

(2003) 01 BOM CK 0047

In the Bombay High Court

Case No : Criminal Appeal No. 217 of 1987

Rajpal Shyamlal Soude

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-01-2003

Acts Referred:

Arms Act, 1959 — Section 25(1), 27
Explosive Substances Act, 1908 — Section 4, 5
Penal Code, 1860 (IPC) — Section 307, 34, 395, 427

Citation : (2003) BomCR(Cri) 1033 : (2003) CriLJ 4238

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Revati Mohite-Dere and Sapna Rohira, for the Appellant; U.V. Kejariwal, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.M. Khanwailkar, J.—This appeal takes exception to the Judgment and order dated February 21, 1987 passed by the 5th Additional Sessions Judge, Thane in Sessions Case No. 243 of 1985.

2. The Appellant alongwith two others was prosecuted in connection with the alleged offence punishable under Section-307, 427 read with 34 of the Indian Penal Code and u/s 25(1)(a) and 27 of the Indian Arms Act read with Section 34 of the Indian Penal Code. They were also charge sheeted for offence punishable under Section-4 and 5 of the Explosive Substance Act read with Section 34 of the Indian Penal Code. The Trial Court however, has convicted the Appellant-Accused No. 1 only for the offence punishable u/s 307 read with 34 of the Indian Penal Code and sentenced to suffer R.I. for 7 years and to pay fine of Rs. 500/- in default to undergo further rigorous imprisonment for 6 months. The Appellant-Accused No. 1 has been acquitted of all the other charges. Even the the Accused Nos. 2 and 3 have been acquitted of all the charges.

3. The incident in question took place on April 10, 1985. It is the prosecution

case that, one Gopal was arrested in connection with Crime No. 134 of 1985 for offence punishable u/s 395 of the Indian Penal Code by the Police Station, Vitthalwadi and he was required to be taken to the Court for the purpose of remand. The Sr. Inspector of the concerned Police Station directed P.S.I. Mr. Kulkarni (P.W.9) to take the said Gopal to the Court. On the basis of those instructions, said P.S.I. Kulkarni (P.W.9) alongwith A.S.I. (P.W.4), Police constable Miya (P.W.1), Gulab (P.W.2) started from Police Station, Vitthalwadi at about 2.35 p.m., on that day. The said Gopal was handcuffed and tied with the rope. IT is stated that, since the Police jeep was out of order, P.S.I. Kulkarni called for two auto rickshaws. Said Gopal was made to sit in the centre and P.W.Nos. 1 and 2 were sitting on his left and right side respectively. Whereas, P.S.I. Kulkarni (P.W.4) occupied the other auto rickshaw. All of them started from Police Station, Vitthalwadi towards the court. On their way, when the auto rickshaw reached near Shiv Mandir, the front rickshaw in which the said Gopal and P.W.Nos. 1 and 2 were occupying was stopped and the rickshaw driver ran away, having noticed three persons standing in the middle of the road-two of them were holding weapons like revolvers. As soon as the rickshaw stopped and the rickshaw driver ran away, said three persons standing on the road came from the front side. One of them holding revolver came from the left side of the rickshaw and the other person who was also holding revolver came from the right side of the rickshaw. It is the prosecution case that, the moment front rickshaw stopped, police constable Miya (P.W.1) and P.W.2 alighted from the auto rickshaw and they saw that, one hand bomb exploded in front of the auto rickshaw. At the same time, they saw that two persons coming from left and right side of the auto rickshaw were firing towards the said Gopal who was sitting in the rickshaw. Police Constable Miya (P.W.1) who alighted from the left side of the auto rickshaw accosted one person who is stated to be the appellant before this court and Accused No. 1. Whereas, the Police Constable Bhargude (P.W.2) went towards the P.W.1 Miya who was making efforts to over power the Appellant-Accused No. 1. Both of them succeeded in accosting the Appellant-Accused No. 1. This is the substratum of the prosecution case. The Accused No. 1 was arrested on the spot, whereas the Accused Nos. 2 and 3 succeeded in fleeing who were later on arrested during the course of investigation. After investigation was completed, charge sheet was filed and as the matter was exclusively triable by the Court of Sessions, the same was remitted to the Sessions Court, Thane. The prosecution examined in all 10 witnesses as prosecution witnesses in support of its case; whereas, the Accused No. 3 examined D.W.1 Rita John Patole, Staff Nurse, Central Hospital, Hlhasnagar to establish his plea of alibi. On examining the materials on record, the Trial Court by the impugned Judgment and order was pleased to acquit the Accused Nos. 2 and 3 respectively of the alleged charges. The Trial Court accepted the plea of alibi put forth by the Accused No. 3 as the same was supported by evidence in that behalf. In so far as the Accused No. 2 is concerned, the Trial Court found that, the prosecution evidence was not sufficient to bring home the guilt against the Accused No. 2. According to the Trial Court, none of the prosecution witnesses had identified the Accused No. 2. In so far as

