SUPREME COURT OF INDIA

Debashis Daw

Vs.

State of West Bengal

Crl.A.No.1679 of 2005

(B.Sudershan Reddy and Surinder Singh Nijjar JJ.)

05.08.2010

JUDGEMENT

B.Sudershan Reddy, J:

1. The appellants in these appeals and three others were tried in Sessions Trial Case No. XXVII of March 1987 by the Additional Sessions Judge, Midnapore for offences punishable under Sections 148, 324/149 and 304 part I/149 of the Indian Penal Code. The learned Additional Sessions Judge, as per his judgment dated 26th September, 1989 convicted the accused persons under Sections 148 and 304 part I read with Section 149 and as well as under Section 324/149, IPC and sentenced them to suffer rigorous imprisonment for ten years each under Section 304 part I read with Section 149, IPC only. No separate sentence has been awarded for the proven charges under Sections 148 and 324/149 of the IPC. The appellants herein preferred appeals before the High Court at Calcutta. A Division Bench of the High Court, as per its judgment dated 21st April, 2005 dismissed the appeal of the appellants.

2. Against the said judgment of the High Court, the appellants have preferred the above noted three criminal appeals.

3. Brief facts necessary for disposal of these appeals are as follows:

> "According to prosecution case, on 31st March, 1986, the appellants have formed themselves into an unlawful assembly and being armed with deadly weapons like bhojali, sword, tangi and lathi etc. had been at Rajagram Kharida T.O.P. under Kharagpur (town) P.S. and all of them being members of such unlawful assembly, voluntarily caused hurt with a sharp cutting weapon and injured Kalyan Seth (PW 2) and also assaulted Subrata Ghosh (deceased) with deadly weapons and as a result of such assault, the said Subrata Ghosh succumbed to his injuries."

4. The police officer of Kharagpur (town) P.S. having received the information over telephone, made a G.D. entry and rushed to the place of occurrence where he met Suphala Sau (PW 1) who narrated about the incident which was reduced into writing at about 11.35 p.m. on 31st March, 1986. The injured Kalyan Seth (PW 2) was taken to the hospital by the local residents at about 11.00 p.m. on 31st March, 1986 and was treated by Dr. Subrata Jana (PW 7). The First Information Report (FIR) was despatched from police station on 1st April, 1986 at about 10.00 a.m.

5. The Investigating Officer recovered the body of the injured Subrata Ghosh and sent to nearby hospital for immediate medical treatment where he died. The Investigating Officer conducted inquest over the dead body of the deceased and witnesses were examined in connection with the case. The I.O. completed the formalities and made charge sheet against 18 persons including one Rabin Dangua and Sibu Borua who died before the commencement of sessions trial.

6. The prosecution altogether examined ten witnesses including parents of the deceased victim Subrata Ghosh and the injured person Kalyan Seth (PW 2). Dr. Madanmohan Das (PW 6) is the Medical Officer who conducted post-mortem of the deceased.

7. The trial Court upon appreciation of the evidence on record, came to the conclusion that all the appellants were members of the unlawful assembly and were present at the place of occurrence armed with deadly weapons with the object of rioting and in the process, attacked and assaulted Subrata Ghosh (deceased) causing multiple injuries resulting in his death. The trial Court also came to the conclusion that Kalyan Seth (PW 2) also received injuries from the appellants who formed themselves into unlawful assembly. The trial Court accordingly found all the appellants guilty for the offences punishable under Sections 148, 324/149 and 304 part I/149, IPC and accordingly sentenced them as noted hereinabove.

8. The High Court, upon reappreciation of the evidence available on record, concurred with the findings and conclusions reached by the trial Court and accordingly dismissed the appeal.

9. We have heard Shri Pradip Kumar Ghosh, learned senior counsel on behalf of the appellants and as well as M/S Rauf Rahim and Rakesh Garg, learned counsel for the appellants in the connected appeals. We have also heard Shri T.C. Sharma, advocate on behalf of the State.

