

**(2002) 01 MP CK 0050**  
**In the Madhya Pradesh High Court**  
**Case No : Criminal Appeal No. 161/90**

State of Madhya Pradesh

APPELLANT

Vs

Mehboob Khan and Others

RESPONDENT

**Date of Decision :** 02-01-2002

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 141, 148, 149, 302, 307

**Citation :** (2002) 1 MPHT 241 : (2002) 1 MPLJ 611

**Hon'ble Judges :** Uma Nath Singh, J;Rajeev Gupta, J

**Bench :** Division Bench

**Advocate :** Chanchal Sharma, for the Appellant; Karan Singh, for the Respondent

**Final Decision :** Dismissed

## Judgement

Uma Nath Singh, J.

The State has preferred this appeal against the impugned judgment and order dated 16-9-89, passed by the Fourth Additional Sessions Judge, Bhopal in Session Trial No. 103/85, where by accused Farookh was convicted for offence u/s 302 and sentenced to life imprisonment and other accused persons (respondents herein) were acquitted of the charge u/s 302 read with Section 149 of the IPC. All the accused persons including Farookh were acquitted of the charge u/s 148, IPC. Further, it may not be out of context to record that the appeal by accused Farookh against conviction abated on his death.

Succinctly narrated the facts of the prosecution case are that accused/respondents Ayub Khan (R-2), Ishaq alias Gattua (R-3), Yakoob (R-4) and convicted accused Farookh are sons of accused Mehboob Khan (R-1). On the other hand prosecution witnesses Mohamad Jameel (P.W. 1), Faridul Hassan (P.W. 2) and Mohamad Iliyas (P.W. 3) are interested witnesses. Further the parties were enimically disposed towards each other for one reason or other. On 5-2-85 at about 6 O'clock in the evening behind Boldarpura Road at Bhopal, deceased Zahoor Mohamad was unloading goods brought from BHEL on the plot

of his shop with his son Jameel Mohamad. At that moment accused Farookh and Mehboob came carrying swords and started quarrel with the deceased alleging that the said plot belonged to them and objected to unloading of goods which led to altercation between them. In the mean time, other accused namely Yakoob with sword, Ayub with Farsa and accused Ishaq alias Gattua empty handed also arrived there and on their exhortation to kill the deceased, accused Farookh caused sword injuries including the fatal one in the stomach of the deceased who collapsed on the spot of incident. The deceased was carried to Hamidia Hospital, Bhopal, by Jameel Mohd., where he lodged FIR on 5-2-85 at 7 P.M. by way of Dehati Nalish which was registered for offence under Sections 307/34, IPC, wherein, he named accused Mehboob, Farookh, Yakoob and Ayub. He also named Mohd. Iliyas @ Baddu, Farrid and Sajid Ali to have seen the incident. Zahoor Mohamad expired during his treatment on 21-2-85. On investigation a challan was laid and accused persons were charged for offences under Sections 148 and 302/149 of the IPC.

The Trial Court on a careful appreciation of evidence placed reliance on the dying declaration (Ex. P/4-A) and the Dehati Nalish (Ex. P-12) and found that except in the evidence of interested witnesses, in no other evidence nor even in the dying declaration of Zahoor Mohamad (Ex. P/4-A), it is mentioned that the accused/respondents (herein) reached the spot with deadly weapons and exhorted accused Farookh to cause death of the deceased or they surrounded him and dealt blows, therefore, no offence u/s 148 against accused Farookh and that u/s 302 read with Section 149 of the IPC against the rest of the accused were proved. Accordingly, the learned Trial Judge held accused Farookh guilty of offence u/s 302 for thrusting sword into the stomach of the deceased and acquitted others.

Heard Smt. Chanchal Sharma, Panel Lawyer for the appellant-State and Shri Karan Singh, Advocate for the respondents and perused the record. The prosecution case is grounded on the eye-witness accounts, the FIR by way of Dehati Nalishi, the dying declaration and the medical evidence. Mohd. Jameel (P.W. 1), son of the deceased, in his examination in chief named all the accused but assigned overt act of causing sword injuries only to convicted accused Farookh. He was subjected to a lengthy cross-examination and in Para 8 thereof, he denied to have named accused Yakoob (R-4) to be carrying a sword. Though, he reiterates that accused Mehboob and accused Farookh carried swords, he was candid in saying that accused Mehboob (R-1) did not cause any sword injury to the deceased, so also the other respondents. Though he ascribed the role of exhortating accused farookh to all the accused but did not assign them any overt act of causing assault to the deceased. Another witness Faridul Hassan alias Rafik (P.W. 2) in examination in chief stated that accused Farookh and Mehboob came to the disputed plot and asserted right over that which was objected to, by deceased Zahoor Mohamad who asserted his right to unload the articles on the said plot. Like P.W. 1 this eye-witness also assigned the role of exhortation to all the accused and enumerated 3 - 4 assaults to have been caused by accused

