

(2010) 09 BOM CK 0066

In the Bombay High Court

Case No : Criminal Appeal No's. 3 and 120 of 2006

Sachin Chate and Sandip Kishor Waghmare

APPELLANT

Vs

The State of Maharashtra
 The State of Maharashtra Vs
Lalji alias Rajkumar Ramavatar Yadav and Others

RESPONDENT

Date of Decision : 24-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 141, 149, 300, 302, 304

Citation : (2010) 09 BOM CK 0066

Hon'ble Judges : A.P. Bhangale, J;A.H. Joshi, J

Bench : Division Bench

Advocate : R.M. Daga, in Criminal Appeal No. 3/2006 and D.B. Patel, APP in Criminal Appeal No. 120/2006, for the Appellant; D.B. Patel, Assistant Public Prosecutor in Criminal Appeal No. 3/2006, S.A. Sainis Advocate, h/f., A.S. Manohar, for Res. No. 1, 5, 6 and 8 and A.A. Joshi, in Criminal Appeal No. 120/2006, for the Respondent

Judgement

A.P. Bhangale, J.—Criminal Appeal No. 3/2006 is preferred by the appellants/convicts challenging the impugned judgment and order dated 20th October, 2005 passed by learned 1st Ad-hoc Additional Sessions Judge, Wardha in Sessions Trial No. 117/2003 whereby the learned trial Judge found the appellants guilty of offence punishable u/s 302 read with Section 34 of the Indian Penal Code (in short "IPC") and sentenced them to suffer imprisonment for life; while the other accused Lalaji Yadav, Suraj Vaidya, Dheeraj Wankhede, Prakash Ingle, Kailash Ingle, Dinesh Yadav, Narendra Dubey were found guilty of offence punishable u/s 326 read with Section 149 of the IPC; and were sentenced to suffer RI for four years and fine in the sum of Rs. 1,000/- payable by each of them, in default, each of them were directed to suffer RI for one month. Thus, the accused who were found guilty of offence punishable u/s 326 read with Section 149 of IPC and were acquitted of the offence punishable u/s 302 read with Section 149 IPC.

2. The State of Maharashtra too challenged the impugned judgment and order by

way of Criminal Appeal No. 120/2006 questioning the legality thereof, with prayer to convict and sentence the accused according to law.

3. Briefly stated the prosecution case is that: one Aziz Babu Miyan Sheikh was running a STD booth at Sevagram Chowk, Wardha; while his elder brother Suleiman is running a shop of Pan material by the side of STD booth. There is one hotel and tea canteen of Johnny @ Jan Mohammed since last eight years prior to the incident. The deceased Salim @ Mahesh Barayya was living along with said Johnny and was running another tea canteen, adjacent to the tea canteen of Johnny. Salim @ Mahesh married with a Muslim girl. Dilip Barayya, brother of said Salim was working as servant in the hotel of Johnnybhai. The accused were resident of Adarsha Nagar, Sevagram, on the date of incident. On 1st July 2003 between 9.10 p.m. and 9.30 p.m., Aziz Babu Miyan Sheikh was present at his STD booth. He had heard shouts coming from the side of Sevagram square. When he went there he saw that accused Lalji Yadav, Munna Sandip Waghmare, Sachin Chate and others had entered into the Hotel of Johnnybhai. The accused No. 1 Lalji Yadav was having sword in his hands, accused Sandip Waghmare was having a trident (trishul); whereas other accused were armed with iron rods as well as wooden sticks. They had started damaging the tables and chairs of the tea canteen of Johnnybhai and accused Lalji had assaulted Suleiman on the head by means of sword. Suleiman fell down on the ground; while accused Sachin Chate assaulted Salim Barayya with a spear. Sandip Waghmare hit Salim on his head by means of trident. Accused Dhiraj assaulted Suleiman on his head. Accused Prakash had assaulted Tahir son of Suleiman by means of wooden stick; Kailash was also armed with sword and he had assaulted Tahir by means of sword. The accused Guddu Dubey was assaulting Suleiman on his head, when Tahir tried to intervene to save his father Suleiman. Thus, according to prosecution Aziz Babu Miyan Sheikh saw the entire incident in which his elder brother Suleiman Johnnybhai Mahesh @ Dilip were injured. The accused persons had also damaged the articles in the Hospital and thereafter they ran away from the spot. Aziz Sheikh informed the Sevagram Police Station by telephone about the incident. All the injured persons were then taken to Sevagram Hospital while Aziz Sheikh lodged first information report which gave rise to Crime No. 102/2003 against the accused. The investigation followed thereafter. The Police visited the spot, drew the spot panchnama. Injured persons were taken to Sevagram Hospital where they were medically examined namely, Suleiman Sheikh, Tahir Sulkeiman, Johnnybhai as well as Dilip Barayya. Salim @ Mahesh Barayya unfortunately succumbed to the injuries which he had received. The Inquest Panchanama was drawn on the dead body in presence of Panchas and dead body of Salim was referred for post-mortem examination. According to Doctor who performed the autopsy he died as a result of hemorrhagic shock due to injury on vital organ i.e. lung. During the course of investigation articles namely, pair of slippers, sample of blood, blood smeared with earth, were seized from the spot.

