
(2004) 09 AHC CK 0057
In the Allahabad High Court
Case No : Criminal Appeal No. 1791 of 1981

Jawahar and Others (in Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 01-09-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 302

Citation : (2005) 1 ACR 94

Hon'ble Judges : S. Rafat Alam, J; Mukteshwar Prasad, J

Bench : Division Bench

Advocate : Kamini Mohan, R.C. Yadav, Umesh Mohan, O.N. Shukla, S.P. Singh and M.S. Yadav, for the Appellant; A.G.A., for the Respondent

Judgement

Mukteshwar Prasad, J.—Five accused Jawahar, Chhakauri, Nankhoo, Ram Nath and Ram Chandra have filed this appeal against the judgment and order, dated 7.8.1981, passed by Sri D. C. Srivastava, the then Additional Sessions Judge, Gyanpur, Varanasi, whereby he convicted Jawahar under Sections 148, 302 and 323/149, I.P.C. and sentenced him to suffer rigorous imprisonment for a period of one and half years, imprisonment for life and six months rigorous imprisonment respectively thereunder. The remaining four accused were convicted under Sections 147, 323 and 302/149, I.P.C. and were sentenced to undergo rigorous imprisonment for a period of one year, six months and imprisonment for life respectively. All the sentences of five accused were directed to run concurrently.

2. The relevant facts of the case leading to the trial of the Appellants are as under.

3. Accused Jawahar and Chhakauri are sons of accused Ram Nath. P.W. 8, Smt. Lalti Devi is wife of P.W. 6 Lalmani. The parties are residents of village Prkshpur, P. S. Bhadohi.

4. On 26.3.1979 at about 9.00 a.m., Smt. Lalti Devi accompanied by Smt.

Vidhya, wife of P.W. 4 Chhabinath, had gone to collect grass in the fields for the cattle. Accused Nankhoo, son of Munni Lal, and Jawahar, son of Ram Nath, arrived there, passed indecent remarks and caught hands of Smt. Lalti Devi. She complained to her husband Lalmani in the night at about 9.30 p.m.

5. Next day, i.e., on 27.3.1979, Nankhoo was coming towards house of Lalmani. He lodged protest regarding his behaviour with his wife and slapped him twice. Nankhoo returned home and Lalmani went for weaving of carpet. This incident caused annoyance to Nankhoo, Jawahar and other members of his family.

6. On the same day at about 7.00 p.m., Mithai Lal along with Lalmani, Hriday Narain, Chhabinath and Bajrangi were sitting at the door of Hriday Narain and were talking to each other. In the meantime, Jawahar armed with a ballam and the remaining four accused, named above, having lathis in their hands arrived there. They exhorted each other that all were available at one place and they had a golden chance to kill them and teach a lesson. Accused Jawahar struck his ballam in the chest of Hriday Narain who sustained grievous injuries and the remaining four accused wielded their lathis and caused injuries to Lalmani and Chhabinath. Thereafter, Mithai Lal and Ors. picked up lathi-danda and female members of the family raised alarm and intervened. Jawahar and Ors. sustained injuries in the course of incident. On the alarm raised, a number of villagers arrived there and saw the incident. Jawahar and Ors. took to their heels. Lalmani and Chhabinath sustained injuries and Hriday Narain succumbed to his injuries on the spot.

7. P.W. 7 Mithai Lal got a report of the incident prepared by one Mewa Lal on the spot and affixed his thumb impression. He accompanied by Lalmani and Chhabinath took the dead body of Hriday Narain to P.S. Bhadohi and on the basis of his written report, P.W. 3 Som Nath Tiwari registered a case at Crime No. 55 and made entry in the G.D. at serial No. 31.

8. After registration of the case S.I. Sarvajit Mishra, the then S.O. took up investigation and recorded the statement of Mithai Lal, Chhabinath and Lalmani at the police station.

9. S.I. Kailash Nath Tripathi prepared inquest report and other papers relevant for autopsy. He sent the dead body of Hriday Narain to mortuary along with constables Kashi Nath Ojha and Madan Mohan Singh.

10. Both Lalmani and Chhabinath were sent to Government Hospital, Bhadohi, for medical examination of their injuries through constable Surendra Rai.

