

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

**Criminal Appeal No.360 of 2015  
With  
Criminal Application No.2412 of 2019**

Taher Maheboob Shaikh,  
Age 43 years,  
R/o Pethsangvi, Taluka Omerga,  
District Osmanabad. .. **Appellant.**

**Versus**

The State of Maharashtra  
Through In-charge Police Station/  
Investigating officer, Mr. Rajkumar  
Assistant S.P. Sub Division, Omerga,  
Taluka Omerga, Dist Osmanabad. .. **Respondent.**

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Shri. P.P. Mandlik, Advocate, for appellant.

Shri. R.D. Sanap, Additional Public Prosecutor, for  
respondent.

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**With**

**Criminal Appeal No.379 of 2015**

Sayyad Miyalal Pathan,  
Age 39 years, Occu: Labour,  
R/o Pethsangvi, Taluka Omerga,  
District Osmanabad. .. **Appellant.**

**Versus**

The State of Maharashtra. .. **Respondent.**

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Shri. Naseem R. Shaikh, Advocate, for appellant.

Shri. R.D. Sanap, Additional Public Prosecutor, for respondent.

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**With**

**Criminal Appeal No.390 of 2015**

1) Mustafa Babu Mogarge,  
Age 60 years, Occupation Labour.

2) Rashid Amin Pathan,  
Age 50 years, Occupation Labour.

(Name of appellant No.2 is deleted as  
per Court's order dated 22-10-2018)

3) Siraj Mattu Pathan,  
Age 37 years, Occupation : Labour.

All R/o Pethsangvi,  
Taluka Omerga,  
District Osmanabad.

**.. Appellants.**

**Versus**

\* The State of Maharashtra. **.. Respondent.**

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Shri. Satej S. Jadhav, Advocate, for appellants.

Shri. R.D. Sanap, Additional Public Prosecutor, for respondent.

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**With**

**Criminal Appeal No.720 of 2018**

Rashid Amin Pathan,  
Age 53 years, Occu: Driver,  
R/o Pethsangvi, Taluka Omerga,  
District Osmanabad. **.. Appellant.**

**Versus**

The State of Maharashtra. **.. Respondent.**

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Shri. Joydeep Chatterji, Advocate, for appellant.

Shri. R.D. Sanap, Additional Public Prosecutor, for  
respondent.

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**Coram: T.V. NALAWADE &  
K.K. SONAWANE, JJ.**

**Date: 5th AUGUST 2019**

**JUDGMENT (Per T.V. Nalawade, J.):**

1) These appeals are filed to challenge the judgment and order of Sessions Case No.19/2013 which was pending in the Court of learned Additional Sessions Judge, Omerga, District Osmanabad. The appellants of all the appeals are convicted and sentenced for the offences punishable under sections 302,307,149 of the Indian Penal Code and sections 143, 147, 148 of the Indian Penal Code.

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Sentence of imprisonment for life is given to them and fine is also imposed by the trial court. Criminal Appeal No.379/2015 is filed by accused No.1 (Sayyad Pathan), Criminal Appeal No.720/2018 is filed by accused No.7 (Rashid Pathan), Criminal Appeal No.360/2015 is filed by accused No.11 (Taher Shaikh) and Criminal Appeal No.390/2015 is filed by accused Nos.6 and 9 (Mustafa Mogarge and Siraj Mattu Pathan). Original accused Nos.2 to 5 and 8 and 10 are acquitted by the trial court when there was charge against them for the aforesaid offences. Both the sides are head.

2) In short, the facts leading to the institution of the appeals can be stated as under.

3) The informant Amar Yamgar is a real brother of deceased Kishore. The informant and the deceased were living with their parents and other members of the family in village Pethsangvi, Tahsil Omerga at the relevant time. The incident in question took place on 1-10-2012 after 7.00 p.m. As per the case of the prosecution, there is some structure like *Katta* in the vicinity of the house of the

deceased and there some of the accused persons had gathered and they were creating noise. As the lady members of the family of the deceased were present outside of the house, uncle of the deceased by name Prabhakar asked the accused to leave that place.