4. The accused were arrested. It is the case of the prosecution that in the course

of investigation the accused Lalji Yadav had led police and Panchas to discovery of sword which he had concealed while accused Sachin Chate led police and Panchas and Bhala (spear) was discovered from under the cot from his house; while at the instance of Narendra @ Guddu Dube one iron rod was recovered and auto rickshaw in which the accused allegedly travelled to the hotel of Johnnybhai was also seized; while at the instance of accused Suraj Vaidya, iron rod was seized; weapons were also allegedly recovered from other accused Manoj Kolte, Dhiraj Wankhede. The police had also seized blood stained clothes from the dead body of Salim Barayya; blood stained clothes injured persons were also seized and stick was seized at the instance of Prakash Ingle while at the instance of Kailash Ingle sword was seized. Trident was seized at the instance of accused Sandip Waghmare; sticks were seized at the instance of Ankush Meshram and Dinesh Yadav. The police had also collected samples of blood from the arrested accused which were referred to Chemical analysis in a sealed condition. Thus upon completion of evidence charge-sheet was laid before the Court of first J.M.F.C. Wardha on 29.9.2003. The case was committed to the Court of Sessions at Wardha being Sessions trial No. 117/2003.

5. Learned APP in support of the Appeal filed by the State, submitted that those who formed the unlawful assembly in prosecution of common object to commit murder of unfortunate Salim @ Mahesh Barayya were wrongly acquitted of offence of murder and were convicted u/s 326 read with Section 149 IPC, instead of Section 307 read with Section 149 IPC. He submitted that trial Court had convicted the accused with the aid of Section 149 of the IPC which indicate that existence of unlawful assembly was proved within the meaning of Section 141 of IPC. Hence, reasonable inference ought to have been drawn while answering the points framed for determination to hold as to whether the accused were members of unlawful assembly liable for actual offence committed for the death of Salim Barayya and for causing injury to others. According to learned APP the learned trial Judge lost sight of crucial aspect of the evidence led regarding vicarious penal liability in respect of armed assault upon Salim Barayya and others by the unlawful assembly. Learned Advocate Mr. R.M. Daga submitted that the weapons Articles 45 to 55 were not found stained with blood by the Chemical Analyser. The submission would not carry much importance in a case where offence is committed by an unlawful assembly while slow rains were in progress. In such case, it is not sine-qua-non for to establish guilt of members thereof to trace and identify weapons if oral evidence of injured has received corroboration from the medical evidence. Non-identification or improper identification of weapons would not affect veracity of oral evidence of an eye witness particularly when incident is otherwise corroborated i.e. by medical evidence and other circumstantial evidence on record, i.e. spot Panchnama, inquest Panchnama, recovery of weapons at the instance of accused.

6. The evidence is criticized by learned defense Advocates on the ground that there are certain omissions in the evidence of eye witnesses which they admitted with regard to their statement made to Police. In our opinion, those omissions

were such which do occur in the evidence of truthful witnesses. No criminal case is free from shortcomings as pointed out to us from the evidence on record. The omissions by themselves unless material, cannot uproot the case of the prosecution.

7. Learned Advocate Shri R.M. Daga submitted that there was no evidence beyond reasonable doubt to show that the appellants-convicts had acted in furtherance of their common intention to murder the deceased. It is argued that the appellants-convicts could not have been held liable for committing offence punishable u/s 302 read with Section 34 IPC. It is also submitted that the conviction was based upon evidence of interested witnesses who claimed that they had seen incident which occurred at night time. Learned Advocate for the appellants submits further that injury to accused No. 2 received on left occipital region, was suppressed by the prosecution. The failure or omission on the part of the prosecution to explain injury on the person of accused No. 2 is very important circumstance on the basis of which the court can draw adverse inference against the prosecution on account of suppression of relevant fact regarding the incident.