11. P.W. 2 Dr. R.V. Singh, the then Medical Officer of P.H.C. Bhadohi, examined the injuries of Lalmani at 9.30 p.m. on 27.3.1979 and found one lacerated wound over right parietal scalp 10 cm. above right ear 1 cm. ? 0.5 cm. ? skin deep fresh, bleeding present.

12. In the opinion of Dr. Singh, injury was caused by hard and blunt object and was simple in nature and fresh.

13. On the same night at 9.48 p.m. Dr. Singh further examined Chhabinath and found one lacerated wound over forehead 6 cm. above nasal root 1 cm. ? 0.5 cm. ? skin deep, bleeding present.

14. Dr. Singh opined that injury was simple, fresh and was caused by hard and blunt object.

15. P.W. 1 Dr. K. N. Pandey conducted post-mortem examination on the dead body of Hriday Narain on 28.3.1979 at 2.45 p.m. According to Dr. Pandey the deceased was about 35 years old and had died about 16 to 20 hours before. Rigor mortis was present in both the limbs. Both eyes were closed.

Dr. Pandey found the following injuries :

(1) Punctured wound 2 cm. ? 0.75 cm. ? chest cavity deep over front of chest (just over sternum) in between both nipples, direction upwards and downwards. Margin of wound clean cut. Direction of depth of wound of slightly towards right then going inwards.

(2) Incised wound 0.75 cm. ? 0.25 cm. ? bone deep over medial aspect of right lower leg 11 cm. below right knee joint. Direction upwards downwards. Margin clean cut.

16. On internal examination, 5th rib was found cut. Left lung was found ruptured. In the opinion of doctor, death of Hriday Narain was caused due to ruptured lung and punctured heart and on account of haemorrhage and shock resulting from the injuries.

17. The Investigating Officer collected blood-stained earth from the spot and prepared site-plan on 28.3.1979 after inspection. After completing investigation, he submitted charge-sheet against all the five assailants, named above.

18. Accused Jawahar was charged under Sections 147, 148, 302 and 323/149, I.P.C. on 2.3.1981.

19. Accused Chhakauri, Nankhoo, Ram Nath and Ram Chandra were charged on the same day under Sections 147, 148, 302/149 and 323 of the Penal Code. They pleaded not guilty to the charges framed against them and claimed to be tried.

20. At the trial, in order to establish its case against the accused the prosecution examined P.W. 1, Dr. K. N. Pandey, the Medical Officer, who conducted autopsy, P.W. 2, Dr. R.V. Singh, who examined the injuries of Lalmani and Chhabinath. He further examined injuries of Ram Nath, Jawahar and Chhakauri (all the three accused) on the same night at 10.10, 10.20 and 10.30 p.m. respectively. P.W. 3 H. C. S. B. Tiwari, who proved chik report and made entry in the G.D., P.W. 4 Chhabinath, one of the injured, P.W. 5 constable K. N. Ojha, who took the dead body to mortuary for post-mortem examination, P.W. 6 Lalmani, another injured, P.W. 7 Mithai Lal, the informant and one of the eye-witnesses. P.W. 8 Smt. Lalti Devi, P.W. 9 S.I. K. N. Tripathi who prepared inquest report and relevant papers

and P.W. 10 S.I. Sarvajit Mishra, Investigating Officer of the case.

21. All the accused facing trial pleaded their false implication in the case on account of enmity and alleged that Hriday Narain, Lalmani, Chhabinath, Mithai Lal, Jiudhan, Bhuidhan, Bajrangi and Munna armed with lathis arrived at the door of Jawahar and assaulted Jawahar, Ram Nath and Chhakuri and caused injuries to them and they in exercise of their right of private defence used lathis and the female inmates of the house threw faar of the plough in defence which caused injuries to Hriday Narain. The other accused adopted the statement given by Jawahar.

22. Accused examined D.W. 1 Smt. Chameli, wife of Jawahar, and D.W. 2 constable Muin Ahmad, who proved chik report (Ex. Ka-4) lodged by Ram Chandra, one of the Appellants, at P.S. Bhadohi on the same night at 10.00 p.m. Accused further got proved injury reports of Ram Nath, Jawahar and Chhakauri by Dr. R.V. Singh (P.W. 2), which are (Ex-Kha-1 to Ex-Kha-3) respectively.

23. After close scrutiny of the entire evidence on record led by the parties and considering the submissions made on their behalf, learned Judge found all the five accused guilty and convicted and sentenced them, as noted above.

