SUPREME COURT OF INDIA

Ram Dular Rai

Vs.

State of Bihar

(Doraiswamy Raju and Arijit Pasayat JJ.

27.11.2003

JUDGMENT

ARIJIT PASAYAT, J

The appellant No.1 (Ram Dular Rai) faced trial for the commission of offences punishable under Sections 302 and 307 of the Indian Penal Code, 1860 (for short the 'IPC'). The other appellants were tried for offences relatable to Section 302 read with Section 149 IPC and Section 307 read with Section 149 IPC. Each of the appellants was also tried for commission of offence punishable under Section 148 IPC and Section 27 of the Arms Act, 1959 (in short the 'Arms Act'). They were found guilty and sentenced to undergo imprisonment for life for the offence relatable to Section 302 or Section 302 read with Section 149 IPC, as the case may be. Appellant No.1 was further sentenced to undergo imprisonment for 10 years for the offence relatable to Section 307 IPC and other three appellants were sentenced to five years imprisonment for the offence relatable to Section 307 read with Section 149 IPC. Each of them were sentenced to undergo imprisonment for three years for the offence relatable to Section 148 IPC and Section 27 of the Arms Act. In appeal by the impugned judgment, appeal of the appellant Ram Dular Rai was dismissed. In respect of other appellants, conviction for offences relatable to Section 307 read with Section 149 IPC was set aside. The background facts leading to the trial is as follows:

The informant Baleshwar Nath Singh (PW-6) in his fardbayan recorded on 17.3.1988 at about 1.05

a.m. stated that he was sleeping in the night on the Dalan of the house where a lantern and a dhibri were burning giving sufficient light in the Dalan. He was sleeping at the eastern extreme on a cot and near him his son Kamla Singh, daughter of Kamla Singh, Renu Devi (PW-2), were also sleeping. Other members of the family were sleeping inside the rooms. At about 12.30 a.m. the accused- appellants each armed with double barrel gun came to the Dalan along with ten to eleven other persons and standing outside the Dalan, were also armed with guns. On being asked by the informant about their identity, appellant Lalu Rai scolded him and placed his gun on his chest. Accused-appellant Ram Dular Rai fired three times on his son Kamla Singh (hereinafter referred to as the 'deceased') grievously injuring him, whereafter accused fired on Renu Devi, injuring her.

Thereafter all the assailants fled away. Other members of the family and co-villager Jai Narain Singh (PW-3) also had seen the occurrence. Kamla Singh died due to the injuries soon thereafter. According to the informant, the reason for the assaults was that they had been opposing one Madho Singh since the election of Mukhiya of their Panchayat, for which reason the assailants had committed the offence.

The accused persons denied their alleged role in the alleged occurrence claiming that they have been falsely implicated. Accused- appellant Lallan Rai in his examination under Section 313 of the Code of Criminal Procedure, 1973 (for short the 'Code') claimed that he was not even present, for which he placed reliance on medical certificate. One witness was also examined as DW-1. The said witness Narain Chaupal was a constable who was deputed for the security for accused-appellant Ram Dular Rai after a dacoity was allegedly committed in his house. The witness (DW-1) claimed that on hearing gunshots he had called appellant- Ram Dular Rai and his brother Lal Mohar Rai and at his call they came out from their house. In essence, the stand was that since they were at their residence at that time, they could not have committed the alleged offence. Prosecution examined 13 witnesses, out of whom Renu Devi (PW-2) is an injured witness and the informant was PW-6. There were two other eye-witnesses namely Ramji Singh and Jai Narain Singh (PWs 1 and 3 respectively). Placing reliance on their evidence, the trial Court convicted the appellants as noted supra.

In appeal, as noted supra a Division Bench of the Patna High Court upheld the conviction of accused-appellant Ram Dular Rai while allowing the appeals of other three appellants before it. The conviction under Section 307/149 IPC was set aside and rest of the convictions were upheld. The High Court held that the accused persons, all armed with guns had come to Dalan. Ram Dular Rai fired at the deceased in furtherance of a common object and, therefore, the others were to be convicted under Section 302 read with Section 149 IPC. However, the assault on Renu Devi (PW-2) was a separate offence by Ram Dular Rai and there was no common object involved.