P.W.No. 1 is concerned, he did not state anywhere about the presence of Accused Nos. 2 and 3, at the time of incident. The Trial Court further found that this witness did not give description of Accused No. 2 before the police nor even remotely suggest that he would identify the Accused No. 2 and moreover, no identification parade was held, so as to identify the Accused No. 2. While considering the evidence of P.W.No. 9, the Trial Court has found that this witness admits that he only saw back of the said person and that evidence was not sufficient to even remotely suggest that, he could have identified the Accused No. 2. In the circumstances, the Trial court found that, the identify of Accused No. 2 has not been established by the prosecution for which reason he was entitled to be acquitted of the alleged charges. Even after having acquitted, the Accused Nos. 2 and 3, who were the only Accused stated to have participated alongwith Appellant-Accused No. 1 in the commission of the alleged offence, the Trial Court preferred to convict the Appellant-Accused No. 1 on the same evidence for offence punishable u/s 307 read with 34 of the Indian Penal Code. The Trial Court has found that the prosecution evidence in the shape of P.W.No.1, P.W.No. 2 and P.W.No. 9 was consistent that more than one accused had participated in the commission of the alleged offence and since the identity of Accused No. 1 has been established, he could be convicted u/s 307 read with 34 of the Indian Penal Code. It is this decision which is the subject matter of appeal at the instance of Appellant-Accused No. 1 before this court. It is not in dispute that, the state has not challenged the order of acquittal passed in favour of other two Accused, though they were stated to have participated in the commission of the alleged offence.

4. The learned counsel for the Appellant contends that as the named Accused Nos. 2 and 3 have been acquitted by the Trial Court of all the charges, the conviction against the Appellant u/s 307 read with 34 of the Indian Penal code cannot be sustained in law. According to her, if the co-Accused who were named in the charge sheet for the same offence by applying Section 34 of the I.P.C. and, are acquitted, then, no conviction can be recorded against one of the Accused such as the Appellant on the same evidence by employing Section 34 of the Indian Penal Code read with the substantive offence u/s 307 of the code. In support of this contention, reliance has been placed on the decision of the apex Court in Krishna Govind Patil Vs. State of Maharashtra, . It is next contended that the evidence on record is absolutely inadequate so as to record the finding of guilt against the Appellant-Accused No. 1, for having committed offence simpliciter under Section-307 of the Code.

5. The learned A.P.P., however, contends that, even though the other two Accused have been acquitted by the Trial Court that by itself cannot be sufficient ground to acquit the Appellant especially when the prosecution has established in evidence that the incident has taken place and one Gopal was injured by causing bullet injuries during the said incident coupled with the fact that the Appellant-Accused No. 1 was accosted on the spot and found to be holding weapon in his hand. According to the learned A.P.P. in such a situation, the Court can convict

the Appellant-Accused No. 1 for having committed offence u/s 307 read with 34 of the Indian Penal Code. In support of this submission, reliance has been placed on the decision of the Apex court in Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, and another decision in Surendra Chauhan Vs. State of M.P., . The learned A.P.P. further contends that, as there is legal evidence to infer that the Appellant-Accused No. 1 alongwith two other accused with common intention committed the alleged offence, the order of conviction recorded by the Trial Court against the Appellant u/s 307 read with 34 of the Indian Penal code ought not to be interfered with.

