

(1956) 10 BOM CK 0010
In the Bombay High Court
Case No : Criminal Appeal No. 856 of 1956

Rajaram Raghu Patil

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 01-10-1956

Acts Referred:

Penal Code, 1860 (IPC) — Section 149, 302, 326, 34

Citation : AIR 1958 Bom 469 : (1957) 59 BOMLR 43 : (1958) CriLJ 1385 : (1957) ILR (Bom) 173

Hon'ble Judges : Vyas, J;Dixit, J

Bench : Division Bench

Advocate : P.T. Patil, for the Appellant; V.H. Gumaste, Addl. Asst. Govt. Pleader, for the Respondent

Judgement

Dixit, J.—Three accused persons including the present appellant, who was accused No. 1 in the Court below, were tried before the Additional Sessions Judge, Kolhapur, for an offence of murder of one Bapu Tukaram Patil, the charge against the three accused persons being that on or about 18-9-1955, in Shahapur village they and one Shankar Nalavade, "since absconding, in furtherance of a common intention of all intentionally caused the death of Bapu Tukaram Patil of Kodoli and thereby committed an offence punishable u/s 302 read with Section 34, Indian Penal Code. At the trial, the learned Judge acquitted Nos. 2 and 3, hut convicted accused No. 1 u/s 326 read with section 34 and sentenced him to suffer rigorous imprisonment for a period of two years. Accused No. 1 now appeals from his conviction and the sentence imposed upon him.

2. The order of conviction runs as follows:

"In the result, I acquit accused No. 1 of the charge u/s 302 but convict him u/s 326 read with Section 34 of the Indian Penal Code and sentence him to undergo rigorous imprisonment for two years. Accused Nos. 2 and 3 are acquitted of the charge and they are set at liberty".

Now, the charge against the three persons including the present appellant was a charge of murder of Bapu. The prosecution case against accused No. 1 was that on 18-9-1955 accused Nos. 1 and 2 and one Shankar Nalavade hid themselves in a streamlet & they asked accused No. 1 to post himself in such a way that when Bapu passed by the road, accused No. 1 should give a signal to accused Nos. 2 and 3 anil Shankar. In this case, the prosecution relied upon several pieces of evidence. Reliance was placed upon the evidence of one Shantabai, which was the direct testimony in the case. " Reliance was placed upon the evidence of motive, the motive being that the deceased was acting as an attorney of one Balkabai who was disputing certain transactions of gift made in favour of accused Nos. 1 and 2. Reliance was then placed upon dying declarations and also upon a confessional statement made by accused No. 1 which was subsequently retracted by him.

Lastly, reliance was placed upon circumstantial evidence and that was that although the offence took place on 18-9-1955, the first accused was not to be found in the village and was absconding unit 25-9-1955. The evidence of motive is not, by itself, enough to convict an accused person of a serious offence of murder. Shantabai's evidence was rejected on the ground that she did not mention the assailants who took part in the assault upon Bapu. As regards the dying declarations, it was recognised that the declarations constituted a weak piece of evidence and without corroboration, it would not be safe to act upon them. With regard to the confessional statement, the learned Additional Sessions Judge took the view that there was enough corroboration to the confessional statement. It may be pointed out that the confessional statement was retracted and in order to rely upon a confessional statement which is retracted, it must be proved that the confessional statement is a voluntary statement and a true statement. So far as the circumstantial evidence in the case is concerned, that evidence is not, by itself, sufficient to convict an accused person charged with a serious offence of murder.

3. On this appeal by accused No. 1, what one has to consider is, therefore, the evidence furnished by the dying declarations and the confessional statement. Now, if the dying declarations require corroboration, surely they constitute a weak piece of evidence and if a confessional statement is retracted, one has to find corroboration before it is acted upon. The result is that both the dying declarations as well as the retracted confessional statement constitute such pieces of evidence that one piece of evidence cannot corroborate another. To find out corroboration, there must be some independent evidence.

