

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

Criminal Appeal No.544 of 2014

Ramesh Waman Bodke
R/o. Talwade,
Taluka – Trimbakeshwar,
Dist. Nashik.
Presently at Nashik Jail

... Appellant

V/s.

The State of Maharashtra
(At the instance of Trimbakeshwar
Police Station, Nashik)

... Respondents

Mr. Shantanu Phanse for the appellant.
Mr. H.J. Dedhia, APP for the State.

**CORAM : PRASANNA B. VARALE
& SHRIKANT D. KULKARNI, JJ.**

**Reserved on: 20th June 2022.
Pronounced on: 13th July 2022.**

JUDGMENT (PER SHRIKANT D. KULKARNI, J)

Feeling aggrieved by the impugned judgment and order of conviction passed by the Additional Sessions Judge, Nashik in Sessions Case No.271/2012, the Appellant-Original Accused No.2 has preferred this Appeal by taking aid of Section 374 of the Code of Criminal Procedure.

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2. The Appellant was put on trial alongwith co-accused Pandarinath Dattu Bodke for charge of committing murder of their cousin Samadhan Motiram Bodke, resident of same village Talwade for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

3. There is no record or office note which may indicate that original Accused No.1 Pandarinath has preferred an appeal, feeling aggrieved by the impugned judgment and order rendered by the Additional Sessions Judge at Nashik.

4. In the above premise, we are dealing with this appeal preferred by original Accused No.2-Appellant/Ramesh.

5. According to the Prosecution story, the Appellant alongwith his accomplice were on cross terms with the father of the deceased on account of land dispute. Appellant had also an evil eye on the wife of deceased. Samadhan Moti Bodke (since deceased) left his house after breakfast on 13th September 2012 at about 8.30 a.m. with his agriculture equipment sickle and rope. It was his daily routine to cut the grass with help of sickle and after tying it with rope bring it to the house for his she buffaloes. Motiram Mathhu Bodke happened to be father of the deceased who is first informant. First Informant left his

house with she buffaloes in the morning. He went to the area of Pach Budache farm for grazing his she buffaloes. Bhaguji Punja Bodke informed to the first informant on his mobile that accused Pandarinath Dattu Bodke has assaulted Samadhan by means of sickle. Samadhan was lying in the pool of blood. First informant was asked to leave the spot immediately to reach Trimbakeshwar hospital. Samadhan was taken to Trimbakeshwar hospital by four wheeler. Doctor attached to Trimbakeshwar hospital examined Samadhan and declared him dead.

6. Motiram Matthu Bodke-father of the deceased rushed to Trimbakeshar Police Station and lodged FIR against this Appellant-Accused No.2 and Pandarinath- Accused No.1 for committing murder of his son Samadhan. On the basis of the FIR lodged by the father of the deceased C.R.No.59/2012 came to be registered with Trimbakeshwar Police Station for the offences punishable under Section 302 read with Section 34 of the IPC.

7. The investigation was entrusted to the Police Inspector Mr. K.J. More. He went to the scene of offence and prepared panchnama of offence in the presence of panch witnesses. Articles like soil mixed with blood, one white shirt button, one black colour cap, soil without blood, bundle of grass tied with nylon rope came to be seized from the scene of offence. The dead body was referred for autopsy and opinion

about cause of death. The weapon used in the commission of the offence came to be recovered and seized under the seizure panchnama. The Mudemal articles were sent to C.A. for analysis and report. The Investigating Officer has recorded statements of witnesses including eye witnesses. The Investigating Officer found sufficient evidence against both the accused for the offence of committing murder of Samadhan. Ultimately, investigation conducted by Police Inspector More culminated in sending up of chargesheet to the concerned Court of JMFC.

8. The case was committed to the Court of Sessions at Nashik for trial in view of offence of murder involved therein.

9. The learned trial Judge framed the charge against this Appellant-Accused No.2 and original Accused No.1 on 18th March 2012 for the offences punishable under Section 302 read with Section 34 of the IPC.

10. The trial was commenced before the Additional Sessions Judge at Nashik. The prosecution machinery has examined in all 16 witnesses and thereafter closed its evidence. The statement of accused under Section 313 of the Cr. P.C. came to be recorded. The defence of the Appellant-Original Accused No.2 was of plain denial. According to

him, he has been falsely implicated in this case.

11. The learned Additional Sessions Judge, Nashik after going through the oral and documentary piece of evidence and considering the argument of APP and defence side was pleased to convict this Appellant-Original Accused No.2 and Accused No.1 for the offence punishable under Section 302 read with Section 34 of the IPC and awarded sentence of life imprisonment and fine of Rs.500/- each with default stipulation.