8. As against this, learned APP who supported the impugned judgment and order of conviction of the accused for offence of murder submitted that the accused were armed with deadly weapons like sword and spear etc. and came with common object to commit murder of Salim @ Mahesh Barayya and, therefore, the trial Court ought to have convicted all the accused u/s 302 with the aid of Section 149 IPC. Learned APP submitted with reference to plethora of rulings on the subject that the penal liability u/s 149 IPC is essentially a group liability when offence is committed by five or more offenders in prosecution of common object or such offence is committed under such circumstances when all the members of that assembly knew it to be likely to be committed in prosecution of common object, then every person who at the time of commission of offence is member of the same assembly is guilty of that offence. The essential ingredients are:

- (i) commission of offence by any member of an unlawful assembly, and;
- (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew it to be likely to be committed in prosecution of the common object.

Once it is proved or established that the unlawful assembly had common object to commit offence, it is not necessary to establish that all the offenders/members of that assembly committed some specific overt act. The vicarious penal liability is incurred by all members of the unlawful assembly for the offence committed by it during the continuance of the occurrence or incident, based upon knowledge before-hand that the offence actually committed was likely to be committed in prosecution of the common object. Every case has to be judged on its own facts to reach a conclusion as to whether the offence was committed to accomplish a common object. Such common object need not be proved by evidence of prior

meeting or pre-concert. Offence committed is such which members knew was likely to be committed. It is matter of common knowledge that when group of heavily armed men set out to use force, they would know that someone is likely to be killed or injured. The death may or may not happen but each of them are aware of that likelihood and therefore would be guilty under second part of Section 149 IPC, as indicated above. When group or body of persons (five or more) go armed with weapons like sword, spear, trident, iron rod, stick, it has to be said that each member of that group has knowledge that murder or culpable homicide or such other serious offence is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of that unlawful assembly clearly points out to such attributable motive and knowledge on the part of all of them. Knowledge as to likelihood of the death by murder or culpable homicide not amounting to murder, can be imputed to them dependent upon conduct, behaviour of each of the members of the unlawful assembly before, at the time of incident and thereafter. Motive for the crime may be relevant to determine question of fact keeping in view the nature of the assembly and the arms carried by the members and the behaviour of members at or near scene of the incident while criminal act is committed and soon thereafter. Every member of the unlawful assembly with unlawful common object is vicariously punishable as member thereof on account of his knowledge as to likelihood of the offence which is actually committed. Therefore, each member of the unlawful assembly may not have committed the overt act which actually caused death by offence of murder or culpable homicide not amounting to murder.

9. In the present case, learned trial Judge appears to have overlooked that it has come in evidence that the accused who were more than five in number were seen armed with lethal weapons, like sword, spear, iron rod, trident etc. when five or more persons set out armed with lethal weapons and commit offence by inflicting injuries upon victim or victims, it is not necessary to attribute overt act to each of them when they were sharing and pursuing common object to assault. Presence in the unlawful assembly carrying an arm or weapon coupled with conduct may be enough to fasten criminal liability upon assailants.

10. Learned Advocate Mr Saini argued that there would be no vicarious liability if incident arose due to free fight and then Section 149 IPC would not be attracted. He relied upon the following rulings:

- (1) Bhajan Singh and Others Vs. The State of Punjab,
- (2) Lalji and Others Vs. The State of U.P.,
- (3) State of Haryana Vs. Chandvir and others,
- (4) Lakshmi Singh and Others Vs. State of Bihar,

It must be observed upon perusal of the rulings that each case has to turn on its own facts.

