
(2012) 10 BOM CK 0244
In the Bombay High Court
Case No : Criminal Appeal No. 255 of 2006

Premising Jogsing

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 31-10-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 141, 142, 143, 147, 148

Citation : (2013) 1 ABR 179

Hon'ble Judges : V.M. Kanade, J;P.D. Kode, J

Bench : Division Bench

Advocate : Y.M. Choudhary, for the Appellant; J.P. Yagnik, App., for the Respondent

Judgement

V.M. Kanade, J.—For the reasons separately recorded in the judgment, following order is passed.

(i) Appeal is allowed.

(ii) The impugned judgment and order passed by the 3rd Ad-hoc Additional Sessions Judge, Sangli is quashed and set aside. The Appellant/Accused is acquitted of the offence punishable u/s 302 of the Indian Penal Code. Fine, if paid, be refunded to the Appellant.

(iii) The Appellant be released forthwith unless he is required in any other case.

Appellants are original accused Nos. 1 to 5. They are challenging the judgment and Order dated 1.8.2006 passed by the 3rd Ad-hoc Additional Sessions Judge, Baramati, by which all the accused were convicted for the offences punishable under Sections 143, 147 read with 149, 148, 323 read with 149 -and 302 read with 149 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 1,000/- each and in default, to suffer further rigorous imprisonment for six months and also convicted them on each count by awarding separate sentence. Appellants shall, hereinafter, for the sake of convenience, be referred to as accused by their original numbers.

Brief facts are as under:--

2. The incident in question took place on 7.2.2004 at about 10.00 p.m. P.W. 11 Hanumant Fadatare, RW. 12 Kiran Prataprao Bhosale and P.W. 13 Shrikant Bhosale had gone to their field at about 9.00 p.m. for the purpose of watering their crops. At that time, they heard some loud arguments and, therefore, they went in direction from which they heard this sound and noticed that the accused were damaging culverts of the canal with the help of crow bars. According to prosecution, P.W. 11, P.W. 12 and P.W. 13 informed this fact to deceased and they along with the deceased again came back at the place where the said accused were trying to damage the said canal. Prosecution case is that the accused rushed towards the deceased and other witnesses and assaulted them with stones and crow bars and in the said assault the deceased Pandurang Fadatare succumbed to the injuries. The said witnesses P.W. 11, P.W. 12 and P.W. 13 then took deceased on their motor-cycle to the hospital. He was, however, declared dead on arrival at the hospital. A complaint was lodged. The names of the accused were mentioned by the witnesses. Medical Officer Dr. Subhash Lamkhede (P.W. 8) examined P.W. 11 on the next morning and issued injury certificate. P.W. 8 also performed autopsy of the deceased and he gave an opinion that the death has taken place due to hemorrhagic shock due to multiple fracture of skull bones and death of vital organ like brain. Accused were charged for the offences punishable under Sections 143, 147 read with Section 149, Sections 148, 323 read with Section 149 and Section 302 read with Section 149 of the Indian Penal Code. They pleaded not guilty to the said charge.

3. Prosecution, in all, examined 21 witnesses. Trial Court, after perusing the evidence which was on record was pleased to convict all the accused for the offences with which they were charged.

4. The learned counsel appearing on behalf of the appellants/accused has taken us through the judgment and order of the Trial Court as also the evidence adduced by the prosecution. He submitted that no reliance could be placed on the testimony of the said eye-witnesses viz. P.W. 11, P.W. 12 and P.W. 13. He submitted that from the call-log which was produced in the Court, it could be seen that the deceased was contacted by accused Nos. 1 and 2 and, as such, presence of the appellants/accused at the scene of offence was doubtful and it was not established by the prosecution. He then submitted that there was no special reason for P.W. 12 and P.W. 13 to accompany the complainant on that day. He submitted that, it was not possible for the complainant to hear a loud voice of the quarrel which was going on between the accused from the spot. He then submitted that blood-stained clothes of P.W. 11 and P.W. 12 were seized after two months from the date of incident. He further submitted that there were no bleeding injuries on the complainant. He then submitted that the Medical Officer (P.W. 8) has stated that the deceased was brought in four wheeler which falsifies the claim of P.W. 12 and P.W. 13 who have stated that they had brought the deceased to the hospital on motorcycle. He further submitted that the

