

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.354/2018

Suraj s/o Madhukarrao Tayade,
Aged about 25 years, Occ. Labour,
r/o Sanjay Gandhi Nagar No.2,
Amravati, Tq. Dist. Amravati. **.....APPELLANT**

...V E R S U S...

The State of Maharashtra,
through the Police Station Officer,
Police Station, Frezarpura, Amravati,
Tq. Dist. Amravati. **...RESPONDENT**

Mr. P. R. Agrawal, Advocate for appellant.
Mr. S. S. Doifode, A.P.P. for respondent.

CORAM:- ROHIT B. DEO & ANIL L. PANSARE, JJ.
DATED :- 05.09.2022

ORAL JUDGMENT (Per: Anil L. Pansare, J.)

The present appeal assails the judgment and order dated 27.04.2018 passed by Additional Sessions Judge, Amravati in Sessions Trial No.133/2015, thereby convicting the appellant-Suraj Tayade, who was accused no.1 therein, for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code (IPC) and sentencing

him to undergo rigorous imprisonment for life and to pay a fine of Rs.2000/-. In default of payment of fine, the appellant is further directed to suffer simple imprisonment of six months.

2. The facts necessary to decide the appeal thus:

The incident has occurred on 05.04.2015. The informant is wife of the deceased namely Ravicharan Patil. According to the informant at about 01:30 p.m., her husband was talking with his friend namely; Ganesh Rangari. At that time, someone made a phone call to her husband and was abusing him. Thereafter her husband went out of his house along with Ganesh Rangari. Her husband was called towards graveyard situated near his house. She suspected the activities and therefore went towards the graveyard. She viewed through the broken gate of the graveyard, an ongoing quarrel at the middle portion of the graveyard. She rushed there and saw that the appellant and his associate namely; Sagar Bhagwan Kore were beating her husband with fist and blows. Her husband fell down. At that time the accused Sagar lifted big stone of cement concrete lying nearby and hit

her husband on head. Her husband sustained head injuries and died on the spot.

3. The informant has also complained before the police that prior to eight days of the incident, there was a quarrel between the accused Sagar and her husband on monetary transaction and hence on 05.04.2015, the appellant and accused Sagar have committed murder of her husband Ravicharan Patil.

4. On the basis of the aforesaid information, the Police Station Officer, Frezarpura, Amravati has registered an offence against the appellant and co-accused Sagar vide Crime No.122/2015 for the offence punishable under Section 302 read with Section 34 of the IPC. The investigating officer has then collected the evidence and filed charge-sheet.

5. The case was committed to the Sessions Court as the offence punishable under Section 302 of the IPC is triable exclusively by the Court of Sessions. The charges were framed. Both the accused i.e. the appellant and Sagar did not plead guilty. The prosecution examined six witnesses to

bring home the guilt of the accused persons. The defence of the accused is of total denial and false implication. The learned Additional Sessions Judge, having examined the material placed before him in the form of evidence and the documents, held that both the accused i.e. appellant and co-accused-Sagar were guilty of offence punishable under Section 302 read with Section 34 of the IPC.

6. The appellant has challenged the impugned judgment. The grounds of challenge are that the prosecution has examined only one eye witness though several others were allegedly present, the evidence has not been properly appreciated, the sole witness is the wife of deceased and is thus an interested witness, the common intention has not been proved and that the appellant's role has not been properly appreciated.

7. We have gone through the impugned judgment and the evidence led before the trial Court. We have heard both the sides and also have gone through the documents exhibited before the trial Court. We will refer to the

arguments, evidence and documents, etc. to the extent necessary to decide the following points that arise for our consideration. We have recorded our finding thereon for the reasons to follow.

Sr. No	Points	Findings
(i)	Whether the prosecution has proved that the deceased Ravicharan has suffered homicidal death on 05.04.2015?	In the affirmative.
(ii)	Whether the prosecution has proved that on 05.04.2015 at graveyard on by-pass road Amravati, the appellant has shared the common intention with the co-accused Sagar and committed murder of Ravicharan Patil?	In the negative.
(iii)	Whether the prosecution has proved that on 05.04.2015, the appellant has committed any other offence?	The appellant has committed offence punishable under Section 323 of the IPC.
(iv)	What order?	As per final order.