24. Aggrieved by their conviction and sentence, the accused came up in appeal.

25. We have heard learned Counsel for the Appellants and learned A.G.A. and have perused the record also.

26. Learned Counsel for the Appellants has assailed the impugned judgment mainly on the ground that site-plan prepared by the Investigating Officer does not support the prosecution version and has demolished the whole prosecution case. He contended with vehemence that there was in fact, no motive on the part of the Appellants to commit the offences and in any case there was very weak motive. According to him, the possibility of falsely implicating all the Appellants in the case cannot be ruled out and out of the five Appellants Jawahar, Ram Nath and Chhakauri sustained injuries in the course of incident and they all in exercise of their right of private defence of person caused injuries with lathis and the female members of the family used faar which caused injuries to Hriday Narain. It was further submitted vehemently that there was no unlawful assembly and as such, the provisions of Section 149, I.P.C. are not attracted and all the Appellants could not be convicted with the aid of Section 149, I.P.C.

27. Learned Counsel for the Appellants has placed reliance on the following decisions :

(1) State of U. P. v. Ram Bahadur Singh and Ors., 2004 SCC 1467;

(2) Boya T. Venkateswarlu and Ors. v. State of A. P., 2004 SCC 469 ;

(3) Bhargavan and Ors. v. State of Kerala, JT 2004 (1) (SC) 263 ;

(4) Bharwad Jakshibhai Nagjibhai and Ors. v. State of Gujarat, 1995 SCC 993 ;

(5) Jharu @ Avadh Ram and Ors. v. State of Madhya Pradesh, 1991 SCC 1042 ;

(6) Sudhir Samanta v. State of W. B. and Anr. 1998 SCC 461.

28. On the other hand, learned Additional Government Advocate supported the judgment under appeal and urged that the trial court rightly concluded that the Appellants were the aggressors and took law in their hands and caused death of Hriday Narain and assaulted Lalmani and Chhabinath in the course of same incident. According to him, the Appellants had a motive to commit the crime in question and in view of promptness in lodging the F.I.R. at the police station there was no question of falsely implicating any of the Appellants in the case instead of real assailants. Consequently, the appeal is liable to be dismissed.

29. Reliance has been placed by the State counsel on two decisions of the Supreme Court in Masalti Vs. State of U.P., (a judgment rendered by a Bench of four Judges of the Court) and Mannu alias Ramadhar and Others Vs. State of Uttar Pradesh, .

30. We have given our anxious consideration to the arguments advanced on behalf of the parties and have perused the decisions relied upon by them.

31. According to the prosecution case, the impugned incident took place at about 7.00 p.m. on 27.3.1979 at the door of Hriday Narain, the deceased. On the other hand, A-1 (Jawahar) disclosed in his statement that on the impugned date and time Hriday Narain, Lalmani, Chhabinath, Mithai Lal and Ors. arrived at his door and assaulted him. Ram Nath and Chhakauri and they too wielded their lathis in self-defence. Thus, we find that the Appellants came to the Court with a cross version and they also lodged a written report at the police station on the same night at 10.00 p.m. which is Ex-Kha-4 on record. It is, therefore, obvious that incident in question took place on 27.3.1979 at about 7.00 p.m.

32. Now we shall scrutinize the evidence with a view to test whether the trial Judge rightly held the Appellants as aggressors.

33. As mentioned above, the prosecution examined ten witnesses in all to prove its allegations. Out of which, P.W. 1 Dr. K. N. Pandey, P.W. 2 Dr. R.V. Singh, P.W. 3 H.C. S. B. Tiwari, P.W. 5 constable Kashi Nath Ojha, P.W. 9 S.I. K. N. Tripathi and P.W. 10 S.I. Sarvajit Mishra are formal witnesses. The prosecution mainly relied on the testimony of P.W. 4 Chhabinath and P.W. 6 Lalmani who were allegedly assaulted and sustained injuries in the course of same incident in which Hriday Narain was done to death. P.W. 7 Mithai Lal and P.W. 8 Smt. Lalti Devi claimed themselves to be eye-witnesses.

