

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1606 OF 2008

Suresh Sakharam Nangare

.... Appellant(s)

Versus

The State of Maharashtra

.... Respondent(s)

J U D G M E N T

P.Sathasivam,J.

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

2) **Brief facts:**

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

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

wife-Surekha and children. On this account, Kishore developed enmity against Sanjay and wanted to get rid of him.

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

(d) On the very same day, i.e., on 03.03.1995, between 10:30 pm. to 11:00 p.m., PW-1 was informed by two residents of Ghatkopar at his residence that his younger brother-Sanjay has expired due to burn injuries. PW-1 lodged an FIR against his elder brother-Kishore Mahadeo Lokhare at Ghatkopar Police Station which was registered as CR No. 76/1995.

(e) After investigation, the police filed chargesheet against 3 persons, namely, Kishore Mahadeo Lokhare, Shabbir Fariyad Khan and Suresh Sakharam Nangare for their involvement in the death of Sanjay Mahadeo Lokhare. The case was

committed to the Court of Sessions and numbered as Sessions Case No. 816 of 1995 and charges were framed against the accused persons under Sections 302 and 201 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC').

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

(g) Being aggrieved, Suresh Sakharam Nangare preferred Criminal Appeal No. 865 of 2001 before the High Court. By impugned judgment dated 04.08.2006, the Division Bench of the High Court dismissed the appeal and confirmed the

conviction and sentence passed by the Additional Sessions Judge, Greater Bombay.

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

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

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

- (i) There is no direct evidence showing the complicity of the appellant-accused and he has been convicted on the sole evidence of Shabbir Fariyad Khan (PW-7), the approver, as to his presence and participation in the crime.
- (ii) It will not be safe to rely on the sole testimony of PW-7 - the approver which lacks corroboration.
- (iii) Even if the evidence of PW-7 - the approver is accepted, still it cannot be said that the appellant-accused shared common intention with Kishore-original accused No.1 to commit the murder of his younger brother-Sanjay Mahadeo Lokhare.

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

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

5) On the other hand, Mr. Sushil Karanjkar, learned counsel for the respondent-State, submitted that on a conjoint reading of the statements of the prosecution witnesses including that of PW-7-original accused No.2, (Approver) by applying the provisions of Section 34 of IPC, the courts below were justified in convicting the present appellant along with original accused No.1 under Sections 302 and 201 read with Section 34 IPC.

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

7) It is not in dispute that originally, 3 persons, viz., Kishore Mahadeo Lokhare, Shabbir Fariyad Khan and Suresh Sakharam Nangare were implicated as A-1 to A-3 respectively

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

8) The first witness examined by the prosecution was Rajendra Mahadeo Lokhare (PW-1), who deposed that the appellant herein (original Accused No. 3) and Shabbir Fariyad Khan-Approver (original Accused No. 2) came to his house and told him that Sanjay has committed suicide by setting himself

on fire. His evidence relating to the cause of death by suicide has been negated by the evidence of Dr. Balkrishna (PW-10) who conducted the *post mortem*. When a specific question was put to the doctor by pointing out that whether a person like Sanjay, who was having flexed fingers would be in a position to light a match stick or lift a can containing Kerosene, he specifically negated the same and confirmed that all the injuries suffered by the victim were *ante mortem*. He also pointed out that the death was due to 100% burns. We will discuss the evidence of doctor and his report in the later part of our order. The above deposition of PW-1 shows that he has not implicated the appellant herein (original Accused No. 3) in the crime.

9) Surekha - wife of Kishore (original Accused No. 1) was examined as PW-2. She narrated about the conduct of her husband as well as the disability of the deceased. According to her, the deceased was unable to speak and both his hands were disabled and he had flexed fingers. She further explained that when Sanju was young, he had suffered from Typhoid and during that, he had an attack due to which he lost his power of speech and became disabled. Since he was unable to take

bath and to wear his clothes etc., she used to hold him. She also explained about the habits of her husband (original Accused No. 1) and complained that he was addicted to Ganja and liquor and used to beat her and her children because of which she used to go to her parents house. In the entire evidence, she has not implicated the appellant herein (original Accused No. 3).

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

11) The only person, who named the appellant herein (original Accused No. 3), is Kumari Subhadra Dhondibhau Tagad (PW-5). She deposed that she knows all the accused persons. She narrated that on 03.03.1995, at about 6:45 p.m., when she was standing outside her house, she saw the deceased and Kishore Mahadeo Lokhare (original Accused No. 1) in their house. At about 07:45 p.m., on that day, when she

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

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

13) The only evidence, based on which the present appellant (original Accused No. 3) was convicted under Section 34 IPC, is of approver (PW-7), who was originally Accused No.2. In the examination, he has mentioned that Kishore (A-1) has two brothers, viz., Rajendra Mahadeo Lokhare (PW-1) and Sanjay (deceased). He also stated that Sanjay was dumb and had

