

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO.551 OF 2017

WITH

CRIMINAL APPEAL NO.363 OF 2018

1) CRIMINAL APPEAL NO.551 OF 2017 :

1. Manoj Puran Bagde,
Aged about 31 years, Occ. Agrilst.,

2. Puran Sakharam Bagde,
Aged about 52 years, Occ. Agrilst.,

Both r/o. Kutasa, Tq. Akot,
Distt. Akola.

..... **APPELLANTS**

// VERSUS //

The State of Maharashtra,
Through its Police Station Officer,
Police Station, Dahihanda, Tq.
Akot, District Akola.

..... **RESPONDENT**

Mr.Amit Kukday, Advocate for the Appellant.
Mrs.K.S.Joshi, A.P.P. for the Respondent/State.

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1) CRIMINAL APPEAL NO.363 OF 2018 :

The State of Maharashtra,
Through Police Station Officer,
Police Station, Dahihanda,
Tq.Akot, District Akola.

..... APPELLANT

// VERSUS //

1.Sanjay Puran Bagde,
Aged about 25 years, Occ. Agrilst.,

2.Rajratna @ Nandu Puran Bagde,
Aged about 23 years, Occ.Agrilst.,

Both r/o. Kutasa, Tq.Akot,
Distt. Akola.

..... RESPONDENTS

Mrs.K.S.Joshi, A.P.P. for the Appellant/State.
Mr.Amit Kukday, Advocate for the Respondents.

Date of reserving the Judgment	: 9.1.2019.
Date of pronouncement of the Judgment	: 5.2.2019.

CORAM : P.N.DESHMUKH
AND
ROHIT B. DEO, JJ.

JUDGMENT (Per P.N.Deshmukh, J) :

1. Criminal Appeal No.551 of 2017 is preferred by Original accused no.1 Manoj Puran Bagde and Original accused no.2 Puran Sakharam Bagde challenging their conviction for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code for which they are sentenced to suffer life imprisonment and to pay a fine of Rs.25,000/- each and in default of payment of fine, to suffer rigorous imprisonment for two years each.

2. Criminal Appeal No.363 of 2018 is preferred by State of Maharashtra against acquittal of Original accused no.3 Sanjay Puran Bagde and Original accused no.4 Rajratna @ Nandu Puran Bagade of the offence punishable under Section 302 r/w. 34 of the Indian Penal Code. For the sake of convenience, accused are referred as shown in

Charge (Exh.12). The Judgment impugned in both these appeals is passed in Sessions Case No.11 of 2016 by the learned Additional Sessions Judge, Akot, District Akola, dated 14th September, 2017.

3. Case of prosecution, in brief, is stated as under :

PW-6 Anita Gawande, the Complainant/wife of deceased Vilas Gawande was residing with her husband and two children in front of house of accused no.1 Manoj Bagde, who was also residing with his wife. About one year prior to the incident, due to construction of cement road in front of their houses, drainage water was flowing, due to which there was some dispute between these two families. About six months prior to the incident, there was quarrel between deceased and accused no.1 Manoj as the later found deceased playing songs on his mobile phone after seeing his wife, for which said accused had objected him and said that he should not have ill-intention for his wife and had assaulted the deceased. However, as they were neighbours, no report in respect of this incident was lodged. In the background of above case of prosecution of strained relations between the accused and deceased, it is its case that, on 3.11.2015 since the deceased was required to

attend work of plucking lady finger crop with his wife, woke up in the early hours of night intervening 2.11.2015 and 3.11.2015, at about 3.30 a.m. and went to attend nature's call, while his wife/Complainant Anita was in the kitchen. After sometime, she heard cries of her husband in a loud voice that some one was beating him and thus, immediately came out of house in the courtyard and found four assailants assaulting her husband. On seeing such assault, PW-Anita went nearby the spot and found accused no.1 Manoj and accused no.2 Puran (appellants in Criminal Appeal No.551 of 2017) assaulting deceased by axe; while accused no.3 Sanjay and accused no.4 Rajratna @ Nandu (respondents in connected Criminal Appeal No.363 of 2018) had caught hold of her husband. Due to Anita's raising shouts, all of them ran away.

