
(1981) 04 BOM CK 0016

In the Bombay High Court

Case No : Criminal Appeals No's. 1228 of 1977 and 22 of 1978, D/- 31-3-1981 and 15-4-1981

Pradumna Shriniwas Auradkar and etc.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 15-04-1981

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197, 313
Penal Code, 1860 (IPC) — Section 120B, 161, 218, 34, 347

Citation : (1981) 04 BOM CK 0016

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Judgement

1. These two appeals arise out of the order of conviction and sentence passed by the learned Special Judge Solapur, in Spl. Case No. 2 of 1976 by which order he had convicted accused No. 1, who is the appellant in Criminal Appeal No. 1228 of 1977, as well as accused No. 2, who is appellant in Criminal Appeal No. 22 of 1978 of the offence under Sections 218, 409, 420, 467, 468, 471, 477-A of the Penal Code as also u/s 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act. He also convicted both the accused of the offence u/s 120-B of the Penal Code for an offence of conspiracy to commit the above offences.

1-A. After hearing both the accused on the question of sentence the learned Special Judge sentenced both of them to rigorous imprisonment for one year and to pay a fine of Rs. 200/- and in default to suffer further rigorous imprisonment for 3 months for each of the offences under Sections 218, 409, 420, 467, 468, 471, 477-A and 120-B of the Penal Code as also u/s 5(1)(c) read with Section 5(2) of the P.C. Act. He further directed that the substantive sentences shall run concurrently. Though the judgment was a common judgment, the two original accused have filed two different appeals as mentioned above.

2. Both these appeals are being disposed of by this common judgment. For the sake of convenience, appellant in Criminal Appeal No. 1228 of 1977 will be

referred to hereinafter as accused No. 1 and the appellant in Criminal Appeal No. 22 of 1978 will be referred to as accused No. 2. Admittedly accused No. 1 was serving as a Sub-Overseer and accused No. 2 was serving as a Head Clerk in the office of Minor Irrigation Sub-Division Zilla Parishad at Barsi. At that time Vasant Gumaste, P.W. 1, was also serving in the same office as a peon. Said Vasant Gumaste was also charge-sheeted by the police as a fellow conspirator along with the other two accused; but he turned approver and was tendered pardon by the Court.

The time relevant for the purpose of the possession case is the period between 3-11-1971 to 28-12-1971. It is an admitted fact that both the accused as well as the approver Vasant Gumaste were working on the posts as mentioned above at the relevant time. The work in question was construction of Mangegaon-Khairav Road for the purpose of giving relief to the scarcity affected people. The work started on 21-8-1971 and ended on 28-12-1971.

Initially one Shri Bagal, an Overseer, and accused No. 2 were deputed for and entrusted with said work. However, it appears that there were quarrels between said Shri Bagal and accused No. 2. As a result of which it was found necessary to transfer Shri Bagal to some other work and accused No. 1, a Sub-Overseer, was entrusted with the said road work along with accused No. 2 and the said peon Gumaste.

The method of the work and the mode of disbursement of moneys, so far as it is relevant for the purpose of this prosecution, is something about which there is hardly any dispute. It was as follows :-

Labourers were employed by accused No. 2 for the purpose of road work and their muster roll was maintained by accused No. 2. The muster roll for each day showed the work done by each of the labourers. Periodically the bills in respect of wages payable to the workers for the work done were submitted, to the Head Office. The bills were sanctioned by the Head Office and the total amount due under the bills was paid to accused No. 1. Accused No. 1 then went to the worksite. There accused No. 2 identified each worker who was entitled to receive the wages for the previous period. The amount due in that behalf was shown in the pay sheet as against the name of each of the workers. When the concerned worker was identified by accused No. 2 his signature or thumb impression was taken against the entry of his name and the amount due to him under the said entry was paid to him. So far as this procedure is concerned, there is no dispute about the same whatsoever.

