
(2020) 12 BOM CK 0022
In the Bombay High Court
Case No : Criminal Appeal No. 119 Of 2014

Shrimant @ Wantya And Ors

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 02-12-2020

Acts Referred:

Indian Penal Code, 1860 — Section 34, 109, 299, 300, 302, 304
Code Of Criminal Procedure, 1973 — Section 174, 235(1), 313, 428
Evidence Act, 1872 — Section 27

Citation : (2020) 12 BOM CK 0022

Hon'ble Judges : Ravindra V. Ghuge, J;B. U. Debadwar, J

Bench : Division Bench

Advocate : Satej S. Jadhav, R. D. Sanap

Final Decision : Allowed

Judgement

Ravindra V. Ghuge, J

1. By this appeal, the convicts viz. accused No.1 Shrimant and accused No.2 Dashrath son of Shrimant, have been held guilty of committing an

offence punishable under Section 302 read with Section 34 of the Indian Penal Code (hereinafter referred as "IPC") and have been handed down

a sentence of suffering rigorous imprisonment for life. Since both had been arrested on 26-07-2012, which is after the offence committed at about

09.00 p.m. on 25-07-2012, they were entitled for set off for the period of detention in prison under Section 428 of the Code of Criminal Procedure,

1973 (hereinafter referred as "Cr.P.C.").

2. We have considered the strenuous submissions of the learned advocate for the appellants and the learned prosecutor on behalf of the State. With

their assistance, we have gone through the appeal paper book and the record

and proceedings, threadbare. In order to avoid repetition of their submissions, we would be referring to their submissions while drawing our conclusions based on the oral and documentary evidence.

3. The prosecution had proved its case against these two appellants as follows :-

a) The father of accused No.1 is Mokinda Pawar who had passed away about 20 years prior to the date of the offence. He had about 4 acres of land

and was survived by his wife Indrabai. The accused and the deceased are blood relatives and all belong to the Paradhi tribe which is a Scheduled

tribe. Mokinda and Indrabai had six sons and one daughter. One son Manohar was allegedly kidnapped and killed years ago by members of another

Pardhi community who have been acquitted. The remaining five sons are Pandit, Shrimant, Kundalik, Sambhaji and Balbhim. Indrabai resides with the

youngest son Balbhim who cultivates the four acres of land.

b) A dispute was on going between these five sons for partition of the four acres of the agricultural land. Time and again, there used to be some

friction between these brothers as the agricultural land had become the nucleus of the dispute.

c) On 25-07-2012, accused Shrimant and his son Dashrath are said to have had an altercation with Kundalik. The wife of Kundalik namely

Basvantabai, PW4, is said to have watched the exchange of words. Kundalik is said to have telephoned eldest brother Pandit for help. All these

brothers live in a cluster in the same locality called as Paradhi Pedi / Basti and the distance between their hutments is approx 500 feet. Pandit arrived

with his son Shivaji and tried to pacify Shrimant and Kundalik. Dashrath is said to have gone back to his house and returned with a knife. Shrimant is

said to have snatched the knife and stabbed nephew Shivaji in the abdomen leading to the death of Shivaji. This incident has occurred between 08.00

to 09.00 p.m.

d) On the next day, 26-07-2012, Pandit lodged an FIR with Police Station Sirsala, camp at Parli at about 13 hrs. (01.00 p.m.) and the crime was

registered as 70/2012. Section 302 read with 34 of the IPC were made applicable.

e) A spot panchanama Exhibit-47/C was drawn by the investigating officer. Both the accused were arrested from the Basti itself. Both have been

behind bars since their arrest.

f) A charge-sheet was submitted before the trial Court on 01-10-2012. The learned Additional Session Judge-2, Ambajogai, framed the charge in

Sessions Case No. 85 of 2012, on 08-11-2012. Both the accused denied the charge and sought to be tried for the offence punishable under Section

302 read with Section 34 of the IPC

g) In all seven witnesses were examined by the prosecution, which are as follows :-

PW1 â?" Laxman Tukaram Tambade, Panch witness for the seizure of clothes and knife used by accused No.1.

PW2 â?" Manik Rambhau Paul, Panch witness for the spot panchanama and seizure of soil from the crime spot.

PW3 â?" Pandit Mukinda Pawar, the first informant PW4 â?" Basvantabai w/o Kundlik Mukinda Pawar PW5 â?" Shrirang Jeeja Kale, Panch of the

inquest panchanama and seizure of clothes of the deceased.

