
(2007) 11 GAU CK 0020
In the Gauhati High Court

Gautam Ghosh and Others

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 20-11-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 149, 436

Citation : (2008) 1 GLT 42

Hon'ble Judges : Mutum B.K. Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Mutum B.K. Singh, J.—This is an appeal against the judgment dated 28.08.2001 passed by the learned Additional Sessions Judge, West Tripura, Agartala in Sessions Trial No. S.T. 5(WT/S)/97, convicting the appellants u/s 436 read with Section 149 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for 5 years and to pay a fine of Rs. 2,000/- each and in default thereof to suffer rigorous imprisonment for another 6 months. By the impugned judgment the appellants were also convicted for the offence punishable u/s 148 of the Indian Penal Code but no sentence has been awarded for the said conviction.

2. Heard Mr. S. Kar Bhowmik learned Counsel appearing for the appellants Mr. A. Ghosh, learned Addl. Public Prosecutor appearing on behalf of the State-respondent.

3. Facts, briefly, leading to this appeal are that on the basis of a written report (complaint) dated 01.08.1992 of one Rina Naha, D/O Ananta Naha of village North Maheshpur, the Yatrapur Police Station registered a case being No. 1(8)/1992 under Sections 148,149,427 and 436 of the Indian Penal Code against the appellants and seven others. According to the informant, on 01.08.1992 at about 1.30 p.m. the appellants and many others suddenly trespassed into the informant's house and set their two rooms on fire and also ransacked all the

things of the other rooms. Three bharies gold, five bharies silver and Rs. 7000/- in cash were found missing. The accused persons, thereafter, moved towards the adjacent house of Rebati Mai la and saw fire thereat. Later on three rooms were found completely gutted by fire. After investigation, the 10 submitted charge-sheet against 10 accused persons under Sections 148,149,448,427 and 436 of the Indian Penal Code. The learned trial court framed charges against 6 (six) accused persons including the appellants under Sections 148,448 and 436 read with Section 149 IPC. The trial as against four accused persons, namely, Amal Ghosh, Dipak Majumdar, Biswajit Ghosh, S/O Ramesh Ghosh and Nandan Ghosh has been adjourned sine die vide order dated 26.12.1996 passed in G.R. Case No. 200/1992. The accused persons pleaded not guilty to the charges levelled against them and claimed to be tried. The prosecution examined 10 witnesses and exhibited 12 documents. No witness was examined on behalf of the accused persons.

4. That, out of the 10 prosecution witnesses, 5 witnesses (P.W. Nos. 1, 2, 5, 6 & 7) including the informant were declared hostile by the prosecution. The learned trial court relying heavily on the statement of P.W. No. 4, arrived at the decision that the prosecution has proved beyond all reasonable doubt that the appellants were the members of an unlawful assembly being armed with deadly weapons, and in prosecution of their common object, they caused mischief by setting fire to the dwelling huts and kitchen of P.W. No. 3 (Rebati Malla) and thus, they committed the offence punishable u/s 148 of the Indian Penal Code. The learned trial Court further held that the accused persons (appellants), in prosecution of their common object as unlawful assembly committed the offence of causing mischief by setting fire to the huts of P.W. Nos. 3 and 4 (Rebati Malla and Tarun Malla respectively), punishable u/s 436 read with Section 149 IPC. The learned trial Court, however, acquitted the other accused persons namely, Biswajit Ghosh, S/O Hiranmoy Ghosh, Sanjit Ghosh and Manash Ghose from the charges levelled against them.

