

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

**CRIMINAL APPLICATION NO. 1751 OF 2020
IN
CRIMINAL APPEAL NO. 525 OF 2020**

Rohit s/o balaji Waghmare,
Age : 22 years, Occu. Labour,
R/o. Harangul (Bk.), Latur,
Dist. Latur.

...Applicant

Versus

The State of Maharashtra
through Police Inspector,
MIDC Latur Police Station,
Latur, Tq. & Dist. Latur.

...Respondents

.....

Shri. P. P. More, Advocate for the applicants
Shri. S. G. Sangle, APP for respondent/State

.....

**AND
CRIMINAL APPLICATION NO. 2020 OF 2020
IN
CRIMINAL APPEAL NO. 463 OF 2020**

Pawan s/o. Deelip Sarwade @
Pavan Dilip Sarwade s/o. Late
Deelip Dyanoba Sarwade,
Age : 22 years, Occu. Student,
R/o. Harangul (Bk.), Latur,
Dist. Latur.

...Applicant

Versus

The State of Maharashtra

...Respondent

.....

Shri. A. D. Ostwal, Advocate for the applicant
Shri. S. G. Sangle, APP for respondent/State

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**CORAM : RAVINDRA V. GHUGE
AND
B. U. DEBADWAR, JJ.**

DATE : 14th January, 2021

PER COURT : -

1. We have heard the learned Advocates for both the applicants, who are accused nos. 1 and 2. Their appeals against their conviction and sentence of life imprisonment have been admitted.

2. Shri. P. P. More, the learned Advocate appearing for accused no. 1 in the first application is instructed by a friend of the applicant – Rohit, to seek withdrawal of this application and renew his request if the appeal is not decided within one year. As such, the Criminal Application No. 1751 of 2020 is disposed off as withdrawn. If Criminal Appeal No. 525 of 2020 filed by accused no. 1 - Rohit is not decided by 31.01.2022, we grant liberty to the applicant - Rohit to renew his request.

3. We have considered the appeal paper-book, which is before the court, as we heard the submissions of Shri. Ostwal, learned Counsel appearing on behalf of the accused no. 2 - Pawan Sarwade. We have considered the strenuous submissions of the learned Prosecutor, who has opposed the application for suspension of the

substantive sentence. We have also perused our detailed order dated 15.09.2020 in Criminal Application No. 1407 of 2020 filed by accused no. 3 - Alim @ Mangal Fattulal Sayyad. We had observed in the said order in paragraphs 8 to 13 as under : -

“8. It is, therefore, obvious that the actual act of the present applicant, unlike the role of accused No.1 Rohit, who was carrying the knife on his person and has inflicted the stab wound, is that he was also hurling abuses upon the deceased. Accused No.2 Pawan had also hurled abuses and had physically pushed the deceased. It is not established by the prosecution as to whether Alim was aware that Rohit had carried a knife hidden beneath his clothes. There is no evidence that the deceased had a previous enmity or was on enmical terms with the three accused.

9. It requires no debate that if the three accused have acted in unison with the intention of causing such an injury to the deceased that, knowingly, such an injury would kill the deceased, the trial Court can arrive at the conclusion, which is found in the impugned judgment.

10. In the case of **Suresh Sakharan Nangare Vs. The State of Maharashtra** [(2012) 9 SCC 249], decided by the Honourable Apex Court, the convict Suresh was acquitted by the Honourable Apex Court from his conviction under Sections 302, 201, read with 34 of the IPC, sentencing him to imprisonment for life. The role played by the accused Suresh is considered by the Honourable Apex Court in paragraph Nos.14, 15, 16 and 17 which read as under:-

“14. Since the conviction of the Appellant is based only with the aid of Section 34 of Indian Penal Code, it is useful to refer the same:

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

A reading of the above provision makes it clear that to apply Section 34, apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of accused in the commission of an offence. It further makes clear that if common intention is proved but no overt act is attributed to the individual accused, Section 34 will be

attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked. In other words, it requires a pre-arranged plan and pre-supposes prior concert, therefore, there must be prior meeting of minds.

15. We have already referred to the evidence of prosecution witnesses. Nobody has implicated the present Appellant except the statements made by PW-5 and PW-7 (the approver). We are satisfied that absolutely there is no material from the side of the prosecution to show that the present Appellant had any common intention to eliminate the deceased, who was physically disabled. The only adverse thing against the present Appellant is that he used to associate with A-1 for smoking Ganja. In the absence of common intention, we are of the view that convicting the Appellant with the aid of Section 34 Indian Penal Code cannot be sustained.