PW6 â?" Ramakant Dhondiba Panchal, Investigating officer

PW7 â?" Dr. Uddhav Narhari Shinde, Autopsy Surgeon

h) PW1 turned hostile. The blood group of accused No.1 Shrimant was not determined. Both the accused recorded their statements under Section 313

of Cr.P.C. and their common stand was â??I do not know/ It is false / false crime is registered against themâ? and finally accused No.1 stated that

the daughter of Kundlik and Basvantabai, namely Laxmi had a love affair with a person belonging to another tribe namely Ghisadi and hence, the

accused are falsely implicated. Same answer has been given by accused No.2.

i) Based on the oral and documentary evidence, the trial Court has concluded that the death of Shivaji was homicidal. Shrimant had stabbed Shivaji

with a knife which was fetched for him by his son Dashrath. Shivaji died of the stab injury and, hence, Shrimant is guilty of having committed the

offence punishable under Section 302. Dashrath has also been convicted by invoking Section 34 of the IPC and was held equally responsible with

Shrimant. Both have been sentenced to suffer rigorous imprisonment for life.

4. The strenuous submissions of the learned advocate for the appellants can be summarised as under :-

a) Both of them have not committed the murder of Shivaji and that Shivaji was suffering from blood pressure and had, therefore, suffered terminal

cardio respiratory arrest.

b) Shrimant had suffered a head injury on the date of the incident and he was not involved in the commission of the offence.

c) The entire Basti knew about the love affair of the daughter of Kundlik. Kundlik as well as Basvantabai suspected Shrimant's role in spreading the said story.

d) Shrimant, Kundlik and Pandit are real brothers and Shrimant could never develop the intention of murdering any of his brothers, much less Shivaji who is the son of Pandit.

e) Though it has come in the evidence of PW6, I.O. and PW3 brother Pandit that a crowd had gathered when Shivaji was found with a bleeding injury, not a single person from the crowd was examined by way of an independent witness.

f) Though PW6 stated in his testimony that he had inquired with the people who had gathered and had recorded their statements, none of them were examined as witnesses.

g) Two witness namely PW3 Pandit Mukinda Pawar and PW4 Basvantabai w/o Kundlik Mukinda Pawar are interested witnesses.

h) Though it is the case of the prosecution that an argument took place in between the accused and Kundlik, the testimony of Kundlik has not been recorded before the Court.

i) PW4 Basvantabai, being the wife of Kundlik, has been projected as an eye witness and that she is a manufactured witness.

j) Since PW3 Pandit and Kundlik had aligned with each other, Pandit has tendered a false testimony against the accused.

k) Since a false charge has been leveled upon the accused, Kundlik did not step into the witness box to support a false charge.

l) Even if it is assumed that Shrimant used a knife which caused the death of Shivaji, it is obvious that Shrimant did not have any intention of inflicting any such injury which was likely to cause the death of any person who may be inflicted with a injury.

m) The fact that Shrimant neither carried a knife with him, nor did he himself fetch a knife, supports his contention that there was no intention on his part to kill any person.

n) Though Dashrath is alleged to have fetched a knife, he himself has not used the knife and it can be said that he may have brought the knife only to use it as a threat against Kundlik.

o) The statement of Pandit, the first informant / PW3, in his testimony that the accused started scolding and abusing PW3 and the deceased, is not set out in the FIR. The deposition of PW3 is, therefore, an improvisation and will have to be ignored.

p) The murder weapon " knife was never shown to the autopsy surgeon and no impression was sought by the I.O. from the autopsy surgeon PW7

as to whether such knife could have caused the injury that is said to have killed Shivaji.

q) There are no blood stains on the clothes of accused No.2 Dashrath, in as much as, there is no oral evidence to indicate that Shrimant and Dashrath

planned to use a knife and that Dashrath brought a knife for executing such plan or that he fetched the knife on the dictate of Shrimant and handed

over the knife so as to enable Shrimant to stab Shivaji.

r) The gravity of the verbal dispute between the accused and Kundlik had not reached such a proportion which would have agitated Dashrath so as to bring the knife from his house.

s) The trial Court has drawn an unsustainable conclusion in paragraph 35 (ii) and (vii) of the impugned judgment.

t) Neither Section 34 nor section 109 of the IPC could be attracted.

u) If at all this Court concludes that Shrimant had caused the death of Shivaji, such act would, at the most, fall under Part II of Section 304 of the IPC.

v) In the absence of any plan or conspiracy or a common intention or common object in the minds of both the accused, Section 34 and Section 109 of

the IPC would not be attracted and accused No.2 Dashrath would be entitled for an acquittal.