4) The incident in question took place due to aforesaid scolding by Prabhakar to the accused and after some time of the aforesaid incident. The informant and the deceased took dinner after the aforesaid incident in their house and then the deceased left home by saying that he was proceeding towards the field. Within no time of leaving of the house by Kishore, the informant heard hue and cry coming from the road side where Kishore had gone and so he rushed to the spot. The spot is situated at some distance from the house of the informant. From some distance he noticed that accused No.1 was assaulting on the abdomen of the deceased. He noticed that accused Nos.2 to 9 had held the deceased and some of them were assaulting the deceased with fist blows and kicks. When the informant rushed forward to rescue the deceased, accused No.1 gave blow of knife on abdomen of

the informant. The informant then realised that deceased was assaulted by accused No.1 on his abdomen by using knife. In the mean time Prabhakar also rushed to the spot. He was also assaulted by accused by fist blows and kicks. After assault, the accused left the place. All the accused are Muslim and the deceased & the witnesses are Hindu.

5) Kishore was seriously injured in the incident and he had vomiting. Kishore was shifted to Omerga Government Hospital by arranging a jeep but the medical officer from the Government Hospital declared that Kishore was already dead. The informant had sustained injury on his abdomen which was a stab injury and he received treatment in the same hospital. There, police recorded the first information report. It was recorded in presence of medical officer and a certificate of the medical officer was obtained to show that the informant was fit to give statement. The F.I.R. was recorded on 2-12-2012 and crime at CR No.70/2012 came to be registered for offences punishable under sections 302, 307 read with 149 of Indian Penal Code. On 2-10-2012 itself most of the accused including accused Nos.1 and 7 came to be

arrested. As accused Nos.1 and 7 had injuries and so they were referred for medical examination on the same day. One injury each was found on the person of accused Nos.1 and 7.

6) Post mortem was conducted on the dead body of Kishore. Medical examination revealed that there were four stab injuries and three of them were on the chest and abdomen. One injury was on the shoulder. The death took place due to haemorrhagic shock due to stab injuries which had cut internal organs like lungs and trachea and there was haemothorax. One stab injury was found on the abdomen of the informant. He was examined on 1-10-2012 at about 11.30 p.m. and the age of the injury was within six hours.

7) During the course of investigation spot panchanama was prepared. The record of injury sustained by accused Nos.1 and 7 was collected. They were examined on 2-10-2012 at about 2.30 p.m. and 4.00 p.m. and the injuries found on their person were found to be caused within 24 hours. The injuries were simple.

8) During the course of investigation, statements of eye witnesses came to be recorded. During supplementary statement, the names of accused Nos.10 and 11 were disclosed by the informant and their names were taken by other witnesses also. Charge sheet came to be filed for aforesaid offences against 11 accused.

9) It is not disputed that Kishore died homicidal death. The prosecution has examined Dr. Danai, who had conducted post mortem on the dead body. In his evidence the post mortem report is proved as Exhibit 61. The post mortem was conducted on 2-10-2012 between 8.30 a.m. and 10.30 a.m. There were following injuries on the dead body :-

"(1) stab injury on left side of chest 3cm above left nipple oblique medial direction - 2cm x 1cm deep upto lung. Fracture of third rib midclavicular line middle of rib left side.

(2) stab injury on right shoulder, horizontal, medial and anterior and upwards directions - 1.5cm x 1cm up to muscle deep.

(3) stab injury at 6th intercostal space, med-axillary line transverse downwards and posteriorly 3cm x1cm upto muscle deep.

(4) stab injury at right axilla oblique, upwards and anterior direction - 2cmx1cm upto lung deep."

10) The doctor has given evidence that these injuries were caused by sharp and pointed object. A knife, article No.4, was shown to the doctor and the doctor has given opinion that such injuries can be caused by article No.4.

11) Dr. Danai (PW 1) has given evidence on the internal injuries which were noticed by him and the evidence on internal injuries is given as under.

"In the postmortem note at column no.20 under thorax head I have mentioned other injuries on the various points A to J. The thorax injuries were similar as described in column no.17. I found haemothorax to left side approximately one liter of blood contained in left thoracic cavity.

Pleura cut at left anterior upper lobe of lung.

Larynx, tracheal and bronchi-stab injury left side of trachea at hilar region.

Right lung, pale on cut section

Left lung, stab injury to left side of lung anterior surface of left upper lobe of lung, size of injury 2cm x 1cm x 4cm.

Heart weight - all four chambers of heart contain scanty of blood.

In the abdomen area I found stab injury on left desophagus at hilar region, size of injury 2cm x 1cm.

