SUPREME COURT OF INDIA

Hori Lal and Another

Vs

State of Uttar Pradesh

Appeal (Crl.) 97 of 2000

(S. B. Sinha and Markandeya Katju, JJ)

05.12.2006

JUDGMENT

S. B. SINHA, J.

Two appellants are before us questioning the judgment and order dated 11.3.1999 passed in Criminal Appeal No.2824 of 1980, whereby and whereunder their conviction and sentence under Section 302 read with Section 149 of the Indian Penal Code, 1860 ('IPC', for short) and other provisions have been upheld.

The incident resulting in death of one Hazarilal and Smt. Ram Shree and serious injuries to one Balbir Singh and simple injuries to Smt. Mohar Shree took place at about 10 a.m. on 2nd November, 1979 in village Balarpur, P.S. Bhagaon, District Mainpuri, U.P. The First Information Report was lodged by one Harpal Singh, son of Hazarilal and husband of deceased Smt. Ram Shr

Appellants are also residents of the same village. They, together with Registar Singh, Bahadur, Babu Ram, Chhotelal, Sohran, Sohran, Jai Singh, Subedar and Kedar sons of Jai Singh were named in the First Information Report. Three persons were not named therein being unknown. Bahadur Singh is said to be an outsider.

Babu Ram, Chhotlal and Sohran are real brothers being sons of Chaman Lal. Registar Singh is son

of Babu Ram. Phool Singh @ Bhajan Lal is son of Punno. Jai Singh is son of Nagpal. Subedar and Kedar are sons of Jai Singh. Babu Ram and Phool Singh died during trial. Jai Singh was acquitted by the High Court, whereas Subedar and Kedar had been acquitted by the learned Sessions Judge. Phool Singh, Registar Singh and Bahadur Singh were said to be armed with guns. Jai Singh, since acquitted, was said to be armed with hand grenades. Appellants herein, Subedar and Kedar were said to be armed with country made pistols.

Enmity between the parties is not in dispute. Long standing land dispute between them also stands admitted. In the First Information Report it was alleged that a murderous assault was made on Ram Autar, brother of the first informant, in 1976, wherein the accused persons were alleged to be the assailants. However, it ended in submission of a final report as nobody was prepared to support the case due to terror created by Registar Singh and Bahadur Singh. Ram Autar thereafter shifted to Gopalganj in Bihar. Ram Swarup, another brother of the informant shifted to Mainpuri. Ram Swarup on the fateful day came to the village. On receipt of the said information, the accused persons said to have formed an unlawful assembly and armed with various lethal arms, came to the place of occurrence. They were seen by Balbir Singh-P.W.3. He started running towards the village. An exhortation was given by Registar Singh and he was chased. Shots were fired resulting in sustenance of injuries by him on his right arm. Harpal Singh was, at that time, sitting on a cot. His mother and aunt were sitting on the earth. They were talking amongst themselves. Hazarilal, the deceased, uncle of Balbir Singh was tethering his cattle. He informed them that Registar Singh and others were coming to their house armed with firearms and also that he had received firearms injuries. Balbir Singh concealed himself inside his house. Jai Singh had, allegedly, thrown a hand grenade at Hazarilal. He fell down, whereafter Phool Singh and Bahadur Singh fired shots at him. Harpal Singh ran and entered in the house of his uncle Ram Swarup. He took the rifle of Ram Swarup and fired towards the accused persons from the upper story of the house of Ram Swarup. In the meantime, Smt. Ram Shree, wife of Harpal Singh, also started firing from the gun of the first informant. At this, the accused persons made indiscriminate firing at her, due to which she received injuries and died. The accused persons reached the house of Phool Singh and Anokhey, uncles of the first informant and fired several rounds of shots causing of injuries to Smt. Mohar Shree, wife of Balbir Singh. Shiv Singh also said to have received injuries, which was not believed by the learned Sessions Judge. Hazarilal and Smt. Ram Shree died. The gun which was used by Smt. Ram Shree was taken away by the accused persons.

