SUPREME COURT OF INDIA

Lokeman Shah

Vs.

State of W.B.

Crl.A.No.784 of 2000

(K.T. Thomas, R.P. Sethi and S.N. Phukan JJ.)

11.04.2001

JUDGMENT

K.T.Thomas, J.

1. On the day of Holi celebrations, seventeen years ago in Calcutta, (as the city was then known) an infuriated motley mob carmined one street not with Gulal (which is often used by ecstatic celebrants) but with human blood. They ran berserk blinded by communal frenzy and unleashed a terror of murder spree on 18.3.1984, along Fatehpur Village Road, which was within the limits of Garden Reach Police Station. Two among the innocent casualties of the gory episode were a young IPS officer and his security guard, both of whom were violently murdered.

2. Four persons, out of a number of accused arraigned before the Sessions Court for murder and other allied offences, were convicted and sentenced to death by the trial court at the first round. But on a retrial as ordered by the High Court the Sessions Court confined the conviction to two persons (the appellants herein) and awarded the sentence of death to both of them. A Division Bench of the High Court of Calcutta, while confirming the conviction of both, has chosen to uphold the death penalty for appellant Nasim @ Naso, and altered the sentence passed on appellant Lokeman Shah from death to life imprisonment, besides lesser sentences for lesser counts of offences. Both of them have filed appeal before this Court by special leave.

3. State of West Bengal is not prepared to spare Lokeman Shah from extreme penalty for murdering two of its police personnel and hence the State has filed an appeal for enhancement of the sentence to the extreme penalty. As we heard both the appeals together we have the advantage of disposing of both of them together by this common judgment.

4. A communal riot broke out on the morning of 18.3.1984. The rioters were running on a rampage hither and thither with bombs, brickbats and other weapons, prowling for human prey. Vinod Kumar Mehta, a 35-year old IPS officer was then the Deputy Commissioner of Police (DCP) at the Port Division, Calcutta. The Garden Reach Police Station falls within the territorial limits of his domain and hence he set out to quell the riots, escorted by his security

guard Mukhtar Ali (a police constable) besides some other police personnel. When they felt that the infuriated rioters were thirsting for victims they thought it safe to go into a mosque expecting asylum. But the Imam of the mosque was not disposed to afford a shelter to such people. So they went out of the mosque. The security guard Mukhtar Ali ran into the house of a private individual while the Deputy Commissioner ran into the house of a police constable (PW- 21 Abdul Latif Khan). As the rioters were chasing him PW-24 Md. Hadis Khan son of PW-21 Abdul Latif Khan gave asylum to the Deputy Commissioner in his house.

5. The rioters spotted the fleeing cops. The Deputy Commissioner in order to save himself from the fury of the chasing mob got into the bathroom of the house of PW-21 but a few of the marauders pursued him up to that place and caught him and killed him. The security guard was also intercepted by the blood thirsty assailants and he too was killed. Not having satisfied with the death of these police personnel the killers mutilated their corpses, stripped them off, tethered them and tried to incinerate the dead bodies which succeeded only partly as the bodies remained charred.

6. We may refer to the evidence focussing on the two appellants alone. As against appellant Nasim @ Naso, PW-24 Hadis Khan has deposed that he saw that accused among the assailants inflicting two blows with an iron rod on the head of the Deputy Commissioner of Police, the first blow caused his helmet to slide off, but the second blow fell on the head of the victim. The doctor who conducted the autopsy noted as many as twenty two ante-mortem injuries on the dead body of the Deputy Commissioner, out of which the injuries on the head consisted of a depressed comminuted fracture involving the right frontal and parietal and left temporal bones of the skull crushing the brain. According to the doctor the said injury could be inflicted by an iron rod and that was sufficient in the ordinary course of nature to cause death.

7. Shri A.K. Ganguli, learned senior counsel who argued for the appellants contended that the testimony of PW-24 cannot be treated as wholly reliable and hence there is no legal justification in relying on his evidence being the solitary item as against appellant Naso. Learned senior counsel alternatively contended that there is no corroboration for the evidence of PW-24 (Md. Hadish Khan) in so far as he implicated appellant Naso. It must be pointed out that the trial court and the High Court have concurrently accepted the evidence of PW-24 (Md. Hadis Khan) as reliable. Normally the Supreme Court would not upset such a finding unless it is shown that his evidence is afflicted with such serious infirmity.

