

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.572 OF 2002

Kathod Tukaram Thakur ... Appellant
(Orig. Accused No.1)

Vs.

The State of Maharashtra ... Respondents

ALONG WITH
CRIMINAL APPEAL NO.1154 OF 2002

The State of Maharashtra ... Appellants

Vs.

Kathod Tukaram Thakur & Anr. ... Respondents
(Orig. Accused Nos.1 & 3)

ALONG WITH
CRIMINAL APPEAL NO.1176 OF 2002

The State of Maharashtra ... Appellants

Vs.

Keshav Shankar Pawar & Ors. ... Respondents
(Orig. Accused Nos.2, 4, 5 & 7)

...

Mr. H. J. Dedhia, A.P.P. for the Appellant-State in Appeal No.1154 of 2002 and Appeal No.1176 of 2002.

Mr. Tushar Rane i/b Mr. Ganesh Gole for the Appellant in Appeal No.572 of 2002.

Mr. Dushyant Pagare for Respondent Nos.1 to 4 in Appeal No.1176 of 2002.

**CORAM: PRADEEP NANDRAJOG, C.J. &
SMT. BHARATI DANGRE, J.**

DATED : 28th AUGUST, 2019.

ORAL JUDGMENT:- [Per: Shri Pradeep Nandrajog, C.J.]

1. Heard learned counsel for the parties.
2. At the outset, we must record our surprise at the manner in which the learned Trial Judge has proceeded to decide the fate of the Accused in Sessions Case No.278 of 2001 and Sessions Case No.358 of 2001. Wherefrom two sessions case numbers have been assigned would emerge from the subsequent facts.
3. In a common charge-sheet filed, 28 Accused were sent for trial charged of having committed offences punishable under Sections 302, 307, 323, 147, 148 and 149 IPC.
4. The evidence was led.
5. On 26th April, 2002, 22 Accused (A-6 and A-8 to A-28) were acquitted and we find no discussion in the said judgment. Mercifully for

us, the State has not filed an Appeal against the acquittal of the said 22 Accused. Three days' later on 29th April, 2012, fate of remaining 6 Accused (A-1 to A-5 and A-7) has been decided. This is the reason why two sessions case numbers have been assigned.

6. In this background, we note that in Appeal No.1154 of 2002, the State is aggrieved by the conviction of Accused No.1 and Accused No.3 for the offence punishable under Section 304 Part I IPC read with Section 34 IPC. The State wants the conviction to be for the offence punishable under Section 302 IPC. In Criminal Appeal No.1176 of 2002, the State is aggrieved by 4 Accused not being convicted for the offence of murder and wants they to be convicted for the offence of murder. In Criminal Appeal No.572 of 2002, Accused No.1 seeks to challenge his conviction.

7. As regards the Appeal filed by Accused No.1, we note that during the pendency of the Appeal he died and thus the Appeal filed by him abates and the proceedings against him in Criminal Appeal No.1154 of 2002 also abates.

8. From the evidence it emerges that in Village Khidkali the practice was that the Head of the Village, who unfurled the national flag on the Republic Day i.e. on 26th January had the honour to light the fire at the celebration of *Holika Dahan*. Gautam Patil (PW-1) was the traditional Head of the Village and in the past it was he who was having the honour to unfurl the national flag and light the wood to celebrate *Holika Dahan*,

but in the year 2001 he had to proceed for *Kumbh* at Allahabad and was not available in the Village on 26th January. That year, Kathod Tukaram Thakur (A-1) had the honour and privilege to unfurl the national flag. The festival of *Holika Dahan* had to be celebrated at the night of 11th March, 2001. PW-1 Gautam Patil having returned to the Village proclaimed that he would light the fire. A-1 objected. The reason given by A-1 was that the tradition in the Village was that he who unfurled the national flag on 26th January would light the fire at the *Holika Dahan*.

9. It was the case of the prosecution that marching under the banner of A-1, 27 other persons – three of them armed with sword, one of them armed with spear and few armed with sticks reached the place where the fire had to be lit and the assault took place.

10. In the assault, Manoj Sadan Patil died. The postmortem report shows fracture of the skull and resultant trauma causing death. External injury is only one on the dead body.

