Mohan Singh

Vs

State of Punjab

Criminal Appeal No. 186 of 1960

(CJI B. P. Sinha, T. L. Venkatarama Ayyar, P. B. Gajendragadkar, K. N. Wanchoo, N. Rajgopala Ayyangar JJ)

14.03.1962

JUDGMENT

GAJENDRAGADKAR, J. -

This appeal by special leave arises out of a criminal case in which the appellants Mohan Singh and Jagir Singh along with three others were charged with having committed offences under s. 148 and s. 302 read with s. 149, as well as s. 323, read with s. 149 of the Indian Penal Code. The three other persons who were thus charged along with the two appellants were Dalip Singh and two Piara Singhs who were the sons of Ujagar Singh and Bahadur Singh respectively. Of the five accused persons, Dalip Singh was also charged under s. 302. The case against these persons was tried by the II Additional Sessions Judge at Ferozepore. He held that the charges framed against the two Piara Singhs had not been proved beyond reasonable doubt. So, giving them the benefit of doubt, he acquitted them. Dalip Singh was convicted under sections 302 and 147 and the two appellants were convicted under s. 302 read with sections 149 and 147. For the major offence of murder, all of them were sentenced to imprisonment for life and for the minor offence under s. 147, each one of them was sentenced to six months' rigorous imprisonment. These sentences were ordered to run concurrently. This order of conviction and sentence was challenged by the said three accused persons by preferring an appeal before the Punjab High Court. The High Court has accepted the findings of the trial Judge and has confirmed the orders of conviction and sentence passed against them. Thereafter, the said three accused moved this Court for special leave. The application for special leave filed by Dalip Singh was dismissed, but that of the two appellants was granted. That is how the two appellants have come to this Court by special leave, and on their behalf, Mr. Raghubir Singh has urged that the conviction of the appelants under s. 302/149 is unsustainable in law, because as a result of the acquittal of the two Piara Singhs, the provisions of s. 149 were inapplicable.

Before dealing with the merits of the contention thus raised by the appellants, it is necessary to state briefly the material facts leading to the prosecution of the appellants. The incident giving rise to the present case took place on the 9th May, 1959, at a village called Malsian. The prosecution case is that on the said day, the five accused persons named in the charge were members of an unlawful assembly and that in prosecution of the common object of the said assembly, they committed rioting and at that time were armed with deadly weapons. It has also alleged that in pursuance of the said common object, Gurdip Singh, was murdered and injuries were caused to Harnam Singh. That is the bases of the charge under s. 148 I.P.C. The second charge was that since Dalip Singh, one of the accused, had inflicted a fatal injury on Gurdip Singh on his head in prosecution of the common object of the unlawful assembly, all the members of the assembly were guilty under s. 302/149 of

the Indian Penal Code for the murder of Gurdip Singh. Dalip Singh was also charged under s. 302 without reference to s. 149. That is the substance of the charge based on the allegation that Gurdip Singh had been murdered in prosecution of the common object of the unlawful assembly. For the injury caused to Harnam Singh, an additional charge was framed under s. 323/149. As we have already pointed out, in the present appeal we are concerned with the conviction of the appellants under s. 302/149.