The First Information Report was lodged at about 11.45 p.m. The distance between the village and police station is said to be 8 kms. Dr. R.K. Jain - P.W.6, Surgeon of District Hospital, Mainpuri conducted autopsy on the dead bodies. The injured were treated by Dr. S.C. Dubey - P.W.8. The prosecution in support of his case examined the first informant Harpal Singh besides Balbir Singh - P.W.3 and Smt. Roopwati - P.W.4. Virendra Singh - P.W.2 was examined, however, he was later declared hostile. The Investigating Officer, Durga Prasad Sharma examined himself as P.W.5.

Appellants herein and Jai Singh were convicted for commission of an offence under Section 302 read with Section 149 of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for life for committing murder of Hazarilal and Smt. Ram Shree; under Section 307 read with Section 149 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years for making murderous assault on Balbir Singh, under Section 324 read with Section 149 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years for causing

hurt to Smt. Mohar Shree. All sentences, however, were directed to run concurrently. As noticed hereinbefore, the High Court has given benefit of doubt to Jai Singh and acquitted him.

Dr. Nafis A. Siddiqui, learned counsel appearing on behalf of the appellants raised the following contentions before us :

(i) The First Information Report was entertained without assigning any crime number to it.

(ii) Having regard to the manner in which the occurrence had taken place and the fact that the first informant had to travel 8 kms, the First Information Report could not have been lodged within 1 hour 45 minutes.

(iii) The said report having been forwarded to the learned Magistrate only on the next day, i.e., 3rd November, it should be held to be ante-timed.

(iv) As in the letter addressed to the Medical Officer, the 'Hazhoori Chiththies' and the letter requesting the doctor to conduct post mortem, the crime number was not mentioned, the same establishes that the First Information Report was anti-timed.

(v) The Investigating Officer having opined that an offence under Section 396 IPC having been committed, there was no reason to convert the same to an offence under Section 302 IPC.

(vi) The post mortem report would show that one of the injuries (injury No.5) that there was blackening and thus, the shot must have been fired from a short distance and having regard to the fact that the appellants were said to be carrying pistols, they could not have caused the said injuries.

(vii) Appellants did not have any motive to commit the offence and they have been roped in as there is a tendency in India to implicate the family members of the accused falsely.

(viii) Eye-witnesses being P.W.1 and 2 having not mentioned the name of appellant No.1 in their statements before the police under Section 161 of the Code Of Criminal Procedure, 1973, they should not have been relied upon.

(ix) No case has been made out for inferring that the appellants and other accused had common object in commission of the offence.

Mr. Ashok K. Srivastava, learned counsel appearing on behalf of the State, on the other hand, supported the impugned judgment.

The learned Sessions Judge as also the High Court analysed the evidences brought on records by the prosecution very minutely.

The First Information Report was promptly lodged. After such a ghastly crime was committed, it was but natural for P.W.1 to report the matter as early as possible to the police. It was also necessary to get necessary medical assistance for the injured persons, particularly having regard to the nature of injuries suffered by them. P.W.1 had travelled in a bullock cart to the out skirts of the village. He thereafter took the tractor of one Braj Bhujbal Singh Thakur to travel upto the police station. He returned to his village on a cycle.

The Investigating Officer was cross-examined on the question of alleged ante-timing of the First Information Report. It may be that the special report was sent to the Magistrate on 3rd November, but, then keeping in view the magnitude of the occurrence, we do not think that the same itself would negate the entire prosecution story.

We also are unable to accept the submissions of the learned counsel for the appellants that the number of crime case had not been mentioned in the documents. The inquest report mentioned the number of crime. The time of recording the First Information Report had also been mentioned there. Crime number was not necessary to be mentioned on the challan of the dead bodies or letters to the doctors for the medical examination of the injured persons and for obtaining post mortem report of the deceased. Those documents, undoubtedly, were prepared after preparation of panchnama and the fact which was recorded in the panchnama, in our opinion, was not necessary to be mentioned in the other documents and in any event, such omission would not be of much significance. P.W.1 was also a witness to the said panchnama.

