

In Re: Ningappa Balappa Hadli and anr.

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Court : Karnataka

Decided On : Jun-14-1960

Reported in : 1960CriLJ1472

Judge : A. Narayana Pai and; M. Ahmed Ali Khan, JJ.

Appellant : In Re: Ningappa Balappa Hadli and anr.

Judgement :

ORDER

A. Narayana Pai, J.

1. The appellants, Ningappa Palappa Hadli and Gudigeppa Balappa Hadli, were respectively the first 2nd the second accused in Sessions Case No. 48 of 1957 on the file of the Additional Sessions Judge, Dharwar. They and 7 others were tried together upon the charge that on or about the 18th day of July 1957 at Huilgol village they formed themselves into an unlawful assembly armed with deadly weapons, with the common object of Committing the murders of Sivappa Gangappanavar and Ningappa Gangappanavar and that, in prosecution of the said common object, some of them did intentionally cause the deaths of the said Sivappa Gangappanavar and Ningappa Gangappanavar and thereby all of them committed offences punishable Under Section 148 and Under Section 302 read with Section 149 of the Indian Penal Code.

Accused Nos. 3 to 9 were acquitted. The appellants were found to be guilty only of causing grievous hurt to Sivappa and Ningappa punishable Under Section 325 of the Penal Code. Each of them has been awarded two sentences, each of 5 years' rigorous imprisonment, one in respect of grievous hurt caused to Sivappa and the other in respect of grievous hurt caused to Ningappa; the sentences are to run consecutively. (Paras 2 to 23 which deal mainly with the facts of the case and do not involve any point of law have been omitted. His Lordship proceeded:)

24. The plea of self defence is not confined to the appellants alone before us but was raised in the lower Court on behalf of all the accused. It involves an admission that all the 9 accused were present on the scene of offence or at any rate, their presence is implicit in the plea. It means that all the 9 of them acted with the common object of warding off the alleged aggression on part of the deceased and that therefore all of them acted in concert with that common object. Now the plea of self defence means that the harm which the accused had inflicted on the alleged aggressors is not an offence because the circumstances entitled them to exercise the right of self defence.

If, therefore, the plea of self defence fails, the harm so caused would undoubtedly be a punishable offence. If, in addition, the accused acted in concert in the purported exercise of the right of self defence to which they were not entitled, there is no escape from the conclusion that they together constituted an unlawful assembly with the common object of committing the offence constituted by the harm inflicted by them. Apart from the admission so implicit in the plea of self defence, there is, as a matter of fact, no doubt as to the presence of all the 9 accused as well as of the second, accused's son Basappa on the scene of offence.

None of the accused, except the 5th, has in fact denied his presence. Even as to him, the evidence of his presence is clear and convincing. Not only does Siddappa speak to the 5th accused having dealt blows on Sivappa at several places, but he is one of the three persons whom Sivangoud P.W. 6 clearly recognised, whom he knew as Yella ppa and whom he identified in court. Even the trial Judge who, without examining the question of common intention or common object, proceeded

to deal with the evidence against each individual accused and came to the conclusion that all the accused except the appellants before us should be acquitted, has done so on the view that the evidence when taken as against each of them is weak or inadequate in his opinion to convict them and not because they or any of them were not present on the scene of offence.

Taking all the circumstances and the entire evidence into consideration and examining the same carefully ourselves, we have no doubt that all the 9 accused persons as well as the 2nd accused's son Basappa were present on the scene of offence and did participate in the offence in some form or other.

25. The question arises whether the trial Judge having acquitted accused 3 to 9 and the State having failed to appeal against their acquittal, we are precluded from assessing the evidence afresh and examining the correctness of findings recorded by the trial Judge, for the purpose of deciding the question of guilt or otherwise of the appellants before us. The powers of an appellate Court are set out in Section 423 of the Code of Criminal Procedure separately in respect of an appeal from an order of acquittal and an appeal from a conviction.

