P.C. vide CR No. 115 of 1980. The F.I.R. is at Exhibit-43.

After registering the case Police Inspector Shankarrao Pawar took over the investigation. The same day he prepared the panchanama of the scene of offence, Exhibit-15. He recovered from the place of the incident some sticks and wooden logs, Articles 1 and 2, under a panchanama. He also recorded the statements of Mukimabi and some others and the supplementary statement of the informant, Rafik Ahmed Quereshi. On 1.6.1980 he recorded the statements of Ali Azgar, Sakinabi, Raziya Banu and others. (Raziya Banu was the wife of one Ghulam Kasim Quereshi and it appears that in the same transaction in which Aslam and others were assaulted the respondents came to her house asked about Kasim Quereshi and on her informing them that he was not at home broke open the door of her house). Raziya Banu had informed him that the door of her house was broken. He, therefore, prepared a panchanama, Exhibit-18 and took possession of the broken door and some tiles, which were lying there. On 2nd June 1980 he visited J.J. Hospital where the injured, who were seriously injured were transferred. On 3rd June 1980 Mohd. Aslam Quereshi succumbed to his injuries and thereupon P.I. Pawar converted the case to one u/s 302 I.P.C.. He tried his level best to arrest Shahanawaj but, as stated by him in his statement, his endeavour proved futile. On 9th July 1980 after completing the investigation he submitted the charge-sheet.

6. The post-mortem examination of the dead body of Mohd. Aslam Quereshi was conducted on 3rd June 1980 by Dr. Avinash Ruikar, P.W. 12, between 9.15 p.m. and 10.15 p.m. On the corpse the doctor found the following injuries:-

"(1) Sutured wound, on scalp in front parietal region = 4 cms. in length.

(2) Sutured wound on scalp in parietal-occipital region = 4.5 cms. in length.

(3) Sutured wound, semi lunar in shape commencing 5 cms. away from lateral angle of right eye, crossing right temporal, right parietal, right side of occipital region ending 3 cms. behind pinna of right ear, 34 cms. in length (surgical).

(4) Old operation scar in iliac fossa."

On internal examination the doctor found the following injuries :-

Subaponeurotic Hematomas in inter parietal and occipital regions, 1.5 and 2 cms. in diameter respectively, 0.5 cms. in thickness, chocolate red in colour.

Right parietal craniotomy was done. Bone piece in right tempo-parietal region seen removed, 12 x 10.5 cms. in size (surgical).

Buss-hole in right. parietal region anteriorly.

Recent subdural bleeding chocolate red in colour, adherent to meninges.

In the opinion of Dr. Ruikar the deceased died on account of complications following head injury due to hard blunt object. He also opined that the external and internal injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death. In his cross-examination he stated that he had noticed " traces of pneumonia on the right upper lobe of right lung. While opining the cause of death I had head injuries of the deceased and pneumonia of right lung before my eyes. In all head injuries pneumonia necessarily may not occur. The person may develop pneumonia without having any head injury."

7. The case was committed to the Court of Sessions where charges on a number of counts, including 302 read with 149 I.P.C. in the alternative 302 read with 34 I.P.C., 147, 148, 324, 324 read with 34 I.P.C., 324 read with 149 I.P.C. and 454 read with 34 I.P.C. etc. were framed. To the said charges the respondents pleaded not guilty and claimed to be tried. During trial, apart from tendering and proving some material exhibits, prosecution in all examined 16 witnesses. Seven of them namely Mukimabi, Abdul Khalik, Ali Akbar, Riyaz Ahmed, Mukhtar Ahmed, Sakinabi and Ali Azgar, P.Ws. 4,7,8,9,10,11 and 14 respectively were injured witnesses who had received injuries during the incident.

In defence no witness was examined. From the tenor of the cross-examination of the witnesses, it appears that the defence case is that whereas the victims belonged to the Janata Party the respondents belonged to Congress (I) and on account of the circumstance that on the date of the incident there was polling bad blood between them that had been generated and at about 2.30 p.m. the victims tore posters, damaged furniture and caused injuries to some persons of Congress (I), in the office of the Congress (I) situated in a room of Aziz Kuwari and in that incident they received injuries. This suggestion was denied by the victims when put to them in their cross-examination.

8. After recording the evidence and hearing learned Counsel for the parties, the learned trial Judge came to the conclusion that the prosecution had failed to prove the guilt of the respondents beyond reasonable doubt and hence acquitted them. It is this acquittal of theirs which has been challenged by means of the present appeal,. preferred by the State of Maharashtra.

