

A SURESH SAKHARAM NANGARE
v.
THE STATE OF MAHARASHTRA
(Criminal Appeal No. 1606 of 2008)

B SEPTEMBER 21, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

PENAL CODE, 1860:

C *ss.302/34 and 201/34 - A-1 alongwith A-2 and A-3 stated to have committed the murder of his younger brother by setting him on fire - A-2 turned approver - Trial court convicting A-1 and A-3 - Appeal by A-3 only - Conviction and sentence of life imprisonment affirmed by High Court -- Held:*
D *Except the evidence of approver, there is nothing on record to inculcate the appellant - Even if the evidence of approver is accepted, the role attributed to appellant is that he caught hold of the legs of the deceased as directed by A-1, after the latter had finished his work of assaulting the deceased - Besides, the doctor, who conducted the post mortem, opined that the death occurred due to 100% burns and not because of assault - This categorical evidence makes it clear that the appellant had nothing to do with the same since the evidence brought in shows that it was A-1 who took the deceased to the other room where he burnt him to death - This important aspect has not been considered by trial court as well as by High Court - Prosecution failed to establish the guilt insofar as appellant is concerned - Both the courts below committed an error in convicting him u/ss 302 and 201 read with s.34 of IPC and sentencing him to imprisonment for life -*
E *Accordingly, both the orders are set aside, and appellant is acquitted.*

s. 34 - Common intention - Explained.

The appellant (original A-3) was charged alongwith original A-1 for committing the murder of latter's younger brother. The prosecution case was that A-1 was addicted to ganja and liquor and used to ill-treat his wife (PW-2) and other members of the family including the deceased because of which all the family members except A-1 shifted to a different locality. The deceased, who was suffering from deformity and loss of speech used to intervene whenever A-1 assaulted his wife and children, and due to this, A-1 wanted to get rid of the deceased. On 2.3.1995, A-1 came to his other brother (PW-1) and took the deceased to his house on the pretext of performing 'pooja'. On 3.3.1995 between 10.30 A.M. and 11.00 P.M., PW-1 was informed that his younger brother had expired of burn injuries. PW-1 lodged an FIR against A-1. After investigation, the police filed charge-sheet against three accused, namely, A-1, A-2 and A-3. During the trial A-2 turned approver and was examined as PW 7. The trial court convicted A-1 and A-3 u/ss 302/34 and 201/34 and sentenced both of them to imprisonment for life. A-3 filed an appeal which was dismissed by the High Court.

Allowing the appeal filed by A-3, the Court

HELD: 1.1 The first witness examined by the prosecution was PW-1, who deposed that A-3 and A-2 came to his house and told him that the deceased had committed suicide by setting himself on fire. This deposition of PW-1 shows that he has not implicated the appellant (A-3) in the crime. PW-2, the wife of A-1 narrated about the conduct of her husband as well as the disability of the deceased. According to her, the deceased was unable to speak and both his hands were disabled and he had flexed fingers. She also explained about the habits of her husband (A-1) and complained

A that he was addicted to Ganja and liquor and used to beat
her and her children because of which she used to go
to her parents house. In the entire evidence, she has not
implicated the appellant. PW-3 and PW-4, the neighbours,
though explained about the conduct and character of A-
B 1 and his brother, there is not even a whisper about the
role of the appellant in the commission of the crime. [para
8-10] [1194-F-G; 1195-B-F]

1.2 The only person, who named the appellant is PW-
C 5, who was also residing next to the house of A-1. She
deposed that she knew all the accused persons. On the
day of incident, at about 07:45 p.m., she noticed the
appellant coming out of the house of A-1 in a frightened
state. She identified the appellant in the court. She further
D deposed that she heard the shouts of A-1 that the
deceased had set himself on fire. Thus, a perusal of the
evidence of PW-5 shows that at the time of occurrence,
the appellant was coming out of the house of A-1 in a
frightened state of mind. She has not stated anything
further. [para 11-12] [1195-G-H; 1196-A-D]