12. The Appellant-original Accused No.2 has challenged the impugned Judgment and order of conviction on various grounds.

13. Heard Mr.Shantanu Phanse, the learned Counsel for the Appellant-Original Accused No.2 appointed through the panel of High Court Legal Services Committee, Mumbai and Mr.H.J.Dedhia, learned APP for the State-Respondent. We have also perused original record and proceedings of the Sessions trial with the able assistance of learned APP and learned appointed Counsel.

14. Mr.Phanse, learned Counsel for the Appellant vehemently submitted that the prosecution has miserably failed to prove presence of the Appellant-Original Accused No.2 at scene of offence. He

submitted that the learned Additional Sessions Judge, Nashik has convicted this Appellant-Original Accused No.2 by taking aid of Section 32 of the Indian Penal Code, 1860. He invited our attention to the evidence of two eye witnesses; PW No.4 – Bhaguji Bodke vide Exhibit 29 and PW No.5 - Ganesh Bodke vide Exhibit 30. He submitted that the evidence of both eye witnesses nowhere indicates that there was prior meeting between this Appellant-Original Accused No.2 and Accused No.1-Pandarinath. He further pointed out that there is no iota of evidence to establish that both the Accused had shared common intention so as to commit murder of Samadhan. Mr.Phanse then took us to the FIR vide Exhibit 24 and evidence of PW No.1- Motiram Bodke who happened to be father of the deceased. He pointed out that name of this Appellant is stated in the FIR in concluding para. PW No.1-Motiram is not an eye witness to the incident. He came to know through mobile conversation with PW No.4 - Bhaguji Bodke about attack on his son Samadhan at the hands of Accused No.1- Pandarinath. However, PW No.1- Motiram Bodke has nowhere stated that PW No.4 - Bhaguji had disclosed names of both the accused who allegedly assaulted the deceased.

15. Mr.Phanse submitted that no weapon was recovered at the instance of this Appellant. The panch witnesses on the seizure of clothes of this Appellant has turned hostile and that seizure of clothes is

simply exhibited at the hands of investigation officer which is of no consequence. Mr. Phanse further took us through the evidence of PW No.4-Bhaguji Bodke and PW No.5-Ganesh Bodke respectively. He pointed out that evidence of both eye witnesses does not go hand in hand. Their evidence is lacking on the presence of this Appellant at the scene of offence at the time of alleged incident. Mr. Phanse invited our attention to the evidence of Investigation Officer Mr. P.I.More-PW No.13 vide Exhibit 49. He submitted that it was revealed through investigation that Kachru was the first person who had intimated to Bhaguji about the incident that Samadhan (since deceased) was lying near the tower. He pointed out that though Kacharu was important and star witness in this case, he was not examined by the prosecution which is very much fatal to the prosecution case. Mr. Phanse further invited our attention to PW No.7 – Tanaji Bodke vide Exhibit 34, PW No.8 – Kalidas vide Exhibit 37, PW No.9 – Tushar vide Exhibit 41 and PW No.10 Rohidas vide Exhibit 53. He pointed out that those witnesses have turned hostile and not supported to the prosecution case.

16. While concluding argument of Mr.Phanse, the learned Counsel for the Appellant vehemently submitted that the prosecution has utterly failed to prove that the Appellant had shared common intention with Accused No.1 Pandarinath and he was present at the scene of

offence while committing murder of Samadhan. Mr.Phanse, learned Counsel for the Appellant submitted that findings recorded by the learned Additional Sessions Judge,Nashik are not in consonance with the evidence on record and the legal position as contemplated under Section 34 of the Indian Penal Code, 1860. He, therefore, urged to quash and set aside the judgment and order of conviction rendered by the Additional Sessions Judge, Nashik.

17. Per contra, Mr. H.J.Dedhia, learned APP for the State also took us through the evidence of two eye witnesses PW No.4-Bhaguji Bodke and PW No.5-Ganesh Bodke vide Exhibits 29 and 30 respectively. He submitted that both the eye witnesses have supported to the prosecution case. They have stated about presence of these Appellants-Accused No.2 at the time of incident. The Appellant-Accused No.2 has also participated in the commission of crime. He submitted that there is no reason to dis-believe both the eye witnesses in absence of any material on record. He submitted that prosecution agency has examined all the material witnesses including the Investigation Officer and proved the charge of offence of murder against the Appellant-Accused No.2 beyond reasonable doubt. He submitted that even though panch witnesses have turned hostile, it is of no consequence since Investigation officer has proved the relevant panchnamas. He submitted that learned Additional Sessions Judge, Nashik has rightly

convicted the Appellant-Accused by taking aid of Section 34 of the IPC, 1860. He submitted that there is no merit in the appeal and it is liable to be dismissed.

