

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

CRIMINAL APPEAL NO. 842 OF 2008

Pravin s/o Deorao Oimbe,
aged 21 years, Occ. Student,
R/o Ramnagar, Shivni, Akola.
District Akola.

.... **APPELLANT**

// VERSUS //

The State of Maharashtra,
Through Police Station Officer,
Police Staiton, Civil Lines, Akola,
District Akola (Crime No. 362/05)

.... **RESPONDENT**

AND

CRIMINAL APPEAL NO. 866 OF 2008

Yashwant s/o Ganesh Kaside
aged 21 years, Occ. Education,
R/o New Shivani, Akola,
Tq. And Distt. Akola.

.... **APPELLANT**

// VERSUS //

The State of Maharashtra,
Through Police Station Officer,
Police Staiton, Akola, Tq. And Distt. Akola.

.... **RESPONDENT**

Shri S.M. Bhangde, Advocate for appellants.
Ms.S. Haider, A.P.P. for respondents.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 04/02/2021.

JUDGMENT :

1. The Appellants who were the accused in Sessions Case No. 29 of 2007 have questioned the legality of the conviction and sentence imposed by learned Additional Sessions Judge, Akola vide judgment dated 05.12.2018. By the impugned judgment learned Sessions Judge, Akola has held the Appellants guilty of offence punishable under Section 326 read with 34 of the Indian Penal Code and sentenced them to undergo Rigorous Imprisonment for a period of two years and to pay fine of Rs. 1000/- each , in default to undergo simple Imprisonment for one month.

2. It is the case of the prosecution that on 11.05.2005 at 12.30 am, the Appellants Pravin and Yashwant (hereinafter referred to as 'accused Nos. 1 and 2' respectively) in furtherance of the common intention, caused grievous hurt to P.W.3 Chandrakant Mourya by means of a dangerous weapon. The said incident was preceded by a quarrel between Sunil, the nephew of the injured and one Pankaj, wherein the injured had intervened. The accusation against the accused are that at about 12.00 to 12.30 am accused no. 1 accompanied by accused no.2 went to the court yard of the injured (P.W.3) and assaulted him with a

sword. It is the case of the Prosecution that the accused no. 2 assaulted P.W.3 Chandrakant Mourya by kicks and blows on his private part. As a result of the assault right thumb of the injured was severed and he received injuries on the other parts of the body. P.W.1 - Chandan Thakur, P.W.2 Haridas Dhore and P.W.4 Anil Moyrua took the injured to the Civil Hospital, Akola.

3. P.W.1 Chandan Thakur lodged the First Information Report at Exhibit 39 pursuant to which Crime No. 362/05 came to be registered against the accused for offence under Section 307 read with 34 of the Indian Penal Code. In the Course of investigation, the statement of the injured and other witnesses were recorded, spot Panchnama was conducted and the incriminating material found at the spot was attached under Panchnama at Exhibit. 51. The sword being the weapon of offence was recovered at the instance of accused no.1 and seized, under Panchanama (Exhibit 49) under Section 27 of the Indian Evidence Act, 1872. The clothes of the accused as well as of the injured were seized under the seizure Panchanama. The incriminating material was sent for chemical analysis at Nagpur. Upon completion of investigation charge-sheet was filed before learned Judicial Magistrate First Class, Akola. Since the offence was exclusively triable by the Court of Sessions, the case was committed to the Sessions

Court, Akola.

4. The charge was framed against accused for the offence punishable under Section 307 read with Section 34 of Indian Penal Code and Section 4 and 27 of the Arms Act. The accused pleaded not guilty and claimed to be tried.

5. The prosecution examined the injured and the other material witnesses. The statements of the accused were recorded under Section 313 of the Code of Criminal Procedure. The defence of the accused was that of total denial.

6. Upon considering the evidence on record and basically relying upon the evidence of the injured witness and other corroborative evidence, the learned Judge held that the accused with common intention caused grievous hurt to P.W.3 Chandrakant Mourya by means of dangerous weapon. Learned Judge held that the injuries were not sufficient to cause death in the ordinary course of nature and as such offence under Section 307 of the Indian Penal Code is not made out. Learned Judge therefore held the accused guilty of offence under Section 326 read with 34 of the Indian Penal Code and sentenced them as stated above. Learned Judge acquitted the accused of offence under Section 4 and 25 of the Arms Act holding that the Prosecution

had not adduced evidence to prove prohibition of possession of swords and knife in the area where the offence was committed. Being aggrieved by the conviction and sentence, the accused have preferred this appeal under Section 374(2) of the Code of Criminal Procedure.