In support of the appeals, learned counsel for the accused- appellants submitted that in view of the admitted animosity the evidence does not inspire confidence. There was nothing to bring in application of Section 149 IPC. Accused-appellants 2 to 4 did not make any attempt to enter into the house and did not commit any overt act. Only one witness (PW-6) has stated that all the persons

came together. In view of the acquittal of appellants 2 to 4 in respect of accusations under Section 307 read with Section 149 IPC, Renu Devi (PW-2) ceased to be an injured witness and only evidence was that of the informant (PW-6). The so- called eyewitnesses could not have identified the persons as claimed. There was no scope for recognizing any of the accused. A person lying on a bed immobilized could not have made any recognition. As the other witnesses were beyond doors they could not have seen who was coming and who was going and, therefore, their evidence should be discarded. In any event, the number of accused persons does not exceed five and merely because some people were claimed to be unidentified persons they were only introduced to bring in application of Section 149 IPC. If Section 149 IPC is kept out then Section 34 IPC can be pressed into service and for that there must be a participation. There is no evidence of any participation or showing sharing of common object. The evidence of DW-1 has not been duly considered as his evidence clearly rules out the presence of accused appellants Ram Dular Rai and Lal Mohar Rai. Even if for the sake of arguments it is accepted that there was definite role attributed to accused appellants 1 and 4, that is not sufficient to rope in others. The presence of any dhibri or lantern as stated has not been established. The prosecution has introduced these two articles to make identification possible. The FIR was ante dated as has been clearly noted by the trial Court; but the reason given by the investigating officer has been accepted; which should not have been done.

In response, learned counsel for the State submitted that the evidence of DW-1 does not in any way rule out presence of the accused appellants 1 and 4. The High Court has analysed the evidence in detail as the evidence of eyewitnesses was categorized to be of partisan nature. The High Court has held that the witnesses were natural witnesses. The conviction and consequentially the sentences imposed are well merited and do not deserve any interference.

Coming to the question whether Section 149 has application when presence of more than five persons is established, but only four are identified, Section 149 does not require that all the five persons must be identified. What is required to be established is the presence of five persons with a common intention of doing an act. If that is established merely because the other persons present are not identified that does not in any way affect applicability of Section 149 IPC.

Another plea which was emphasized relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine 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 in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared

by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful.

It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co instanti.

Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the

object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated.

In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object, but would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore, AIR 1956 SC 731.) The other plea that definite roles have not been ascribed to the accused and, therefore, Section 149 is not applicable, is untenable. A 4-Judge Bench of this Court in Masalti and Ors. v. State of U.P. (AIR 1965 SC 202) observed as follows:

"Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well founded.

Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not." To similar effect is the observation in Lalji v. State of U.P. (1989 (1) SCC 437). It was observed that:

"Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case." In State of U.P. v. Dan Singh and Ors. (1997 (3) SCC 747) it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to Lalji's case (supra) where it was observed that "while overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149".

In the present case the evidence of eye-witnesses which has been analysed in great detail by both the trial Court and the High Court shows that though four appellants were specifically identified, other persons carrying weapons were present along with the appellants at the time and place of occurrence. That being so, Section 149 has been rightly applied.

One of the pleas raised with emphasis related to the evidence of DW-1. On a closer reading of his evidence it is clear that the same does not in any way improbabilises the presence of the appellants at the time of occurrence. He only has stated that on hearing his call, appellants 1 and 4 came near him. The place of occurrence and the place of residence of A-1 are in close proximity. The possibility, as has been highlighted by the trial Court and the High Court, of the aforesaid two accused appellants coming to their respective place of residence after committing the offence cannot be ruled out and is not physical impracticability or impossibility. In respect of appellant Lallan Rai it is submitted that he did not fire the gun. Nothing has been shown about his intention or to show that the deceased was the target. This plea is clearly untenable because when some persons came with guns and their actions preceding and succeeding the assault indicate the existence of a common intention to do an act as stipulated in Section 149, the liability under Section 149 is clearly attracted. The eyewitnesses to the occurrence as held by the trial Court and the High Court are natural witnesses and their presence at the spot of occurrence or nearby is quite normal. Nothing suspicious has been indicated as to why their evidence which stood firm in spite of incisive cross-examination is to be discarded on the hypothesis that they are inimical to the accused persons. Looked at from any angle the judgment of the High Court does not warrant any interference and the appeals fail and are dismissed.