9. We heard Mr. I.S. Thakur, Additional Public Prosecutor for the appellant and Mrs. V.R. Bhonsale for the respondents. We have also perused the depositions of

the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statements of the respondents recorded u/s 313 Cr.P.C; and the impugned judgment. After giving our anxious consideration to the matter, we are of the judgment that this appeal must succeed partly against respondents Irphan Khudada Bardi, Parvej Mahanudmiya Don, Mirhasan Mohd. Amin Bardi, Khudada Gulam Husen Bardi, Shabir Mohd. Amin Bardi and Faruk Khudada Bardi (i.e. respondents 1 to 5 and 8). In our view, the acquittal of respondents Abdul Bari Khudada Bardi and Irphan Gulam Mohiddin Barmer (i.e. respondents 6 and 9) deserves to be affirmed. As said earlier, the appeal against respondent 7, Ikbal Gulam Rasul Kharabe stands abated.

10. Before arriving at the judgment stated above we have warned ourselves that we are seized of the matter in an appeal against acquittal and interference should only be made by us if the view of acquittal is not a possible view. There is a plethora of decisions of the Apex Court on this proposition. But to eschew prolixity we are only referring to that reported in State of Punjab Vs. Ajaib Singh, . In the said decision in paragraph 7 the Apex Court has observed thus:-

"....We agree that the Court hearing the appeal against acquittal is not prevented from examining and reappreciating the evidence on record. But the duty of a Court hearing the appeal against acquittal in the first instance is to satisfy itself if the view taken by acquitting Court exercising appellate jurisdiction was possible view or not. And if the Court comes to conclusion that it was not, it can on reappreciation of evidence reverse the order."

We have also borne in mind the decision of the Apex Court in Sanwat Singh and Others Vs. State of Rajasthan, wherein in paragraph 9 the Apex Court explaining the obligations on the Appellate Court, in an appeal against acquittal has observed that although an Appellate Court in such appeal has the power "to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the Court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

11. Bearing in mind the legal framework set out in the above paragraph, we propose to examine the impugned order of acquittal.

12. We would first like to take up the evidence of the injured witnesses. From a perusal of paragraph 3 of our Judgment, it would be apparent that the incident took place on 31-5-1980 in Kasaiwada in two parts; the first part at 2 PM near Sakinabi's house wherein Mukhtar Ahmed, P.W. 10, and Ali Azgar, P.W. 14 sustained injuries by sticks and Sakinabai P.W. 11 by tile and the second part about half an hour later i.e. 2.30 p.m. in front of Mukimabi's house wherein Mukimabi P.W. 4, her sons Abdul Khalik, Ali Akbar Quereshi and Riyaz Ahmed, P.Ws. 7,8 and 9 respectively and Mohammad Aslam received injuries attributable

to sticks and wooden logs. Mohd. Aslam succumbed to his injuries at the J.J. Hospital on 3rd June 1980.

We would first like to take up the first part of the incident. Three injured witnesses namely Mukhtar Ahmed, Sakinabi and Ali Azgar P.Ws. 10,11 and 14 deposed about it. It is on the basis of the averments contained in their examination in chief that we have described it in paragraph 3 wherein we have set out the prosecution story. Hence we would only enumerate the specific overt acts assigned by them to the respondents.

(A) Mukhtar Ahmed : (i) Parvej Mahanudmiya Don threw a tile on Sakinabi's chest; (ii) Shabir and Ikbal Kharabe assaulted him with sticks and (iii) Shabir assaulted Ali Azgar with sticks;

(B) Sakinabi :(i) Parvej threw a tile which hit her on her chest; and (ii) Shabir assaulted Mukhtar with sticks; and

(C) Ali Azgar :(i) Shabir and Ikbal were assaulting Mukhtar with sticks; and (ii) Faruk and Shabir assaulted him with sticks.

We now take up the second part of the incident on which there is the testimony of the four injured witnesses namely Mukimabi, Abdul Khalik, Ali Akbar and Riyaz Ahmed, P.Ws. 4,7,8 and 9 respectively. That has also been described in para 3.

(a) Mukimabi: (i) Shabir pulled Khalik from ota; (ii) Shabir and Mirhasan assaulted Khalik with sticks; (iii) Irphan and Khudada assaulted Aslam with sticks on head; and (iv) Mirhasan assaulted her with a stick.

It may be mentioned that she wrongly identified Irphan and Mirhasan in the Court;

(b) Abdul Khalik: (i) Shabir pulled him from his ota (veranda); (ii) Irphan, Mirhasan and Khudada assaulted him by sticks; (iii) Khudada and Shabir assaulted Mohammad Aslam with sticks on head; and (iv) Mirhasan assaulted Mukimabi with stick.

(c) Ali Akbar: (i) Shabir pulled Abdul Khalik from ota; (ii) Mirhasan assaulted Khalik with a stick; (iii) Irphan and Khudada assaulted Mohammad Aslam with sticks on head; (iv) Mirhasan assaulted Mukimabi with stick; and (v) Parvej and Shabir assaulted him with sticks; and

(d) Riyaz Ahmed: (i) Shabir pulled down Khalik from the ota; (ii) Mirhasan and Shabir gave blows with wooden logs to Khalik; (iii) Irphan and Khudada assaulted Mohd. Aslam with wooden logs; (iv) Mirhasan gave blow with wooden log to Mukimabi; and (v) Irphan inflicted a blow with wooden log on him.