Farookh on the deceased, P.W. 1 and P.W. 2 say that initial attacks were evaded by the deceased but ultimately accused Farookh succeeded in causing a fatal blow by thrusting sword into the stomach of the deceased. Mohamad Iliyas alias Baddu (P.W. 3) also repeats the version given by other prosecution witnesses and says that accept accused Ishaq alias Gattua all the accused were variously armed. In his examination in chief he further says that when accused Farookh caused the sword injury, that sword was broken into pieces. He also does not attributed any overt act of causing injury to any other accused except accused Farookh. Kailash Narayan Sharma (P.W. 4), Patwari prepared the spot map and R.P. Gehlot (P.W. 5), Naib Tehsildar and Executive Magistrate recorded the dying declaration of the deceased which also finds a mention that accused Farookh thrust sword through the stomach of the deceased. Dr. Vijaya Mathur (P.W. 6) Autopsy Surgeon who conducted post-mortem of the dead body of the deceased noticed two stitched injuries namely one on the left arm and the other on the abdominal region. In the opinion of the doctor, the death was caused due to shock as a result of abdominal injury and its complications. S.I. B.B. Subbarao (P.W. 11) recorded the Dehati Nalish and Dr. Kamal Singh Chauhan (P.W. 8) treated the deceased in Hamidia Hospital and noticed on incised wound 5 cm x 3 cm in the stomach. Head Constable Chandrabhan Singh (P.W. 9) was posted at Police Station, Kotwali on the date of the incident and had received a telephonic message about the incident which he had recorded at Serial No. 375 of Roj Namcha Sanha. Ram Shanker Tiwari (P.W. 10) was also posted as Head Constable at Police Station, Kotwali who had carried Ex. P-12, the Dehati Nalish, recorded by S.I. Subbarao and had produced it in the Kotwali where upon the FIR was instituted. Parmeshwar Mishra (P.W. 12) was posted as Constable who produced a Sealed Packet at the Police Station. ASI Chandrabhan Singh (P.W. 13), being the I.O. prepared the spot map at the instance of Mohd. Iliyas, arrested the accused and effected seizures.

On a reappraisal of the entire evidence before us, we are unable to disagree with the findings of acquittal, recorded by the learned Trial Judge, of the accused/respondents herein. The unimpeachable evidence of the dying declaration candidly ascribed the role of causing fatal injury by way of thrusting sword into the stomach of the deceased to accused Farookh and accordingly fastened the liability on him. Even surrounding circumstances exhibit and corroborate that accused Farookh alone is the author of the incident. Though the evidence of interested witnesses as discussed above tried to implicate the accused respondents but in view of several contradictions and improbabilities as indicated by the learned Trial Judge, when two view are possible, it is safe to approve of the findings of the learned Trial Judge. Had there been a common object to cause the death of the deceased, except accused Ishaq who was empty handed, others who were said to be armed with sword and farsha would have participated and fatally injured the deceased. Hence the respondents cannot be ascribed a role of prosecuting an unlawful object to murder the deceased, and for that matter when the deceased died after 16 days on 21-2-85 on account of complications as

a result of stomach injury coupled with diabetic complaints.

The Apex Court in the matter of M.P. Khachar v. State of Gujarat (1996 (3)CrLJ 2465) held :

"We have found sufficient force in the contention of Shri Lalit, first because, if the unlawful object would have been to cause murder of Kolis of Village Sarangpur, as has been stated in the charge, Darbars of other villages would not have perhaps made available themselves. Secondly and more importantly, if the unlawful object would have been to murder either the complainant or other Kolis, achievement of the object would not have been at all difficult in view of the fact that the appellants had fired arms with them and had taken position on the terrace of the first floor wherefrom it would have been easy to shoot down good number of Kolis who were on the road and, what is more, quite unarmed. While taking this view, we have conceded that arranging of Dayra in the house of Apabhai was a pretext for the Darbars to assemble there, though the contrary view is also possible inasmuch as if convening of Dayra would have been a ruse, outside singer would not have been invited and the Dayra would not have been allowed to continue even upto 2-3 a.m. of the next day to fatigue all by that time, not leaving that much of energy as would have been expectedly required to undergo next morning's laborious work.

