

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.279 OF 2013

1. Madhav S/o. Ukaji Dhutraj,
Age-61 years, Occu-Retired,
2. Santosh S/o. Madhav Dhutraj,
Age-34 years, occu-Driver,
3. Arun S/o. Madhav Dhutraj,
Age-28 years, Occu-Labour,

All R/o. Prabhatnagar, Nanded,
Dist. Nanded

...APPELLANTS

VERSUS

The State of Maharashtra
through Bhagyanagar Police Station,
Nanded, Dist. Nanded

...RESPONDENT

Mr.P.R.Katneshwarkar, Advocate for the appellants
Mr.M.M.Nerlikar, APP for the respondent/ State

**WITH
CRIMINAL APPEAL NO.291 OF 2013**

Siddhu W Siddhodhan S/o.
Vaijinath Waivale,
Age-27 years, Occu-Education,
R/o. Vidyut Nagar, Nanded,
Tq. & Dist. Nanded

...APPELLANT

VERSUS

The State of Maharashtra
Through Police Station,
Bhagya Nagar, Nanded
Tq. & Dist. Nanded

...RESPONDENT

Mr.G.J.Karne, Advocate for the appellant
Mr. M.M.Nerlikar, APP for the respondent/ State

**CORAM : A.V.NIRGUDE,
& V.L.ACHLIYA, JJ.**

RESERVED ON : 18.07.2016

PRONOUNCED ON : 31.08.2016

J U D G M E N T [PER: A.V.NIRGUDE, J.]

1. This appeal challenges judgment and order dated 17.06.2013 passed by learned Additional Sessions Judge, Nanded in Sessions Case No.27 of 2011 convicting the appellants from amongst 10 accused who were charged for offence of rioting with deadly weapons, murder, criminal intimidation, attempt to commit murder r/w certain offences punishable with The Arms Act and The Bombay Police Act. Some accused were separately charged only with offence punishable under Section 212 of the Indian Penal Code. Hereinafter the appellants would be referred to as per their designation in the Lower Court.

2. Prosecution alleged that on 11th August 2010 the appellants and other accused formed unlawful assembly

with deadly weapons and due to previous inimical incident attacked Maroti. They dragged Maroti from his house and dealt several blows of deadly weapons. Other witness who came for rescuing Maruti was also attacked causing him grievous injuries. Prosecution examined 10 witnesses. Gist of their evidences, in short can be stated as under:-

3. Prosecution Witness No.2 Ushabai -wife of deceased Maruti- stated that she stayed at Prabhat Nagar with her husband Maruti and four children. In the neighbourhood her husband's brothers and their families resided. The accused were also staying in neighbourhood. One Anil son of accused No.1 Madhav had love affair with her daughter Sukeshini.

4. On 9.08.2010 accused No.4 Santosh brother of Anil assaulted Maruti going to his work place alleging that his daughter Sukeshini enticed his brother Anil and had vanished. Maruti lodged a complaint to the Bhagyanagar Police Station.

5. Maruti as well as his wife Ushabai did not go to work on next day i.e. on 10th August. Since morning they and their family members were present in their house. At 10.00 a.m. accused No.5 Arun came to their

house and said to Maruti, he should not have lodged police complaint against accused No.4 Santosh and then threatened to kill him. Accused No.4 Santosh then left the spot. Shankar brother of Maruti went to police station to report this incidence.

6. At about 10.30 a.m. Maruti was still sitting outside his house on cement chair and Ushabai was sitting in varanda of her house. Accused No.4 Santosh, accused No.5 Arun, accused No.6 Siddhu, accused No.1 Madhav and others came there. Accused No.4 Santosh had a sword in his hand. Accused No.6 Siddhu had a sword too. Accused No.5 Arun had an iron rod. Accused No.1 Madhav had a wooden stick. Other persons were also armed with rods and sticks. Accused No.6 Siddhu dealt a blow of sword on the head of Maruti. Seeing this Maruti's family members raised alarm. Maruti tried to escape and went towards nearby house of Nagesh. But accused No.6 Siddhu and accused No.4 Santosh dragged Maruti out of that house. They brought Maruti on the road. Accused No.4 Santosh then dealt a blow of sword on the hand of Maruti. At this point of time Nagesh brother of Maruti came there and tried to protect Maruti. He told assailants not to hit Maruti. Accused No.5 Arun therefore assaulted him with iron rod. Other unknown persons started beating Maruti's family members. Maruti on the other hand tried to escape the assault and rushed

towards another house belonging to one Choudante. But accused No.4 Santosh and accused No.6 Siddhu again followed him to Choudante's house. Here accused No.4 Santosh dealt another blow by sword on the Maruti's back. Accused No.4 Santosh dealt one more blow of sword on Maruti's head. Maruti fell down. While Nagesh tried to help Maruti, accused No.6 Siddhu tried to hit him with sword, but Nagesh warded off such blow. Accused ran away from the spot. Maruti fell down injured in front of Choudante's house. Ushabai and others took Maruti and Nagesh to Government Hospital. Doctor examined Maruti and declared him dead. Nagesh was admitted to hospital for medical treatment.

