SUPREME COURT OF INDIA

Hamlet

Vs.

State of Kerala

Crl.A.Nos.584-585 of 2002

(N. Santosh Hegde and B. P. Singh, JJ.)

21.08.2003

JUDGEMENT

SANTOSH HEGDE, J.:-

1. These criminal appeals are filed by the convicted accused persons against the judgment of the High Court of Kerala at Ernakulam dated 7th November, 2001 whereby the High Court confirmed the sentence imposed on these appellants by the trial Court under Sections 302 and 324 read with Section 149, IPC. Since particulars of the punishment imposed on other accused is not relevant for the purpose of considering these appeals, we will not advert to it unless necessary in any particular context. The appellants before us are A-1 to A-3 before the trial Court.

2. The prosecution case is that Yugine alias Sajiv and others, some of whom were prosecution witnesses in this case, were active followers of the Indian National Congress Party. The accused were stated to be followers of Communist Party of India (Marxist). It is stated that at about 3 p.m. on 1-10-1991, 44 accused entered into a criminal conspiracy to commit the murder of Yugine (deceased), Jose (PW-2) and others as also to commit dacoity and mischief in the houses of the

followers of Congress-I. In pursuance of that common object, at about 4 p.m. on 1-10-1991 the accused formed themselves into members of an unlawful assembly, armed with deadly weapons. It is alleged that they chased deceased Yugine and PW-2 who were returning from the shop of PW-15 situated at Anjuthengu on a public road. In that process at a place near Manjamoodu junction A-1 to A-4, A-24 and five others wrongfully confined the deceased and PW-2 from proceeding in any direction. The prosecution further alleges that the 1st accused caught hold of Yugine by his waist, lifted him up and threw him on the ground. Thereafter, he kicked the deceased on the stomach and A-2 and another accused beat the deceased with iron bar, while A-3, A-4 and two others beat the deceased and PW-2 with Oars. The prosecution alleges that PW-1, brother of the deceased, came running to the place of occurrence and he was also beaten up by the accused. Subsequently, A-5 to A-7, A-9 and A-10 to A-23 and other accused joined in attacking the deceased and PW-2. The further case of the prosecution is that A-6, A-7 and four other persons attacked PW-4 and inflicted injuries on him with an intention to kill him. The prosecution also alleges that the accused persons trespassed into the houses of certain prosecution witnesses and committed robbery.

3. After the said attack the deceased, PW-2 and PW-4 were taken to the Taluka Head Quarters Hospital and from there to Medical College Hospital, Trivandrum. While undergoing treatment, Yugine succumbed to the injuries at 11.20 p.m. on 1-10-1991. In the meanwhile, PW-1 at about 4 p.m. had lodged a complaint Ext. P-1 in the Police Station which was registered for offences punishable under Sections 143, 147, 148, 120-B, 450, 451, 452, 342, 359, 397, 427, 323, 324 and 307, IPC. After investigation a final report was filed by the police against 44 persons when offence under Section 302 read with Section 149 was included. Out of these 44 accused, A-25, A-26 and A-37 died and out of the other accused persons mentioned in the final report only 24 persons were tried by the trial Court, therefore, those persons against whom the trial could not proceed were treated as "other accused persons".

4. The learned IInd Additional Sessions Judge, Thiruvananthapuram acquitted A-5, A-9, A-10 and A-17 while he convicted A-1 to A-4, A-6, A-7 and A-24 for offences punishable under Sections 143, 147, 148, 342, 427, 450, 451, 452, 461, 395, 397, 324, 307 and 302, IPC read with Section 149, IPC. He sentenced all these accused persons to undergo rigorous imprisonment for various terms and for various offences while for the offence punishable under Section 302 he directed the said accused to undergo imprisonment for life.

5. As stated above, in an appeal filed by the convicted accused persons the High Court while confirming the sentence imposed on A-1 to A-4 under Section 302 as well as under Sections 143, 147, 148 and 324 acquitted A-6 and A-7 of the offence punishable under Section 302 but convicted them of an offence punishable under Section 324, IPC. So far as A-24 is concerned he was acquitted of all the charges.

6. It is against the said judgment of the High Court, 4 appellants are before us who have been convicted of an offence punishable under Section 302 read with Section 149, IPC and for certain

other offences.