10. The learned senior counsel for the appellants strenuously contended that the FIR in the present case is unreliable document because it was neither first in point of time nor truthful in its contents. The submission was that the maker of the FIR, Ms. Sufala Sau (PW 1) did not support her version given in the FIR while deposing in the Court.

> "Learned senior counsel further contended that the injured Kalyan Seth (PW 2) gave entirely a different version implicating only Rabin Dangua, Dulal Khara, Mantu Santra and Chunki Santra when he made a statement to the Doctor (PW 7) who

treated him at the hospital. It was mainly contended that the prosecution deliberately shifted the place of occurrence from Rajagram Kharida to that at Gokulpur road with an obvious intention to introduce the parents of the deceased who were examined as PWs 5 and 8 in the trial Court. The learned senior counsel submitted that admittedly the police received a telephonic message to the effect that a disturbance was going on at Teghori near Madbhati liquor shop and to that effect made a G.D. entry at 10.45 pm on 31st March, 1986. There is no explanation forthcoming as to why the police reached Rajagram instead of village Teghori since the telephonic message received by the police was regarding some disturbance at village Teghori. It was submitted that there is no explanation forthcoming as to why the police went to the house of Suphala Sau (PW 1) who is a resident of Rajagram which is a village to the east of railway line and opposite to the side of village Teghori. These factors, according to the learned senior counsel, make the whole prosecution story doubtful. Learned senior counsel made an attempt to point out certain contradictions in the evidence of PWs 2, 5 and 8 who are stated to be the eyewitnesses. The submission was that if PWs 5 and 8 are to be disbelieved there is no other credible evidence at all to convict the appellants. It was further submitted that Kalyan Seth (PW 2) specifically pointed out and named only four persons as his assailants in his statement made to the Doctor (PW 7) at the hospital. None of the appellants in Criminal Appeal No. 1679 of 2005 were named by him. He, however, named only Mantu Santra being one of the appellants in Criminal Appeal No. 1680 of 2005. Later on, he named others in Court but that was an improvement in his deposition."

11. Learned counsel for the respondent submitted that the trial Court and as well as the appellate Court, upon appreciation of evidence, found the appellants guilty of the charges framed against them and there is no reason to interfere with concurrent findings of fact arrived at by the Courts below. Learned counsel submitted that there is absolutely no reason to disbelieve PWs 2, 5 and 8 who are material witnesses examined by the prosecution in support of their case.

12. Suphala Sau (PW 1) is the maker of the FIR but was declared hostile as she did not support the prosecution story. Nothing much turns upon her evidence except that she disclosed that there was an unlawful assembly of which some of the appellants were members carrying deadly weapons but she did not state anything about the actual participation of the appellants either in inflicting the assault on PW 2 or on the deceased. She retracted from her version given in the FIR. Nothing much turns upon her evidence and the Courts below did not place any reliance on her evidence to convict the appellants.

13. We do not find any particular reason as to why the evidence of Kalyan Seth (PW 2) is to be disbelieved. It is in his evidence that the deceased was a very close friend of his and both of them were on visiting terms. It is clearly stated in his evidence that on 30th March, 1986, at about 6.00 in the evening, the deceased came to his house and after about three hours, both of them were proceeding towards the house of the deceased at Teghori which is at a distance of about 250 meters to the east of his house, when they have reached the culvert near the

licensed country liquor shop, the appellants encircled him and the deceased with deadly weapons in their hands.

