
(1991) 11 BOM CK 0046
In the Bombay High Court
Case No : Criminal Appeal No. 156 of 1984

Jayendra Shantaram Dighe and others	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 20-11-1991

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 295, 295A

Citation : (1992) 1 BomCR 679 : (1992) CriLJ 2796

Hon'ble Judges : M.L. Dudhat, J

Bench : Single Bench

Advocate : B.B. Apte, for the Appellant; Y.V. Patil, Public Prosecutor, for the Respondent

Judgement

1. The only limited point that is to be decided in this appeal is, as to whether a member of an unlawful assembly which was initially lawful can be said to be guilty of the offences committed by the unidentified members of the unlawful assembly by foisting vicarious liability u/S. 149 of the Indian Penal Code ?

2. In all thirty six persons from Baramati were charged u/Ss. 147, 148, 149, 295, 295-A, 332, 353, 434 and 337 of the Indian Penal Code. Out of these thirty six persons the present appellants, in all eighteen in number, were convicted u/Ss. 147, 148 and 332 read with S. 149 of the Indian Penal Code and were sentenced to pay fine of Rs. 250/- on each count and in default of payment of the fine to undergo simple imprisonment for ten lays on each count. These appellants were acquitted of all the other charges for which they were charged before the trial Court. The rest of the accused persons were acquitted by the trial Court. It is against this decision dated December 12, 1983, passed by the Additional Sessions Judge, Pune in Sessions Case No. 75 of 1983, the present appellants have preferred this appeal.

3. A few facts which are material for deciding this appeal are as under :

On February 13, 1982, at about 12-30 noon one Dastagir resident of Baramati

kept an excrement of a pig in front of the picture of Shivaji Maharaj. This injured the feelings of the local residents. To protest against the said insult and the injury caused to the sentiments, the workers of Vishwa Hindu Parishad decided to take out a morcha within the Baramati town. The morcha started from Sidheshwar Temple. It is the case of the prosecution that in the said morcha the accused persons carrying a Bhagwan flag were giving slogans viz. "Pakistan Murdabad", "Pakistan Jala do", "Landyana Kapun Kadha" etc. At this stage, I may point out that the trial Court has disbelieved that such slogans were given, but the trial Court has come to the conclusion that slogans like "If you want to stay in India say Vande Mataram" were given. The said morcha commenced from Gandhi Chowk and thereafter went through Tandulwadi Chowk, (Durga Talkies), back to Tandulwadi Chowk, Tahasil Office, Gandhi Chowk through Bagwan Galli, Subhash Chowk, Bhagwan Chowk, Indapur Chowk, and from there some processionists proceeded towards the S.T. Bus Station, Gunwadi Chowk. From there same processionists went towards Pan Gadi, Kasba Chowk, Kattalkhana, Makka Masjid. Thereafter the morcha crossed the river and reached the temple of Panvatha Hanuman Mandir. From there, the morcha again intended to pass through Bagwan Galli where they had already passed earlier. However, the police prevented them from doing so apprehending some trouble, by the processionists who were about two thousand in number, to the Muslim community in the Bagwan lane. The police asked them to disperse. Thereupon some of the participants of the morcha pelted stones towards Dy.S.P., Jamadar and other police constables which caused injuries to certain police officers and the police staff. Therefore, the Dy.S.P. gave orders to PC Kamble to fire in air, As per the said order P. C. Kamble fired in air due to which the processionists dispersed. Subsequently, Sessions Case No. 75 of 1983 was filed against in all thirty six persons, including the present appellants, before the Additional Sessions Judge, Pune. In the said case it was alleged that slogans like "Pakistan Murdabad", "Pakistan Jala do", "Landyana Kapun Kadha" were given and that some of the processionists entered into Makka Masjid and burnt mats and papers and threw them in the river. It is also alleged that when the processionists came near panvatha Hanuman Mandir and as the police obstructed the procession to proceed through the Bagwan Lane, the processionists pelted stones at the police party. On these allegations all the thirty six persons were charged u/Ss. 147, 148, 149, 295, 295-A, 332, 353, 434 and 337 of the Indian Penal Code and the present appellants were convicted u/Ss. 147, 148 and 332 read with S. 149 of the Indian Penal Code.