7. Shri Sanjay Parikh, learned Counsel appearing for the appellants contended that the High Court having rightly disbelieved the prosecution case in regard to the attack on PW-4, as also the prosecution case against other acquitted accused, the High Court ought to have extended the said benefit of doubt to the appellants also. He also contended that even according to the finding of the High Court the prosecution has been able to establish the overt act of only 4 accused in regard to the assault on the deceased, therefore, the High Court fell in error in convicting the accused persons with the aid of Section 149, IPC because the number of people identified by the High Court in regard to the assault on the deceased was less than 5 as required under Section 141 of IPC. Hence, in the absence of any material to show that apart from these appellants there were some more accused who formed the unlawful assembly, the High Court could not have convicted the appellants for a charge under Section 302 with the aid of Section 149, IPC. He, of course, also attacked the evidence led by the prosecution in regard to the incident itself which according to him was full of contradictions and improbabilities. Alternatively the learned Counsel argued that even assuming that the prosecution has been able to establish the attack on the deceased by these appellants, the nature of injuries suffered by the deceased were such that these appellants cannot be attributed with the intention to kill the deceased nor could they be held to have had knowledge that the injuries caused by them in the ordinary course would lead to Yugine's death, hence, at the most the appellants can be held guilty of an offence under Section 324, IPC.

8. Shri John Mathew, learned Counsel appearing for the respondent-State supported the impugned judgment and contended that from the material produced by the prosecution, it is clear that accused 1 to 4, 6, 7 and 24 along with 5 other persons had attacked the deceased with iron rods etc. and some of the injuries suffered by the deceased were such as would cause death in the ordinary course. Therefore, assuming that the High Court was justified in acquitting A-6, A-7 and A-24 of the offence punishable under Section 302, still it could be seen from the finding of the High Court that A-1 to A-4 and 5 others had attacked the deceased, therefore, Section 149 is rightly relied on by the High Court to convict the appellants. He submitted that because of the political rivalry between the two groups of people, deceased Yugine was done to death and the nature of injuries would clearly show the intention of the accused was to commit murder, therefore, the conviction under Section 302 read with Section 149 was justified.

9. We do notice that both the Courts below have rejected the prosecution case of conspiracy punishable under Section 120-B of IPC. The High Court has also found that the prosecution has not established its case under Sections 307, 395 etc. We also notice that the High Court has specifically come to the conclusion that A-5, A-6 and A-24 were not the members of the unlawful assembly the object of which was to commit the murder of the deceased. Therefore, bearing in mind the argument of the learned Counsel for the appellants, we will examine the evidence on record as also the findings of the two Courts below. The trial Court in this regard came to the following conclusion :

"It is further found that the death of the deceased was caused by A1, A2, A3, A4, A6, A7 and A24. After discussing points Nos. 17, 18 and 19, I have found that A1, A2, A3, A4, A6, A7 and A24

committed the aforesaid acts in furtherance of their common object. Even though the presence of other accused persons at the scene of occurrence was spoken to by PW-1, specific overt acts are alleged only against A1, A2, A3, A4, A6, A7 and A24 in committing the aforesaid acts."

10. Based on this finding the trial Court convicted the said accused of an offence punishable under Section 302 read with Section 149 among some other offences.

11. From the above finding of the trial Court, we notice that the members of the unlawful assembly were identified by their individual overt acts and not by their mere presence. On this basis, according to the learned Sessions Judge, the unlawful assembly which attacked the deceased and which had the common object of committing the murder of the deceased consisted only of A-1 to A-4, A-6, A-7 and A-24, that is, an assembly of 7 members. Whereas the High Court in regard to the persons who constituted the unlawful assembly to attack the deceased held thus in its judgment :

"So the finding of the learned Sessions Judge that the prosecution has succeeded in establishing that A1 to A4 are guilty of the offences under Section 302 read with Section 149 of the Indian Penal Code is correct and is confirmed. But there is no evidence to hold that A6, A7 and A24 also inflicted any injuries on Yugine or they were aware that common object of the unlawful assembly is to eliminate Yugine or there is likelihood to commit such offence."

12. From the above observations of the High Court, we notice that even the High Court proceeded on the basis of accepting the prosecution case as to the members of the unlawful assembly only based on the overt acts of the accused persons and not by their presence. It is in this process the High Court found that the prosecution has not established that A-5, A-7 and A-24 had inflicted any injury on Yugine, therefore, it held that these three accused persons were not members of the unlawful assembly. Consequence of such a conclusion of the High Court would be that it is only A-1 to A-4 who attacked the deceased, therefore, they alone can be found to be members of the unlawful assembly and none other. However, without elaborating any further on the prosecution evidence and without naming or identifying or even coming to a final conclusion that there were persons other than A-1 to A-4 who together formed the unlawful assembly with the common object of committing the murder of the deceased. The High Court came to the following conclusion :

"We have already found that the evidence adduced only proves the identity of A1 to A4 as members of unlawful assembly. So we hold that the prosecution has succeeded in establishing that an unlawful assembly was formed at 4 p.m. on 1-10-1996 and A1 to A4 were members of that unlawful assembly. The evidence also shows that they were armed with deadly weapons and committed the offence of rioting. So the finding of the learned Sessions Judge that A1 to A4 are guilty of the offences punishable under Sections 143, 147 and 148 of the Indian Penal Code is correct and confirmed..... But the finding of the Court below that A6, A7 and A24 are guilty of the offences under Sections 143, 147 and 148 of Indian Penal Code are set aside and they are

acquitted of that offences."