13. The evidence of the injured witnesses referred to in the preceding paragraph is that in both the 2 p.m. and the 2.30 p.m. incident they were assaulted by blunt weapons. This evidence of theirs appears to be trustworthy. It is corroborated by medical evidence as would become apparent from paragraphs 4

and 6 wherein we have set out the injuries suffered by them and the deceased. A perusal of paragraph 4 would show that Dr. Madhukar Patil, P.W. 13, who examined them opined that their injuries were attributable to hard and blunt weapon. Paragraph six would show that Dr. Ruikar P.W. 12 who performed the autopsy on the corpse of the deceased opined that the injuries of the deceased were sufficient in the ordinary course of nature to cause death.

The evidence of Dr. Patil would also show that the injuries were fresh meaning thereby that they could have been caused at 2 or 2.30 p.m. on 31.5.1980 as alleged by the said injured witnesses.

14. We may mention that in a broad daylight incident there could be no question of injured witnesses mistaking their assailants. We would like to point out that the place of incident has also been fixed in the instant case. P.I. Shankarrao Pawar, P.W. 16, the Investigating Officer on the date of the incident itself visited it (near Mukimabi's house) and prepared the spot panchanama. A perusal of the said panchanama shows that three wooden sticks and two wooden planks were found there. In this connection, it would be worth referring to the prosecution case that after assaulting the victims some of the respondents left sticks and wooden planks on the place of the incident. It may also be stated that P.I. Pawar also visited the place where the incident at 2 p.m. had taken place viz., in front of Sakinabi's house. From there he recovered two tiles.

15. Assurance is also forthcoming to the prosecution case by the circumstance that the F.I.R. was lodged within an hour of the incident i.e. at 3.30 p.m. on the same day (31-5-1980) at Police Station Nizampura. It needs to be emphasized that in the said F.I.R. the respondents are named. Criminal Courts attach great importance to the lodging of a prompt F.I.R. because the same to a large extent eliminates the possibility of embellishments and improvements in the prosecution case creeping therein. A prompt F.I.R. is more or less an in-built guarantee about the truthfulness of the prosecution case and this would particularly apply to those cases wherein there is the evidence of injured witnesses, as is the case here.

16. In our view, the evidence of seven injured witnesses adduced by the prosecution, three in respect of the 2 p.m. incident and 4 in respect of the 2.30 p.m. incident, backed up by corresponding injuries and a prompt F.I.R. inspires implicit confidence and has been perversely rejected by the learned trial Judge for reasons given out in paragraphs 27 to 47 of the impugned judgment. He has rejected their evidence on their conduct in not going to the Police Station after being discharged from hospital; in not disclosing the incident to anyone till their interrogation u/s 161 Cr.P.C.; and on account of minor discrepancies and petty contradictions in their evidence. Discrepancies like whether a witness stated wooden planks in place of sticks in his statement u/s 161 Cr.P.C. are bound to occur when witnesses are examined in the trial Court nearly one year after the incident. These would not wash off the overwhelming weight of the evidence of the injured witnesses. It is well settled that every discrepancy does not impair

the testimony of a witness, more so of an injured witness and only such infirmities which militate against the core or the meat of the prosecution case render it unworthy of acceptance. In the instant case apart from the circumstance that Mukimabi, mother of the deceased Aslam, P.W. 7 Khalik, P.W. 8 Ali Akbar and P.W. 9 Riyaz Ahmed wrongly identified Irphan and Mirhasan in Court. We find no such infirmity in the statements of the injured persons on the basis of which we could conclude that the meat of the prosecution story deposed to by them is falsified. On account of the said infirmity in Mukimabi's evidence, in our view, the result would be that it cannot be relied upon against the said two respondents. However there is the testimony of the other injured witnesses against the respondents which is beyond reproach and clinches their involvement in the incident.

17. Mrs. Bhonsale, learned Counsel for the respondents, vehemently urged that the prosecution case bristles with a glaring improbability namely that the victims of 2.30 p.m. incident viz., Mukimabi, Abdul Khalik, Ali Azgar and Rafik Ahmed were doing the business of selling meat and there is evidence to show that butchers' knives were lying in their houses at that time and had they been assaulted near their house, they would have rushed out from there with knives and would have defended themselves. She urged and the learned trial Judge has also emphatically mentioned in the impugned judgment, that this shows that the incident took place at the Congress (I) Office which was at a distance of about 300 to 400 feet from Mukimabi's house when the victims who belonged to the Janata party went there and damaged it and in the same incident were injured.