4. It is further case of prosecution that the deceased sustained bleeding injuries and on Complainant going near him, was informed by deceased that he was assaulted by four of them by axe. PW-Anita thereafter, woke up neighbours and informed about the assault by accused. In the meantime, other villagers gathered on the spot, who carried deceased in injured condition to his house, who was thereafter taken in the auto-rickshaw of one Pravin Gawande for

some distance and from Palsod Phata, was taken in Ambulance to Government hospital at Akola, where he was declared dead on admission.

5. On the basis of report (Exh.76), dt.3.11.2015 lodged with Police Station, Dahihanda by PW-6 Anita, wife of deceased, PW-8 Bhaurao Ghuge, A.P.I. lodged offence vide Crime No.79 of 2015 and issued requisition memo (Exh.38) to the Authorities of Shivaji Junior College, Kutasa for providing two panch witnesses. Further investigation was carried out by PW-10 Satish Rajanna Donkalwar, P.S.I. who, on arrival of panch witnesses, drew Spot Panchanama, as pointed out by Complainant (Exh.33) and at the same time, seized articles from the spot vide Seizure Panchanamas (Exh.34 and 35). The accused came to be arrested on the same day as per Arrest Panchanamas (Exh. Nos. 59 to 62). Clothes on the person of deceased came to be seized under Seizure Panchanamas (Exh. Nos. 68, 69 and 70) as produced by Police Naik Dilip Ingle, B.No.1059.

6. During the course of interrogation of accused no.2 Puran Sakharam Bagde on 5.11.2015, his Memorandum Statement

(Exh.41) came to be recorded in presence of panch witnesses and in pursuance to same, he led Investigating Officer and panchas to Bordi nala situated on Kutasa to Dahihanda road in police vehicle and after alighting from the same, went in the nearby field having cotton crop and discovered axe from the boundary of field having blood stains, which is seized under Seizure Panchanama (Exh.42) marked as Article 'E'. At the same time, accused had produced clothes being pant, shirt from below the bushes in the field which came to be seized under Seizure Panchanama (Exh.43) marked as Articles 'F' and 'G'.

7. On 6.11.2015, Memorandum Statement of accused no.1 Manoj Bagde is recorded as per Exh.45 and in pursuance to it, said accused led Investigating Officer and panchas on Akot-Akola road towards village Kutasa and from the field situated near Bordi nala, discovered one axe having blood stains, which is seized under Discovery Panchanama (Exh.46). At the same time, accused produced clothes from the bushes in the field, which are seized under Seizure Panchanama (Exh.47), which are marked as Articles 'I' and 'J'.

8. On receipt of Post Mortem Report (Exh.87), by requisition memo (Exh.90), query was made to Medical Officer with reference to clothes of deceased, which was replied by Query Report (Exh.91). Seized articles were forwarded to C.A. and on recording statements of witnesses, charge sheet is filed against the accused in the Court of learned Judicial Magistrate, First Class, Court No.2, Akot. In the due course of time, case is committed for trial to the Court of learned Sessions Judge, Akot.

9. Charge is framed against the accused vide Exh.12 for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code, to which they pleaded not guilty and claimed to be tried. Defence of accused is of total denial and false implication.

10. We have heard Mr.Amit Kukday, Counsel for appellants in Criminal Appeal No.551 of 2017, who has also represented Original accused nos. 3 and 4 in Criminal Appeal No.363 of 2018 and Mrs.K.S.Joshi, learned Additional Public Prosecutor for State in both the appeals. With the assistance of learned Counsel, we have also scrutinized the oral and documentary evidence on record.

11. Mr.Amit Kukday, learned Counsel, while advancing submissions in both the appeals for the accused has, by referring to the evidence of eye witnesses, had contended that if, according to evidence of these witnesses, involvement of all the accused is established and if, on the same set of evidence, Original accused nos. 3 Sanjay and Original accused no.4 Rajratna @ Nandu are acquitted then Original accused no.1 Manoj and Original accused no.2 Puran also deserve to be acquitted as there are no reasons in the impugned Judgment establishing their conviction.

