SUPREME COURT OF INDIA

Shivjee Singh

Vs.

State of Bihar

Crl.A.No.1494 of 2004

(Dr. Arijit Pasayat and Dr. Mukundakam Sharma JJ.)

30.07.2008

JUDGMENT

Dr. Arijit Pasayat, J.

1. These two appeals have a common matrix in judgment of the Division Bench of the Patna High Court. Two appeals were disposed of by the common judgment. In Criminal Appeal no.408 of 1998 there were six appellants whereas in Criminal Appeal no.458 of 1998 there was one appellant. In the two appeals before this Court there are five appellants in the Criminal Appeal no.494/2004, and there are two appellants in Criminal Appeal no.484/2006. All the five appellants in Criminal Appeal No.1494 of 2004 were found guilty of offence punishable under Section 302 read with Section 149 of the *Indian Penal Code, 1860* (in short `IPC') and Section 147. Similar was the conviction recorded in case of Satya Narain Singh, one of the appellants in Criminal Appeal no.484 of 2006. Ambika Singh the other appellant in Criminal Appeal no.484 of 2006 was convicted for offence punishable under Sections 302 and 148 IPC and Section 27 of the *Arms Act, 1959* (in short `Arms Act'). Appellants in Criminal Appeal no.1494 of 2004 were sentenced to life imprisonment and two years respectively. Similar was the case of Satya Narain Singh- appellant in Criminal Appeal no.484 of 2006. Ambika Singh- appellant in criminal appeal no.484 of 2006 was sentenced to undergo life imprisonment, three years, and five years for the three offences noted above.

2. Background facts giving rise to the trial are as follows:

> "At sunset time on the day of Holi (the date being 9.3.1993) Bhagwan Singh (P.W.1) was sitting at his Dalan. Satya Narain Singh came there in an inebriated state and started quarreling with him and abusing him. Bhagwan Singh asked him to stop the abuses and to go away. On this Satya Narain Singh called his family members. Ambika Singh, one of his three sons came armed with his gun; others carried sticks, stones and brick pieces in their hands. On hearing the exchange of hot words a number of villagers came there. Some of them were singing Holi songs at the nearby Devi Asthan and on hearing the noise they came to the Dalan of Bhagwan Singh. Others who were neighbours also came. The villagers coming there asked Satya

Narain Singh to stop the quarrel and scolded him. Satya Narain Singh then took his relatives to his roof-top and from there they started throwing stones and pieces of bricks at the tiled roof of the house of Bhagwan Singh. Satya Narain Singh urged his son Ambika Singh to open fire from his gun. So, ordered by his father, Ambika Singh fired a shot that hit Meghnath Singh (hereinafter referred to as the `deceased') on his back and as a result he fell down and died. Ambika Singh fired seven to eight shots that caused injuries to Ram Pran Singh (PW 3), Sri Ram Singh (PW 10) and Umesh Singh (PW 6). One of the stones thrown by Satya Narain Singh hit Suraj Singh (PW 5) and caused injury to him. After the occurrence the injured were carried on a tractor to Ara town where they were admitted to the Sadar Hospital and were treated there for about a week. Sitaram Singh (PW 15) who at that time was the officer Incharge of Ayar P.S. was going round the villages under his P.S. for maintaining peace and order on the day of Holi. At village Bargaon he came to learn that gun shots were fired at Medhapur village. From there he proceeded to Medhapur along with an armed police party and reached there at about 10.30 in the night. There he recorded the statement of Babulal Singh (PW 12), the brother of the deceased in presence of a witness Baleshwar Singh (PW 2). The statement was recorded as fard-e-bayan (Ext.1) on the basis of which a formal F.I.R. (Ext. 7) was later drawn up on 10.3.1993 at 00.30 hrs. giving rise to Jagdishpur (Ayar) PS Case No.27 of 1993. After recording the fard-d-bayan he took up investigation of the case, recorded the statements of other witnesses who were available there, examined the place of occurrence and prepared the inquest report (Ext. 2) of the deceased Meghnath Singh.

On completion of investigation he submitted charge sheet against the appellants. They were put up on trial and at the end were convicted and sentenced as indicated above.

It may be mentioned here that in regard to the same occurrence a case was instituted from the side of the appellants as well. That was registered as Jagdishpur (Ayar) PS Case No.28 of 1993 under Sections 147, 148, 149, 323, 447, 337 and 325 of the Indian Penal Code and Sections 27 of the Arms Act. In that case some of the witnesses examined by the prosecution in the present case, along with some others were named as accused. That case is said to be pending trial before a Magistrate."

3. 17 witnesses were examined by the prosecution to establish the prosecution version. PWs 1 to 6 and 9 to 12 were stated to be eye witnesses. PWs 3, 5, 6 and 10 were injured witnesses. The trial Court placed reliance on their evidence and found accused appellants guilty as noted above.

4. In appeal, the High Court rejected the plea of the appellant that the evidence of witnesses should not have been relied upon as there was sudden pre-fight and, therefore, Section 149 has no application. The High Court, as noted above, dismissed the appeal.

5. In support of the appeal learned counsel for the appellant submitted that so far as applicability of Section 149 IPC is concerned, there was no discussion either by the Trial Court or the High Court. The appellant in Criminal Appeal no.1494 of 2004 is stated to have

pelted stones on the house of the deceased. That is not sufficient to attract Section 302/149 IPC. According to the prosecution version accused- Ambika Singh fired the shots after the pelting of the stones has stopped. The role ascribed to Satya Narain Singh was that he was exhorting Ambika Singh to fire.

6. Leaned counsel for the respondent-State on the other hand supported the judgments of the Trial Court and the High Court.

7. We shall first deal with the applicability of Section149 IPC. So far appellants in Criminal Appeal no.1494 of 2004 are concerned, it is pointed out by the prosecution that the stones were pelted by the accused persons with a view to damage the roof and did last only for two to three minutes. It is also stated by the witnesses that only after the stopping of the pelting of stones, firing was done. It is, therefore, stated by leaned counsel for the appellant in Criminal Appeal no.1494 of 2004 that neither the Trial Court nor the High Court has analysed the aspect relating to applicability of Section 149 IPC. Abrupt conclusions have been arrived at about the applicability of the provisions.

8. A plea which was emphasized by the appellants 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.

9. `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. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, is some of the relevant considerations. 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 becomes 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 becomes unlawful. In other words it can develop during the course of incident at the spot co instanti.

10. 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 part, but offences committed in prosecution of the common object would be generally, if not always, be within the second part, 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*[1])

11. In *State of U.P. v. Dan Singh and Ors.*[2] 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 v. State of U.P.*[3] 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"."

12. This position has been elaborately stated by this Court in *Gangadhar Behera and Ors. v. State of Orissa*[4].

13. When the factual scenario is considered in the background of the above principles set out above, the inevitable conclusion is that the appeal filed by the appellants in Criminal Appeal no.1494 of 2004 deserves to be allowed. Their conviction is set aside so far their conviction under Section 302 read with Section 149 IPC is concerned. But the sentence imposed for the offence punishable under Section 147 is maintained. The sentence shall be three months for the offence punishable. So far the other appeal is concerned, the evidence brought on record clearly establish the accusations. Therefore, while Criminal Appeal no.1494 of 2004 is partly allowed, Criminal Appeal no.484 of 2006 is dismissed.

[1] *AIR 1956 SC 731*
[2] *1997 (3) SCC 747*
[3] *1989 (1) SCC 437*
[4] *2002 (8) SCC 381*