The fallacy of the latter part of Mrs. Bhonsale's contention becomes per se evident from the circumstance that two of the injured witnesses are Mukimabi P.W. 4 aged about 40 years and Sakinabi P.W. 11, aged about 55 years and we are not prepared to believe that they would have gone and damaged the Congress (I) Office. Their injuries as also the circumstance that the F.I.R. in respect of the Congress (I) Office being ransacked, which was lodged at 7.45 p.m. the same day at Police Station Nizampura by Jalil Ahmed (Exhibit-51), mentions the time of incident as 2.30 p.m. while the incident in which Mukhtar Ahmed, Sakinabi and Azgar Ali P.Ws. 10,11 and 14 respectively received injuries took place at 2 p.m. (half an hour earlier) shows the hollowness of Mrs. Bhonsale's contention and the perversity on the part of the learned trial Judge in giving disproportionate weight to it.

We are constrained to observe that even the first part of the said submission of Mrs. Bhonsale is not lethal enough to wash off the weight of the evidence of the injured witnesses. In a given situation different people react differently. What Criminal Courts have to see is as to whether the reaction of a set of persons when faced with such situations could be described as a normal one and not whether it is the most rational reaction. Let us visualize the situation at Abdul Khali's place where the assault on him was first launched. The evidence is that ten persons armed with sticks and wooden planks were present there. In our

view it is in consonance with reason that in that grim situation the brothers of Abdul Khalik (P.Ws. 8 and 9 and the deceased Aslam) lost their mental equilibrium and it did not occur to them to bring with them the butchers' knives which were in the house to defend Abdul Khalik and themselves. At any rate we cannot fault the evidence of the injured witnesses to such an extent that on account of this improbability it becomes impossible of acceptance. It is these aspects which Mrs. Bhonsale seems to have over looked when she made the said contention. Consequently we reject the said submission of Mrs. Bhonsale.

18. Mrs. Bhonsale also contended that the conduct of these witnesses in not disclosing the incident to anyone till they were interrogated u/s 161 Cr.P.C. and in not going to the Police Station after being discharged from hospital is an extremely unnatural one and is in consonance with the inference that they were not assaulted in the manner deposed to by them. Again we regret that on account of their said conduct their evidence cannot be rejected. It may be that their experience was so traumatic that they did not want to tell anyone about it. Their not going to the Police Station after being discharged from the hospital is perfectly understandable because their first urge must have been to go home. It should also be remembered that the statements of some of them had been recorded by the Investigating Officer at the hospital. At any rate on account of such a conduct of theirs it would not be proper to reject their evidence. To repeat they are injured witnesses.

Pursuant to the above discussion, we are squarely satisfied that the prosecution has proved both the parts of the incident and the learned trial Judge acted perversely in rejecting the prosecution case.

19. The question which remains is as to which of the respondents are guilty and for what offences.

20. We would first like to examine the question as to which of the respondents would be guilty. In our view in riot cases the dictates of prudence warrant that accused persons should not be convicted on omnibus statements of witnesses. Only those accused persons to whom the witnesses assign specific overt acts, the performance of which is established by medical evidence or some other corroborative evidence should be convicted. This is based on the time honoured rule of assessment of evidence in such cases; that being along with the accused persons often members of public also happen to be present as onlookers (just for the sake of curiosity) and often they are mistaken for accused persons and hence wrongly roped in. This rule is based on sound commonsense and no authority is really required. But for those who have a penchant for authorities reference may be made to the observations of the Apex Court contained in paragraph 19 of its decision reported in Baladin and Others Vs. State of Uttar Pradesh, which read thus:-

"We have, therefore, to examine the case of each individual accused to satisfy ourselves that mere spectators who had not joined the assembly and who were

unaware of its motive had not been branded as members of the unlawful assembly which committed the dastardly crimes that morning."

21. A perusal of paragraph 12 of our judgment would show that none of the seven injured eye witnesses has attributed specific overt acts to respondent No. 6 Abdul Bari Khudada Bardi and respondent No. 9 Irphan Gulam Mohiddin Barmer. Hence on dictates of prudence the acquittal of the said respondents, in our view, deserves to be sustained.

A perusal of the said paragraph would also show that specific overt acts have been attributed by those very witnesses to respondents No. 1 to 5 namely Irphan Khudada Bardi, Parvej Mahanudmiya Don, Mirhasan Mohd. Amin Bardi, Khudada Gulam Husen Bardi, Shabbir Bardi and respondents No. 7 namely Ikbal Gulam Rasul Kharabe (against whom the appeal has been abated) and respondent No. 8 Faruk Khudada Bardi.