11. The evidence led in this case consists of PW 1 Suleiman Bapu Miyan who is an eye witness and knew all the accused. He had seen the accused while they were assaulting by means of rods and pipes. He had seen weapons in the hands of accused as he described that the accused Lalji (A-1) had sword; Sachin (A-2) had spear; Sandeep (A-3) had trident and others were armed with rods and some had stones. He was also assaulted when he tried to intervene. Salim Chate and Sandeep were beating Salim by means of Trishul (trident) and Bhala. Salim had fallen on the ground while other accused were also seen beating Dilip Barayya by means of trishul, rods, stones; Accused Prakash had assaulted by means of stick and Kailash assaulted by sword. He had also identified weapons in Court. During the course of cross-examination, the eye witness was questioned regarding few omissions in the statement made to police but in the admissions sought or elicited in the course of cross-examination, the witness is firm to say that when he tried to intervene, the accused Lalji had assaulted by sword. The witness had denied the suggestion that accused Sachin and Sandeep were proceeding from Kharangana to Sevagram old village. PW 1 also denied suggestion that he (PW 1) along with Johnnybhai, Tahir, Mahesh Barayya, Dilip Barayya, Ajiz and Roshankhan assaulted by means of rods, swords and bhala. It also appears from admission that slow rains was going on at the time of incident. PW 2 Tahir also knew accused and had seen the incident. He saw accused assaulting Johnnybhai and Salim (deceased) and Dilip Barayya by means of sword rods, trishul and sticks. Accused Lalji had assaulted his father (PW 1) while he had also seen the accused Kailash and Prakash assaulting by stick and sword respectively. While trying to save himself he was hit by sword. Thus, accused were seen assaulting his father, Johnnybhai, Salim and Dilip Barayya and after 2/3 minutes the accused ran away towards Adarsha Nagar. In the course of cross-examination he was questioned about omissions in his statement made to police but much importance cannot be given to them particularly when the present case has multiple number of eye witnesses whose evidence has been corroborated by medical evidence. PW 4 Jan Mohammed and PW 7 Ajiz Bapu Miyan are the other eye witnesses examined who saw about 12 persons including the accused who came to his hotel. He identified the accused in the court as the same persons who had damaged the property and articles in the hotel and when questioned, accused Guddu had assaulted him on his head by rod Lalji had assaulted Suleiman. Salim and Dilip had tried to intervene. Accused Sachin had assaulted by means of spear while accused Suraj assaulted Dilip by means of rod. Salim had died on spot. Although the incident occurred at night time, the evidence indicated that there was gas light as well as tubelight. PW 4 denied that there was commotion and Mahesh (Salim) fell down on sharp edge of tin embedded on earth and received injuries. Such suggestion in the course of cross-examination by the defence proceeds on the basis of admitted presence of the accused at the spot and becomes risky when denied because ocular version received corroboration from rest of the evidence led, the prosecution can establish the incident beyond reasonable doubts. PW 5 Shaikh Babu deposed about happening prior to the incident. He had seen Lalji; Sachin Chute, Sandip

Waghmare, Pramod Goyal going with weapons after he heard voice "Chalo Awjar Lo" (Take weapons and leave). Dr. Seema Sute (PW 3) performed autopsy over dead body of Mahesh @ Salim Chotelal Barayya, on whose body following injuries were observed:

- 1) Incised lacerated wound measuring 5 cm x 2 cm and 3.5 cm in depth, present on anterior side of fold right axilla oblique in direction.
- 2) Contused lacerated wound measuring 2 cm x 1 cm in size present on right cheek, zygomatic arch 1 cm below angle of right eye.
- 3) Contused lacerated wound measuring 1.5 cm x 2 cm in size tringularly shape, present just above right mustache, It was 1 cm away from ala of nose.
- 4) Linear abrasion 3 cm in length present v.o. Right cheek, verticle in direction 3 cm away from right angle of mouth.
- 5) Penetrating wound measuring 4 cm ? 1.5 cm cavity deep, situated at posterior fold of left axilla Verticle in direction clean cut margin acute angle.
- 6) Split laceration 7 cm ? 1 cm bone deep obliquely verticle in direction present over vertex.
- 7) Superficial incised wound triangular in shape 3 cm x 2 cm in size, present on posterior aspect of left thigh 16 cm above left knee.

She opined that deceased died as a result of haemorrhage and shock as a result of injury to vital organ -lungs and that injuries observed by her in PM notes (Exh.33) were sufficient in the ordinary course of nature to cause death. She had also examined weapons produced before the Court and opined that injuries she observed (as above) were possible by those weapons.

12. Dr. Rajmohan (PW 14) had examined injured Suleiman Sheikh (PW 1) with following injuries:

- 1) Penetrating wound over the face lateral to the left nose, bleeding present.
- 2) Avulsion of the nostril with bleeding.
- 3) Clean out lacerated wound present in the right cheek.
- 4) Laceration of the lower eye lip extending up to the nasal breathe.
- 5) Abrasions present in the left ear with bleeding, from the left ear.
- 6) Bleeding present in the first finger tip on the left side.
- 7) Contusions present over the abdomen.
- 8) Lacerated wound present in the left parietal region having size 3 ? 1 ? 2 cm.

