

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 5361 OF 2011

Pruthviraj Baba Deshmukh,
Age. 48 years, Occ. Business,
R/o. Kadepur, Tq. Kadegaon,
Dist. Sangali.

...Applicant.

Versus

1. Mandabai Bajirao Bade,
Age. 51 years, Occ. Agril,
R/o. Sonai, Tq. Newasa,
Dist. Ahmednagar.
2. Sou. Alka Bhausahab Alhat,
Age. 59 years, Occ. Agril,
R/o. More Chinchore, Tq. Newasa,
Dist. Ahmednagar.
3. Sou. Sunanda Ramnath Shinde,
Age. 40 years, Occ. Agril,
R/o. Brahmni, Tq. Rahuri,
Dist. Ahmednagar.
4. Sou. Sangita Suresh Funde,
Age. 21 years, Occ. Household,
R/o. Sonai, Tq. Newasa,
Dist. Ahmednagar.
5. The State of Maharashtra,
Through Sonai Police Station,
Tq. Newasa, Dist. Ahmednagar.
6. Ashok R. Mane (deleted)
7. Shankarrao Anandrao Patil (deleted)
8. Mahavir D. Yadav (deleted)
9. Sandeep Shekhar Mohite (deleted)
10. Uddhav Tukaram Garud (deleted)

...Respondents

...
Advocate for Applicant : Mr. Suresh Kulkarni h/f Mr. D.G. Nagode
APP for Respondent No.5: Mr. M.B. Bharaswadkar
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CORAM : V. K. JADHAV, J.
DATED : 9th DECEMBER, 2016

ORAL JUDGMENT:-

1. Being aggrieved by the order passed by the learned J.M.F.C. Newasa, dated 14.3.2011 in OMA No. 400 of 2010, issuing process thereby against accused, including the present applicant, who is original accused No.6, for the offences punishable under Sections 363, 347, 364 r.w. 34 of I.P.C. and the judgment and order passed by the District Judge-3 and Additional Sessions Judge, Shirampur dated 25.11.2011 in Criminal Revision Application No. 30 of 2011, confirming thereby the order passed by the Magistrate, as aforesaid, the applicant original accused No.6, has approached this court by filing present criminal application.

2. Brief facts, giving rise to the present criminal application, are as follows:-

a) Respondent Nos. 1 to 4 approached the learned J.M.F.C. Newasa by filing O.M.A. No. 400 of 2010 which is subsequently converted into R.T.C. No. 89 of 2011, alleging therein that their respective husbands are doing the business of providing labour to

the sugar factory on contract basis for cutting the sugarcane. On 29.11.2010, at about 12.00 noon, respondent Nos. 6 to 10 original accused Nos. 1 to 5, came in front of the house of the complainant No.1 and the respondents/original accused No.3 Mahaveer Yadav threatened their respective husbands at the point of revolver and further forced them to sit in the jeep. The said accused persons, who were carrying the revolver fired in the air. It has further alleged in the complaint that they further threatened the complainants that their respective husbands have misappropriated amount of Rs.45.00 to Rs.50.00 lacs given to them by the factory as an advance and that if the said amount is not refunded within a period of one month, they never see their respective husbands. It has also alleged in the complaint that the accused persons, further disclosed to the complainants that they have been sent by the present applicant-original accused No.6.

b. On the basis of these allegations, the learned Magistrate has recorded verification statements of the complainants and on perusal of the documents and verification statements of the complainants, issued process against the accused, including the present applicant, as aforesaid. Being aggrieved by the same, the applicant original accused No.6 had preferred criminal revision application No. 30 of 2011 before the Sessions Court at Shrirampur and the learned

Additional Sessions Judge, Shrirampur by its impugned order dated 25.11.2011, dismissed the revision application by confirming the order passed by the Magistrate. Hence, this criminal application.

