
(1984) 04 RAJ CK 0020
In the Rajasthan High Court
Case No : RefIn Cr. Revision No. 314 of 1977

Moti Lal	Vs	APPELLANT
State of Rajasthan		RESPONDENT

Date of Decision : 17-04-1984

Acts Referred:

Constitution of India, 1950 — Article 141, 142
Criminal Procedure Code, 1973 (CrPC) — Section 342, 464
Penal Code, 1860 (IPC) — Section 114, 140, 148, 149, 210

Citation : (1984) RLW 694 : (1984) WLN 680

Hon'ble Judges : S.N. Bhargava, J;N.M. Kasliwal, J;G.M. Lodha, J

Bench : Full Bench

Judgement

G.M. Lodha, J.—This is a reference made by the Chief Justice, on the request of the learned Single judge of this Court for resolving the controversy about the power of the court to punish the accused for a substantive offence when he has only been charge-sheeted with the aid of Section 149 IPC and there is no charge of the substantive offence, simpliciter.

2. Motilal, the accused in the instant case, was convicted u/s 326, IPC though the charge against him was for offence u/s 326/149 IPC, and there is no charge for offence u/s 326 IPC, simpliciter.

3. In the revision petition, the learned Counsel for the petitioner raised objection that the accused petitioner could not have been convicted either by the trial court or the appellate court u/s 326, IPC as there was no separate and independent charge for the substantive offence of Section 326, IPC.

4. It was argued that it was not necessary to show the prejudice and reliance was placed on the judgment of the Supreme Court in Suraj Pal Vs. The State of Uttar Pradesh, Lakhan Mehta v. State of Bihar AIR 1965 SC 1743 and Bhopal Singh and Others Vs. State of Rajasthan and Others,

5. The learned Public Prosecutor contested this position of law and argued that

after the authoritative pronouncement of the Supreme Court in Willie (William) Slaney Vs. The State of Madhya Pradesh, the law is now well settled that unless prejudice is shown to a conviction for substantive offence when the charge was with the aid of Section 149 IPC it is not vitiated.

6. The learned Single Judge discussed the facts and principles enunciated in Nanak Chand's case (supra) Lakhan Mehta's case (supra) and Surajpal's case (supra) and then pointed out that the conflict between the principles laid down in Nankachand and Surajpal's case (supra) was referred to a bench of five Judges of the Supreme Court in W. Slaney's case (supra) and the authoritative pronouncement of the Supreme Court in W. Slaney's case (supra) is therefore, binding.

7. In view of this it, was held that this Court has committed an error in taking a different view in Bhopal Singh's case (supra). In the instant case the learned Single Judge ultimately opined as under:

It can, therefore, be said that whether a charge is framed or not where there is any error, omission of irregularity in the charge no finding, sentence, or order by a court of competent jurisdiction can be invalid unless a failure of justice in fact has been occasioned thereby It is abundantly clear from a bare reading of Section 464 Cr.P.C, Therefore the mere ground that the accused was not charged with the substantive offence and was only charged vicariously by virtue of Section 149, IPC. and therefore cannot be convicted for the substantive offence is not sufficient to set aside the conviction of the accused for the substantive offence, unless the accused is able to show that a failure of justice has in fact been occasioned.

In Bhopal Singh's case (supra) placing reliance on Lakhan Mehta's case (supra), it was held that accused persons could not be convicted for a specific offence without there being a charge to that effect. It was not considered as to whether the case of the accused persons was prejudiced in any manner. W. Slaney's case (supra) was not cited. Choke's case (supra) does not apply to the facts of the instant case.

Therefore, I am of the opinion that even if an accused person is only charged vicariously of an offence read with Section 149, IPC and is convicted for the substantive offence, for which he was not charged the finding of sentence of trial court cannot be set aside merely on the ground that no charge was framed, and it is necessary for framing charge the finding for specific offence, prejudice, in fact, has been occasioned to him, in the trial of the case.

As in Bhopal Singh's case (supra) a Division Bench of this Court appears to have taken a different view, I think it necessary that for laying down the proper law, so far as this Court is concerned, these may be laid before My Lord the Chief Justice for referring the same to a larger bench.

8. We have heard Shri K.K., Sharma, the learned Counsel for the petitioner-

accused and the learned Public Prosecutor Shri G.C. Chatterjee. We have also considered the principles laid down in the important judgments in Surjpal and Nanakchand's and Lakhan Mehta's case (supra) and finally the five Judges judgment of Supreme Court in W. Slaney's case (supra), where a reference was made regarding suspected conflict of view between Nanakchand and Surajpal's cases (supra).

9. The learned Counsel Shri Sharma argued that even W Slaney's case (supra) nowhere lays down that if a charge for substantive offence is not framed against the accused person, and he is only charged vicariously by virtue of Section 149, IPC he can be convicted for the substantive offence.

10. On a thoughtful consideration of the entire matter, we are of the opinion that a detailed discussion of the judgment of W. Slaney's case (supra) is necessary in order to understand the above principles laid down therein.