12. As regards appeal preferred by State against acquittal of Original accused nos. 3 Sanjay and Original accused no.4 Rajratna @ Nandu, it is submitted that same needs to be dismissed as trial Court has rightly found that said accused cannot be attributed with common intention of killing deceased and as such, are rightly acquitted of charges of murder and in support of above proposition, has relied upon the case of **Kailas Namdeo Patil and Others vs. State of Maharashtra** reported in 2017 ALLMR (Cri) 462.

13. Mrs.K.S.Joshi, learned Additional Public Prosecutor, per contra, contended that Original accused no.1 Manoj and Original

accused no.2 Puran are rightly convicted as there is ample evidence against these accused persons establishing their involvement in the present crime as assailants of deceased Vilas and has, thus, contended that the appeal filed by them is liable to be dismissed. Learned Additional Public Prosecutor, while submitting in appeal by the State against acquittal of Original accused no.3 Sanjay and Original accused no.4 Nandu prayed that said appeal be allowed inasmuch as role attributed to all the four accused are similar and from the evidence of eye witnesses, it has not come on record that said Original accused no.3 and Original accused no.4 had not participated in any manner in commission of crime. In fact, from their evidence, it is, pointed out that both the acquitted accused had played major role in commission of murderous assault on deceased by Original accused no.1 Manoj and Original accused no.2 Puran respectively. It is, therefore, prayed that State's appeal be allowed and on advancing submissions as above, has relied on following cases :

- 1) **Rajkishore Purohit .vs. State of Madhya Pradesh and Others** reported in (2017) 9 SCC 483.

- 2) **Vijendra Singh .vs. State of Uttar Pradesh** reported in (2017)11 SCC 129.
- 3) **Jaswant Singh .vs. State of Haryana** reported in (2000) 4 SCC 484.

14. With the assistance of learned Counsel for the parties, we have scrutinized the evidence on record. From the evidence of PW-6 Anita, the Complainant and Wife of deceased, who has proved her report (Exh.76), it has come on record that, about one year prior to the incident, relations between her deceased husband Vilas and accused no.1 Manoj were strained on the count of drainage water and also for the reason that deceased, about six months prior to incident, is alleged to have played songs on his mobile phone having ill-intention on the wife of said accused. In the background of her evidence as such, PW-Anita has further stated that, as on 3.11.2015 deceased and herself were required to go to field early, since they were required to pluck lady finger crop and thus, had got up early in the night intervening 2.11.2015 and 3.11.2015, at about 3.00 a.m. to 3.50 a.m. and was preparing food, while her husband had gone out to attend nature's call. She further stated that as he did not return for sufficient period, she went to the courtyard and heard shouts of her husband saying "*are baap re, marun rahile*" and

therefore, went running on the road to see accused no.1 Manoj, accused no.2 Puran, accused no.3 Sanjay and accused no.4 Nandu present there and on seeing them, she raised shouts and proceeded ahead and saw that accused no.1 Manoj was assaulting her husband by axe on his head and shoulder; accused no.2 Puran was assaulting by axe on his leg, while accused no.3 Sanjay and accused no.4 Nandu had caught hold of deceased. On seeing PW-Anita, the assailants ran away.

15. Her evidence further reveals that, while her husband was lying in injured condition, he made oral statement to her involving all the accused to have assaulted him. As it was impossible for her to lift her husband alone to her house, she called neighbours including PW-3 Nirmala Sarkate and also informed her of the incident involving accused and had accordingly brought her husband in the house.

According to PW-Anita, she thereafter went to PW-4 Pravin Gawande to arrange for his auto-rickshaw. While she was going raising shouts, other residents of the area woke up and helped her to shift deceased in the auto-rickshaw. She has further stated

that, while deceased was being taken to the hospital in auto-rickshaw, PW-5 Pratap inquired from Vilas as to how incident took place, upon which he named all the accused to have committed assault on him by axe. It has further come in her evidence that, after reaching till Palsod phata, injured was shifted in an Ambulance and was reached to Government hospital at Akola, where he was declared dead on admission and therefore, she had lodged her oral report (Exh.76), upon which offence came to be registered.