18. Having regard to the argument advanced by the learned Counsel for the Appellant and learned APP for the State, we have gone through the original record and proceedings of Sessions trial vide Sessions Case No.271/2012. We have carefully gone through the evidence of 13 witnesses examined by the Prosecution Agency with the help of learned APP and learned Counsel for the Appellant.

19. Mr.Phanse, the learned Counsel for the Appellant, has been fair enough to admit that Samadhan Bodke met with homicidal death. He is disputing about the presence and participation of this Appellant in the commission of alleged crime. As such there is no difficulty to accept that Samadhan met with homicidal death on the day of incident. However, it is necessary to have a look on the medical evidence and cause of death which focus light on the nature of death of Samadhan. We have gone through the evidence of Dr.Swarooprani Dilip Thakur vide Exhibit 44. On going through the evidence of PW No.11, Dr. Swarooprani, it is evident that she has conducted the postmortem examination on the dead body of Samadhan Motiram Bodke on 13 September 2012 between 2.00p.m. to 3.00 p.m. She has noticed 17 injuries on the dead body which are described in the column No.17 of

the postmortem report. She has also disclosed internal injuries which are shown in the postmortem report including head injury to abdomen and thorax. Dr.Swarooprani Thakur has given probable cause of death in this case. According to Dr.Swarooprani, Samadhan Bodke died due to shock due to haemopneumothorax. The cause of death given by Dr.Swarooprani is supported by medical evidence discussed herein before.

20. Having regard to the above scenairo, we have no hesitation to reach at conclusion that Samadhan Bodke met with homicidal death.

21. On going through the stock of evidence, it is evident that prosecution machinery has examined in all 13 witnesses to prove the charge of murder punishable under Section 302 of IPC against this Appellant-Original Accused No.2 and his accomplice Accused No.1-Pandarinath. However, PW No.1 – Motiram Bodke vide Exhibit 23, PW No.4 Bhaguji vide Exhibit 29 (eye witness) and PW No.5 -Ganesh (another eye witness) vide Exhibit 30 are the important witnesses.

22. PW No.1-Motiram Mathhu vide Exhibit 23 happened to be father of the deceased who had put the criminal law in motion by lodging FIR on 13th September 2012 vide Exhibit 24. On going through the FIR, it is revealed that PW No.1-Motiram came to know

about the incident of attack on his son Samadhan (since deceased) through his nephew Bhaguji Bodke. On going through the testimony of PW No.1 – Motiram Bodke, it is revealed that Bhaguji-PW No.4 who happened to be his nephew has intimated him on his mobile phone that Pandarinath (Accused No.1) had assaulted Samadhan by sickle and Samadhan has sustained injuries. It was first communication by his nephew Bhaguji on mobile which did not disclose name of this Appellant-Accused No.2. On perusal of FIR vide Exhibit 24, it would also reveal the same picture, however, in concluding para of the FIR, it is stated that Accused No.1 - Pandarinath and Accused No.2 – Ramesh had assaulted to son Samadhan on account of land dispute by using sickle and thereby killed him. So far as name of this Appellant-Accused No.2 stated in the concluding para of the FIR is found to be an improvement.

23. The intention to commit murder of Samadhan is stated to be of two fold in nature; (I) land dispute and (2) evil eye on the wife of the deceased.

24. On going through the cross-examination of PW No.1-Motiram, it would reveal that there was no quarrel between the family of first informant and Accused No.1 – Pandarinath. It further speaks that there was no such land dispute between this Appellant-Accused No.2

and the family of the first informant. Thus, that part of motive goes away. So far as another part of motive regarding evil eye of this Appellant on the wife of deceased is concerned, the answer to that effect finds in the testimony of PW No.6 – Yogita who is wife of deceased Samadhan. She has admitted during the course of cross-examination that prior to two years of incident, this Appellant had abused her in filthy language. She went on admitting that thereafter in a span of two years there was no meeting between her and Ramesh. Thus so called intention projected by the Prosecution Agency about appellant's evil eye on the wife of deceased also goes away.