11. In W. Slaney's case (supra). W. Slaney was charged u/s 302 read with Section 34 of the IPC and there was no separate charge u/s 302 IPC. The court below held W. Slaney guilty of Section 302 IPC. It was held that there could not have been prejudice and in the absence of the prejudice, a separate charge u/s 302 IPC against W. Slaney was only a curable irregularity and could not affect the legality of conviction u/s 302 IPC.

12. Three separate judgments were given in that case. First one is by Bose J. on behalf of himself and S R. Das, Actg. C. J. and the entire provision regarding framing of charge were discussed and their Lordships summed up principles in this respect in para 44 as under:

Section 225, 232, 535 and 537(a) between them, cover every conceivable type of error and irregularity referable to a charge that can possibly arise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors irregularities and omissions in it. The Code is emphatic that whatever the irregularity it is not to be regarded as fatal unless there is prejudice.

13. Their Lordships emphasized that the shadow should not be mistaken for the substance and the question must be considered as the Criminal Procedure Code is emphatic that "whatever" the irregularity it is not to be regarded as fatal unless, there is prejudice. In para 45, their Lordships then considered the various facts of prejudice and then observed that it would depend upon the facts of each case and conclusions in the special case in any case cannot be regarded as precedent or guide for a conclusion of fact in another, as the facts can never be alike in any two cases however alike they may seem. Their Lordships further observed that, there is no such thing as a judicial precedent on facts though counsel, and even judges, are some times prone to argue and to act as if there were.

14. The crucial discussions which are relevant for the purpose for consideration

before this Court in the present reference, find place in para 46 and 47 and once we find that the view expressed by Bose J., on his own behalf and on behalf of S.R. Das Act. CJ. has not been dissented in this respect, we have got no hesitation in holding that this is correct view of law and therefore, no distinction can be drawn in case where specific offence in subject matter of separate charge but is tried with the aid of Section 34, IPC with those offences which are tried with the aid of Section 149, IPC. Para 46 and 47 read as under :

Endeavour was made in the argument to draw a distinction between cases falling u/s 34 of the Indian Penal Code and those u/s 149 of the Indian Penal Code. It was contended that even if no separate charge is necessary when Section 34 is called in aid because Section 34 does not create a separate offence, one is essential for a conviction u/s 149 and that there, at any rate, the absence of separate charge is fatal.

This is not a case u/s 149 of the Indian Penal Code so the question does not really arise but it is necessary to advert to the argument because, on the view we take of Sections. 225, 535 and 537, it is immaterial what the offence is and whether there is a charge at all. The only question is whether the irregularity occasioned prejudice.

(emphasis supplied)

15. We have got no hesitation in holding that this view is the view which has prevailed. It may be pointed out here that Chandrasekhara. Aiyar J., gave separate judgment and, posed question first in para 75 in order to understand the implications of Nanakchand and Surajpal's decisions (supra).

As is well known, in the first case of Nanakchand, it was held to be illegality and, in the second case of Surajpal, it was held that it was a mere irregularity, curable if no prejudice was caused to the accused. In para 77, their Lordships noticed that there was conflict in those two views. Their Lordships then discussed the various facts of the controversy and ultimately bracketed Sections 34, 114, and 149 IPC in one and the same category and observed as under :

Section 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled up one involving the direct liability and the constructive liability without specifying who are directly and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.

16. We have got no hesitation in deducting that Chandrasekhara Aiyar and Jagannadnadas JJ , also took the same view as was taken by Bose J., who gave judgment for himself and S.R. Das, Actg. CJ.

17. In view of the judgment by the four Judges directly covering the point of reference before us and which was given by them in order to resolve the controversy between the decisions of Nanakchand and Surajpal's case (supra), we have got no hesitation in holding that the absence of specific charge for substantive offence of Section 326 IPC as is the case before us convicting the accused u/s 326 IPC read with Section 149 IPC, is not an illegality or irregularity which is fatal to the conviction peruse and the conviction can be sustained. Such a conviction can only be set aside if it is found that the accused has been prejudiced in his defence and, if that finding is given, the court can further decide that the re-trial should be ordered or the case should be concluded on account of other circumstances intervening

18. It would be useful to have a resume and survey of other decisions on this important fact of the criminal jurisprudence belonging to procedural branch of law also, in order to make the adjudication comprehensive although we are firmly of the opinion that so long as W. Slaney's decision (supra) which is landmark and leading case of this precise point holds the field, it would continue to govern and guide us in view of Art. 141 and 142 of the Constitution of India.

19. We would first like to notice the decision of our own High Court In Bhopal Singh and Others Vs. State of Rajasthan and Others, the guidance was taken from the decision of the Supreme Court in Pandurang, Tukia and Bhillia Vs. The State of Hyderabad, but, there, the learned Public Prosecutor did not refer to the important judgment of W. Slaney's case (supra) and the Court also, as a normal result of it, failed to consider the implications of W. Slaney's decision.