16. Thus, from the evidence of this eye witness, it has come on record that, in the early hours in the night intervening 2.11.2015 and 3.11.2015 since deceased did not come back for sometime after answering nature's call, she came in the Courtyard and had heard shouts of her husband and therefore, went running towards the spot and had witnessed assault on her husband involving all four accused, out of which accused nos. 1 and 2 were assaulting by axe on head, shoulder and leg respectively while accused nos. 3 and 4 had caught hold the deceased. Further it has come in the evidence of PW-6 Anita that, on her reaching near her husband, he disclosed her names of all the four accused as aforesaid as his assailants and has further stated of her disclosing names of accused to be informed

by her to PW-3 Nirmala by visiting her house, who arrived on the spot in response to shouts raised by her and has further deposed of deceased disclosing names of accused persons to PW-5 Pratap, who was accompanying him in auto-rickshaw.

17. Perusal of report (Exh.76) would reveal that same is lodged on the same day and materially corroborates entire evidence of Complainant Anita. Though it is contended on behalf of accused that there is delay in lodging F.I.R., we do not find any substance in submissions advanced for the reason that, from the evidence of PW-Anita, it is amply clear that she was required to attend her husband, who was taken to hospital, where he was admitted in dead condition and as such, after intimation was given by hospital Authorities to police, further procedure took place and as such, PW-Anita could lodge report only after returning back to her native place by attending Police Station, Dahihanda, which Police Station, according to evidence of PW-10 Satish Donkalwar, P.S.I., the Investigating Officer, is situated at a distance of seven kilometres, from village Kutasa where Complainant resides. In fact, from the evidence of PW-10 Satish Donkalwar, P.S.I., it has come on record that, after knowing of incident, he visited Government hospital, Akola and on

registering Marg, drew Inquest Panchanama till 9.35 and from the evidence PW-8 Bhaurao Ghuge, A.P.I. it is the case of prosecution that he has recorded report (Exh.76) of PW-Anita and registered offence. Thus, there is ample evidence which goes to establish that there is no unreasonable delay caused in lodging report. On the contrary, it is found that PW-Anita had lodged the same immediately after she came back home as the printed F.I.R. establishes that report is lodged at 11.40 a.m. on 3.11.2015. In the circumstances, we find no substance in the submission about delay in lodging report.

18. In fact, in the cross-examination of PW-Anita, it has come on record that relations between accused and deceased were strained and they were not on visiting terms. Though Anita admits to have not stated to police of her shouting when she went to the spot, same cannot said to be material omission as it does not go to the root of the case. From her cross-examination, in fact, we find that irrelevant questions were put to her for instance that she had not stated in her complaint that as her husband did not report early, she came out in the Courtyard or that when her husband was lying on the spot, has not named assailants to her or of her not informing

about incident to PW-3 Nirmala. However, from her evidence, it is noted that learned Additional Public Prosecutor has pointed out that all such facts are mentioned in her report. We, therefore, find that the trial Court had allowed irrelevant questions and had mechanically recorded the evidence blindly. From evidence of Anita, we, therefore, find that nothing could be elicited in her cross-examination to doubt her evidence or to dislodge her evidence as an eye witness to the incident, except for her evidence of PW-5 Pratap inquiring with deceased in the auto-rickshaw about incident, to whom deceased is stated to have informed that he was assaulted by accused with axe. Since said evidence is by way of omission, but, in-spite of it, there is ample other evidence as discussed aforesaid establishing involvement of all the accused in the present crime.

19. In the background of evidence of PW-6 Anita, we have scrutinized evidence of PW-3 Nirmala to whom Anita claims to have immediately informed of the incident disclosing names of all the accused. On perusal of evidence of PW-3 Nirmala, her evidence corroborates with the evidence of Anita when she has stated that, in the early hours of night intervening 2.11.2015 and 3.11.2015, Anita visited her house in frightened condition and had informed that her