In the former, the Court upon reversing the order of acquittal, may either order further enquiry or trial or may itself find the accused guilty and pass sentence upon him; in an appeal from a conviction, the appellate Court may-

(1) reverse the finding and sentence, and acquit or discharge the accused, or, order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court or committed for retrial; Or

(2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence; or

(3) with or without such reduction and with or without altering the finding, alter the nature of the sentence.

These powers are, in our opinion, advisedly set out in wide and comprehensive language with a view to arm the appellate Court with full power to do what is just and proper in the circumstances of the case. By way of illustration, we may take a

case where there is ample and convincing evidence to convict an accused, but the reason stated by the trial Court in support of conviction might be open to challenge or untenable. In such a case, it would be impossible for the appellate Court to Sustain the conviction when it finds the trial Court's reasoning untenable, if wrong findings of the trial Court are to be binding on the appellate Court despite the fact of availability of convincing evidence to convict the accused.

We are, therefore, clearly of opinion that while assessing the guilt or otherwise of the appellants before us, we have not only the power but also the duty of examining the correctness of all findings of the trial Court and if necessary, reversing the same on a re appreciation of the evidence. This position seems to us to be clear upon principle. There is also authority in support of it. In *Gulab v. State* : AIR1951 All660 , Full Bench of the Allahabad High Court has held that where in a prosecution of 5 or more persons whose criminal liability is sought to be supported Under Section 149 of the Indian Penal Code, all but one are acquitted and there is no appeal by the State Government against the acquittal, the appellate Court in an appeal by the convicted accused can sustain the conviction of the appellant under the provisions of Section 149 if it corned to the conclusion that the acquittal of others is wrong although it cannot reverse the order of acquittal.

26. Coming now to the plea of self defence, it is no doubt true that it need not be specifically pleaded but can be spelt out or supported on the strength of the material on record. At the same time, it, should be remembered that Under Section 105 of the Evidence Act, the burden of proving the existence of circumstances entitling the accused to the right of self defence is upon the accused, and the Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by themselves adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. The question, therefore, is whether the accused in this case have placed such material on record.

(27-29) (Their Lordships then discussed the evidence and coming to the conclusion that the deceased were unarmed and that the accused had attacked the deceased before they had any time to raise their hands, continued as follows):-

Even assuming, therefore, that the 7th accused, her brothers and her companions were lawfully on the land at the commencement and Sivappa might he said to have committed a wrong in entering upon the land Udaspatti. the manner in which the accused have attacked Sivappa who remained unarmed and unassisted, is sufficient to reject their plea of self defence. It is impossible, in the circumstances, to believe that the accused could have had any apprehension, much less a reasonable apprehension, of either death, grievous hurt or even simple hurt from Sivappa or Ningappa, The injuries found on Sivappa and Ningappa show that the accused have used violence grossly in excess of the occasion. The accused cannot, therefore. foe said to have acted in the bona fide exercise of the right of private defence.

30. The plea of self defence being thus unavailable to. the accused, the only reasonable con elusion to which evidence leads is that all the accused have acted in concert with the common object of belabouring Sivappa and later Ningappa also and inflicting serious injuries on them. We cannot understand how the trial Judge, with all this evidence before him, could say that the accused came singly and independent of one another.' The only apparent basis for such a view, so far as we Lave been able to make out, would1 be the tact that the acts attributed by the eye witnesses to several accused have had to be recorded in separate sentences. All that we can say is that this Is a merely mechanical and completely inaccurate approach to the evidence. In describing the assaults like those made on Sivappa and Ningappa in this case, it is not possible for anybody who has witnessed the same either to make merely a general statement that all the accused beat the victims together at the same time or to avoid having to state In different sentences the part played by several .accused. One should therefore take a reasonably understandable view of the evidence and. assess the total effect of it rather than dissect it in the manner in which the trial Judge has done in this case. The error committed by the trial Judge is not merely one of logic; it has in our opinion resulted in failure of justice and the acquittal of persons who should have been convicted.