The case of the prosecution is that whereas various labourers were paid their wages by accused No. 1 in company with accused No. 2, there were some cases where both the accused conspired to commit the offences of forgery, defalcation, cheating and criminal breach of trust. What they did was that in some cases amount due to a labourer was not paid to him but accused No. 2 put his own thumb mark against the name of the particular labourer and it was shown as if

the amount was paid to that worker. As a matter of fact that amount was misappropriated by the two accused unto themselves, or unto their of them. At least in one case the thumb impression which should have been made by the real recipient of the wages was made not by accused No. 2 but by accused No. 1 himself. By making such thumb impression against the name of the real recipient, it was shown that the amount was received by the recipient; but as a matter of fact the amount was received by either or both of the accused. In some cases there existed no worker who was entitled to any wages but a bogus name was shown and it was shown that he had actually done the work. Against his name thumb impression was put by accused No. 2 himself and the moneys were shown to have been paid by accused No. 1 to such bogus person. This was the third manner in which both the accused had conspired to commit the said offences.

It may be stated here that the approver P.W. 1 Gumaste also was a party to the conspiracy and hence he was also initially charge-sheeted by the police. However pardon was tendered to him by the Court upon his application in that behalf for becoming an approver. That is the reason why only the present two appellants were arraigned as accused Nos. 1 and 2 in the lower Court and charges were framed against them in respect of the offences as mentioned above.

3. The defence of the accused was outwardly of total denial. Accused No. 1 contended that he was over-burdened with the work and hence it was not possible for him to devote much time for supervision of the work which was being looked after mainly by accused No. 2. He contended that except on 22-1-1972 on each occasion he himself had disbursed moneys to the workers for their wages. He contended that on 22-1-1972 he had to entrust the work of disbursement of the moneys to accused No. 2 that Accused No. 2 subsequently represented to him that the work of disbursement had been completed by him; but that later on he reported that the thumb impression of one labourer inadvertently remained to be taken. He further contended that in order to complete the record he himself, i.e. accused No. 1, put his thumb mark against the name of the labourer upon being assured by accused No. 2 that he had made the necessary payment to the said workman. He contended that his thumb impression on the entry dated 22-1-1972 was a bona fide thumb impression and was not made with any criminal motive.

So far as accused No. 2 was concerned, he contended that there was no entrustment made to him at all. According to him all the payments were made by accused No. 1 only. He admitted the above mentioned modus operandi as regards the payment but contended that on one occasion he was very much ill and at that time accused No. 1 and Gumaste came to him, and informed him that some thumb marks remained to be taken from the workmen concerned as against the payment already made to them. According to accused No. 2, accused No. 1 and said Gumaste impressed upon him the need of putting his own thumb mark as against those entries in order to show that those persons had received

the payments and had put their thumb marks in token of the receipt of moneys. Accused No. 2 was thus evidently trying to fasten the liability exclusively on accused No. 1.

4. The prosecution led evidence of a number of witnesses. It is not necessary to go through the entire evidence. The evidence of only relevant witnesses may be mentioned here. P.W. 3 Mainu Bapu Tamboli stated that he had worked for six days and that he did not get the wages for that period. He stated that he had not put the thumb mark in token of the receipt of the wages. The prosecution led the evidence of Finger Print Expert to show that the thumb impression against the relevant entry, Ex. 27, was the thumb impression of accused No. 2 only.

P.W. 6 Tukaram Sakharam Sathe stated that he had worked for six days. He stated that he had not received the amount for the work done and had made no thumb mark against the relevant entry. The evidence of the Finger Print Expert showed that there was a thumb mark against the said entry and the thumb mark was not of any one other than that of accused No. 2 himself.

P.W. 19 Sambha Bhagwan Doiphode stated that he worked for three weeks and two days and that he had received the salary only for three weeks and not for those last two days. He denied having made any thumb impression in token of the said two days salary. But the thumb impression was very much there against the entry for those two days' work. The evidence of the Finger Print Expert showed that the thumb impression was of none other than that of accused No. 2 himself.