Medical Officer has stated that he had examined the complainant and P.W. 12 on 8.2.2004 at 7.50 a.m. which falsifies the claim of the complainant that they were examined by the doctor when they took the deceased to the hospital on 7.2.2004. He submitted that no injury was caused to P.W. 12. He then submitted that the immediate complaint which was given by the Sectional Engineer, Irrigation Department indicated that the farmers of Tarangwadi had caused damage to the culvert and that the appellants/accused not being residents of Tarangwadi, they could not have been present when the said offence was committed. He then submitted that P.W. 10 had acted as panch in 7 cases of Indapur Police Station and had deposed as panch in 2 to 3 sessions cases. He lastly submitted that it is difficult to rely on the FIR since it was recorded without seeing the dead body.

5. In the alternative, the learned counsel for the appellants/accused submitted that the said incident in question had taken place at the spur of the moment and there was neither an intention nor knowledge on the part of the accused that the injuries which were caused to the deceased were either sufficient in the ordinary course of nature to cause death or were likely to cause death.

6. The learned counsel submitted that, in any case, no motive or object could be attributed to accused Nos. 3 to 5. He submitted that version given by witnesses that accused Nos. 3 to 5 had assaulted deceased on his head after he fell down with stone on the back side of his head is not believable since P.W. 11 and P.W. 12 have stated that after the deceased was assaulted with stone which was thrown by accused No. 4, he fell down on the ground and was facing the sky and, as such, version of P.W. 11 that accused Nos. 3 to 5 had given blows with the stone on the backside of the head of the deceased is palpably false. He submitted that, therefore, there was no material to show that accused Nos. 3 to 5 shared the object or intention of accused Nos. 1 and 2.

7. The learned counsel for the appellants/ accused has relied on the following three judgments:--

1. Shivjee Singh and Others Vs. State of Bihar, ;
2. Chikkarange Gowda and Others Vs. State of Mysore, ;
3. Mariadasan and Others Vs. State of Tamil Nadu, .

8. Mrs. Bhosale, the learned APP appearing on behalf of the State submitted that the accused had assembled near the culvert with an intention of causing damage to the public property and that Pandurang Fadatore (deceased) had made telephone calls on his mobile to the Irrigation Officer (P.W. 9) informing him about the damage being caused by the accused. The accused were annoyed and all of them rushed towards the deceased and other witnesses and assaulted them with stones and iron bars, as a result of which deceased died on the spot as he received grievous injuries on the vital part of his body viz. brain. She submitted that the assault was brutal and that there was fracture of skull bones

and all the veins in the brain were broken.

9. The learned APP appearing on behalf of the State relied upon the following judgments.

1. Ramachandran and Others etc. Vs. State of Kerala, ;
2. Dharnidhar Vs. State of U.P. and Others, ;
3. Raj Nath Vs. State of U.P., ;
4. Ramesh Vs. State of Haryana, .

10. The Apex Court in its recent judgment in Ramachandran and Others etc. Vs. State of Kerala, has taken into consideration the scope and object of Section 149 and in the said case, the Apex Court has considered the circumstances under which a person can be made vicariously liable for the act of unlawful assembly and in paras 17 and 18, it has observed as under:--

Section 149, IPC: Scope and object

17. Section 149, IPC has essentially two ingredients viz. (i) offence committed by any member of an unlawful assembly consisting of five or more members, and (ii) such offence must be committed in prosecution of the common object (under Section 141, IPC) of the assembly or members of that assembly knew to be likely to be committed in prosecution of the common object.

18. For "common object", it is not necessary that there should be a prior concert in the sense of a meeting of the members of the unlawful assembly, the common object may form on the spur of the moment; it is enough if it is adopted by all the members and is shared by all of them.