Since the appeal of Ikbal Kharabe has abated we are not specifying his specific overt acts. Those of the other respondents (all of them used sticks or wooden planks excepting Parvej who assaulted Sakinabi with a tile) are as under:

(a) Irphan Khudada Bardi:- assaulted Abdul Khalik, P.W. 7, Riyaz Ahmed, P.W. 9; and the deceased Mohd. Aslam;

(b) Parvej Mahanudmiya Don:- assaulted Sakinabi, P.W. 11 and Ali Akbar, P.W. 8;

(c) Mirhasan Mohd. Amin Bardi:- assaulted Mukimabi, P.W. 4 and Abdul Khalik P.W. 7;

(Note:- Apart from Mukimabi herself, P.W. 7 Abdul Khalik and P.W. 9 Riyaz Ahmed also stated he assaulted Mukimabi.)

(d) Khudada Gulam Husen Bardi:- assaulted the deceased and Abdul Khalik P.W. 7;

(e) Shabir Mohd. Amin Bardi:- assaulted the deceased, Abdul Khalik, P.W. 7, Ali Akbar, P.W. 8, Mukhtar Ahmed, P.W. 10, Sakinabi, P.W. 11 and Ali Azgar, P.W. 14; and

(f) Faruk Khudada Bardi :- assaulted P.W. 14 Azgar Ali.

22. The next question is what offences have been committed by respondents Irphan Khudada Bardi, Parvej Mahanudmiya Don, Mirhasan Mohd. Amin Bardi, Khudada Gulam Husen Bardi, Shabir Mahamad Amin Bardi and Faruk Khudada Bardi. Since all of them had formed an unlawful assembly within terms of section 141, Third, which reads that "An assembly of five or more persons is designated as an unlawful assembly, if the common object of the persons composing that assembly is

.....

Third - To commit any mischief or criminal trespass or other offence;

or "with the avowed object of assaulting Sakinabi, P.W. 11 and Abdul Khalik, P.W. 7 and they had the knowledge contemplated by section 149 I.P.C. that it was likely that those who came to their rescue could also be assaulted by some of them, they would be guilty of the offences under sections 147 I.P.C. and 324 read with 149 I.P.C. on seven separate counts for causing simple injuries to Mukimabi, Abdul Khalik, Ali Akbar, Riyaz Ahmed, Mukhtar Ahmed, Sakinabi and Ali Azgar, P.Ws. 4, 7, 8, 9, 10, 11 and 14 respectively.

23. We now enter the marshy area. And that is what offence the said six respondents are guilty of in respect of the assault on the deceased. They have been charged for the murder of Mohd. Aslam u/s 302 I.P.C. read with section 149 I.P.C., in the alternative u/s 302 I.P.C. with the aid of section 34 I.P.C.

Section 149 I.P.C. reads thus:-

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence, is a member of the same assembly, is guilty of that offence."

24. An analysis of section 149 I.P.C. would show that an act committed by any member of the unlawful assembly would fall within its mischief only if:-

(a) either it was performed in the prosecution of the common object of the unlawful assembly; or

(b) it was such an act which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object of the unlawful assembly.

25. In the instant case the fatal assault on the deceased Aslam was not in the prosecution of the common object of the unlawful assembly. The evidence of Mukimabi, Abdul Khalik, Ali Akbar and Riyaz Ali P.Ws. 4, 7, 8, and 9 respectively is that in the incident which took place near Mukimabi's house, the common object of the unlawful assembly was only to assault Abdul Khalik, P.W. 7. The evidence on record does not show that Aslam was sitting with Abdul Khalik on the ota when he was pulled and assaulted.

26. We now have to examine as to whether can it be said that the members of the unlawful assembly knew that a fatal assault on Aslam was likely to be made in prosecution of the common object of the unlawful assembly. To that our answer is in the negative.

27. The expression likely as used in section 149 I.P.C. means an imminent likelihood of the happening of a thing or positive knowledge in respect of its happening. A thing is likely to happen if there was every likelihood of its happening. Likely as used in section 149 I.P.C. means only a shade short of a certainty. It does not contemplate of a distant likelihood or of a remote possibility

of the happening of a thing or event. We wish to emphasise that under the garb of word "likely" members of an unlawful assembly would not be liable, as is often assumed, for all or any acts committed by any member of the unlawful assembly.

We are fortified in our view by two Division Bench decisions of the Allahabad High Court namely those reported in Charan Singh and Others Vs. State, and Maiyadin and Others Vs. State, . In Charan Singh and Others Vs. State, the Division Bench thus observed:

"Even if the Act is an individual act of one member and it is not actually done in prosecution of the common object all the members will be liable for it provided they knew and it must be noted here that positive knowledge is necessary. It is not sufficient to show that they ought to have or might have known or that they had reason to believe that it might happen that the act was likely to be committed in prosecution of the common object. The use of the word "Likely" in the second part of section 149 I.P.C. implies some thing more than a possibility. A thing is likely to happen only when it will probably happen or may very well happen."