E 1.3 The only evidence, based on which the appellant
was convicted with the aid of s. 34 IPC, is of approver
(PW-7), who was originally A-2. Even if the evidence of
PW-7 is accepted, the role allotted to the appellant was
F that of only holding the legs of the deceased as directed
by A-1. It should be noted that, according to PW-7, A-1
was sitting on the abdomen of the deceased and was
holding his neck with one hand and was also fisting his
chest with the other hand and after fulfilling the work, at
G the end, he directed the other two accused persons to
catch hold of the legs of the deceased. Beyond this, there
is no role assigned to the appellant. PW-7 further stated
that when the deceased had stopped his movements, A-
1 got down from his abdomen. Thereafter, A-1 told them

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to go out. However, PW-7 did not leave that place and saw A-1 lifting kerosene can and pouring it on the person of the deceased. On seeing this, he rushed to his house. [para 13] [1196-E; 1197-C-F] A

1.4 A reading of s. 34 IPC makes it clear that to apply the section, apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of accused in the commission of an offence. Thus, it requires a pre-arranged plan and pre-supposes prior concert; therefore, there must be prior meeting of minds. This Court is satisfied that there is absolutely no material from the side of the prosecution to show that the appellant had any common intention to eliminate the deceased, who was physically disabled. The only adverse thing against the appellant is that he used to associate with A-1 for smoking Ganja. In the absence of common intention, convicting the appellant with the aid of s.34 IPC cannot be sustained. [para 14-15] [1198-A-C, D-E] B
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1.5 The other important circumstance which is in favour of the appellant is the evidence of the doctor (PW-10) who conducted the post mortem. In his evidence, PW-10 has stated that the injuries on the dead body were 100% superficial to deep burns. In his opinion, the cause of the death was due to 100% burn injuries. He also issued the post mortem certificate which is Ext. 21 wherein he opined that the death occurred due to 100% burns and not because of assault. The categorical evidence and the opinion of PW-10 for the cause of the death of the deceased makes it clear that the appellant has nothing to do with the same since the evidence brought in shows that it was A-1 who took the deceased to the other room where he burnt him to death. This important aspect has not been considered by the trial court as well as by the High Court. [para 16] [1198-F-H; 1199-A-B] E
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A 1.6 On appreciation of the entire material, it is evident
that the appellant had no role in the criminal conspiracy
and no motive to kill the deceased. Therefore, this Court
holds that the prosecution failed to establish the guilt
insofar as the appellant (A-3) is concerned and the trial
B court committed an error in convicting him u/ss 302 and
201 read with s. 34 of IPC and sentencing him to
imprisonment for life, and the High Court has also
erroneously confirmed the said conclusion. Accordingly,
both the orders are set aside, and the appellant is
C acquitted. [para 17-18] [1199-C; G-H; 1200-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1606 of 2008.

D From the Judgment & Order dated 04.08.2006 of the
Hon'ble High Court of Judicature at Bombay in CrI. Appeal No.
865 of 2001.

E Aishwarya Bhati (AC), GP. Capt. Karan Singh Bhati,
Sanjoli Mittal, Karmender Singh, Jyoti Upadhyay, Karan
Sharma for the Appellant.

Sushil Karanjkar, Sanjay Kharde, Asha Gopalan Nair for
the Respondent.

F The Judgment of the Court was delivered by

G **P. SATHASIVAM, J.** 1. This appeal is directed against the
judgment and order dated 04.08.2006 passed by the High
Court of Bombay in Criminal Appeal No. 865 of 2001 whereby
the Division Bench of the High Court confirmed the order of
conviction and sentence dated 15.10.1998 passed by the Court
of Additional Sessions Judge, Greater Bombay in Sessions
Case No. 816 of 1995 against the appellant herein.