20. In para 9, the learned Judge (C. M. Lodha J., as he then was) surveyed the ratio decidendi of the decisions cited before us and after referring to the decisions in Lakhan Mehta, Surajpal and Nanakchand's cases concluded as under :

Thus there appears to be force in the contention of the learned Counsel for the appellants that these three accused Richpalsingh Bhanwar Singh and Kalyansingh cannot be convicted u/s 304 Part II and Section 323, Indian Penal Code respectively since they have been charged only u/s 304 Part II read with Section 149, Indian Penal Code.

21. It may be pertinent to notice that the Public Prosecutor instead of relying upon the authority of W. Slaney's case, took the line of least resistance by submitting that, if the conviction is not possible by resort to Section 149 IPC then he would like to press into service Section 34, IPC. It would thus be seen that the principles enunciated in W. Slaney's case (supra) were not pressed into service by the Public Prosecutor and consequently, the learned Single Judge while making the reference is justified in mentioning that the authority of

Bhopalsingh's case (supra) fails to lay down the correct law.

22. In Bishan Singh and Others Vs. The State of Rajasthan, L.S. Mehta J , as he then was, again, considered this precise point which is subject matter of reference before us whether in the absence of the specific charge for substantive offence, the conviction can be sustained for substantive offence separately after holding that the offence under--Section 149 IPC is not made out. Here also, it may be noticed that, the case of accused was decided without, reference to W. Slaney's decision and with sole reference to Nanakchand and Lakhan Mehta's decisions (supra).

23. Of course, the learned Judge has taken the guidance from the decision in Barendra Kumar v. Emperor wherein the Privy Council took the view that there is a legal distinction between--a charge u/s 302, IPC, and a charge of constructive liability u/s 302/149 IPC.

24. How unfortunate it is that even in the year 1972 whereas the earlier decisions in Nanakchand's case was referred so also the Privy Council's decision in Barendra Kumar v. Emperor but, the leading case of five Judges of the Apex Court resolving anomaly or dispute, as it was assumed to be in W. Slaney's decision, has not even been referred and, in the absence of such a reference, the High Court was left with no alternative but to follow the decision in Nanakchand case (supra).

25. In Jasraj Vs. State of Rajasthan and Others, exactly a similar situation arose and the Court was considering the question, whether in the case where the accused was charged under--Section 302/149 IPC, and, not separately under--Section 302, IPC simpliciter can be convicted u/s 302, IPC, if acquitted u/s 302/149 IPC. In para 21, speaking for himself, and V. P. Tyagi, Actg. CJ (as they were) M. L. Shrivastava J., assumed that the principle of law is well settled that when the accused is charged with offence under--Section 302/149, IPC, he cannot be convicted u/s 302, IPC simpliciter. Then the division Bench in that case proceeded to examine, whether they can be convicted with the help of Section 34, IPC. It may be noticed here that the argument of the Public Prosecutor that it is only an irregularity which is curable under--Section 35 and 537, Cr. PC, was repelled by the Court, again, on the basis of the authority of Nanakchand's case (supra) and after making reference to Barendra Kumar's decision (supra) which was referred to by L S. Mehta J., earlier in Bishansingh's case (supra), their Lordships were of the opinion that Nanakchand's decision was reiterated in Gokul and Others Vs. The State of Rajasthan, by the Supreme Court.

26. It may be noticed that the decision of Gokul v. State of Rajasthan (supra) is of two Judges of the Apex Court. In this case, reference undoubtedly has been made to the decision of Surajpal. The ratio of Surajpal's decision was extracted in para 9 of Gokul's decision which also contains the following observations :

The conviction in these circumstances under Sections 302 and 307 of the Code and sentences of death and transportation for life cannot be maintained unless

the Court is satisfied, on the facts of the case, that the accused has not been prejudiced in his trial. Whether or not in such a situation the questioning of the accused during the course of his examination u/s 342 of the Code of Criminal Procedure in relation to the offences under Sections 302 and 307 of the Indian Penal Code can be relied upon as obviating the likelihood of prejudice has to be determined with reference to the facts and circumstances of each case.

All the circumstances of the case and the evidence and materials on the record should be looked into on the question arising in such a situation as to whether a retrial, should be ordered or not

27. With due respect, we find that the observations that the law laid down in Nanakchand's case was reiterated in Gokul v. State of Rajasthan, appears to be based on misreading of Gokul's decision. A thorough study of Gokul's decision would show that Nanakchand's decision was not even referred to and all that was referred was Surajpal's decision and, after referring to the decision in Surajpal's case their Lordships of the Supreme Court in Gokul's case (supra) observed that, the law laid down in that decision is unexceptionable but they considered it wholly unhelpful to the appellants. Their Lordships further observed that Surajpal's case (supra) has got, therefore, no assistance to the appellants.