6. The first point that requires to be considered is: when the other two co Accused who were named in the charge sheet and even though evidence was adduced against them during the trial by the prosecution-but acquitted, will it be permissible in law to convict the third co-Accused by employing Section 34 of the Indian Penal Code. The Supreme Court in the case of K.G. Patil (supra) has squarely dealt with this proposition. The Apex court has observed that, it is well settled that common intention within the meaning of Section 34 implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a Court can convict a person u/s 302, read with Section 34, of the Indian Penal Code, it should come to a definite conclusion that the said person had prior concert with one or more other persons, named or unnamed, for committing the said offence. The Apex Court has thereafter indicated three different situations. In so far as the present case is concerned, the same is covered under illustration No. 1 given in Para 5 of the said Judgment. That illustration reads thus:

"(1) A,B,C, and D are charged u/s 302, read with 34 of the Indian Penal Code, for committing the murder of E. The evidence is directed to establish that the said four persons have taken part in the murder."

While examining the efficacy of this illustration, the Apex Court has observed that:

"....in the first illustration the court certainly can convict two or more named accused if it accepts the evidence that they acted conjointly in committing the offence. But what is the position if the court acquits 3 of the 4 Accused either because it rejects the prosecution evidence or because it gives the benefit of doubt to the said Accused? Can it hold, in the absence of a charge as well as evidence, that though the three Accused are acquitted, some other unidentified persons acted conjointly along with one of the named persons? If the Court could do so, it would be making out a new case for the prosecution: it would be deciding contrary to the evidence adduced in the case. A Court cannot obviously make out a case for the prosecution which is not disclosed either in the charge or in regard to which there is no basis in the evidence. There must be some foundation in the evidence that persons other than those named have taken part

in the commission of the offence and if there is such a basis the case will be covered by the third illustration."

In paragraph 7, the Apex Court has adverted to its earlier decisions and observed in Paragraph 8, as under:

"When Accused were acquitted either on the ground that the evidence was not acceptable or by giving benefit of doubt to them, the result in law would be the same; it would mean that they did not take part in the offence. The effect of the acquittal of Accused Nos. 1, 3 and 4 is that they did not conjointly act with Accused No. 2 in committing the murder. If they did not act conjointly with Accused 2, Accused No. 2 could not have acted conjointly with them."

7. Applying the principle enunciated by the Apex Court in the above decision, I have no hesitation in accepting the submission of the Appellant that the Trial Court could not have convicted the Appellant of the offence u/s 307 read with 34 of the Indian Penal Code.

8. However, to get over this position, the learned A.P.P. contends that even if the other two Accused have been acquitted by the Trial Court that by itself was not sufficient and would not entitle the Appellant/Accused No. 1 to be acquitted. In support of this submission, reliance has been placed on the decision of the Apex Court in Tiwari's case (Supra). However, on close examination of this decision of the Apex Court, it would appear that the Apex Court observed that though there was no appeal filed by the State against acquittal in respect of the other Accused, there was evidence on record to reverse the finding with regard to those Accused returned by the court below. The Apex Court then found as a fact that the other Accused who has been acquitted by the court below had participated in the commission of the crime alongwith the convicted Accused (Appellant therein); and only after recording that finding, the Apex Court went on to observe that failure on the part of the prosecution witnesses P.W.No. 3 and 4 to identify the others would not alter the situation. To my mind, therefore, to apply the principle enunciated in this decision, it will be necessary to first overturn the finding recorded in favour of Accused Nos. 2 and 3 by the Trial Court. It is only if this Court was to overturn that finding and positively hold that either Accused No. 2 or Accused No. 3 had participated in the commission of the crime alongwith the Appellant, only then the conviction u/s 307 read with 34 of the Indian Penal Code can be sustained against the Appellant and not otherwise. To put it differently, if this court was to affirm the finding returned by the Trial Court with regard to Accused Nos. 2 as well as Accused No. 3, then, applying the ratio of the decision in K.G. Patil's case (supra), this court will have no option but to acquit the Appellant of the alleged offence u/s 307 read with 34 of the Indian Penal Code. In fact, the Trial Court itself ought to have acquitted the Appellant of that charges. I shall advert to this position a little later.

9. The next decision relied upon by the learned A.P.P. is Surendra Chauhans Case (supra). This decision, to my mind, reiterates the settled legal position as to

when Section 34 of the Indian Penal Code can be invoked. Para 11 of the said decision reads thus :

"Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them(Ramaswami Ayyangar and Others Vs. State of Tamil Nadu,). The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence.(Rajesh Govind Jagesha Vs. State of Maharashtra,). To apply Section 34 I.P.C. apart from the fact that there should be two or more Accused, two factors must be established: (i) common intention (ii) participation of the Accused in the commission of an offence. If common intention is proved but no overt act is not attributed to the individual Accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the Accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked, in any case, it is not possible to have direct evidence of the common intention. It has to be inferred from the facts and circumstances of each case."