2. Brief facts:

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(a) Rajendra Mahadeo Lokhare (PW-1)-the complainant, Kishore Mahadeo Lokhare-(original Accused No. 1) and Sanjay Mahadeo Lokhare @ Sanju (since deceased) are brothers and were residing at Room No. 11, Gangabhaiya Chawl, near K.V.K. High School, Sainath Nagar Road, Ghatkopar (W), Bombay. Suresh Sakharam Nangare-(original Accused No. 3) is the friend of A-1 and Surekha Mahadeo Lokhare (PW-2) is the wife of A-1. A B

(b) Kishore Mahadeo Lokhare (A-1) was addicted to ganja and liquor and used to ill-treat his wife-Surekha (PW-2) and other members of the family including his younger brother-Sanjay Mahadeo Lokhare-the deceased. Due to the said behaviour, all the family members except Kishore Mahadeo Lokhare shifted to Punjab Chawl, Near Tata Fission Pipe Line, Mulund (W), Bombay. Surekha (PW-2) was very loving and affectionate to Sanjay-the deceased and was used to take care of him as a mother as he was suffering from deformity due to typhoid and had also lost his speech. Sanjay was also having love and affection as a son towards Surekha (PW-2) and he used to intervene whenever his elder brother assaulted his wife-Surekha and children. On this account, Kishore developed enmity against Sanjay and wanted to get rid of him. C D E

(c) On 02.03.1995, Kishore Mahadeo Lokhare came to the house of Rajendra Mahadeo Lokhare (PW-1) and persuaded him to send Sanjay to his house at Ghatkopar on the pretext of performing some Pooja. On the same day, in the afternoon, Sanjay left for his elder brother's home informing that he will return the same night but he did not return. On 03.03.1995, at about 09:30 hrs, Rajendra Mahadeo Lokhare (PW-1) visited his elder brother's house in search of Sanjay but he returned after finding that Kishore was present there. F G

(d) On the very same day, i.e., on 03.03.1995, between 10:30 pm. to 11:00 p.m., PW-1 was informed by two residents of Ghatkopar at his residence that his younger brother-Sanjay H

A has expired due to burn injuries. PW-1 lodged an FIR against his elder brother-Kishore Mahadeo Lokhare at Ghatkopar Police Station which was registered as CR No. 76/1995.

B (e) After investigation, the police filed chargesheet against 3 persons, namely, Kishore Mahadeo Lokhare, Shabbir Fariyad Khan and Suresh Sakharam Nangare for their involvement in the death of Sanjay Mahadeo Lokhare. The case was committed to the Court of Sessions and numbered as Sessions Case No. 816 of 1995 and charges were framed against the accused persons under Sections 302 and 201 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC').

D (f) During trial before the Court of Sessions, Shabbir Fariyad Khan turned approver and by impugned judgment and order dated 15.10.1998, the Additional Sessions Judge convicted Kishore Mahadeo Lokhare and Suresh Sakharam Nangare (original accused Nos. 1 and 3 respectively) under Section 302 read with Section 34 of IPC and sentenced them to suffer rigorous imprisonment (RI) for life. The accused persons were also convicted under Section 201 read with Section 34 IPC and sentenced to suffer rigorous imprisonment (RI) for 3 years each alongwith a fine of Rs. 2,000/- each, in default, to further undergo RI for 6 months each and the sentences were to run concurrently.

F (g) Being aggrieved, Suresh Sakharam Nangare preferred Criminal Appeal No. 865 of 2001 before the High Court. By impugned judgment dated 04.08.2006, the Division Bench of the High Court dismissed the appeal and confirmed the conviction and sentence passed by the Additional Sessions Judge, Greater Bombay.

G (h) Aggrieved by the said judgment, the appellant has preferred this appeal by way of special leave before this Court.

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3. Heard Ms. Aishwarya Bhati, learned amicus curiae for the appellant-accused and Mr. Sushil Karanjkar, learned counsel for the respondent-State.

4. Ms. Aishwarya Bhati, learned amicus curiae appearing for the appellant raised the following contentions:

(i) There is no direct evidence showing the complicity of the appellant-accused and he has been convicted on the sole evidence of Shabbir Fariyad Khan (PW-7), the approver, as to his presence and participation in the crime.