16. The other important circumstance which is in favour of the Appellant herein is the evidence of the doctor (PW-10) who conducted the post mortem. In his evidence, PW-10 has stated that on 04.03.1995, at about 08:15 a.m., the dead body of one Sanjay Mahadeo Lokhar was brought by the police for post mortem. He started the examination at 2 p.m. and the same was concluded at 3 p.m. According to him, it was a burnt body, averagely nourished with presence of rigor mortis in muscles. His tongue was protruding outside and surface wounds and injuries were 100% superficial to deep burns. In his opinion, the cause of the death was due to 100% burn injuries. He also issued the post mortem certificate which is Exh. 21 wherein he opined that the death occurred due to 100% burns and not because of assault. The categorical evidence and the opinion of PW-10 for the cause of the death of Sanjay make it clear that the Appellant herein – original Accused No. 3 has nothing to do with the same since the evidence brought in shows that it was Kishore Mahadeo Lokhare - (original Accused No. 1) who took Sanjay to the other room where he burnt him to death. This important aspect has not been considered by the trial Court as well as by the High Court.

17. On appreciation of the entire material, we have already concluded that the present Appellant had no role in the criminal conspiracy and no motive to kill the deceased. On the other hand, the evidence led in clearly implicates Kishore Mahadeo Lokhare - (original Accused No. 1) in all aspects including motive and the manner of causing death by lighting fire. Apart from all the evidence led in by the prosecution, the above position is clear from the evidence of the Doctor (PW- 10) - who conducted the post mortem and his opinion for the cause of the death. Merely because the approver (PW-7) has stated that based on the direction of Kishore Mahadeo Lokhare (original Accused No. 1), the present Appellant (original Accused No. 3) caught hold of the legs of the

deceased, in the absence of any motive or intention, mere act of holding his legs that too at the end of the event when original Accused No. 1 throttled his neck by sitting on his abdomen, the Appellant (original Accused No. 3) cannot be mulcted with the offence of murder with the aid of Section 34 of Indian Penal Code, particularly, when the medical evidence for the cause of death is otherwise, namely, due to 100% burns.”

11. In the appeal preferred by the present applicant, we would have to assess as to whether the trial Court has committed an error in convicting him under Section 302, especially in view of Section 34 of the IPC, in the light of the conclusion as regards the limited role played by Alim and whether, he would deserve to be sentenced for life in the facts and circumstances of the case. Prima facie, we find that the case of the present applicant Alim stands on a better footing if his role is to be compared with the role played by Suresh in the case of Suresh Sakham Nangare (supra).

12. In the case of **Barendra Kumar Ghosh Vs. Emperor** - [AIR 1925 Privy Council 1], it has been held as under:-

The doing to death of one person at the hands of several by blows or stabs, under circumstances in which it can never be known which blow or blade actually extinguished life, if indeed one only produced that result is common in criminal experience and the impossibility of doing justice, if the crime in such cases is the crime of attempted murder only, has been generally felt. It is not often that a case is found where several shots can be proved and yet there is only one wound, but even in such circumstances it is obvious that the rule ought to be the same as in the wider class, unless the words of the Code clearly negative it. Of course questions arise in such cases as to the extent to which the common intention and the common contemplation of the gravest consequences may have gone, and participation in a joint crime, as distinguished from mere presence at the scene of its commission, is often a matter not easy to decide in complex states of fact, but the rule is one that has never left the Indian Courts in much doubt.

"Thus the effect is that, where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done as if he had done it by himself. Such a proposition was not worth enacting, for, if a man has done something criminal in itself, he must be punishable for it, and none the less so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common to all."

13. We are, therefore, of the prima facie view that the present applicant has an arguable case against the impugned judgment of conviction. We would not, at this stage, hold this view for accused

No.1 Rohit or accused No.2 Pawan, since they are not before us. What we find is that the present applicant may not even be aware that Rohit was carrying a knife, inasmuch as, he may not have imagined that the drunken brawl would incite Rohit to stab the deceased Parmeshwar. If we find at this *prima facie* stage that Alim might be able to extricate himself from the impugned judgment, this application can be favourably considered.”

4. We had favourably considered the application of Alim @ Mangal Fattulal Sayyad, notwithstanding that Section 34 of the Indian Penal Code was made applicable, for the reason that he probably was not aware that accused no. 1 - Rohit was carrying a knife. These three accused had reached the Akshay Bar for celebrating the evening over liquor. None of them had any money to buy liquor. Rohit had convinced the Bar owner by handing over his mobile that he would make the payment of the liquor that would be consumed. With this understanding, the Bar owner directed the waiter to serve two quarters of liquor, which amounts to 360 ml., together. These three accused had consumed the said quantity and then a drunken brawl erupted between these three accused on one side and the deceased Parmeshwar, who was drinking solo, on the other side. We came to a *prima facie* conclusion that, Alim may not have been aware that Rohit would be carrying a knife on his person when the three had stepped out of their house together for enjoyment.