7. Shri S.M. Bhangde, learned counsel for the accused states that there was no enmity between the accused and the injured and that there was no motive behind inflicting any injury on PW-3 Chandrakant Mourya. He submits that the prosecution has not established the guilt of the accused beyond reasonable doubt and as such the learned Judge has erred in holding the accused guilty of offence under Section 326 of the Indian Penal Code. He submits that as on the date of incident the accused were young boys within the age group of 19-20 years. He therefore prays that a lenient view be taken and the sentence imposed against the accused, be reduced.

8. Learned APP submits that the testimony of the injured amply proves the involvement of the accused in commission of the said crime. He submits that the testimony of the injured is duly corroborated by PW.1, PW.2 and PW.4 as well as by medical evidence. Learned A.PP. states that no case is made out for interference either with conviction or sentence.

9. I have perused the records and considered the submissions advanced by learned counsel for respective parties. The only point for consideration is whether the prosecution has established beyond reasonable doubt that the accused herein had with common intention caused grievous hurt to P.W.3 Chandrakant Mourya by means of a dangerous weapon.

10. In this regard it will be advantageous to consider the evidence of the injured P.W.3 Chandrakant Mourya. This witness has deposed that on the relevant date he was sleeping in the court yard of his house. At about 12 to -12.30 a.m., both the accused came to his house and woke him up. Accused No. 1 was armed with a sword. He inflicted a blow of sword on his hand as a result of which his right thumb got severed. The accused No. 1 also inflicted a blow of sword on his right leg above the knee. The accused No.1 thereafter inflicted another blow on his face by the blunt side of the sword as a result of which his two teeth got dislocated. P.W.3 has further deposed that the accused No.2 gave kicks and blows on his private part. P.W.3-Chandrakant Mourya has deposed that earlier in the evening, he had intervened and in the quarrel between his nephew Sunil and Pankaj, who is a friend of the accused and the accused had assaulted him because of his intervention.

11. P.W.1 Chandan Thakur has deposed that he had seen both the accused going towards the house of P.W.3 Chandrakant Mourya. He has stated that the accused No. 1 was armed with a sword. After some time he heard shouts of P.W.3 Chandrakant Mourya. He ran towards to his house and saw both the accused running away from the spot of the incident. He saw P.W.3 lying in a pool of blood with injuries on his hand, legs and face. This witness has stated that with the help of P.W.4 – Anil Mourya and others he took the injured to the hospital and later lodged the First Information Report at Exh. 39 against the accused for causing hurt to P.W.3 by means of sword, kicks and blows.

12. P.W.4 has deposed that he went to the compound of P.W.3 Chandrakant Mourya on hearing his cries. He saw accused No. 1 coming out of the compound with a sword in his hand. He was accompanied by accused no. 2. He had seen them running away from the spot of the incident. He has deposed that P.W.3 was lying unconscious with bleeding injuries on his hand, legs and face.

13. The evidence of P.W.9 Dr. Vivek Ramchandra Phadke, the Medical Officer on duty at Civil Hospital, Akola, reveals that he had examined P.W.3 Chandrakant Mourya at about 1.05 a.m. The testimony of this witness vis-a-vis a Medical Certificate at Exhibit 53 reveals that

the P.W.3 had sustained the following external injuries :

- “1) Incised wound over right knee joint on lateral Aspect.
Size 3inch X 1/4th inch X bone deep.*
- 2) Incised wound over upper lip. Centrally placed size
1/2” X 1/4”*
- 3) Incised wound over lower Lip “1/2 X 1/4in size.*
- 4) Ikamo Haematoma on both testis.*
- 5) Amputation of Right thumb from base of proximal
phalynx.*
- 6) Suspected fracture over right Patela.”*

P.W.9 Dr. Vivek Phadke has deposed that injuries 1, 2, 3 and 5 were caused by a sharp cutting object while injuries Nos. 4 and 6 were caused by blunt and hard object. The age of injuries was within two to four hours. He has deposed that the right hand of the victim had become dis-functional due to the injuries. He has denied the suggestion of the injuries were of simple nature.

14. The evidence of P.W.3 Chandrakant Mourya, who is an injured witness proves that the incident had occurred in his court yard at the midnight of 11.05.2005 at about 12.00 to 12.30 am. The accused no. 1 who had come armed with a sword had inflicted injuries on his hand, leg and face. It is also on record that accused no. 2 had assaulted P.W.3 by kicks and blows on his private part resulting in heamatoma of

testis. The fact that accused no.1 had inflicted forceful blow of sword resulting in severance of thumb and dislocation of teeth, sufficiently proves the intention was to cause grievous injury.

