Mannam Venkatadari and Others

Vs

The State of Andhra Pradesh

Criminal Appeals Nos. 288 and 289 of 1968

(C. A. Vaidilingam, A. N. Ray JJ)

08.04.1971

JUDGMENT

VAIDIALINGAM, J. -

1. These appeals, by special leave, by the five appellants, who are accused Nos. 1 to 5, are directed against the common judgment and order, dated April 26, 1968 of the Andhra Pradesh High Court in Criminal Appeals Nos. 833 and 1031 of 1966.

2. The appellants took their trial before the learned Additional Sessions Judge, Nellore for the following offences -

1. Rioting armed with deadly weapons under Section 148, I.P.C. against accused Nos. 1 to 5.

2. Murder with common intention under Section 302, read with Section 34, I.P.C. against accused Nos. 1 to 5.

3. Murder under Section 302, I.P.C. only against accused No. 2.

4. Voluntarily causing hurt with dangerous weapon under Section 304, I.P.C. against accused No. 4.

3. The prosecution case was as follows : One Mannam Siddaiah had seven sons, of whom P.W. 3 is one. The first and the third accused are brothers and their other two brothers were Peraiah and Sheshaiah. Similarly, the second and the fifth accused are brothers and the fourth accused is the son-in-law as also the sister's sons of the first accused. The mother of the first and the third accused and the mother of the second and fifth accused are sisters. The father of the first accused Venkataiah and Peda Guravaiah, father of Siddaiah were brothers. There was bitter enmity between the family of Siddaiah and that of the first accused. On the morning of June 27, 1966, Peraiah, the brother of the first and third accused was killed and the six sons of Siddaiah were alleged to be responsible for his murder. At about 3 p.m. the same day, the appellants in order to retaliate for the murder of Peraiah, formed themselves into an unlawful assembly along with ten other persons and went to the house of Siddaiah to kill him. The first accused was armed with a Bandinatu Karra; the second accused with an axe; the third accused with a Rokali; the fourth accused with a Medithoka; and the fifth accused with a Nagalikarru. On seeing Siddaiah in his house, the second accused pulled him out and hit him on his head with the axe. Siddaiah fell down whereupon all the accused hit him with the weapons which they had and caused him multiple injuries, as a result of which Siddaiah died on the spot.

P.W. 3, one of the sons of Siddaiah, who was with his father at that time, tried to intervene but was beaten by the fourth accused. The witnesses to the occurrence are stated to be the daughter, widow, son and daughter-in-law of the deceased Siddaiah being P.Ws. 1, 2, 3 and 4 respectively. The daughter of Siddaiah, P.W. 1 gave the report about the occurrence Ex.P. 1 on the same day at about 5 p.m. to the village Munsif, who contacted the police, as a result of which investigation commenced. P.W. 3, who had received an injury was examined by the doctor P.W. 5, who found the following injury on the body of P.W. 3 :

> "A contused wound 1" lateral to the middle line middle of the left shoulder blade back 1 1/2" x 1" skin deep. Clotted blood seen at the site. Age of injuries about 40 hours."

P.W. 5 has given a wound certificate Ex.P. 2. According to P.W. 5 the above injury was simple. At this stage it may be mentioned that in the evidence P.W. 5 has stated that the injury was really not on the left shoulder blade as mentioned in Ex.P. 2 but on the right shoulder blade. But nothing turns of this because there is no controversy that P.W. 3 did sustain an injury.

4. P.W. 5 has also issued the post-mortem certificate Ex. P. 4 regarding the injuries found on the body of Siddaiah. The following injuries were found on his body :

> "1. A contused wound on the right arm upper third 1"x 2" skin deep. Clotted blood seen.
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> 2. A contused wound on the left arm upper third and left forearm lower third 1"x 2"x skin deep, each wound clotted blood seen at the site.
>
> 3. A vertical incised wound 5" above the right ear 2"x 1"x bone deep, clotted blood at the site.
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> 4. A horizontal wound behind 1" lateral to the right ear 1"x 1/2" bone deep, clotted blood seen at the site.
>
> 5. An incised wound vertical 4" above the left ear 3"x 1" x bone deep clotted blood seen. All incised wound edges clean margin clear.
>
> 6. A contused wound 1" above injury No. 5 left side. 1" x 1/2" x bone deep. Clotted blood seen.
>
> 7. A vertical contused wound 1" above the injury No. 6 left side of head 1" x 1/2" x bone deep clotted blood seen.
>
> 8. A lacerated wound inside left ear 1/2" x 1/4 x skin deep clotted blood seen.
>
> 9. An oblique incised wound on the sternum in the middle at the level of the nipple 1" x 1/4" x bone deep clotted blood seen on the outer surface of the knees."

