SUPREME COURT OF INDIA

Daya Kishan

Vs.

State of Haryana

Crl.A.No.879 of 2007

(J.M.Panchal and Deepak Verma JJ.)

22.04.2010

JUDGEMENT

J.M.Panchal, J.

1. This appeal, by grant of special leave, is directed against judgment dated August 21, 2006, rendered by Division Bench of High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 277-DB of 2004, whereby the High Court has dismissed the appeal filed by the appellant and confirmed judgment dated January 19, 2004, passed by the learned Sessions Judge, Sonipat in Sessions Case No. 21 of 1999/2003 convicting the appellant (1) under Section 302 read with Section 149 of Indian Penal Code (IPC) and sentencing him to R.I. for life and fine of Rs.3,000/- in default R.I. for two years, (2) under Section 307 read with Section 149 IPC and sentencing him to R.I. for seven years and fine of Rs.2,000/- in default R.I. for one year, (3) under Section 323 read with Section 149 IPC and sentencing him to R.I. for one year and (4) under Section 148 IPC and sentencing him to R.I. for two years.

2. The facts emerging from the record of the case are as under: - Bhale Ram is a resident of Village Jagsi. He has constructed shops on Bus Adda of Village Jagsi. There is a liquor vend in one of the shops constructed by him, while one shop, i.e., tea stall was being run by his son Sanjay and nephew Rajesh, son of Balbir. Two other shops are lying vacant and there is land behind these shops for tethering the cattle. According to the prosecution case a civil suit between Bhale Ram and the appellant regarding the land was pending since long time. The dispute relating to land was referred to Panchayat of the village. It was the claim of Bhale Ram that the said dispute was settled by the Panchayat but thereafter also the members of the family of the appellant were bearing a grudge against him and his family. The incident in question took place on November 30, 1998. At about 7.00 P.M. on the said date Sanjay and nephew of Bhale Ram were sitting in the shop when accused No. 1 Krishan, son of the appellant, came to the shop and asked for some goods. The goods were given by Sanjay to him. When Sanjay demanded money, an altercation ensued.

"Krishan threatened Sanjay that he would burn him. Krishan went back to his house, which was just behind the shop and after a short time (1) Krishan, (2) Pohla @ Sat Narayan, both sons of the appellant Daya Kishan, (3) the appellant Daya Kishan himself, (4) Ajmer and (5) Raja, both sons of Lalchand Bairagi, came there. They raised lalkara saying that Sanjay would not be spared by them. Pohla was armed with a gun whereas Ajmer was armed with Jelli and other accused including the appellant were armed with lathi.

On coming to the place of incident, Pohla at once fired a shot at Rajesh from his gun, which hit on the chest of Rajesh. When Sanjay went to the rescue of Rajesh, Pohla fired at Sanjay as a result of which Sanjay sustained injuries. The appellant gave a lathi blow on the right eye of the informant Bhale Ram whereas other accused, namely, Ajmer caused injury to the first informant with a jelli and Krishan gave a lathi blow on the wrist of the informant. The other assailants caused injuries to the informant's daughters, namely, Kamlesh and Meena and wife Kishni and left. The injured were taken to Health Centre, Gohana from where they were referred to PGIMS, Rohtak. When they reached PGIMS Hospital, Rohtak, Rajesh was declared brought dead whereas others were admitted to the hospital. The first informant Bhale Ram had also caused injury to the appellant in self-defence. The Head Constable on duty at PGIMS Hospital, Rohtak, had informed the police station about the injured having been admitted in the hospital for treatment.

Therefore, ASI Ram Prakash went to PGIMS Hospital and recorded the statement of Bhale Ram. The ASI sent the statement to P.S. Baroda for registration of FIR. At the police station, FIR was registered against the accused for commission of offences punishable under Sections 148, 149, 323, 307 and 302 IPC as well as under Sections 27, 54 and 59 of the Arms Act."

3. The Investigating Officer recorded statements of the witnesses, who were found to be conversant with the facts of the case. Inquest was held on the dead body of the deceased and arrangements were made by the ASI for conducting post mortem examination on the dead body of the deceased.