P.W. 20 Rama Udhav Hagtilak stated that though he was literate he had taken education enough to be able to sign his name. He stated that he received all his wages except for the wages for one day. He denied having made any signature in token of the receipt for the wages for one day. There was, however, a thumb impression as against that entry for the day's work and the Finger Print Expert deposed that the thumb impression was that of accused No. 2.

P.W. 33 Biru Vithoba Saravade stated that he had worked for three weeks as a cartman and that he received only a sum of Rs. 30/- in that behalf when the amount actually to be paid to him was Rs. 54/-. He did not get the balance of Rs. 24/- but his thumb impression appeared on the pay sheet showing that he had received all the amount due to him. Actually the witness was asked by accused No. 2 to make an application for payment of the balance of the amount of Rs. 24/- and thumb mark of the witness was taken on that application. The evidence of the Finger Print Expert showed that the thumb impression in the pay-sheet as against the entry in respect of the moneys payable to this witness was that of none other than accused No. 2 himself. It was thus clear that the said witness Biru Saravade was not paid the said amount of Rs. 24/- but the said amount was received by either or both of the accused from the Government under the pretext of making payment to the said witness Biru pay sheet .

Lastly the prosecution led evidence to show that the accused had shown in the

pay-sheet payment of Rs. 15/- having been made to one Ambadas Ganpat for the work done but as a matter of fact no person such as Ambadas Ganpat ever existed, that the entry referring to the work of Ambadas Ganpat and of the payment made to him was a bogus entry and that the thumb mark against that impression was in fact that of accused No. 2 only which fact was deposed to by the Finger Print Expert.

5. It is this evidence which was required to be examined by the lower Court. The prosecution proved the sanction for prosecution of accused No. 2 So far as the sanction for prosecution of accused No. 1 was concerned, it appears that no such sanction was taken or proved by the prosecution. It appears that no sanction for prosecution was taken against accused No. 1 so long as he was in service and by the time such sanction was thought about accused No. 1 had already resigned from the service.

In these circumstances the learned Judge held that the prosecution has neatly established the conspiracy by all the three persons to cheat the Government as well as the legitimate recipients of the amount and had misappropriated the various sums to themselves and that by doing so they committed criminal breach of trust, forgery, defalcation and creation of false record. The order of conviction and sentence was therefore passed by the learned Judge against both the accused as mentioned above.

6. As mentioned above, the two appeals have been filed by the two accused, evidently because their interests are conflicting, each one trying to shove on the criminal liability to the other. The appeal filed by accused No. 2 was argued by his learned Advocate Mr. Mandlik in the first instance. I must state here that Mr. Mandlik took me very carefully through the evidence of each of the prosecution witnesses, viz. P.W. 3, P.W. 6, P.W. 19, P.W. 20 and P.W. 33, to show that even according to these witnesses there was no allegation against accused No. 2 that he was the recipient of the amounts in question. On the basis of this evidence Mr. Mandlik wants to contend that accused No. 2 could not be said to have committed any offence at all. Mr. Mandlik conceded that so far as the evidence of the Finger Print Expert was concerned it was not possible for him to find any fault with the same at all. As a matter of fact Mr. Mandlik conceded that the fact that accused No. 2 had made those various thumb impressions in respect of the sums which were payable to P.W. 3, P.W. 6, P.W. 19, P.W. 20 and P.W. 33 is fully established. He, however, contended that the defence of the accused set up in his examination u/s 313 Cr.P.C. to the effect that all those impressions were taken from accused No. 2 by accused No. 1 and Gumaste while he was ill should have been accepted. Mr. Mandlik contended that the entire foul play was by accused No. 1 and that accused No. 2 was only a scapegoat or rather cat's-paw of accused No. 1.