Stomach contain approximate one liter of blood.

small intestine contained semi digested food material.

Large intestine contain faecal matter and foul smelling gases.

All the injuries described in column no.20 and 21 corresponds to the injury described in column no.17."

12) The doctor has given evidence that the aforesaid injuries are sufficient in ordinary course of nature to cause the death. He has given evidence that even injury No.1 mentioned above itself is sufficient to cause the death. Opinion is given that death took place due to haemorrhagic shock due to stab injuries to the vital organs.

13) Dr. Danai (PW 1) had examined the informant Amar (PW 2) also on 1-10-2012 at about 11.30 p.m. The evidence on this injury is given as under.

"Stab injury 4cm x 5cm upto intra abdominal on right side of abdomen para umbilical region. Said injury might have caused by pointed and sharp object within six hours before examination. Said injury was of grievous nature. Said injury is possible by the muddemal knife now shown to me. I provided medical treatment to him and issued M.L.C. Certificate to him and then referred him to Civil Hospital Solapur for further medical

treatment. The medical certificate dated 1/10/2012, now shown to me is the same. Its contents are correct. It bears my signature. It is marked with Exh.62. Said injury was on vital limb of the body and if immediate medical treatment not provided it could cause life threatening to him."

14) In the trial court no cross-examination of the doctor was made by the counsel of accused Nos.2,3,5,7,8 and 9. The doctor was cross-examined by the learned counsel of accused Nos.1,4,6,10 and 11. The cross-examination is mainly on the possibility of sustaining of injuries when there is scuffle. The questions were hypothetical in nature. Thus, the evidence of the doctor remained unshattered.

15) Amar (PW 2), the informant, has given evidence that on that date at 7.00 p.m. the first incident took place as accused Nos.1,4 and 5 were sitting on *Katta* situated in the vicinity of their house and as they were talking loudly. Prabhakar, uncle of the informant, had asked these accused to leave that place as female members of his house were present in front of the house. He has given evidence that those accused went away from that place.

The informant (PW 2) has given evidence that he and the deceased took dinner in the house at 8.30 p.m. and then the deceased and Rajendra Jamadar, a labour of the family of the informant, left the house for going to the field. He has deposed that within short time, Jamadar came running towards the house and informed that accused Sayyad Pathan, Ayas Pathan, Vazir Pathan, Siraj Pathan, Shamshoddin Pathan, Husen Pathan, Rashid Pathan, Afasar Pathan, Taher Shaikh, Mustafa Mogarge and Yusuf Sayyad were beating Kishore. He has deposed that after learning about the incident, he, his father Manik, uncle Prabhakar, mother Daivatabai and aunt Mangalbai went towards the spot. He has given evidence that the spot is situated at a distance of about 100 feet from his house. He has given evidence that when they reached the spot he noticed that accused No.11 Taher, Accused No.6 -Mustafa, accused No.9-Siraj Pathan and accused No.7-Rashid Pathan had caught hold of Kishore and accused Sayyad (accused No.1) was giving blow of knife on the chest of Kishore. He has given evidence that when he rushed forward, accused No.1 stabbed him on his stomach by using knife. He has given evidence that other accused also

started giving beating to him. He has given evidence that, he, Prabhakar and his father were assaulted by fist blows and kicks. He has given evidence that accused No.9 Siraj assaulted his father by using stick on the neck of his father. He has deposed that when accused No.1 was about to give second blow of knife on him accused No.1 missed the aim and the blow landed on accused No.7 Rashid Pathan and accused Rashid sustained injury to his waist. He has deposed that during the incident, handle of the knife was separated from the blade and due to that accused No.1 sustained injury to his hand due to the same knife. The incident took place during rainy season and after the incident the articles like his pair of chappals, slipper of accused No.1, footwear of accused No.5 and stick were lying there. He has given evidence that after the incident he and the deceased were shifted in a jeep to Omerga hospital and he was given treatment there. He has given evidence that his statement was recorded by police in the hospital as F.I.R. and it is at Exhibit 65.