husband was assaulted by accused by axe. She has disclosed names of all four accused as his assailants, and requested to help her to lift her injured husband from the spot to her house. Accordingly, she had accompanied Anita to the spot, where she found her husband lying in injured condition having sustained bleeding injuries to his head and was referred to hospital with the assistance of other neighbours in auto-rickshaw. PW-Nirmala has specifically denied that Anita had never come to her house nor she had accompanied her to the spot nor saw deceased Vilas lying in injured condition on the spot. In her cross-examination, nothing material has come on record to doubt her evidence. In fact, her evidence corroborates evidence of Anita of her getting knowledge of incident from Anita, to whom Anita appears to have disclosed of the incident immediately after it took place disclosing names of all four accused as assailants, to whom she even otherwise had personally seen, assaulting her husband. Moreover, we do not find any reason for PW-Nirmala to falsely depose against the accused persons. In fact, it has come in the evidence of PW-Nirmala that, when Anita had come to her house in the early hours, she had just returned back home after attending nature's call. In view of her evidence as aforesaid, which has gone unchallenged, there is reason to believe that immediately on Anita's

visiting her house, on her knocking the door, it was opened by PW-Nirmala, who found Anita to be afraid and had disclosed her about assault, as such there is nothing to disbelieve PW-Nirmala, to whom PW-Anita, in fact, is found to have immediately made disclosure of assault.

20. Evidence of PW-4 Pravin when perused, would reveal that, in the early hours of night intervening 2.11.2015 and 3.11.2015, PW-Anita knocked doors of his house, when he was informed by Anita of assault on her husband, by accused and he, therefore, visited her house and found her husband to have sustained bleeding injuries. Rest of his evidence is with regards to PW-5 Pratap on the way inquiring to deceased about the incident and the deceased involving all the accused narrating him about the assault. However, said evidence is not convincing, to be relied upon being material omission, which is also in the evidence of PW-Anita. In that view of the matter, evidence of PW-4 Pravin is required to be kept out of consideration on the issue of both dying declarations. However, rest of his evidence corroborates with Complainant Anita, and PW-Nirmala of Anita immediately disclosing incident to him naming accused persons as assailants of deceased.

21. In the background of above discussed evidence, we do not find it necessary to refer to evidence of PW-5 Pratap, who is relied by prosecution on alleged oral dying declaration to him by deceased while proceeding to hospital in auto-rickshaw, as this piece of evidence has come by way of material improvement in the evidence of above discussed witnesses. However, even, in the absence of evidence of PW-5 Pratap, we do not find any reason to not to disbelieve evidence of above witnesses from whose evidence, involvement of all the accused persons is clearly established beyond, reasonable doubt.

22. Evidence of PW-2 Mangesh Meshram further corroborates above evidence when he has stated that, in his presence, PW-10 Satish Donkalwar, P.S.I. on 5.11.2015 recorded Memorandum Statement (Exh.41) of accused no.2 Puran and in pursuance to same, effected seizure of one blood stained axe at his instance as produced by him from the boundary of field which was concealed in cotton plant stems and is seized under Seizure Panchanama (Exh.42).

23. Similarly, further evidence of PW-2 Mangesh establishes that, on 6.11.2015, Memorandum Statement (Exh.45) of accused no.1 Manoj is recorded by Investigating Officer and in pursuance of which Memorandum Statement, one blood stained axe came to be seized at the instance of accused no.1 Manoj as produced by him which was concealed under the heap of babul tree thorns in a field and which came to be seized under Panchanama (Exh.46).

24. Evidence of PW-2 Mangesh further establishes seizure of clothes of accused no.2 Puran from the same field which came to be seized under Seizure Panchanama (Exh.43) and of accused no.1 Manoj under Seizure Panchanama (Exh.47), which evidence is further corroborated by Investigating Officer. From the evidence of PW-1 Satish Chatar as well as of Investigating Officer PW-10 Satish Donkalwar, P.S.I., seizure of clothes of accused no.3 Sanjay and accused no.4 Nandu is proved. He has proved seizure of clothes i.e. pant and shirt of accused no.3 Sanjay and accused no.4 Nandu under Seizure Panchanama (Exh.36 and 37). PW-1 Satish apart from proving above Seizure Panchanama, has proved Spot Panchanama (Exh.33) and Seizure Panchanamas (Exh.34 and 35 respectively) of articles found from the spot.