4. According to the confessional statement, accused No. 1 was asked to sit near a hillock. Accused Nos. 2 and 3 sat in hiding in a streamlet and they told accused No. 1 that when Bapu Tukaram came that way, he should make a sign to them by show of hand. He says he saw Bapu Tukaram coming and he signaled to them by show of hand. He says Shankar and accused Nos. 2 and 3 assaulted Bapu Tukaram with axes and spear. They then came up to him and asked him to go

wherever he liked. Mr. Gumaste appearing for the State argues that the confessional statement, though retracted, is enough to sustain the conviction. He says that there is corroboration as regards the confessional statement. Corroboration to the confession is sought from the evidence of Appaji and Police Patil Shankar who say that accused No. 2 went to the chavadi to obtain extracts of the record of rights. Next, the corroboration is sought from the evidence of Shantabai who says that four persons were involved in the incident and, finally from the evidence of Pandu who says that he saw accused No. 1 going to Shankar shortly before the commission of the offence. But it is not necessary to examine the correctness of that contention for reasons which I shall mention presently.

5. In this case, three accused persons including the present appellant have been charged with the offence of murder u/s 302 read with Section 34. The learned Additional Sessions Judge has convicted the appellant of an offence u/s 326 read with Section 34. But what is significant is that he has acquitted accused Nos. 2 and 3, though the prosecution case was that they caused Bapu multiple injuries. What then remains is the case of accused No. 1. Accused No. 1 has been convicted for having shared the Intention of other accused persons. It is not the case for the prosecution that accused No. 1 himself took part in the assault upon Bapu. He became liable for the act of another in that he shared the intention entertained by the other persons i.e. the three persons having been animated by a common intention.

6. Common intention within section 34 implies a pre-arranged plan and acting in concert pursuant to the plan. Therefore, it must be shown that the criminal act was done by one of the accused persons in furtherance of the common intention of all. And it would be a strange result if accused No. 1 is convicted on the basis of the principle of joint liability when accused Nos. 2 and 3, the alleged assailants, are acquitted of the offence. The learned Judge himself finds that accused No. 1 was not the actual assailant and according to the Judge, the actual assailant must go unpunished for want of evidence. If this is his conclusion, it is difficult to support the finding that accused No. 1 is guilty of the offence u/s 326 read with section 34. If accused Nos. 2 and 3 are acquitted of the charge and it is not shown which of the accused persons inflicted the injuries resulting in causing grievous hurt, it is difficult to say how accused No. 1 can be convicted of the offence of grievous hurt u/s 326 read with Section 34. Accused No. 1 is not being convicted for his individual act. His conviction rests upon the basis of Section 34 and before accused No. 1 is convicted of the offence u/s 326 read with Section 34, it must be shown that some specified person has committed the offence of grievous hurt u/s 326 read with Section 34. In this case there is no finding by the learned Additional Sessions Judge upon the point. On the contrary, it would seem as if the finding is that there is no such person who took part in the assault resulting in causing grievous hurt. In our view, it would seem to be elementary that before accused No. 1 can be convicted of the offence u/s 326 read with Section 34, it must be established that some specified person, whose

intention accused No. 1 shared, committed the act resulting in causing grievous hurt. In the absence of such a finding, it is impossible to say that the conviction of accused No. 1 is right. If any authority for this proposition is necessary, it would be found in a decision of the Calcutta High Court reported in *Fazoo Khan v. Jatoo Khan* 33 Cri. LJ 92: AIR 1931 Gal 643 and it has the high authority of Sir George Rankin. The head note to that case runs as follows:

"To attract the operation of Section 34, Penal Code, and fix constructive guilt on each of the several accused under that section, there must be participation in action, with a common intention, although the different accused might have taken different parts; and unlike u/s 149 before any of them can be convicted for an offence read with Section 34, the Court must arrive at a finding as to which of the accused took what part, if any, in furtherance of the common intention. A conviction without such finding is illegal".

In view of the above consideration, it follows that the conviction recorded against the appellant for an offence u/s 326 read with Section 34 of the Indian Penal Code is wrong and must be set aside.

7. The appeal will, therefore, be allowed, the conviction recorded against accused No. 1 for an offence u/s 326 read with Section 34 of the Indian Penal Code will be set aside and the sentence also will be set aside and he will be acquitted and discharged.

8. Appeal allowed.