SUPREME COURT OF INDIA

Aqeel Ahmad

Vs.

State of U.P.

C.A.No.595 of 2007

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

19.12.2008

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Challenge in these appeals is to the judgment of a Division Bench of the Allahabad High Court upholding the conviction of appellant Aqeel Ahmad (Appellant in Crl. A. No.595/07) in Criminal Appeal No.2630 of 2004 but altering the sentence of death as awarded by learned Additional District and Sessions Judge, Court No.3, Aligarh to life sentence. Criminal Appeal No.2593 of 2004 filed by Ashiq Ali and Criminal Appeal No.2590 of 2004 filed by Mohammad Shakir and Chaudhary Aleem were also dismissed. The Criminal Reference for confirmation of death sentence as referred under Section 366 of the Code of Criminal Procedure, 1973 (in short the `Code') was answered in the negative. While Criminal Appeal No.595 of 2007 has been filed by Aqeel Ahmad, the other accused persons, namely, Mohammad Shakir, Ashiq Ali and Irfan have filed Criminal Appeal No.596 of 2007. Since the accused Ashiq Ali did not file surrender certificate, special leave petition was dismissed so far as he is concerned. So far as accused Chaudhary Aleem and Irfan are concerned it is submitted that they have died during the pendency of the matter before this Court. State of U.P. has filed Criminal Appeal No.597 of 2007 questioning alteration of death sentence to life sentence by the High Court.

2. Background facts leading to the trial of accused persons as projected by the prosecution is as follows:

A report was lodged by Ahmadur Rahman Sherwani at Police Station, Civil Lines, Aligarh stating that some construction of lane from the crossing of Amirnisha to Goshtwali gali was going on from the quota of Khwaja Aleem, M.L.A. A banner was fixed by Vyapar Mandal, Amirnisha and on the banner, name of his son Favad Khan Sherwani was mentioned as General Secretary. On 16.12.2001 at about 4.00 p.m. Shakir, Sabhasad had taken out the banner. He came at the house of informant armed with D.B.B.L. Gun. Irfan driver, Chaudhary Aleem, Shakir son of Shabbir and Ashiq Ali. His sons Favad and Shahood Ali khan were present there and they started abusing them and challenged saying that how he could dare to fix the banner and set the banner on fire. His sons told him that since there was a festival next day, they should talk about it later on. Hearing this, companions of Shakir Sabhasad exhorted and Shakir and appellant Aqueel Ahmad started firing from their guns which hit both his sons. He alongwith Iqbal Ahmad, Farooq Ahmad, Shah Alam, Jalaluddin, Mohd. Shabir, Maroof Ahmad Khan, Majid Ali khan, Subhash Chandra and others who were making purchases in the nearby shops came to rescue them and accused persons firing from their country made pistols and guns went away. His younger son Favad Khan (described as D1) died on the spot and injured Shahood (described as D2) died in the hospital during treatment. Shah Alam had also received fire arm injuries and he was taken to the Medical College. The report was registered at the Police Station Civil Lines on 16.12.2001 at 6.25 p.m. and the distance of the police station is 1 km. from the place of occurrence. After the registration of the report, Shri B.K. Tiwari, S.H.O. Civil Lines started the investigation. He recorded the statement of scriber of the report Om Prakash Chaturvedi, informant and Iqbal Ahmad. Thereafter, he reached at the place of occurrence and prepared the site plan on the direction of the informant which is Ex.Ka-21. He prepared site plan of the place where the banner was fixed, which is Ext. Ka-22. He prepared the recovery memo of the blood stained and plain earth and prepared the recovery memo of empty cartridge 12 bore and one bullet. Recovery memo of half burnt banner was prepared. The recovery memos are Ext. Ka-23, 24 and 25. He recorded the statement of witnesses, thereafter he reached the Medical College and instructed Sub-inspector N.L. Arya to prepare the inquest memo of the deceased persons Favad and Shahood. After the preparation of inquest memos the dead bodies were sealed and handed over to the constables for post-mortem examination on 17.12.2001. He recorded the statements of Farooq Ahmad, Jalaluddin, Shakir son of Shabbir, Majid Ali and lqbal Ahmad. Accused Shakir was arrested and his statement was recorded. On 5.1.2002 statement of Shakir, Sabhasad was recorded and on 10.1.2002 statement of accused Aqeel Ahmad was recorded and they were taken on police remand and on the pointing out of Shakir, Sabhasad a gun was recovered and recovery memo was prepared which is Ext. Ka-27. On the pointing out of Aqeel Ahmad a gun was recovered and recovery memo is Ext, Ka-28. On 25.1.2002 a D.B.B.L. Gun No. 17524 was recovered from the shop of Choudhary Gun House, Arms and Ammunition Dealer, Malviya Market, Aligarh, recovery memo is Ext. Ka-38. A written application was given by the proprietor of the Gun House Surendra Singh. The gun was deposited by Ashiq Ali, the recovery memo is Ext.Ka-30.