"On completion of the investigation the appellant and three other accused were charge-sheeted in the court of learned Judicial Magistrate, First Class, Gohana for commission of offences punishable under Sections 148, 149, 323, 307 and 302 IPC as well as Sections 27, 54 and 59 of Arms Act. As the offences punishable under Sections 307 and 302 IPC are exclusively triable by Court of Sessions, the case was committed to Sessions Court, Sonepat for trial. In the Charge- sheet it was mentioned that accused Sat Narayan was absconding and declared proclaimed offender. Subsequently, he was arrested and a supplementary challan was submitted resulting into registration of Sessions Case No. 122 of 1999."

4. The learned Sessions Judge framed charge against the appellant and other accused for commission of offences punishable under Sections 148, 149, 323, 307 and 302 IPC. The same was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined several witnesses and produced documents in support of its case against the appellant and others. In his statement under Section 313 accused Krishan denied all the allegations levelled against him by the prosecution. He stated that when he was present in his house with his father Daya Kishan, i.e., the appellant and ladies, Sanjay, who was armed with Gandasa along with 20 to 25 persons armed with weapons came to his house and raised lalkara to teach a lesson to them. According to him Sanjay gave Gandasa blow to him and other persons who were in the house and therefore in the defence of himself (Krishan) and other members of the family, his father Daya Kishan (`the appellant' therein) fired a shot from a gun. Krishan further mentioned in his statement that other accused namely Ajmer, Sat Narayan and Raja were not present in the house.

> "Ajmer in his further statement stated that he was not present at the time of occurrence and was falsely implicated.
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> The appellant in his statement under Section 313 of Cr.P.C. denied the allegations of the prosecution and mentioned that when he was present in his house along with his son Krishan and ladies, Sanjay, who was armed with Gandasa and came with 20 to 25 other persons armed with weapons came to his house.
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> According to him, after raising lalkara to teach him and others a lesson, Sanjay gave Gandasa blow to him and other persons and, therefore, to rescue him and his son, Krishan, he fired a shot from a gun and other persons, namely, Ajmer, Raja and Sat Narayan were not present at all.
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> Accused Raja denied all the allegations of the prosecution and stated that he was not present at the place of incident. In defence the accused examined (1) Dr. Gaurav Bhardwaj as DW-1, (2) Bhan Singh as DW- 2, (3) Khajan Singh as DW-3 and (4) Dr. S.S. Gupta as DW-4.
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> It may be mentioned that after recording of defence evidence was over, three other accused, i.e., Krishan, Ajmer and Raj Singh alias Raja jumped the bail. Their presence could not be procured despite the proclamation issued by the learned Additional Sessions Judge, Sonipat. Ultimately, they were declared proclaimed offenders and in such circumstances, Sessions Case No.121 of 1999 was tried and decided only against the present appellant. However, subsequently Raj Singh alias Raja was also arrested and his trial was concluded. Raj Singh was convicted under Section 148/302/307/323 read with Section 149 IPC and was visited with sentences mentioned in the judgment."

5. On appreciation of the evidence adduced by the parties, the learned Judge came to the conclusion that it was proved by the prosecution beyond reasonable doubt that deceased