7. I find myself wholly unable to accept contention of Mr. Mandlik. The learned Judge has rightly pointed out that the story of accused No. 2 that all those thumb impressions made by accused No. 2 in respect of the payments shown to

have been made to P.W. 3, P.W. 6, P.W. 19, P.W. 20 and P.W. 33 were made at the behest of accused No. 1 only is patently incredible. It is just inconceivable that accused No. 2 would make his own thumb impressions for showing the payments to the said P.W. 3, P.W. 6, P.W. 19, P.W. 20 and P.W. 33 when in fact no such payments were made to those persons by accused No. 1. If these payments were in fact made by accused No. 1 to those witnesses, it is inconceivable that their thumb impression would not be taken by accused No. 2 from the said witnesses at the time of the payments themselves. As stated above the procedure of disbursement is not at all in dispute. Accused No. 1 would not have made any payment to any worker unless that worker was identified by accused No. 2 and payment would not have been made to that worker unless that worker put his thumb mark against the relevant entry. In this view of the matter, it is just inconceivable that accused No. 1 could ever tell accused No. 2 that payments were made to some workers but their thumb impression remained to be taken at the time when the payment was made. It is clear that this entire transaction of bogus entry could not have been successful unless both the accused had conspired with each other to commit those various offences, or had the common intention with each other to commit the offence. Offence of conspiracy by these two accused is writ large upon the entire transaction. The omnibus defence taken by accused No. 2 that while he was ill those thumb impressions were taken by accused No. 1 and said Gumaste from him under some pretext or the other is a story just to be stated to be rejected. Even if the statements made by accused No. 2 in his examination u/s 313 Cr.P.C. are examined it will be found that those statements are almost confessions made by accused No. 2. The fact that each of the relevant labourer had worked is admitted by him. The fact that in fact the worker had not received the amount in his presence had been admitted by him. The thumb impression made by himself against that entry in respect of the workmen is admitted by him. If all these facts are admitted the remaining matters are matters of inference and the inescapable inference is that accused Nos. 1 and 2 were hand in glove with each other. These admissions establish their common intention to commit the above offences and thus attract the provisions of Section 34 I.P.C. They also go a long way to prove the substantive offence of conspiracy u/s 120B of the Penal Code.

8. Moreover, once it is held that the evidence of the Finger Print Expert remains unassailed, very little could be said in favour of the accused. Mr. Mandlik contended that the offence alleged against accused No. 2 is of such petty amounts that it is impossible to impute any criminal motive to him. I am afraid that the contention is misconceived. It is only what is conclusively proved against accused No. 2 that he is convicted. I really do not know what he has escaped from. Even the above offences have been detected mainly because of the fact that accused Nos. 1 and 2 fell off from the approver Gumaste, who was a co-conspirator and the entire conspiracy has been hatched by the said three miscreants. The mere fact that the amounts proved to have been misappropriated are small amounts does not mean that no criminal intention

could have been entertained by the said accused No. 2. The last contention of Mr. Mandlik relates to the want of sanction to prosecute accused No. 1. I will refer to the contention when I consider the case of accused No. 1.

9. Coming to the case of accused No. 1 I may state at the outset that so far as the evidence against accused No. 1 is concerned, Mr. Kanade, the learned Advocate appearing for him, was not in a position to satisfy me that the view taken by the learned Judge as regards the part played by accused No. 1 was not a correct one. The fact that he made the payments to the labourers concerned only upon :

(a) identification of the individual worker by accused No. 2 : and

(b) upon thumb impression being made by the worker concerned in token of the receipt of the payment. is an admitted fact. As a matter of fact it is the contention of this accused that on all days except on 22.1.72 the disbursements were made by accused No. 1 himself to the workers concerned. Such a disbursement could not have been made by him unless the worker concerned was identified by accused No. 2 and the said worker had himself made the thumb impression against his name on the pay sheet in the presence of accused No. 1. The very fact that those five thumb impressions referred to above are those of accused No. 2 and not of the legitimate recipients shows that accused No. 1 has been the active conspirators with accused No. 2 for the purpose of commission of all the above mentioned offence. On merits, therefore. I find no justification whatsoever for interfering with the order of conviction passed by the learned Special Judge against accused No. 1.