After the investigation he submitted the charge sheet against the accused persons. Since the accused persons abjured guilt they were put on trial. To establish the accusations prosecution examined 12

witnesses, out of whom PW-1 is the informant and father of the deceased. PWs 2 and 3 were stated to be eye-witnesses. The two deceased persons are Favad and Shahood and as noted above are described as D1 and D2. Placing reliance on the evidence of the prosecution witnesses, the trial Court found the accused persons guilty. Out of 6 accused persons, accused Shakir absconded and he had not faced trial. The trial Court had found the evidence of eye witnesses clear, cogent and trustworthy and recorded the conviction as noted above. While the accused Aqeel Ahmad was convicted under Section 302 IPC and sentenced to death, the other accused persons Irfan, Chaudhary Aleem, Ashiq Ali and Shakir were convicted for offence punishable under Section 302 read with Section 149 IPC and sentenced to undergo imprisonment for life. Each of the accused persons were also convicted under Section 148 IPC and sentenced to two years imprisonment. Before the High Court in the appeals and the Reference for confirmation of sentence, the basic stand of the accused persons was that there was unexplained delay in lodging the FIR. The presence of PW-1 has not been established. There was no evidence that the special report was sent to the Magistrate. Since Shah Alam who was stated to be an injured witness was not examined, the evidence of PWs 2 and 3 cannot be believed. The investigation was tainted. Appropriate questions were not put under Section 313 of the Code. There was no evidence to show that death was on account of appellants' firing and in any event the ingredients of Section 302 are not made out and at the most even if the prosecution version is accepted in its totality, the offence would be under Section 304 Part I IPC.

The High Court did not find any substance in these pleas. The appeals were dismissed but the death sentence was altered to life sentence in case of accused Aqueel Ahmad, as noted above.

3. In support of appeals by the accused persons, learned counsel for the appellants re-iterated the various stands taken before the High Court.

4. It is pointed out that there was no evidence that the special report was sent to the concerned Magistrate with reference to Section 157 of the Code. It is submitted that the requirements have not been complied with. In response, learned counsel for the informant and the State supported the judgment. Additionally, learned counsel for the State submitted that this was a case where death sentence as awarded by the trial Court should have been confirmed.

5. There is no doubt that forwarding of the report is indispensable and absolute and it has to be forwarded with earliest dispatch which intention is implicit with the use of the word `forthwith' occurring in Section 157 of the Code which means promptly and without any undue delay.
The real purpose is to avoid possibility of the improvement in the prosecution case and introduction of distorted version by deliberations and consultation and to enable the Magistrate concerned to have a watch on the progress of the investigation. In Sunil Kumar v. State of Rajasthan (2005 (9) SCC 283) it was observed by this Court that as a rule of universal application it cannot be laid down that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable. It would depend upon the facts of each case. It was noted in the said case that

investigation was taken up immediately and certain steps in the investigation were taken. Therefore, the plea that there was delayed FIR and/or that the FIR was inexistent at the relevant point of time was turned down. In the instant case the High Court noted that the same was received on 20.12.2001. The High Court observed that if there was any lapse on the part of the investigating officer, that would not affect the credibility of the prosecution version.