16) In the F.I.R. names of accused Nos.10 and 11 were not given by the informant (PW 2). In the F.I.R. he

had not mentioned that witness Jamadar had left the house of the informant with Kishore and it is Jamadar who had informed about the incident and after that they had rushed to the spot. There was no mention about the assault on his father by using stick by one of the accused. It was not mentioned in the FIR that along with him, his father and lady members had gone to the spot and they had also witnessed the incident. It was not mentioned that Jamadar had witnessed the incident. These omissions in the F.I.R. were confronted to him during cross examination and he has admitted that in the F.I.R. there is no mention of this part of the incident. Absence of the name of Jamadar in the F.I.R, as a witness and as a person who had informed about the incident is an omission which amounts to contradiction and this circumstance needs to be kept in mind while appreciating the evidence of Jamadar and the evidence of the informant.

17) Statement of Amar (PW 2) was recorded under section 164 of the Code of Criminal Procedure also which is at Exhibit 66. It is mostly similar to the F.I.R. and so detail discussion of Exhibit 66 is not necessary. He only

added few circumstances by saying that there was light coming from electricity pole having solar energy and in that light he had seen the incident. He added the names of 2 accused like Yusuf Sayyad (accused No.10) and Taher (accused No.11). It appears that in supplementary statement also he had added these two names. This circumstance needs to be kept in mind while appreciating the substantive evidence given by not only Amar (PW 2) but also other witnesses. The F.I.R. and the statement under section 164 of Cr.P.C. of PW 2 gives corroboration to other part of the version of PW 2.

18) Rajendra Jamadar (PW 4) has given evidence on both the incidents. He has deposed that after taking dinner by Kishore with PW 2, Kishore had started with him towards the field but after crossing some distance by them they were intercepted by all the accused. He has given evidence that when he saw that accused No.1 was giving blow of knife to Kishore and others were holding Kishore he ran towards the house of Prabhakar to inform the incident and after informing the incident, he, Prabhakar, Manik, other brother, the lady members, Amar

(PW 2) had rushed to the spot and thereafter he had noticed that accused No.1 gave stab of knife into abdomen of Amar. He has given evidence that other accused gave beating to Prabhakar by fist blows and kicks and Siraj assaulted Manik, father of the informant, by using stick. He has given evidence that when accused No.1 attempted to give another blow to Amar, the blow missed and it landed on accused Rashid Pathan, on the waist of Rashid. Other evidence given by him is similar to the evidence of Amar. It is already observed that name of Rajendra was not given in the F.I.R.. If Rajendra is believed, it will have to be held that there was no opportunity to Amar to witness the incident of assault on the deceased Kishore. The trial court has not believed Rajendra (PW 4) and due to the aforesaid circumstances this Court holds that Rajendra cannot be believed. There is no circumstantial check to the evidence of Rajendra. In ordinary course he would have also intervened in the incident and would have sustained some injury if so many accused were assaulting the deceased and the informant.

19) Manik (PW 5), father of the deceased has given evidence that when Rajendra (PW 4) informed about the incident he started with others to the spot and then he witnessed the incident. He has given evidence that four persons like Mustafa, Rashid, Siraj and Taher (accused Nos.6,7,9 & 11) had held Kishore and accused No.1 Sayyad was assaulting Kishore on his chest by using knife. He has given evidence that Sayyad then stabbed Amar on his chest and the remaining accused started assaulting him with fist blows and kicks. According to him, his brother Prabhakar was also assaulted with fist blows and kicks. He has given other evidence which is similar to the evidence of Amar. No medical evidence is given to show that he had sustained injuries in the incident. It does not look probable that so many accused had assaulted him with fist blows and kicks and when one accused had assaulted him by using stick but no injury was found on his person. The spot panchanama however shows that two pieces of stick were found on the spot. The trial court has rightly not believed this witness due to absence of circumstantial check and this Court sees no reason to interfere in that finding of the trial court. In ordinary

course such finding of the trial court is not disturbed by appellate court as the trial court is in a best position to appreciate the evidence of eye witnesses and take a decision on the probability about their presence and probability of witnessing the incident in question.

20) Prabhakar (PW 6) has given evidence on both the incidents. It is already mentioned that in the first incident he had virtually scolded some of the accused and there is such mention in the F.I.R. also. He has given evidence on this first incident by deposing that in the first incident accused No.1, Sayyad, accused No.4 Vajeer Pathan and accused No.5 Aayaj Pathan were present on the platform, katta, and as they were talking loudly he had scolded them and had asked them to go away.

