
(2020) 01 JH CK 0080

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No.112 Of 2002

Shambhu Mahali And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 07-01-2020

Acts Referred:

Indian Penal Code, 1860 — Section 141, 149, 302, 307, 324, 325, 379

Citation : (2020) 01 JH CK 0080

Hon'ble Judges : Shree Chandrashekhar, J;Ratnaker Bhengra, J

Bench : Division Bench

Advocate : Swapan Maji, Asit Baran Mahata, Ravi Prakash

Final Decision : Partly Allowed

Judgement

Shree Chandrashekhar, J

1. Sixteen persons were put on trial in Sessions Trial No.117 of 1996/112 of 1997 on the charge under section 302/149 of the Indian Penal Code for

causing murder of Lal Mohan Mahali, under section 307/149 of the Indian Penal Code for attempting murder of Konda Mahali, Sona Mahali and

Bhodesh Mahali and under section 379/149 of the Indian Penal Code for theft of the paddy crops.

2. During the trial, the accused, namely, Manu Dhibar has died and therefore trial in his respect has abated.

3. During pendency of this criminal appeal, the appellants, namely, Mukund Mahali, Saheb Dhibar, Andu Dhibar and Dhonda alias Bhonda Dhibar

have passed away and, accordingly, this appeal qua the appellants, namely, Mukund Mahali, Saheb Dhibar, Andu Dhibar and Dhonda alias Bhonda

Dhibar has abated. It has also been brought on record that in the mean-time, the appellants, namely, Mangla Mahali and Rabi Mahali after serving a

part of the sentences inflicted upon them have been released, on remission.

4. Mr. Swapan Maji, the learned counsel for the appellants has not pressed this criminal appeal on merits qua the appellants, namely, Mangla Mahali and Rabi Mahali.

5. The appellants have been convicted and sentenced to R.I for life under section 302/149 of the Indian Penal Code, R.I for six years under section 307/149 of the Indian Penal Code, R.I for two years under section 379/149 of the Indian Penal Code.

6. Sona Mahali is the informant in this case. He is brother of Lal Mohan Mahali, the deceased. On the basis of his fard-beyan which was recorded on 12.11.1995, Dalbhumgarh P.S Case No.48 of 1995 has been registered against 16 persons. During the trial, the prosecution has examined 8 witnesses;

the informant is P.W 1. The prosecution witness, namely, Konda Mahali who is an injured witness has been examined as C.W 1. The accused-

appellants have examined one witness, namely, Basudeo Kujur as D.W 1.

7. The prosecution has projected P.W 1-Sona Mahali, P.W 2-Bhodesh Mahali, P.W 4-Saheba Mahali and C.W 1-Konda Mahali as eye-witness.

8. The prosecution case as narrated by the informant in his fard-beyan is that; on 11.11.1995 the accused persons variously armed with tangi, balua,

sword, sickle, lathi and bow-arrow came to his paddy field and started cutting the paddy crops, whereupon the informant along with his brothers,

namely, Lal Mohan Mahali, Konda Mahali and Bhodesh Mahali went there and objected to cutting of the paddy crops by the appellants. Amongst the

appellants, Mukund Mahali, Mangla Mahali and Rabi Mahali assaulted his brother Lal Mohan Mahali with tangi of his head, right hand and back.

When the informant and his other brothers tried to intervene, Suklu Kaibarta assaulted the informant with sword on his left hand, Raitu Kaibarta

assaulted him on his head, Mangala Mahali assaulted Bhodesh Mahali with tangi on his head and Mangala Dhibar assaulted Konda Mahali with sword

which injured his nose. They brought Lal Mohan Mahali to house and then took him to the hospital but within two hours he has succumbed to the

injuries. The informant and other two injured witnesses were taken to Dalbhumgarh hospital where they were treated by Dr. Yogeshwar Ram.