25. As pointed out earlier, PW No.1 – Motiram had not witnessed the incident. Whatever he has stated on the basis of narration given by PW No.4 who is stated to be an eye witness. On going through the testimony of PW No.4-Bhaguji, it is revealed that PW No.4-Bhaguji with another witness Kachru who is not examined, went to the spot by one motorcycle where he had seen both the Accused while assaulting Samadhan and Accused No.1 – Pandarinath was armed with sickle. He has nowhere stated about the role played by this Appellant-Accused No.2. He has simply stated that Ramesh and Pandarinath – Accused Nos.1 & 2 were assaulting to Samadhan which is found to be an improvement. According to PW No.4 – Bhaguji, he has disclosed to PW No.1-Motiram on phone that both the accused assaulted to

Samadhan but PW No.1 Motiram has stated during his evidence that PW No.4-Bhaguji has stated about assault on Samadhan by Accused No.1 - Pandarinath. Therefore, it is clear that evidence of PW No.1 and PW No.4 – Bhaguji is found to be inconsistent about the name and role of this Appellant-Accused No.2. Secondly, the above referred version is found to be a material contradiction between PW No.4-Bhaguji and PW No.1 – Motiram.

26. On careful scrutiny of PW No.4-Bhaguji Bodke who is eye witness to the incident nowhere speaks about sharing of common intention by both the accused and positive role played by this Appellant-Accused No.2 in the commission of crime.

27. In view of the above quality of evidence of PW No.4-Bhaguji, it is very much difficult to accept about the role allegedly played by this Appellant-Accused No.2 by sharing common intention.

28. Now coming to PW No.5 – Ganesh Bodke vide Exhibit 30 who is another eye witness. On careful assessment of this eye witness, we noticed that his evidence is found to be unnatural. According to PW No.5 – Ganesh, he had seen both the accused while assaulting Samadhan. Even then he did not intervene and went to Bhaguji – PW No.4 and thereafter he came back to spot alongwith PW No.4 –

Bhaguji. It seems to be an unnatural behaviour and conduct of PW No.5-Ganesh. Moreover, he has nowhere described what role this Appellant-Accused No.2 had played in the commission of crime. He simply stated that he has seen both the accused while assaulting Samadhan, a vague nature of a statement. The evidence of this eye witness is also not corroborated fully by PW No.1 – Motiram and PW No.4 – Bhaguji.

29. PW No.4 Bhaguji and PW No.5 Ganesh who are stated to be the eye witnesses are not categorical about role of this Appellant-Accused No.2. Neither PW No.4-Bhaguji nor PW No.5-Ganesh stated that Accused No.1-Pandarinath made attack on Samadhan by means of sickle and this Appellant-Accused Ramesh was holding him and thereby taken active part in the commission of crime. There is no indication of sharing of common intention by both the accused while committing murder of Samadhan.

30. In view of the above quality of evidence of both eye witnesses, a crucial point is about sharing of common intention by this Appellant-Accused. The Prosecution has taken aid of Section 34 of IPC against this Appellant-Accused No.2 for joint liability of criminal act. The essence of law under Section 34 is conscious mind of persons participating in the criminal action to bring about a particular result.

Under Section 34 of the IPC, 1860 pre-concert in the sense of a distinct previous plan is not necessary to be proved. The dominant feature of Section 34 is the element of intention and participation in action. The participation need not in all cases be by physical presence. It is the essence of Section 34 of the IPC, that a person must be physically present at the actual commission of the crime. To attract Section 34 of the IPC, it is well settled that a common intention pre-supposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act have been done in furtherance of common intention of them all.

31. A bare reading of Section 34 reveals that the Section could be dissected as follows:

- (a) Criminal act is done by several persons;
- (b) Such act is done in furtherance of the common intention of all; and
- (c) Each of such persons is liable for that act in the same manner as if it were done by him alone.

32. Section 34 is intended to meet the situation wherein all the co-accused have also done something to constitute the commission of a criminal act.

33. Having regard to the provisions of Section 34 of IPC which provides joint liability in a criminal act; a useful reference can be made to the citation of the Apex Court in the case of ***Dharam Pal & Ors. v. State of Haryana***¹ wherein the Apex Court has held as under:

“ It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf. A Criminal Court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or

1 AIR 1978 Supreme Court 1492

otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. The common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan e.g. during the progress of an attack on the person who is intended to be beaten but the evidence in that behalf should be clear and cogent for suspicion, however, strong, cannot take place of the proof which is essential to bring home the offence to the accused.”

34. We may refer to another citation of the Hon’ble Supreme Court in the case of *Dajya Moshya Bhil & others v/s. State of Maharashtra*² wherein it is held as under:

“Let it be made clear here that in order to attract

2 AIR 1984 Supreme Court 1717

Section 34 it is not sufficient to prove that each of the participating culprits had the same intention to commit a certain act. What is the requisite ingredient of Section 34 is that each must share the intention of the other.”

