

(1954) 04 GAU CK 0002
In the Gauhati High Court

Rajab Ali

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 05-04-1954

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 201, 302

Citation : AIR 1955 Guw 105 : (1955) CriLJ 780

Hon'ble Judges : Ram Labhaya, J; Haliram Deka, J

Bench : Division Bench

Judgement

Deka, J.—Two persons, the appellant Rajab Ali and his brother "Dukhi Sheik were tried under Sections 148/149 IPC 302/149 and u/s 201 IPC with the help of a jury who returned a verdict of not guilty against accused Dukhi with respect to all the charges and the verdict of guilty Under Sections 148/149 and 302/149 IPC against accused Rajab Ali and the verdict of not guilty against him with respect to the charge u/s 201, 1. P. C. The learned Additional Sessions Judge, L. A. D. agreeing with and accepting the unanimous verdict of the jury convicted and sentenced the accused Rajab Ali to transportation for life Under Sections 302/149 IPC and though there was conviction u/s 148/149 IPC no separate sentence was passed. Rajab Ali has preferred this appeal against the said conviction and sentence.

2. The prosecution case is that on 7-1-1946, Police Sub-Inspector, Taheruddin attached to the Hajo-Police Station left Hajo with three constables including Sheikh Mohammed to execute a requisition received from the North Salmara Police Station for arresting certain offenders. The Sub-Inspector sent back two of the constables with a prisoner in custody the next day and he remained in the house of one Kayed Ali - Gaobura inasmuch as his mission was not complete. In company of some of the local "Matbars" including Teheruddin Dewani, Inatulla, Abdul Gani, Gani Bepari, Damulla Sheikh and others, he moved on the morning of the 10th January to the house of Teher Dewani in a village known as Bhangnapota, and from there to a village known as Bhagnamari or Kalaichar

where they put under arrest two more persons by the names of Manika and Nurul and deputed another man to bring another offender and according to some of the prosecution witnesses it was the accused Rajab Ali who was wanted in connection with some other matter.

Before that man returned a crowd of about 25 or 30 persons including accused Rajab Ali and his brother Dukhi Sheikh came to the place armed with lathis, daos etc. and surrounded the Police Sub-Inspector and the constable and the local "Matbars" who accompanied them. One Somer Bepari who came with the crowd asked the Daroga as to why the police had come and arrested the persons. P.W. 3, Sayad Ali, one of the Matbars who accompanied the Daroga, protested and then Somer Bepari ordered the crowd to attack the police party and beat them so that none could escape. At this accused Rajab Ali struck Sayed Ali on the head with a lathi and then other people followed suit. Simultaneously, one Mai-juddin who was in the crowd with Somer Bepari whipped out dao from under his cloth and struck the constable. Taheruddin the Daroga, who had a gun with him attempted to defend himself when his gun was snatched away and then Taimuddin, Maijuddin and Samer Bepari struck him with lathis and daos and the daroga collapsed under the injuries sustained. So did the constable.

Another of his companions by the name of Allabaksh was also put to death by the riotous crowd then and there. One Ibrahim Sarkar of the police party took refuge in the neighbouring hut wherefrom Manika, Maijuddin and two others took him out and tied him with a rope. The dead bodies of the murdered persons, namely, the Daroga, the constable and Allabaksh were removed by the crowd and they dragged away - Ibrahim Sarkar also, who has not since then been seen or heard and is believed to be killed. The prosecution case is that all these persons were murdered by the rioting assembly of which this accused Rajab Ali was one of the members and took lead in the assault by giving Sayed Ali the first blow on his head with a lathi. Abdul Gani one of the Matbars who accompanied the police party returned home and went to the Hajo Police (Station which was about 23 miles off from the place of occurrence, during the night and lodged an information there on the next day, that is on 11-6-1946.

3. On submission of the charge-sheet, some of the accused had been tried and convicted and the present accused Rajab and Dukhi who were also charge-sheeted were shown to be absconders in that case but they having been arrested subsequently, this trial started against those two persons with the result indicated above.

4. Two points have been argued by the learned Advocate appearing for the appellant?(1) that there can usually be no conviction u/s 148 read with S, 149, IPC and (2) that the common object of the assembly not being clearly made out so far as Rajab Ali was concerned, his conviction u/s 302/149, I.P.C. is bad in law.