3. Learned counsel for the applicant original accused No.6 submits that as per the allegations made in the complaint, the applicant original accused No.6 has not participated in the alleged crime nor he was present at the scene of offence or near thereto. Even though the allegations made in the complaint, as against the present applicant, is accepted as it is, no case is made out against the present applicant. It further appears from the contents of the complaint that the complainants have no knowledge about the common intention shared by the applicant accused No.6 and the allegations are made in the complaint only on the basis of the statements made by other accused persons at the time of alleged incident. Learned counsel submits that applicant original accused No.6 is the Chairman of sugar factory and he is not likely to indulge in such type of activities. Even though the applicant original accused No.6 is resident of village Kadepur, Tq. Kadegaon, District Sangli, the learned Magistrate has directly issued process without complying with the provisions of Section 202 of Cr.P.C. In view of provisions of Section 202 of Cr.P.C. if the accused is resident at the place beyond the area in which the Magistrate exercises his jurisdiction, the

Magistrate is bound to postpone the issue process and enquire into the case or direct that the investigation to be made by the police officer. Learned counsel submits that the learned Magistrate has not complied with the aforesaid provisions. Both the courts below have not considered the provisions of Section 34 of the I.P.C. in its proper perspectives and thus arrived at erroneous conclusion.

Learned counsel for the applicant, in order to substantiate his contentions, placed reliance on the judgments in the following cases:-

1. Lalchand B. Patil vs State of Maharashtra, reported in 2007(1) Mh.L.J. (Cri.) 1068,
2. State of Maharashtra vs Nanubhai Dhanjibhai Vegada and another reported in 2007(2) Mh.L.J.(Cri.) 223,
3. Kashinath Vishnu Jagtap and another vs State of Maharashtra, reported in 2000(2) Mh.L.J. 160,
4. Onkar Motiram Kale and others vs. State of Maharashtra, reported in 2001 (1) Mh.L.J. 521,
5. Vikram Singh and others vs. State of Punjab, reported in (2010) 3 SCC 56,
6. Shivalingappa Kallayanappa and others vs. State of Karnataka, reported in 1994 Supp (3) SCC 235,
7. Jai Bhagwan and others vs. State of Harayana, reported in (1999) 3 SCC 102,
8. Dharmender Singh Alias Vijay Singh vs. State, reported in (2013) 12 SCC 263.

4. None present for respondent Nos. 1 to 4. Respondent Nos. 6 to 10 are already deleted as per Court's order dated 17.2.2012.

5. Learned A.P.P. for the respondent State submits that the other accused persons are employees of the said sugar factory and they are not likely to indulge in such activities unless directed by the applicant-accused No.6, who happened to be the Chairman of the said sugar factory. It has specifically alleged in the complaint that the other accused persons participated in the crime, disclosed that they were doing it as directed to them by the applicant accused No.6. The said disclosure makes out a case of collusion in the commission of offence and thus, rightly attracted the provisions of Section 34 of I.P.C. Learned Magistrate, has therefore, rightly issued process against the applicant accused with the aid of Section 34 of I.P.C.. No interference is required. Criminal application is liable to be dismissed.

6. On careful perusal of the complaint, it appears that there are allegations against the applicant original accused No.6 to the extent that other accused persons participated in the crime, disclosed that at the instance of applicant-accused No.6, the action is being taken. Except this, there are no allegations against applicant accused No.6. It further appears from the contents of complaint that the respondents/complainants have no knowledge about the involvement

of the applicant accused in the alleged crime.

7. In the case of ***Rajesh Govind Jagesha vs. State of Maharashtra, reported in AIR 2000 SC 160***, which is referred to in the case of ***Lalchand B. Patil vs State of Maharashtra (supra)*** relied upon by learned counsel for the applicant, the Supreme court in para 7 of the judgment has made following observations:-

“7. ...No pre-meditation or previous meeting of mind is necessary for the applicability of section 34 of the Indian Penal Code. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purposes of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence.”...

8. In the case of ***State of Maharashtra vs. Nanubai Dhanjibhai Vegada and another*** (supra), the Division Bench of this court in para 22 of the judgment has made the following observations:-

