

Harijan Dhana Badha and Others

Vs

State of Gujarat

Criminal Appeals No. 592 of 1987 with No. 598 of 1987

(M.K. Mukherjee, S.P. Kurdukar JJ)

26.04.1996

JUDGMENT

M. K. MUKHERJEE, J. –

1. 11 persons (hereinafter referred to as A-1 to A-11 respectively) were tried by the Additional Sessions Judge, Gondal for rioting with deadly weapons and committing the murder of Dana Pitha in prosecution of their common object. The trial court acquitted eight of them and convicted and sentenced A-2, A-6 and A-7 under Section 302 IPC. Against the judgment of the trial court two appeals were preferred : one by the three convicts and the other by the State challenging the acquittal of A-1, A-3 to A-5 and A-8 to A-10, but not of A-11. In disposing of the appeals by the impugned judgment the High Court upheld the conviction of A-2, A-6 and A-7 (after altering the conviction of A-7 to one under Sections 302/149 IPC) and the acquittal of A-9 and A-10, but reversed the acquittal of A-1, A-3 to A-5 and A-8 and convicted them under Sections 148 and 302/149 IPC. Against dismissal of their appeal A-2, A-6 and A-7 has filed one of these two appeals (Criminal Appeal No. 598 of 1987) while the other one has been filed by A-1, A-3 to A-5 and A-8, against their conviction and sentence as recorded by the High Court. Both the appeals have been heard together and this judgment will dispose of them.

2. Bereft of details the prosecution case is as under :

(a) The deceased Dana Pitha hailed from Village Ambardi in Gondal taluka where all the accused also live. A month prior to the incident with which we are concerned in these appeals a quarrel took place between Accused 1 and 2 members of Dana Pitha's family in their village for which a complaint was lodged at the former's instance with the police against Dana Pitha and his two sons.

(b) In the morning of 26-4-1981 Dana Pitha had gone to the market-place of their village while his son Ramji Dana (PW 1) along with his two brothers had gone to the field to work as labourers. Uga Lakha (PW 3), who hails from Village Machharda, had come to the house of Dana Pitha in that morning and having come to know that Dana had gone to the market went there. On their way back from the fields at or about 8.30 a.m. Ramji proceeded towards their house in the Harizan Vas to leave the shovel he was carrying and his two brothers went to the village market. While Ramji was going home he saw his father Dana and Uga Lakha also going towards their house.

(c) For going to the house of Dana one has to go along a road which runs north to

south. That road meets a lane which runs east to west and in that lane is the house of Dana. While proceeding along the road when Dana and Uga reached near the house of A-10, which is on its eastern side, A-9 and A-10 threw stones from the terrace of the house which hit deceased Dana. Immediately thereupon the other accused persons rushed there from the adjoining deli of Gova Daya armed with various weapons including dharia, axe, pickaxe (trikam), pipes and sticks and started beating Dana with their respective weapons. As a result of such beating Dana fell down dead. The accused persons then fled away.

(d) In the meantime Ramji, who had come out of their house after leaving the shovel, heard the shouts of Uga for help and rushed to the scene of occurrence. Devuben, who was sitting in the osari of her house heard her daughter, who was playing in the lane, crying and she also ran there.

(e) An information about the incident was given to the police station over phone by Uga Lakha and on receipt of the same Jamadar Shri Shukla came to the village. He recorded the complaint of Ramji and sent it to the police station. On that complaint a case was registered and Shri V.S. Gupta, Assistant Superintendent of Police took up investigation. Shri Shukla then went to the scene of offence and prepared the inquest panchnama as also the panchnama of the scene of offence. He then recorded the statements of Devuben, Uga Lakha and other witnesses. After completion of investigation police submitted charge-sheet and in due course the case was committed to the Court of Session.

3. The accused pleaded not guilty to the charges levelled against them and contended that they had been falsely implicated.