5. That, the grounds of appeal are that the prosecution failed to prove that the appellants formed an unlawful assembly within the meaning of Section 141 of the IPC and that formation of an unlawful assembly is the condition precedent for invoking Section 149 of the IPC. The Findings of the learned Trial Court that the appellants were the members of an unlawful assembly being armed with deadly weapons, and in prosecution of their common object, they caused mischief by setting the dwelling huts and the kitchen of P.W. No. 3 and 4 on fire are quite perverse and not supported by the evidences on record. Out of the six accused persons, three were acquitted by the learned Trial Court and thus, the number of the accused persons falls short of forming an unlawful assembly within the meaning of Section 141 of the IPC. Hence, the conviction of the appellants u/s 436 read with Section 149 of the IPC is not sustainable in law. The learned Trial Court passed the impugned judgment by misappreciating the evidences on record and mis-reading the provisions of law.

6. That, in view of the above grounds of appeal, I feel it necessary to examine the evidences on record. P.W. No. 1, the informant, simply deposes that on 01.08.1992 at about 01 -30 pm some miscreants set their two houses on fire and those miscreants had also burnt down the two houses of Sri Rebati Malla, P.W. No. 3 but stated that she had not seen the persons, who set those houses on fire. P.W. No. 2, the mother of P.W. No. 1 and wife of P.W. No. 5, deposes that some miscreants may be of 11 or 12 in numbers set on fire their houses and she also learnt that the houses of Sri Rebati Malla were also burnt by the said miscreants and among the said miscreants she could identify only two persons, namely, Sanjit Ghosh and Amal Ghose. P.W. No. 5, the father of the informant, who was examined on 16.03.2001, deposed that the accident was occurred about 5/6 years ago, his two huts were burnt down by fire and articles of his house were damaged but he did not see any of the miscreants as he was in his another house at Mainapathar at the relevant time. P.W. No. 6, a villager of Maheshpur, simply deposed that the houses of the informant were gutted by fire and that at the relevant time he was not in his house and he had not seen the alleged incident. Similarly, P.W. No. 7, a villager of Maheshpur, deposed that about 7/8 years ago on 01.08.1992 at about 01-30 pm some miscreants set the huts of Ananta Naha (P.W. No. 5) and Rebati Malla (P.W. No. 3) on fire but the miscreants were not known to him. The statement above witnesses did not support the prosecution story that the appellants formed an unlawful assembly in order to invoke Section 149 of the IPC. However, it can be safely inferred from the above evidences that the huts of the P.W. No. 3 and P.W. No. 5 were set on fire on 01.08.1992 by some unknown miscreants.

7. That, P.W. No. 3, Sri Rebati Malla, whose huts were set on fire, deposes that on 01.08.1992 at about 02-00 pm the appellants along with Nandan Ghosh, Amal Ghosh, Biswajit Ghosh @ Bishu entered into his hut and then they set fire to his hut and at that time the appellants Uttam and Paresh were holding with daos and others with lathis. Out of fear, he hid himself inside the cluster of banana trees wherefrom he could see that the accused Nandan and Paresh set his huts on fire. But he could identify only Uttam Ghosh, Manash Ghosh, Biswajit Ghosh and Paresh Deb while giving the statement before the Court. During the cross-examination this witness admitted that he did not say to the police in his previous statement that the accused persons entered into his house. When the attention of this witness was drawn to his previous statement, it was also found that he did not state to the police that the accused Nandan and Paresh set his house on fire and that the accused Biswajit and Nandan were present at the time of incident. On close scrutiny of the above statement of P.W. No. 3, it simply reveals that he could identify the appellants and one Biswajit Ghosh, who has been acquitted by the learned Trial Court, and that his statement about the presence of Nandan Ghosh and Anial Ghosh is not reliable and trustworthy. The statement of this witness also did not extend support to the prosecution case that the appellants were the members of an unlawful assembly within the meaning of Section 141 of the Indian Penal Code.