(ii) It will not be safe to rely on the sole testimony of PW-7 - the approver which lacks corroboration.

(iii) Even if the evidence of PW-7 - the approver is accepted, still it cannot be said that the appellant-accused shared common intention with Kishore-original accused No.1 to commit the murder of his younger brother-Sanjay Mahadeo Lokhare.

(iv) The medical evidence and the post mortem report (Exh.21) clearly indicates that the victim did not die due to assault but the cause of death is due to 100% burns which was confirmed after receipt of the C.A.'s report.

With these contentions, learned amicus curiae contended that the conviction and sentence insofar as the appellant-original Accused No.3, deserves to be set aside.

5. On the other hand, Mr. Sushil Karanjkar, learned counsel for the respondent-State, submitted that on a conjoint reading of the statements of the prosecution witnesses including that of PW-7-original accused No.2, (Approver) by applying the provisions of Section 34 of IPC, the courts below were justified in convicting the present appellant along with original accused

A No.1 under Sections 302 and 201 read with Section 34 IPC.

6. We have carefully considered the rival contentions and perused all the materials including oral and documentary evidence.

B 7. It is not in dispute that originally, 3 persons, viz., Kishore
 Mahadeo Lokhare, Shabbir Fariyad Khan and Suresh
 Sakharam Nangare were implicated as A-1 to A-3 respectively
 for the cause of death of Sanjay. During the course of trial,
 Shabbir Fariyad Khan (A-2) turned approver and he was
 C examined as PW-7. Based on the materials led in by the
 prosecution, the trial Court convicted Kishore Mahadeo
 Lokhare (original Accused No.1) and Suresh Sakharam
 Nangare (original Accused No. 3) - the appellant herein under
 Section 302 read with Section 34 IPC and sentenced them to
 D suffer rigorous imprisonment for life. In addition to the same,
 both were also convicted under Section 201 read with Section
 34 IPC and sentenced to suffer R.I. for 3 years each along with
 a fine of Rs. 2,000/- each, in default, to further undergo R.I. for
 6 months each. Further, it is not in dispute that Kishore
 E Mahadeo Lokhare-(original Accused No.1) has not appealed
 against his conviction and sentence, hence, we are concerned
 only with Suresh Sakharam Nangare (original Accused No. 3)
 - the appellant herein.

F 8. The first witness examined by the prosecution was
 Rajendra Mahadeo Lokhare (PW-1), who deposed that the
 appellant herein (original Accused No. 3) and Shabbir Fariyad
 Khan-Approver (original Accused No. 2) came to his house and
 told him that Sanjay has committed suicide by setting himself
 on fire. His evidence relating to the cause of death by suicide
 G has been negated by the evidence of Dr. Balkrishna (PW-10)
 who conducted the post mortem. When a specific question was
 put to the doctor by pointing out that whether a person like
 Sanjay, who was having flexed fingers would be in a position
 to light a match stick or lift a can containing Kerosene, he

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specifically negated the same and confirmed that all the injuries suffered by the victim were ante mortem. He also pointed out that the death was due to 100% burns. We will discuss the evidence of doctor and his report in the later part of our order. The above deposition of PW-1 shows that he has not implicated the appellant herein (original Accused No. 3) in the crime.

9. Surekha - wife of Kishore (original Accused No. 1) was examined as PW-2. She narrated about the conduct of her husband as well as the disability of the deceased. According to her, the deceased was unable to speak and both his hands were disabled and he had flexed fingers. She further explained that when Sanju was young, he had suffered from Typhoid and during that, he had an attack due to which he lost his power of speech and became disabled. Since he was unable to take bath and to wear his clothes etc., she used to hold him. She also explained about the habits of her husband (original Accused No. 1) and complained that he was addicted to Ganja and liquor and used to beat her and her children because of which she used to go to her parents house. In the entire evidence, she has not implicated the appellant herein (original Accused No. 3).