25. Evidence of PW-10 Investigating Officer Satish Donkalwar, P.S.I. fully corroborates evidence of PW-1 Satish and PW-2 Mangesh on his recording Memorandum Statements of accused no.2 and accused no.1 respectively on 5.11.2015 and 6.11.2015 and recovery of one axe each at the instance of said two accused persons and on his drawing Spot Panchanamas as well as Seizure Panchanamas of clothes of accused no.3 Sanjay and accused no.4 Nandu as deposed by PW-1 Satish. Nothing is brought on record to doubt said part of investigation carried out by PW-10 Satish Donkalwar, P.S.I.

From the evidence of Investigating Officer, it has also come on record that, during the course of investigation, by requisition letter (Exh.88), he had forwarded both axes seized from accused nos. 1 and 2 to C.A. and had made a query if injuries mentioned in Col. No.17 of P.M. report sustained by deceased are possible by said weapons. According to the opinion on record (Exh.89), the queries put to C.A. are replied in the affirmative, which are also stated to be sufficient to cause death in ordinary course of nature.

26. In the background of above evidence, from the evidence of PW-9 Dr. Balwan Bolsure, it has come on record that, on 3.11.2015, he had performed autopsy on the body of deceased Vilas and noted the following external injuries :

- 1) Chop wound present over just below right ala of nose, horizontal place of size 4 x 2 x bone deep.
- 2) Chop wound present over parietal region over midline vertically placed of size 7 cm x 2 cm x bone deep.
- 3) Chop wound present over lateral aspect of right shoulder of size 4 cm x 2 cm x muscle deep.
- 4) Abrasion present over sternum upper 1/3rd of size 1.5 cm x 1.5 cm, margins are reddish and irregular.
- 5) Chop wound present over medial aspect of lower end of left thigh of size 4 cm X 2 cm x muscle deep and horizontal place.
- 6) Chop wound present over upper medial aspect of popliteal fossa (lower rear portion behind knee) admeasuring 3 x 2 x 2 cm. muscle deep.

On internal examination, following injuries were noted :

- 1) Under scalp contusion present over right parieto-occipital region reddish.

- 2) Evidence of displaced depressed communitied fracture present over right parietal region. Fracture margins irregular and blood infiltrated.
- 3) Evidence of subarachnoid haemorrhage present over left cerebral hemisphere with cerebellum, forming thick layer, reddish, rest of the brain matter intact and oedematous and pale. ”

27. According to Doctor's evidence, deceased had sustained chopped wounds having irregular margins and were ante mortem. According to Expert's evidence, cause of death was head injury sustained by deceased and has further deposed on the opinion given by him and C.A. with regards to query made by Investigating Officer about possibility of injuries sustained by deceased by axe involved in the present crime. Medical Officer has further deposed of further query made to him vide requisition memo (Exh.90) by which clothes of deceased consisting of his T-shirt and brown coloured pant, which was torn at places, were forwarded to obtain its opinion and as per the report, pant was found torn at the places corresponding to Injury Nos. 5 and 6 as mentioned in Column No.17 of Post Mortem report over left side of pant medial aspect and right side of back of pant respectively and T-shirt is certified to have torn corresponding to injury no.3 in column no.17 at the upper shoulder line, which is

another strong circumstance, establishing assault by axe on the legs, shoulder, head of deceased.

28. According to Viscera report (Exh.6) on record, no poison was found detected in the body of deceased, who admittedly died of homicidal death. C.A. report (Exh.20) establishes further involvement of accused as clothes of accused no.1 Manoj as well as axe seized at his instance are stained with blood group 'B'. Similarly, clothes of accused no.2 Puran and axe seized at his instance are also stained with blood group 'B', while clothes of accused no.3 and 4 are stained with human blood.

As per Exh.21, blood group of deceased could not be determined as the result of it is inconclusive. While as per Exh.22, 23 and 24, blood groups of accused no.1 Manoj, accused no.2 Puran and accused no.3 is 'O', while as per Exh.25, blood group of accused no.4 is 'B'. No explanation is putforth by accused of blood stains having found on their clothes as aforesaid which is also a strong circumstance establishing involvement of accused in the present crime. In that view of the matter, we find it useful to refer to the case

of Guru Singh vs. State of Rajasthan reported in (2001) 2 SCC 205, wherein it has been observed as under :

“In view of the authoritative pronouncement of this Court in Teja Ram Case (1999) 2 SCC 507) we do not find any substance in the submissions of the learned Counsel for the appellant that in the absence of the report regarding the origin of the blood, the trial Court could not have convicted the accused. The Serologist & Chemical Examiner has found that the chadar seized in consequence of the disclosure statement made by the appellant was stained with human blood. As with lapse of time the classification of the blood could not be determined, no bonus is conferred upon the accused to claim any benefit on the strength of such a belated and stale argument. The trial Court as well as the High Court were, therefore, justified in holding the circumstance as proved beyond reasonable doubt against the appellant.”