15. It is well settled that the testimony of an injured witness is generally considered to be very reliable as he is a witness who comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare the actual assultant in order to falsely implicate some one. Reliance is placed on the decision of the Apex Court in ***State of U.P. vs. Kishan Chand and ors. (2004) 7 SCC 629, Balraje @ Trimbak vs. State of Maharashtra (2010) 6 SCC 673***. The evidence of P.W.3 is trustworthy and is duly supported by the medical evidence. Furthermore, the testimony of P.W.1 and P.W.4 also proves the presence of the accused at the place of the incident. They had seen the accused no.1 armed with a sword and further seen the accused nos.1 and 2 running away from the scene of the crime. Nothing has been brought on record to impeach credibility of these witnesses. Furthermore prompt lodging of F.I.R. also rules out possibility of false implication. Cumulative effect of this evidence only points to the guilt of the accused.

16. P.W.7 Shrikrishna Kale and the Investigating Officer P.W.10

have also deposed that the accused no.1 had stated that he had concealed the sword in an almirah in his house and that he was ready to show the same. The said sword was recovered at the instance of accused no. 1 and seized under Panchanama at Exhibit 49. The said sword with other incriminating material was forwarded for chemical analysis. The C.A. report at Exhibit 64 prove that the sword and the clothes of the injured were stained with human blood. This is also a material circumstance which corroborates the testimony of the injured. The evidence adduced by prosecution proves that the accused no.1 had voluntarily caused grievous injuries to PW.3 by means of a sword which used as a weapon of offence is likely to cause death.

17. Now coming to the question of 'common intention' the law as regards applicability of Section 34 of the Indian Penal Code is well settled. In ***Pandurang and ors vs. State of Hyderabad (S) A.I.R. 1955 S.C. 216 (Vol.42, C.N.37)*** the Apex Court has held that

32. Now, in the case of [section 34](#) we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all :- '*Mahbub Shah v. King-Emperor*', AIR 1945 PC 118 at pp.120 and 121 (B). Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would

have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: AIR 1925 PC 1 at pp 5 & 6 (A) and AIR 1945 PC 188(B). As their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

33. *The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example, when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose.*

18. In ***Virendra Singh vs. State of M.P (2010) 8 SCC 407***, the Apex Court has reiterated that

“40. *The dominant feature of [section 34](#) is the element of intention and participation in action. This participation need not in all cases be by physical presence. Common intention implies acting in concert.*

41. *The essence of [section 34](#) IPC is a simultaneous consensus of the minds of the persons participating in criminal action to bring about a particular result. Russel in his celebrated book Russel on Crime 12th Edn. Vol. 1 indicates some kind of aid or assistance producing an effect in future and adds that any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony.*

It was observed by Russel that any act of preparation for the commission of felony is done in furtherance of the act.

42. [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 premeditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the premeditation 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](#).”

19. In the instant case, the evidence on record clearly indicates that accused no.2 had accompanied accused no.1 to the scene of offence despite knowing that accused no. 1 was armed with sword. It is also on record that while accused no. 1 was inflicting blows of sword, accused no. 2 had assaulted P.W.3 Chandrakant Mourya with blows and kicks on his private part causing haematoma of both testis. The evidence of P.W.9 Dr. Vivek Phadke reveals that the said injury was caused by a forceful kick. While denying the suggestion that no injury was inflicted on the vital part, this witness has explained that testicles are placed in the scrotum and forceful blow on scrotum can lead to neurogenic shock and consequent death. It can thus be seen that the

accused no.2 had inflicted injury on vital part of the body. He had run away with accused no. 1, on seeing P.W.1 Chandan Thakur and P.W.4 Anil Mourya come to the place of the incident. The above facts and circumstances are sufficient to hold accused no.2 guilty for offence under Section 326 read with 34 of the Indian Penal Code.

20. As regards quantum of sentence, the accused are held guilty of offence under Section 326 read with Section 34 of the Indian Penal Code. The offence under Section 326 of the Indian Penal Code is punishable with imprisonment for life or with imprisonment which may extend to ten years and with fine. In the instant case, the Trial Court has imposed sentence of two years of imprisonment and fine of Rs.1000/-. The learned Judge has already taken a lenient view and no further leniency is warranted.

21. Under this circumstances and in view of the discussion supra, the appeal has no merit and is accordingly dismissed. The accused shall surrender within two weeks to serve the substantive sentence.

JUDGE

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