4. The mainstay of the prosecution case at the trial was the evidence of the three eyewitnesses, namely Ramji (PW 1), Uga Lakha (PW 3) and Devuben (PW 8). Besides, the prosecution relied upon the medical evidence to corroborate their evidence. The trial court found the evidence of PWs 1 and 3 partly reliable but the evidence of PW 8 wholly unreliable. On discussion of the evidence of PWs 1 and 3 that of Dr Vasudeva, who held the post-mortem examination upon the dead body of Dana, the trial court first held that the incident occurred at the time and place alleged by the prosecution, and that Dana met with his death owing to injuries that were inflicted on various parts of his body. The trial court then proceeded to consider "whether the accused had formed an unlawful assembly with the common intention to murder deceased Dana Pitha and in furtherance of that common intention the accused armed themselves with various deadly weapons and assaulted the deceased and caused his death". After discussing the evidence of PWs 1 and 3 relating to the first part of the incident, namely, throwing of stone from the house of A-10 the trial court observed as under :

"What is required to be established for unlawful assembly is that there must be a preconcert or premeditation on the part of the accused and in furtherance of that preconcert or premeditation they ought to have gathered armed with their weapons in order to carry out their common intention and, therefore, to accomplish their object. Here none of these ingredients are established in our case merely because if we go by the prosecution case then simply by having the number of accused gathering cannot be said to be termed as an unlawful assembly. It is pertinent to note going by the prosecution case that neither Accused 9 Kala Pitha nor Accused 11 Pala Pitha

shouted or made any sound or noise after throwing the stone on the head of the deceased Dana Pitha and as a result of that shout, noise or sound the rest of the accused gathered and then assaulted the deceased Dana Pitha to death. Therefore, in view of the circumstances I am of the opinion that the prosecution has failed to establish the unlawful assembly on the part of the accused within the meaning of Sections 147, 148, 149 IPC and that, therefore, we will have to consider the individual act on the part of each of the accused and whether those individual acts constitute any offence so far as each of the accused is concerned."

The trial court then undertook the task of finding out the individual roles played by the accused in the murder from the testimonies of PWs 1 and 3 and drew the following conclusion :

"... If the accused who are eleven in number had given the blows then there would be only 11 injuries and not 12 injuries. If the accused had given three to four blows in all as per the testimony of Uga Lakha and six to seven blows as per the testimony of Ramji Dana then the injuries on the deceased Dana Pitha have not been explained as to how he got more injuries than six to seven injuries which would have been if he would have been given six to seven blows. This, therefore, would go to show that the presence of Accused 1, 3, 4, 5, 8 and 11 at the time of the incident is highly doubtful."

5. In drawing the above conclusion the trial court also commented upon the contradictions in the evidence of the two eyewitnesses, one of which related to the sequential order in which the accused appeared on the scene of occurrence and the other reads as under :

"... So, looking to this part of his (PW 3) evidence we find that if we go by his evidence then Dhana Badha had given two dharia blows both on the head and face of deceased Dana Pitha when the complainant Ramji Dana says that the first blow which he saw was on the face of his father and that same person also gave the blow on the head of his father. But Ramji Dana sticks to his case that the accused Dhana Badha gave a dharia blow on the face of his father only and not on the head of his father. So looking to this material contradiction in this evidence of the complainant Ramji Dana it appears that the complainant Ramji Dana is confused as to who gave the dharia blow on the face of his father and he is not able to know as to the person who actually gave the dharia blow on his father, because, if we go by his case, then surely, Accused 1 has not given the dharia blow on the head of his father, whereas, the complainant has said that two dharia blows were given on his father, one on the head and one on the face and later on he resiled from his statement by saying that only one dharia blow was given. Thus from this it is difficult to believe that the dharia blow was given by Accused 1 Dhana Badha."

6. The trial court, however, found that the evidence of PWs 1 and 3 trustworthy so far as they testified about the roles of A-2, A-6 and A-7 in the murder and convicted and sentenced them as indicated earlier.