28. We, therefore, find that the reference to Nanakchand in Taga's case and reliance on Gokul's decision (supra) suffers from two facilities: it was assumed that reference has been made in Gokul v. State of Rajasthan (supra) of Nankchand's decision which has not been done in fact, and secondly, it was assumed that the principles laid down in Nanakchand's decision have been reiterated whereas, we find that in the case of Gokul's decision (supra) not only the principles of Nanakchand decision were not mentioned but, the principles of Surajpal's decisions (supra) were referred and, then it was observed that they are unhelpful to the appellants. We may further add that the third fallacy with which this judgment suffers, with due respect is, that the principle of Surajpal and Nanakchand's decisions (supra) have been assumed to be indistinguishable although there is a marked difference on the point of prejudice doctrine which we would refer a little later.

29. It would thus be seen that V. Slaney's decision (supra) was not fully noticed in Taga's case. The relevant question was discussed in paras 20 and 21. However, a passing reference to it was made in para 22 in respect of the argument of Public Prosecutor that the accused can be convicted with the help of Section 34, IPC, even if they cannot be convicted u/s 302, IPC, simpliciter. This court then converted the conviction of the appellants from Section 302, IPC to Section 302/34, IPC, in Taga and Lakha's case (supra), on the basis that the three decisions in Bhoor Singh and Another Vs. State of Punjab, , Kamail Singh v. State of Punjab AIR 1954 SC 204 and W. Slaneys's case (supra) referred to by the Addl. Govt. Advocate in support of his argument that when the accused can be convicted u/s 302, IPC, simpliciter on account of acquittal under Section 302/149 IPC, he may be convicted u/s 302/34, IPC.

30. In our considered opinion, as we have extracted the relevant portions of W. Slaney's decision, neither the Additional Govt. Advocate in Taga's case relied upon it for the correct proposition of law that, the accused can be convicted u/s (sic)02, simpliciter even when he has been acquitted u/s 302/149 IPC if the prejudice is not proved was referred to and, naturally their Lordships were not called upon to consider this important aspect of the case. We would, therefore, mention it that W. Slaney's decision on this crucial aspect of the case was not noticed correctly by Division Bench in Taga's case (supra).

31. To conclude, we would say that, whereas in Bhopal Singh and Bishansingh's case (supra), W. Slaney's decision was not noticed at all and thus, the judgments in the absence of considering the guidance and the principles of law laid down by the Supreme Court in W. Slaney's case (supra) cannot be treated as an authority on the complex crucial question which, we are dealing with in the present reference; Taga's case equally failed to consider the correct implications of W. Slaney's case on the question which we are adjudicating in the present reference for the various reasons, given above.

32. The reference was also made by the learned Counsel, Shri Sharma, to the decision of this Court (*Madho v The State* 1979) CriLR 200 where in the same learned judge (Per Mahendra Bhushan, J.) who has made the present reference before us, taking assistance from the decision of the Supreme Court in *Lakhan Mehta and Pandurang, Manakchand's case* (supra) held that u/s 149, IPC if a specific offence is created it deals with punishment of that offence alone, Therefore, if an accused is not charged u/s 325/149 PC and is charged u/s 325 simpliciter, in case the charge of Section 325 simpliciter fails, he cannot be convicted u/s 325/149 IPC.

33. The learned Judge in *Madho v The State* has himself, extracted the ratio decidendi of *Pandurang v. State of Hyderabad* (supra) in the following terms:

It has been held that, where the accused is not charged vicariously u/s 149 IPC for the injuries caused by the others in the prosecution of common object of all the accused persons, then the Supreme Court hearing appeal on special leave would require strong reasons for using that Section even if it be possible to convict under this Section in the absence of a specific charge.

34. It is difficult to understand how from the above proposition, (the learned Judge came to the conclusion that no conviction can at all be made. However, although we would like to mention that *Pandurang's case* (supra) clearly lays down the principle of prejudice and special reasons and it can be held that it is not the decision that in no case, the conviction can be upheld.

35. In any case, it will have to be noticed that the learned Judge, there also, makes no reference of W. Slaney's decision (supra) presumably because it was not referred to before him and this judgment of *Madho v. State* (supra) given by the same learned Judge who has made the present reference before us, has now pointed out that W. Slaney's decision which has not been referred to in *Bhopal*

Singh's case (supra) suffers from the same infirmity as it was not referred before him in Madho v. State (supra).

36. The last decision referred to by Shri Sharma again, of this court in Girahari v. State 1983 CriLR 345 shows that, here also, whereas the decisions of the Supreme Court in Nanakchand, Surajpal, Pandurang, Lakhan Mehta's case (supra), Bhopal Singh and Madho's decisions (supra) of this court but the Public Prosecutor failed to refer and rely upon the decision of W. Slaney's case (supra), against. Incidentally, the resume of this Court shows that whereas the counsel for the accused relied upon and referred to Nanakchand, Surajpal, Lakhan Mehta and Pandurang's decisions (supra) the Public Prosecutor with the exceptions of Taga's cases, where also true different dimensions were not correctly put always did not bring to the notice of the court the decision of W. Slaney's case (supra), which according to us, is the leading case on the precise point. This incidentally points out the qualitative difference in the preparation of the cases between the learned Counsel who had appeared privately on behalf of the accused and the comparative handicap which the Court suffers on account of the absence of such vigilance and thorough preparation by the Public Prosecutors who appeared on behalf on the State Government. Of course, this is explainable because whereas the private counsel comes with two three cases normally per day, the Public Prosecutor brings cart-load of files and has to assist the court for whole of the day single banded without proper time to prepare the cases at home due to quantitative rush of work including dictation of reply to the petition on behalf of the Government. It is not for us but, for the State Government to find out the ways and means to improve the qualitative performance of the State's counsel as many guilty have been acquitted due to it as shown above and in unreported cases the number is bound to be several.