> "Then all of a sudden, Rabin Dangua (since died) hit the deceased with a lathi on his head and the deceased fell down, then Rabin Dangua hit PW 2 with a lathi on his right leg. Thereafter, all the appellants attacked them at random with different weapons. He could see the deceased somehow managed to save himself from the hands of the appellants and ran towards the east but all the appellants were chasing him with the weapons in their hands. Of course, he named only four persons in his statement made to the Doctor (PW 7) who treated him in the hospital. Obviously, he must have been under terrible shock as he along with the deceased was encircled by a riotous mob with deadly weapons in their hands. The mere fact that he did not mention the names of all the accused is no reason to disbelieve his evidence. There is no particular reason suggested in the cross examination as to why he should depose falsely against the appellants.
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> Admittedly, the deceased and PW 2 were bosom friends and meeting almost everyday. His presence at the scene of offence along with the deceased cannot be doubted. In the circumstances, we hold that the Courts below rightly placed reliance on the evidence of PW 2."

14. PW 5 is the father of the deceased. On the fateful day at about 9.00 p.m. he was at his house at Teghori. He came out of the house along with his wife after hearing an alarm and went towards the railway line to ascertain the cause as the alarm was coming from the eastern side of the railway line. After crossing rail line, he saw a group of persons. He was having a torch light with him and clearly saw the appellants armed with deadly weapons encircling and assaulting somebody. At that time he did not realize that his son was the victim because the victim was encircled by the mob. Only after the mob left, he searched for the unfortunate victim subjected to assault by the appellants and to his utter shock and dismay, realized that the victim was none other than his son Subrata Ghosh lying in the drain with multiple injuries.

> "The injured was pulled out from the drain. In the meanwhile, the police reached there and took the injured to hospital. This version has been fully corroborated by the evidence of PW 8 who is none other than the mother of the deceased. We do not find any reason to reject the evidence of PWs 5 and 8. They clearly speak about the assault on the deceased by the appellants forming themselves into an unlawful assembly armed with deadly weapons. It is true that they did not realise as to who was the victim when the accused were actually assaulting the deceased. There is nothing unnatural in the evidence of PWs 5 and 8 that they have seen the actual assault on the victim inasmuch as the appellants having themselves formed into unlawful assembly armed with deadly weapons encircled the victim and it is for that reason they could not realize that the victim injured in the act of indiscriminate attack was none other than their own dear son."

15. Further, the comment by the learned senior counsel that the torch lights that were seized and produced in the Court were without batteries and bulbs and therefore there was no possibility of PW 5 identifying the appellants as the assailants at the place of occurrence that took place at about 9.00 p.m., does not impress us. The fact that the torch lights marked as material objects are without batteries and bulbs after so many years is of no consequence. They were perhaps missing for obvious reasons.

16. Be it noted that the learned Sessions Judge in his judgment noted that the incident had taken place on 31st March, 1986 just after four days after the full moon and all the assailants were known to PWs 5 and 8 and it was not impossible for them to identify them at the relevant time. We do not find any reason not to accept the reasons given by the learned Sessions Judge in this regard.

17. We do not find any merit in the criticism levelled by the learned senior counsel about the absence of the parents of the deceased at the hospital and their not accompanying their injured son to the hospital after being pulled out from the drain. This, according to the learned senior counsel, makes the presence of PWs 5 & 8 at the scene of occurrence doubtful. It is clearly stated in the evidence of PWs 5 and 8 that their request to accompany the injured to the hospital was turned down for want of accommodation in the Jeep and the I.O. (PW 9) also supported the said version. The I.O. in his evidence clearly stated that all his effort was to shift the injured quickly and take him for the treatment and in the process did not bother as to who should accompany the victim in the jeep. Be it noted, there was mud all over the body of the victim with the multiple injuries. The parents of the victim were told by the I.O. that it was not possible to accommodate them in the jeep since there was no sufficient space available for them to accompany the victim in such a condition with mud all over the body.

18. Likewise, we do not find any merit in the submission that the scene of occurrence has been deliberately shifted to the vicinity of the residence of PW 5 to conveniently press the parents of the victim into service to speak falsely. The failure to collect control earth from the scene of occurrence by the I.O. may be a lapse on the part of the I.O. but the same would not make the presence of PWs 5 and 8 doubtful at the scene of occurrence. There is no particular reason suggested to PWs 5 and 8 as to why they should speak falsely against the appellants. Once we accept the evidence of PWs 5 and 8, minor contradictions if any in the evidence of the I.O. and PW 2 fail to persuade us to take a different view.