It appears that the appellants Mohan Singh and Jagir Singh are uncle and nephew respectively, the latter being the son of Mohan Singh's brother Dalip Singh who was one of the accused in the present case. There was a third brother named Tara Singh who was married to Tej Kaur, the daughter of Gurdip Singh, the victim of the assault. Tara Singh was murdered by some Muslims during the communal disturbances that raged in the Punjab in the wake of the partition of the country in 1947. As a result of the said communal disturbances, the parties migrated from their homes in West Pakistan to the East Punjab and in due course, were allotted land in village Malsian. After her husband's death, Tej Kaur began to reside with her father Gurdip Singh in village Ghandyala. Since Tej Kaur had left the village of her husband, Dalip Singh and Mohan Singh managed to get into possession of her share of the Land. After the holdings in village Malsian had been consolidated, Tej Kaur obtained a separate holding of land as representing the interest of her deceased husband, Tara Singh. Thereupon, Mohan Singh and Dalip Singh entered into possession of the said land after executing a 'pattanama' in her favour. Having entered into possession of her land in this manner, they did not care to pay the share of the produce to Tej Kaur regularly and in consequence, the amounts due from them fell into arrears. Tej Kaur was thus compelled to appoint her father Gurdip Singh as an attorney in order to realise the arrears of rent and to take steps for evicting Mohan Singh and Dalip Singh from her land. When the attorney instituted eviction proceedings, Mohan Singh and Dalip Singh paid up the arrears, but even so, Tej Kaur succeeded in obtaining an order of eviction. The said order was challenged by Mohan Singh and Dalip Singh by preferring an appeal, but the appeal failed and the order of eviction was confirmed. That naturally led to an application by Gurdip Singh for obtaining the execution of the said order. On this application, warrants for possession were issued. It is because Gurdip Singh was thus effectively protecting the interest of his daughter that he ultimately met his death on the 10th May, 1959, at the hands of the appellants and their companions.

Armed with the warrants of possession, Gurdip Singh went to village Behak Gujran to meet his cousin Harnam Singh and asked for his assistance. Accordingly, Harnam Singh agreed to accompany Gurdip Singh. On May 9, 1959, both of them went to Zira and requested the Patwari and Girdawar to proceed to the spot and deliver to them the possession of Tej Kaur's land. The Patwari, however, told them that since the Qanungo was not in station, they might see him in the evening. While they were in the Court compound, Dara Singh, the brother of Gurdip Singh's wife met them. He was also requested to join them and he agreed. As suggested by the Patwari, the three of them went to see him in the evening. Then they all started towards the land in order to deliver possession to Gurdip Singh. The fields in question were at a distance about a mile from the village abadi. As they approached the fields, they saw the appellant Mohan Singh grazing cattle nearby. Mohan Singh was accordingly informed by the Chowkidar who had joined the party that they had arrived to deliver possession of the land to Gurdip Singh. Mohan Singh thereupon left the spot on the pretext that he was hungry and could not wait. The Qanungo and the Patwari then delivered possession of the land in dispute to Gurdip Singh and the delivery was duly proclaimed in the village. Since a formal report about the delivery of possession had yet to be made, the party went back to the village. While they were at a distance of about two squares, the appellants and their companions were noticed coming out of a grove of 'khajoor' trees armed with a lathi each. As soon

as the appellants were seen by Gurdip Singh and Harnam Singh, they tried to run away but the assailants chased them and surrounded them. Dalip Singh opened the attack on Gurdip Singh by giving him a blow with a 'dang' on the head. Jagir Singh followed and used his 'dang' on Gurdip Singh's right arm. As a result, Gurdip Singh fell down unconscious. The appellants then assaulted Harnam Singh and gave him several blows on all parts of his body. An alarm was raised by the other members of the party and so, the assailants were afraid that villagers might arrive at the scene. That is why they ran away. Gurdip Singh was then put in a bus and taken to the hospital at Zira. Medical help was given to him, but that proved ineffective and he ultimately succumbed to his injuries in the early hours of the next morning. Harnam Singh received treatment and has recovered. It is on these facts that the appellants and their companions were tried before the learned Additional Sessions Judge at Ferozepore for having committed the offences as charged.

