

SUPREME COURT OF INDIA

Bharat Soni etc.

Vs.

State of Chhattisgarh

C.A.No.1262-1264of2010

(P. Sathasivam and Ranjan Gogoi,JJ.)

22.11.2012

JUDGMENT

Ranjan Gogoi,J.

1. Four of the seven accused persons whose conviction under Section 302 IPC and the sentence of life imprisonment has been affirmed by the High Court of Chhattisgarh have filed the instant appeals challenging Judgment and Order dated 30th November, 2009 of the High Court. We have heard the learned counsels for the appellants as well as the learned counsel for the State.

2.The short case of the prosecution is that on 05.12.2000 at about 8.55 p.m., Santosh (PW-4) lodged a FIR in the Ambikapur Police Station stating that a short while ago i.e. at about 8.40 p.m. while he was standing in front of his house alongwith deceased Vinod and Amit (PW-13), accused Gopi Ghasia(A-6) and Ranu(A-5) had come there in a state of intoxication. According to the first informant, an altercation took place in the course of which he as well as Vinod had slapped accused Gopi. Enraged, the accused persons went away threatening to kill them. According to the first informant, after about an hour, the four accused appellants. i.e. Bharat, Dhruv, Sanjay and Rupesh accompanied by accused Ranu, Gopi and Jitender came to the place armed with different kinds of dangerous weapons. Specifically it was mentioned that accused Gopi had come armed with a Nepali Khukhri; accused Ranu had a knife with him whereas accused Jitender was armed with a Nan Chaku. In so far as accused Bharat and Dhruv are concerned, it was claimed by the first informant that while the former was armed with an iron rod, accused Dhruv had carried a leather belt in his hand. In the FIR it was further alleged that accused Ranu had assaulted the first informant Sanjay (PW-4) with a knife but he had escaped without any serious injuries. However, accused Gopi and Ranu gave knife blows to the deceased Vinod on his chest and stomach whereas accused Dhruv

and Bharat had assaulted Amit Kashyap (PW-13) with the belt and iron rod that they had carried. According to the first informant, accused Rupesh and Sanjay had instigated the other accused to kill the deceased Vinod. Due to the assault committed on Vinod, he had sustained injuries for which reason he had to be taken to the hospital.

3. On receipt of the FIR a case under Sections 147, 148, 149 and 307 of the IPC was registered. However as the injured Vinod died at about 9.15 p.m. on the same night, the offence under Section 302 was added in the FIR. The crime alleged was duly investigated and on completion thereof all the seven accused were charge sheeted under Section 147, 148, 302/149 of IPC. Thereafter, the case was committed for trial to the court of sessions and charges under Sections 147, 148, 302/149 IPC were framed against the accused persons. As the accused claimed innocence a regular trial was held, at the conclusion of which all the seven accused were found guilty of the charge under Section 147, 148, 302/149 IPC. They were accordingly sentenced. The separate appeals filed by the seven accused before the High Court having been dismissed by the impugned order dated 30.11.2009, the accused Bharat, Dhruv, Sanjay and Rupesh have challenged the aforesaid order of the High Court in the appeals filed by them before this Court.

4. Before advertng to the core legal issue arising in the present appeals, namely, the liability of the accused appellants for the offence under Section 302 IPC on the basis of their constructive liability, if any, under Section 149 IPC, it will be necessary to notice, though very briefly, the salient part of the evidence adduced by the prosecution in support of the charges levelled.

5. Of the fifteen witnesses examined by the prosecution, the evidence of Sonu Kewat (PW-1), Suraj Dass (PW-2), (though declared hostile), Ram Naresh (PW-3), Prakash Suryavanshi (PW-5), Imtiaz Ali (PW-6) and Dr. S.K. Sinha (PW-7) would be relevant. Equally, the evidence of (PW-4) and PW-13 who had been examined as the eye-witnesses to the incident will have to be noticed in some details.

6. From the deposition of PW-1, PW-2, PW-3 and PW-5, it transpires that the aforesaid witnesses had come to the place of occurrence on hearing the commotion that had taken place. The said witnesses, without any major discrepancies or contradictions, have narrated that on reaching the place of occurrence they could see the deceased Vinod lying injured and all the seven accused fleeing away therefrom. However, two of the accused, namely, Dhruv and Bharat were apprehended by the persons who had gathered at the place of occurrence, having come there on hearing the commotion that had taken place. It may be noticed, at this stage, that in so far as the identity of the accused is concerned, no issue has been raised on behalf of the accused at any point of time.

7. Imtiyaz Ali (PW-6) is a witness to the recovery of the alleged weapons of assault. All such recoveries were made at the instance of the accused persons. Specifically, PW-6 has deposed that on the basis of the statement of accused Jitender a Nan Chaku (Ex.P-7) was recovered. At the instance of accused Gopi and Ranu a Nepali Khukri and a Gupti (Ex.P-8 and Ex.P-11 respectively) was recovered. Similarly, on the basis of the statement of accused Dhruv and Bharat a leather belt and Bharat Soni Etc vs State Of Chhatisgarh on 22 November, 2012an iron rod (Ex.P- 14 and Ex.P-15) were recovered.

