

Roshan and Others

Vs

State of Maharashtra

Criminal Appeal No. 298 of 1975

(P.N. Bhagwati, Syed M. Fazal Ali JJ)

03.08.1976

JUDGMENT

FAZAL ALI, J. -

1. The appellants Roshan, Baban Krishna Mhatre and Shantaram Dunda Mhatre, who were petitioners 3, 7, and 8 in the original special leave petition, have been convicted under Section 147, 148 and 302 read with Section 149 and sentenced to imprisonment for life. In this appeal by special leave, Mr. Ganpule, learned Counsel for the appellants, has raised a short point. He has submitted that the prosecution evidence taken on its face value, does not prove the presence of the appellants in the so-called unlawful assembly and, therefore, the appellants are entitled to the benefit of doubt. In the view that we take it is not necessary to detail the prosecution case which has been fully narrated in the judgments of the High Court and that of the Sessions Judge. It appears that on April 30, 1970, ten persons alleged to be accused persons went to the house of Motiram to wreck a vengeance; but as he was not in the house, they started abusing him. The deceased Dattu, who was the neighbour, came out and protested against the abuses being hurled on Motiram. This appears to have enraged the accused persons, who after some time went to the house of Balu Ram and challenged the deceased to come out. The deceased came out and he was assaulted by swords and spears. Besides, pistol shots were also fired. So far as the appellants are concerned, no clear overt act has been attributed to them, but it is said that they were also members of the unlawful assembly and were armed with lathis. The courts below after considering the evidence, were of the opinion that even though the appellants did not commit any overt act, since they were present in the unlawful assembly with lathis, they must be deemed to possess the common object of killing the deceased.

2. It would appear that the prosecution case runs into two parts. In the first part, the common object was to kill Motiram, who was not available. At that time the question of causing any injury, far less the fatal injury to Dattu did not arise at all. The common object to kill the deceased developed at the second vent by the armed party to the house of Balu Ram when the accused decided to teach him a lesson also. Therefore, there can be no doubt that the common object changed when the assembly proceeded to the house of Balu Ram. There is no reliable evidence at all to show that the appellant also shared this changed new common object. But even if they may be deemed to have shared the common object, by virtue of the vicarious liability, contemplated by Section 149 I.P.C., there are clear circumstances to show that the appellants did not participate in the offence. In the first place, PWs 1, 2, 3 and 8 have not at all alleged any overt act against the appellants. PW 3 has categorically stated that he did not see any other accused causing injuries to Dattu, deceased. He also says that Baban and Shantaram did not speak even though Ramesh have a threat. PW 2 has categorically stated that when the mob came at Balu Ram's house, it was joined by the three appellants a little

later. And he also does not attribute any overt act to these appellants. Similar is the evidence of PW 8. PW 1 is the only witness who says that almost all shouted the words 'beat beat'. This fact is not mentioned in the F.I.R. and is not supported by the other eyewitnesses examined by the prosecution. So far as appellants Roshan and Baban Krishan are concerned, they are close relations of the accused Sakharam and Ramesh and the possibility of their being falsely implicated due to enmity, cannot be reasonably excluded, particularly having regard to the admitted enmity which existed between the parties. Shantaram is not at all related to any of the accused and there does not appear to be any motive why he should have joined the unlawful assembly to assist the accused. From these circumstances therefore, we entertain a serious doubt regarding the presence of these appellants in the unlawful assembly. Mr. Khanna, learned Counsel for the respondent submitted that in view of the fact that the two courts have also said that they were members of the unlawful assembly, they must be deemed in law to possess the common object to kill the deceased in the occurrence. If the presence of the appellants itself becomes doubtful, the question of application of Section 149, I.P.C. to the appellants does not arise. The courts below do not appear to have viewed this case from the angle of vision with which we have approached the case and have overlooked the admission of the witnesses referred to by us. In these circumstances, we are satisfied that the participation of the appellants in the offence has not been proved beyond reasonable doubt. The result is that the appeal is allowed. The conviction and sentence passed and recorded against the appellants are set aside. They are acquitted of the charge levelled against them and are directed to be set at liberty at once. Formal order or release may be communicated forthwith.

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