5. The learned prosecutor has vehemently contended that there are two eye witnesses. Merely because they are related to each other would not

mean that they could be branded as interested witnesses. If the father of the deceased and PW4 Basvantabai have seen Shrimant stabbing Shivaji,

their testimony cannot be discarded merely because PW3 is the father of the deceased and PW4 being the wife of Kundlik.

6. The learned prosecutor further submits that the blood detected on the clothes

of the deceased and Shrimant and on the knife, was of human origin.

The blood group on the clothes, labeled as Exhibit Nos. 1 to 5 was of A group. Therefore, both the accused can be safely said to have been

guilty of the death of Shivaji. He further submits that the two eye witnesses PW3 and PW4 clearly establish the guilt of the accused. Since PW3 and

the deceased tried to pacify Shrimant and Dasharath, Shrimant used the knife for silencing Shivaji for showing allegiance towards Kundlik and since

Kundlik and his brother Pandit had aligned themselves against Shrimant. He, therefore, submits that the conviction of both the accused calls for no

interference.

WHETHER DEATH OF SHIVAJI IS HOMICIDAL ?

7. The inquest panchanama Exhibit-55/C recorded under Section 174 of the Cr.P.C. indicates that Shivaji had suffered a stab injury in his abdomen.

He has profusely bled and as a consequence of which, he had died during his journey to the hospital.

8. Exhibit-69/C is the memorandum of the postmortem examination of the deceased Shivaji. The stab injury suffered by him is set out in clause 17.

The knife had penetrated the abdomen of Shivaji below the umbilicus and had further penetrated into his intestines. The dimensions of the injury were

set out as 8 cm in vertical direction, 4 cm in horizontal direction and 10 cm in depth. The report indicates at clause 18(a) that the injury was ante-

mortem. The cause of death was mentioned as terminal cardio - respiratory arrest due to hypovolumic shock due to vital injury.

9. Dr. Uddhav Narharrao Shinde, PW7, was examined at Exhibit-68/C. He has referred to the postmortem report and he has supported its contents.

He has specifically stated that the injury was sufficient to cause the death of Shivaji and the same was ante-mortem. In his cross examination, he

perused the knife and has deposed that the injury was caused in a vital area and the said knife could have caused the said injury. Thus, he supported

his statement in his examination-in-chief that the injury referred by him in the postmortem report is possible by the use of the knife shown to him.

10. We have also perused the report of the chemical analyst submitted by the Regional Forensic Science Laboratory and considering the said report in

the back drop of the oral and documentary evidence, it is crystal clear that the stab injury suffered by Shivaji had led to his death. We, therefore, have

no hesitation in concluding that Shivaji has suffered a homicidal death.

WHETHER SHRIMANT HAS INFLECTED THE STAB INJURY TO THE DECEASED ?

11. We have perused the deposition of PW1 Laxman Tukaram Tambade Exhibit-27. He is a panch witness. He has deposed that the clothes worn by

Shrimant were seized in his presence. The second panch witness Angad Hanumant Kale was also along with him. The clothes of accused were

stained with blood. He identified the contents of the seizure memo Exhibit-28. Since he stated that he was preempted by PW6 that the clothes of the

accused are to be recovered, the prosecutor has cross examined him, though he has admitted the contents of the memorandum of the accused under

Section 27 of the Evidence Act, marked Exhibit-29. He denied that he had travelled in the police vehicle to the place from where the knife was

brought out by the accused. He denied that Shrimant had taken out the knife from the back yard of his house.

12. Though PW1 was declared hostile, we find from his testimony that Shrimant had volunteered to show the place where he had hidden the knife.

Based on the memorandum Exhibit-29 and the testimony of PW1 which supports Exhibit-29, it appears to us that Shrimant had shown the exact place

where the knife was hidden.

13. The learned advocate for the appellants strenuously submits that the manner in which the memorandum form was written, would not amount to a

statement under Section 27 of the Evidence Act. So also, assuming that the statement was made by Shrimant, he was kept in the lock up when he

made the statement in the presence of the panch. Such statement is involuntary and under duress. Even under Section 313 of Cr.P.C., he has

answered question No. 36 as regards the said memorandum by saying â??It is falseâ?. He has denied that he led the police party to the spot from

where he dug out the soil and brought out the knife in the presence of two panch witnesses. He has also denied that the knife carried blood stains.