The Apex Court in Dharnidhar Vs. State of U.P. and Others, has noted in paras 43 and 44 of its judgment as under:--

43 In Md. Ankoos and Others Vs. The Public Prosecutor, High Court of A.P., this Court held as under (SCC p. 107 para 34)

34. Section 149, IPC creates constructive liability i.e. a person who is a member of the unlawful assembly is made guilty of the offence committed by another member of the same assembly in the circumstances mentioned in the section, although he may have had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. The legal position is also fairly well settled that because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if the accused has not been affected thereby.

44 In Pandurang Chandrakant Mhatre and Others Vs. State of Maharashtra, , this Court enunciated the principle that u/s 149, two ingredients are required to be satisfied. Firstly, there has to be the commission of an offence by any member of an unlawful assembly. Secondly, such offence must have been committed in

prosecution of the common object of that assembly or must be such that the members of that assembly knew it to be likely that the offence would be committed. The Court held as under (SCC pp. 795-97 paras 65-66 and 71)

65. Section 149, IPC creates a specific and distinct offence. Its two essential ingredients are:

(i) commission of an offence by any member of an unlawful assembly; and

(ii) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew it be likely to be committed.

66. In *Masalti Vs. State of U.P.*, , this Court exposted: (AIR pp. 210-11, para 17)

17.....What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141, IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, 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 be-comes relevant to consider whether the assembly consisted of some persons who were mere by passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.

* * *

71. Having carefully examined the testimony of eye-witnesses, we find that the prosecution has been able to establish that the party of assailants comprised of more than five persons and that they formed unlawful assembly. It is also seen from the evidence that at least five persons chased the deceased and then attacked him. These members of the unlawful assembly who chased and attacked the deceased definitely shared the common object or causing murder of Suresh Atmaram Gharat. A-1 had died during pendency of the appeal before the High Court and, therefore, nothing further needs to be said about his role.

Similarly, in *Raj Nath Vs. State of U.P.*, the Apex Court observed in para 15 of its judgment as under:--

15. 10. A plea which was emphasised by the [appellant] relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation.

12...

13...

14. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall u/s 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same the knowledge that, that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew what likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first part but offences committed in prosecution of the common object would be generally, if not always, within the second [part], namely, offences which the parties knew to be likely to be committed in the prosecution of the common object (See Chikkarange Gowda and Others Vs. State of Mysore,)...

11. At the same time, the learned counsel appearing on behalf of the appellants/accused has relied upon the judgment in Shivjee Singh and Others Vs. State of Bihar, . The Apex Court in the said judgment-has held that mere presence in unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object. In para 8 of its judgment in the said case, the Apex Court has observed as under:--

8. A plea which was emphasised by the appellant relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not common intention. 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 common 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. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more 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 assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who composed the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 have to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of nature of the object. There must be community of object and the object may exist only upto a particular state, and not thereafter. Members of an unlawful assembly may have community of objects upto certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

Similarly, the learned counsel appearing on behalf of the appellants/accused has relied upon the judgment of the Apex Court in *Mariadasan and others v. State of Tamil Nadu*, AIR 1980 SC 578 in which the Apex Court held that where there is no evidence as to the formation of unlawful assembly with common object and if there is sudden fight at the spur of the moment, accused cannot be convicted under Sections 147, 148 and 149. In para 4 of its said judgment, the Apex Court has observed as under:--

4....Reading the evidence of P.W. 1 as also the allegations made in the F.I.R. we are satisfied that there was no satisfactory evidence to prove the formation of

any unlawful assembly at any time with the common object of assaulting or killing either the deceased Francis or P.W. 1. The whole fight started suddenly on the spur of the moment in a heat of passion and, therefore, the accused could only be liable for the individual acts committed by them. For these reasons, therefore, we agree with Mr. Singh that there is no evidence to support the conviction of rioting u/s 149, 148 or 147 I.P.C. as recorded by the High Court.