37. Since, W. Slaney's decision (supra) was not referred to in the decision of Girdhari v. State (supra), we would like to treat this judgment also as not discussing the dimensions and implications of W. Slaney's decision on the crucial question, referred to us.

38. We would now like to have a detailed resume of the decisions of the Apex Court. As is well known the first case in chronological term is of the year 1955. In Nanakchand's case (supra) Imam J, speaking for himself, and S.R. Dass & Bhagwati, JJ. held that if there is a conviction for a charge not framed it is an illegality and not an irregularity curable by the provisions of Section 535 and 537, Cr. P.C. It was also held that even if it is assumed that it was only an irregularity which was curable then in the facts and circumstances of the case of Nanakchand the appellant was misled in his defence by the absence of a charge u/s 302 IPC. In para 14, the Court explained the prejudice, as in his defence the appellant was not called upon to meet such a charge and in his defence he may well have considered it unnecessary to concentrate on that part of the prosecution case.

39. It may be noticed in that case" the result of the discussion was that the re-

trial was ordered under S. 232 Cr. 1 C and the case of the appellant was remanded to the court of Sessions at Jullundur, in view of the above prejudice shown by court.

40. However, it will have to be admitted as a proposition of law in Nanakchand's case (supra) goes to the extent that it is an illegality and not an irregularity.

41. Then we come to Surajpal's decision (supra) where in Jagannadhadas J. speaking for the court consisting of himself, Bose and Sinha JJ. held that material prejudice was caused because of absence of the specific charges u/s 302 IPC and in view of that when the conviction and sentences have been set aside under s, 307/149 IPC and 302/149 IPC the conviction cannot be altered to Section 307&302 IPC simpliciter. It was held that Section 302 constitutes the distinct offence and the framing of the charge for a separate distinct offence is the foundation for the conviction and the sentence and therefore the absence of it creates the serious lacuna. However, after laying down the above principle in para 3, their Lordships posed the important question, whether this lacuna has prejudiced the accused in the trial which is obvious from the last sentence of para 3 which runs as under:

The question then which arises for consideration is whether or not this lacuna has prejudiced him in his trial.

42. In foregoing para 4, the question of prejudice has been discussed in details, by their Lordships and then after considering the S evidence including the medical evidence it has been held that it has materially prejudiced him. The last but one sentence of para 4 reads as under:

In all the circumstances above noticed, we are satisfied that the absence of specific charge against the appellant under ss. 302 and 307 IPC has materially prejudiced him. We must accordingly set aside the Convictions and sentences of the appellant u/s 302 and 307, Penal code".

43. Their Lordships then devoted anxious moment and discussed the evidence, whether the re-trial should be ordered and, on merits found that was a case in which there special infirmities in the prosecution case, account of which, the evidence normally cannot be believed and, therefore no useful purpose would be served by ordering re-trial. The convictions and sentences were therefore, maintained u/s 302/149 and 307/140 IPC but, were set aside u/s 302 & 307 IPC.

44. It would thus be seen that Surajpal's decision ratio decidendi brings the dictum and doctrine of prejudice deciding on the forefronts as the sole consideration for deciding whether the conviction should be set aside account of the absence of specific charge of the offence u/s 302 IPC when the accused has been acquitted of the offence u/s 302/149 IPC.

45. It was precisely the above controversy between Nanakchand and Surajpal's decision (supra) which resulted in reference to the bench of five Judges of the Supreme Court in W. Slaney's case (supra) as would be obvious from para 1 of

W. Slaney's which reads as under:

This appeal was referred to a Bench of five Judges in order to determine whether there was a conflict of view between-- Nanak Chand Vs. The State of Punjab, and Suraj Pal Vs. The State of Uttar Pradesh, and if so, to determine it.

46. Now as we have discussed in the very beginning W. Slaney's decision (supra) is the land mark in criminal jurisprudence so far as the question of effect of absence of charge for specific offence and the interpretation of Section 535 and 537 Cr. P.C is concerned. In addition to considering the decision of Surajpal and Nanakchand's case (supra), the five Judges have also considered the earlier decisions of the Privy Council in Babulal Choukhani v. Emperor AIR 1938 PC 133 Sabramania Iyer v. King Emperor 28 Ind App. 257 PC, AIR 1927 44 (Privy Council) Atta Mohammed v. Emperor AIR 1930 PG 57 AIR 1947 75 (Privy Council) and earlier decision of the Supreme Court in Lachman Singh and Others Vs. The State, and Karnail Singh v. State of Punjab (supra). We would not like to travel into excursion of the implications of the above decisions because once the Apex Court has intepreted them, well established principles, precedents properties warrant that all that is to be done by us is to understand their implications and follow them. Their Lordships took the guidance from the well known dictum of law of Privy Council in Atta Mohammad v. Emperor (supra) where in Viscount Sumner said that in the complete absence of any substantial injustice, in the complete absence of anything that outrages what is due to natural justice in criminal cases their Lordships find it impossible to advise his Majesty to interfere.