10. However, Mr. Kanade's main contention on behalf of his client, accused No. 1 has got to be accepted. He contends that in the instant case accused No. 1 could not be prosecuted unless the requisite sanction for prosecuting him was obtained as required by S. 197 Cr.P.C. He invited my attention to the fact that no such sanction was obtained either before filing the charge-sheet or even thereafter. He invited my attention to the letter of the Chief Executive Officer, Zilla Parishad, dated 21-3-1976 addressed to the Police Inspector, A.C. and P.I.B. Solapur wherein it is stated as follows :

"As regards the accused Shri P. S. Auradkar, Asst. to Extension Officer (Rural Engineer) it is stated that he is no more in service and as such question of according sanction for prosecution does not arise."

Mr. Kanade also invited my attention to the observations made by the learned Judge in paragraph 11 of his Judgment wherein it was stated that the sanction was obtained for prosecution of accused No. 2 only. I called upon Mr. Phanse, the learned Public Prosecutor, to let me know whether in fact sanction for prosecution of accused No. 1 was obtained or not, Mr. Phanse frankly stated that no requisite sanction was obtained for the prosecution of accused No. 1. Question that then remained was as to whether the conviction of accused No. 1 could be sustained or not. I called upon Mr. Phanse to state as to whether sanction was necessary or

not. I am happy to state that Mr. Phanse was candid to state that having regard to the provisions of Section 197 Cr.P.C. the sanction was an indispensable prerequisite for the very prosecution of accused No. 1. A glance at Section 197 is enough to show that the time relevant for the purpose of deciding whether the sanction is necessary or not is the time of the commission of the offence. If the person concerned is public servant at the time of the commission of the offence then there can be no prosecution unless the requisite sanction for prosecution is obtained. The fact that the miscreant subsequently ceases to be the public servant after the commission of the offence does not obviate the necessity of the sanction. This position is clear from the initial expression employed by Section 197. The section starts by saying : "What any person who is or was a public servant". This clearly means that subsequent ceasing from being a public servant is a matter of no consequence so far as the requirement of Section 197 is concerned. Once it is held that the sanction was an indispensable prerequisite for the prosecution, it must follow that the entire trial of accused No. 1 was misconceived and vitiated and hence his consequent conviction cannot be sustained. Accused No. 1 is, therefore, entitled to an order of acquittal in the context of the above legal position.

11. This brings me to the last argument advanced by Mr. Mandlik on behalf of accused No. 2. His contention is that if accused No. 1 was acquitted of the offence of conspiracy with accused No. 2 for the commission of the offences, accused No. 2 by himself could not be convicted of any of the offences. To my mind this contention cannot be accepted. In the context of the facts of the present case it is not necessary that accused No. 2 should be held guilty of the offence u/s 120B I.P.C. at all. The evidence on record is enough to show that even independent of the provisions of Sections 120B and 34 of the Penal Code accused No. 2 is capable of being legitimately convicted of the offences under all other sections of which he is convicted. In any event he could be convicted of the offence for the abetment of the said offences. Moreover, for proving the offence u/s 120B it is not necessary that the co-conspirator should also be tried and/or convicted. Moreover in the instant case, it is not that accused No. 1 has been exonerated of the charge of conspiracy. The conspiracy between accused Nos. 1 and 2 is in fact established. Accused No. 1 is being acquitted only on technical ground. My attention has not been invited to any authority which takes the view that in such circumstances accused No. 2 would have to be acquitted ipso facto. The last contention advanced by Mr. Mandlik must, therefore, be rejected.

12. For the reasons mentioned above, Criminal Appeal No. 1222 of 1977 is allowed. The order of conviction and sentence passed by the learned Special Judge against accused No. 1 is set aside and he is acquitted of the charges levelled against him. His bail bonds stand cancelled, and the fine, if paid, is ordered to be refunded to accused No. 1.