All the accused denied the said charges. The learned trial Judge considered the evidence given by the principal eye-witnesses Harnam Singh Phula, the Chowkidar and Sandhura Singh, the Qanungo; he also examined the medical evidence and came to the conclusion that the said evidence considered as a whole, proved the charge against the appellants under s. 302, read with s. 149 and 147 beyond a reasonable doubt. He likewise held that the charge against Dalip Singh under s. 302 and 147 was satisfactorily proved. In regard to the two Piara Singhs, however, he came to the conclusion that the motive for the commission of the offence on which the prosecution relied, was not available against them; that their names mentioned in the First Information Report did not satisfactorily prove their identity and that on the probabilities, it looked very unlikely that the two Piara Singhs by reason of their alleged remote relationship with the three other accused or their friendship with them, could have joined in making the assault on Gurdip Singh and Harnam Singh. He held that the reasons given by the prosecution for their joining in the assault appeared to him to be weak as so, he entertained a reasonable doubt as to whether they had really taken part in the assault at all. That is how he gave them the benefit of doubt and acquitted them. It appears from his judgment, however, that the learned Judge was satisfied that the large number of injuries inflicted on Harnam Singh and Gurdip Singh and the complete absence of injuries on the persons of the assailants would show that the odds were very uneven and that emphasised that the assault must have been the work of more than 3 or 4 members. He also held that the direct evidence of disinterested witnesses indicated that there were five assailants and so, he had no doubt that the charges of unlawful assembly and rioting were brought home even though he was acquitting two of the accused persons. In other words, according to the learned Judge, though two of the five persons, charged were acquitted, that still left five or more persons who were concerned with the assault and so, the charge under s. 147 was established. It is in the light of this finding that he convicted the appellants under s. 302/149.

When the appeal was argued before the High Court on behalf of the appellants, the findings of the learned Judge on the merits were challenged and the High Court considered the said challenge by examining the evidence for itself. Ultimately, it was satisfied that the view taken by the trial Court was right. It appears that in respect of the charge under s. 149, the only contention raised before the High Court was that the said section did not apply because the incident which resulted in the death of Gurdip Singh was no more than a chance encounter. The High Court examined this argument and held that the assailants were lying in wait for Gurdip Singh and so, the assault on Gurdip Singh was the work of the members of the unlawful assembly as alleged by the prosecution. No argument was urged before the High Court that the acquittal of the two Piara Singhs in law rendered section 149 inapplicable to the case.

Mr. Raghubir Singh, however, contended that the finding of the trial Court about the presence of five assailants even after ignoring the alleged presence of the two Piara Singhs is not justified.

Indeed, his case is that like the charge which specifies five named persons as the assailants, the whole of the evidence refers to the said five persons as the assailants and no one else. This position is not disputed by Mr. Bindra who appears for the State and so, we must proceed to deal with the merits of the appeal on the assumption that both in the charge and in the evidence, the prosecution case in that five named persons were the members of an unlawful assembly two of whom have been acquitted; and that raises the question as to whether the acquittal of the two Piara Singhs leaves it open to the prosecution to rely upon section 149 against the appellants.

The true legal position in regard to the essential ingredients of an offence specified by s. 149 are not in doubt. Section 149 prescribes for vicarious or constructive criminal liability for all members of an unlawful assembly where an offence is committed by any member of such 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. It would thus be noticed that one of the essential ingredients of section 149 is that the offence must have been committed by any member of an unlawful assembly, and s. 141 makes it clear that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided, of course; the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. In other words, it is an essential condition of an unlawful assembly that its membership must be five or more. The argument, therefore, is that as soon as the two Piara Singhs were acquitted, the membership of the assembly was reduced from five to three and that made s. 141 inapplicable which inevitably leads to the result that s. 149 cannot be invoked against the appellants. In our opinion, on the facts of this case, this argument has to be upheld. We have already observed that the point raised by the appellants has to be dealt with on the assumption that only five persons were named in the charge as persons composing the unlawful assembly and evidence led in the course of the trial is confined only to the said five persons. If that be so, as soon as two of the five named persons are acquitted, the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly.

In dealing with the question as to the applicability of s. 149 in such cases, it is necessary to bear in mind the several categories of cases which come before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where s. 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under s. 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under s. 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under s. 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted. Similarly, less than five persons may be charged under s. 149 if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and un-named assailants or members composed an unlawful assembly, those before the Court can be convicted under section 149 though the un-named and un-identified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an

unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then s. 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under section 149 because on the evidence the court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly un-named and unidentified may conceivably raise the point as to whether prejudice would be caused to the persons before the Court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified. That appears to be the true legal position in respect of the several categories of cases which may fall to be tried when a charge under section 149 is framed.