8. The positional importance of PW-24 (Md. Hadish Khan) as a witness for the occurrence is significant. The incident happened in his own house and in his presence. He would thus be one of the most natural witnesses to speak about what happened in front of him. We are not told of any cause for PW-24 to have any bias against appellant Naso for falsely implicating him nor are we told of any difficulty for PW-24 to identify Naso as one among the assailants particularly when the witness ascribed a specific serious role to that accused. His evidence has secured corroboration from the testimony of his father PW- 21 Abdul Latif who said that his son told him that Deputy Commissioner of Police took shelter in his house and that

appellant Naso and some other persons (whose names were also mentioned) assaulted him. Such evidence of PW-21 is admissible under Section 157 of the Evidence Act as a corroborative material. (vide *State of T.N. vs. Suresh and anr.*[1]).

9. Thus we have no reason to dissent from the findings of the trial court in so far as the involvement of appellant Naso in the murder of Deputy Commissioner of Police (V.K. Mehta) is concerned. The conviction of the offences under different counts passed on that appellant thus needs no interference. The question whether the sentence of death passed on him need be altered or not can be dealt with while considering the appeal filed by the State of West Bengal for enhancement of the sentence passed on the co- appellant Lokeman Shah.

10. Now we proceed to consider the appeal filed by Lokeman Shah. The only evidence which prosecution succeeded in adducing against him is a statement (Ext.13) which is described as confessional statement of appellant Lokeman Shah as recorded by PW-51 P.K. Deb (Sub Divisional Judicial Magistrate). That statement was acted on by the trial court and the High Court as a confession voluntarily made by the appellant, and the conviction of that appellant was made entirely on the said material. Before dealing with the contention advanced by Shri A.K. Ganguli, learned senior counsel we deem it apposite to extract the substance of Ext.13 below:

11. At about 10 or 10.30 A.M. Naso, Puttan, Akhtar and Chowdhary came to me for money. They said that money was needed to buy weapons to fight against persons who set fire to the mosque if they created any trouble. I told them that I would also fight out. After they ran away I heard the sound of a commotion around 11.45 A.M. I saw two police officers scampering and many who chased them pelting brickbats at them. One policeman in white uniform went to the house of the Mulla and the other police officer in Khaki dress ran straight. I threw a brickbat when that police officer crossed me, but I do not know whether it hit him. He entered the house of PW-21 and he was chased by others who threw brickbats at him. I also threw one or two brickbats but I am not sure whether they hit him or not. After some time four persons (Naso, Puttan, Akhtar and Chowdhary) came from the side of Battikal mosque. I was also taken by them inside the house of PW-21. I found the police officer in Khaki dress standing near the kitchen. When he revealed his identity as the DC some among us said that they did not know whether he was DC or not. Then all the others caught him, I too caught him. Then Naso hit him with an iron rod on his head, but his helmet fell off. Naso hit him again and then the policeman fell down. Puttan and Akhtar also dealt blows on him with deadly weapons. As I could not stand the gushing of blood I left the room. Shri A.K. Ganguli, learned senior counsel raised a three-pronged attack on Ext.13. Firstly, he said it did not amount to a confession at all. Second is, even assuming that it is a confession it cannot be relied on as the statement was not voluntary. Third is, even if it can be acted on as a confession it is insufficient to convict its maker for the offence under Section 302 read with Section 49 IPC as the confessor never said that there was a common object to murder the police officer. Alternatively, he contended that there is nothing in Ext.13 to show that the confessor shared any knowledge with any others, much less a common object to murder a police officer.

12. Dealing with the first point we have no doubt that the statement (Ext.13) attributed to accused Lokeman Shah, does incriminate himself very much. At any rate it is not exculpative despite the possibility of reading one or two sentences culled out separately from the rest of it, in order to say that they are not tantamounting to inculpative nature. But the test of discerning whether a statement recorded by judicial magistrate under Section 164 from an accused is confessional or non-confessional is not by dissecting the statement into different sentences and then to pick out some as not inculpative. The statement must be read as a whole and then only the court should decide whether it contains admissions of his incriminatory involvement in the offence. If the result of that test is positive then the statement is confessional, otherwise not. Applying that test on Ext.13 statement we have no doubt that it is a confessional statement.