11. The complainant is PW-1. He has deposed in sync with his statement. As per his testimony, A-1 inflicted a blow towards his head with a sword and on his exhortation, A-3 hit the deceased on the head with a spear. His further testimony is that A-2 tried to hit him with a sword but missed. A-5 assaulted him with stick hitting him on the shoulder. PW-2 assigned same role to A-1, A-2 and A-3 as was assigned by PW-1. He also deposed that A-4 came to the spot bursting crackers.

He assigned the same role to A-5 as assigned by PW-1. PW-3 assigned the same role to A-1, A-2 and A-3 as has been assigned by PW-1 and PW-2 and qua A-4, he stated that he hit the deceased with an iron bar on his back. He assigned a role to A-7 of assaulting his brother PW-7 with a sword. PW-4, a Police Constable deposed that the deceased had told him before he died that A-3 assaulted him. PW-5 assigned same roles as were assigned to A-1, A-2, A-3, A-4 and A-5 as deposed by PW-2. PW-7 assigned the same roles to A-1, A-2, A-3 and A-4 as were assigned by PW-2. He assigned no role to A-6 and A-8 but assigned same role to A-7 as was assigned by PW-3. Through the testimony of PW-8 Sr. P.I. Parshuram Bapat, the prosecution established recovery of a sword each from A-1, A-2 and A-6, a spear from A-3, iron bar from A-4 and wooden sticks from A-5 and A-8.

12. As no role being assigned to A-6 and A-8 by any of the prosecution witnesses, they have been acquitted. For the roles played by the other accused A-1 and A-3 have been convicted for the homicide of Manoj Patil on the reasoning that on the exhortation of A-1, A-3 hit him using a spear and the injury caused the death. The other Accused as also A-1 and A-3 have been convicted for the offences punishable under Sections 148 and 149 IPC. They have also been convicted for the offence punishable under Section 323 IPC.

13. From the facts noted hereinabove, it is clear that the Accused being more than five in number, had formed an unlawful assembly, having

object of by criminal force to take over the celebration of *Holika Dahan* and prevent PW-1 from exercising the privilege of lighting the fire. One member of the unlawful assembly i.e. A-3 was armed with a spear. A-1, A-2 and A-7 were armed with swords and others with sticks and iron bars. Thus, the unlawful assembly was armed with deadly weapons under Section 144 of the IPC. The members of the unlawful assembly indulged in rioting using the deadly weapons and thus committed an offence punishable under Section 148 IPC.

14. The question which now arises is whether the members of the unlawful assembly can be saddled with the liability to suffer the punishment for the death of Manoj Patil. Section 149 IPC reads as under:

“149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—
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 the committing of that offence, is a member of the same assembly, is guilty of that offence.

For the offence committed by a member of an unlawful assembly, to fasten the liability on the other members of the assembly, it has to be proved by the prosecution that the offence was committed in prosecution of the common object of the assembly or that the members of the

assembly knew the commission of offence to be likely in prosecution of the object of the assembly.

15. As noted above, the object of the assembly was to ensure that A-1 performs the honour of lighting the fire at the celebration of *Holika Dahan*. The injuries caused to the deceased as also to PW-1 show that neither was brutally assaulted and a blow each was inflicted and thus, it cannot be said that the members of the assembly knew or were likely to know that anyone of them would be committing the offence of murder.

16. The intention was not to murder anyone. This emerges from the testimony. Therefore, for the offence pertaining to the death of Manoj Patil, A-3 and A-1 alone would be liable for the reasons A-3 gave the fatal blow on the head of the deceased with a spear on the exhortation of A-1. From the postmortem report, it is clear that the blow was not with such force that A-3 can be said to have the intention to cause the death of the deceased. Surely, hitting a person on the head using a spear would require knowledge to be attributed that by the act death would be likely.

17. Therefore, the State appeal cannot be allowed to alter the conviction and then enhance the sentence imposed on A-3.

18. We note that the sentence imposed upon A-3 for the offence committed is to undergo imprisonment for three years which A-3 has already undergone. The sentence for other offences is for a period of

less than three years. The sentences were ordered to run concurrently.

19. Thus, the appeals filed by the State are dismissed and the appeal filed by A-1 is disposed of as having abated.

(SMT. BHARATI DANGRE, J.)

(CHIEF JUSTICE)