10. In addition to the same, the prosecution has also examined two neighbours - Chandrakant as PW-3 and Durgavati Ashok Thakur as PW-4. Though they explained about the conduct and character of Kishore Mahadeo Lokhare (original Accused No. 1) and his brother, there is not even a whisper about the role of the appellant herein in the commission of the crime.

11. The only person, who named the appellant herein (original Accused No. 3), is Kumari Subhadra Dhondibhau Tagad (PW-5). She deposed that she knows all the accused persons. She narrated that on 03.03.1995, at about 6:45 p.m.,

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A when she was standing outside her house, she saw the
 deceased and Kishore Mahadeo Lokhare (original Accused
 No. 1) in their house. At about 07:45 p.m., on that day, when
 she was sitting near the door of her house, she noticed Suresh
 Sakharam Nangare- appellant herein (original Accused No. 3)
 B coming out of the house of Kishore Mahadeo Lokhare (original
 Accused No. 1) in a frightened state. He was looking here and
 there and, thereafter, he left the place. She identified the
 present appellant in the Court. She further deposed that she
 heard the shouts of Kishore Mahadeo Lokhare (original
 C Accused No. 1) as "Sanjune Jalun Ghetale" i.e., "Sanju has set
 himself on fire". She also deposed that she made a statement
 to the police. Like PWs 3 and 4, she was also residing next to
 the house of A-1.

D 12. A perusal of the evidence of PW-5 shows that at the
 time of occurrence, the appellant herein (original Accused No.
 3) was coming out of the house of A-1 in a frightened state of
 mind. She has not stated anything further.

E 13. The only evidence, based on which the present
 appellant (original Accused No. 3) was convicted under Section
 34 IPC, is of approver (PW-7), who was originally Accused
 No.2. In the examination, he has mentioned that Kishore (A-1)
 has two brothers, viz., Rajendra Mahadeo Lokhare (PW-1) and
 Sanjay (deceased). He also stated that Sanjay was dumb and
 F had flexed fingers and he was unable to lift anything. He further
 narrated that on 03.03.1995, at about 12 noon, Kishore (original
 Accused No. 1) met him near K.V.K. School. At that time,
 Kishore was under the influence of alcohol and requested him
 to come to his place in the evening. At about 7.30-7.45 p.m.,
 G he went to his house. As soon as he reached the house of A-
 1, Suresh Sakharam Nangre - the present appellant (original
 Accused No. 3) also came there. There were 2 rooms in the
 house of A-1. At that time, the deceased was present in the
 inner room. He along with Kishore (A-1) and Suresh (appellant
 herein) was sitting in the first room. At that time, A-1 took out
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ganja and all of them smoked it. Thereafter, A-1 went inside the inner room where Sanjay was sitting. After some time, he heard the sound of assault. Then A-1 called him and the present appellant (original Accused No. 3) inside the said room. As soon as they went inside, they noticed that Sanjay was lying on the floor and A-1 was sitting on his abdomen and was holding his neck with one hand and fisting with the other hand on his chest and both sides of the stomach. A-1 asked him and the present appellant (original Accused No. 3) to hold Sanjay. Accordingly, the appellant herein caught hold of the legs of Sanjay. Thereafter, A-1 removed his hands from the throat of Sanjay and he (PW-7) caught hold of the throat of Sanjay. When Sanjay had stopped his movements, A-1 got down from his abdomen. Thereafter, A-1 abused them and told them to go out. However, PW-7 did not leave that place and saw A-1 lifting kerosene can and pouring it on the person of Sanjay, who was lying on the floor. On seeing this, he ran away from the place to his house. Even if we accept the evidence of PW-7 (original Accused No. 2), who turned approver, the role allotted to the present appellant was that of only holding the legs of the deceased as directed by A-1. It should be noted that A-1 was sitting on his abdomen and was holding his neck with one hand and was also fisting his chest with the other hand and after fulfilling the work, at the end, he directed the other two accused persons to catch hold of the legs of the deceased. Beyond this, there is no role assigned to the present appellant.