In this connection, we may refer to three representative decisions of this Court. In Dalip Singh v. State of Punjab ((1954) S.C.R. 145.) this Court has held that before section 149 can be applied, the Court must be satisfied that there were at least five persons sharing the common object. It has also been held that this does not mean that five persons must always be convicted before s. 149 can be applied. If the Judge concludes that five persons were unquestionably present and shared the common object, though the identity of some of them is in doubt, the conviction of the rest would be good. In that case, this Court took the view that the evidence adduced by the prosecution did not satisfactorily prove the fact that the unlawful assembly was composed of five or more persons, and so, s. 149 was held to be inapplicable. In other words, on facts relevant for the purpose of applying s. 149 this case is similar to the case with which we are concerned in the present appeal.

In Bharwad Mepa Dana v. State of Bombay ((1960) 2 S.C.R. 172.) this Court was dealing with a case where twelve named persons were charged with having formed an unlawful assembly with the common object of committing the murder of three persons. At the trial before the Sessions Judge, seven of the named persons were acquitted and five were convicted under s. 302/149 and s. 302/34. On appeal, the High Court acquitted one of the convicted persons but maintained the conviction and sentence passed on the rest. The validity of the said order of conviction and sentence was challenged before this Court on several grounds, one of which was that s. 149 became inapplicable as soon as eight out of the twelve persons named as members of the unlawful assembly were acquitted. In rejecting this argument, this Court referred to the finding recorded by the High Court that the unlawful assembly in question consisted of ten to thirteen persons out of whom only four were identified and not the rest; and held that it was open to the High Court to come to such a finding. The argument which was urged against the validity of such finding was put alternatively in two forms. It was first contended that the prosecution case must be confined to the charge framed against the accused persons and the charge in the Sessions Court referred to twelve named persons

as composing the unlawful assembly, and so, as soon as eight of them were acquitted, s. 149 became inapplicable. It was also urged that in coming to the conclusion that the unlawful assembly consisted of ten to thirteen persons, the High Court was making out a case of a new unlawful assembly and that was not permissible in a criminal trial. Both these arguments were repelled by this Court and it was held that there was no legal bar which prevented the High Court from coming to the conclusion that apart from the persons who were acquitted and excluding them, evidence adduced by the prosecution showed the presence of more than five persons who composed the unlawful assembly. The assembly about the existence of which the High Court has made a finding is not a new assembly but the same assembly as alleged by the prosecution. The only difference is that according to the charge, all the members of the assembly were alleged to be known, whereas on the evidence the High Court has reached the conclusion that the identity of all the members of the assembly has not been established, though the number of the members composing the assembly is definitely found to be five or more. It is on this reasoning that this Court confirmed the conviction of the appellants under s. 302/149. Thus, this decision illustrates how s. 149 can be applied even if two or more of the persons actually charged are acquitted.

