PETITIONER:
VITHAL AND OTHERS

Vs.

RESPONDENT:
THE STATE OF MAHARASHTRA

DATE OF JUDGMENT03/08/1995

BENCH:
MUKHERJEE M.K. (J)
BENCH:
MUKHERJEE M.K. (J)
NANAVATI G.T. (J)

CITATION:
1995 AIR 2337 JT 1995 (5) 673
1995 SCALE (4)627

ACT:

HEADNOTE:

JUDGMENT:

JUDGMENT

M.K.MUKHERJEE.J.

This appeal is directed against the judgment and order dated June 25, 1984 passed by the Bombay High Court in Criminal Appeal No. 286 of 1980 whereby it affirmed the conviction and sentence recorded against the four appellants under Section 302/34 of the Indian Penal Code by the Sessions Judge, Bhandara.

According to the prosecution case in the night between October 15/16, 1984 Antiram met with his death at the hands of his sons by his first wife (appellant Nos. 1 and 2 herein) and two sons of her brother (the other two appellants). The motive ascribed for the killing was that the deceased and his first wife, whom he had deserted some 10/12 years back, were fighting for long over the ownership of the house in which the murder took place.

In proving the charges levelled against the appellants, the prosecution rested its case principally upon the ocular version of the incident as given out by Bhivarabai (P.W.21) the mother of the deceased and Suresh (PW 22), a son of the sister of Antiram, who at the material time was 8 years old. Though the trial Court relied upon the evidence of both the witnesses to find the appellants guilty, the High Court found it unsafe to rely upon the child witness in view of obvious reservations in that regard and certain major contradictions in his evidence vis-a-vis his statement recorded under Section 161 of the code of Criminal Procedure. The High Court, however, found PW 21 was transparently honest and narrated the events in a truthful manner. In drawing the above conclusion the High Court observed:-

> "She had the traumatic experience of witnessing the macabre tragedy of her own grandsons to be jailed for life more so when an average Indian elderly woman

> prizes sons over anything else being the perpetuators of the family tree? The degree of cogency of evidence contained in the deposition of Bhivarabai has reached to such a high degree of probability that we unhesitatingly conclude that the learned Additional Sessions Judge was right in finding the accused persons guilty of offence under section 302 read with section 34 of the Indian Penal Code and sentencing them to undergo imprisonment for life."

At first blush we also felt that we will not be justified, while exercising our jurisdiction under Article 136 of the Constitution of India, in disturbing the concurrent findings of fact recorded by the learned Courts below, more so for the reason canvassed by the High Court in the above quoted passage, but having gone through the entire materials on record we are firmly of the opinion that the evidence of PW 21 that she had properly seen the incident and correctly identified the appellants as the miscreants cannot be safely relied upon. We do not for a moment suggest that as a grand-mother she would falsely implicate her grandsons as observed by the High Court but as our discussion to follow will show, her identification of the appellants can justifiably be attributed to her optical aberrations.

In her testimony PW 21 stated that after she, her son Antiram and grandson Suresh took food together she and Suresh went to sleep in one room while Antiram went to the adjoining chabari. According to her the door in between the room and the chapari was closed from inside. She next stated that around mid-night she was awakened by the sound of beating and therefore, she tried to open the door in between the chapari and her room only to find that the door was chained from outside also. However, she claimed, she could see all the four accused persons (the appellants) beating his son Antiram with ubharies while she was seated on the cot. She asserted that she could identify the appellants through the gap between the two doors and not through the crevices of the planks. As regards the source of light, she stated that the electric bulb of the street pole in front of her house illuminated the chapari enabling her to see the incident and identify the miscreants.

It appears from the record that for properly appreciating the evidence of PW 21, the trial Judge visited and inspected the locale, recorded a memorandum of the relevant facts observed at such inspection (Ext. 32) and placed the same on record in accordance with Section 310 of the Code of Criminal Procedure. In the report the trial Judge recorded, inter alia, as under:

> "The door opening in the room from chapari closed from the side of the chapari by means of the chain and seen from inside - The room into the chapari by myself, A.P.P. Shri Raut and Shri Saxena Adv. for accd.-
> a) Nothing could be seen from the gaping in between the 2 doors (shutters).
> b) The central pillar of the chapari and the gate (entrance) of the chapari is Visible from the crevices in between the planks of both the shutters."
>
> (emphasis supplied)

From the above quoted passage of the report of inspection it

is evidently clear that PW 21 could not have seen the incident, much less identify the miscreants in view of her categorical statement, as mentioned earlier, that she saw through a gap between the two doors and not through the crevices of the planks. This apart, the report nowhere indicates that the entire chapari was visible through the crevices of the planks even if we proceed on the assumption that she could see the incident through the crevices. On the contrary, the report indicates only the pillar and gate of the chapari were visible. Unfortunately, however, neither of the learned Courts below did give much importance to this aspect of the matter and proceeded on the basis that it was a minor mistake. We are however unable to share the above view as it is evident from Ext.32 that P.W.21 could not have properly seen the incident much less, identify the miscreants. Having regard to the fact that the success of the prosecution rested upon the testimony of P.W. 21 alone we feel that the learned Courts below ought not to have placed implicit reliance upon the evidence of PW 21 solely on the ground that as a grand-mother she was not expected to implicate her grandsons falsely. Then again PW 21 has admitted in cross examination that her eye sight was weakened and she could not properly see an object beyond a distance of about one foot. As regard the source of light, the trial Court has noticed that distance of the street pole on the road was at a distance of 55 ft from the east corner of the central room of the house. In that context it is difficult to hold that from the light emanating from the street pole from such a distance it could be possible for P.W. 21 to see the incident properly, more so when she had a defective vision.

On the conclusions as above, it must be said that the prosecution has not been able to prove its case against the appellants beyond all reasonable doubts. The order of conviction and sentence recorded against the appellants is therefore set aside and they are acquitted of the charge under Section 302 read with Section 34 of the Indian Penal Code. As the appellants are on bail, they are discharged from their bail bonds.