9. The informant has been examined as P.W 1. He has again narrated a similar story of the occurrence which had happened in the morning of

11.11.1995 in his paddy field. He has seen the appellants armed with tangi, sword, lathi, sickle etc. and when his elder brother Lal Mohan Mahali

objected to cutting of their paddy crops he was first assaulted by the accused, namely, Mukund Mahali, Mangla Mahali and Rabi Mahali. The

informant and other two prosecution witnesses were also assaulted by the accused-appellants. P.W 2 is cousin of the informant and P.W 3 and P.W 4

are the nephew of the informant. C.W 1-Konda Mahali is cousin of the informant. These prosecution witnesses have also stated that the accused-

appellants and Munu Dhibar, who has died during the trial, were trying to remove the paddy crops from field of the informant and when the informant

and his brothers objected, they were assaulted by the appellants.

10. P.W 1, P.W 2, P.W 3, P.W 4 and C.W 1 are related to each other but their presence in the morning of the incident at the place of occurrence has

been established by the prosecution. They belong to one family and their presence in their house which is adjacent to the place of occurrence is quite

natural. In fact, there is no serious challenge to their presence at the place of occurrence by the defence during their cross-examination. These

witnesses have stood to their grounds and nothing material could be elicited by the defence during their cross-examination. A glance at their testimony,

particularly, stand taken by them during their cross-examination would reveal that they are reliable and trustworthy witnesses.

11. But what transpires from their evidence is that they have not made specific allegation of assault against all the appellants.

12. The appellants have been convicted with the aid of section 149 of the Indian Penal Code.

13. The law on the subject was explained by the Supreme Court long back. In *â?? Masalti Vs. The State of U.P.â??* reported in AIR 1965 SC 20,2 the

Supreme Court has held that to constitute the offence under section 149 of the Indian Penal Code it is not necessary that every accused must have

done some illegal act. The Hon'ble Supreme Court has held, thus:

â??17.it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that

had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly in fact,

S. 149 makes it clear that if an offence is committed by any member of an

unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly; is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by S. 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of Baladin, (S) AIR 1956 SC 181 must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law such as Mr. Sawhney suggests.â??

14. An assembly of five or more persons becomes unlawful assembly if common object of the assembly is to commit any one of the five acts

mentioned under section 141 of the Indian Penal Code. Section 149 of the Indian Penal Code is a substantive offence. It embodies constructive liability

of all the persons forming part of the unlawful assembly. It provides that if an offence is committed by any member of unlawful assembly in

prosecution of the common object of that assembly, or such as the member of that assembly knew to be likely to be committed in prosecution of that

object, every member who at the time of committing of that offence is a member of the assembly is guilty of that offence. A bare reading of section

149 of the Indian Penal Code would indicate that it is in two parts. The first part of section 149 of the Indian Penal Code indicates that if an offence

has been committed by one or more persons in furtherance of common object of the unlawful assembly, whereas the second part of section 149 of the

Indian Penal Code provides that if it is known to the members of the unlawful assembly that an offence may be committed in furtherance of the

common object, every member of the unlawful assembly is liable for such offence. In â??Joseph Vs. State Rep. by Inspector of Policeâ? reported in

AIR 2018 SC 93, the Supreme Court has held as under:

â??9. â?¦..... Section 149, IPC consists of two parts:

*The first part of the section means that there exists common object and that the offence has been committed in prosecution of 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 member.

*The second part of the section means that even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149, if it can be shown that the offence was such as the members knew was likely to be committed.â??

â??What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was the one which the members knew to be likely to be committed. Once the Court finds that the ingredients of Section 149, IPC are fulfilled, every person who at the time of committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to the Court to see as to who actually did the offensive act nor would it be open to the Court to require the prosecution to prove which of the members did which of the above two ingredients. Before recording the conviction under Section 149, IPC, the essential ingredients of Section 141, IPC must be established.â??