13. Learned counsel contended that the confession without corroboration cannot be acted on for the purpose of entering a conviction. We are unable to agree with the said submission as a legal proposition. Way back in 1957, the Supreme Court has laid down the law in explicit terms that confession if true and reliable can form the basis of conviction. [vide *Balbir Singh vs. State of Punjab*[2], *Pyare Lal Bhargava vs. State of Rajasthan*[3] *and Ram Chandra Prasad Sharma vs. State of Bihar*[4]]. Yet this Court said time and again that as a rule of prudence the court must seek other circumstances to corroborate a confession, particularly when the same is retracted. There also the delay involved in making the retraction was considered relevant for a court to judge regarding genuineness of the confession. Even about the extent of corroboration this Court has pointed out as early as in 1954, that if it is insisted that each and every circumstance mentioned in the confessional statement must be separately and independently corroborated then the rule would become meaningless inasmuch as the independent evidence itself would afford sufficient basis for conviction and hence it would be unnecessary to call the confession in aid. (vide *Hemraj vs. The State of Ajmer*[5]). This was reiterated by a three-Judge Bench of this Court in Balbir Singh vs. State of Punjab (supra). This is what the learned Judges observed then:

14. It is necessary to emphasise here that the rule of prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused person in the crime must be separately and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made.

15. Dealing with the contention that a confession was not voluntary learned senior counsel invited our attention to a fact that one of the persons arrested along with the appellant died in the lock up (his name is Idris) and that would give sufficient indication as to the physical torture which the persons involved in this case would have been subjected to. Unfortunately neither the prosecution nor the defence could show how Idris died when he was in police custody. The defence did not even bother to ask the investigating officer about the result of the inquiry conducted by a magistrate under Section 176 of the Code of Criminal Procedure, regarding the death of Idris (if he had died while he was in the lock up the afore-mentioned provision mandates that the inquiry should be conducted by a magistate). In the absence of any such material it is too late in the day for this Court, particularly dealing with the appeal

under Article 136 of the Constitution, to use the death of Idris as a sufficient ground to eclipse the voluntariness of the confession of Lokeman Shah which was recorded by a judicial magistrate. In this context we may also point out that there is no allegation that the Judicial Magistrate has not adopted all the precautions enjoined by law before recording the confession. No other formality prescribed under law has been infringed by PW-51 Judicial Magistrate.

16. It is on the next point (whether anything more could be built up on the basis of the confession) that Shri Ganguli, learned senior counsel for the appellant, and Shri Altaf Ahmad, learned Additional Solicitor General, appearing for the State of West Bengal, argued in extenso. Learned senior counsel for the appellants pointed out that de hors Ext.13 there is not even a shred of evidence for involving accused Lokeman Shah with this crime and hence even if the confession in its full text is received in evidence it is impermissible to add anything to it for the purpose of building up a conviction of the confessor. At the first blush we felt that the above contention was impressive. But after hearing Shri Altaf Ahmad, learned Additional Solicitor General and after ruminating deeper into it we felt that the contention is not legally acceptable.

17. The confession shows that appellant Lokeman Shah got himself involved in the episode and the role played by him. True, he did not say in so many words that he shared the common object of the unlawful assembly. Usually nobody would say like that. We may observe that even a witness for prosecution in cases involving unlawful assembly would not testify in court that the accused persons had a particular common object. It is normally the judicial work of the court to make out from proved facts whether a particular accused shared the common object of the assembly. After all, the common object once formed would invariably remain in the minds of the members of the unlawful assembly and it is very seldom that they proclaim it to be heard by others.

18. A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of a particular case, to act upon the supposition that it exists, (vide Section 3 of the Evidence Act). What is required is materials on which the court can reasonably act for reaching the supposition that a certain fact exists. Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting on any important matter concerning him. [vide *M. Narsinga Rao vs. State of A.P.*[6]].

19. It is within the radius of permissibility that court can rely on a factual presumption for the purpose of reaching one conclusion. Thus, the confessional statement, if admissible and reliable, can be used by the court for drawing inferences as to whether the confessor shared the common object with the rest of the members of the unlawful assembly. For that purpose the court will take into account other materials available in evidence. There is no warrant for the proposition that the court cannot proceed from the confession even a wee bit for the purpose of knowing whether the confessor had entertained any particular intention while perpetrating the acts admitted by him in his confession. Whether such intention could have

focussed on the common object of the unlawful assembly to which he joined depends upon other facts.

20. Section 149 of IPC consists of two parts. The first part deals with the commission of an offence by any member of the unlawful assembly in prosecution of the common object of that assembly. Second part deals with commission of an offence by any member of an unlawful assembly in a situation where other members of that assembly know to be likely to be committed in prosecution of that object. In either case every member of that assembly is guilty of the same offence which another members committed in prosecution of the common object. The focal point is the common object.