5. It is further stated in the post-mortem certificate that fracture of left arm and left forearm were detected and that blood vessels and nerves were cut. It is also stated in the certificate that death was the result of shock and haemorrhage due to injuries on the head and injury No. 2. At this stage it may be pointed out that P.W. 5 in his evidence has stated that injuries Nos. 3 to 7 are injuries on the

head, out of which injuries 3, 4, 6 and 7 are simple and injury No. 5 is serious. He has further stated that injury No. 2, is not a fatal one though grievous.

6. The appellants denied having committed any offence and according to them the witnesses were giving false evidence due to enmity that existed between the two families. In particular the first accused pleaded alibi on the ground that he had been taken away by his son-in-law at Siddavaram and he also adduced evidence in support thereof. However, the first, second, third and fifth accused admitted enmity with the family of Siddaiah.

7. The main evidence relied on by the prosecution regarding the actual attack on Siddaiah resulting in his death was that of P.Ws. 1 to 4. The same evidence was also relied on in respect of the injuries stated to have been caused to P.W. 3, by the fourth accused. The evidence of these witnesses was to the effect that when they were all together with Siddaiah on the evening of June 27, 1966, the appellants armed with the weapons already mentioned above, along with ten others rushed into the house. The second accused abused Siddaiah and saying that he would meet the same fate as Peraiah, dragged him out of the house while the other accused pushed Siddaiah. After Siddaiah was dragged out of the house by the second accused, the latter hit him on the head with the axe and inflicted a number of injuries. When Siddaiah fell down he was severely belaboured by all the accused with the weapons that they had. Suggestions have been put to these witnesses that they never witnessed any such occurrence and that in fact the incident did not take place in the house.

8. The learned Sessions Judge rejected as false the plea of alibi set up by the first accused. He also accepted as true the evidence furnished by P.Ws. 1 to 4, notwithstanding the fact that they were close relations of the deceased, and that their evidence was not liable to be rejected on this basis. They were all inmates of the house of Siddaiah and their presence at the material time was quite natural. On the basis of the evidence of P.W. 5, the learned Sessions Judge held that the incised injuries on the head could have been caused only by a weapon like an axe. As the evidence disclosed that the only person among the accused who had such a weapon was the second accused, the learned Sessions Judge held that those injuries had been caused by the second accused.

9. While considering the question whether all the five accused came in a body fully armed to attack Siddaiah with the common intention of killing him, the learned Judge after adverting to the case of the prosecution that apart from the five appellants there were ten other persons along with them, held that it was highly improbable that fifteen persons should come to kill an old man like Siddaiah. The Court held that it may be that all the fifteen persons came to attack the sons of Siddaiah, who are alleged to have murdered Peraiah earlier in the day. The Court further held that if the appellants came to attack Siddaiah and the other members of his family, they would have caused more serious injuries to P.W. 3. On the other hand, P.W. 3 had only a simple injury, which he sustained at the hands of accused No. 4 when he tried to intervene to protect his father. The learned Judge was not prepared to accept the case of the prosecution that the second accused cried out that Siddaiah should meet the same fate as Peraiah inasmuch as P.Ws. 1 to 4 have not mentioned about the same in their statements to the police. Ultimately the learned Judge found that the appellants did not have the common intention of killing Siddaiah though they may have intended to attack the six sons of Siddaiah, who are alleged to have murdered Peraiah. On this reasoning the learned Sessions Judge ruled out the offence under Section 302, read with Section 34, I.P. C. though there was no specific reference to Section 34, I.P.C.

10. The learned Sessions Judge has further found that it cannot be said that the accused had the common object of killing Siddaiah or that they knew that they are likely to cause the death of

Siddaiah in prosecution of their common object. On this reasoning the Court held that each of the accused has to be held responsible only for the act done by him and not constructively for any act of the other or others. So far as the second accused was concerned the Court held that when he hit Siddaiah on his head with an axe, he must have known that the said act is so imminently dangerous that death will be caused in the ordinary course of nature and that he had no excuse for inflicting injuries on Siddaiah. On the basis of the medical evidence regarding the fatal nature of the injuries on the head of Siddaiah, the second accused was found guilty of the offence of murder under Section 302, I. P.C. Here again though the learned Judge has not specifically referred to Section 149, I.P.C. he has considered the necessary ingredients for making a person liable under that section and ruled out the applicability of Section 302, read with Section 149, I.P.C.