He opined that the injuries were grievous in nature.

He had also examined injured Dilip with following injuries:

- 1) Multiple contused lacerated wound present over the face of varying sizes.
- 2) Contused lacerated wound present over the root of nose, swelling present, bleeding present, tenderness present, crepitus present.
- 3) Contused lacerated wound present left side occipital region of size 7 x 1 x 2 cms. Active bleeding present.
- 4) Contused lacerated wound present over inner side of the lower lip.

The above injuries in the opinion of the Doctor were grievous in nature.

13. The learned trial Judge therefore could not have ignored the evidence referred above, which implicated all the accused before the Court.

14. The prosecution had thus led sufficient and reliable evidence beyond reasonable doubt that five or more persons were involved in armed assault including the accused. They had formed unlawful assembly which was armed with lethal weapons, like sword, spear, trident, iron rods etc and caused death of Salim and injuries as above. Non-explanation of injury suffered by one of the accused in such incident of armed assault is not material and prosecution case cannot be thrown out on the tenuous ground that prosecution did not explain injury to such accused in view of the ruling in *Suresh Sitaram Surve v. State of Maharashtra* 2003 All M. R. (Cri) 394 (SC) {Three Judges Bench (Para 6)}. The argument that the injuries on the person of accused were not explained by the prosecution was rejected as without substance. In the present case also, the ratio is attracted in the facts and circumstances, the accused were identified as members of unlawful assembly and each of them were attributable with knowledge in the facts and circumstances brought on record about likelihood of consequences of their armed assault as none of them could have feigned ignorance of likely consequences of death of Salim @ Mahesh as a result of collective assault by them. As regards the arguments advanced about the injury on the person of one of the accused Sandip, the Investigating Officer (PW 13) PSI Vijay Kuhikar in Paragrpah 26 of his evidence stated in the cross of cross-examination as follows:

Sandip Waghmare was arrested on 3.7.2003. It had come to my notice that Sandip Waghmare was injured. Sandip Waghmare had not lodged any report and so I had not taken it. I had conducted investigation regarding injuries to Sandip Waghmare separately. Those papers are not on record.

These admissions by the Investigating Officer probabilise the theory that the unlawful assembly may have caused death of Salim @ Mahesh Barayya in a sudden fight, in the hit of passion, upon sudden quarrel and, therefore, each member of the unlawful assembly in the facts and circumstances revealed from the record would get benefit of exception (4) to Section 300 IPC. regarding culpable homicide of Salim @ Mahesh which occurred as a result of collective assault by them. Hence, each of them can safely be held guilty under part one of Section 304 of IPC with the aid of Section 149 IPC, in addition to offence proved

u/s 326 read with Section 149 IPC.

15. We have heard learned Advocates for the appellants in both the Appeals as also learned Additional Public Prosecutor for the State on the point of sentence. After hearing them, we are satisfied that the following order would meet the ends of justice:

In the result, Criminal Appeal No. 3/2006 is partly allowed. Conviction and sentence of the appellants therein for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code is set aside. Instead, appellants stand convicted for the offence punishable u/s 304 Part-I of the Indian Penal Code and are sentenced to suffer RI for seven years. Sentence as regards fine is maintained. Appellants are said to be in custody/jail since the date of their arrest and if they have already undergone the substantive sentence of imprisonment, they be released forthwith, if not required in any other pending criminal case.

As regards Criminal Appeal No. 120 of 2006 preferred by the State of Maharashtra, the same is also partly allowed. Acquittal of original accused No. 6 (respondent No. 4 herein)- Ankush Bhaurao Masram is set aside. Respondents Nos. 1 to 8 are held guilty for the offence punishable u/s 304 Part-I read with Section 149 of the Indian Penal Code and upon conviction, each of them is sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 1000/- each, in default, to suffer further RI for three months. Accused- Respondents 1 to 8 herein are directed to surrender to their bail bonds to serve out the sentence. Conviction and sentence of respondents 1 to 3 and 5 to 8 u/s 326 read with Section 149 of the Indian Penal Code is maintained. Respondent No. 4-Ankush Masram shall also undergo sentence u/s 326 read with Section 149 IPC same as respondent Nos. 1 to 3 and 5 to 8 were sentenced in the trial Court.

Accused would be entitled to set off u/s 428 Cr.P.C. in both the Appeals. Appeals stand disposed of accordingly.