13. From the above, we find an element of contradiction in the judgment of the High Court in regard to its conclusion as to who were the members of the unlawful assembly, while in an earlier part of the judgment it did observe that A-1 to A-4 and five others attacked the deceased, later on, while coming to the conclusion as to who were the members of the unlawful assembly the High Court rests satisfied with A-1 to A-4 alone as being members of the unlawful assembly. If that be so, we think the High Court was not justified in invoking Section 149 to convict the appellants of an offence under Section 302 because the said number falls short of the minimum number required to form an unlawful assembly under Section 141, IPC. It is true that this Court in any number of cases has held that there can be an unlawful assembly of less than five named accused so long as there is material to come to the conclusion that the prosecution has established that apart from these named accused there were also others who were unnamed but who were members of such assembly and shared the common object of that unlawful assembly. In the instant case it is true that originally the complaint stated that about 50 persons formed unlawful assembly, that number came down to 44 when the final report of the investigation was filed before the trial Court out of which only 24 persons were brought to trial. Out of these 24 accused, the Sessions Judge came to the specific conclusion that only A?1 to A-4, A-6, A-7 and A-24 together formed an unlawful assembly which would number seven in total, while the High Court came to the conclusion that out of these seven persons three accused namely A-6, A-7 and A-24 could not have been the members of the unlawful assembly thus leaving only A-1 to A-4 as the members of the unlawful assembly. Therefore, in the absence of a specific finding that there were other members also in the said unlawful assembly, the invocation of Section 149 will be untenable. Learned Counsel for the State contended that it is the prosecution case that apart from the appellants and other accused there were other persons also who formed the unlawful assembly and finding of the trial Court that only seven members formed the unlawful assembly was erroneous. Similarly, he contended that the High Court also committed an error in holding that A-6, A-7 and A-24 were not the members of the unlawful assembly, therefore, we should consider the prosecution case dehors the findings of the Courts below and only in the background of the complaint and evidence produced in this case which would indicate that apart from these four accused even accused 6, 7 and 24 and many others were members of the unlawful assembly. We cannot accede to this request of the learned Counsel for the respondent-State because all other accused except A-1 to A-4 have been acquitted by either the trial Court or the High Court and there is no appeal against their acquittal, therefore, the question of reappreciation of the evidence in these cases as against the acquitted persons does not arise at all at this stage even for the limited purpose of finding out whether A-1 to A-4 were members of an unlawful assembly as required under Section 141, IPC.

14. The learned Counsel for the State then pointed out from the judgment of the High Court that it had come to the conclusion that it is A-1 to A-4 and five others who were involved in the attack on Yugine, therefore, we should proceed on the basis that apart from A-1 to A-4 there were five others who were also members of the unlawful assembly. We are unable to accept this argument because though from the judgment of the High Court we notice that there is an observation of the High Court that A-1 to A-4 and five others were involved, this was only an observation and not a finding of the High Court. The finding of the High Court in regard to the members of the unlawful assembly is found in that part of the judgment which is extracted by us hereinabove wherein the

High Court came to a definite conclusion that so far as the attack on the deceased is concerned it is only A-1 to A-4 who were the members of the unlawful assembly. To fortify this conclusion of ours at the cost of repetition, we once again extract that part of the judgment which runs as follows :

"We have already found that the evidence adduced only proves the identity of A-1 to A-4 as members of unlawful assembly. So we hold that the prosecution has succeeded in establishing that an unlawful assembly was formed at 4 p.m. on 1-10-1996 and A-1 to A-4 were members of that unlawful assembly."

15. From the reading of this part of the judgment of the High Court, we find that the High Court has confined the members of the unlawful assembly only to A-1 to A-4. Therefore, we cannot accede to the argument of the learned Counsel for the respondent-State. In that view of the matter, we cannot accept the finding of the High Court that A-1 to A-4 can be found guilty of an offence punishable under Section 302 read with Section 149, IPC.

16. The question then would be : Will the appellants be entitled to an acquittal of the charge under Section 302 because the prosecution has failed to prove that the unlawful assembly did contain more than five persons entertaining the same common object ?