6. Another factor which was highlighted by learned counsel for the appellants was that the prejudice is caused because the evidence of PWs 9 and 10 show that there were some deliberations and improvements made. Non examination of Shah Alam who is supposed to be injured witness also has relevance. It is pointed out that the medical evidence is contrary to the oral testimony. Since the medical report shows two wound and two entries it was stated that firing took place once.

7. Interestingly, as rightly submitted by respondents that no question was put to the relevant witnesses on this aspect. Submissions were made regarding nature of the wounds.

8. It was also stated that PW-1 could have used one of the cars which he possessed and there is no reason as to why he had taken the deceased on scooter. This has also been explained by the prosecution witnesses.

9. So far as applicability of Section 149 IPC is concerned, it is submitted that the co-accused included the driver. If they were carrying weapons, there was no question of any exhortation. It may have been done by the absconding accused. It is unlikely that the driver would give orders to his master.

10. In Sunil Kumar's case (supra) it was inter alia observed as follows:

7. The pivotal question is applicability of Section 149 IPC. Said provision has its foundation on 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, asspecified 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 such 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.

8. `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 eo instante.

9. 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 culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at the time of or before or after the occurrence. The word `knew' used in the second limb 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 the first part but offences committed in prosecution of the common object would also be generally, if not always, be within the second part, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore AIR 1956 SC 731).

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12. It has been established by the evidence of the eye witnesses that all the eight accused persons were armed with weapons, they surrounded the deceased and in fact prevented others from going near the deceased to rescue him. They had arrived together in the same jeep and left by the jeep after the incident. One important and relevant factor, which has been noticed by the trial court and the High Court, is that the jeep was kept in starting position. Significantly the defence in the cross examination brought out the fact that the accused persons surrounded the deceased and prevented those who wanted to go to rescue the deceased by threatening them with dire consequences. The trial court and the High Court have analysed the factual position in great detail and have pointed out the aforesaid relevant factors. Therefore, there is no infirmity in the conclusion of the courts below about the applicability of Section 149 IPC.

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17. Where a group of assailants who were members of the unlawful assembly proceeds to commit the crime in pursuance of the common object of that assembly, it is often not possible for witnesses to describe the actual part played by each one of them and when several persons armed with weapons assault the intended victim, all of them may not take part in the actual assault. Therefore, it was not necessary for the prosecution to establish as to the specific overt act was done by each

accused."

11. It was pointed out by learned counsel appearing for the informant and the State that there was no possibility of any false or delayed FIR and there has been no prejudice caused. The accused persons accepted that there was no previous enmity and, therefore, the question of any fabrication does not arise. As regards the delayed dispatch of report of the Magistrate is concerned, reference can also be made to the decision of this Court in Pala Singh and Anr. v. State of Punjab (1972 (2) SCC 640). In para 8 it was observed as follows:

"8. Shri Kohli strongly criticised the fact that the occurrence report contemplated by Section 157 CrPC was sent to the Magistrate concerned very late. Indeed, this challenge, like the argument of interpolation and belated despatch of the inquest report, was developed for the purpose of showing that the investigation was not just, fair and forthright and, therefore, the prosecution case must be looked at with great suspicion. This argument is also unacceptable. No doubt, the report reached the Magistrate at about 6 p.m. Section 157 CrPC requires such report to be sent forthwith by the police officer concerned to a Magistrate empowered to take cognizance of such offence. This is really designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under Section 159. But when we find in this case that the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report by the Magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the appellants' case that they have been prejudiced by this delay."