21. In *Mizaji vs. State of U.P.*[7] this Court vivisected S.149 into two parts and held that the first part means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish with the common object. Learned Judges further observed that the offence committed must be connected immediately with the common object of the unlawful assembly of which accused were members. If it is to come under the second part, the court must be in a position to hold that the offence committed was such as the members knew was likely to be committed, even if the offence was not committed in direct prosecution of the common object. But in that event mere possibility of commission of offence by one of the members of the assembly is not enough. Mere possibility would swing only in the range of might or might not happen. A higher degree of possibility is required to say that the member of the assembly knew that the offence was reasonably likely to be committed. In *Muthu Naicker vs. State of T.N.*[8] this Court made the following observations, which should always be borne in mind by the courts while considering the application of S.149 of the Penal Code. Whenever an uneventful rural society something unusual occurs, more so where the local community is faction ridden and a fight occurs amongst factions, a good number of people appear on the scene not with a view to participating in the occurrence but as curious spectators. In such an event mere presence in the unlawful assembly should not be treated as leading to the conclusion that the person concerned was present in the unlawful assembly as a member of the unlawful assembly.

22. In that case this Court held that where a large crowd collected, and one among them committed a stray assault on a victim, the said assault cannot be treated as an act committed in prosecution of the common object of the unlawful assembly. Nor can the remaining accused be imputed with the knowledge that such an offence was likely to be committed in prosecution of the common object of the assembly. In *Samant vs. State of Maharashtra*[9] this Court observed that it is an over statement of law that when a morcha moved on to a stage when it became unlawful any person who was a member of that morcha must be presumed to share the common object of the unlawful assembly. The court must enter satisfaction that a particular accused was a member of the unlawful assembly either through his active participation or otherwise. It must further be shown that he shared the common object of the assembly. Of course the court can draw necessary inference from the conduct, but mere presence in the assembly is hardly sufficient to draw any adverse inference against him. The question whether or not the offence having been committed in prosecution of the common

object of the assembly is one of the fact, depending upon facts and circumstances of each particular case.

23. In this context it is appropriate to refer to Section 142 of the IPC. It pertains to a person who intentionally joins an unlawful assembly and continues to involve himself in it. The only condition which the section envisages is that the person who joins the unlawful assembly should have been aware of the facts which rendered such assembly as unlawful. If he knew that an unlawful assembly had been formed with a common object and if he has chosen to join it en-route to its destination the person joining midway can also be fastened with the vicarious liability envisaged in Section 149 of the IPC, unless he drops himself out before reaching such destination.

24. We have no doubt that appellant Lokeman Shah joined the unlawful assembly knowing fully well that it had already become unlawful as its common object was to chase the persons whom the rioters believed to be responsible for defilement of the mosque. It is immaterial that the deceased V.K. Mehta had no part in the destruction or defilement of any mosque, but the rioters believed him to be the one. We must bear in mind that the chasers carried with them explosive and lethal weapons. In all such broad circumstances it would be inane to presume that the common object of those chasers was something less than finishing the prey whom they were chasing after. For the aforesaid reasons we are not persuaded to interfere with the conviction passed by the trial court and concurred by the High Court, in respect of the appellant Lokeman Shah. The last and the only remaining aspect is regarding sentence. Appellants had neither any previous enmity to the victims nor even any acquaintance with them. It is admitted fact that they acted in a rage of fury blind- folded by communal frenzy. We are aware that in most of the communal riots the participants are by and large illiterate and indoctrinated people. When the literate leaders try to keep themselves away, without participating in the perpetration of crimes though, perhaps, some such persons would fan up the communal frenzy by their utterances in the minds of the ignorant poor people who in a deranged fury rush into the streets prowling for prey. It was an unfortunate plight of the people who are ignorant about the real sublime thoughts of religions that they threw themselves into the cauldron of communal delirium which was burning up to boiling point. That was a time when the minds of the rioters turned demented and no sensible thoughts would enter into them. The leaders and the society have not played their part to teach them that religions are not meant for killing fellow human beings. If ignorance had prompted people to take up cudgels in the name of religion for indulging in carnage or murders they are no doubt liable to be convicted and sentenced for the offence committed by them. But we have great difficulty to treat such a case as rarest of the rare cases in which the alternative sentence of life imprisonment can unquestionably be foreclosed. Thus, we alter the sentence passed on Nasim @ Naso for the offence under Section 302 read with Section 149 IPC and impose the next alternative (imprisonment for life) for the said offence. Subject to this modification of the sentence we dismiss both these appeals.

[1]1998 (2) SCC 372 *[2]AIR 1957 SC 216* *[3]AIR 1963 SC 1094* *[4]AIR 1967 SC 349*
[5]1954 SCR 1133 *[6]2001 (1) SCC 691* *[7]AIR 1959 SC 572* *[8]AIR 1978 SC 1647*
[9]AIR 1979 SC 1265