

A SANJAY PURAN BAGDE & ANR.

v.

THE STATE OF MAHARASHTRA

B (Criminal Appeal No. 143 of 2020)

JULY 28, 2022

[SANJAY KISHAN KAUL AND M.M. SUNDRESH, JJ.]

Penal Code, 1860 – s.302 r/w s.34 – Murder – Common

- C *intention – On the fateful night at about 3 a.m., the victim and his wife (eye witness) woke up and while the wife was doing preparations for cooking, the husband went to attend to the nature's call – Wife heard his shouts, when she ran to the site she saw two accused assaulting her husband with an axe whereas the appellants had caught hold of him – She found him bleeding, he also told her that four of them had caught hold of him and assaulted him by an axe – He was taken to hospital, was declared brought dead – Appellants were acquitted by trial court noticing that the role attributed to them was of catching the victim without actual participation or use of weapon to assault and inflict injuries, other two accused were*
- E *convicted – High Court dismissed the appeal of the convicted accused, while the acquittal of appellants was reversed – SLP filed by the two accused who used the axe was dismissed – Held: Concurrently both the Courts have held that the witnesses were reliable, more so the wife of the deceased – There is no quibble with the manner in which the incident occurred or the identifying of all*
- F *the accused – The very presence of all the accused at 3.30 in the morning at the site with two of them holding an axe clearly shows that there can be no doubt about a common intention in behalf of what they were proposing to do – It was not an axe picked up at the site – Two of the accused were carrying the axes – It is not a sudden*
- G *incident which had occurred – The premeditated intention was clear – Even at the site, the intentions had never changed as the appellants were holding the deceased while the other two attacked – The fact that only two of them used the axe while the other were two holding the deceased to ensure appropriate injuries being inflicted on the*

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*deceased would give no remission to the case of the appellants – A
No fault in High Court reversing the acquittal.*

Penal Code, 1860 – s.34 – Scope of – Common intention – Evidence – Held: s.34 creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one, into others, in pursuance to a common intention – This would require the quality of evidence to be substantial, concrete, definite and clear. B

Penal Code, 1860 – s.34 – Common intention – Principle of constructive liability – Held: Dominant feature of s.34 is an element of intention and participation in action – This participation need not in all cases even be physical presence but a common intention – There has to be a simultaneous consensus of minds of the persons participating in the criminal action to bring about a particular result – That intention can be formed at any time – s.34 does not create any distinct offence but it lays down the principle of constructive liability stipulating that the act must be done in furtherance of the common intention. C D

Jasdeep Singh Alias Jassu v. State of Punjab (2022) 2 SCC 545 : 2022 (1) JT 96; Virendra Singh v. State of Madhya Pradesh (2010) 8 SCC 407 : [2010] 9 SCR 772 – relied on. E

Case Law Reference

(2022) 2 SCC 545	relied on	Para 11
[2010] 9 SCR 772	relied on	Para 11 F

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 143 of 2020.

From the Judgment and Order dated 05.02.2019 of the High Court of Judicature at Bombay, Nagpur Bench in Crl. Appeal No. 363 of 2018. G

Akash Kakade, Somanatha Padhan, Swetab Kumar, Ashok Anand, Rakesh Kr. Singh, Bipin Bihari Singh, Advs. for the Appellants.

Rahul Chitnis, Sachin Patil, Aaditya A. Pande, Geo Joseph, Ms. Shwetal Shepal, Advs. for the Respondent. H

- A The Judgment of the Court was delivered by
SANJAY KISHAN KAUL, J.
- B 1. On the fateful night intervening 2nd and 3rd November, 2015 at about 3 a.m. the deceased Vilas Babusa Gawande and his wife Sau. Anita Vilas Gawande woke up and while the wife was doing preparations for cooking, the husband went to attend to the nature's call. The wife (PW-6) heard shouts of the husband that four persons were assaulting him and when she ran to the spot she saw two of them, Manoj Puran Badge and Puran Sakharam Bagde assaulting the husband with an axe and whereas the appellants before us Sanjay Puran Bagde and Rajratna
- C @ Nandu Bagde had caught hold of him. On her creating a noise loudly, all of them ran away. She found her husband bleeding who also told her that four of them had caught hold of him and assaulted him by means of an axe. She gave some water to the husband on his asking and then went to the house of the neighbours who carried the husband into the house and then by an auto he was carried to the hospital where he was declared to be dead.
- D 2. The stated reason for the assault is alleged to be an evil eye kept on the wife of Manoj Puran Bagde by the deceased. The statement of PW-6 was recorded under Section 161 Cr.P.C. and subsequently under Section 164 Cr.P.C. We may say at the threshold itself that though the learned counsel for the appellant endeavoured to persuade us, we found no glaring inconsistency between the two statements.
- E 3. The FIR No.79/2015 dated 03.11.2015 was registered and in pursuance to the investigation charge sheet was filed. All the four accused were charged with the offence of Section 302, IPC read with Section 34
- F IPC. On trial being completed, the learned Additional Sessions Judge, Akot, District Akola by a judgment dated 14.09.2017 convicted the first two accused while acquitting the two appellants.
- G 4. A scrutiny of the trial Court' order would show that the testimony of PW-6 was found to be reliable who was the only eye witness. In fact the whole judgment goes into the defences raised by the accused and rejects all of them. However, towards the end of the judgment, in para 46 while referring to some judicial precedents, it was noticed that the role attributed to the appellants was of catching the victim without actual participation or use of weapon to assault and inflict the injuries. In that sense, it has been stated that as that was the only role, it could not be
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said that there was a shared common intention along with the first two accused to cause death. A