8. That, P.W. No. 4, Sri Tarun Malla, Son of P.W. No. 3 deposes that the incident was occurred on 01.08.1992 at about 02-00 pm. The appellants along with Amal Ghosh and Nandan Ghosh set their huts on fire and at the relevant time he was beside the huts. He further deposes that accused Uttam and Paresh were wielded with daos and others with lathis. He identified the appellants before the court but he could not identify the other accused persons. In the cross-examination, he admitted that he did not state to the police that accused Amal, Nandan and Goutam Ghosh set their house on fire. He also admitted that he could not remember the day of the week on which the alleged incident took place. He further deposes that at the relevant time he was a school student. He did not try to flee away from the place of occurrence. He also admitted that his brother Gobinda Malla and one Narayan Naha were the accused in the murder case of the younger brother of accused Uttam Ghosh. He also admitted that at the time of the incident no neighbour came to their house, the neighbours visited their house only after the police arrived at the spot.

9. That, according to the learned Trial Court the statement of the P.W. No. 4 was fully convincing and reliable and it clearly proved that the appellants along with Amal Ghosh and Nandan Ghosh formed an unlawful assembly, and in prosecution of their common object, the appellants committed the offence of setting the houses of Sri Rebati Malla and Sri Tarun Malla on fire. However, on scrutiny it appears that the statement of P.W. No. 4 that the appellants along with Amal Ghosh and Nandan Ghosh set their houses on fire is not wholly reliable and trustworthy because of his admission in the cross-examination that he did not state to the police in his previous statement that the accused Amal, Nandan and Goutam Ghosh set their houses on fire. Besides, no charges has been framed against the accused Amal and Goutam Ghosh as the trial as against them has been adjourned sine-die. According to the P.W. No. 3, one Biswajit Ghosh was also present along with appellants at the time of occurrence but P.W. No. 4 did not mention the name of Biswajit Ghosh in his statement. On the other hand, the alleged accused persons against whom no charges have been framed for the offence punishable u/s 149 of the IPC cannot be taken as the members of an unlawful assembly in connection with the trial of the other accused persons, which has been taken up and proceeded with separately, for the reasons that (i) no charge u/s 149 IPC has been framed against the alleged two accused persons; (ii) they cannot be held as the members of an unlawful assembly without trial and giving opportunity to defend themselves according to law; and (iii) in case if such alleged accused persons are acquitted honourably in the subsequent trial, the conviction of the appellants for forming an unlawful assembly along with such alleged accused persons, would not be sustainable in law. In the case at hand, six accused persons were charged for the offence punishable u/s 436 read with 149 IPC and out of the six accused persons, the learned trial court honourably acquitted three accused persons and convicted the appellants for forming an unlawful assembly along with the said alleged two accused persons who were not on trial. The acquittal of three accused persons

clearly shows that the said three accused persons were not the members of the unlawful assembly. On that count, the remaining three accused persons i.e. the appellants cannot be held as the members of an unlawful assembly within the meaning of Section 141 of the Indian Penal Code.

10. That, Mr. A. Ghosh, the learned Addl. Public Prosecutor submits that there are sufficient evidences on record that the appellants along with two others i.e. Amal and Goutam Ghosh formed an unlawful assembly and as such the acquittal of the three accused persons does not mean that the appellants were not the members of an unlawful assembly. According to the learned Addl. Public Prosecutor, the conviction of the three appellants is quite sustainable in law. In support of the above contention, the learned Addl. Public Prosecutor relied on a decision of the Hon'ble Apex Court in *Kallu @ Kallu @ Masih and Others Vs. State of Madhya Pradesh*, (Para 17 & 19). In the said case, out of 27 charge-sheeted accused persons, 4 accused persons were ultimately convicted by the High Court but the Hon'ble Apex Court held that when the evidence clearly shows that more than 5 persons armed with swords, appears etc. had come to the house of the victim with the common object of causing injury, and injured him the mere fact that several accused were acquitted and only four are convicted, does not enable the four who are convicted guilty to contend that Section 149 is inapplicable.