19. The evidence of Medical Officers (Pws 6 & 7) is of some importance. Dr. Subrata Jana (PW 7), the Medical Officer of Kharagpur State General Hospital who initially attended on the deceased Subrata Ghosh and noted a number of injuries on the body of the victim including one lacerated injury over the skull and further noticed that brain matter was protruding through it. The size of that injury, according to him was 6"x4"x2". He also found three other incised wounds on the body of the victim. Of course he highlighted in his cross examination about the injury on the head which was on the midline. However, PW 6 Dr.

Madanmohan Das who held post-mortem found sharp cut `x' type injury over scalp measuring 4" x =" x =" deep and another of same dimension. He also noticed as many as eight sharp cut wounds on the body of the deceased.

> "The medical evidence in our considered opinion is not at variance with the version given by PWs 5 and 8 who are undoubtedly the eyewitnesses to the incident."

20. Learned senior counsel for the appellants placed reliance *State of M.P.*[1] to contend that the mere fact that PWs 5 and 8 are consistent in their say is not a sure guarantee of their truthfulness and the Courts below ought to have considered all the circumstances and taken their version as a whole instead of relying on their evidence in the examination-in-chief. This contention is untenable for the trial Court as well as the appellate Court did consider their evidence in its entirety including the cross examination and found nothing in it to discard their evidence for any reason whatsoever. It is not a case where the Courts found the case of the prosecution doubtful or incredible but convicted the appellants merely on the basis that the evidence of PWs 5 and 8 was consistant. The High Court critically scrutinized the evidence in detail and discharged its responsibility as a final Court of fact.

21. The learned senior counsel for the appellants relying on *W.B.*[2] submitted that where large number of persons are implicated collectively, the Courts must insist for something more than their being cited as an accused I n order to convict them for the charge of the offence. It is well settled and needs no restatement at our hands that mere presence of the persons at the scene of offence itself would not be enough to convict them and punish under Section 149, IPC unless it is established that each one of them was part of the unlawful assembly and committed the offence in prosecution of the common object of that assembly. In all such cases, the question who had committed the overt act is of no consequence.

> "This Court in Akbar Sheikh (supra) observed that the prosecution in a case of this nature is required to establish: (i) whether the appellants were present; and (ii) whether they shared a common object. The trial Court and as well as the High Court, in the present case, found that all the stated ingredients were present for each of the appellants was found to be part of the unlawful assembly armed with deadly weapons and shared common object with that intention participated in the commission of offence. The evidence available on record clearly suggests that each of the appellants was part of the unlawful assembly and armed with deadly weapons, together indulged in indiscriminate beating and freely used weapons in their hands causing severe injuries on the body of the deceased. It is true as held by this Court have to be very careful in case where general allegations are made against a large number of persons and the Courts should categorically scrutinize the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. There must be reasonable circumstances which lend assurance to the story of the prosecution. But in the present case, there are no circumstances to doubt the presence of the appellants as well as their membership of the unlawful assembly. This is clear from the evidence of PWs 5 and 8 which the Courts below accepted for good and cogent reasons. It is not

necessary for us to undertake a detailed scrutiny of the evidence of PWs 5 and 8 in view of the concurrent findings by the Courts below upon proper appreciation of evidence. We see no reason to disturb the concurrent findings of the Courts below holding the appellants guilty of the charged offences."

22. We accordingly uphold the conviction of the appellants but having regard to the peculiar facts and circumstances of the case, reduce the sentence to that of the period already undergone. The appellants may be released from the jail forthwith provided they are not required in any other case.

23. The appeals are accordingly disposed of.

[1]*(2003) 12 SCC 792*
[2]*(2009) 7 SCC 415*
[3]*(1991) Supp.(2) SCC 437*