5. On appeal being preferred by the two accused convicted, as well as the State against acquittal of the appellants, the High Court, in terms of the impugned judgment dated 05.02.2019, dismissed the appeal of the convicted accused while allowing the appeal of the State against B
acquittal of the two appellants.

6. The High Court has found the approach of the trial Court unacceptable, while appreciating that the parties had been roped in with the aid of Section 34 IPC. In that behalf, it has been observed that the essence of the liability is existence of common intention and the participation in commission of offence in furtherance of common intention. On the basis of the evidence discussed by the trial Court with which the High Court agreed, it was found that firstly, there were estranged relationship between the accused (all of whom are relatives) and the deceased about a prior incident and the common intention of the accused is established by the presence of all four accused on the spot in the night/early morning, armed with dangerous weapons, even if the actual attack was made by the other two while the appellants held on to the deceased. C

7. The appellants have thus, preferred Special Leave Petition and leave was granted to examine the case. The Special Leave Petition preferred by the two accused who used the axe was dismissed on 20.01.2020 while notice had been issued in the Special Leave Petition of the appellants. D

8. We have heard learned counsel for parties. E

9. In our view, the case falls within the limited contour as concurrently both Courts have appreciated evidence to hold that the witnesses were reliable, more so, PW-6, the wife of the deceased who was an eye witness and also related what the deceased stated to her. By the time the deceased was taken to the hospital, he was declared brought dead. Thus, there would be no case of recording of any dying declaration. F

10. Learned counsel for the appellant did make a valiant endeavour to persuade us to look into the entire ambit of the evidence but then that would not be appropriate. Suffice to say that both the Courts below as well as us, on a reading of the judgment, find that there is really no G
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- A quibble with the manner in which the incident occurred or the identifying of all the accused. The only question which arises is whether by reason of the appellants only holding the deceased while the other two attacked the deceased, can it be said that there was no shared common intention between all the accused.
- B 11. In a recent judgment of ours in *Jasdeep Singh Alias Jassu v. State of Punjab – (2022) 2 SCC 545*, the ambit and discussion of scope of Section 34, IPC has been examined in the context of the earlier judgments. It has been emphasized that Section 34 of the IPC creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one, into others, in pursuance to a common intention. This would of course require the quality of evidence to be substantial, concrete, definite and clear. What is required is a common intention. We referred to the earlier judicial pronouncements including in the case of *Virendra Singh v. State of Madhya Pradesh - (2010) 8 SCC 407*, to opine, taking a clue from the said judgment, that the dominant feature of Section 34 is an element of intention and participation in action. This participation need not in all cases even be physical presence but a common intention. There has to be a simultaneous consensus of minds of the persons participating in the criminal action to bring about a particular result. That intention can be formed at any time. Section 34, IPC does not create any distinct offence but it lays down the principle of constructive liability stipulating that the act must be done in furtherance of the common intention.
- C 12. In the conspectus of the aforesaid legal position, if we examine the facts of the present case, the very presence at 3.30 in the morning of all the accused at the house of the appellant with two of them holding an axe clearly shows that there can be no doubt about a common intention in behalf of what they were proposing to do. It was not an axe picked up at the site. Two of the accused were carrying the axes. It is not a sudden incident which has occurred. The pre-meditated intention was thus, clear. Even at the site, the intentions had never changed as the appellants were holding the deceased while the other two attacked. The fact that only two of them were using the axe while the other were two holding the deceased to ensure appropriate injuries being inflicted on the deceased would give no remission to the case of the appellants.
- D 13. In view of the aforesaid reasons, we cannot really fault the conclusion arrived at by the High Court in reversing the acquittal by the

trial Court on what may be stated as the erroneous principle of law A followed by the trial Court.

14. The appeal is accordingly dismissed leaving parties to bear their own costs.

Divya Pandey
(Assisted by : Deepak Panwar, LCRA)

Appeal dismissed.