5. It must be said that from a perusal of Section 148, IPC itself, it is clear that there is no scope for reading this section along with Section 149, I. P. O. Section

148, IPC says that "whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both." The requirement of the section is that the person must not only be a member of the riotous assembly but must also be armed with deadly weapon or with anything which used as weapon of offence is likely to cause death. Section 149, I.P.C. contemplates only constructive liability whereas Section 148 deals with direct liability. Being armed with weapon cannot be made to be a constructive liability and one who does not carry weapon himself cannot be convicted u/s 148 by virtue of Section 149, I.P.C.

This difference ought to have been pointed out to the Jury by the learned Additional Judge and that not having been done, the Jury it seems failed to understand the implication of the sections and wrongly returned a verdict of guilty under both these sections read together. If the charges were independent and the prosecution evidence believed, there was scope for conviction u/s 148, IPC There being no separate sentence under these two sections, this point has only technical importance. Even then we must hold that the conviction u/s 148 read with Section 149, I.P.C. was bad in law and is liable to be set aside.

6. The learned Advocate for the appellant laid great stress on the other point, namely, that even though it be said that Rajab Ali was in the party which in the course of events committed triple murder, no part has been assigned to him with respect to these murders. All that has been said against him was that he struck Sayed Ali on the head and even on that point, the evidence is very discrepant. He has further laid great emphasis on the ruling reported in - 54 CWN 214 , wherein it has been held by Ellis and Ahmed JJ. that Section 149, Penal Code is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of common object. In order to bring a case u/s 149, Penal Code, the act must be done with a view to accomplish the common object of the unlawful assembly or it must be proved that the offence though committed in prosecution of the common object of the unlawful assembly, is one which the accused knew would be likely to be committed in prosecution of the common object.

7. The case undoubtedly lays down a sound principle or puts a correct interpretation on Section 149 I.P.C. but the facts in each case have to be gathered from the circumstances and the law has to be applied to the facts as found. Section 149, I.P.C. consists of two parts?first, the member of the unlawful assembly is made liable for the offence actually committed by any member of the assembly in prosecution of the common object of that assembly and second, even for such offences as the members of the assembly knew to be likely to be committed in prosecution of that object. Here, the contention is that accused Rajab Ali not having taken part in the murderous assault on the police officer or his party it could not be said that he was directly liable for murder but the

question is whether he would be constructively liable, and such liability arises if he is found to possess the same common object of committing murder which had been done by some other persons in the assembly while the accused continued to be a member of that assembly.

The contention of the learned Advocate is that. he did not share such common object inasmuch as he took no direct or indirect part in committing any assault on the police. What we have to examine is that whether Rajab Ali, assuming he was present, could know that the unlawful assembly as it was constituted was likely to commit murder on the police officer in prosecution of the common object. Here obviously, the common object was to attack the police party when Rajab Ali responded to the order of Somer Bepari that they should attack the police party and not spare any of them. Before his very eyes, three or four persons were put to death by some of the members of the attacking party and there is nothing to show or suggest that Rajab Ali acted in a way to show that his intention was to cease to be a member of that assembly.

His presence in the assembly or at the place of occurrence is admitted even by his own relations including his wife and sister-in-law, but they said that he took no part in the affray whereas from other witnesses there was sufficient evidence on the record to show that Rajab Ali gave a start to the beating and he himself beat Sayed Ali on his head with a stick. Under these circumstances, it cannot be said that the jury would be wrong in holding that he shared the same common object of killing the police which was actually done by the rioters. The learned Advocate for the appellant has not succeeded in showing that there was any misdirection in the charge which vitiated it but he laid emphasis on the fact that there was no evidence to show that Rajab Ali shared the common object of the party to committing the murder.

In the circumstances of the case, we cannot say that he had no idea that the riotous crowd was likely to have killed the police party and that he shared the common object only to a limited extent and not to the full extent of causing death or murder. Under these circumstances, we hold that there was no misdirection even in the matter of law on the point and there being sufficient evidence on which the jury returned a verdict of guilty against the accused u/s 302/149, IPC we see no reason to interfere and the second contention raised on behalf of the appellant fails. The result is that the conviction and sentence u/s 302/149, IPC are maintained and the one u/s 148/149, IPC is set aside. The appeal therefore substantially fails except that there will be no conviction u/s 148/149.

Ram Labhaya, J.

8. I agree.