Rajesh had died a homicidal death. Placing reliance on the depositions of the injured informant and other witnesses, the trial court concluded that it was proved by the prosecution that there was no delay in lodging the FIR nor any evidence could be produced to suggest that the First Information Report was filed after due deliberation or that the accused were falsely implicated. After referring to the prosecution story as narrated by the witnesses and defence version as narrated by the defence witnesses, the learned Judge came to the conclusion that the incident had taken place at the site mentioned by the prosecution and not at the house of the accused. The learned Judge held that the deceased Rajesh had died because of the shot fired on him from a gun by Pohla @ Sat Narayan and he had also injured witness Sanjay, who had gone to the rescue of the deceased Rajesh. According to the learned Judge it was not probablised by the defence that the appellant had fired shot at deceased Rajesh and Sanjay in exercise of right of self-defence whereas the injuries sustained by the appellant were explained by the first informant Bhale Ram. The learned Judge held that it was proved by the prosecution that the accused had formed an unlawful assembly, common object of which was to cause death of Rajesh and injure other witnesses and, therefore, the appellant was liable to be convicted under Section 302 read with Section 149 IPC, Section 307 read with Section 149 IPC, Section 323 read with Section 149 IPC and Section 148 IPC. The learned Judge accordingly convicted the appellant and imposed sentences referred to above. It may be noticed that in Sessions Case No.122 of 1999/2003 accused Sat Narayan alias Pohla was released on interim bail vide order dated 5.4.2000. His bail was continued till the next date of hearing. On 27.4.2000, when Sat Narayan failed to surrender before the court, warrants for his arrest were issued. Despite best efforts, his presence could not be procured and hence he was declared proclaimed offender vide order dated 16.1.2001 by the learned Additional Sessions Judge, Sonipat. Thus, Sessions Case No.122 of 1999/2003 has remained unconcluded. It was clarified by the learned Sessions Judge that finding of conviction recorded against the present appellant would not amount to expression of opinion for or against other remaining four accused unless they and the prosecution are heard. A direction was given by the learned Judge that file of this case and that of Sessions Case No.122 of 1999/2003 should be consigned to the record room but should be restored as and when the accused who are declared proclaimed offenders are produced by the police for hearing.

6. Feeling aggrieved, the appellant preferred Criminal Appeal No. 277-DB of 2004 before the High Court of Punjab and Haryana at Chandigarh. The Division Bench of the High Court dismissed the same by judgment dated August 21, 2006, giving rise to the instant appeal.

7. This Court has heard the learned counsel for the parties at length and considered the record of the case summoned from the trial court.

8. The fact that the deceased Rajesh died a homicidal death is not challenged before this Court. PW-3, Dr. Vimal Kumar Sharma stated in his testimony that he had conducted post mortem examination on the dead body of the deceased Rajesh on December 1, 1998 at about 2.30 P.M. and found that there were bluish circular 0.5 cm to 1.00 cm in diameter multiple holes on the anterior surface of chest and upper part of abdomen in the area of 25 cm x 22 cm

starting from 5 cm. above the nipple and 6 cm. above the umbilicus. Margins were abraded and inverted.

> "According to him on dissection the internal organs were found perforated and pellets had pierced the internal organs. What is mentioned by him is that 26 pellets were found on internal examination of the body, which were handed over to the police. According to the doctor, the cause of death of the deceased was shock and haemorrhage caused by fire arm injuries, which were ante mortem in nature and sufficient to cause death in ordinary course of nature. The testimony of the doctor, who performed autopsy on the dead body of the deceased, gets complete corroboration from the contents of post mortem notes produced by the prosecution. On the facts and in the circumstances of the case this Court is of the opinion that it is proved beyond pale of doubt that the deceased Rajesh had died a homicidal death."

9. The trial court as well as the High Court had relied upon the testimony of injured informant as well as other witnesses and had rightly recorded the conclusion that the deceased had died because of shot fired at him by the accused Pohla from his gun. The Sessions Court referred to the injuries sustained by Sanjay and has correctly come to the conclusion that he had sustained injuries from the shot fired by the accused Pohla.

> "The other findings recorded by the Sessions Court and the High Court relating to commission of offences under Sections 323, 307 and 148 IPC are based on appreciation of reliable evidence.
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> The learned counsel for the appellant has failed to satisfy this Court that those findings are either perverse or not borne out from the evidence.
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> Under the circumstances those findings deserve to be confirmed and are hereby confirmed."

10. The only point argued was that the appellant could not have been fastened with the liability under Section 302 read with Section 149 IPC for the death of Rajesh, which was caused by the accused Pohla @ Sat Narayan. According to the learned counsel for the appellant, the prosecution has not proved that common object of the unlawful assembly was to cause death of the deceased Rajesh, but at best it can be said that it was proved by the prosecution that common object of the assembly was to teach Sanjay a lesson and in that process to injure him and, therefore, the instant appeal should be accepted.