15. From the aforesaid judgments, it can be seen that to fasten liability on others for the act of one with the aid of section 149 of the Indian Penal

Code the prosecution must prove that; (i) death has been caused in furtherance of common object of the unlawful assembly, or (ii) it was known to

every member present there that death may be caused in furtherance of common object of all. At the same time, false implication of innocent persons

such as bystander, onlooker etc., however, cannot be ruled out. In â??Bhagwan Singh & Ors. Vs. State of M.P.â? reported in (2002) 4 SCC 8,5 a

situation like this has been dealt with by the Hon'ble Supreme Court in the following words:

9. â??.....It is true that a mere innocent person, in an assembly of persons or being a bystander does not make such person a member of

an unlawful assembly but where the persons forming the assembly are shown to be having identical interest in pursuance of which some of

them come armed, others though not armed would, under the normal circumstances, be deemed to be the members of the unlawful

assembly.....â??

16. In the present case enmity between the parties is proved. There were cases filed by them against each other. In Title Suit No.103 of 1987, which

was instituted by Sita Mahali and others, the plaintiffs have sought a declaration of title and confirmation of possession, however, the suit was

dismissed. In the suit, Mukund Mahali who is one of the accused-appellants was a defendant. The accused persons have also brought on record

certified copy of the judgment in Criminal Appeal No.15 C of 1989 which was filed by Arti Mahalin, Konda Mahali, Lal Mohan Mahali, Sona Mahali

and others. They were convicted in Complaint Case No.295 of 1983.

17. From the evidences led by the parties, it appears that when the incident took place the informant was in possession of the land from where the

accused-appellants tried to remove the paddy crops. This is an admitted position that the appellants were present in the paddy field before the

informant party came there and objected to removal of the paddy crops. A quarrel has ensued between them and in the occurrence the informant, his

brothers and other family members were assaulted by the appellants. But, from narration of the incident as spoken by the prosecution witnesses,

particularly, injuries caused to Lal Mohan Mahali and other prosecution witnesses it is difficult to hold that the appellants have caused death of Lal

Mohan Mahali in furtherance of common object of all. The prosecution has also failed to establish that it was known to all the appellants that death of

Lal Mohan Mahali may be caused in furtherance of common object. All that the prosecution has been able to prove is that some of the appellants

intended to initiate maar-peat. This is apparent from testimony of the prosecution witnesses, particularly, P.W 1, P.W 2, P.W 3, P.W 4 and C.W 1. All

these witnesses have made specific allegation of assault only on Lal Mohan Mahali by Mukund Mahali, Mangla Mahali and Rabi Mahali. These three

appellants were carrying sharp-cutting weapons, such as, tangi, sword, sickle etc. has been brought on record through the evidence of the prosecution

witnesses.

18. The appellant, namely, Mangla Dhibar has been named as an assailant by P.W 1 and C.W 1. Mangla Mahali has assaulted Bhodesh Mahali with

tangi on his head and Konda Mahali with a sword. Raitu Kaibarta has assaulted Sona Mahali with lathi on his head, as spoken by Sona Mahali himself.

But, the other three witnesses who have been projected by the prosecution as eye-witnesses have not alleged any overt act by him. According to

Sona Mahali, Sublu Kaibarta has assaulted with tangi on his hand, however, P.W 2-Bhodesh Mahali and C.W 1-Konda Mahali say that he has

assaulted Lal Mohan Mahali with sword on his hand. Shambhu Mahali has been named by P.W 2 and C.W 1 as the one who has also assaulted the

deceased. He was carrying bow-arrow, however, no injury caused by arrow has been found by the doctor who has conducted the post-mortem

examination. Similarly, against Meghrai Murmu specific overt act has been spoken by P.W 3 only.

19. Dr. Ranjan Sinha-P.W 5, who has conducted the post-mortem on 13.11.1995, has found the following injuries on Lal Mohan Mahali:

(i) Sharp cut looking but lacerated wound on left side of head 2 ½" x 1" x ½" deep to bone and there was underlying fracture of skull and

deposit of black haematoma between meninges and on the wound.