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@ November 17, 2003.

S.B. Sinha.

S.B. SINHA, J :

The mode and manner of selection and method of appointment to the post of Sub-Engineer (Civil) in the Kerala State Electricity Board as also the terms and conditions thereof indisputably are governed by Kerala State and Subordinate Service Rules, 1958 ('the Rules'). The Rules also provide for reservation being governed by Rules 14 to 17 thereof. Rule 14(c) provides for the manner in which the order of rotation shall be worked out. In terms of Rule 15, it is provided that if a suitable candidate is not available for selection from any particular community or group of communities specified in the Annexure, the said community or group shall be passed over and the post shall be filled up by a suitable candidate from the community or group of communities immediately next to the passed over community or group in the said Annexure, as the case may be, in the order of rotation. In the Annexure appended to Rule 15 for direct recruitment to the posts other than those included in the Kerala Last Grade Service, a 100 point roster is given. Once, however, the benefit of the turn in terms of Rule 15 is forfeited to a particular community or a group of community having been passed over, the same shall be restored to it at the earliest possible opportunity, if a suitable candidate from the particular community or group is available for selection upon making adjustment therefor against the claims of that community or group, as the case may be. The proviso appended to the said Rule in no uncertain terms restricts reservation including carrying forward vacancy to a category of posts in the year of recruitment in question not exceeding 50% of the total number of vacancies.

By reason of a note appended to Rule 15, it is provided that for purposes of application of the proviso to Rule 15 limiting the number of vacancies to be reserved in a year as 50 per cent in respect of a category of post, the period of one year shall commence on and from the day on which the ranked list of candidates prepared by the Commission in respect of that post comes into force. The matter relating to reservation is governed thereunder and the Public Service Commission was under a statutory duty to follow the principles laid down in the said rules.

The Public Service Commission of the State of Kerala framed the Kerala Public Service Commission Rules of Procedure which is non- statutory in nature. Rule 2(g) of the said Rules defined "Ranked List" as:

"Ranked List" means list of candidates arranged in the order of merit, either on the basis of the interview or examination or by both;

Rule 4 of the said Rules which is material for the purpose of determining the issues raised in this matter reads thus:

"Where a written examination and/ or a practical test is conducted by the Commission for recruitment to a service or post, the Commission shall - (i) announce:

(a) the qualifications required of the candidates for the examination, (b) the conditions of admission to the examination including the fees, (c) the subjects, scheme or syllabus of the examination, and (d) the number of vacancies to be filled from among the candidates for the examination;

Provided that where the exact number of vacancies to be filled is not ascertainable, the Commission may either announce the approximate number of vacancies to be filled or state that the number of vacancies has not been estimated.

(ii) invite applications and consider all the applications so received, (iii) make all arrangements for the conduct of the examination for the candidates whose applications are found to be in order, and (iv) prepare a list in the order of merit of such number of candidates as the Commission may determine from time to time;

Provided that the Commission may also prepare separate ranked lists in the order of merit of candidates coming under separate groups in accordance with the qualifications or other conditions as stipulated in the notification;

Provided further that for the purpose of satisfying the rules of reservation of appointment to Scheduled Castes, Scheduled Tribes and other Backward Classes also the Commission may prepare such supplementary lists as found necessary from time to time in the order of merit of the candidates belonging to such classes." Relevant part of Rules 12 and 13 of the said Rules read as under:

"12. All the candidates interviewed and who obtained not less than the minimum marks fixed by the commission shall be included in the ranked list prepared in the order of merit;

Provided where the candidates have been called for interview for the purpose of satisfying the rules of reservation alone such candidates who have got not less than the prescribed minimum marks in the interview shall be included in the supplementary list or lists arranged in the order of merit among the candidates belonging to each class;

Provided further that the Commission may also prepare list or lists of such categories of candidates who have got not less than the prescribed minimum marks in the interview and who are entitled to priority according to the terms of the notification inviting applications;

Provided further that the Commission may also prepare lists of overaged candidates who have secured not less than the prescribed minimum marks in the interview and who are eligible to be considered for appointment in the absence of candidates who conform to the rules regarding age limits...