> "It was maintained that the act of Sat Narayan of firing a shot at Rajesh was his individual act and, therefore, the appellant should not have been convicted for murder of Rajesh with the aid of Section 149 IPC. The learned counsel emphasised that the prosecution has failed to prove that the appellant knew that death of Rajesh was likely to be caused by any member of the unlawful assembly in prosecution of the common object because common object of the unlawful assembly was to teach a lesson to PW-

10, Sanjay and, therefore, the conviction of the appellant under Section 302 with the aid of Section 149 IPC should be set aside."

11. The learned counsel for the State contented that the appellant himself armed with a lathi was a member of unlawful assembly, common object of which was to cause death of Sanjay as well as those who were accompanying him and, therefore, it is not correct to say that the provisions of Section 149 IPC would not apply to the facts of the case. According to the learned counsel for the State, the appellant, who was a member of the unlawful assembly, had come with other four accused and was armed with lathi and after fatal injury was caused to Rajesh and Sanjay was seriously injured with others, the appellant had left the place of incident with other accused and, therefore, the Sessions Court and the High Court committed no error in convicting the appellant under Section 302 with the aid of Section 149 IPC for causing death of deceased Rajesh. What was maintained was that sufficient evidence was brought on record by the prosecution to prove that the appellant had known that death of the deceased Rajesh was likely to be caused by any member of unlawful assembly in prosecution of the common object and, therefore, well recorded conviction of the appellant under Section 302 read with Section 149 IPC should be upheld by this Court.

12. Section 149 IPC creates a constructive or vicarious liability on the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. The basis of the constructive guilt under Section 149 IPC is mere membership of the unlawful assembly, with the requisite common object or knowledge. This Section makes a member of the unlawful assembly responsible as a member for the acts of each and all, merely because he is a member of an unlawful assembly. 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.

> "There are two essential ingredients of Section 149, viz., (1) commission of an offence by any member of an unlawful assembly and (2) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Once the court finds that these two ingredients are fulfilled, every person, who at the time of committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to the court to see as to who actually did the offensive act nor it would be open to the Court to require the prosecution to prove which of the members did which of the offensive acts.
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> Whenever a court convicts any person of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but that in pursuance of such common object the offence was committed. There is no manner of doubt that before recording the conviction under Section 149 IPC, the essential ingredients of Section 149 IPC must be established."

13. Applying the abovementioned well settled principles to the facts of the present case, this Court finds that the prosecution has not led any evidence to prove that the accused party had any grievance or grudge against the deceased Rajesh, who was nephew of the first informant Bhale Ram. The only fact, which can be held to be proved by the prosecution, is that the accused Krishan had an altercation with Sanjay relating to purchase of some goods, after which Krishan had threatened Sanjay and had then left the shop and come back within a short duration with other four accused including the appellant, who were variously armed. The further fact proved by the prosecution is that immediately on coming to the place of incident, the son of the appellant named Sat Narayan @ Pohla had fired a shot at Rajesh without any provocation or previous enmity or any other reason. It may be mentioned that the defence had tried to prove enmity between the first informant and the appellant but the substantive evidence of first informant Bhale Ram, examined as PW-4, and injured Sanjay, examined as PW-10, in fact goes to prove that there was no such dispute relating to the land and/or enmity between the first informant Bhale Ram and the appellant. The record does not indicate that any altercation had taken place between Krishan, who is son of the appellant, and deceased Rajesh when accused Krishan had gone to the shop of injured Sanjay for purchasing certain articles. In fact, the altercation had taken place between Krishan and injured Sanjay.

