Prabhakar Shankar Sawant and Others

Vs

State of Maharashtra

Criminal Appeal No. 174 of 1975

(Syed M. Fazal Ali, A. D. Koshal JJ)

09.02.1979

JUDGMENT

Fazal Ali J. –

1. This appeal by special leave is directed against the judgment of the Sessions Judge, Greater Bombay dated March 3, 1975. The appellants were convicted by the Metropolitan Magistrate under Sections 147, 426/149 and 506 and sentenced to three months' rigorous imprisonment under each count. The sentences were directed to run concurrently. By the time the Metropolitan Magistrate decided the case the new Criminal Procedure Code, 1973 came into force and, therefore, the appellants filed a revision to the Sessions Judge. The Sessions Judge after going through the evidence affirmed the decision of the Magistrate and confirmed the convictions as also the sentences imposed on the appellants by the trial magistrate. It appears that in view of a decision of Division Bench of the Delhi High Court that no appeal lay in the present case as the new Code of Criminal Procedure, 1973 had already come into force and since the appellants had taken the matter in revision to the Sessions Judge, a further revision to the High Court was not maintainable. The correctness of the view of the High Court has been assailed before us by the learned counsel for the appellants but in the circumstances of this case we do not want to decide that question because we have decided to enter into the merits of the case as the appellants were deprived of a right of appeal in this matter. According to the evidence the appellants forming members of a morcha constituted an unlawful assembly only when it transcended its limits and started committing violence by throwing brick-bats on the houses of some of the prosecution witnesses. Actually, the occurrence took place as a result of a dispute between two rival unions. A perusal of the evidence clearly shows that the entire morcha consisting of 300 to 400 persons was in the first instance peaceful but became violent only when some of the members of the assembly started pelting stones and damaged the glass panes of the houses of some of the prosecution witnesses. It is true that the Sessions Judge as also the Magistrate had held that the appellants were members of the unlawful assembly but the courts below have viewed this case from an absolutely wrong angle of vision. Before the appellants could be convicted of sharing the common object of the assembly or of being members of the same at a time when the assembly became unlawful, it had to be proved by the prosecution that the appellants were members of the unlawful assembly at the time when the assembly became unlawful and started pelting stones. To begin with there is no such evidence in this case. The evidence merely shows that the appellants were members of the morcha but there is absolutely nothing to show that they were members of the unlawful assembly when the members of the assembly started pelting stones. PW 1 who is a complainant and a full-fledged eyewitness had lodged the FIR on June 21, 1972 in which he did not mention the names of any of the appellants. That by itself is a serious infirmity in the prosecution case which is sufficient to throw doubt on the truth of the version presented by the prosecution. No explanation for the omission of the names of the appellants has

been given in the statement of the complainant and in absence of any explanation this appears to us to be a manifest defect in the prosecution case on which alone the appellants are entitled to an acquittal, more particularly when the complainant says categorically in his evidence that accused 1, 3, 4, 5, 10 and 11 were heading the morcha. Indeed if this was so then we would have expected the complainant to mention at least these names in the FIR. It is true that PW 1 in his deposition has stated that the morcha was shouting and after some time, stones were thrown at his house but he does not state anywhere in his evidence that at the time when stones were being thrown, appellants continued to be members of the morcha. Strong reliance was placed on the evidence of PW 2 who says that he saw that a morcha had come and members of the morcha had thrown stones in his house. He further says that there were 400 to 500 persons in the morcha and he had seen accused 3 and 6 in the morcha. But he does not state at what stage he had seen these members in the morcha nor does he say that when the morcha started pelting stones and broke his window glass panes any of the appellants continued to be members of the morcha. PWs 2 and 6 are neighbours and if they had actually identified the appellants or any of them as members of the morcha at the time when stones were being pelted, they must have in ordinary circumstances revealed the name of the persons whom they identified to the complainant before he lodged the FIR. This was, however, not done which clearly shown that the witnesses did not at all identify the appellants at the stage when the morcha became unlawful. The learned Sessions Judge tried to explain away this important lacuna in the prosecution case by presuming that as the morcha moved on it must be presumed to be unlawful and any person who was a member of that assembly must be presumed to share the common object of the unlawful assembly. We think that the learned Sessions Judge has, however, overstated the law on the subject. In fact this is not a manner in which conviction for offences under Sections 147, 149 can be proved. Before the court is satisfied that an accused is member of an unlawful assembly it must be shown either from his active participation or otherwise that he shared the common object of the unlawful assembly. It is not necessary that the accused should be guilty of any overt act. It is sufficient if it is shown that as a participant of the unlawful assembly he was sharing the common object of the same. Even that evidence is wholly lacking in the present case. In this view of the matter the evidence led by the prosecution has not at all established the complicity of the appellants in the offences with which they were charged. For these reasons, therefore, we allow this appeal, set aside the conviction and sentence imposed on the appellants and acquit them of the charges framed against them. The appellant will now be discharged from their bail bonds.

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