7. Prosecution witness No.3 Nita is daughter of Maruti. She too disclosed as to how the incident occurred. She reiterated what was stated by her mother Ushabai. She stated that when her Uncle Nagesh tried to save her father, accused No.5 Arun dealt a blow of iron rod on his right leg. She did not attribute any overt act to accused No.1 Madhav.

8. Prosecution witness No.4 Nagesh is Maruti's brother. He stated that on 10.08.2010 he and his brother Maruti were sitting in the varanda of his house. At about 10.00 a.m. accused No.5 Arun came there and threatened

Maruti. After he left them, his brother Shankar went to police station for lodging a complaint. 10-15 minutes thereafter accused No.1 Madhav, accused No.4 Santosh, Accused No.5 Arun and Accused No.6 Siddhu came there with swords, rods, wooden sticks, etc. Accused No.6 Siddhu dealt a blow of sword on Maruti's head. In order to save his life Maruti tried to enter into a neighbors house. Nagesh tried to save him but accused No.5 Arun dealt a blow of iron rod on his right leg. Accused No.1 and other accused rushed towards Nagesh with sticks in their hands. Accused No.4 Santosh, Accused No.5 Arun and accused No.6 Siddhu followed Maruti and dragged him out side the house and then accused No.5 Arun, accused No.4 Santosh dealt sword blows on his head. Maruti again tried to go inside Choudante's house. But accused No.4 Santosh, accused No.5 Arun and accused No.6 chased him. Then accused No.4 Santosh gave a sword blow on the Maruti's back. Accused No.4 Santosh dealt one more blow on the Maruti's head. Maruti fell down. Accused No.6 Siddhu tried to assault Nagesh, but he escaped.

9. Next important prosecution witness is P.W.No.11 Sanjay who stated that at the time of autopsy of Maruti's body he found following external injuries:

- i] Chop wound 6cm x 8cm x muscle exposed obliquely. Bewaring directing above downwards on the lateral side

on the left forearm.

ii] Chop wound over the left elbow 5cm x 4cm x bone exposed.

iii] Incised wound on back below the right infra scapular region, extending to the left scapular region, 26cm x 1cm x $\frac{1}{2}$ cm horizontally gaping varying from 1mm to 4mm at the level of T-7 and 10cm (right) and 16cm (left) from the mid line.

iv] Chop wound over the left partial region.

Approximately 9cm above the ear pinna 9cm x 3cm x scalp exposed, vertically and posterior end of the wound 3cm above the partial eminence. On internal examination he found fracture on scalp and injuries to brain. He opined that death was caused due to head injury.

10. Prosecution witness No.8 Dr. Rajesh stated that on 10.08.2010 Nagesh was admitted to Government Medical College, Nanded in causality at about mid-night. Nagesh gave him history of assault. He took X-ray and found that Nagesh sustained fracture of tibia fibula.

11. On the basis of this evidence the learned Judge of the trial Court came to a conclusion that accused No.1 Madhav, accused No.4 Santosh, accused No.5 Arun and accused No.6 Siddhu should be convicted for offences punishable under Sections 143,148,452,506 Part-II, 326,302 r/w 149 of the Indian Penal Code. The learned Judge acquitted other accused. In short the learned Judge

of the trial Court held that accused No.1,4,5 and 6 were members of unlawful assembly and committed offence with deadly weapons and they caused grievous injuries using deadly weapons and caused Maruti's death.

12. Criminal Appeal No.279 of 2013 is filed by Madhav and others and Criminal Appeal No. 291 of 2013 is filed by Siddhu Waivale.

13. We heard submission at bar. The learned counsel for the appellants tried to convince us that the entire prosecution case deserves to be disbelieved mainly because the witnesses are interested ones. They strongly criticized the prosecution case for not examining an independent witness. They pointed out names of neighbours having gone on record, but were not examined as witnesses and, therefore, the prosecution case should be discarded.

14. We are not inclined to accept this submissions at all. The prosecution case as observed above depended mainly on three witnesses. Maruti's wife and daughter whose presence on the spot was quite natural and Nagesh Maruti's brother whose presence was not only natural but since he too sustained grievous injury his presence on the spot cannot be disputed. Another unique feature of

this case is narration of the incident by all three prosecution witnesses is more or less similar. All of them stated that first sword blow on Maruti's head was dealt by accused No.6 Siddhu and final two blows on the Maruti's head were delivered by accused No.4 Santosh.