35. In view of the above referred legal framework, if evidence of two eye witnesses; PW No.4-Bhaguji and PW No.5- Ganesh is examined, it would clearly indicate that there is no sufficient evidence focusing light on the sharing of common intention by this Appellant-Accused No.2. The learned Additional Sessions Judge has convicted this Appellant-Accused No.2 by taking aid of Section 34 of IPC which is found to be an erroneous approach in the backdrop of evidence of two eye witnesses.

36. There is one more aspect which needs attention. On going through the evidence of PW No.13 – Kishor More, Investigation Officer, it revealed that Kachru was the first person who had witnessed the incident and in turn intimated to Bhaguji that Samadhan was lying near the tower. The statement of Kachru recorded by the Investigation Officer under Section 161 of the Cr. P.C. is on record but the prosecution has not examined this important witness Kachru who was the first person to witness the incident. No reason is coming forth from the prosecution side as to why said important witness is not examined.

The link would certainly may not be complete regarding communication of incident. Kachru was the first witness to witness the incident who in turn intimated the incident to Bhaguji and in response Bhaguji and Ganesh arrived to the scene of offence. The important pillar of the link is collapsed since this star witness Kacharu is not examined.

37. The only incriminating evidence against this Appellant-Accused No.2 is the C.A. Report vide Exhibit 86. The C.A. report indicates that shirt seized from this Appellant-Accused No.2 found with blood stains of blood Group 'B' which is blood group of deceased. It is material to note that shirt of this Appellant came to be seized on 13th September 2012 in presence of two panch witnesses. The prosecution has examined one of the panch witnesses to that effect who is PW No.8 Kailas Shinde vide Exhibit 37 who has turned hostile and not supported to the prosecution case. Another panch witness is not examined. Said seizure of clothes of Accused Nos.1 & 2 seems to have been exhibited at the hands of the Investigation Officer. In this background, it may not be safe to rely upon seizure of clothes of Accused and Secondly when there was delay in sending the seized Muddemal articles/shirt to the C.A.. Even carrier who carried this seized articles to the C.A., is not examined by the prosecution agency. It is also interesting to note that said incriminating evidence in the

nature of C.A. Report is even not put to the Appellant-Accused No.2 while recording his statement under Section 313 of Cr.P.C.. Certainly, that piece of evidence cannot be used against the Appellant-Accused No.2 though it is in the nature of expert evidence. The object of Section 313 of Cr.P.C. is to give an opportunity to the accused to explain any circumstance against him in the evidence. In case of ***Harijan Megha Jesha V/s. State of Gujrat***³, it is held by the Hon'ble Supreme Court that when circumstance against the accused is not put to him under Section 313 of Cr. P.C., prosecution cannot be permitted to rely on that circumstance.

38. Having regard to the above reasons and discussion, we arrived at conclusion that the prosecution agency has failed to prove the charge of murder against the Appellant-Accused No.2 beyond reasonable doubt. The presence of this Appellant-Accused No.2 at crime scene is not proved beyond doubt. It is also not proved by the Prosecution that this Appellant-Accused No.2 has shared the common intention with Accused No.1 Pandarinath and after pre-concert and plan had committed murder of Samadhan Bodke. In this background, the Appellant-Accused No.2 is liable to be acquitted by giving him benefit of doubt. The Appeal is liable to be allowed in following terms:

3 AIR 1979 SC 1566

ORDER

- (i) The Appeal stands allowed.
- (ii) The impugned judgment and order of conviction passed by the Adhoc District Judge-3 and Additional Sessions Judge, Nashik in S.C. No.271 of 2012 dated 3rd October 2013 is hereby quashed and set aside.
- (iii) The Appellant-Accused No.2 Ramesh Waman Bodke is hereby acquitted for the charge of offence of murder punishable under Section 302 r/w Section 34 of IPC and he is set at liberty.
- iv) The Appellant-Accused No.2 shall furnish PR Bond of Rs.15,000/- with one solvent surety of the like amount so as to appear before the Higher Court as and when such Court issues notice in respect of any Appeal or Petition filed against the Judgment of this Court and such Bail Bonds shall remain in force for six months, in view of Section 437 A of the Code of Criminal Procedure Code, 1973.
- (v) The Registry to take necessary steps accordingly.

(vi) R & P be sent back to the concerned Sessions Court.

(vii) The Appeal is accordingly disposed of.

(viii) The Secretary, High Court Legal Services Committee, Mumbai is hereby directed to make payment of professional fees of Mr. Shantanu Phanse, who is on the panel of Legal Aid Advocates, according to the rules.

(SHRIKANT D. KULKARNI, J) (PRASANNA B. VARALE, J)

L.S. Panjwani, P.S.