47. Their Lordships then discussed the various provisions relating to proceeding u/s 530 to 537 Cr.P.C. and obseved in para 18 as under:

There, broadly speaking the question is whether the error has caused prejudice to the accused or, as some of the Sections put it has occasioned a failure of justice".

48. It was then observed.

What we are seeking to demonstrate is that the Code has carefully classified certain kinds of errors and expressly indicated how they are to be dealt with. In every such case the court is bound to give effect to the express commands of the legislature there is no scope for further speculation. The only class of case in which the courts are free to reach a decision is that for which no express provision is made.

49. Their Lordship in para 23, then observed that when there is a charge and there is either error or omission in it or both, and whatever its nature, it is not to be regarded as material unless two conditions are fulfilled both of which are matters of fact; (1) the accused has in fact been misled by it and (2) it has occasioned a failure of justice. Their Lordships then held in reasonably plain language.

50. Thereafter, their Lordships discussed the entire scheme of the provisions. It was observed that in a case the error is not observed and corrected during the trial and the accused is convicted, in such a case the High Court is empowered to direct a retrial only if in its opinion the accused was "misled in his defence". It was further observed that this is so whether there was a total absence of a charge or merely an error in it. It is evident that a conviction cannot stand if the defect cuts at the root of the trial, therefore, defects even of this nature are not regarded as fatal.

51. Then follows the discussion about the entire case law and the conclusion which is relevant for our purpose is contained in paras 46, 47 which we have already extracted above in our judgement at the very beginning though even at the cost of the repetition we may mention that what was mentioned in paras 46 and 47 clinches the issues so far this reference presently is concerned.

52. Their Lordships then considered that in *Karnail Singh v. State of Punjab* (supra) the question of "prejudice" was and considered and in *Pandarang, Tukia v. State of Hyderabad* (supra), the question of "prejudice" was left opened. Their Lordships then analysed the implications of the judgment in *Surajpal's* case (supra) and observed that the question of "prejudice" was brought home and the argument that "prejudice" was to be assumed, was repelled which according to us, requires specific extraction here for ready reference;

It was argued before us that in the ground of the decision there was that the absence of charge under Sections 307 & 302 simpliciter was in itself conclusive to establish prejudice and that therefore, one need go no further. It is enough to say that that was not the decision and though that was one of the matters taken into consideration, the conclusion was based on a careful and lengthy investigation of all the facts in the case including the way in which it was conducted, the evidence of several witnesses, the first information report and certain documents including two filed by the accused.

53. Bose, J., then referred to the judgment of *Nanakchand's* case (supra) and comes in the grip with the controversy whether *Nanakchand's* case entertains the doctrine of prejudice or it assumes prejudice. In para 55 it was observed that the doctrine of prejudice was considered though the judgment may go beyond it, The crucial observations are as under:

As there was prejudice in that case, the decision was invalid and being invalid it was illegal. We do not say that that is necessarily so but it is a reasonably plausible conclusion and was what the learned judges had in mind.

54. Thereafter, Bose, J., examined Section 535 along with Section 537, Criminal Procedure Code and other relevant provisions and observed that, if Section 233 is mandatory, that put of it which prohibits misjoinder except in the cases mentioned in Sections. 234, 235, 236 and 239 is just as mandatory as the portion that requires a separate charge for each offence. Bose, J., further observed that it is unfortunate that they have no definition of the terms

"illegality", "irregularity" and "invalidity" because it can be used in different senses, but however that may be, the decision we are now examining and the remarks made in that case must be read in the light of this background.

55. Their Lordships agreed that some of the expressions used in the judgment appear to travel wider than this but in order to dispel misconception, they would now hold that the true view is the one which they have propounded at length in the judgment.

56. It would thus be seen thus that Bose, J., speaking for himself and S.R. Das, Actg. C J, has held that firstly, Nanakchand's decision is the best law on the doctrine of "prejudice" though in some respect the Judges have travelled a little too far and then Bose, J., curtailed them by saying that in order to spell misconception would now hold that the true view is the one we have propounded at length in the present judgment". Bose, J., then considered the question of "prejudice" in details and on the facts decided the case.

57. The other two Judges, Chandrashekhara and Jagannadadas, JJ., separate judgment and they too have discussed the entire matter, in detail, and various decisions and the collated the distinction between the complete absence of charge where trial proceeds and, trial in which some charges have been framed. The following illustrations have been given in para 85:

(a) Where there is no charge at all as required by the Code from start to finish from the Committing Magistrate's court to the end of the Sessions trial; the Code contemplates in Section 226 the possibility of a committal without any charge and it is not impossible to conceive of an extreme case where the Sessions trial also proceeds without any formal charge which has to be in writing and read out and explained to the accused (Section 210(2) and Section 251A(4) and Section 227).