21) Prabhakar (PW 6) has given evidence that Rajendra, who had left the house with Kishore, returned to home and informed about the incident and then he and others including Amar left for the spot and so they could witness the incident. He has given evidence that accused Mustafa, Rashid, Siraj and Taher (accused Nos.6,7,9 and

11) had held Kishore and Sayyad was assaulting Kishore on his chest by using knife. He has given evidence that when Amar rushed forward to rescue Kishore, Sayyad stabbed knife into the stomach of Amar. He has given evidence that when he and Manik tried to intervene, the other accused assaulted them by kick blows and fists and Siraj had given stick blow to Manik. Though the trial court has believed this witness in respect of the evidence given on both incidents, it can be said that more importance needs to be given to the evidence of PW 2, Amar as he is injured witness. The incident took place in night time and as Amar sustained injury in the same incident and his statement was recorded by police immediately after the incident in the hospital, more weight needs to be given to his evidence. Prabhakar's evidence can be considered in respect of the first incident. If he is believed on his version that after learning from Rajendra he had rushed to the spot, it is difficult to believe that he could witness the entire incident in which accused No.1 had assaulted deceased by using knife. Even if the evidence of Prabhakar on the incident of assault is ignored as there is no circumstantial check, that cannot make much

difference and the case can be properly decided on the basis of evidence given by Amar (PW 2).

22) The other two witnesses like Santosh (PW 7) and Dnyanraj (PW 8) turned hostile. They have denied that they witnessed the incident and so more discussion about their evidence is not necessary.

23) The incident took place in the night time. The map of scene of offence is not there to show the exact distance between the house of the informant and the place of the incident. In the evidence of Sidhappa Mahajan (PW 10), the spot panchanama is proved as Exhibit 91. There is evidence of the investigating officer also on the spot panchanama. The spot panchanama at Exhibit 91 shows that the spot was spread over up to quite long distance. Pieces of two sticks were found at some distance on the road. Then, slipper and pair of chappals were found on western side from the pieces of the stick. There were two poles of electricity, one was of regular electricity and one was of solar energy. Due to rain, there was virtually mud over this space and no blood was found on the spot. The

spot panchanama was prepared on 2-10-2012 between 9.00 a.m. and 10.00 a.m. The defence has not specifically denied that the incident took place at this spot and as PW 2 was injured and the house is situated in the vicinity it is possible to infer that the incident did take place on the spot shown in Exhibit 91. This evidence gives corroboration to the version of PW 2 though not to the evidence of other witnesses. The house of witness Santosh is also situated in the vicinity but he turned hostile.

24) From the evidence it can be said that there were at least 2 persons involved in the incident from the side of the informant like deceased Kishore and the informant. Evidence is given that these two persons were assaulted by using dangerous weapon by accused No.1 and most of the other accused had held Kishore when assault was being made on Kishore by accused No.1. There is no circumstantial check to the evidence given as against other accused except accused No.1 Sayyad and accused No.7 – Rashid. A doctor is examined to prove the injuries which were sustained by accused No.1 and accused No.7 and their injury certificates at Exhibits 77

and 78 are duly proved in the evidence of Dr. Sunil (PW 3). They were immediately arrested after the incident as their names were mentioned in the F.I.R. and the injuries were sustained by them within 24 hours. As already observed they were examined at about 4.00 p.m. on 2-10-2012. This is the circumstantial check in respect of the evidence given as against accused No.7 Rashid and accused No.1 Sayyad. There is more evidence as against accused No.1 Sayyad which is in the form of discovery of weapon on the basis of statement given by Sayyad under section 27 of the Evidence Act. There is evidence of Dnyanraj (PW 8). He turned hostile. But during cross-examination he has admitted that he acted as panch witness when spot panchanama was prepared and he acted as panch witness when accused No.1 gave statement to police that he had concealed the knife at a place in the grass. Memorandum of statement is proved as Exhibit 85. On that there is evidence of the investigating officer (PW 12). Then there is evidence of discovery of the knife which had no handle and which was having blood stains. The seizure panchanama is proved in the evidence of these two witnesses. The knife was found to be concealed in the

grass and from there it was produced by accused No.1. C.A. report in respect of this knife was not produced before trial court though covering letter dated 15-10-2012 at Exhibit 103 shows that it was sent to C.A. office. Considering the description of the weapon given by the eye witnesses and as there is evidence of the medical officer about the possibility of causing such injuries by the weapon (article No.4) this Court sees no reason to disbelieve that part of the evidence also.