AS TO POINT NOS. (i) to (iii):

8. All the points, being interlinked, are decided by common reasoning.

On the point of culpable homicide, there is no dispute that the deceased Ravicharan suffered homicidal death. It is nobody's case that he has committed suicide or that he met with fatal accident. Even otherwise, the evidence of Padma (PW1) would indicate that the appellant and co-accused Sagar were beating Ravicharan by fist and blows. The co-accused picked up cement concrete stone and hit Ravicharan on his head. The post mortem report, Exh.-47 indicates that there were ten injuries sustained by the deceased Ravicharan. Out of ten injuries, three injuries were on his head. They are:

(i) Depressed fracture both frontal, both parietal, extending towards both temporal region. (ii) Lacerated wound 10 X 6 inch, posterior 1/3rd of both parietal region with fractured (displaced) both parietal bone with brain matter coming out horizontal.

(iii) Lacerated wound oblique 6 X 5 cm. in occipital region with occipital bone fractured (displaced) with brain matter coming out. This lacerated wound communicating with above said injury no.2 as lacerated wound.

The cause of death is shown as "Head Injury".

9. Dr. Rajesh Ingale (PW3), who has conducted post mortem has deposed that there were ten surface injuries so also the internal injuries which were sufficient to cause death of the deceased. The above evidence, in our view, is sufficient to prove that the deceased suffered homicidal death.

10. The question involved in the present appeal is whether the appellant and co-accused Sagar, had common intention to cause death of Ravicharan.

11. The ocular evidence is only in the form of PW1. She has deposed that on 05.04.2015 at about 1.30 p.m., her husband received mobile call from someone. At that time, one Ganesh Rangari, was present at home. However, said Ganesh whose statement under Section 164 of the Code of Criminal Procedure was recorded, could not be examined as he was reported dead. The person calling was abusing Ravicharan. PW1 asked Ravicharan as to who called him. He replied that the caller was his friend. Thereafter Ravicharan and Ganesh went towards the graveyard. She

followed them but after about 15 minutes. She saw appellant and co-accused beating Ravicharan by means of fist and blows. At that time, co-accused picked up a concrete stone and gave a blow on his head, he died on the spot. The appellant and co-accused then ran away.

12. Learned counsel for the appellant has argued, and rightly so, that the role attributed to the appellant is distinct than that of the co-accused, particularly to gather the element of common intention. It is so because, the case of the prosecution, on the point of enmity of Ravicharan is only against co-accused and not against the appellant. The ocular evidence shows that the appellant and co-accused were beating Ravicharan by means of fist and blows. The appellant is not party to the subsequent event when co-accused picked up a concrete stone and gave a blow on the head of Ravicharan. It is not the evidence of PW1 that appellant or co-accused had called Ravicharan towards the graveyard. She has not deposed, as has not witnessed, about the trigger point of quarrel. There is nothing on record in the form of evidence or otherwise that the appellant has

participated, in any manner, in the action of co-accused giving blow of concrete stone on the head of Ravicharan. The evidence of sole witness does not indicate that there was meeting of minds of the two accused at any point of time viz. prior to, during or post incident. The evidence does not indicate that the ultimate act has been done in furtherance of common intention between the two accused. There is no evidence that appellant and co-accused have come to graveyard with predetermined ideas, as none of the accused carried with them any weapon. The conduct of the appellant is, thus, not supporting the theory of prosecution on common intention.

13. It will be apt to go through the authoritative pronouncement of the Hon'ble Supreme Court in **Suresh and anr. Vs. State of Utter Pradesh**¹ on the question of common intention, the Hon'ble Supreme Court has observed thus:

“38. Section 34 of the Penal Code, 1860 recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention.

¹ (2001) 3 SCC 673

It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting [Section 34](#) of the Penal Code, 1860 (hereinafter referred to as “the Code”) is the element of participation in absence resulting in the ultimate “criminal act”. The “act” referred to in the later part of [Section 34](#) means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

40. *Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word “act” used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *Satrughan Patar v. Emperor* held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.”*

14. Thus, there has to be unity of criminal behaviour to commit the ultimate act. As stated earlier, there is nothing in the evidence of PW1 to indicate that the appellant has played

any role in the fatal blow inflicted by co-accused on the head of Ravicharan.