(ii) Sharp cut looking wound on supra clavicular region of root of neck with bleeding black colour and haematoma 2" x 1"

(iii) Sharp cut looking lacerated wound on right arm and elbow cutting the skin, muscles and bone 3" x 2" x 2"

(iv) Horizontal lacerated wound on right region of back 2" x 1" x 1/2"

(v) Long abrasion on back 6" x ¼"

(vi) Abrasion on left shoulder 2" x ½"

20. According to the doctor, all the injuries were ante-mortem in nature and caused around 72 hrs. from the post-mortem examination.

21. Dr. Yogeshwar Ram-P.W 6 has examined Konda Mahali on 11.11.1995 at about 7:30 p.m. and he has found the following injuries on his person:

(i) An oblique sharp cut wound on right cheek which extending from bridge of the nose to mid of the cheek. Size 4 ½" x ½" / muscle deep.

Margin of the wound-clear cut colour red.

(ii) A transverse sharp cut wound on right side of fore-head along the hair line. 2" x ¼" x scalp deep. Margin- clear cut colour red. Shape of

both wounds elliptical.

22. P.W 6 has examined Sona Mahali on the same day at about 8:00 p.m. and found the following injuries on his person:

(i) A transverse lacerated wound on the occipital region of head.

Size 3" x 1/2" x scalp deep. Margine irregular, colour red.

(ii) An oblique sharp cut wound in the mid portion of left fore-arm in ventricular aspect. Size 2 1/2" x 1/2" x skin deep. Shape of wound elliptical, colour red. Margine clear cut.

23. P.W 6 has also examined Bhodesh Mahali at about 8:35 p.m. and found the following injuries on his person:

(i) A longitudinal sharp cutting wound on the right side of head (parietal region). Size 2 1/2" x 1/8" x scalp deep

(ii) A longitudinal sharp cut wound on the back portion of right elbow. Size 1/2" x 1/4" x skin deep.

(iii) A lacerated wound in the palm of right hand 1/2" x 1/4" x skin deep.

24. The medical evidence led by the prosecution through P.W 5 and P.W 6 corroborates allegation of assault by Mukund Mahali, Mangla Mahali and

Rabi Mahali on the deceased, but they have passed away during pendency of this criminal appeal.

25. The injuries caused on the head of Bhodesh Mahali are simple in nature. Mangala Dhibar is said to have assaulted Bhodesh Mahali on his head.

He has also caused injury to Konda Mahali on his nose which is found grievous in nature. Accordingly, the appellant, namely, Mangla Dhibar is

convicted and sentenced to undergo R.I for three years and fine of Rs.25,000/- under section 325 of the Indian Penal Code.

26. The appellant, namely, Suklu Kaibarta has assaulted Sona Mahali on his hand. He is said to have inflicted injuries to Lal Mohan Mahali also. But,

there is contradiction in the testimony of P.W 1 and C.W 1 in respect of the weapon carried by him. We accept the allegation of assault by him on the

hand of Sona Mahali. This injury has been found by the doctor simple in nature and, therefore, he is convicted and sentenced to fine of Rs.50,000/-

under section 324 of the Indian Penal Code. The sentence under section 324 of the Indian Penal Code may extend to R.I for three years, or with fine,

or with both. We are imposing fine only upon the appellant, namely, Suklu Kaibarta in view of his old age. Today, he is aged about 80 years.

27. The essential distinction between the offence punishable under section 307 of the Indian Penal Code and Section 302 of the Indian Penal Code is

that the offence under section 307 of the Indian Penal Code is not culpable

homicide; the victim finally survives. What is required by the prosecution to establish is that the accused had requisite intention or knowledge that if successfully executed the alleged act would have caused death. In *State of Maharashtra Vs. Kashirao* reported in (2003) 10 SCC 434, the Supreme Court has observed as under;

20.The essential ingredients required to be proved in the case of an offence under section 307 are:

- (i) that the death of a human being was attempted;
- (ii) that such death was attempted to be caused by, or in consequence of the act of the accused; and
- (iii) that such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as: (a)

the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused

attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b)

such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury

28. Assault by the appellants, namely, Mangla Dhibar and Suklu Kaibarta on the prosecution witnesses do not fall under the category of attempt to

murder and, accordingly, conviction of these appellants under section 307/149 of the Indian Penal Code is set-aside. Their conviction under section

379/149 of the Indian Penal Code is also set-aside.