11. I have carefully gone through the above decision cited by the learned Addl. Public Prosecutor and of the view that the ratio laid down in the said case is not applicable in the case at hand. In the above case all the 27 accused persons faced the trial and the learned trial court acquitted them and on appeal the Hon'ble High Court convicted 4(four) accused persons and acquitted 1 (one) on the benefit of doubt but his presence as a member of the group was accepted. However, in the present case 3 accused persons were acquitted as the prosecution failed to prove their presence as the members of the group but the learned trial court held that the appellants formed an unlawful assembly along with the two other persons who were not on trial. Hence, the contention of the learned Addl. Public Prosecutor has no sufficient force to accept.

12. That, Mr. S. Kar Bhowmik, the learned Counsel appearing for the appellants, reacting sharply to the above contention advanced by the other side, submits that the prosecution has completely failed to prove that the appellants were the members of an unlawful assembly and that an assembly of less than 5 members is not an unlawful assembly within the meaning of Section 141 of the Indian Penal Code. The effect of the acquittal of three accused persons by the learned trial court shows that they were not the members of the unlawful assembly and thus, the remaining three persons cannot be said to be the members of an unlawful assembly within the meaning of Section 141 of the Indian Penal Code. The learned Counsel, in support of the above contention, relied upon a decision of a Bench of Three Judges of the Hon'ble Apex Court in *Subran @, Subramanian and Ors. v. State of Kerala* (1993) 3 SCC 32, in which the Hon'ble Apex Court

held that an unlawful assembly must consists of minimum numbers of 5 (Five) persons for conviction with the aid of Section 149 of the IPC. In the said case, the learned trial court convicted 6 accused persons with the aid of Section 149 of the IPC but the Hon''ble High Court acquitted two of them. The Hon''ble Apex Court held that the remaining four persons cannot be convicted with the aid of Section 149 IPC.

13. That, coming to the facts of the present case, P.W. No. 4, however, stated that the appellants along with Amal and Nandan Ghosh set their huts on fire but this piece of evidence suffers from infirmities for the reasons given in paragraph No. 9 above. Except the, above piece of evidence, there is no other convincing evidence to show that at least or more persons formed an unlawful assembly and in prosecution of common object of such assembly, the huts of P.W. Nos. 3 & 5 were set on fire. Admittedly, there is no substantive/separate charge has been framed against the appellants for the offence punishable u/s 436 of the IPC and the appellants were convicted u/s 436 of the IPC in the aid of Section 149 of the IPC. There is also no evidence on record that Amal and Nandan Ghosh were known to the P.W. Nos. 4 & 3 since before or from the date of occurrence, besides none of the prosecution witness could identify 5 (Five) or more accused persons in the trial though the names of 10(ten) were given as accused persons in the FIR. The informant herself stated that she had not seen any of the accused persons at the time of incident. Under the above backdrops there cannot be any presumption that the appellants along with other persons formed an unlawful assembly within the meaning of Section 141 of the IPC.

14. Apart from the above facts, the acquittal of the three accused persons were not either on the benefit of doubt or mis-identification of their identities but on the complete failure of the prosecution to prove their presence at the time of incident. It appears that the prosecution has failed to establish that the appellants along with other accused persons either known or unknown about their identities formed an unlawful assembly and hence, the conviction of the accused persons u/s 436 IPC in the aid of Section 149 IPC is not sustainable in law.

15. That, having regard to the above discussions, observations and in view of the ratio laid down by the Hon''ble Apex Court in Subran @ Subramanian and Ors. (supra), this Court is of the firm view that the prosecution has failed to prove that the appellants were the members of an unlawful assembly, consequently, the conviction of the appellants u/s 436 of the IPC in the aid of Section 149 of the IPC is liable to be set aside.

16. Resultantly, the impugned judgment and order of conviction and sentence dated 28.01.2001 passed by the learned Additional Sessions Judge, West Tripura, Agartala in ST. No. 5(WT/S)/9 convicting and sentencing the appellants for the offence punishable u/s 436 read with 149 of the IPC is set aside and the appellants are set free at liberty. Surety bonds and bail bonds stand discharged. The appeal is, accordingly, allowed. No costs.