14. We, however, find that he has signed (marked as Exhibit-30) below the portion marked Exhibit-29 which is his statement in the accused

memorandum form. The testimony of the I.O. and the panch in our view, proves that the knife article-8 was dug out from the spot behind the hut of

Shrimant. Considering Section 27, any fact is supposed to be as discovered in consequence of information received from a person accused of any

offence, in the custody of a police officer and if such information relates distinctly to the fact thereby discovered, the prosecution has to prove the said

discovery. The portion marked at Exhibit-29 in the memorandum is reproduced as being the words of Shrimant, though the earlier portion is

inadmissible in evidence, as follows :-

â??

. . 25/7/12

â??

15. We have considered the testimony of the informant PW3 and PW4, both being eye witnesses. They have also identified the knife Article-8. The

I.O. PW6 has stood by the contents of Exhibit-29, the recovery and seizure of the knife and the autopsy surgeon PW7 who was not shown the knife

earlier, has perused the same before the Court and has expressed an opinion that the injury mentioned in the postmortem report can be caused by such

a knife. There is no material before us on the basis of which, we could conclude that the testimony of PW3 and PW4 deserves to be discarded. Based

on the substantive ocular evidence, we conclude that Shrimant had used the knife to stab Shivaji which caused his death.

WHETHER THE OFFENCE COMMITTED BY SHRIMANT WOULD FALL UNDER SECTION 302 OR PART I OR PART II OF

SECTION 304 OF THE IPC

16. The learned prosecutor has strenuously contended that section 302 of the IPC clearly stands attracted as both the accused had specifically

planned the attack on Shivaji. Accused No.2 Dashrath has fetched the knife from his house so as to be handed over to accused No.1 Shrimant. It was

preplanned that Shrimant would use the knife to stab Shivaji and both had intended to cause the death of Shivaji. Reliance is also placed on the

testimony of PW7 autopsy surgeon who has stated that the injury shown to him was sufficient to cause the death of Shivaji.

17. We have perused the testimony of Basvantabai PW4 who has stated that both the accused commenced a verbal exchange with her husband

Kundlik on the issue of partition of the agricultural land. We have believed the statement of Basvantabai being an eye witness and having corroborated

the testimony of PW3 informant that Shrimant had snatched the knife from Dashrath and stabbed Shivaji. To this extent, the contents of the FIR and

the substantive evidence of PW3 and PW4 established that Shrimant had stabbed Shivaji.

18. The issue before us is whether Shrimant and Dashrath had preplanned the attack on Shivaji which would have attracted Sections 34 and 109 of

the IPC, as has been held by the trial Court. Taking into account the evidence before us, we are of the view that Section 109 of the IPC prescribes

punishment for abetment, if the act abetted is committed.

19. The issue before us is as regards whether the act committed by the accused would be covered by Section 304. Sections 299, 300, 302 or 304 of

the IPC read as under :

299. Culpable homicide â?

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death,

or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Murder â?

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing

death, orâ?" Secondly â?" If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the

person to whom the harm is caused, orâ?" Thirdly â?" If it is done with the intention of causing bodily injury to any person and the bodily injury

intended to be inflicted is sufficient in the ordinary course of nature to cause death, orâ?

Fourthly â?" If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury

as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1. - When culpable homicide is not murder. - Culpable homicide is not murder if the offender, whilst deprived of the power of self-control

by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or

accident.

The above exception is subject to the following provisos:

First. - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly. - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. - That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation. - Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2. - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property,

exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation,

and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3. - Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public

justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the

due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel

and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5. - Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes

the risk of death with his own consent.

302. Punishment for murder â?

Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

304. Punishment for culpable homicide not amounting to murder â?

Whoever commits culpable homicide not amounting to murder, shall be punished

with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

20. The evidence before us indicates that a verbal exchange began between both the accused on one side and Kundlik on the other side. There is no iota of evidence to indicate that there was an exchange of blows or physical contact between the accused and Kundlik. Ocular evidence before us indicates that neither of the two accused had carried a knife while entering into a verbal dual with Kundlik. So also, the entire evidence on record indicates that neither PW3 nor his deceased son Shivaji were present when the arguments between the accused and Kundlik commenced. This, therefore, rules out the possibility of both the accused having planned an attack on Shivaji or having developed a common intention and object to kill Shivaji.