17. This Court in Nethala Pothuraja v. State of Andhra Pradesh (1992 (1) SCC 49) has held that the non-applicability of Section 149, IPC is no bar in convicting the accused under Section 302 read with Section 34, IPC if the evidence discloses commission of an offence in furtherance of the common intention of such accused. This is because both Sections 149 and 34, IPC deal with a combination of persons who become liable to be punished as sharers in the commission of offences. Therefore, in cases where the prosecution is unable to prove the number of members of the unlawful assembly to be five or more, Courts can convict the guilty persons with the aid of Section 34, IPC provided that there is evidence on record to show such accused shared the common intention to commit the crime. While doing so the Courts will have to bear in mind the requirement of Section 34. It is well-known that to establish the common intention of several persons to attract Section 34 of the IPC the following two fundamental facts have to be established- (i) common intention (ii) participation of the accused in commission of the offences. If the above two ingredients are satisfied even overt act on the part of some of the persons sharing in the common intention is not necessary. [See : Jai Bhagwan and Ors. v. State of Haryana (1999 (3) SCC 102)]. Bearing in mind the above principles and applying the same to the facts of the present case, we notice that on the date of incident a large number of people, which included A-1 to A-4 came in a group which the prosecution alleged had the object of causing the murder of the deceased and to assault PW-2 and PW-4 among their illegal intentions. Of course, the prosecution has failed to establish many of these charges. However, from the facts of this case it proved at least that A-1 to A-4 formed a separate group and targeted the deceased and PW-2 against whom there was a specific motive for these appellants to attack him. The prosecution has also proved in that attack the deceased died and PW-2 suffered injuries. The question then is : What was the common intention of these persons in

attacking the deceased? While the learned Counsel for the appellants contended that the common intention at the most was only to cause hurt, while the learned Counsel for the respondent-State vehemently submitted that it was to cause the death of Yugine and grievous hurt to PW-2. In this context, if we examine the prosecution case, we notice that A-1 caught hold of the deceased by his waist and threw him on the ground causing him grievous injuries on the backside of his head and thereafter A-1 assaulted the deceased by kicking him on various parts of the body and A-2 to A-4 attacked him with iron rods and Oars which caused among other injuries, a lacerated wound on the neck of the right elbow leading to fractures of the humorous, a contusion on the left ankle leading to fracture of the fibula, apart from nearly 12 other injuries on different parts of the body. Consequent to the throw deceased suffered a head injury because of which there was cerebral bleeding. The participation of these accused persons in the assault of the deceased even after he was thrown down to the ground by A-1 clearly shows that the further attack by A-2 to A-4 was in furtherance of a common intention they shared with A-1, therefore, in our opinion, Section 34 is clearly attracted to the facts of this case.

18. But then the question would be : What was the common intention shared by these accused persons in the attack on the deceased? While the learned Counsel for the appellant contended that from the nature of injuries and the manner in which the assault was committed, it could be nothing more than to cause hurt to the deceased, whereas the learned Counsel for the State contended that it is clear from the injury No. 4 suffered on the head of the deceased that all these persons had the knowledge that by such injuries, the victim would suffer death in the normal course, but in spite of the same, all these accused proceeded to attack the deceased, causing more injuries, which would show that each one of these persons had acted in furtherance of a common intention to cause death of the deceased.

19. We have noted that the medical report showed that the deceased had suffered about 14 injuries out of which injury Nos. 1 and 2 caused fractures and injury No. 4 was a head injury leading to subdural haemorrhage on the left part of the temporal lobe which seems to be the most serious of all wounds which ultimately led to the Yugine's death. After examining the entire prosecution evidence, we notice none of these accused used any deadly weapon carried by them on any vital part of the body like the head. Injury No. 4 which led to the death of the deceased was caused by the fall caused by A-1. It is very difficult to come to the conclusion if really A-1 had the intention to kill Yugine, he would have only thrown him to the ground without attacking him the iron rod available to him to be used. The fact that he only kicked the deceased after the fall also supports this inference of ours. Similarly, even according to the prosecution A-2 to A-4 used the iron rods and oars to hit the deceased on his limbs only and not on any vital part of the body. All these facts show that these appellants did share a common intention, the same was only to cause grievous hurt to the deceased and not to cause his death.

20. Therefore, we are of the opinion that the High Court was wrong in convicting the appellants for an offence punishable under Section 302 read with Section 149, IPC. We, however, find the appellants guilty of causing grievous hurt by dangerous weapons punishable under Section 326 read with Section 34, IPC. We sentence these appellants for the said offence to undergo rigorous

imprisonment for 7 years and further impose a fine of Rs. 1,000/- each, in default, the appellants shall undergo simple imprisonment for a further period of one month each.

21. The High Court has also convicted the appellants herein for an offence punishable under Section 324 read with Section 149, IPC and has awarded 2 years' RI on this count to the appellants. We alter this conviction also to one under Section 324 read with Section 34, IPC, and maintain the same sentence awarded by the High Court for the said offence under Section 324. We direct the sentences imposed by us to run concurrently, and the appellants shall be entitled to remission of the sentence for the period already undergone, if any. The appeals are allowed partly.

Appeals partly allowed.