14. Since the conviction of the appellant is based only with the aid of Section 34 of IPC, it is useful to refer the same:

"34. Acts done by several persons in furtherance of common intention - When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

A A reading of the above provision makes it clear that to apply
 Section 34, apart from the fact that there should be two or more
 accused, two factors must be established: (i) common intention,
 and (ii) participation of accused in the commission of an
 offence. It further makes clear that if common intention is proved
 but no overt act is attributed to the individual accused, Section
 B 34 will be attracted as essentially it involves vicarious liability
 but if participation of the accused in the crime is proved and
 common intention is absent, Section 34 cannot be invoked. In
 other words, it requires a pre-arranged plan and pre-supposes
 prior concert, therefore, there must be prior meeting of minds.
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15. We have already referred to the evidence of
 prosecution witnesses. Nobody has implicated the present
 appellant except the statements made by PW-5 and PW-7 (the
 approver). We are satisfied that absolutely there is no material
 D from the side of the prosecution to show that the present
 appellant had any common intention to eliminate the deceased,
 who was physically disabled. The only adverse thing against
 the present appellant is that he used to associate with A-1 for
 smoking Ganja. In the absence of common intention, we are
 E of the view that convicting the appellant with the aid of Section
 34 IPC cannot be sustained.

16. The other important circumstance which is in favour of
 the appellant herein is the evidence of the doctor (PW-10) who
 F conducted the post mortem. In his evidence, PW-10 has stated
 that on 04.03.1995, at about 08:15 a.m., the dead body of one
 Sanjay Mahadeo Lokhar was brought by the police for post
 mortem. He started the examination at 2 p.m. and the same
 was concluded at 3 p.m. According to him, it was a burnt body,
 averagely nourished with presence of rigor mortis in muscles.
 G His tongue was protruding outside and surface wounds and
 injuries were 100% superficial to deep burns. In his opinion, the
 cause of the death was due to 100% burn injuries. He also
 issued the post mortem certificate which is Exh. 21 wherein he
 H opined that the death occurred due to 100% burns and not

because of assault. The categorical evidence and the opinion of PW-10 for the cause of the death of Sanjay make it clear that the appellant herein - original Accused No. 3 has nothing to do with the same since the evidence brought in shows that it was Kishore Mahadeo Lokhare - (original Accused No. 1) who took Sanjay to the other room where he burnt him to death. This important aspect has not been considered by the trial Court as well as by the High Court.

17. On appreciation of the entire material, we have already concluded that the present appellant had no role in the criminal conspiracy and no motive to kill the deceased. On the other hand, the evidence led in clearly implicates Kishore Mahadeo Lokhare - (original Accused No. 1) in all aspects including motive and the manner of causing death by lighting fire. Apart from all the evidence led in by the prosecution, the above position is clear from the evidence of the Doctor (PW-10) - who conducted the post mortem and his opinion for the cause of the death. Merely because the approver (PW-7) has stated that based on the direction of Kishore Mahadeo Lokhare (original Accused No. 1), the present appellant (original Accused No. 3) caught hold of the legs of the deceased, in the absence of any motive or intention, mere act of holding his legs that too at the end of the event when original Accused No. 1 throttled his neck by sitting on his abdomen, the appellant (original Accused No. 3) cannot be mulcted with the offence of murder with the aid of Section 34 of IPC, particularly, when the medical evidence for the cause of death is otherwise, namely, due to 100% burns.

18. In the light of the above discussion, we hold that the prosecution failed to establish the guilt insofar as the present appellant (original Accused No. 3) is concerned and the trial Court committed an error in convicting him under Sections 302 and 201 read with Section 34 of IPC and sentencing him to imprisonment for life. For the same reasons, the High Court has

- A also erroneously confirmed the said conclusion. Accordingly, both the orders are set aside. The appellant (original Accused No. 3) is ordered to be released forthwith if he is not needed in any other case. The appeal is allowed. We record our appreciation for the able assistance rendered by Ms. B Aishwarya Bhati, learned amicus curiae.

R.P.

Appeal allowed.