4. After going through the evidence, the trial Court disbelieved the prosecution case that in the procession, slogans like "Pakistan Murdabad", "Pakistan Jala do", "Landyana Kapun Kadha" were given. The trial Court has also come to the conclusion that the object of the procession became unlawful when the procession came near Panvatha Hanuman Mandir and lastly it came to the conclusion that the prosecution has failed to prove the identity of any accused person, in particular, who pelted stones at the police party. The accused persons

were also acquitted of the charges for damaging the carpets, ceiling fans and water tank in the Makka Masjid. However, the trial Court convicted the appellants on the ground that when the procession came near the Panvatha Hanuman Mandir they were identified by some of the police officers and the police constables. According to the learned Judge, there was no animosity between the police party and the accused persons. The trial Court further held that in fact the police party never objected to the morcha so long as it was lawful till Gunwadi Chowk and it is only when the morcha came near the Panvatha Hanuman Mandir and when the processionists insisted that they will take the morcha through Bagwan Galli and when the police obstructed them apprehending trouble and the processionists started pelting stones at the police party, that the assembly became unlawful. The trial Court also came to the conclusion that the present appellants shared the common intention of the unlawful assembly at the time when the processionists started pelting stones, and therefore, convicted the present appellants under Ss. 147, 148 and 332 read with 149 of the Indian Penal Code. It is against this background I have to consider the case of the present appellants.

5. Before scanning the evidence, it is desirable to discuss the legal position as to under what circumstances the criminal liability can be foisted on a member of an unlawful assembly which was initially lawful, but, which became unlawful because of the offences committed by some of the unidentified persons of the assembly. Section 149 of the Indian Penal Code reads as under :

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly, knew to be likely to be committed in prosecution of that object, every person who, at that time of the committing of that offence, is a member of the same assembly is guilty of that offences."

In the case of Musakhan and Others Vs. State of Maharashtra, the Supreme Court has held that a mere innocent presence in an assembly of persons, does not make the accused a member of an unlawful assembly. According to the Supreme Court, to constitute "member of unlawful assembly" it must be shown either by direct or circumstantial evidence that the accused shared the common object of the assembly. The Supreme Court has also held that the Court is not entitled to presume that any and every person in the mob is guilty of every act committed by the mob. In the case of Prabhakar Shankar Sawant and Others Vs. State of Maharashtra, the Supreme Court held that before the accused could be convicted of sharing the common object of the assembly or of being members of the same at a time when the assembly became unlawful, it had to be proved by the prosecution that the accused were members of the unlawful assembly at the time the assembly became unlawful and started pelting stone. If there is no evidence of identification of accused at the stage when the morcha became unlawful it cannot be explained away by presuming that as the morcha moved on it must be presumed to be unlawful and any person who was a member of that

assembly must be presumed to share the common object of the unlawful assembly. This, according to the Supreme Court, is like over-stating the law on the subject. The Supreme Court has also held that before the Court is satisfied that an accused is a member of an unlawful assembly it must be shown either from his active participation or otherwise that he shared the common object of the unlawful assembly though it is not necessary that the accused should be guilty of any overt act. But, it is sufficient if it is shown that as a participant of the unlawful assembly he was sharing the common object of the same. Further, in the case of *Allauddin Main v. State of Bihar*,¹ the Supreme Court has laid down one more principle that in such case it is to be found out if the offence committed was committed to accomplish the common object of the assembly or the one which the member knew was likely to be committed. According to the Supreme Court, there must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object, then every member of the assembly will be liable for the same.