31. We have no doubt that all the accused persons constituted themselves into an unlawful assembly and that every one of them has acted in some manner or other

in furtherance of that common object. We have felt some difficulty in deciding whether that common object was to commit murder or merely to inflict severe injuries. The fact that they have chosen to belabour men who have fallen helpless on the ground and cause in fractures of ribs and puncture of lungs, is a strong circumstance in favour of imputing to them an intention to kill. But, (here is one important consideration which we cannot lose sight of while dealing with a case of this nature. It is never possible to state with accuracy who, among the members of the unlawful assembly, inflicted what may be called the fatal blow, and the ultimate consequence viz. the death of the victim may be the cumulative effect of several blows given by different persons, each of whom might not have intended to kill. The assailants did not have any fire arms; they were armed only with sticks and even those that had pick axes in their hands, are said to have used only their wooden handles. It cannot therefore be said definitely that every one of the members of the unlawful assembly knew that murder was likely to be committed. We therefore consider it just and safer to hold that the common object of the unlawful assembly was only to cause grievous hurt to Sivappa and Ningappa.

32. Before concluding, we must notice the last argument presented by the learned Counsel for the appellants that even if the other arguments fail, his clients can only be convicted for simple hurt punishable Under Section 323 of the Indian Penal Code. In support of this argument, he relies on the observations contained in the judgment of a Bench of the Calcutta High Court reported in *Kunja Bhuniya v. Emperor*, ILR 39 Cal 896, and on the fact that so far as the express evidence of the eye witnesses goes, each of the appellants is said to have administered only one blow to Sivappa and one blow to Ningappa. The learned Judges of the Calcutta High Court in the said case observe that people who were in the exercise of lawful rights cannot be held to have been members of an unlawful assembly, nor can that assembly be some unlawful by reason of exceeding the lawful right they had, and further the fact of exceeding the right of private defence which a man has, cannot make him a member of an unlawful assembly, and he can only be punished for the individual act which he himself has done in excess of the right of private defence. No exception can be taken to the principle that people who join together in protection of their rights lawfully in the circumstances entitling them to exercise that right, cannot possibly be said to be members of an unlawful

assembly by reason of their common object of doing harm, if necessary, in protection of their rights. When, however, one or some of them exceed the limits prescribed by the law for the exercise of that right, it will be a question of some difficulty whether each of such persons acted independently or after exceeding the limits some of them acted in concert, although we must say that the possibility of finding that they were acting in concert if the evidence and circumstances of a case justify such a finding, cannot be totally discounted. No such difficulty, however, can arise in this case, because as we have already held on an examination of the evidence circumstances did not entitle the accused persons to claim the right of private defence. On this principle of law, therefore, the appellants cannot contend that they should be punished only for their individual acts.

33. In this view, even though a mechanical reading of the evidence of the eye witnesses as the trial Judge has done, would show that each one of the appellants gave only one blow to Sivappa and one blow to Ningappa, they must be held guilty of causing not merely simple hurt as suggested by their learned Counsel, but causing grievous hurt punishable Under Section 325 of the Indian Penal Code. Their conviction therefore for the said offence as found by the trial Judge must be and is hereby confirmed.

34. On the question of sentence, the learned Counsel has argued that consecutive sentences ought not to have been imposed but that in the circumstances of the case, they should have been directed to run concurrently. If Ningappa had come in the company of Sivappa as contended by this accused and therefore the attack on him also could be said to have been a highly probable if not an inevitable consequence of an attack on Sivappa, we would have acceded to the request of the learned Counsel. That is not the case upon facts as found by us. Even though Sivappa might be accused of some attempt, not wholly justified, to enter upon the land in assertion of his disputed title under Exs. 18 and 19, Ningappa was a perfectly innocent person, who attracted by cries came to the rescue or assistance of his brother. There was no justification therefore for the accused to go out of their way and assault him in the manner they have done. We do not feel therefore disposed to interfere with the direction of the trial Court regarding the two sentences.

35. The appeal is dismissed.

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