The Code requires that there should be a charge and it should be in writing. A deliberate breach of this basic requirement can not be cured by the assertion that everything was orally explained to the accused the assessors or jurors, and there was no possible or probable prejudice.

(b) Where the conviction is for a total different offence from the one charged and not covered by Sections 236 and 237 of the Code. On a charge for a minor offence, there can be no conviction for a major offence, e g., grievous hurt of rioting and murder. The omission to frame a separate and specific charge in such cases will be an incurable irregularity amounting to an illegality.

58. However, the crucial finding which is relevant for the purpose of this reference is covered in para 86 and since Section 149 IPC expressly finds place in para 87, the doctrine of prejudice has been accepted by these two Judges also, and that shows that four Judges out of five have proceeded to hold that the doctrine of prejudice is to be considered in cases where the charge u/s 149 IPC is in existence along with specific offence, like 302, 307, 323 IPC.

59. In para 87, then Chandrasekhara, J. emphasised the reasons for the above findings and in para 88 has put a word of caution and a warning is given to the subordinate courts against a deliberate disobedience to the mandatory requirements of the Code, because in some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted.

60. Their Lordships then examined William Slaney's case and on merits found that he was not guilty of offence u/s 302 IPC but, convicted him u/s 304, Part II, IPC.

61. Imam, J., in the said case of W Slaney's case (supra) agreed with the judgment delivered by Chandrasekhara Aiyar, J., in his separate judgment and then pointed out that in such situation where the contravention of provisions regarding framing of the charge is substantial, it would mean wastage of public time, therefore, the provisions of charge can be obeyed and should not be ignored. However, their Lordships also convicted the accused u/s 304 IPC.

62. It would thus be seen that all the five Judges leaving aside the question of emphasis have, in fact, converted the conviction from Section 302 IPC to Section 304, IPC even though there was no distinct specific charge for the same and the charge was with the aid of Section 34 IPC.

63. It will have also to be seen that Section 34 and Section 149 IPC have been put into same category as is obvious from para 46 of the decision delivered by Bose J and para 86 of decision delivered by Chandrasekhara Aiyar J. in W. Slaney's case (supra).

64. In our considered opinion therefore, Manakchand's case cannot provide any correct guidance and we have to apply the principles of William Slaney's decision and the reference made by the learned Single Judge (Mahendra Bhushan J.) before us appears to be well justified on a proper reading of the entire case law as discussed above.

65. We have now to see, whether after the judgment of Five Judges in W. Slaney's case (supra) there has been any other judgment of the Supreme Court by now on account of which W. Slaney's decision cannot hold the field.

66. In Gurbachansingh v. State of Punjab AIR 1937 SC 623 W. Slaney's case was referred to in para 7 and it was observed that Section 537 Cr PC was considered in judging the question of "prejudice" courts must act with a broad vision and look to the substance and not to technicalities and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. In the facts of the case of Gurbachan Singh, their Lordships held relying upon the decision of W. Slaney's case (supra) that there was a fair trial.

67. In *G.D. Sharma and R.N. Tyagi Vs. The State of Uttar Pradesh*, their Lordships held that the provisions of Section 236 and 237 are clear enough to enable a court to convict an accused person even of an offence with which he had not been charged if the court is of the opinion that the provisions of Section 236 apply. It was further observed that, where a case is covered by the provisions of Sections 236 and 237, the appellate Court errs in ordering a re-trial. Instead it should itself dispose of the appeal.

68. In *State of Andhra Pradesh Vs. Cheemalapati Ganeswara Rao and Another*, , the view taken was that in cases of misjoinder of charges if objection is not taken by the trial Court, the High Court would not interfere unless it has occasioned the failure of justice. In para 33, *W. Slaney's* decision was referred to be the Supreme Court and it was observed that where an objection to misjoinder of charge contrary to the provisions of the Code is taken at an early stage of the trial there is time enough to rectify the error. But where such objection is raised for the first time only in the Trial Court what the Court has to consider is whether prejudice has in fact been caused to the accused by reason of the multiplicity of charges or misjoinder, if any, of the charges. Merely because the accused persons are charged with a large number of offences and convicted at the trial the conviction cannot be set aside by the appellate court unless it in fact came to the Conclusion that the accused persons were embarrassed in their defence with the result that there was failure of justice.

69. *W. Slaney's* case (supra) was referred to by their Lordships in *Madan Raj Bhandari Vs. State of Rajasthan*, in para 14 wherein it was held that it is well settled law that the absence of charge or an error or omission in it is not fatal to a trial unless prejudice is caused and, therefore, the essential question is whether there is any reasonable likelihood of the accused having been prejudiced in view of the charge framed against him.