34. P.W. 8 Smt. Lalti Devi, wife of Lalmani, testified in clear words that on 26.3.1979, she accompanied by Smt. Vidhya went to collect (scrap) grass to the fields where Nankhoo and Jawahar arrived and passed indecent remarks. They caught her hands and dragged her. She narrated this incident to her husband in the night at about 9.00 p.m. Next day, Nankhoo was questioned by Lalmani about his misconduct towards his wife and lodged protest. Nankhoo became

angry whereupon Lalmani slapped him. This incident of slapping to Nankhoo by Lalmani is said to be the motive of the crime. It was, therefore, urged that motive was very weak in this case and prosecution did not come to the Court with clean hands. First of all, it is noteworthy that Smt. Lalti Devi was cross-examined at length but she stood successful in the test of cross-examination. It is well-settled that motive is not a sine qua non for commission of a crime. Moreover, where the prosecution case rests on direct evidence of the witnesses, the motive loses its significance. In the instant case, there was a motive for the accused to commit the crime and teach a lesson to Lalmani and his family. In my opinion, the slapping to Nankhoo at the hands of Lalmani publicly must have caused annoyance. We, therefore, hold that there was a motive for the Appellants to commit the offence.

35. According to the F.I.R. besides the deceased Hriday Narain, Lalmani and Chhabinath were also sitting there where Jawahar pierced his ballam in the chest of Hriday Narain. Both Lalmani and Chhabinath were also given lathi blows by A-2 to A-4 who were having lathis in their hands. We find from perusal of the injury reports of Chhabinath and Lalmani that both had lacerated wounds over forehead and right parietal scalp. The injuries of both were bleeding at the time of examination by Dr. R.V. Singh, who examined them at 9.48 p.m. and 9.38 p.m. on the same night. Keeping in mind the nature and seat of injuries of both the witnesses, we can say it safely that the injuries could not be manufactured or self-suffered only with a view to falsely implicate the Appellants/enemies. Besides the medical evidence on record, P.W. 4 Chhabinath fully supported the prosecution story and testified that the deceased was his cousin and they all were sitting at the door of Hriday Narain on the impugned date. According to Chhabinath A-1 (Jawahar) exhorted his associates to kill and teach a lesson as they were present at one place. Accused Jawahar himself struck his ballam in the chest of Hriday Narain and the remaining accused used their lathis and caused injuries to Chhabinath and Lalmani, P.W. 4 Chhabinath and P.W. 6 Lalmani picked up lathis and used in their self-defence. The witnesses tried to apprehend Hriday Narain whereupon all the assailants ran away and Hriday Narain succumbed to his injuries. It is noteworthy that the statements of Lalmani and Chhabinath to the effect that they too used lathis and caused injuries to Jawahar and Ors. in the course of the same incident find place in the written report handed over to the police by Mithai Lal.

36. P.W. 6 Lalmani corroborated the testimony of Chhabinath on all material points and supported his wife on the point of motive. He testified that his wife narrated the incident to him in the night regarding teasing by Jawahar and Nankhoo and he next day gave two slaps to Nankhoo. He too disclosed in unambiguous words that A-1 pierced his ballam in the chest of Hriday Narain and the Appellants 2 to 4 having lathis assaulted him and Chhabinath and caused injuries. He admitted in very clear words in cross-examination that Ram Nath, Jawahar and Chhakauri had sustained injuries in the course of incident. Both Lalmani and Chhabinath were cross-examined extensively on behalf of the

accused but nothing could be elicited in their cross-examinations to disbelieve their testimony. They stated categorically that it were the Appellants who arrived at the door of Hriday Narain after forming an unlawful assembly and at the exhortation of Jawahar they committed murder of Hriday Narain and caused injuries to Lalmani and Chhabinath. They totally denied that they and Anr. attacked upon the Appellants. They asserted that no brick batting was done by the female member of the family.

37. P.W. 7 Mithai Lal further supported the prosecution story and corroborated the testimony of the injured. P.W. 7 Mithai Lal was also cross-examined at length but his testimony was not shaken. There are a few minor discrepancies in the statement of both the injured and Mithai Lal but the discrepancies are not fatal at all as they are not on material points.

38. A perusal of the site-plan shows that Hriday Narain was dragged by the Appellants and was left near the house of Jawahar where he died. It was urged that the Investigating Officer found no blood marks between the houses of Hriday Narain and Jawahar. It is noteworthy that the Investigating Officer visited the scene of occurrence on 28.3.1979 and after inspection prepared site plan. It was month of March. Moreover, the villagers must have been using the village pathway throughout the night and day and as such, the Investigating Officer found no blood marks. The Investigating Officer had collected blood-stained earth from the scene of incident and prepared a fard also. He collected blood-stained earth from places shown at A and B of the site plan.