> "Though it was the case of the prosecution that after reaching the place of incident, the members of the unlawful assembly had given lalkara before the attack, the first informant in his substantive evidence before the court has not mentioned anything about the said lalkara though it was so mentioned by him in his FIR. Thus, the fact that lalkara was made before the attack will have to be disbelieved. If the evidence of the injured witness is appreciated in the above background, it becomes evident that no evidence could be adduced by the prosecution to establish that common object of the unlawful assembly was to do away with Rajesh or cause any injury to him.
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> As mentioned earlier the evidence clinchingly establishes that immediately after reaching the place of incident a shot was fired by accused Pohla from his gun. It would have been a different matter if Rajesh had suffered injuries in some other manner, e.g., Rajesh had tried to intervene when Sanjay was being attacked and was shot at. In such circumstances provisions of Section 149 IPC could have been well invoked.
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> There is no evidence regarding meeting of minds or formation of the common object even at the spur of the moment, when Pohla immediately after reaching the place of incident shot at the deceased Rajesh. There is no evidence suggesting that the appellant said something to indicate that he wanted the deceased to be done away with.
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> There is nothing to establish that the appellant knew that Pohla would cause fatal injuries to the deceased, though the appellant must have anticipated that Pohla would

cause injuries to Sanjay. In the present case, no overt act is attributed to the appellant so far as the deceased is concerned. Mere fact that the appellant was armed with a lathi by itself would not prove that he shared common object with which the main accused Pohla was inspired. The prosecution has not led the evidence to establish nexus between the common object and the offence committed.

The appellant, being father of the accused Krishan, who had an altercation earlier with injured Sanjay, had accompanied Krishan, which can be termed as natural conduct on the part of the appellant. It is relevant to notice that in the course of the incident the appellant himself had sustained serious injuries. The testimony of PW-14, Dr. Rajesh Saini indicates that he had examined the appellant Daya Kishan on December 1, 1998 at 2.30 P.M. and noticed abrasion of 1.5 cm x 0.2 cm on anterior surface of left leg and swelling around the abrasion.

According to him the movements of leg were restricted and he had also found lacerated wound of 6 cm x 0.3 cm on left parietal region. The testimony of Dr. Gaurav Bhardwaj, examined as DW-1, makes it clear that the appellant had sustained fracture of both bones of the left leg for which POP cast was given. As noticed earlier the first informant Bhale Ram has mentioned in his First Information Report itself that he had caused injuries to the appellant in exercise of his right of self-defence. The record does not indicate that the injuries sustained by the appellant were caused by deceased Rajesh. It is not the case of the prosecution that the appellant retaliated or asked others to attack the first informant despite having received serious injuries, which would indicate that the appellant had no grudge nor shared the object with which the accused Pohla had fired shot at the deceased Rajesh. The only circumstance on the basis of which the prosecution wants to hold that the common object of the unlawful assembly was to murder Rajesh is that Pohla had a gun and the appellant was a member of an unlawful assembly. The test for application of Section 149 IPC as suggested by the prosecution cannot be accepted. On the peculiar facts and in the circumstances of the case it can be safely concluded that the appellant did not share common object of one of the members of the unlawful assembly to cause death of Rajesh. The appellant cannot be reasonably attributed with knowledge that there was likelihood of commission of murder of Rajesh, because no altercation or quarrel had taken place between Rajesh and the accused Krishan nor there was any enmity between the appellant and Rajesh. Under the circumstances, this Court is of the opinion that the conviction of the appellant recorded under Section 302 read with Section 149 IPC for causing death of deceased Rajesh is not well-founded and is liable to be set aside. As far as conviction of the appellant under Section 307 read with Section 149 IPC is concerned, this Court finds that the said conviction recorded by the Sessions Court and affirmed by the High Court is amply borne out from the evidence on the record. So also the learned counsel for the appellant could not demonstrate that the conviction of the appellant under Section 323 read with Section 149 IPC and under Section 148 IPC are contrary to the evidence on record. Therefore, those convictions will have to be upheld."

14. The net result of the above discussion is that the appeal filed by the appellant partly succeeds. His conviction under Section 302 read with Section 149 IPC for causing death of the deceased Rajesh recorded by the Sessions Court and affirmed by the High Court is hereby set aside. His conviction under Section 307 read with Section 149 IPC for attempting to commit murder of injured Sanjay, under Section 323 read with Section 149 IPC and under Section 148 IPC is confirmed. This Court also finds that the sentences imposed on the appellant for commission of abovementioned offences are just and proper and no case is made out to interfere with the same.

15. Subject to above observations, the appeal stands disposed of.