70. Again, in *Kahan Singh and Others Vs. State of Haryana*, *W. Slaney's* case (supra) was referred to in para 15 and it was observed that it is not necessary to refer to the other decisions in view of the decision of this Court in *W. Slaney's* case (supra), the essential question being whether the accused were prejudiced by the charge. It was held that the appellants were not prejudiced by the alternative charge referred to. It was further observed that the counsel for the appellants was not able to show how the accused can be said to have been prejudiced by the alternative charges. Their Lordships further held that if the necessary information is conveyed to him and no prejudice is caused to him because of the charges, the accused cannot succeed by merely showing that the charges were defective.

71. In *Bhoor Singh v. State of Punjab* (supra), Their Lordships of the Supreme Court observed that the ratio of *Slaney's* case (supra) is a complete answer to the first contention of the learned Counsel for the appellants. The first contention of the learned Counsel was that the appellants were charged in respect of offences under Sections 148 and 302 read with Section 149 IPC, but they have

been convicted u/s 302 read with Section 34 IPC, though there was no specific charge under S. 34, IPC against them and, this irregularity amounts to an illegality and vitiates the trial.

72. In *Karnal Singh Uttam Singh Vs. State of Maharashtra*, their Lordship observed that the trying Magistrate has convicted the appellant u/s 411, IPC and sentenced him to six months' rigorous imprisonment and to pay a fine of Rs. 500/- when he was not even charged with this offence. The High Court had maintained this conviction and the sentence and had not even mentioned the defects in the trial. There was neither a charge u/s 411 IPC nor was the appellant asked to explain his possession of the truck although he did account for it. Their Lordships further observed that the appellant's explanation appeared quite plausible and it may have been difficult to hold that the appellant could not have been prejudiced by the omission to frame a charge or by the manner in which he was put an omnibus question u/s 342 Cr. PC without giving him an intimation of the offence of which he was likely to be convicted, if these questions had been seriously raised.

73. In *Bhajan Singh and Others Vs. The State of Punjab*, *W. Slaney's case* (supra) was not noticed by their Lordships of the Supreme Court. Without noticing the above decision and the principles (aid down, their Lordships, *Jaswant Singh and PS. Kailasam JJ*), held that the injury was caused by one of the members of the unlawful assembly but the common object was only to cause grievous hurt. Since none of them was charged for the offence u/s 302 IPC for that specific injury distinctly therefore, one cannot be held to be guilty of causing death which is sufficient in the ordinary course of nature, to the deceased. This injury was not caused in prosecution of the common object of the assembly and, therefore, the accused cannot be convicted for offence u/s 302/149 IPC.

74. As we have discussed in the earlier part of the judgment at length, the dimensions of the procedural law regarding framing of the charge and the doctrine of the prejudice which is inherent in it on account of Section 535 and 537 Cr. FC have been authoritatively decided by the Supreme Court in *W. Slaney's case* (supra) where four Judges have, in terms, held that the absence of framing of charge for distinct offence when there is a charge for that the offence with the aid of S. 149 IPC is not necessarily fatal and the Court will have to examine, whether the prejudice has been caused to the accused warranting a re-trial in each case.

75. In our considered opinion, *Bhajan Singh's* (supra) in to way waters down that authoritative decision of five Judges who were required to decide this point, precisely on account of the alleged historical anomaly created due to the decisions in *Nanakchand and Surajpal's case* (supra).

76. No other cases have been referred before us and even after our own study of the various decisions so far reported, we have not been able to find out any pronouncement of the Supreme Court either taking a different view from *W.*

Slaney's case (supra) or making an effort to water down it after applying its mind to the principles laid down therein specifically.

77. We have, therefore, no hesitation in holding that W. Slaney's case (supra) which is a leading case on this point holds the field and the principles of law laid down in it, admits of no doubt or debate. To be precise, we may mention it that according to it, no trial is vitiated and no conviction can be set aside simply because separate distinct charge has not been framed for a specific offence, although the charge with the aid of Section 149 IPC has been framed for that particular specific offence.

76. In the instant case, before us the charge framed against the accused was u/s 326, read with Section 149 IPC and he was convicted u/s 326, IPC, both by the trial Court and the Appellate Court.

79. Before the Appellate Court no objection was raised for the trial being vitiated on account of non-framing of any charge or prejudice having been caused on account of non framing of the distinct separate charge u/s 326 IPC and the appeal was dismissed on merits.

80. Since the revision petition will have to be considered on merits also, at that time, it would be open to the accused to show that any prejudice has been caused on account of non-framing of the distinct charge of Section 326 IPC because he has been acquitted from the constructive liability u/s 326, read with Section 149 IPC for which a charge was framed and, it would be for the learned Single Judge to decide the case on merits. Consequently we hold that even if the accused person is only charged vicariously of offence read with Section 149 IPC and is convicted for the substantive offence for which no separate charge was framed, the conviction by the trial Court or appellate court cannot be set aside merely on the ground that no charge was framed. In such cases, it would always be necessary for the accused to show that because of the failure of the framing of separate charge for a specific substantive offence, prejudice in fact has been caused to him in the trial of the case. In the absence of showing such prejudice no conviction can be set aside.

81. The reference is disposed of accordingly.