Criminal Appeal No. 22 of 1978 is hereby dismissed. Accused No. 2 to surrender to his bail.

13. After this judgment was dictated but before the same was signed by me, Mr. Mandlik appeared before me and wanted to rely upon the judgment of the Supreme Court Bhagat Ram Vs. State of Rajasthan, According to him, the said judgment was a clear authority for the proposition that when one of the two conspirators is acquitted of the offence u/s 120B of the Code for any reason whatsoever, the other conspirator cannot be convicted under the said Section 120B at all nor can he be convicted of any other sections for the commission of which the conspiracy was hatched. He was, however, not prepared to advance any argument upon the question of applicability of the said authority. Even after being informed that he was at liberty to advance arguments on the said question after giving necessary notice to the Public Prosecutor, he expressed his unwillingness to take any further pains in the matter. All the same since I have not signed the judgment as yet and since I am of the opinion that the authority can be of no help to Mr. Mandlik for various reasons, I am disposed to express my view in that behalf even though I have not heard the Public Prosecutor in connection with the said authority. To my mind the said judgment of the Supreme Court is no authority for the prosecution that in no case one of the two conspirators can be convicted u/s 120B, if the other conspirator is acquitted. The facts of the case before the Supreme Court were as follows :

Bhagat Ram and Ram Swaroop were charged of the offences under Sections 120B 161, 218, 347 and 389 I.P.C. as also u/s 5(1)(a) read with Section 5(2) of the P.C. Act. Both of them were acquitted by the trial Court. In Appeal against acquittal by the Government the Division Bench of the High Court dismissed the appeal in its entirety so far as Ram Swaroop was concerned, but the appeal against acquittal of Bhagat Ram was dismissed by both the learned Judges of the Division Bench so far as it related to the order of acquittal for offences under Sections 347, 218, 389 and 120B, I.P.C. So far as the offences u/s 161 I.P.C. and Section 5(1)(a) of the P.C. Act were concerned there was a difference of opinion between the two learned Judges. The Bench, therefore, dismissed the appeal relating to said accused Ram Swaroop. The Bench also in terms dismissed the appeal against Bhagat Ram so far as it related to the offences under the above mentioned sections, but as regards the offences u/s 161 I.P.C. read with Section 5(1)(a) of the P.C. Act the appeal had to be referred to a third learned Judge Shri Jagat Narayan, J. of the Court. Jagat Narayan, J. however took the view that Bhagat Ram was not only guilty of the offence u/s 161 I.P.C. as found by one of the learned Judges of the Division Bench but also under Sections 120B, 218 and 347, I.P.C. The appeal against acquittal of Bhagat Ram was, therefore, allowed by Jagat Narayan, J. and Bhagat Ram was convicted of the offence under Sections 120B, 161, 218 and 347, I.P.C. by him.

It is in these circumstances that to the Supreme Court an appeal against conviction was filed by Bhagat Ram and an appeal against acquittal of Ram Swaroop was filed by the State of Rajasthan. It was in the context of these facts that the Supreme Court held that in the first instance Jagat Narayan, J. had no jurisdiction to allow the appeal against acquittal of Bhagat Ram so far as offences

under Sections 218, 347 and 120B, I.P.C. were concerned for the simple reason that the order of acquittal of Bhagat Ram of the offence under the said sections was already confirmed by the Division Bench and hence the learned single Judge could have no power to review the said order or to sit in appeal over the same. In this connection the Court observed that the principle of *res judicata* is also applicable to criminal proceedings and it is not permissible in the subsequent stage of the same proceedings or in some other subsequent proceedings to convict a person for an offence in respect of which an order of acquittal has already been recorded. The Supreme Court observed that the plea of *autrefois acquit* as a bar to prosecution embodied in Section 403 of the Criminal P.C. is based upon the above wholesome principle. After observing this the Supreme Court further observed as follows (at p. 913 of Cri LJ) :