“22. We will now advert to the question as to whether accused No. 1 is guilty and had a common intention with

accused No. 2 to kill the victim. Under section 34 of the Indian Penal Code, before a person can be held liable for the acts done by another, it must be established that (i) there was a common intention between the two, such as a pre-arranged plan; (ii) there is some participation by that person in the commission of the offence in furtherance of the common intention. (iii) the common intention must be anterior in point of time to the commission of the crime. It is well settled that before a person can be convicted for an offence with the aid of provisions of section 34, the aforesaid ingredients must be satisfied. Section 34 of the Indian Penal code requires that the prosecution has to establish that there was a common intention in the sense of a pre-arranged plan between the two accused and secondly, the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless the common intention and participation are both present, this section cannot apply. However, in order to prove the participation it is not necessary that the accused must be actually present in the room in which the offence occurs. He can, stand guard by a gate outside, ready to warn his companions about any approaching danger or wait in a car on a nearby road ready to facilitate their escape. But he must be physically present at the scene of offence and must actually participate in the commission of the offence in some way or the other when the offence is being committed. The antithesis are the preliminary stages, i.e., the agreement, the preparation, the planning which are covered by section 109. The second stage of the commission of the offence involves the plan being put into effect and being carried out. Section 34 is concerned with the latter stage. If several persons have

common intention of doing a particular criminal act and in furtherance of that common intention, all of them aid or abet each other in the commission of the act, then although one of these persons may not actually carry out that act physically, but if he helps by his presence or other acts in the commission of the act, he would be held to have done that act within the meaning of section 34.”

9. In the case of ***Kashinath Vishnu Jagtap and another vs State of Maharashtra (supra)***, the Division Bench of this Court has made following observations:-

“Section 34, Indian Penal Code provides that “when a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for the act in the same manner as if it were done by him alone.”

A perusal of section 34, Indian Penal Code would show that the following prerequisites have to be fulfilled before it would have application:-

- (i) A criminal act should be done by several persons or by persons more than one; and*
- (ii) the said criminal act must be committed by them in furtherance of their common intention.*

It is only where (i) and (ii) co-exist, would it be deemed in law that the criminal act committed, was committed by each of the said persons as if it was committed by him alone.”

10. It is thus clear that before a person can be held liable for the

acts done by another, it must be established that (i) there was a common intention between the two, such as a pre-arranged plan (ii) there is some participation by that person in the commission of the offence in furtherance of the common intention; and (iii) the common intention must be anterior in point of time to the commission of the crime.

11. In the instant case, the applicant accused No.6 had not actually participated in the commission of offence nor he was physically present at the scene of offence. Unless the common intention and participation both are present, the provisions of Section 34 of I.P.C. cannot apply. However, in order to prove the participation, it is not necessary that the accused must be actually present where the offence occurs. But, his presence, other way indicating his common intention with the accused, who involved in the commission of crime, is required.

12. In the case in hand, both the aforesaid ingredients are lacking. The respondents complainants have no knowledge about involvement of the applicant accused No.6 in the alleged crime and the allegations have been made in the complaint only on the basis of some disclosure made by other accused, who alleged to have been involved in the commission of crime. Admittedly, the applicant

accused No.6 was not present at the scene of offence. In view of this, the provisions of Section 34 of I.P.C. are not attracted in the facts and circumstances of the present case so far as applicant accused No.6 is concerned. Both the courts have not considered this aspect of the case.

13. Furthermore, even though the applicant accused No.6 is hailed from Sangli district, the learned Magistrate has not applied the provisions of Section 202 of Cr.P.C. and in absence of that, the order of issuance of process against the applicant accused No.6 is also liable to be quashed and set aside.

14. In the case of ***Tukaram Ganpat Pandare vs State of Maharashtra, reported in AIR 1974 SC 514***, relied upon by learned A.P.P., it is observed that though the accused in that case was not found at the spot of incident, and even though there was no evidence about his participation in commission of crime, it was found that the said accused was in possession of duplicate keys of the burgled godown found missing from the factory of the company and said accused was present at the weigh bridge. The accused in the said case could not explain for possession of the godown keys nor for his presence at the weigh bridge. In the facts of the said case, the Supreme Court concluded that Section 34 of I.P.C. stands attracted.

In the case in hand, as discussed above, except the disclosure by other accused, there is no evidence showing the presence of the applicant accused No.6 at the scene of offence nor his participation in the crime, in any manner.

15. In view of the above discussion, I proceed to pass the following order:-

O R D E R

- I. Criminal application is allowed in terms of prayer clauses "B" and "C"
- II. Rule made absolute in the above terms.
- III. Criminal application is accordingly disposed of.

(V. K. JADHAV, J.)

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