11. The learned Judge then considered the application of Section 148, I.P.C. and held that none of the accused can be found guilty as their acts have not been done in furtherance of a common object. However, the Court held that as the witnesses have spoken to other injuries inflicted by accused Nos. 1 and 3 to 5 on Siddaiah and which were borne out by the post-mortem certificate Ex. P. 4, the said accused must be held guilty of an offence punishable under Section 324, I.P.C. and he accordingly convicted them for the same. The learned Judge also accepted the evidence of P.Ws. 1 to 4 and held that the injury found on the body of P.W. 3 was caused by the fourth accused and for that the latter was convicted under Section 324, I.P.C. Ultimately the second accused was convicted under Section 324, I.P.C. Ultimately the second accused was convicted under Section 302, I.P. C. and sentenced to imprisonment for life as there was no pre-meditated design to kill Siddaiah. Accused Nos. 1 and 3 to 5 were convicted for the offence under Section 324, I.P.C. and each was sentenced to undergo rigorous imprisonment for one year. The fourth accused was further convicted under Section 324, I.P.C. and sentenced to imprisonment for six months with the direction that the sentences imposed on him are to run concurrently.

12. Against the judgment of the Sessions Judge convicting the accused as above, all the appellants filed before the High Court Criminal Appeal No. 833 of 1966. In this appeal they challenged the findings of the learned Sessions Judge convicting them for the offences referred to above. The State filed Criminal Appeal No. 1031 of 1966. According to the State the appellants should have also been convicted under Section 148, I.P.C. and that the accused Nos. 1 and 3 to 5 should have been convicted for offences under Section 302, read with Section 34 or with Section 149, I.P.C.

13. The High Court by its judgment under attack has held that the conviction of the appellants for the offence for which they were found guilty by the Sessions Judge was correct and that the sentences imposed for those offences were also proper. The High Court has accepted as true the evidence of P.Ws. 1 to 4 and has agreed with all the findings recorded by the Sessions Judge against the appellants and it has specifically held that these conclusions have been reached by the Trial Court after a fairly elaborate consideration of the evidence adduced in the case. In this view Criminal Appeal No. 833 of 1966, filed by the appellants was dismissed.

14. Regarding Criminal Appeal No. 1031 of 1966 filed by the State the High Court, we are constrained to remark, has in a very summary manner allowed the same holding accused Nos. 1 and 3 to 5 guilty under Section 148 and also under Section 302, read with Section 149, I.P.C. For the offence under Section 148, I.P.C. they were sentenced to undergo rigorous imprisonment for two years and for the offence under Section 302, read with Section 149, I.P.C., each of them has been sentenced to imprisonment for life with a direction that the sentences are to run concurrently. The view of the High Court is that as the medical evidence disclosed that death of Siddaiah was due to the cumulative affect of all the injuries and as all the accused have participated in beating him, all of

them must be considered to have a common object or common intention thus making each of them liable for causing the death of Siddaiah. The High Court has further held that when five persons come together and beat up a person, there is no difficulty in holding that they had committed an offence of rioting under Section 148, I.P.C. Accordingly the appeal of the State was allowed and the accused Nos. 1 and 3 to 5 were also convicted for additional offences, as mentioned above.

15. Against the decision of the High Court dismissing the appeal of the appellants (Criminal Appeal No. 833 of 1966) and allowing the appeal of the State (Criminal Appeal No. 1031 of 1966) these two appeals have been filed by the appellants.

16. Mr. R. K. Lala, learned counsel for the appellants, has urged that the conviction of the second accused for the offence of murder under Section 302, I.P.C. as well as the conviction of the other accused appellants Nos. 1 and 3 to 5 for the offence under Section 324, I.P.C. passed by the Sessions Judge and confirmed by the High Court is not justified. The counsel pointed out that P.Ws. 1 to 4 are bitterly inimical to the family of the appellants. Even according to their evidence over and above the appellants there were 10 other persons along with them. Having eliminated the application of Section 34, I.P.C. there was no clear evidence regarding the individual offence, if any, committed by the appellants. The counsel further urged that the appreciation of the prosecution evidence is faulty as it was inconsistent in material particulars and it was not safe to act on such evidence. He further urged that the plea of alibi of the first appellant should have been accepted.