5. The prosecutor had come forward with the following case and had earned conviction of all the three accused persons : -

- (a) It was on 29.1.2018 that the deceased Parmeshwar Baburao Lakhadive went to the Akshay Beer Bar in the evening, situated in District Latur.
- (b) All the three accused were occupying an adjacent table.
- (c) The deceased was consuming drinks on his table and the three accused were also consuming liquor on the adjacent table.
- (d) An argument occurred between the deceased on one side and the three accused on the other. All were under the influence of liquor.
- (e) Accused No.1 - Rohit Balaji Waghmare assaulted the deceased by hammering a chair on his person.
- (f) The Bar Owner sorted out the issue and asked all of them to leave the Bar. The deceased made his payments and left the Bar, only to halt at the pan stall installed outside the Bar.
- (g) The three accused followed the deceased and started a quarrel in front of the pan shop owned by prosecution witness No.3 Sunil Boke. This witness has subsequently turned hostile.

- (h) While the verbal duel continued between the deceased and the three accused, Rohit whipped out a knife and struck a stab blow on the left thigh of the deceased below the groin who started bleeding profusely.
- (i) The deceased borrowed the mobile phone of Sunil Boke and contacted his brother-in-law Shri Subhash Siddheshware for help.
- (j) Subhash reached the pan stall within minutes and found that the deceased was writhing in excruciating pain and was bleeding profusely.
- (k) The deceased was mounted on the motor cycle of Subhash with the help of Sunil Boke and the owner of adjoining 'Pravin Bar'.
- (l) As the deceased was unable to position himself properly on the motor cycle due to the stab injury, he was shifted into an auto rickshaw and was taken to the Latur Government Hospital.
- (m) The incident had occurred at about 9.15 pm on 29.1.2018 and the deceased, during treatment, succumbed to his injuries at about 10 minutes past midnight, 12.10 am, on 30.1.2018.

(n) All the three have been convicted by the impugned judgment. The present application has been filed only by accused No.2 - Pawan @ Pavan.

6. In paragraph nos. 58, 59, 60 and 61 of the impugned Judgment, the trial Court had concluded as under : -

58. In this respect, it is noteworthy to mention here that there were two incidents of assault. The first incident was witnessed to by Sandip (P.W.7) and he stated in clearer terms that all three accused persons participated in the assault against deceased Parmeshwar. In addition thereto, the testimony of the informant plays vital role to prove participation of all the accused persons and sharing of common intention in respect of subsequent incident. In his testimony he stated that Parmeshwar had narrated to him that when he was standing at the pan shop of Sunil (P.W.3), at that time, all three accused persons again came there, they hurled abuses and beat him and, thereafter, accused No.2 pushed him onto the ground and, accused No.1 inflicted the fatal blow of knife on his left thigh.
59. From the above discussion, it is crystal clear that accused Nos.1 to 3 not only acted together inside the bar, but also acted in unison outside the bar.
60. It is not out of place to mention here that in the earlier incident accused No.1 assaulted with the help of chair, but when accused persons came and confronted deceased Parmeshwar outside the bar, at that time, accused No.1 was armed with a knife and this fact was known to other two accused persons. All the accused persons initially beat and hurled abuses in the subsequent incident and, thereafter, accused No.2 pushed deceased Parmeshwar on the ground and accused No.1 inflicted knife blow. Accused No.3 was very much present there, after hurling abuses and beating in unison. If at all accused No.3 was not involved, in that event, he would not have come together with accused Nos.1 and 2 for the subsequent incident and upon seeing deceased Parmeshwar being assaulted, he must have dissuaded accused Nos.1 and 2 from assaulting.
61. It is now well settled that for invoking Section 34 of the Code which contains the theory of vicarious liability for committing any crime, mere presence of the member is enough and active participation in commission of offence is not sine qua non. However, in the present set of facts, all three accused persons took active participation in commission of the earlier incident

and, in subsequent incident as well, all three accused persons were present and they hurled abuses and beat deceased Parmeshwar. Thereafter, accused No.2 pushed deceased Parmeshwar and accused No.1 inflicted blow of knife. Therefore, the defence that accused Nos.2 and 3 did not share common intention with accused No.1 does not hold any water.