The learned counsel for the appellants/accused has also relied upon the judgment of the Apex Court in Chikkarange Gowda and Others Vs. State of Mysore, . In the said judgment, the Apex Court in paras 9 and 10 has observed as under:--

9. It is quite clear to us that on the finding of the High Court with regard to the common object of the unlawful assembly, the conviction of the appellants for an offence under S. 302 read with S. 149, Penal Code cannot be sustained. The first essential element of S. 149 is the commission of an offence by any member of an unlawful assembly; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.

In the case before us, the learned Judges of the High Court held that common object of the unlawful assembly was merely to administer a chastisement of Putte Gowda. The learned Judges of the High Court did not hold that though the common object was to chastise Putte Gowda, the members of the unlawful assembly knew that Putte Gowda was likely to be killed in prosecution of that common object. That being the position, the conviction under S. 302 read with S. 149, Penal Code was not justified in law."

10. So far back as 1873, in *Queen v. Sabed Ali*, 20 Suth WR (Cr) 5 (A), it was pointed out that S. 149 did not ascribe every offence which might be committed by one member of an unlawful assembly while the assembly was existing, to every other member. The section describes the offence which is to be attributed under two alternative forms: (1) it must be either an offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly; or (2) an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

In 94 Ind. Cas. 782 (Privy Council) the distinction between Ss. 149 and 34, Penal Code was pointed out. It was observed that S. 149 postulated an assembly of five or more persons having a common object, namely, one of those objects named in S. 141, and then the doing of acts by members of the assembly in prosecution of that object or such as the members knew were likely to be committed in prosecution of that object. It was pointed out that there was a difference between common object and common intention; though the object might be common, the intention of the several members might differ. The leading feature of S. 34 is the element of participation in action, whereas membership of

the assembly at the time of the committing of the offence is the important element in S. 149. The two sections have a certain resemblance and may to a certain extent overlap, but it cannot be said that both have the same meaning.

The distinction between the two sections was again explained in a recent decision of this Court. *Nanak Chand Vs. The State of Punjab*,

12. In our view, ratio of the judgments on which reliance has been placed by the learned counsel appearing on behalf of the appellants clearly applies to the facts of the present case, so also the ratio of the judgments on which reliance has been placed by the learned APP appearing on behalf of the State would reveal that the offences punishable under Sections 143, 147, 148 and 149 of the Indian Penal Code are not attracted in this case.

13. After having heard the learned counsel appearing on behalf of the appellants/accused and the learned APP appearing on behalf of the State and after having considered the facts and circumstances of the case and the evidence on record, we are of the view that the prosecution has not established that the accused Nos. 3 to 5 shared the intention of accused Nos. 1 and 2 or were aware as to what accused Nos. 1 and 2 intended to do and, as such, it cannot be said that ingredients of offence punishable under Sections 143, 147, 148, 149 and 323 had been established by the prosecution against accused Nos. 1 to 5. However, in our view, prosecution has clearly established that accused Nos. 1 and 2 have committed an offence punishable u/s 302 of the Indian Penal Code. So far as accused Nos. 3 to 5 are concerned, in our view, prosecution has established that they have caused grievous injuries to the deceased by throwing stones at him and, therefore, they are liable to be convicted u/s 326 of the Indian Penal Code. We have come to the said conclusion for the following reasons.

14. As we have stated, Prosecution has examined, in all, 21 witnesses. P.W. 11 Hanumant Fadatore, P.W. 12 Kiran Bhosale and P.W. 103 Shrikant Bhosale are eye-witnesses to the said incident. P.W. 16 Bapu Tarange also is an eye-witness but he was declared hostile by the prosecution.