17. Mr. P. Ram Reddy, learned counsel for the State, on the other hand, pointed out that the conviction of the appellants by the learned Sessions Judge has been confirmed by the High Court in Criminal Appeal No. 833 of 1966. Both the Courts have concurrently accepted the evidence of P.Ws. 1 to 4 as true and have given good reasons for acting on their evidence.

18. So far as the conviction of the appellants for the offences for which they were found guilty by the Sessions Judge and confirmed by the High Court is concerned, we are of the opinion that the learned counsel for the appellants has not been able to satisfy us that the decision of the High Court is erroneous. The second accused has been found guilty for the offence of murder under Section 302, I.P.C. and that is fully justified by the evidence of P.Ws. 1 to 4, who have spoken to the infliction of the injuries on the head of Siddaiah by him with an axe. The medical evidence furnished by P.W. 5 establishes that the head injuries were the fatal injuries. Injuries Nos. 3 to 7, noted in the post-mortem certificate Ex.P. 4 were head injuries which could have been caused only by a heavy cutting weapon like an axe. If that is so, the second accused has been rightly found guilty of the offence of murder under Section 302, I.P.C. by both the Courts. Therefore his appeal is totally devoid of any merit.

19. Regarding accused Nos. 1 and 3 to 5, it is to be noted that they have been found guilty of the offence under Section 324, I.P.C. by the Sessions Judge. Their conviction again is rested on the evidence of P.Ws. 1 to 4. That P.W. 3 sustained an injury is clear by the wound certificate Ex.P. 2 and therefore the conviction of the fourth accused for causing hurt to P.W. 3, is justified. Similarly, accused Nos. 1 and 3 to 5 have been convicted under Section 324 for causing other injuries found on the body of Siddaiah. Here again the evidence of P.Ws. 1 to 4 shows that these accused caused the other injuries found on the body of Siddaiah. Therefore, their conviction for the said offence by the two Courts is also justified. Both the learned Sessions Judge and the High Court have elaborately considered the evidence in the case and have given a concurrent findings against the appellants. We do not propose to cover the ground over again. There is no merit in the appeal challenging the dismissal by the High Court of Criminal Appeal No. 833 of 1966.

20. The more serious attack against the decision of the High Court is regarding allowing the appeal of the State by the High Court. The counsel for the appellant pointed out that the charge against accused Nos. 1 and 3 to 5 was one under Section 302, read with Section 34, I.P.C. whereas the conviction by the High Court is for the offence under Section 302 read with Section 149, I.P.C. The contention of the counsel is that when a charge has been framed under Section 302, read with Section 34, I. P.C. no conviction can be based under Section 302, read with Section 149, I.P.C. The learned counsel further urged that, in any event, the High Court has without adverting to the reasons given by the Sessions Judge for acquitting the accused for the offence under Section 302, read with Section 34 or Section 302, read with Section 149, I.P.C. has very summarily found them guilty of the latter offence. The High Court has not found what the common object or common intention of the appellants was, more especially when the Trial Court has categorically found that the appellants had no common intention of killing Siddaiah nor had they the common object of causing his death. It is pointed out that the High Court has made a very serious mistake when it assumed that the medical evidence disclosed that the death of Siddaiah was due to the cumulative effect of all the injuries found on his body.

21. Mr. Ram Reddy, learned counsel for the State, on the other hand, urged that the conviction for an offence under Section 302, read with Section 34, I.P.C. The counsel further urged that unless the appellants are able to satisfy this Court that any prejudice has been caused to them, the conviction cannot be interfered with merely on the ground that no charge under Section 302, read with Section 149, I. P.C. has been framed. In this connection the counsel drew our attention to the decision of this Court in Nanak Chand v. The State of Punjab ((1955) 1 1201 : AIR 1955 SC 274 : 1955 Cri LJ 721.), where the distinction between Section 34 and Section 149, I.P.C. has been discussed and according to him this distinction has been properly borne in mind by the High Court. He has also referred us to the decisions in Willie (William) Slaney v. The State of Madhya Pradesh, ((1955) 2 SCR 1140 : AIR 1956 SC 116 : 1956 Cri LJ 29.) and Tilkeshwar Singh and Others v. The State of Bihar, ((1955) 2 SCR 1043 : AIR 1956 SC 248 : 1956 Cri LJ 441.) in support of his contention that unless the appellants are able to establish that they have been prejudiced by their being convicted under Section 149, I.P.C. when the charge was under Section 302, read with Section 34, I.P.C., their conviction under Section 149, I.P.C. cannot be considered to be illegal, Mr. Ram Reddy pointed out that the prosecution evidence establishes that the appellants came in a body armed with dangerous weapons and inflicted injuries on Siddaiah resulting in his death. Under those circumstances the conviction for the offence under Section 148, I.P.C. was also justified. We are not inclined to accept the contention of Mr. Ram Reddy that the High Court was justified in allowing Criminal Appeal No. 1031 of 1966 filed by the State. In this case it is not necessary for us to consider the question whether the a conviction under Section 302 read with Section 149 is legal when the charge was under Section 302 read with Section 34, I.P.C. as the High Court has not found the facts necessary for a conviction under Section 302, I.P.C., read with Section 34 or under Section 302, read with Section 149, I.P.C. Therefore we do not propose to refer in detail to the principles laid down in the decisions referred to above.