7. We have perused the testimony of PW1 - Subhash Manohar Siddheshware. His profession was as a Driver on a tractor belonging to Rameshwar Waghmare. The deceased Parmeshwar was his brother-in-law. He was the first person who received a call from Parmeshwar immediately after he suffered a severe stab injury in his thigh with the knife penetrating upwards right upto his abdomen. He was bleeding profusely and had desperately made the call to PW1. When PW1 reached the Pan Stall (Betel Shop) of Sunil Boke, he asked Parmeshwar as to what happened. The statement made by Parmeshwar to PW1, has been uttered by PW1 before the trial Court stating as under : -

“Boys from the village i.e. Rohit Waghmare, Alim Sayyad and Pawan Sarwade beat him. He told him that they pushed, abused and beat him in Akshay Bar and thereafter he came out of the Akshay Bar. He told him that, thereafter he came to Pan Stall of Sunil Boke and all the three persons followed him. He told that, Pawan Sarwade pushed him and when he fell down, Rohit assaulted him with knife on his left thigh”.

8. PW5 is Yogesh Subhash Siddheshware, who is the nephew of Parmeshwar. At about 09:30 p.m. on 29.01.2018, after doing his duty on a private employment with a petrol pump belonging to one Bhushan Date, he had returned to his home and was standing in front of his house at around 09:30 p.m. When his mother came there, she told him that his maternal uncle i.e. deceased Parmeshwar was badly assaulted in front of Akshay Bar and father of PW5 had gone there. She asked him to go to the spot. He took his mother on a motorcycle near the Pan stall. Sunil Boke, owner of the Pan shop met him on the way and told him that his maternal uncle was badly beaten and father of PW5 had taken him to the hospital. Both reached the hospital. The maternal uncle picked up Parmeshwar from the auto and took him to the hospital. While taking him to the hospital, PW5 asked Parmeshwar as to what happened and he narrated the same version as was narrated to PW1. We do not find any difference of even a slightest nature. What we find significant is that, Parmeshwar told PW5 that Pawan Sarwade (the present applicant) pushed him due to which Parmeshwar fell down and then Rohit assaulted him in his left thigh with a knife.

9. PW6-Meena Prakash Giram, aged about 55 years, is the real sister of the deceased Parmeshwar. On 29.01.2018, at about

10:00 p.m., she received a call from her sister Shakuntala, who informed that Parmeshwar had received serious injuries and was taken to the hospital. PW6 accompanied her son to the hospital on a motorcycle. On seeing Parmeshwar, she asked him as to what happened. Parmeshwar is said to have narrated the same version as was narrated to PW1 and PW5 and we find, even in this version of PW6, no discrepancy in between the three versions. Consequently, we find that, Pawan had pushed Parmeshwar and as Parmeshwar fell down, since he was also drunk, Rohit assaulted him with a knife in his left thigh.

10. The reasoning that we have set out while considering the case of Alim was that, firstly, these four persons were drunk and were hardly able to maintain their balance. Secondly, consequent to being intoxicated, the reaction time further slows down and latency creeps in. The only distinguishing feature between Alim and the present applicant is, i.e. Pawan had given a push to Parmeshwar due to which Parmeshwar fell down on the ground. It is not a part of the evidence that either Alim or Pawan were aware as to whether Rohit normally carries a knife on his person or whether they knew that Rohit was carrying a knife on that specific evening.

11. What we find common in the deposition of PW1, PW5 & PW6 based on the dying declaration of the deceased is that, after Rohit stabbed the deceased, neither Alim nor Pawan extended the brawl or quarrel. Evidence indicates that, the quarrel ended with the stroke of the stab injury.

12. In view of the above, we find that in the absence of evidence, it cannot be conclusively deduced at this stage that, Pawan was aware that Rohit was carrying a knife and was equally aware that Rohit could have used the knife to stab Parmeshwar on his left thigh. In view of the above, we find that, parity at least be shown in favour of Pawan *vis-a-vis* Alim.

13. As such, this application is allowed on the following conditions:-

(A) The sentence awarded to the applicant - Pawan @ Pavan (accused no.2) shall stand suspended till Criminal Appeal No. 463 of 2020 is decided.

(B) Applicant - Pawan @ Pavan shall pay the fine of Rs.2,000/-, if not already paid and in default shall suffer rigorous imprisonment for six months.

- (C) Applicant - Pawan @ Pavan shall be released on bail on a PR bond of Rs.25,000/- and a solvent surety of the like amount.
- (D) Applicant - Pawan @ Pavan shall mark his presence at the MIDC Police Station, Latur on every Wednesday in each week in between 11 am to 1 pm.
- (E) The Station House Officer / Police Station Officer shall record the attendance of the applicant - Pawan @ Pavan in the Station Diary and obtain his signature as evidence of his attendance.
- (F) Applicant - Pawan @ Pavan shall tender an attested copy of his driving license, aadhar card and his latest permanent residence proof with the Station House Officer / Police Station Officer of the concerned Police Station.

[B. U. DEBADWAR]
JUDGE

[RAVINDRA V. GHUGE]
JUDGE