29. In the background of above discussed evidence and the facts in appeals, we are required to consider principle of joint liability in doing criminal act as embodied in Section 34 of Indian Penal Code. The essence of said liability is existence of common intention. Participation in commission of the offence in furtherance of the common intention which is necessarily to be looked into keeping in

mind the principles of joint liability. As has been embodied in the above provision, it is necessary to state that existence or non-existence of common intention amongst the accused requires to be considered from their conduct, behaviour and also with regards to events, if any, which have occurred prior to, during and after the incident as same are relevant to hold if there existed common intention between accused persons. By now it is settled principle of law that absence of any overt act of assault, exhortation or possession of weapons cannot be singularly determinative of absence of common intention. In the above discussed evidence, it has come on record that on two counts relations between accused and deceased were strained since one year prior to incident since, while common intention of all the accused is established, from the very fact of all four accused nos. 1 to 4 having been present on the spot, duly armed with dangerous weapons viz. Axe in the early hours in the night intervening 2.11.2015 and 3.11.2015.

30. No explanation is putforth by accused as to for what purpose they were together, on the spot, armed with deadly weapon. As we have already stated earlier, there is ample evidence against Original accused no.1 Manoj and Original accused no.2 establishing

their involvement in commission of assault on deceased, which is found from the evidence of PW-Anita, the Complainant and PW-3 Nirmala, which evidence is further found substantiated from the evidence of PW-2 Mangesh and no.1 Satish, who are examined to prove Memorandum Statement and recovery of weapons at the instance of accused and recovery of their clothes, which evidence is further corroborated from the C.A. reports as stated above and having considering available evidence, prosecution is held to have proved its case against all the accused beyond reasonable doubt.

28. In the facts and circumstances of the case, the law laid down in the case of **Rajkishore Purohit** (cited supra) can be usefully applied, wherein, in para nos. 9 and 10 thereof, it is observed thus :

“9.Common intention is a state of mind. It is not possible to read a person’s mind. There can hardly be direct evidence of common intention. The existence or non-existence of a common intention amongst the accused has to be deciphered cumulatively from their conduct and behavior in the facts and circumstances of each case. Events prior to the occurrence as also after, and during the occurrence, are all relevant to deduce if there existed any common intention. There can be no straightjacket formula. The absence of any

overt act of assault, exhortation or possession of weapon cannot be singularly determinative of absence of common intention.

10. Though judicial precedents with regard to common intention stand well entrenched, it will be sufficient to refer to [State of Rajasthan vs. Shobha Ram](#), (2013) 14 SCC 732, observing as follows:-

“10. Insofar as common intention is concerned, it is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances. As observed in [Hari Ram v. State of U.P.](#) 6 (SCC p. 622, para 21), the existence of 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. Therefore, in order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence before a person can be vicariously convicted for the act of the other.”

As such, in order to bring home the charge of common intention, prosecution has to establish by evidence : either direct or circumstantial that there was plan or meeting of mind amongst all

the accused persons to commit offence and this requirement is found clearly established by prosecution from the evidence of eye witnesses and from evidence of PW-3 Nirmala who, in clear terms, has involved all four accused persons who were present on the spot armed with axe, particularly in early hours in the night intervening between 2.11.2015 and 3.11.2015. Assembling of all the four accused persons together at such odd hours in the night by itself establishes their intention to come together to commit assault on deceased; as otherwise, there was no reason for all of them to come together at such odd hours. The intention of all the accused as aforesaid is further materialised as, admittedly, prior to incident, relations between accused as well as of deceased were strained as already aforesaid.