In Maiyadin and Others Vs. State, the deceased was also not the original target of assault. Hence the Division Bench in paragraph 29 observed that the first part of section 149 I.P.C. namely that the act was committed in prosecution of the common object of the unlawful assembly would not apply. Coming to the application of second part of section 149 I.P.C. which provides knowledge on the part of the members of the unlawful assembly that a certain act was likely to be committed the Division Bench observed:

"The use of the word "Likely" in the second part of the section means some clear evidence that the unlawful assembly had such a knowledge."

28. In the instant case certainly positive knowledge can be attributed to the members of the unlawful assembly that persons and this would include the deceased Aslam also, for the incident took place at his house, could come to the rescue of Abdul Khalik but it would be too much to stretch the word "Likely" to include that they also knew that some of them would launch a fatal assault on Aslam. In our view it would be reasonable to infer that respondents Parvej Mahanudmiya Don, Mirhasan Mohd. Amin Bardi and Faruk Khudada Bardi along with other members of the unlawful assembly had the knowledge that grievous hurt was likely to be caused to Mohd. Aslam by some of them. This is reasonable to infer because all of them were armed with either sticks or wooden logs.

In this connection it would be pertinent to refer to the observations of the Apex Court in paragraph 6 of the judgment reported in Shambhu Nath Singh and Others Vs. State of Bihar, . In the said case the 1st accused had fired at the deceased with a gun. Accused 2 to 8 and 14 were armed with weapons like bhalas, greases and lathis. The Patna High Court took the view that the murder of the deceased was an individual act of the 1st accused and in as much as accused 2 to 8 and 14 being armed with deadly weapons were members of the

same unlawful assembly of which the 1st accused was a member, they knew that at least grievous hurt was likely to be caused to the deceased. The Apex Court endorsed the view of the Patna High Court and in paragraph 6 observed thus:-

"Section 149 of the Indian Penal Code is declaratory of the vicarious liability of the members of an unlawful assembly for acts done in prosecution of the common object of that assembly or for such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. If an unlawful assembly is formed with the common object of committing an offence and if that offence is committed in prosecution of the object by any member of the unlawful assembly, all the members of the assembly will be vicariously liable for that offence even if one or more, but not all committed the offence. Again, if an offence is committed by a member of an unlawful assembly and that offence is one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, every member who had that knowledge will be guilty of the offence so committed. "But members of an unlawful assembly may have a community of object upto a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly. *Jahiruddin v. Queen Empress* ILR 22 Cal 306."

In this context it would also be useful to refer to the observations of Their Lordships of the Apex Court in para 21 of the decision reported in *Ram Anjore and Others Vs. State of Uttar Pradesh*, . In the aforesaid paragraph Their Lordships observed thus:-

".....When the members of the unlawful assembly were armed with lathis and spear the common object of which was to assault Ram Palat and Viswanath, the common object may not be to murder Viswanath, the members of the assembly must have known that at least grievous hurt with a sharp cutting weapon was likely to be caused by any member of the assembly in prosecution of the common object."

29. For the reasons mentioned above, in our view, although the respondents Parvej Mahanudmiya Don, Mirhasan Mohamad Amin Bardi and Faruk Khudada Bardi did not assault the deceased Mohd. Aslam they would still be guilty of the offence u/s 325 read with 149 I.P.C. in respect of the assault launched on him by respondents Irphan Khudada Bardi, Khudada Gulam Husen Bardi and Shabir Mahamad Amin Bardi. It is true that respondents were not charged in the trial Court u/s 325 read with 149 I.P.C. but since they were charged u/s 302 read with 149 I.P.C. for Mohd. Aslam's murder and the offence u/s 325 read with 149 I.P.C. is a minor offence in relation to the offence of 302 read with 149 I.P.C. no prejudice would be caused to them and no separate charge u/s 325 read with

149 I.P.C. is necessary.

30. The question is what offence has been committed by respondents Irphan Khudada Bardi, Khudada Gulam Husen Bardi and Shabir Mahamad Amin Bardi in respect of the assault launched by them with sticks and wooden logs on Mohd. Aslam to which he succumbed three days later i.e. on 3rd June 1980. The evidence of the eye witnesses is that they had come together with the other accused; had assaulted Mohd. Aslam conjointly when he came to the rescue of his brother Abdul Khalik; and thereafter went away together with the other accused persons. In our judgment this is sufficient to infer common intention on their part in terms of section 34 I.P.C. with respect to the assault on Mohd. Aslam.

It is true that Mohd. Aslam was not the original target of assault but in our view the common intention between these three respondents with respect to the assault on him developed on the spot. There is no quarrel with the proposition that common intention can develop on the spot. And for those of us who owe a fanatical allegiance to authorities reference may be made to paragraph 33 of the oft-quoted case of Pandurang, Tukia and Bhillia Vs. The State of Hyderabad, wherein Vivian Bose, J., speaking for the Court observed thus:

"The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a prearranged plan however hastily formed and rudely conceived."