22. It is needless to state that there is a clear distinction between the provisions of Sections 34 and 149, I.P.C. and the two sections should not be confused. The principal element in Section 34 is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation Section provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone. On the other hand, there is no question of common intention in Section 149. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common

intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or is such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence although there may have been no common intention and no participation by the other members in the actual commission of that offence. Unfortunately, there is no indication in the judgment of the High Court that the above distinction has been kept in mind. The Sessions Judge has after considering the facts, specifically ruled out the application of Sections 34 and 149, I.P.C. The High Court when reversing that order of acquittal, should have discussed the matter and given adequate reasons for holding these accused guilty under Section 149, I.P.C.

23. On the other hand, the High Court has very summarily dealt with the Criminal Appeal No. 1031 of 1966 filed by the State and interfered with the order of acquittal passed by the learned Sessions Judge under Section 148 and Section 302, read with Section 34, I.P.C. We have already pointed out that the learned Sessions Judge has categorically considered the question of liability, if any, of the appellants under Section 302, read with Section 34, as well as under Section 302, read with Section 149, I. P.C. though he has not referred in specific terms to Section 34 or Section 149, I.P.C. The finding of the learned Sessions Judge is that the appellants had no common intention of killing Siddaiah. Similary, he has also held that the accused did not have the common object of killing Siddaiah or that they knew that they are likely to cause the death of Siddaiah in prosecution of their common object. We have already adverted to the discussion by the learned Sessions Judge on these two aspects and in our opinion the Trial Court has eliminated the application of Sections 34 and 149, I.P.C. The learned Sessions Judge has also held that Section 149, I.P.C. does not apply and the accused can be held guilty only for their individual acts. It has also been further found that the acts of the accused were not done in furtherance of any common object. In the face of the above finding, one would expect the High Court to deal with those aspects, especially when it was differing from the order of acquittal passed by the Trial Court. The High Court has not recorded any finding as to what was the common object or the common intention of the appellants, nor has it recorded any finding as to what was the criminal act done by the appellants in furtherance of their common intention or what was the offence committed in prosecution of the common object. The High Court has also committed a serious mistake when it has proceeded on the basis that the medical evidence disclosed that the death of Siddaiah was due to the cumulative affect of all the injuries found on his body. We have already referred to the medical evidence furnished by P.W. 5, that the injuries on the head were fatal injuries, as also to the finding of the learned Sessions Judge that those injuries were caused by the second accused who had an axe. This finding has been accepted by the High Court, when it dismissed Criminal Appeal No. 833 of 1966 and there is no indication when it dealt with the appeal of the State that it was taking a different view. In view of these circumstances we are of the opinion that the conviction by the High Court of the accused Nos. 1 and 3 to 5 for offences under Section 148 and Section 302, read with Section 149, I.P.C. was not justified. We are further of the opinion that the High Court should not have interfered with the order of acquittal passed by the learned Sessions Judge in respect of those offences.

24. To conclude the dismissal by the High Court of Criminal Appeal No. 833 of 1966 was correct and to that extent the above appeals are dismissed. The High Court was not justified in allowing the appeal of the State (Criminal Appeal No. 1031 of 1966) and as such the conviction of the accused Nos. 1 and 3 to 5 for the offences under Section 148 and Section 302, read with Section 149, I.P.C. and the sentences imposed on them for the said offences are all set aside and those accused are acquitted of the said offences. The above appeals are allowed to that extent, the result being, that

Criminal Appeal No. 1031 of 1966 filed by the State before the High Court will in consequence stand dismissed.

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