25) There was no previous enmity between the parties and they belong to different communities. The incident took place in the night time and due to petty incident which had taken place about one and half years before the incident in question. As already observed, there is no map of scene of offence and so it is not possible to have convincing evidence on the location of the houses or the business places of the accused. In the cross examination of some witnesses it is brought on record that the houses of the accused are situated at some distance from the spot of offence. In the statements given under section 313 of the Cr.P.C. all the accused (Nos.2 to 11)

have stated that they are relatives of accused No.1 and that is why they are falsely implicated in the matter. The possibility that when the incident was taking place most of the accused were there and they were there only to watch the incident is there cannot be ruled out. It cannot be inferred that they had formed unlawful assembly for teaching lesson to the family of the deceased and they were there to take side of accused No.1. When in the F.I.R. no separate role was attributed to accused Nos.6,7,9 and 11 due to specific evidence of PW 2 and PW 6, the trial court has held that these accused were holding the deceased and due to that accused No.1 could inflict blows of knife on the person of the deceased. Absence of such specific mention as against accused Nos.6,7,9 and 11 in the F.I.R. needs to be given due importance. In the F.I.R. it was mentioned that accused Nos.2 to 9 had held the deceased when accused No.1 was assaulting the deceased. Accused Nos.2 to 5, 8 and 10 are acquitted even when similar allegation was made against them in the F.I.R. and substantive evidence is given against them that they took part in the incident and they assaulted the deceased and also other eye witnesses. It can be said that

the trial court has disbelieved that part of the version given as against accused Nos.2 to 5 and 8 and 10. As there is no circumstantial check in respect of accused Nos.6,9 and 11 also this Court holds that benefit of doubt ought to have been given by the trial court to these accused also. As there is some circumstantial check to the direct evidence given as against accused No.1 and accused No.7, like injuries found on their person, this Court holds that falsehood needs to be separated and on the basis of circumstantial check only accused Nos.1 and 7 need to be convicted. The number of blows of knife given to the deceased and the first informant also needs to be kept in mind at the time of drawing inference as against other accused. The deceased was aged about 20 years and accused No.1 was aged about 37 years at the relevant time. Accused No.7 was aged about 48 years and the first informant was aged about 21 years. Due to all these circumstances, this Court holds that only accused Nos.1 and 7 can be convicted for the offence of murder punishable under section 302 read with 34 of the Indian Penal Code.

26) The learned counsels for the appellants placed reliance on some observations made by this Court at Principal Seat in the case reported as **Parshuram v. State of Maharashtra (2017 (3) Crimes 506)**. In that case one stab injury was inflicted by the accused and in view of the facts of that case conviction was given under section 304 Part II of the Indian Penal Code and the sentence given by the trial court for offence punishable under section 302 of the Indian Penal Code was set aside. Facts of this case were totally different. Relevant facts of the present case including number of injuries inflicted by accused No.1 are already mentioned and as accused Nos.1 and 7 were involved in the incident this Court holds that they are guilty of offence of murder and they had inflicted the injuries with intention to murder Kishore or with the intention to inflict such injury which would prove to be sufficient in ordinary course of nature to cause the death. Same can be said in respect of injury inflicted to PW 2 Amar considering the site of the injury. The incident must have stopped only when others had rushed to the spot and so accused Nos.1 and 7 need to be held guilty for offence of attempt of murder of PW 2. In the case of **Abdul Sayeed**

**v. State of Madhya Pradesh** decided with other matters reported as **(2010) 10 SCC 259** the Apex Court has held that there is no bar in law for conviction of accused with aid of section 34 in place of section 149 if there is evidence on record to show that such accused shared a common intention to commit the crime and no apparent injustice or prejudice is shown to have been caused by application of section 34 in place of section 149. The observations are at paragraphs 48 to 58 and they are as under.

**"Section 34 IPC**

**48.** The aforesaid conclusion takes us to the issue raised by the appellants as to whether the appellants could be convicted with the aid of Section 34 IPC.

**49.** Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit the offence. The phrase "common intention" implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the "same intention" or "similar intention" or "common object". The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (*See Mohan Singh & Anr. v. State of Punjab, AIR 1963 SC 174*).