39. As pointed out above, the incident in question took place at about 7.00 p.m. in which Hriday Narain was killed on the spot and two persons Lalmani and Chhabinath sustained injuries. The dead body was also taken to the police station by the informant who handed over a written report at P.S. Bhadohi on the same night at 9.10 p.m. at a distance of about six kilometers. Therefore, in view of prompt F.I.R. by the informant there was no time at all for any consultation or deliberation and as such, the possibility of falsely implicating any of the Appellants is ruled out.

40. In the instant case, we find no inconsistency between the medical evidence and ocular testimony on record. Moreover, there is no contradiction in the testimony of the injured and the informant who were subjected to lengthy cross-examination.

41. Learned Counsel for the Appellants further submitted that A-1 (Jawahar) alone could be convicted u/s 302, I.P.C. and other Appellants could not be convicted u/s 302, I.P.C., with the help of Section 149, I.P.C. According to him, there was no unlawful assembly and in any case the other Appellants did not know the common object of the assembly that Hriday Narain would be killed. He drew our attention to paragraph 16 of the judgment rendered by the Apex Court in Bhargavan case (supra). In Lalji and Others Vs. State of U.P., , it was observed that common object of the unlawful assembly can be gathered from the nature of

the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case. In *State of U.P. Vs. Dan Singh and others*, , it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. The mere presence in the unlawful assembly may fasten vicariously criminal liability u/s 149, I.P.C.

42. There is a leading judgment of the Supreme Court rendered by a Bench of four Judges in *Masalti Vs. State of U.P.*, . It was held in *Masalti's* case (supra), that an assembly of five or more persons actuated by and entertaining one or more of the common objects specified by the five clauses of Section 141 is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.

43. In a recent judgment delivered by the Apex Court on 29.4.2004 in *Chanda and Ors. v. State of U. P. and Anr.* AIR 2004 SCW 2954, it was held that Section 149, I.P.C. consists of two parts. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149, I.P.C. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts, which fall within the purview of Section 141, I.P.C.

44. We shall now scrutinize the evidence on record with a view to find out whether the Appellants were rightly convicted by the court below with the aid of Section 149, I.P.C. in the light of the aforesaid proposition of law enunciated by the Apex Court. According to Appellants' learned Counsel, there was no unlawful assembly and the Appellants did not know the common object of the assembly that Hriday Narain would be killed. In view of the facts of the case and evidence on record led by the prosecution and the law laid down by the Supreme Court, we are not inclined to accept this contention. There is direct and reliable evidence of two injured, the informant and Smt. Lalti Devi also to the effect that all the five accused armed with ballam and lathis arrived at the door of deceased on the impugned date and they, on the exhortation of Jawahar, committed the

crime. The law requires that the number of assailants must be five or more and such assembly of five or more persons becomes unlawful assembly when common object of the person composing that assembly is to commit the offences described in Clause 1st to 5th of Section 141. The Explanation to Section 141 provides in clear words that an assembly which is not unlawful when it assembled, may subsequently become unlawful assembly. In the instant case, there is overwhelming evidence of the injured and the eye-witnesses that the Appellants reached the scene of incident in a group and they had a common object to teach a lesson to Hriday Narain and his family. Moreover, they used their weapons and took active part in commission of the crime. In this view of the matter, it is not possible for us to accept the submission made on behalf of the Appellants that provisions of Section 149, I.P.C., are not attracted and A-2 to A-5 (except Jawahar) could not be convicted u/s 302 with the aid of Section 149, I.P.C.

45. On careful scrutiny of the entire evidence on record, we are also of the view that the prosecution succeeded in bringing home the charges against the Appellants and, therefore, the conclusion arrived at by the learned trial court is liable to be upheld. We, therefore, hold that this appeal is devoid of merit and is liable to be dismissed.

46. The appeal fails and is hereby dismissed. The conviction and sentence recorded by the trial Judge are hereby affirmed. The Appellants are on bail. Their bail is cancelled. They shall be taken into custody to serve out the sentences passed against them.

47. A copy of this judgment shall be sent to the Court concerned for compliance of the order. Compliance report shall be submitted to this Court within two months.