29. The appellant, namely, Mangla Dhibar is on bail. The bail-bonds furnished by him are cancelled. He shall surrender before the court below to

serve the remaining sentence. The appellants, namely, Mangla Dhibar and Suklu Kaibarta shall pay the amount of fine inflicted upon them within a

period of 8 weeks and in default of payment of fine, the appellant, namely, Mangla Dhibar shall undergo further imprisonment of R.I for two months

and the appellant, namely, Suklu Kaibarta shall undergo imprisonment of R.I for three months. In default of payment of fine by the appellant, namely,

Suklu Kaibarta within a period of 8 weeks, the bail-bonds furnished by him shall be cancelled and he shall be taken into judicial custody.

30. Against the appellant, namely, Shambhu Mahali, C.W 1 has stated that he has assaulted Sona Mahali. However, Sona Mahali who is P.W 1 has

not said so and, therefore, we are inclined to extend benefit of doubt to him. Accordingly, the appellant, namely, Shambhu Mahali is acquitted of the charges framed against him in Sessions Trial No.117 of 1996/112 of 1997.

31. Against the appellant, namely, Raitu Kaibarta, Sona Mahali has made allegation of assault by him upon his head. However, no other prosecution witness has said any overt act by him and, therefore, we are inclined to extend benefit of doubt to him. Accordingly, the appellant, namely, Raitu Kaibarta is acquitted of the charges framed against him in Sessions Trial No.117 of 1996/112 of 1997.

32. Similarly, against the appellant, namely, Meghrai Murmu, P.W 3 has made an allegation of assault upon Bhodesh Mahali on his head. However, Bhodesh Mahali, who is P.W 2, has not made such allegation against him. On such evidence, we are inclined to extend benefit of doubt to him also and, accordingly, the appellant, namely, Meghrai Murmu is acquitted of the charges framed against him in Sessions Trial No.117 of 1996/112 of 1997.

33. The conviction of the appellants, namely, Shambhu Mahali, Raitu Kaibarta and Meghrai Murmu under section 302/149, section 307/149 and section 379/149 of the Indian Penal Code and the order of sentence for the said offences are set-aside.

34. Against the other appellants, namely, Dhonda Dhibar, Chimtu Kaibarta, Doman alias Deven Dhibar and Kharia Dhibar, the prosecution witnesses have not made any specific allegation of overt act by them, except stating that they were present at the place of occurrence. The prosecution has failed to establish that they formed unlawful assembly common object of which was to cause death of Lal Mohan Mahali and to cause injuries to Sona Mahali, Konda Mahali and Bhodesh Mahali. Accordingly, their conviction and sentence under section 302/149 of the Indian Penal Code, under section 307/149 of the Indian Penal Code and under section 379/149 of the Indian Penal Code and sentences inflicted upon them for the said offences are set-aside. They are acquitted of the charges framed against them in Sessions Trial No.117 of 1996/112 of 1997.

35. The appellants, namely, Shambhu Mahali, Dhonda Dhibar, Meghrai Murmu, Chimtu Kaibarta, Doman alias Deven Dhibar, Kharia Dhibar, Raitu Kaibarta and Suklu Kaibarta, who are on bail, shall stand discharged of liability of the bail-bonds furnished by them.

36. In the result, Criminal Appeal (D.B) No.112 of 2002 is partly allowed.
37. Let a copy of the judgment be transmitted to the court concerned through 'Fax'.
38. Let lower-court records be sent to the court concerned forthwith.