7. In its judgment the High Court first observed that the entire approach of the trial court in dealing with the case was patently wrong for it confused "common intention" with "common object" and applied the test of former instead of the latter. In making the above comment the High Court relied upon the decisions of this Court in *Sukha v. State of Rajasthan* (AIR 1956 SC 513 : 1956 SCR 288),

Masalti v. State of U.P. (AIR 1956 SC 202 : (1964) 8 SCR 133), and Muthu Naicker v. State of T.N. ((1978) 4 SCC 385 : 1979 SCC (Cri) 14 : AIR 1978 SC 1647). The High Court next referred to the evidence of PW 8 to point out that the finding of the trial court that she was not a reliable witness was not a proper one. In criticising the observation of the trial court that the evidence of PWs 1 and 3 contradicted each other as to sequence of the surfacing of the accused persons on the scene the High Court observed :

"The incident happened in quick sequence and, therefore, merely because there is some contradiction between the witnesses about Bechar and Jetha coming to the scene of offence in particular sequence, that by itself is not sufficient to discard the evidence and hold that presence of Accused 3, 4, 5, 8 and 11 was doubtful. The reasoning adopted and conclusion arrived at by the learned trial Judge is perverse."

8. As regards the other comment of the trial court, regarding contradictions in the evidence of PWs 1 and 3 (quoted earlier) the High Court had this to say :

"This appreciation of the evidence of complainant Ramji relating to the injuries caused by Dhana Badha is misreading of evidence and is nothing but perverse. Ramji has clearly stated that dharia blow was inflicted by Accused 1 Dhana Badha on the face of his father. Merely because at one stage he stated that injury was caused on the head and immediately corrected himself is not by itself sufficient to discard his evidence. Medical evidence on the point is very clear. Dr Vasudeva (Ex. 32) has stated that incised wound was on the left side of the forehead and a punctured wound was in between the eyebrows. Another punctured wound was on the left side mandible region, and incised wound could have been caused by dharia and punctured wound could have been caused by the pointed edge of dharia."

After pointing out the above perversities in the judgment of the trial court the High Court reappraised the evidence to ascertain whether the accused persons formed an unlawful assembly with the "common object" of committing the murder of Dana and concluded that the eight appellants did share such a common object.

9. Having carefully perused the prolix judgments of the trial court and the High Court (they run through 93 and 99 pages respectively) in the light of the evidence on record we do not find any merit in these appeals. We hasten to add that in drawing our above conclusion we have left out of our consideration the evidence of PW 8 as, in our opinion, the reasons given by the trial court for discarding the same cannot be said to be proper. Before, however, we proceed to consider the evidence of these two witnesses we may point out that the judgment of the trial court is the outcome of its failure to distinguish between common object and common intention and of giving undue importance to ignorable contradictions. In the case of Masalti (AIR 1965 SC 202 : (1964) 8 SCR 133) to which, as noticed earlier, the High Court has made a pointed reference, this Court has in no uncertain terms laid down the principle to be applied in dealing with a case of rioting and commission of offence in furtherance of common object of an unlawful assembly with the following words :

"The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who

were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. ... it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact Section 149 makes it clear that if an offence is committed by any member of 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, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

Instead of deciding the case in the light of the above principles of law, which it was required to do, the trial court decided it confining its attention to the individual acts of the accused persons only. As regards the other infirmity in the judgment of the trial court, which we have mentioned earlier, we can only refer to the nature of contradiction noticed and relied upon by it (quoted earlier); and the comments of the High Court thereon (quoted earlier), with which we are in complete agreement.

10. That brings us to the evidence of PWs 1 and 3 who narrated the entire prosecution case. Of the above two witnesses PW 3 unquestionably is an independent witness and his evidence along with that of PW 1, is cogent and consistent. On perusal of their evidence we find that even though both of them were subjected to a lengthy cross-examination nothing could be elicited by the accused persons in their favour to impair their credibility. Their evidence also gets ample corroboration from that of the doctor who held autopsy and found as many as 12 injuries on the person of the deceased, including incised and punctured wounds. Besides, he found fracture of the skull bones. The evidence of the above two eyewitnesses unmistakably proves that the appellants came together from the deli of Gova Daya armed with sharp-cutting weapons like dharia, pointed weapons like pickaxe and blunt weapons like sticks and pipes and started assaulting Dana, which resulted in his instantaneous death. It is manifestly clear therefore that their common object was to commit the murder of Dana. Their evidence further indicates that Accused A-6 inflicted 2/3 blows on the neck and A-2 gave blows on the head which proved fatal. Such being the state of evidence obtaining on record we find no hesitation in upholding the judgment of the High Court and dismissing both these appeals. The appellants, who are on bail, will now surrender to their bail bonds to serve out the remainder of the sentence.