

Sherey and Others

Vs

State of U.P.

Criminal Appeal No. 86-A of 1979

(K. Jayachandra Reddy, S. R. Pandian JJ)

27.09.1991

JUDGMENT

K. JAYACHANDRA REDDY, J. -

1. There are 25 appellants in this appeal. They were tried for offences punishable under Sections 147, 148 and 302, 307, 323 and 325 all read with Section 149 IPC in respect of a rioting that took place on September 24, 1967 at 12.30 p.m. in the village Jainpur District Gorakhpur. During the course of the said occurrence, three persons died and five persons received injuries. Most of the injuries were caused by sharp-edged weapons. It appears that there was a dispute between Hindus and Muslims of the village regarding the grove. The Hindus claimed that the grove and the pond nearby were their properties where dead bodies were cremated and according to the Muslims it was their graveyard. There was security proceedings and also proceedings were initiated under Section 145.

2. While so, the wife of PW 3, Guptar, a local Hindu, died and PW 3 and other Hindus carried the dead body to the said pond in the grove in order to cremate her body. They dug a pit and as the funeral pyre was being prepared, 25 persons along with another person came there shouting "Ya Ali". Some of them were armed with lathis while others were armed with swords etc. Seeing them armed the Hindus tried to escape but they were overtaken and three deceased persons and the injured witnesses were assaulted. Due to the said assault, two of the deceased died on the spot and the third deceased died a little later. PW 1 who was one of the eye-witnesses left for the police station and lodged an FIR. PW 4 a Constable made an entry in the general diary. PW 15, the Station House Officer reached the spot and took over the investigations. He sent the dead bodies for post-mortem and injured persons for treatment. The doctor who conducted the post-mortems over the dead bodies found a number of injuries and also similar injuries on the injured witnesses. He opined that fatal injuries inflicted on the three deceased persons were ante-mortem and were sufficient in the ordinary course of nature to cause death. There are six eye-witnesses and all of them stated that they had gone along with PW 3 to cremate the dead body of his wife and all of them have named the 25 appellants. Now in the present deposition they have also described the weapons in their hands. They attributed overt acts only to two persons but even that version was not accepted by the courts below on the ground that they could not have noted the details in such a melee. But both the courts have accepted the evidence of the eye-witnesses against the appellants whose names they have mentioned and stated that they were members of an unlawful assembly. The trial court convicted some of them under Section 147 and sentenced to six months' RI and the rest under Section 148, sentenced to one year's RI. All of them were convicted under Section 307 read with 149 IPC and sentenced to 3 years' RI and also under Section 302 read with 149 IPC and sentenced to imprisonment for life. The sentences are directed to run concurrently. The High Court confirmed

the same. Hence the present appeal.

3. Learned counsel for the appellants submitted that it is highly unsafe to rely on omnibus allegation made by these witnesses and on the basis of their mere presence on the spot they cannot be held to be constructively liable by the application of Section 149 IPC.

4. We have carefully gone through the evidence. We have no doubt that all the eye-witnesses were present. Nothing significant has been elicited in their cross-examination. However, the eye-witnesses simply named these appellants and identified them. So, the question is whether it is safe to convict all the appellants. In a case of this nature, the evidence of the witnesses has to be subjected to a close scrutiny in the light of their former statements. The earliest report namely the FIR has to be examined carefully. No doubt in their present deposition they have described the arms carried by the respective accused but we have to see the version given in the earliest report. In that report PW 1 after mentioning about the earlier proceedings has given a fairly detailed account of the present occurrence. He has mentioned the names of the witnesses and also the names of the three deceased persons. Then he proceeded to give a long list of names of the accused and it is generally stated that all of them were exhorting and surrounded the PWs and the other Hindus and attacked them. But to some extent specific overt acts are attributed to appellants 1, 4, 5, 7, 8, 10, 17, 22 and 25. It is mentioned therein that these nine accused were armed with deadly weapons and were seen assaulting the deceased Ram Narain and others. Now in the present deposition he improved his version and stated that in addition to these nine accused, five more persons also attacked the deceased and others. In view of this variation we think that it is safe to convict only such of the appellants who are consistently mentioned as having participated in the attack from the stage of earliest report. With regards the rest PW 1 mentioned in an omnibus way that they were armed with lathis. He did not attribute any overt act to any one of them. Further, the medical evidence rules out any lathis having been used. The doctor found only incised injuries on the dead bodies and on the injured PWs. Therefore, it is difficult to accept the prosecution case that the other appellants were members of the unlawful assembly with the object of committing the offences with which they are charged. We feel it is highly unsafe to apply Section 149 IPC and make everyone of them constructively liable. But so far as the above nine accused are concerned the prosecution version is consistent namely that they were armed with lethal weapons like swords and axes and attacked the deceased and others. This strong circumstance against them establishes their presence as well as their membership of the unlawful assembly. The learned counsel appearing for the State vehemently contended that the fact that the Muslims as a body came to the scene of occurrence would show that they were members of an unlawful assembly with the common object of committing various offences including that of murder. Therefore all of them should be made constructively liable. But when there is a general allegation against a large number of persons the Court naturally hesitates to convict all of them on such vague evidence. Therefore we have to find some reasonable circumstance which lends assurance. From that point of view it is safe only to convict the abovementioned nine accused whose presence is not only consistently mentioned from the stage of FIR but also to whom overt acts are attributed. The fact that they were armed with weapons like swords and axes and attacked the victims shows that they were members of an unlawful assembly with the common object of committing murder and other offences with which they were charged. In the result we confirm all the convictions and sentences awarded to appellants 1 Sherey, 4 Tafazzul, 5 Aziz, 7 Rasheed, 8 Rahman, 10 Nasrullah, 17 Lal Mohammad alias Lalu, 22 Shauliah and 25 Halim. So far as the other appellants are concerned, for the abovestated reasons we set aside the convictions and sentences passed against them and direct that they shall be set at liberty forthwith if not required in any other case.

5. Therefore, the appeal is dismissed as against appellants 1, 4, 5, 7, 8, 10, 17, 22 and 25 and allowed as against the other appellants. The appeal is accordingly disposed of.

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