15. The first question for our consideration is whether the accused/appellants were members of unlawful assembly? In order to form unlawful assembly the group must contain five or more persons. All along the eye witnesses named four persons to be assailants. Some of them rather vaguely mentioned that there were few other assailants. We are aware that there were ten accused before the trial Court. Most of them were probably neighbours and yet witnesses did not even mention their names. Witness No.2 Ushabai stated that along with four named accused, there were some other persons. But she did not describe them, nor did she say that they were unknown to her. She neither disclosed that they were from the neighbourhood or strangers. Witness No.3 -her daughter- did not mention at all that there were more assailants. Witness No.5 Nagesh again rather vaguely stated that there were few more persons with named accused. But he too avoided to mention as to whether the other assailants were known to him or unknown to him, whether they were from the neighbourhood or otherwise. We are, therefore,

of the view that prosecution could not prove that there were five or more assailants. We have, however, no doubt about the presence of the named accused at the time of incident. We hold that the prosecution could prove that the named accused were present at the scene of occurrence.

16. In view of these findings recorded above, we are, unable to hold that the accused could be convicted for the offence punishable under Sections 143 and 148 of the Indian Penal Code. We are also unable to utilize provision of Section 149 of the Indian Penal Code for attributing vicarious liability. If the element of rioting and unlawful assembly is removed, we are still able to utilize section 34 to foist vicarious liability on the named accused.

17. Let us now examine the evidences to find out what offences could be proved against the accused. First offence that can be alleged against them is the offence punishable under Section 452 i.e. house trespass after preparation for causing hurt, assault and wrongful restraint. We have no doubt in our mind that all accused had weapons in their hands. We have no doubt in our mind that even accused No.1 Madhav had a stick like weapon in his hand. Though he apparently did not use it for causing

injury to any victim, but we hold that accused No.1 Madhav was not only present at the time of incident, but had also a stick like weapon in his hand. All of them had common intention to cause harm to Maruti. Their target was Maruti and none else. During the incident, all the accused had common intention to catch Maruti and assault him. During the incident when Maruti tried to enter a house, some of them chased him by entering the house. They dragged him out. It has come in evidence and we believed the part of the evidence that Maruti to save himself entered the house of Nagesh who resided in neighbourhood. But accused No.6 Siddhu and accused No.4 Santosh went inside the house and dragged Maruti out. Therefore offence of trespass after preparation for assault is proved against accused No.4 and 6. When Nagesh intervened it was only accused No.5 who dealt one iron rod blow on his right leg. Because of this blow Nagesh sustained grievous injury. Nagesh was assaulted mainly to prevent him from protecting Maruti. As said above Maruti was the target and Nagesh was not. Had Nagesh been another target, he too could have sustained blows on his vital organs like chest and head. Apparently accused No.1,4 and 6 did not cause any hurt to Nagesh. It is proved by the prosecution that accused No.5 Arun has caused grievous hurt utilizing the deadly weapons and thereby committed offence under Section 326 of the Indian

Penal Code.

18. The prosecution witness categorically stated that accused Nos.4 and 6 dealt blows of their sword on Maruti's person. All the blows are attributed to only accused Nos. 4 and 6. Maruti died due to head injury. Accused Nos.4 and 6 apparently acted in tandem. They were more aggressive amongst four accused. They chased, caught and dragged victim Maruti from Nagesh's house first. Then they also chased and delivered fatal blows to Maruti individually in front of Choudante's house. Both the accused had swords in their hands. They utilized swords freely. We have no doubt in our mind that accused Nos.4 and 6 shared the common intention to cause Maruti's death. Their intention was to cause Maruti's death or to cause such bodily injury to Maruti which was sufficient in ordinary nature to cause Maruti's death. Therefore, we have no doubt in our mind that accused Nos.4 and 6 shared common intention to cause Maruti's death.

19. Crucial questions in this appeal are (i) Whether Madhav can be convicted for the offence causing injury and death utilizing the provision of section 34 of the Indian Penal Code? (ii) Whether the accused No.5 can be convicted for the offence of murder utilizing Section 34 of the Indian Penal Code?