29. Similarly, in the case of Virendra Singh (supra), Hon'ble Apex Court has considered applicability and scope of Section 34 of the Indian Penal Code and has summarised principles as to how common intention is to be inferred and by referring to certain Authorities as to how the concept of common intention is considered therein and how it is made applicable, in para 28 of its Judgment, has observed thus :

“28. The aforesaid authorities make it absolutely clear that each case has to rest on its own facts. Whether the crime is committed in furtherance of common intention or not, will depend upon the material brought on record and the appreciation thereof in proper perspective. Facts of two cases cannot be regarded as similar. Common intention can be gathered from the circumstances that are brought on record by the prosecution. Common intention can be conceived immediately or at the time of offence. Thus, the applicability of Section 34 IPC is a question of fact and is to be ascertained from the evidence brought on record. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the fact of the case and circumstances of the situation. Whether in a proved situation all the individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts. (Kirpal and Bhopal v. State of U.P., AIR 1954 SC 706). [In Bharwad Mepa Dana and Anr. v. The State of Bombay](#), AIR 1960 SC 289], it has been held that Section 34 IPC is intended to meet a case in which it may be difficult to distinguish the acts of individual members of a party who act in furtherance of the common

intention of all or to prove exactly what part was taken by each of them. The principle which the Section embodies is participation in some action with the common intention of committing a crime; once such participation is established, Section 34 is at once attracted.”

30. In view of evidence of PW-Anita, an eye witness, who in clear terms has deposed that accused nos. 3 and 4 had caught hold of deceased while accused nos. 1 and 2 assaulted him by axe, clearly establishes participation of acquitted accused nos. 3 and 4. In fact, act of said accused holding deceased at the time of assault, facilitated accused nos. 1 and 2 to assault deceased by axe. In that view of the matter, the law relied for Original accused nos. 3 and 4 in the case of Kailas Namdeo Patil (supra) as such cannot be used in their favour, as, from the evidence, it has come on record that, at the time of assault by accused nos. 1 and 2, accused nos. 3 and 4 were not only present with accused nos. 1 and 2 but had actively participated in the act involving assault on deceased as, from the evidence of eye witness, they are found to have caught hold hands of deceased when he was subjected to assault by axe by accused nos. 1 and 2. It is material to note that accused nos. 1 and 2 assaulted by axe on the head of deceased, which is vital part of body. Had accused nos. 3

and 4, not shared common intention with accused nos. 1 and 2 to assault the deceased, they could have left the spot seeing accused nos. 1 and 2 having armed with axe without sharing their intention by holding deceased. Instead, they are also found to have shared common intention with accused nos. 1 and 2 and had assisted them in the assault by holding hands of deceased, which aspect goes to establish their involvement and thus, we find no substance when it is contended on behalf of accused nos. 3 and 4 that, from the oral evidence on record, they cannot be attributed with common intention of killing deceased.

31. Though we are aware of our limitation while dealing with appeal against acquittal of Original accused nos. 3 and 4 and may not have interfered with the order of acquittal reversing conviction. However, we find that the trial Court has completely erred in appreciating of evidence and has complied with wrong principles to negate common intention. We, therefore, find that acquittal of Original accused no.3 Sanjay Puran Bagde and accused no.4 Rajratna @ Nandu Puran Bagde is required to be converted into conviction by reversing the Judgment. We, therefore, set aside the order of acquittal and pass the following order.

Criminal Appeal No.551 of 2017 filed by Original accused no.1 Manoj Puran Bagde and Original accused no.2 Puran Sakharam Bagde against their conviction for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code by learned Sessions Judge is dismissed.

Criminal Appeal No.363 of 2018 filed by State against acquittal of Original accused no.3 Sanjay Puran Bagde and Original accused no.4 Rajratna @ Nandu Puran Bagde is allowed. They are convicted for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code and are sentenced to suffer life imprisonment and to pay a fine of **Rs.25,000/-** each, in default to suffer further rigorous imprisonment for two years.

Said accused no.3 Sanjay Bagde and accused no.4 Rajratna @ Nandu shall be entitled for set off for the period, if any, already undergone by them and are directed to surrender before the trial Court within four weeks from today for serving sentence.

JUDGE

JUDGE

[jaiswal]