13. The ranked lists published by the Commission shall remain in force for a period one year from the date on which it was brought into force provided that the said list will continue to be in force till the publication of a new list after the expiry of the minimum period of one year or till the expiry of three years whichever is earlier...;" The Kerala Public Service Commission under a misconception prepared a supplementary list only in relation to the reserved category of candidates and did not prepare such list in terms of the open category candidates. A bare perusal of the two provisos appended to both Rules 4 and 12 clearly show that two separate ranked lists were required to be prepared, one for the open category candidates and another for the reserved category candidates. The purport and object of preparing such separate ranked lists is absolutely clear and unambiguous. Such lists should be in the nature of waiting list so that the vacancies arising during the period when such list is prepared till the publication of a new list as envisaged in Rule 13 can be filled up. In other words, in terms of the aforementioned rules what was required to prepare was a main list - a separate ranked list for open category candidates as also a supplementary list for the purpose of satisfying the rules of reservation of appointment of reserved category candidates. Non- Statutory Rules framed by the Commission must be read in such a manner which would fulfill the reservation criteria contained in the Statutory Rules.

Preparation of only one supplementary list for filling up the vacancies by the some candidates not joining their posts, only from the reserved category of candidates, therefore, would be illegal, as thereby the relevant provision relating to the percentage of reservation contained in Rule 15 of the statutory rule would stand infringed.

Both the lists viz for the open category of candidates as also the reserved category of candidates were necessary, thus, required to be prepared in terms of the said Rules for maintaining the ratio of 50-50.

The respondents herein filed a writ petition before the High Court for giving effect to the said purported supplementary list wherein the following prayers were made:

"(i) to issue a writ of mandamus or any other appropriate writ order or direction commanding the 1st respondent to advice candidates against the non-joining duty vacancies of Muslim candidates advised on 20.8.1994 from Ext. P1 list and also to such vacancies of candidates, advised on 21.12.1994.

(ii) to direct the 2nd respondent to report non- joining duty among 89 candidates advised from Ext. P1 list on 21.12.1994." The High Court by reason of the impugned judgment granted the said prayer inter alia holding that the rule of reservation is not affected as the vacancies created by reason of non-joining of the posts belonging to open category candidates may be filled up in the later year. The hardship created to one category of candidates in terms of Rule 13 had not been considered by the High Court inasmuch as such vacancies may not be filled up for a period of three years. Furthermore, by reason thereof, the reservation policy of the State as contained in the Kerala State and Subordinate Service Rules, 1958 has been violated. This Court in a large number of decisions has clearly held that for the purpose of making the reservation policy a reasonable one the extent thereof should not exceed 50% save in exceptional situation. The statutory rules also contain such a prohibition. Article 16(4B)of the Constitution of India is also a pointer to the said fact in terms whereof an enabling provision has been created whereby and whereunder the State may consider to fill up the unfilled vacancies of a year which are reserved for being filled up in that year in accordance with the provisions made under Clause (4) or (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation on total number of that year.

The judgment of the High Court, if implemented, would thus be violative of Article 16(4B) of the Constitution as also the statutory rules.

The High Court, therefore, committed an illegality in passing the impugned judgment insofar as it failed to take into consideration that in the event the same is given effect to, more than 50% of the vacancies in a particular year will be filled up from amongst the reserved category candidates. We, however, having regard to the facts and circumstances of the case do not intend to set aside the appointments made in favour of the private respondents herein only on the ground that the judgment of the High Court has been acted upon.

For the reasons aforementioned, I agree that the appeal shall be allowed to the extent as directed by my learned Brother Dr. Lakshmanan, J. in his judgment.