

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

CRIMINAL APPEAL 377 OF 2018

Sagar Bhagwan Kore,
aged 22 yrs, Occ. Labour,
r/o.Sanjay Gandhi Nagar No.2,
Amravati, Tahsil & District Amravati.

.....APPELLANT

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

The State of Maharashtra,
through the Police Station Officer,
Police Station, Frezarpura, Amravati,
Tahsil & District Amravati.

...RESPONDENT

Mr. Ankit Ambatkar, counsel for appellant.
Mr. S. S. Doifode, APP for respondent/State.

CORAM:- ROHIT B. DEO & ANIL L. PANSARE, JJ.
DATED :- 08.09.2022

ORAL JUDGMENT (Per: Rohit B. Deo, J.)

The present appeal assails the judgment and order dated 27.04.2018 passed by Additional Sessions Judge, Amravati in Sessions Trial 133/2015, thereby convicting the appellant – Sagar Kore, who was accused 2 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 are thus:

The incident has occurred on 05.04.2015. The informant is the wife of the deceased namely Ravicharan Patil. According to the informant at about 01:30 p.m., her husband was talking with his friend 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 something wrong 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; Suraj Tayade were beating her husband with fist and blows. Her husband fell down. At that time the accused Suraj 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 stated before the police that prior to eight days of the incident, there was a quarrel between the appellant and her husband on monetary transaction and hence on 05.04.2015, the appellant and accused Suraj Tayade have committed murder of her husband Ravicharan Patil.

4. On the basis of the aforesaid information, the Police Station Officer, Frezarpura, Amravati registered an offence against the appellant and co-accused Suraj vide Crime 122/2015 for the offence punishable under Section 302 read with Section 34 of the IPC. The investigating officer 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 Suraj 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-Suraj 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 Suraj 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 304-II 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 Suraj were beating Ravicharan by fist and blows. The appellant Sagar 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 Suraj, 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, the appellant 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. 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.

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. 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

1 (2001) 3 SCC 673

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 Satrugan 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 learned Sessions Judge has considered the evidence threadbare. The learned Sessions Judge observes that the evidence of PW 1 who is the widow of the deceased and who is examined as the sole eye-witness to the incident will have to be tested with caution. Having so observed, the learned Sessions Judge has found the testimony of PW 1 confidence inspiring. We have no reason to take a different view. The core of the testimony of PW 1 that she saw the incident and the beating which the accused administered to her husband, is not shaken. The report is lodged with reasonable promptitude. The defence has not succeeded in creating any doubt as regards the testimony of PW 1 by bringing on record any embellishments. The witness has further deposed that the appellant Sagar picked up a stone and thrown it on the head of the victim.

17. The ocular account of the eye-witness finds corroboration in Chemical Analysis Report Exh. 18 which discloses that human blood was detected on the clothes, chappals and sandles seized from the accused. It is true that the blood group of the appellant and the deceased is the same. However, there is no explanation whatsoever forthcoming from the accused – appellant as regards the presence of human blood on the articles seized from him. We further find no infirmity in the finding recorded by the learned Sessions Judge that notwithstanding that the panch witnesses are not examined, the seizure is proved by PW 4 Police Inspector Mr. Shirish Mankar inasmuch as in his cross-examination, nothing is brought on record to doubt the credibility of the witness.

18. Coming to the conviction recorded under Section 302 of the IPC, the act of picking up the stone lying on the ground and throwing the same on the head of the accused appears to have been done in the midst of physical

altercation. In this view of the matter, we are inclined to modify the conviction under Section 302 to Section 304-II of the IPC.

19. The appeal is partly allowed.

20. Judgment and order of conviction dated 27.4.2018 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 304-II of the IPC and on that count, the sentence of the appellant shall be 07 years, 05 months and 03 days imprisonment which is already undergone by the appellant.

21. The appellant, who is in jail, shall be released forthwith, if not required in any other case.

(Anil L. Pansare, J.)

belkhede

Digitally Signed By:BELKHEDE
RAVINDRA SURESHRAO
P.A. to the Hon'ble Judge
Signing Date:18.07.2023 11:13

(Rohit B. Deo, J.)