**50.** The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this Section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention. (vide : *Krishnan & Anr. v. State of Kerala*, (1996) 10 SCC 508; and *Harbans Kaur & Anr. v. State of Haryana*, (2005) 9 SCC 195).

**51.** Undoubtedly, the ingredients of Section 34, i.e., that the accused had acted in furtherance of their common intention is required to be proved specifically or by inference, in the facts and circumstances of the case. (Vide: *Hamlet v. State of Kerala*, (2003) 10 SCC 108; *Pichai v. State of T.N.*, (2005) 10 SCC 505; and *Bishna v. State of W.B.* (2005) 12 SCC 657).

**52.** In *Gopi Nath @ Jhallar v. State of U.P.*, (2001) 6 SCC 620, this court observed as under:

“8.....Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action — be it that it was not overt or was only a covert act or merely an omission constituting an illegal omission. The section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a preconcerted or pre-arranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case.”

**53.** In *Krishnan v. State*, (2003) 7 SCC 56, this court observed that applicability of Section 34 is dependent on the facts and circumstances of each case. No hard and fast rule can be made out regarding applicability or non-applicability of Section 34.

**54.** In *Girija Shankar v. State of U.P.*, (2004) 3 SCC 793, it is observed that Section 34 has been enacted to elucidate the principle of joint liability of a criminal act:

“Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. *Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances.*”  
[Emphasis added]

**55.** In *Virendra Singh v. State of M.P.* JT 2010 (8) SC 319, this Court observed that:

“Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a prearranged and pre-meditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the pre-meditation and though the plan may be formed suddenly. In order that section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a

specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34."

**56.** Section 34 can be invoked even in those cases where some of the coaccused may be acquitted provided, it can be proved either by direct evidence or inference that the accused and the others have committed an offence in pursuance of the common intention of the group. (vide: *Prabhu Babaji Navle v. State of Bombay*, AIR 1956 SC 51).

**57.** Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who act in furtherance of the common intention of all the members of the party or it is not possible to prove exactly what part was played by each of them. In the absence of common intention, the criminal liability of a member of the group might differ according to the mode of the individual's participation in the act. Common intention means that each member of the group is aware of the act to be committed.

**58.** In view of the aforesaid discussion, we are of the considered opinion that the High Court has rightly proceeded in the matter while setting aside the conviction of the appellants under Sections 147/148 IPC and convicting them with the aid of Section 34 IPC."

27) So, this Court holds that though in the present matter there was no charge for offence punishable under section 302 read with section 34 and under section 307

read with section 34, the accused Nos.1 and 7 can be convicted for such offences. In the result, following order:-

28) Criminal Appeal No.720 of 2018 of Rashid Amin Pathan (accused No.7) is partly allowed. Criminal Appeal No.379 of 2015 of Sayyad Miyalal Pathan (Accused No.1) is partly allowed. Criminal Appeal No.360 of 2015 of Taher Maheboob Shiakh (accused No.11) is allowed. Criminal Appeal No.390 of 2015 of Mustafa Babu Mogare and Siraj Mattu Pathan (accused Nos.6 and 9) is allowed. The judgment and order of conviction given to accused Nos.6,9 and 11 for the offences punishable under sections 302 and 307 read with 149 of Indian Penal Code and offences punishable under sections 143,147 and 148 of the Indian Penal Code is hereby quashed and set aside. They stand acquitted of all these offences. Accused No.1 (Sayyad Miyalal Pathan) and accused No.7 (Rashid Amin Pathan) are convicted for the offence punishable under Section 302 read with 34 of the Indian Penal Code for murder of Kishore and they stand convicted for the offence punishable under section 307 read with 34 of the Indian Penal Code for attempt on the life of informant

(Amar). The sentence given to them for these two offences by the trial court is, however, confirmed. They stand acquitted of the offences punishable under sections 143, 147 and 148 of the Indian Penal Code. Accused Nos.6, 9 and 11 be released forthwith from jail if they are not required in any other case. Before their release, bond of Rs.15,000/- (Rupees Fifteen Thousand Only) from each of them is to be obtained as provided under section 437-A of the Criminal Procedure Code. Criminal Application No. 2412/2019 in Criminal Appeal No.360/2015 is disposed of.

Sd/-  
**(K.K. SONAWANE, J.)**

Sd/-  
**(T.V. NALAWADE, J.)**

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