We would, therefore, hold that Section 149 was not available to the prosecution in the present case....."

The Apex Court further in the matter of Ramashish Yadav and Others Vs. State of Bihar, ] held:

"It is contended by the learned counsel for the appellants that even taking the prosecution case in full on the evidence of P.Ws. 1, 3 and 4 only Ram Das Yadav can be convicted u/s 302 who had fired the gun and Mundrika died on account of the gunshot injury and the two others who gave the gandasas blows on Tapeswar can be convicted under Sections 302/34. But the two others who caught hold of Tapeswar as well as two other appellants who never assaulted either Mundrika or Tapeswar who had caused the injury on P.W. 1 could not have been convicted under Sections 302/149. Mr. B.B. Singh, appearing for the State of Bihar, on the other hand, contended that the very fact that the accused persons went there with arms in their hands and then after the informant party went and challenged them, there was an exchange of words and then they started assault as a result of which two people died, it must be held that all of them had the common object and could be held liable by taking recourse to Section 149. In the alternative he argued that at least those who caught hold of the deceased who facilitated the other two accused persons to give the gadasa-blow on Tapeswar would be liable under Sections 302/34. To appreciate the contentions of Mr. Singh we have scrutinised the evidence of P.Ws. 1, 3 and 4. From the evidence it transpires that the accused persons had gone to the field and were ploughing. Obviously, at that point of time it cannot be said that they

constituted an unlawful assembly within the meaning of Section 141 of the Indian Penal Code inasmuch as it has not been established by the prosecution that they had one of the Five specified objects enumerated in Section 141, IPC as their common objects. Mr. B.B. Singh, however, relied upon the explanation to Section 141 and contended that an assembly which was not unlawful, when it assembled, may subsequently become an unlawful assembly. There is no dispute with the aforesaid proposition. But from the evidence of P.Ws. 1, 3 and 4, it is difficult for us to conceive that at any later point of time the accused persons can be said to have nurtured one of the five specified objects as their common objects. This being the position and in the absence of establishing the fact that the accused persons constituted an unlawful assembly, their conviction by taking recourse to Section 149, IPC is unsustainable. Section 149 postulates an assembly of five or more persons having a common object namely, one of those named in Section 141 and then the doing of acts by members of the assembly in prosecution of that object. In view of our conclusion that there was no unlawful assembly, conviction of the appellants u/s 149, IPC cannot be sustained. We accordingly set aside the conviction of the appellants under Sections 302/149, IPC. But so far as the accused Ram Das Yadav is concerned, the witnesses being consistent that it is he who fired the gunshot which hit Mundrika and Mundrika died and medical evidence corroborates the same, he is convicted u/s 302, IPC and sentenced to imprisonment for life."

Mohd. Iliyas @ Baddu (P.W. 3) in the middle of para 8 of his cross-examination stated that when he reached the spot there was exchange of hot words between deceased Zahoor Mohd. and respondent Mehboob. Accused Mehboob and Farookh were carrying swords but accused Farookh was silent. After about two minutes other accused persons namely Yaqub, Ayub and Gattua also arrived but they did not participate in assaults. Accused Farookh caused 4-5 blows, one of which resulted in fatal injury in the stomach of the deceased. This witness is specific in saying that accused Mehboob did not cause any assault. He clarified that neither he nor witnesses Jamil, Farid and Sajid intervened to save the deceased. Under these circumstances, it is clear that the accused respondents did not constitute an unlawful assembly to commit the murder of the deceased who would have fallen an easy prey to a common object, had it been so formed. Further all the accused including convicted accused Farookh were acquitted of the charge u/s 148, IPC and the State has not preferred an appeal on that count against accused Farookh, therefore, the State cannot gainsay the correctness of the impugned order as regards the offence u/s 148, IPC vis-a-vis the respondents which also militates on their side in respect of the charge for offence under Sections 302/149, IPC.

In the premises discussed hereinabove, we find no merit in the instant appeal, which fails and is hereby dismissed. Consequently, the bail bonds furnished by the respondents shall stand discharged.

Criminal Appeal dismissed.