21. Evidence before us indicate that Kundlik made a telephone call to PW3 Pandit, thereby informing him about the arguments between the accused and Kundlik. Pandit responded to the telephone call by reaching the place where the three were quarreling. He took deceased son Shivaji along with him so as to cool down the accused and end the quarrel. Neither of the accused had any idea that Kundlik would call Pandit and Pandit would bring his deceased son along with him to sort out the dispute. It is purely a coincidence that Kundlik made a call to Pandit and Pandit was accompanied by Shivaji. Kundalik could have called any of his other two brothers namely Sambhaji or Balbhim. As such, these circumstances would clearly indicate that neither of the accused had anticipated the arrival of Pandit and / or Shivaji.

22. Notwithstanding above, there could be circumstances, which could have generated a heated argument and led Dasharath to bring a knife either under orders of Shrimant or to hand over the knife to Shrimant to be used against either Kundlik or Pandit or Shivaji. The fact remains that as Pandit being the eldest brother had tried to pacify Shrimant, Dashrath left the scene to

go to his house and returned with a knife. Evidence indicates that

Shrimant snatched the knife from the hands of Dashrath and stabbed Shivaji.

23. The prosecution has put forth the case that Shrimant and Dashrath began scolding and abusing Pandit and Shivaji and, hence Shrimant, with

predetermination, stabbed Shivaji. We have perused the FIR filed by PW3 Pandit after 16 hours of the incident, wherein the informant Pandit has

mentioned that he and his deceased son Shivaji were trying to pacify the accused when Dashrath went inside his house and brought out a knife,

Shrimant snatched the knife () and delivered a single stab

injury to Shivaji in the abdomen. It is nowhere stated in the FIR that after PW3 and deceased Shivaji began pacifying the accused, they had launched

an abusive attack upon Pandit and Shivaji and therefore, Shrimant had stabbed Shivaji. We have compared this omission from the FIR with the

testimony of the informant PW3 in which he has stated in paragraph No.2 as â??I say that Shrimant and Dashrath started scolding and abusing usâ?.

We have also compared the said statement with the statement made in paragraph No.9 by the informant that â??I have told to police that Shrimant

and Dashrath abusing and scolding myself and my son. I cannot assign reason why this fact was not mentioned in my complaintâ?.

24. This would clearly establish that the informant / complainant himself had not stated in his FIR that the accused had started abusing him and his

son. The last sentence in the FIR signed by PW3 would indicate that after the FIR was written as per the narration of PW3, it was read out to him

and he agreed that it was written exactly as per his narration. We, therefore, find that PW3 had attempted to improvise his statement in the FIR, while

recording his testimony. We, therefore, find it appropriate to discard the said improvisation notwithstanding the fact that PW4 Basvantabai, wife of

Kundlik, who was watching from a distance had stated that the accused were abusing PW3 and the deceased.

25. The learned advocate for the appellants has contended that the appellants did not preplan the attack and had not developed a common intention

and object to kill Shivaji. It is reiterated that they had no idea that Kundalik would call PW3 and his deceased son for help.

26. We find from the evidence before us that PW3 and the deceased are not alleged to have either attacked the accused or had launched a verbal

abusive attack on them so as to invite a reaction of aggression from any of the accused. There is no evidence which indicates that Shrimant directed

Dashrath to fetch a knife or Dashrath brought out a knife to enable Shrimant to stab Shivaji. It is established through the evidence that Dashrath came

with a knife and was simply holding it in his hand when Shrimant suddenly snatched it and stabbed Shivaji. There is absolutely no evidence before us

as to what triggered such an extreme reaction from Shrimant so as to stab Shivaji when there is no evidence that Shivaji had entered the fray and had

antagonised the accused to an extent that Shrimant would stab him. The testimony of PW4 Basvantabai indicates that PW3 had only suggested to

Shrimant that their mother is still alive and it is only after her demise that the agricultural land could be partitioned. Assuming that this antagonised

Shrimant since he felt that PW3 was siding with Kundlik, we find it quite intriguing that Shrimant suddenly stabbed Shivaji without causing any injury to

PW3 Pandit or even Kundlik. We are, therefore, of the view that Shrimant and Dashrath had not preplanned an attack on Shivaji.