20. In order to answers these questions we must appreciate the evidence in this case in the light of provision of Section 34 of the Indian Penal Code. It reads as under:

Section 34 of the Indian Penal Code:-

"Acts done by several persons in furtherance of common intention- When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

21. In order to apply this Section, the prosecution ought to prove that all assailants had common intention of causing death or grievous injury to the victims Maruti and Nagesh. As said above the common intention of this group was to target Maruti, single him out and to assault him. It is difficult to came to a conclusion from the evidence that has come on record that accused Nos.1 and 5 shared intention of causing murder of other two accused. No doubt, accused came with preparation of assault. They were armed with weapons. Accused Nos.4 and 6 were armed with swords and evidence also indicated that they used this weapon decisively i.e. for causing Maruti's death. The circumstances, however, do not indicate that accused Nos. 1 and 5 had shared such intention of other two

accused. The concept of vicarious liability of section 34 of the Indian Penal Code is a rule of evidence and gist of it is that if two or more persons intentionally do an act jointly, in law it is presumed that each of them has done that act individually. In this case the evidence that has come on record would not justify conclusion that accused Nos.1 and 5 shared common intention of accused Nos. 4 and 6 of committing Maruti's murder. On the other hand accused Nos.4 and 6 certainly shared common intention to commit Maruti's murder jointly. Assuming that the fatal blow was that of accused No.4, still position of accused No.6 -in law- is that he too caused Maruti's death. In this case rule of Section 34 would be applicable for accused Nos.4 and 6 when the Court would decide as to whether they shared common intention to cause Maruti's murder.

22. Accused No.1 apparently had common intention with other accused of causing hurt to Maruti. Similar intention cannot be attributed to him for causing hurt to Nagesh. Accused No.5 is only assailant of Nagesh and we have already found that he cannot escape conviction for the offence punishable under Section 326 of the Indian Penal Code.

23. We are, however, of the view that accused No.1

cannot be convicted for the offence punishable under Section 326 of the Indian Penal Code for sharing common intention of grievous hurt. We are also unable to hold that accused No.1 shared common intention of causing Maruti's murder. With the result we hold that accused No.1 should be convicted for offence punishable under Sections 452 r/w 34 of the Indian Penal Code and should be sentenced to suffer rigorous imprisonment for the period which he has already undergone. In addition to this he should also pay a fine of Rs.5000/- (Rupees Five Thousand), in default, he should undergo rigorous imprisonment for six months.

24. Accused No.5 is found guilty of offence punishable under Sections 326 & 452 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for period which he has already undergone. He should also pay fine of Rs.10,000/- (Rupees Ten Thousand), in default, he should undergo rigorous imprisonment for one year. Appeal filed by accused Nos. 4 and 6 deserves to be dismissed.

25. In the result we found no merit in the Criminal Appeal No.291/2013 filed by the Appellant-Siddhu @ Siddhodan Waivale (original accused no.6). Accordingly the Criminal Appeal filed by the said appellant liable to be dismissed.

26. So far as the Criminal Appeal No.279/2013 we found no merit in the Criminal Appeal preferred by the Appellant No.2- Santosh Dhutraj (original accused No.4) and appeal filed to that extent is also to be dismissed.

27. So far as the appellant No.1 Madhav Dhutraj (Original accused No.1) and appellant No.3-Arun Dhutraj (Original accused No.5) in Criminal Appeal No.279/2013 we are of the view that the appeal deserves to be partly allowed.

28. In the result, we pass the following order.

i. Criminal Appeal No.291/2013 filed by appellant-Siddhu @ Siddhodhan S/o. Vaijinath Waivale (Original accused No.6) is dismissed.

ii. Criminal Appeal No.279/2013 is dismissed to the extent of Appellant No.2 Santosh S/o. Madhav Dhutraj (original accused No.4).

iii. Criminal Appeal No.279/2013 is partly allowed to the extent of appellant

No.1- Madhav S/o. Ukaji Dhutraaj (Original accused No.1) and conviction for committing the offence punishable under Section 302 r/w 149, 326 r/w 149, 143 r/w 149, 148 r/w 149 of the Indian Penal Code is hereby set aside. The conviction of the appellant under Section 452 is upheld and maintained in stead of Section 452 r/w 149. The appellant is convicted under Section 452 r/w 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for the period to which he has already undergone. He shall also pay fine of Rs.5,000/- (Rupees Five Thousand) in default, he should undergo rigorous imprisonment for six months.

iv. Criminal Appeal No.279/2013 is partly allowed to the extent of appellant No.3- Arun S/o. Madhav Dhutraaj (Original accused No.5) and conviction for committing the offence punishable under Section 143 r/w 149, 148 r/w 149, 506 Part (II), 326 r/w 149 and 302 r/w 149 of the Indian Penal Code is hereby set aside. The conviction of the appellant under Sections 326 & 452 is

upheld and maintained in stead of Sections 326 r/w 149 & 452 r/w 149. The appellant is convicted under Sections 326 r/w 34 & 452 r/w 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for the period to which he has already undergone. He shall also pay fine of Rs.10,000/- (Rupees Ten Thousand) in default, he should undergo rigorous imprisonment for six months.

v. Appellant No.2-Arun S/o. Madhav Dhutraaj (Original accused No.5) in Criminal Appeal No.279/2013 be set at liberty, if not required in any other case.

vi. Bail bond stand discharged.

[V.L.ACHLIYA, J.]

[A.V.NIRGUDE, J.]