The same principle has been enunciated by this Court in Kartar Singh v. State of Punjab ((1962) 2 S.C.R. 395.). According to this decision, it is only when the number of alleged assailants is definite and all of them are named and the number of persons found to be proved to have taken part in the incident is less than five, that it cannot be held that the assailants, party must have consisted of five or more persons. It is true that having stated this position, this Court has also observed that the fact that certain persons are named in the charge as composing an unlawful assembly, excludes the possibility of other persons to be in the said assembly especially when there is no occasion to think that the witnesses who named all the accused could have committed mistakes in recognising the assailants. It is on this observation that Mr. Raghubir Singh relies. We, however, think that it would be unreasonable to read this statement as laying down an unqualified proposition that whenever persons named in the charge are alleged to constitute an unlawful assembly it is legally not permissible to the prosecution to prove during the trial that persons in addition to those named in the charge also were members of the said assembly. In other words, what this observation intends to suggest is that where persons named in the charge are alleged to compose an unlawful assembly, the court of facts would be slow to come to the conclusion that persons other than those named in the charge were members of the said assembly. If however, it appears on evidence that persons not so named in the charge were members of the unlawful assembly, there is no legal bar which prevents the courts from reaching that conclusion. This position can and does arise where some of the persons composing the unlawful assembly are not identified by the witnesses and they are not named. In fact, the decision in the case of Kartar Singh itself shows that this Court rejected the appellants contention that their conviction under ss. 302 and 307, read with s. 149 was invalid. Therefore, we see no inconsistency between the observations made in this case and the earlier decisions to which we have just referred. The result is that in the circumstances of the present case, the appellants are entitled to contend that s. 149 cannot be invoked against them.

That inevitably takes us to the question as to whether the appellants can be convicted under s. 302/34. Like s. 149, section 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by s. 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just

as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of s. 34. In some ways the two sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of s. 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which s. 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well-settled that the common intention required by s. 34 is different from the same intention or similar intention. As has been observed by the Privy Council in Mahbub Shah v. King Emperor ((1945) L.R. 72 I.A. 148.), common intention within the meaning of s. 34 implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.

What then are the facts and circumstances proved in the present case ? It is proved that the appellants shared with Dalip Singh the motive which impelled Dalip Singh to inflict the fatal blow on Gurdip Singh. The close relationship between the appellants and Dalip Singh leaves no room for doubt that they shared the same motive with Dalip Singh to the same extent. It is also proved that Dalip Singh and the two appellants were lying in wait for Gurdip Singh. We have also seen that when the party accompanying Gurdip Singh told the appellant Mohan Singh that the Patwari and the Qanungo had come on the spot to deliver possession of the land to Gurdip Singh, Mohan Singh pretended that he was hungry and went away. Then he seems to have contacted Dalip Singh and Jagir Singh and all the three were lying in wait for Gurdip Singh, who, they knew, would pass that way. Thus, the two appellants and Dalip Singh, deliberately concealed themselves behind a grove of Khajoor trees and were armed with lathis. This conduct on the part of the three assailants clearly shows that they had the common intention of fatally assaulting Gurdip Singh. That alone can explain why they were armed with lathis and why they hid themselves behind the Khajoor trees. Besides, as soon as Gurdip Singh and Harnam Singh came near the place where the appellants lay concealed, all of them rushed on Gurdip Singh and chased him when he and Harnam Singh began to run away. This conduct also clearly indicates the presence of the common intention. After chasing the victims, three of them surrounded them and Dalip Singh, gave the fatal blow on Gurdip Singh. In the act of surrounding Gurdip Singh, the two appellants undoubtedly played their part and thus helped Dalip Singh. After Gurdip Singh was fatally assaulted, the three assailants apprehended that the villagers would rush on the scene because an alarm had then been raised and so, they ran away together. On these facts, the conclusion appears to be inescapable that the appellants and Dalip Singh were actuated by the common intention to kill Gurdip Singh and the attack made by Dalip Singh on Gurdip Singh was in furtherance of the said common intention. Therefore, in our opinion, there is no difficulty whatever in coming to the conclusion that the appellants are guilty under section 302/34 of the Indian Penal Code. We have no doubt that if the appellants had raised before the High Court the contention that s. 149 was inapplicable to their case, the High Court would have without any hesitation altered their conviction from under s. 302/149 into one under s. 302, read with s. 34.

The result is, the conviction of the appellants is accordingly altered into one under section 302, read with section 34 of the Indian Penal Code. This modification in the order of the conviction does not require any change in the order of sentence at all. For the offence under section 302, read with s. 34

of which we are convicting them, they would be sentenced to imprisonment for life. The conviction and sentence for the offence under section 147 is, however, set aside and they are ordered to be acquitted in respect of that offence.

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