15. P.W. 11, P.W. 12 and P.W. 13 have given evidence as to how the incident had taken place. All the three eye-witnesses have clearly stated that after the deceased and the said witnesses came to the spot, they saw that deceased made phone call to Irrigation Officer and informed the names of the accused and, thereafter, accused came there and accused No. 1 inquired with the deceased and asked him to whom he had called and when the deceased told him that he had informed the Irrigation Officer, accused gave him threat and, at that time, accused No. 4 took up stone and threw it in a direction where the deceased was standing and as a result of injury by the stone, the deceased fell down on the backside and his face was towards the sky and, at that point of time, accused No. 1 came there and gave vertical blow on his forehead by crow bar and accused No. 2 also thereafter picked up his own crow bar and assaulted the deceased on his head. The only role which has been attributed to accused Nos. 3

to 5 is that they had assaulted the deceased with stones.

16. Taking into consideration the evidence on record, in our view, witnesses have established the sequence of events and the manner in which the incident had taken place. The contention of the learned counsel for the appellants/accused that presence of the accused had not been established cannot be accepted. There is sufficient material on record to indicate that accused were present at the spot which is; clearly borne out from the sequence of events narrated by all the eye-witnesses. Therefore, in our view, prosecution has established that accused Nos. 1 and 2 had inflicted injuries with crow bar which has resulted in the death of the deceased and, therefore, in purview, prosecution has established that accused. Nos. 1 and 2 had committed the offence punishable u/s 302 of the Indian Penal Code.

17. So far as accused Nos. 3 to 5 are concerned, it can not be said that they shared the intention of accused Nos. 1 and 2. The incident in question took place at the spur of the moment. The accused did not know that the deceased and other witnesses were going to come to the spot. It was only after the deceased made phone calls to the Irrigation Officer, accused No, 1 got irritated and he assaulted the deceased with crow bar on his head. As such, there was no reason for accused Nos. 3 to 5 to have known that such an incident would take place as a result of phone calls made by the deceased and as a result of which accused Nos. 1 and 2 would be angry and they would assault the deceased with crow bar on his head. P.W. 11 Hanumant Fadatara has stated that accused No. 4 had assaulted the deceased with stone on his head after he fell down on the ground. His testimony cannot be accepted since the deceased was already lying on the ground and his face was facing the sky and, as such, there was no occasion for accused No. 4 to have assaulted him on the backside of his head. This version is therefore improbable and unreliable. Apart from that, the only role attributed to accused No. 4 is that he had assaulted the deceased with stone on his head, as a result of which he fell down. The ingredients of Section 149 therefore are not attracted in the present case. P.W. 8 Dr. Subhash Lamkhede who performed the post-mortem in his evidence stated that the death was unnatural and homicidal and he had given number of injuries which were found on the deceased. The evidence of P.Ws. 12 and 13, therefore, is amply corroborated by the medical evidence on record and, as such, injuries which were inflicted by accused Nos. 1 and 2 with the crow bar clearly had resulted in death of the deceased. The doctor in his evidence has stated that injuries which were caused by the stones could not have resulted in death of the deceased and, as such, accused Nos. 3 to 5 cannot be said to have committed an offence punishable u/s 302 and, therefore, their conviction u/s 302 will have to be set aside and they will have to be convicted u/s 326 of the Indian Penal Code. In the result, the following order is passed:--

ORDER

Appellants/original accused Nos. 1 to 5 are acquitted of the offences punishable

under Sections 143, 147, 148, 149 and 323 of the Indian Penal Code. Original accused Nos. 1 and 2 are convicted for the offence punishable u/s 302 of the Indian Penal Code and are sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 4,000/- each.

Original Accused Nos. 3 to 5 viz. Pandurang Ganpat Parekar (A-3), Dynandeo Laxman Parekar (A-4) and Dattu Pandurang Parekar (A-5) are acquitted of the offence punishable under Sections 302, 143, 147, 148, 149 and 323 of the Indian Penal Code. They, however, are convicted for the offence punishable u/s 326 of the Indian Penal Code and are sentenced to suffer rigorous imprisonment for five years. Original Accused Nos. 3 to 5 have already undergone more than 6 years of actual imprisonment and, therefore, they are directed to be released forthwith unless they are otherwise required in any other case.

Appeal is partly allowed and disposed of.