6. In order to see whether the accused persons who were present in the procession can be held guilty of the overt act done by some unidentified members of the procession by pelting stones at the police party, one has to see if there is any evidence, direct or circumstantial, to show that the accused persons actually anticipated or contemplated the nature of illegal act to accomplish the object of the procession or knew that such an act would be committed or was likely to be committed to accomplish the object of the procession and that the accused persons shared the common object of the unlawful assembly. I have already pointed out that in this case it is not the case of the prosecution that these very accused persons pelted stones at the police party. Even according to the police, and the trial Court has also come to the conclusion that the procession was lawful until it came to Gunwadi Chowk. Therefore, with this background in mind, we have to take into consideration the prosecution evidence and come to the conclusion as to whether or not the accused persons shared the common intention of the unlawful assembly or that they had anticipated and contemplated the common intention of the unlawful assembly. According to me there is no evidence on record by which one can come to the conclusion that these every accused person shared the common intention of the unlawful assembly or anticipated or contemplated the illegal acts which were committed at the fag end of the procession. Similarly, there is no evidence to show that the offences committed by unidentified members of the procession were committed to accomplish the object of the procession. According to me the evidence on record clearly goes to show that the object of the procession on that particular day was only to express righteous indignation against the act of showing disrespect to Shivaji Maharaj by one Dastagir, a resident of Baramati. It is important to note that on February 15, 1982, the morcha had started from Gandhi Chowk. From there, it went through Tandulwadi Chowk (Durga Talkies), then back to Tandulwadi Chowk, Tahasil Office, Gandhi Chowk through Bagwan Galli (This Bagwan Galli is the place where Muslims reside). It is also important

to note that it is not the case of prosecution that anyone of the participants of the procession had indulged in any anti-social activity towards Muslims when they passed through this Bagwan Lane earlier. Therefore, it becomes clear from this that the intention of the processionists was only to register a protest against an act committed by Dastagir. Had there been any intention of the processionists to take revenge, in that event some untoward incident would have occurred when the morcha passed through Bagwan Galli earlier, which is predominantly a Muslim area. It is also the case of the prosecution that some members of the morcha went to Makka Masjid and damaged the carpet, certain documents, ceiling fan and the water tank. However, the trial Court has not convicted any person with regard to these allegations. Further, one must keep in mind that the whole procession had not gone to Makka Masjid. It is only some persons went on a side track towards Makka Masjid and rest of the procession went ahead as a whole. From this, it will be difficult to say that the present appellants shared the common intention of the unlawful assembly. At the highest it can be said that whatever has happened has happened at the behest of some individuals, because the common object of the procession was only to take out a morcha and lodge their protest against the particular act committed by Dastagir of Baramati.

7. If one looks to the map as to how the procession went ahead, it can be seen that the processionists have covered virtually the whole town of Baramati. It appears that when the procession came at Panvatha Hanuman Mandir after crossing the river, the processionists wanted to go through the Bagwan Lane. But, this lane being occupied predominantly by Muslims, the Police party apprehended some trouble and out of security reasons they stopped the morcha from proceeding through the said Bagwan lane. I have already mentioned above that this morcha in fact had been through the Bagwan Lane peacefully. It might be right on the part of the police to take certain precautionary steps to prevent any disturbance, but only from this one cannot conclude that the processionists intended to go through Bhagwan Lane to harass the Muslim community or to destroy their property. It is true that when the procession was stopped by the police certain stones were pelted. But this incident has taken place all of a sudden and as I have already pointed out earlier, the procession was a long procession which went through the whole of Baramati town peacefully. It might be that few miscreants might have gone side tracking the procession and damaged the property of Muslims. But, for that one cannot blame the majority of the members of the procession. Nobody contemplated that the police will stop the morcha at Bagwan lane. The weapons used were stones lying on the street itself and, therefore, if some unidentified persons behaved in an unruly manner one cannot list the vicarious liability on the other members in the procession carried out peacefully throughout.

8. There is another aspect of the matter which has to be taken into consideration. If suddenly a few elements behaved in an unruly manner, which was not contemplated by the other members of the procession and in view of the fact that a huge crowd of about two thousand had assembled, it was certainly

difficult for the other processionists to extricate themselves from the procession and disperse. Therefore, merely because the accused persons were there in the procession, they cannot be held guilty of the offences committed by the unidentified persons. According to me the aforesaid facts which I have discussed in detail clearly go to show that the members who took out the procession to lodge their protest peacefully could not have anticipated or contemplated the unruly behaviour of some miscreants. There is also no evidence on record to show that all the members in the procession shared the common intention of pelting stones at the police party discharging its duty.

9. Therefore, in the light of all this, the present appellants cannot be held guilty under Ss. 147, 148, 332 read with 149 of the Indian Penal Code, merely because they participated in the procession.

10. The conviction and sentence passed by the trial Court by its judgment and order dated December 12, 1983 in Sessions Case No. 75 of 1983, is, therefore, set aside.

11. Fine, if paid, be returned to respective appellants.

12. The appeal stands allowed.

13. Appeal allowed.