12. So far as the purported delayed registration or manipulation is concerned it is to be noted that investigation commenced immediately. In State of Karnataka v. Moin Patel and Ors. (1996 (8) SCC167), it was noted as follows:

"16. The matter can be viewed from another angle also. It has already been found by us that the prosecution case that the FIR was promptly lodged at or about 1.30 a.m. and that the investigation started on the basis thereof is wholly reliable and acceptable. Judged in the context of the above facts the mere delay in dispatch of the FIR -- and for that matter in receipt thereof by the Magistrate -- would not make the prosecution case suspect for as has been pointed out by a three-Judge

Bench of this Court in Pala Singh v. State of Punjab, the relevant provision contained in Section 157 CrPC regarding forthwith dispatch of the report (FIR) is really designed to keep the Magistrate informed of the investigation of a cognizable offence so as to be able to control the investigation and if necessary to give proper direction under Section 159 CrPC and therefore if in a given case it is found that FIR was recorded without delay and the investigation started on that FIR then however improper or objectionable the delayed receipt of the report by the Magistrate concerned, it cannot by itself justify the conclusion that the investigation was tainted and the prosecution unsupportable."

13. In Rabindra Mahto and Anr. v. State of Jharkhand (2006 (10) SCC 432), the position was re-iterated in paras 19 and 20.

14. PW-12 has referred to Ext. Ka-21 and Ka-22, (the site plan) and case number i.e. crime No.570 of 2001 has been clearly mentioned. The correctness of Exts. Ka-21 and Ka-22 has not been challenged. On 18.12.2001 the proceedings in terms of Sections 82 and 83 of the Code were initiated and non-bailable warrants were issued. On 20.12.2001 on the basis of the report attachment of the property was directed. Even if there has been lapse in the investigation as contended by learned counsel for the appellants that cannot affect the credibility of the witnesses. (See Ram Bali v. State of U.P. 2004 (10) SCC 598). It was highlighted that in the panchanama prepared under Section 174 of the Code names of accused persons were not indicated and that adds vulnerability to the prosecution version. This plea is clearly unsustainable. In Amar Singh v. Balwinder Singh and Ors. (2003 (2) SCC 518), it was observed as follows:

"12. The High Court has also held that the details about the occurrence were not mentioned in the inquest report which showed that the investigating officer was not sure of the facts when the inquest report was prepared and this feature of the case carried weight in favour of the accused. We are unable to accept this reasoning of the High Court. The provision for holding of an inquest and preparing an inquest report is contained in Section 174 CrPC. The heading of the section is "Police to enquire and report on suicide etc." Sub-section (1) of this section provides that when the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give information to the nearest Executive Magistrate and shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death describing such wounds, fractures, bruises, and other marks of injury as may be found on the body and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted. The requirement of the section is that the police officer shall record the apparent cause of death describing the wounds as may be found on the body and also the weapon or instrument by which they appear to have been inflicted and this has to be done in the presence of two or more respectable inhabitants of the neighbourhood. The section does not contemplate that the manner in which the incident took place or the names of the accused should be mentioned in the inquest report. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery etc. The scope and purpose of Section 174 CrPC was explained by this Court in Pedda Narayana v. State of A.P. (1975 (4) SCC 153) and it will be useful to reproduce the same: (SCC pp. 157-58, para 11):

`The proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the

deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report.

It is therefore not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of court.'

13. In Khujji v. State of M.P.(1991 (3) SCC 627) this Court, after placing reliance upon the abovequoted decision, rejected the contention raised on behalf of the accused that the evidence of eyewitnesses could not be relied upon as their names did not figure in the inquest report prepared at the earliest point of time. In Shakila Khader v. Nausheer Cama (1975 (4) SCC 122) it was held that an inquest under Section 174 CrPC is concerned with establishing the cause of the death only. The High Court was, therefore, clearly in error in holding that as the facts about the occurrence were not mentioned in the inquest report, it would show that at least by the time the report was prepared the investigating officer was not sure of the facts of the case."

15. Therefore, the appeals filed by the accused persons are without merit, deserve dismissal which we direct.

16. So far State's appeal as regards sentence is concerned, it is to be noted that number of deaths in a case would not be the determinative factor for awarding the death sentence. Even in the case of single victim death sentence can be awarded taking into consideration the circumstances of the case. In the instant case looking to the background facts it cannot be said that the High Court by altering the sentence from death to life has acted inappropriately. We, therefore, dismiss the State's appeal also. All the appeals are dismissed.