"The matter can also be looked at from another angle. The charge u/s 120B I.P.C. related to conspiracy between Bhagat Ram and Ram Swaroop for extorting Rs. 2000/- as illegal gratification from Niranjana Dass. When Ram Swaroop was acquitted of the charge u/s 120B IPC, the basis of the charge against Bhagat Ram for conspiracy between him and Ram Swaroop disappeared. It is not the case of the prosecution that Bhagat Ram had conspired with, another person and even though the identity of the other person has not been established. Bhagat Ram would still be guilty for the offence u/s 120B IPC. On the contrary, the case of the prosecution was that Bhagat Ram had conspired with Ram Swaroop to extort Rs. 2000/- as illegal gratification from Niranjana Dass. Once Ram Swaroop was acquitted in respect of the charge relating to conspiracy, the charge against Bhagat Ram for conspiracy must necessarily fall to the ground."

14. The above observations which I have myself emphasised leave no room for doubt that the proposition that Mr. Mandlik wants to sell to this Court has no basis in the above authority at all. In the instant case, it is not as if that the order of acquittal passed in favour of accused No. 1 is on account of the fact that he is not found guilty of the offence of conspiracy or of any other offence. The order of acquittal of accused No. 1 has been passed by this Court purely on technical ground, viz. that sanction to prosecute him was not obtained. Both the lower Court, as well as myself have examined the evidence against accused No. 1 and have found him to be guilty of the various above mentioned offences including the offence of conspiracy u/s 120B. Applying the implicit ratio of the above mentioned Supreme Court ruling, therefore, it can be safely stated that conviction of accused No. 2 even u/s 120B is perfectly valid and legitimate in spite of the fact that the other co-conspirator, viz., accused No. 1, has been acquitted by me on account of the above technical bar.

15. Moreover, even assuming that for any reason charge of offence u/s 120B cannot be brought home against accused No. 2 that legal position would be of hardly any practical benefit for accused No. 2. It may be that on that account the accused may be acquitted of the offence u/s 120B but his conviction of the offence under other sections will all the same continue to subsist. This is so

because the fact that accused No. 2 entertained a common intention to commit the offence under Sections 218, 409, 420, 467, 468, 471, 477-A, I.P.C. and Section 5(1)(a) read with Section 5(2) of the P.C. Act along with accused No. 1 is writ large upon and evident from the evidence on record which is already examined by the learned Special Judge in the first instance and also by me. My attention was not invited to any authority which took the view that if two persons entertained a common intention to commit any offence and in pursuance of the said common intention the offence has in fact been committed, one of the two accused cannot be convicted of the offence merely because the specific part played by him in the commission of the offence could not be proved by the prosecution without taking assistance of the provisions of Section 34 I.P.C. and the other accused could not be convicted by the Court for some reason or the other, although the part played by the other was also evident from the record. If, therefore, the accused cannot be convicted of the offence under Sections 218, 409, 420, 467, 468, 471, 477-A, I.P.C. with the help of the provisions of Section 120B he can certainly be convicted of the said offences with the help of the provisions of Section 34 I.P.C. In this connection, it may be noted that the charge against both the accused included the charge u/s 34 I.P.C. as well and it is not as if that either of the accused has been acquitted of the charge u/s 34 I.P.C. It is true that the final order of conviction passed by the learned Judge does not refer to the conviction by taking aid of Section 34, but that was so evidently because the learned Judge had found that both the accused could be convicted of the offences in view of the conviction u/s 120B as well. If the conviction u/s 120B goes the conviction of the accused of the said offences would still be sustained with the aid of the provisions of Section 34. I may, however, make it clear that in the instant case, I do not wish to suggest that accused No. 2 cannot be convicted of the said offence u/s 120B for the reasons advanced by Mr. Mandlik. I therefore see no reason to depart from the view already taken by me dismissing the appeal filed by accused No. 2.

16. I, therefore, repeat that the appeal filed by accused No. 2 stands dismissed.

17. Ordered accordingly.