Medical evidence, in our opinion, supports the prosecution case. Injuries found on the persons of the deceased and also the injured persons categorically point out that they had been caused by firearms. The Investigating Officer had also recovered a large number of cartridges from the place of occurrence. The evidence brought on records also suggests that indiscriminate firing had been done towards Smt. Ram Shree. The window, where she was found dead, had been broken. The gun used by Smt. Ram Shree was also found missing.

We, therefore, do not find any reason to differ with the findings of the learned Sessions Judge and the High Court.

Motive on the part of the appellants and other accused persons to commit the murder is evident. The offence was committed by the accused as they could come to learn that Ram Autar was available in the village. Ram Autar had shifted to Gopalganj in the State of Bihar and Ram Swarup shifted to Mainpuri.

All the three eye-witnesses, thus, fully supported the prosecution case.

The submission of Mr. Siddiqui that P.Ws. 1 and 2 did not name Hori Lal in their statements under

Section 161 of the Code Of Criminal Procedure, 1973, is not correct. They had named him. The only omission on their part is that he had not been named as using firearms. Some discrepancies are there as to whether the appellants had been holding pistols or guns. In our opinion, the same is not very material for our purpose. We, having regard to the facts and circumstances of the case, are unable to accept the submission of the learned counsel that the prosecution has failed to prove common object on the part of the appellants.

We may notice some decisions relied upon by the learned counsel. In Baladin & Ors. vs. State of Uttar Pradesh , this Court held that mere presence of a person does not make him a member of an unlawful assembly. The said decision, however, has been explained by this Court in Masalti & Ors. vs. State of Uttar Pradesh , wherein it has clearly been held that the same had been rendered in the peculiar facts obtaining therein, stating :

".....In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of S.141, is an unlawful assembly. 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 S.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 is in that context that the observations made by this Court in the case of Baladin, (S) assume significance; otherwise, in law, 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, S.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 S.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. Therefore, we are satisfied that the observations made in the case of Baladin, (S)

Reliance has also been placed in Nathu Singh Yadav vs. State of Madhya Pradesh 2, wherein again Ugar Ahir & Ors. vs. The State of Bihar was noticed.

No principle of law has been laid down therein. The decision was rendered in the fact situation obtaining in those cases.

Sections 141 and 142 of the Indian Penal Code read as under :

"141. Unlawful assembly An assembly of five or more persons is designated an 'unlawful assembly', if the common object of the persons composing that assembly is :

First: To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second: To resist the execution of any law, or of any legal process; or

Third: To commit any mischief or criminal trespass, or other offence; or

Fourth : By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth : By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation " An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

"142. Being member of unlawful assembly.- Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly."

Common object would mean the purpose or design shared by all the members of such assembly. It may be formed at any stage.

Whether in a given case the accused persons shared common object or not, must be ascertained from the acts and conduct of the accused persons. The surrounding circumstances are also relevant and may be taken into consideration in arriving at a conclusion in this behalf.

It is in two parts. The first part would be attracted when the offence is committed in furtherance of the common object. The offence, even if is not committed in direct prosecution of the common object of the assembly, Section 149 IPC may still be attracted.

However, if an offence is committed in furtherance of such common object, the same would come within the purview of second part.