flexed fingers and he was unable to lift anything. He further narrated that on 03.03.1995, at about 12 noon, Kishore (original Accused No. 1) met him near K.V.K. School. At that time, Kishore was under the influence of alcohol and requested him to come to his place in the evening. At about 7.30-7.45 p.m., he went to his house. As soon as he reached the house of A-1, Suresh Sakharam Nangre - the present appellant (original Accused No. 3) also came there. There were 2 rooms in the house of A-1. At that time, the deceased was present in the inner room. He along with Kishore (A-1) and Suresh (appellant herein) was sitting in the first room. At that time, A-1 took out ganja and all of them smoked it. Thereafter, A-1 went inside the inner room where Sanjay was sitting. After some time, he heard the sound of assault. Then A-1 called him and the present appellant (original Accused No. 3) inside the said room. As soon as they went inside, they noticed that Sanjay was lying on the floor and A-1 was sitting on his abdomen and was holding his neck with one hand and fisting with the other hand on his chest and both sides of the stomach. A-1 asked him and the present appellant (original Accused No. 3) to hold Sanjay. Accordingly, the appellant

herein caught hold of the legs of Sanjay. Thereafter, A-1 removed his hands from the throat of Sanjay and he (PW-7) caught hold of the throat of Sanjay. When Sanjay had stopped his movements, A-1 got down from his abdomen. Thereafter, A-1 abused them and told them to go out. However, PW-7 did not leave that place and saw A-1 lifting kerosene can and pouring it on the person of Sanjay, who was lying on the floor. On seeing this, he ran away from the place to his house. Even if we accept the evidence of PW-7 (original Accused No. 2), who turned approver, the role allotted to the present appellant was that of only holding the legs of the deceased as directed by A-1. It should be noted that A-1 was sitting on his abdomen and was holding his neck with one hand and was also fisting his chest with the other hand and after fulfilling the work, at the end, he directed the other two accused persons to catch hold of the legs of the deceased. Beyond this, there is no role assigned to the present appellant.

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

“34. Acts done by several persons in furtherance of common intention – When a criminal act is done by several persons in furtherance of the common intention of all, each

of such persons is liable for that act in the same manner as if it were done by him alone.”

A reading of the above provision makes it clear that to apply Section 34, apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of accused in the commission of an offence. It further makes clear that if common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked. In other words, it requires a pre-arranged plan and pre-supposes prior concert, therefore, there must be prior meeting of minds.

15) We have already referred to the evidence of prosecution witnesses. Nobody has implicated the present appellant except the statements made by PW-5 and PW-7 (the approver). We are satisfied that absolutely there is no material from the side of the prosecution to show that the present appellant had any common intention to eliminate the deceased, who was physically disabled. The only adverse thing against the present

appellant is that he used to associate with A-1 for smoking Ganja. In the absence of common intention, we are of the view that convicting the appellant with the aid of Section 34 IPC cannot be sustained.

16) The other important circumstance which is in favour of the appellant herein is the evidence of the doctor (PW-10) who conducted the *post mortem*. In his evidence, PW-10 has stated that on 04.03.1995, at about 08:15 a.m., the dead body of one Sanjay Mahadeo Lokhar was brought by the police for *post mortem*. He started the examination at 2 p.m. and the same was concluded at 3 p.m. According to him, it was a burnt body, averagely nourished with presence of rigor mortis in muscles. His tongue was protruding outside and surface wounds and injuries were 100% superficial to deep burns. In his opinion, the cause of the death was due to 100% burn injuries. He also issued the *post mortem* certificate which is Exh. 21 wherein he opined that the death occurred due to 100% burns and not because of assault. The categorical evidence and the opinion of PW-10 for the cause of the death of Sanjay make it clear that the appellant herein – original Accused No. 3 has nothing to do with the same since the

evidence brought in shows that it was Kishore Mahadeo Lokhare – (original Accused No. 1) who took Sanjay to the other room where he burnt him to death. This important aspect has not been considered by the trial Court as well as by the High Court.

17) On appreciation of the entire material, we have already concluded that the present appellant had no role in the criminal conspiracy and no motive to kill the deceased. On the other hand, the evidence led in clearly implicates Kishore Mahadeo Lokhare – (original Accused No. 1) in all aspects including motive and the manner of causing death by lighting fire. Apart from all the evidence led in by the prosecution, the above position is clear from the evidence of the Doctor (PW-10) – who conducted the *post mortem* and his opinion for the cause of the death. Merely because the approver (PW-7) has stated that based on the direction of Kishore Mahadeo Lokhare (original Accused No. 1), the present appellant (original Accused No. 3) caught hold of the legs of the deceased, in the absence of any motive or intention, mere act of holding his legs that too at the end of the event when original Accused No. 1 throttled his neck by sitting on his abdomen, the appellant

(original Accused No. 3) cannot be mulcted with the offence of murder with the aid of Section 34 of IPC, particularly, when the medical evidence for the cause of death is otherwise, namely, due to 100% burns.

18) In the light of the above discussion, we hold that the prosecution failed to establish the guilt insofar as the present appellant (original Accused No. 3) is concerned and the trial Court committed an error in convicting him under Sections 302 and 201 read with Section 34 of IPC and sentencing him to imprisonment for life. For the same reasons, the High Court has also erroneously confirmed the said conclusion. Accordingly, both the orders are set aside. The appellant (original Accused No. 3) is ordered to be released forthwith if he is not needed in any other case. The appeal is allowed. We record our appreciation for the able assistance rendered by Ms. Aishwarya Bhati, learned *amicus curiae*.

.....J.
(P. SATHASIVAM)

.....J.
(RANJAN GOGOI)

NEW DELHI;

SEPTEMBER 21, 2012.

SUPREME COURT OF INDIA



JUDGMENT

SUPREME COURT OF INDIA



JUDGMENT