

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO. 663 OF 2002

1) Ramesh s/o Khandu Kasture, Aged about 32 years,	-(Abated as per order dt. 12-6-2017)
2) Ram s/o Khandu Kasture, Aged about 30 years,	
Both R/o Tiwrang, Tq. Mahagaon, District – Yavatmal (presently in Jail).	 <u>APPELLANT</u>

VERSUS

The State of Maharashtra, through P.S.O. Mahagaon.	 <u>RESPONDENT</u>
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Shri K.P. Sadavarte, Advocate for the appellants,
Shri H.R. Dhumale, Addl.P.P. for the respondent.

CORAM : ROHIT B. DEO, J.
DATED : 22nd SEPTEMBER, 2017

ORAL JUDGMENT :

Appellant 2 (original accused 2) and the complainant has filed on record joint affidavit to the effect that the dispute *inter se* is amicably settled since the death of appellant 1 (original accused 1).

The prayer is to alter the sentence to already undergone consistent with the view taken in the case of *Manohar Singh vs. State of Madhya Pradesh* reported in *(2014) 13 SCC 75*. Shri H.R. Dhumale, learned Additional Public Prosecutor, however, points out that the sentence undergone is hardly two months. In this view of the matter, the request to alter the sentence to already undergone cannot be considered and is rejected.

2. However, with the consent of the learned Counsel for the appellant 2 and the learned Additional Public Prosecutor for the respondent, the appeal is taken up for hearing forthwith. The only allegation against appellant 2 Ram Kasture is that he held the hands of the injured when the deceased appellant 1 Ramesh Kasture dealt a solitary blow. However, the statement in the evidence that appellant 2 Ram Kasture held the hands of the injured is an omission and the omission is proved during the evidence of the investigating officer. There is absolutely nothing on record to involve appellant 2 in the offence

3. The conviction of appellant 2 for offence punishable under

Section 307 of the Indian Penal Code is inexplicable. The only evidence on record was the alleged holding of hands which is a proved omission. The quarrel started between original accused 1 Ramesh Kasture and the complainant over drainage water. Even if the entire evidence of the prosecution is accepted, on the spur of the moment, accused 1 Ramesh Kasture, who has expired, struck the injured with a spade. Even according to the version of the complainant, the surviving appellant Ram Kasture was not present when the quarrel started. The allegation is that he rushed on the spot later on.

4. It is difficult to fathom how the surviving appellant Ram Kasture could have been convicted even with the aid of Section 34 of the Indian Penal Code. There is absolutely nothing on record to suggest a meeting of minds or a pre-concerted plan. I may only refer to the following observations of the Hon'ble Supreme Court in the case of *Pandurang and others ..vs.. State of Hyderabad, AIR 1955 S.C. 216 (Vol.42, C.N. 37)*:

“32. Now in the case of section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man

can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all:- 'Mahbub Shah v. Emperor, AIR 1945 PC 118 at pp. 120 & 121 (B). Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case : AIR 1925 PC 1 at pp 5 & 6(A) and AIR 1945 pc 118 (B). As their Lordships say in the later case, "the partition which divides their bounds is often very thin : nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

33. The plan need not be elaborate, nor is 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 pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g. the intention to rescue another and, if necessary, to kill those who oppose.

34. In the present case, there is no evidence of any prior meeting. We know nothing of what they said or did before the attack – not even immediately before. Pandurang is not even

of the same caste as the others. Bilia, Tukia and Nilia are Lambadas, Pandurang is a Hatkar and Tukaram a Maratha. It is true prior concert and arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or meeting together subsequently. But, to quote the Privy Council again.

“the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case”.

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, “the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis”. (Sarkar's Evidence, 8th edition, page 30).”

5. In this view of the matter, the judgment impugned to the extent the surviving appellant 2 Ram Kasture is convicted for the offence punishable under Section 307 of the Indian Penal Code, is wholly unsustainable and is set aside. The appeal is allowed. Accused 2 Ram Khandu Kasture is acquitted of the offence punishable under

Section 307 of the Indian Penal Code. Bail bond of accused 2 shall stand discharged. Fine paid by accused 2, if any, be refunded to him.

JUDGE

adgokar