To my mind, none of the abovesaid two decisions would be of any avail to the prosecution, unless the prosecution is in a position to positively establish from the record that either Accused No. 2 or Accused No. 3 had participated in the commission of the crime alongwith the Appellant. It is only then the conviction u/s 307 read with Section 34 of the Indian Penal Code can be sustained against the Appellant Accused No. 1.

10. According, although the State has not filed appeal against acquittal of Accused No. 2 or Accused No. 3, this court would be competent to examine as to whether the conclusion reached by the Trial Court with regard to acquittal of Accused Nos. 2 and 3 can be sustained or it is possible for this court to positively find that the Accused Nos. 2 or 3 had conjointly participated alongwith the Accused No. 1/Appellant in the commission of crime. I shall first advert to the case as made out against the Accused No. 3. In so far as Accused No. 3 is concerned, he pleaded alibi. In support of his plea he examined D.W.No. 1. On analyzing the prosecution evidence along with the said defence version, it is not possible to find fault with the conclusion reached by the Trial Court, with regard to finding in so far as Accused No. 3 is concerned. In Para 55 of the impugned Judgment, the Trial Court has rightly found that D.W.No. 1, who was a nurse

incharge of the ward where Accused No. 3 was admitted in the hospital; was an independent witness. Her oral evidence was also supported by the evidence in the shape of entries in the admission register extracts Exh.50 and 51 respectively. From the evidence as adduced by the defence, it is seen that the Accused No. 3 was admitted in the hospital on 10.4.1984 at about 11.45 a.m. and he absconded himself from the hospital at 6.30 p.m. on the very day. In the first place, there is nothing on record to doubt the evidence adduced by D.W.No.1 Rita, who is an independent witness. On the basis of the evidence adduced by the defence, it is obvious that, the Accused No. 3 cannot be said to have remained present on the scene of offence which occurred at 2.35 p.m. On going through the oral evidence of D.W.No. 1 Rita Patole, the same appears to be trust worthy and is corroborated by the entries in admission register extracts Exh.50 and 51. That clearly creates doubt about the presence of Accused No. 3 on the scene of offence which occurred at 2.35 p.m. on 10.4.1984. In this view of the matter, I have no hesitation in affirming the conclusion reached by the Trial Court, in so far as the involvement of Accused No. 3 in the commission of crime is concerned. As observed by the Apex Court in K.G. Patil's case (supra) it would necessarily follow that in law the Accused No. 3 did not take part in the offence.

11. That takes me to the case made out against the Accused No. 2. To establish the participation of Accused No. 2 in the commission of crime, prosecution has examined P.W.No. 1, 2 and 9. On analyzing the evidence of P.W.No. 1, there is nothing in the examination-in-chief of this witness so as to implicate Accused No. 2 in the commission of the crime. On the other hand, in the cross examination Paragraph 8, this witness clearly admits that he knew the Accused No. 2 for last 3 to 4 years prior to the date of the incident. In spite of this, this witness has not named the Accused No. 2 anywhere in the statement before the police. The Trial Court, in the circumstances, has rightly observed that, in so far as the evidence of P.W.No. 1 the same would be of no avail to the prosecution to establish the participation of Accused No. 2. The Trial Court has discarded that part of the evidence of P.W.No. 1, as can be discerned from the discussion from Paragraph 51 of its Judgment. The Trial Court has observed that, even though the P.W.No. 1 knew the Accused Nos. 2 and 3, even much prior to the date of incident, but nowhere he has stated that, they were present at the time of incident. Besides, he has deposed that he could not identify the person apprehended by constable Bhargude (P.W.2) who is stated to be Accused No. 2. If this is so, then no fault can be found with the approach of the Trial Court in discarding the evidence of P.W.No. 1. The prosecution has placed strong reliance on the evidence of P.W.No. 2 Bhargude who is stated to have apprehended the Accused No. 2 but later on managed to run away. Adverting to the evidence of P.W.2, it is seen that this witness has not given description of the Accused No. 2 before the police during the investigation. Moreover, it is not his case that he could identify the Accused No. 2. It is also not in dispute that, no identification parade was held so as to identify the Accused No. 2. However, for the first time, in the examination-in-