8. Dr. S.K. Sinha (PW-7) M.O. District Hospital, Ambikapur who had conducted the post mortem of the deceased Vinod had proved the report of post-mortem (Ex.P-26). This witness had deposed that corresponding to one of the external injuries found i.e. an incised wound over the abdominal wall below the umbilicus, internal injuries cutting the diaphragm and lower lobe of the right and left lung were found by him on the person of the deceased.

9. PW-4 who was examined as an eye-witness had deposed that all the seven accused persons, including the four appellants, had come together to the place of occurrence at about 8.40 pm on 05.12.2000. This witness had specifically deposed that accused Bharat, who was armed with a Gupti, had assaulted the deceased in the stomach with the said weapon. However, in the FIR filed by him, he had stated that accused Bharat was armed with an iron rod. Similarly in his deposition, PW-4 had stated that accused Dhruv was also holding a Gupti whereas in the FIR it had been mentioned that the said accused was armed with a leather belt. In a similar manner, though in the FIR accused Sanjay and Rupesh had been alleged to be the persons who were instigating the others to kill Vinod, in his deposition in court PW-4 had stated that he had seen the accused Sanjay assaulting the deceased in the thigh with a Gupti. In so far as accused Rupesh is concerned PW-4 had not implicated the said accused in any manner at all while deposing in court. Similarly, PW-4 had not implicated accused Jitender his evidence in court though in the FIR filed he had specifically mentioned that accused Jitender was armed with a Nan Chaku. In so far as the accused Gopi and Ranu is concerned PW-4 has, however, been consistent in the alleged involvement of the said two accused both in the FIR as well as in the deposition tendered in Court.

10. On the other hand, Amit Kashyap (PW 13), had deposed that the accused persons, including the present appellants, were assaulting (beating) Vinod with hands and fists and were also kicking him. However, when he (PW-13) along with others had rushed towards Vinod to save him, the accused persons took out the Guptis that they were carrying and started assaulting the deceased with the said weapons. Specifically, PW-13 had stated that accused Ranu had stabbed the deceased with a dagger on the stomach and the accused

Jitender had also inflicted a Gupti blow though he could not see the particular part of the body of the deceased on which the Gupti blow was inflicted by the accused Jitender.

11. Furthermore, reading the evidence of PW-13 it is clearly discernible that the said witness has tried not to involve the accused Bharat in the incident. The motive for the same, as evident from the cross-examination of PW-13, is some relationship between the two i.e. PW-and accused Bharat. Specifically, PW-13 had stated that he had not seen Bharat committing any assault on the deceased and that he was also not sure as to whether Bharat had accompanied the other accused persons and also whether he was holding any weapon at all. PW-13 has also given a different sequence of the arrival of the seven accused persons at the place of occurrence. In this regard he had stated that while five accused had arrived together, accused Bharat arrived at the place of occurrence thereafter and the last to arrive was the accused Sanjay.

12. Having noticed the essential features of the evidence tendered by the prosecution witnesses we may now proceed to examine the liability of the accused appellants, all or any of them, on the principle of vicarious or constructive liability under Section 149 of the IPC. The aforesaid provision of the IPC is in the following terms:

“149. Every member of unlawful assembly guilty of offence committed in prosecution of common object 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.

13. An assembly of five or more persons having as its common object any of the five objects enumerated under Section 141 of the IPC is deemed to be an unlawful assembly. Membership of an unlawful assembly is itself an offence punishable under Section 143 whereas other species of the said offence are dealt with under Sections 143 to 145 of the IPC. Similarly, Sections 146 to 148 of the IPC deals with the offence of rioting which is defined to be use of force or violence by any member thereof. Section 149 makes every member of an unlawful assembly liable for offence that may be committed by any member of the unlawful assembly in prosecution of the common object of that assembly or for commission of any offence that the members of the assembly knew to be likely to be committed in prosecution of the common object of the assembly.

14. Section 149 IPC, therefore, engrafts a principle of vicarious or constructive liability inasmuch as a person would be guilty of an offence, though he may not have directly committed the same if as a member of an unlawful assembly he had shared a common object

with the other members to commit such an offence or if he knew that such offence was likely to be committed in prosecution of the common object of the assembly of which he was a member.

15. The purport and effect of the provisions of Section 149 IPC has received the consideration of this court on more than one occasion. Without referring to any particular or specific precedent available on the point, it would suffice to say that determination of the common object of an unlawful assembly or the determination of the question whether a member of the unlawful assembly knew that the offence that was committed was likely to be committed is essentially a question of fact that has to be made 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 and a host of similar or connected facts and circumstances that cannot be entrapped by any attempt at an exhaustive enumeration.