31. The next question is as to what is the extent of the common intention in furtherance of which respondents Irphan Khudada Bardi, Khudada Gulam Husen Bardi and Shabir Mahamad Amin Bardi assaulted the deceased Mohd. Aslam. In other words

(a) did they share the common intention with respect of his murder in terms of section 302 read with 34 I.P.C.; or (b) the common intention was for a lesser offence and one or two of them who could not be pin pointed by the witnesses in their evidence inflicted the two blows on the head of the deceased beneath one of which a piece of bone was broken.

32. We wish to emphasize that the question of common intention/its extent, is basically a question of fact and not one of law. To arrive at the conclusion as to what is the common intention or the extent of common intention in a given case a variety of circumstances are taken into consideration by the courts, such as :-

- (i) the motive for assault;
- (ii) whether the deceased is the original target of assault or an intervenor;
- (iii) the weapons used;

- (iv) the number of injuries inflicted;
- (v) the parts of body on which the injuries are inflicted;
- (vi) whether the person attacked was done to death on the spot or died later on; and
- (vii) whether there was a direct nexus between the injuries inflicted on him and his

death or some causes unrelated to the injuries led to the death.

33. In the instant case we are firmly of the view that the common intention in furtherance of which respondents Irphan Khudada Bardi, Khudada Gulam Husen Bardi and Shabir . Amin Bardi assaulted Mohd. Aslam was for an offence punishable u/s 304 Part II read with 34 I.P.C. and for not one u/s 302 read with 34 I.P.C.. We say this because:-

(a) there was no prior enmity either between them and Mohd. Aslam or between his brothers and mother and them. From the evidence on record it appears that the day on which the incident took place was a polling day in general election and presumably in canvassing for their rival candidates their relations got soured to such an extent that the respondents went to Abdul Khalik's place to launch an assault on him. In fact Khalik's mother Mukimabi, P.W. 4 in this context stated in her cross-examination (in paragraph 3) that the respondents were saying "Maro Maro";

(b) the deceased was not the original target of assault and he was assaulted by the respondents when he rushed to the rescue of his brother Abdul Khalik, who was the original target of assault;

(c) the deceased was not assaulted by any lethal weapon but only by sticks and wooden logs;

(d) only seven injuries were inflicted on him and out of them only two were on the head and three of them namely injuries No. 5, 6 and 7 are abrasions, which may also have been caused by fall;

(e) it has not been specified by the witnesses in their statements in trial Court as to which out of these three respondents inflicted the two head injuries of the deceased;

(f) the deceased was not done to death on the spot by the respondents in spite of the fact that there was no hindrance in their way and died four days later i.e. on 3rd June 1980; and

(g) the autopsy surgeon Dr. Ruikar, P.W. 12 in his cross-examination stated "While opining the cause of death I had head injuries of the deceased and pneumonia of right lung before my eyes. In all head injuries pneumonia may not necessarily occur".

However, in our view when these three respondents assaulted the deceased Aslam with sticks and wooden logs on vital parts of his body, including the head, it can be safely inferred that they shared the common intention in respect of the knowledge of his death. In our view an offence u/s 304 (II) I.P.C. read with 34 I.P.C. is made out against them.

We have no hesitation in observing that the common intention cannot be down-graded further because it appears from a perusal of the statement of Dr. Ruikar, P.W. 12 and the post-mortem report prepared by him that a piece of bone of the dimensions of 12 x 10.5 cm. in size in right tempo-parietal region seems to have been removed as a result of surgery. Dr. Ruikar also stated that the injuries of the deceased were sufficient in the ordinary course of nature to cause his death. The removal of the piece of bone from the head of the deceased logically means that it must have been broken as a consequence of the assault launched on him by the respondents.

34. Now only one question remains, that being the quantum of sentence to be awarded to the respondents for the offences of which we have found them guilty. In our view the instant case does not call for a jail sentence for the reasons enumerated hereinafter :-

(i) the incident took place more than 16 years ago. After the trauma of a trial they must have settled down in their vocations and in the rhythm of family life;

(ii) the incident appears to be the result of the tempers of the respondents on one hand and of the victims on the other flaring up on account of polling;

(iii) that excepting Mohd. Aslam the injuries of all the victims were simple in nature;

(iv) that death of Mohd. Aslam was the cumulative effect of his injuries and pneumonia;

(v) that there is nothing to indicate that the respondents have any bad criminal antecedents; and

(vi) respondents Irphan Khudada Bardi, Parvej Mahanudmiya Don and Faruk Khudada Bardi were aged about 21 years, 24 years and 18 years at the time of the incident as would become evident from a perusal of their statements recorded u/s 313 Cr.P.C. (In the decision reported in Raisul Vs. State of U.P., it has been observed that the age given in statement u/s 313 Cr.P.C. should be accepted as correct.)

