
(2011) 02 RAJ CK 0007
In the Rajasthan High Court
Case No : Criminal Appeal No. 547 of 2003

Kalyan Sahai and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 18-02-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 141, 149, 304, 326, 34

Citation : (2011) 3 RLW 2464

Hon'ble Judges : Sajjan Singh Kothari, J;N.K. Jain, J

Bench : Division Bench

Advocate : Biri Singh, with Rajesh Chaudhary, Suresh Sahni and R.M. Sharma, for the Appellant; J.R. Bijarniyan, Public Prosecutor, for the Respondent

Judgement

Sajjan Singh Kothari, J.

In these circumstances we find ourselves in complete agreement with the argument of Mr. U.P. Singh, learned counsel for the appellants that there is no material to support the conviction of the appellants u/s 326/149 of the Indian Penal Code. Mr. Bhagat appearing for the State fairly conceded that in the circumstances of this case it would not be possible for him to support the conviction mainly on the ground that since the main accused was convicted u/s 304, Part-I the other appellants should also have been convicted u/s 304/149 and not u/s 326 of the Indian Penal Code. We would like to point out that whenever the High Court convicts any person or persons of an offence with the aid of Section 149 a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction u/s 149 of the Indian Penal code, the essential ingredient of Section 141 of the Indian Penal Code must be established. Section 149 creates a specific offence and deals with the punishment of that offence. There is an assembly of five or more persons having a common object and the doing of acts by members is in prosecution of that object. The emphasis is on common object. In the

instant case there is neither any evidence nor any finding that any of the ingredients of Section 149 have been established by the prosecution.

Learned counsel for the appellants-further submits that the High Court having given a finding that there was no unlawful assembly and that Section 149 could not be made applicable erred in convicting all the accused u/s 304 Part II read with Section 34 IPC. According to the learned counsel to apply Section 34 to a case of this nature there should be clear evidence to show that all of them shared the common intention and in the absence of such evidence only such of those accused who inflicted the injuries on the deceased alone could be liable u/s 304 Part II. We find considerable force in this submission. The High Court while excluding the applicability of Section 149 has in so many terms mentioned that it was a sudden quarrel and there was a fight and each party inflicted injuries on the other and the accused in the instant case were armed with ordinary weapons and not with deadly weapons. Having stated so, to apply Sec. 34 there should be clear evidence that everyone of them participated in the attack otherwise all the 13 accused cannot be made constructively liable by the application of Sec. 34. The evidence shows that Johari, Bheru and Hanuman, appellants 4, 11 and 12, respectively alone inflicted injuries with lathis on the deceased and they can only be convicted under Sec. 304 Part II read with Sec. 34 I.P.C.

8. 5. We shall [also] deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

9. Again in Masalti vs. State of U.P. 5 this Court observed: (pp. 209-210, para 14):

14.But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

15. It is also our experience that invariably the witnesses add embroidery to prosecution story perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the

witnesses. It is necessary to remember that a judge does not escape. One is as important as the other. Both are public duties which the Judge has to perform.