16. In *Dani Singh Vs. State of Bihar*[1] the meaning of the word common object had been considered by this Court. The relevant part of the discussion may be summarized up below: 11 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 2 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 13 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 or before or after the scene of incident

17. In a recent decision of this court in *Kuldip Yadav Vs. State of Bihar*[2] to which one of us (Justice Sathasivam) was a party, the principle of constructive liability under Section 149 IPC had once again received an elaborate consideration. In paragraph 39 of the judgment it was held that:

“It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by

one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of lawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object.

18. In para 40 of the judgment an earlier decision in *Rajendra Shantaram Todankar Vs State of Maharashtra*[3] was noticed, particularly, the opinion thatIt is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime.

19. Having enumerated the principles of law governing the application of the principle of constructive liability under Section 149 IPC, it will now be necessary to apply the said principles to the facts of the present case as disclosed by the evidence on record.

20. The presence of the accused appellants along with the other accused at the place of occurrence and at the time and date as claimed by the prosecution is not in dispute. It is also not in doubt that the two of the accused i.e. Gopi and Ranu (not before us) had an altercation with Santosh (PW-4) and the deceased Vinod about an hour earlier to the incident and that the two accused had left the place threatening that they would come back to kill Santosh (PW-4) and Vinod. Thereafter, all the seven accused had come armed with weapons. From the evidence of the prosecution witness it transpires that some of the accused had attacked Santosh (PW-4) and Amit (PW-13) who were present at the spot besides assaulting the deceased Vinod in the stomach with sharp weapons resulting in his death. From the evidence of PW-1, PW-2, PW-3 and PW-5 it clearly transpires that all the seven accused, after the incident, were seen trying to flee away from the place of occurrence and, in fact, two of the accused i.e. Dhruv and Bharat (Appellants before us) were apprehended by the persons present at the spot.

21. As against the above, what we find is several serious contradictions in the evidence of PW-4 and the previous statement made by him in the FIR. The discrepancies are too significant to be ignored. As the details in this regard have already been noticed the same need not be repeated. Suffice it will be to say that such discrepancies in the evidence of PW-4 relate to vital aspects of the case, namely, the weapons carried by the accused persons; who amongst the accused had assaulted the deceased and the weapon(s) used. On the other hand, from the evidence of PW-13 it transpires that the accused persons were initially assaulting the deceased with their hands and fists and were giving him blows and kicks. It is only at a later

stage i.e. when PW-13 and others had rushed to save Vinod that accused persons are reported to have taken out the weapons they were carrying i.e. guptis. Specifically PW-13 had implicated only accused Jitender and Ranu (not appellants) as the persons who had inflicted knife and gupti blows on the deceased though he had stated that he could not see the specific part(s) of the body of the deceased on which assault was committed by the accused Jitender.

22. From the above it is clear that not only the testimony of PW-4 is self contradictory, the versions of the two eye-witnesses in so far as the involvement of the accused-appellants is concerned is at variance with each other. Insofar as accused Rupesh is concerned he has hardly been implicated and the prosecution evidence, properly read, would seem to show that he was a mere passive onlooker. Also, PW-13 is wholly silent with regard to the involvement of any of the four accused appellants before this Court. In fact, PW-13 had gone to the extent of stating that the accused Bharat may not have accompanied the other accused to the place of occurrence and he was in fact not holding any weapon at all. The recovery of the alleged weapons at the instance of the accused, if the oral evidence of PW-4 and PW- 13 is to be excluded, will not be sufficient to convict the accused appellants under Section 149. The incident of the accused fleeing away from the place of occurrence, similarly, will not be conclusive and determinative of the liability of the accused for the substantive offence under section 302 with the aid of section 149 IPC. There is no convincing and consistent evidence of any individual overt act on the part of any of the accused appellants to implicate any or all of them for causing the fatal injuries on the body of the deceased. Having considered the evidence brought by the prosecution, as discussed above, we are of the view that it cannot be reasonably inferred that the accused appellants, as members of an unlawful assembly, had any common object to commit the offence of murder of the deceased Vinod. Neither, the accused can be attributed with the knowledge that the offence of murder was likely to be caused or to occur in prosecution of the common object. At best what can be said and held is that the common object of the assembly of the accused was to teach PW-4 and the deceased Vinod a lesson on account of the previous altercation that had taken place in the course of which PW-4 and the deceased had slapped one of the accused, i.e. Gopi. The accused persons, including the present appellants, as members of the unlawful assembly were committed and in fact had indulged in the use of force in prosecution of the aforesaid common object. The same would, however, render the accused appellants liable only for the offence under Section 147 and 148 of the IPC for which they have already been convicted by the learned trial court as also by the High Court.

23. We are, therefore, of the view that while maintaining the conviction of the appellants under Section 147 and 148 of the IPC and the sentence imposed they are entitled to be acquitted for the offences under Section 302 read with Section 149 IPC. If the accused appellants have already served the sentence for the offences under Section 147 and 148 of the

IPC we direct that, unless their custody is required in connection with any other case, the accused appellants be set at liberty forthwith. The Judgment and Order of the High Court is modified accordingly and the appeals are partly allowed to the extent indicated above.