chief, P.W.No. 2 gave the description of Accused No. 2 and claimed that he could identify him and in fact identified the Accused No. 2 in the court hall, for the first time. It is in this context, suggestion has been put to him during the cross examination as can be seen from Paragraph 5 of his deposition. He has admitted that the Accused No. 2 was known as Kara and Accused No. 3 is Denda. Suggestion was also put to him that the Accused Nos. 2 and 3 had come to Police Station at Vitthalwadi prior to the date of incident, however, he has denied the same. On the other hand, if we keep in mind the deposition of P.W.No. 1 who is also attached to the said Police Station, he has clearly accepted the fact in Paragraphs 8 and 9 of his deposition that the Accused Nos. 2 and 3 were known to him because they were visiting the police station on number of occasions for last 3 to 4 years, prior to the date of incident. This prosecution evidence would clearly create doubt about the version given by P.W.No. 2. Besides, it is seen that, in Paragraph 5, P.W.2 has been further confronted that, he has not given any description of Accused No. 2 before the police. To this, the P.W.2 has deposed that he had given such description but he does not know why the police has not recorded that statement. If this evidence of P.W.2 is examined in this perspective, then, I find no reason to take a different view than the one taken by the Trial Court. In Paragraph 52 of the Judgment, the evidence of P.W.2, who is the main witness who could have identified the Accused No. 2, has been analyzed and found to be doubtful. It necessarily follows that, even the Accused No. 2 cannot be said to have participated in the commission of the crime and the prosecution evidence is not sufficient to record a finding against the Accused No. 2 in that behalf.

12. In other words, there is no legal evidence so as to record a finding that either Accused No. 2 or Accused No. 3 has participated in the commission of the crime alongwith Appellant-Accused No. 1. If that is so, then by applying the principle enunciated by the Apex Court in K.G. Patil's case (supra), the Trial Court was obliged to acquit the Appellant-Accused No. 1 of the alleged offence and could not have convicted with the help of Section 34 of the Indian Penal Code.

13. The next question is: whether the Appellant can be convicted for offence punishable u/s 307 of I.P.C. simpliciter in connection with the crime in question? In the first place there is no such specified charge. Besides, the Trial Court has had no occasion to examine this aspect. Even if this court were to examine as to whether the accused can be convicted for offence punishable u/s 307 simpliciter, to my mind, that will have to be answered in favour of the Appellant-Accused No. 1. In as much as, the prosecution evidence clearly accepts the position that, since rickshaw stopped, P.W.1 alighted from the rickshaw from the left side and immediately succeeded in accosting the Appellant-Accused No. 1. The evidence further establishes that while P.W.1 was attempting to accost the Appellant-Accused No. 1, he had raised his hand and one bullet went in the air. This fact is admitted by P.W.1 in Paragraph 5 of his deposition. In other words, there is no evidence to even remotely suggest that, the Appellant-Accused No. 1 had attempted or intended to fire at Gopal, at any stage. Reliance has been placed on

the decision of the Apex Court in Hazara Singh and Others Vs. State of Punjab, . The Apex Court in the said decision has observed that: what is to be seen is whether it has been proved beyond doubt that shots were fired at the police party. In that case, Apex Court observed that there could be two possibilities in such a situation; one could be of the shots being fired in the direction of the police party or taking aim at them and the other could be of the shots being fired in the air or in some other direction and not in the direction of the police party merely to create confusion for the purpose of running away. The Apex Court held that as the evidence suggests that firing of gun shots, was done in darkness, direction was not certain and, therefore, conviction u/s 307 of I.P.C. was unsustainable. Reliance is also placed on the decision of this court reported in 2000(1) Mah.L.J. 662 in Shivaji @ Shivanand s/o. Sharnappa Borgi v. State of Maharashtra to contend that the prosecution is required to establish two things. First, that the Accused had intention or knowledge to commit murder and secondly that the act done by him was capable of causing death. From the evidence in the present case, against the Appellant-Accused No. 1, it is not possible to find that the Accused No. 1 was or is guilty of offence u/s 307 of the Indian Penal Code simpliciter.

14. For the aforesaid reasons, this appeal would succeed and the impugned Judgment and order is set aside and the Appellant-Accused No. 1 is acquitted of the offence punishable u/s 307 read with 34 of the Indian Penal Code. His bail bonds stand cancelled.