In the instant case, all the accused persons came heavily armed. They were seen by Balbir Singh. He

was not only chased, a shot was fired at him resulting in his sustenance of an injury on his right arm. He still ran and informed others. Before others could conceal themselves, the appellants reached the spot and started firing. Hazarilal was done to death by a shot fired from a close range. The autopsy surgeon did not say what would be the distance from which shot was fired. It would depend upon the nature of the weapon used. The distance in case of a pistol may be 2 feet, whereas in case of a shot gun, it may be 3 feet. But, undoubtedly the injury resulted from a shot fired from a short distance. In Modi's "Medical Jurisprudence and Toxicology", 23rd Edition at page 721, it is stated :

"If a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches around the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt grains of gunpowder or smokeless propellant powder. The adjacent hairs are singed, and the clothes covering the part are burnt by the flame. If the powder is smokeless, there may be a greyish or white deposit on the skin around the wound. If the area is photographed by infrared light, a smoke halo round the wound may be clearly noticed. Blackening is found, if a firearm like a shotgun is discharged from a distance of not more than three feet and a revolver or pistol discharged within about two feet. In the absence of powder residue no distinction can be made between one distance shot and another, as far as distance is concerned. Scorching in the case of the latter firearms is observed within a few inches, while some evidence of scorching in the case of shotguns may be found even at one to three ft. Moreover, these signs may be absent when the weapon is pressed tightly against the skin of the body, as the gases of the explosion and the flame smoke and particles of gunpowder will all follow the track of the bullet in the body. Wetting of the skin or clothes by rain reduces the scorching range. Blackening is not affected by wet surface although it can easily be removed by a wet cloth. Blackening with a high power rifle can occur up to about one ft. Usually if there are unburnt powder grains, the indication is that the shot was fired from a revolver or a pistol and shorter the barrel of the weapon used the greater will be the tendency to the presence of unburnt of slightly burnt powder grains."

In Major Sir Gerald Burrard's "The identification of Firearms and Forensic Ballistics" at page 59, it is stated :

"Both scorching and blackening prove definitely that the shot was fired from very close quarters, in which case an assertion by the suspected person that the deceased fired the shot himself, cannot be disproved if the weapon used was a pistol or revolver. But if it is possible to establish that the range of the shot must have been greater than the length of the deceased's arm the matter assumes a somewhat different complexion, and the evidence may be of great use in bringing a murderer to book.

The extreme limit of the blackening range is well within any normal person's arm's length, and so the absence of blackening is no proof that the shot was fired from sufficiently far away to have made it impossible for the deceased to have been clutching either the weapon, or the individual who is suspected of having held the weapon.

However, the presence or absence of unburnt or partially burnt powder grains may indicate a range

which is either just within or just without this critical distance; and on this account the investigation into the question of unburnt power grains may become a matter of primary importance."

[See also Baso Prasad & Ors. vs. State of Bihar reported in 2006 (12) Scale 354.]

However, no hard and fast rule can be laid down therefore.

In Russell A. Gregory's "Identification of Disputed Documents, Fingerprints and Ballistics", 3rd Edition, at page 117, it is stated :

"The distance from which a firearm was discharged can be judged to a limited extent. If black powder has been used the distribution of the tattoo marks made by the powder, round about the wound will give some indication as to the distance of the weapon from the wound. This will vary according to the caliber of the weapon and the make of the cartridge. If any empty cartridges have been found on the scene of the crime, similar cartridges should be tested in the suspect weapon and the distance judged by the dispersion of the pellets or distribution of unburnt powder marks. Black powder however is now rarely used in cartridges. Modern smokeless powder leaves little markings of burnt powder beyond eight to ten inches. Within this distance small particles of unburnt powder may be found entangled in the clothing or at the wound of entry. These may be of evidential value if they correspond to the powder in the ammunition found in the possession of the accused."

There cannot be any doubt whatsoever that where two views are possible, benefit of doubt must be given to the accused as was submitted by the learned counsel. But, we have no doubt that the High Court had come to a correct conclusion.

For the reasons aforementioned, in our considered view, there is no merit in this appeal. It is dismissed accordingly.

The appellants are on bail. Their bail bonds are cancelled. They are directed to surrender forthwith before the Chief Judicial Magistrate, Mainpuri, failing which appropriate steps be taken for their arrest.