27. Exception 4 below Section 300 of the IPC indicates that culpable homicide would not be murder if it is committed without premeditation, in a

sudden fight, in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual

manner. Evidence before us indicates that Shrimant inflicted a single blow on a non-vital part. He did not attack either PW3 Pandit or Kundlik, with

whom he had an argument. We find from Part II of Section 304 of IPC that a convict would be liable to suffer imprisonment of either description for a

term which may extend to 10 years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but is without any

intention to cause death or to cause such bodily injury as is likely to cause death. Shrimant could not have even imagined that Pandit and Shivaji would

be called by Kundlik.

28. Considering the law laid down by the Honâ??ble Apex Court in Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra [(1973 2

Supreme Court Cases 793], we do not find the testimony of these two witnesses to be so convincing that we would draw a conclusion that both the

accused had preplanned the attack on Shivaji with the common intention and object of causing his death. We, therefore, find that the act of Shrimant

would fall within the second part of Section 304 of IPC.

ROLE OF ACCUSED NO.2 DASHRATH

29. Section 34 of the IPC reads thus :-

34. Acts done by several persons in furtherance of common intention â?

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.

30. It is obvious that accused No.2 Dashrath would have to face conviction, if the act of murdering Shivaji by Shrimant can be said to be done in

furtherance of common intention of both. In the matter of Suresh and another Vs. State of U.P. [AIR 2001 SC 1344,] it has been held that Section 34

of the IPC would recognize the principle of vicarious liability in criminal jurisprudence. It would be a rule of evidence and does not create a substantive offence.

31. Having drawn a conclusion that elements like common intention and object are missing from the offence committed by Shrimant in the peculiar

facts and circumstance of this case, we are of the considered view that Section 34 would not be attracted. We find from the evidence before us that

Dashrath appears to have rushed back to his house to fetch a knife, having been excited or apprehending trouble. Not a single blow or physical

contact had occurred at the first instance amongst the five persons, after PW3 and Shivaji had responded to the call of Kundaik. Dashrath had not

intimidated anybody. It is only within the knowledge of Dashrath as to why he rushed back to the house to fetch a knife and it is obvious that he had

no idea that Shrimant would suddenly snatch the knife from his hand. Probably, Dashrath had intended to show courage of wielding a knife to deter

Kundlik or Pandit. He is an illiterate 24 years old immature villager and may not have apprehended the snatching of the knife from his hand by his

father. He has been convicted only on account of Section 34.

32. We find that the following conclusion of the trial Court to be unsustainable :-

â??35[vii]. The prosecution has proved its case from probability to possibility and possibility to more than 50% certainty by direct evidence against

both the accused. Both the accused have common intention to cause death of deceased Shivaji. Here in this case accused No.2 Dashrath has abetted

his father Shrimant in stabbing knife in the abdomen of deceased Shivaji. He has brought a knife from the house. It was taken by his father accused

No.1 Shrimant and pierced it in the abdomen of deceased Shivaji. The role played by accused No.2 Dashrath making him liable for the commission of

offence not only under Section 34 of I.P.C. but also under Section 109 of I.P.C.??

33. We are unable to agree with the conclusion of the trial Court that ??the prosecution has proved its case from probability to possibility and

possibility to more than 50% certainty by direct evidence against both the accused. Both the accused have common intention to cause death of

deceased Shivaji? . It is obvious from this conclusion that the trial Court has failed to discern in between the sudden act of stabbing Shivaji and a

planned attack on the deceased with a common intention and object. The trial Court failed to notice that Pandit and Shivaji had suddenly entered the

scene which was not even apprehended or imagined by both the accused. The trial Court has wrongly concluded in para 35(vii) that Dasharath

brought a knife and it was taken by his father to pierce Shivaji. It lost sight of the fact that Dashrath was only holding the knife in his hand which was

suddenly snatched by Shrimant.

34. In view of the above, this appeal is partly allowed as under :-

ORDER

a) Clauses [1] and [2] of the impugned order stand modified.

b) Accused No.1 Shrimant @ Wantya s/o. Mokinda Pawar stands convicted under Section 235(1) of the Cr.P.C. for the offence punishable under

Section 304 (Part II) of the IPC and shall be sentenced to suffer rigorous imprisonment for the period that he has already spent in jail, which is eight

years, five months and five days. The direction to pay fine of Rs.500 is maintained.

c) Accused No.2 Dashrath s/o. Shrimant Pawar stands acquitted in crime No.70/2012 under Section 302 read with Section 34 of the IPC.

d) Both the accused shall, therefore, be set at liberty, if their custody is not required in any other offence.