35. In our view the ends of justice would be squarely satisfied if respondents Irphan Khudada Bardi, Parvej Mahanudmiya Don, Mirhasan Mohd. Amin Bardi, Khudada Gulam Husen Bardi, Shabir Mohd. Amin Bardi and Faruk Khudada Bardi are sentenced to the period already undergone by them under sections 147 I.P.C. and 324 read with 149 I.P.C. on seven separate counts for causing simple injuries to Mukimabi, Abdul Khalik, Ali Akbar, Riyaz Ahmed, Mukhtar Ahmed,

Sakinabi and Ali Azgar P.Ws. 4, 7, 8, 9, 10, 11 and 14 respectively.

We also feel it expedient in the interests of justice to direct that the sentences of respondents Parvej Mahanudmiya Don, Mirhasan Mohd. Amin Bardi and Faruk Khudada Bardi u/s 325 read with 149 I.P.C. (in respect of the assault on the deceased Aslam) be reduced to the period already undergone by them.

It appears that the said respondents have at least been in jail for about one week as an under trial. Some have been much more.

As regards the offence of 304 Part II read with 34 I.P.C. which, in our judgment, respondents Irphan Khudada Bardi, Khudada Gulam Husen Bardi and Shabir Mohd. Amin Bardi have committed (in respect of assault on deceased Aslam) the ends of justice would be squarely satisfied if each of the said respondents is directed to pay a fine of Rs. 10,000/- (Rupees Ten Thousand) within a period of six months from today in the trial Court and in default thereof undergo a sentence of two years rigorous imprisonment each. In case they pay the fine within the stipulated time the whole of it shall be paid as compensation to Mukimabi, P.W. 4 and in case she is not alive then in equal proportions to her sons Abdul Khalik, P.W. 7, Ali Akbar, P.W. 8 and Riyaz Ahmed, P.W. 9. The trial Court immediately on the fine being deposited shall inform the victim/victims entitled to receive the compensation.

36. In the result this appeal is partly allowed and partly dismissed.

The acquittal of respondent No. 6, Abdul Bari Khudada Bardi and respondent No. 9, Irphan Gulam Mohiddin Barmer on all the counts is maintained. They are on bail. They need not surrender. Their bail bonds stand cancelled and sureties discharged.

The appeal against respondents No. 1, 2, 3, 4, 5 and 8 namely Irphan Khudada Bardi, Parvej Mahanudmiya Don, Mirhasan Mohd. Amin Bardi, Khudada Gulam Husen Bardi, Shabir Mahamad Amin Bardi and Faruk Khudada Bardi is partly allowed. The said respondents are convicted under sections 147 I.P.C. and 324 read with 149 I.P.C. on seven separate counts for causing simple hurt to Mukimabi, Abdul Khalik, Ali Akbar, Riyaz Ali, Mukhtar Ahmed. Sakinabi and Ali Azgar P.Ws. 4, 7, 8, 9, 10, 11 and 14 respectively but their sentences on all the counts are reduced to the period already undergone by them as under trials.

Respondents Parvej Mahanudmiya Don, Mirhasan Mohd. Amin Bardi and Faruk Khudada Bardi are also convicted for an offence u/s 325 read with 149 I.P.C. (in respect of assault on deceased Aslam) but their sentence is reduced to the period already undergone by them.

The acquittal of respondents, Parvej Mahanudmiya Don, Mirhasan Mohd. Amin Bardi and Faruk Khudada Bardi on the other counts is maintained. They are on bail. Their bail bonds stand cancelled and sureties discharged.

Respondents No. 1, 4, and 5 namely Irphan Khudada Bardi, Khudada Gulam

Husen Bardi and Shabir Mahamad Amin Bardi are also convicted of the offence of 304 Part II read with 34 I.P.C. (in respect of the assault on deceased Aslam) and each one of them is sentenced to pay a fine of Rs. 10,000/- (Rupees Ten Thousand) within a period of six months from today, in the trial Court, failing which each of them would undergo a sentence of 2 years R.I. This fine shall be paid as compensation to Mukimabi P.W. 4 and in case she is not alive then in equal proportions to P.W. 7 Abdul Khalik, P.W. 8 Ali Akbar and P.W. 9 Riyaz Ahmed. The trial Court shall inform the person/persons entitled to receive the compensation immediately on the fine being deposited. After these respondents deposit the fine their bail bonds shall stand cancelled and sureties discharged. The acquittal of these respondents on other counts is maintained.

As mentioned earlier the appeal against respondent No. 7 Ikbal Gulam Rasul Kharabe has abated.

Before parting with the judgment we would like to put on record our appreciation for the learned Counsel for the parties for the assistance they have rendered us in disposal of this appeal. In spite of the fact that it was impossible to defend the impugned judgment Mrs. Bhosale left no stone unturned.

Issuance of certified copy is expedited.