15. In the aforesaid facts and circumstances, the appellant could only be said to have inflicted fist and blows to the deceased. None of those blows were said to be on the head of Ravicharan. As stated earlier, Dr. Ingale (PW3) has opined that the cause of death is, "Head Injury". The element of common intention is completely absent in the present case. There is no ocular evidence except for PW1. The prosecution ought to have collected additional ocular evidence to have clarity on the point of common intention, since the evidence of PW1 clearly indicates that many people had gathered on the spot. Nonetheless, that itself would not render the evidence of PW1 untrustworthy though her evidence will have to be scrutinized cautiously, being sole eye witness to the incident, which we have done.

16. The other witnesses and their evidence is not relevant on this point. PW2 Pravin is a pancha witness to the spot. PW5 Roshan Shirsat is the one who has received

information and has carried out investigation. He reached the spot and saw that one body was lying down in the injured condition. PW1 identified the said body to be of her husband. He seized concrete stone with blood lying nearby the body. He then prepared the spot-cum-seizure panchanama. He has obtained post mortem report and after completing the investigation, has filed the charge-sheet. PW4 Shishir Mankar is Police Inspector who has arrested the appellant and co-accused and prepared various panchanamas, seized concrete stone, etc. He sent the weapon of incident i.e. concrete stone to the medical officer for opinion and has also sent the seized articles to the chemical analyzer. The report of chemical analyzer is at Exh.-58.

17. Thus, except for the evidence of PW1, the evidence of other witnesses is not relevant to decide as to whether ingredients of Section 34 of the IPC are proved. So far as the evidence of PW1 is concerned, as already discussed, the evidence is not sufficient to bring home the guilt of the appellant under Section 302 of the IPC, taking aid of Section 34 of the IPC. The learned trial Court has not considered as

to how the ingredients of Section 34 will be attracted in the given set of facts. The learned trial Court has on the basis of the evidence of PW1, jumped to the conclusion that the deceased was attacked by the two accused and therefore they are guilty under Section 302 read with Section 34 of the IPC. The trial Court ought to have examined the role played by each accused, which admittedly, is distinct and separable. The learned Judge ought to have justified, by reasons, as to how Section 34 of the IPC would be attracted.

18. We have already discussed supra as to how the prosecution failed to prove the case of common intention. The learned trial Court, therefore, committed an error in analyzing the evidence. It is well settled that in the cases where minimum punishment for the offence is life imprisonment, the burden of proof on the prosecution is of a highest degree. Merely because the appellant has beaten the deceased by fist and blows and merely because he was present with the co-accused, the common intention to commit murder of Ravicharan could not be attributed to the appellant.

19. The evidence of PW1 against the appellant, would only spell out the ingredients of Section 323 of the IPC. The evidence shows that the appellant has inflicted fist and blows to Ravicharan and therefore to that extent he is guilty. The punishment for the offence under Section 323 of the IPC is one year's imprisonment and/or with fine which may extend to one thousand rupees, or with both. We, accordingly, sentence the appellant to undergo simple imprisonment for one year and to pay a fine of Rs.1,000/-.

20. Learned counsel for the appellant submits that the appellant was in jail for more than one year. If that be so, the appellant will get benefit of in terms of Section 428 of the Code of Criminal Procedure.

21. In view of the above, we record our finding to the point no.(i) in the affirmative, point no.(ii) in the negative, point no.(iii) in the affirmative to the extent that the appellant is guilty of committing offence punishable under Section 323 of the IPC. Hence, we proceed to pass the following order.

ORDER

(i) The appeal is partly allowed.

(ii) Judgment and order of conviction dated 27.04.2018 passed by learned Additional Sessions Judge, Amravati in Sessions Trial No.133/2015, thereby convicting appellant for an offence punishable under Section 302 read with Section 34 of the IPC is hereby set aside. Instead, the appellant is convicted for the offence punishable under Section 323 of the IPC.

(iii) The appellant is sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.1000/-. In default of payment of fine, the appellant shall undergo simple imprisonment for one month.

(iv) The appellant shall be entitled to set off under Section 428 of the Code of Criminal Procedure and accordingly, it shall be given to him for the period for which he has undergone the jail sentence.

(Anil L. Pansare, J.)

(Rohit B. Deo, J.)

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