

In Re: Mala Narayana and ors.

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Court : Andhra Pradesh

Decided On : Jan-27-1961

Reported in : 1962CriLJ394

Judge : Satyanarayana Raju and ;H. Anantanarayana Ayyar, JJ.

Appellant : In Re: Mala Narayana and ors.

Judgement :

H. Anantanarayana Ayyar, J.

1. All these three cases arise out of the judgment of the learned Additional Sessions Judge. Anantapur in Sessions Case No. 13 of 1959 on his file. In that case, charges were framed against eleven accused with results below:

Charge No. I: Against A-2 and A-4 under Section 148 I.P.C. armed with fire-arms.

Against : A-1, A-3, A-5 to A-11 under Section 147 I.P.C rioting at 7-30 a.m., on 7.7.1958 in Rapthadu with common object of causing the death of Patil Krishna Reddi, Village Munsif of Rapthadu (P.W. 13) and to members of his party.

Finding: A-2 and A-4 guilty under Section 148, I.P.C. and sentenced to two years' rigorous imprisonment each. A-1 and A-11 guilty under Section 147, I.P.C. and sentenced to six months' rigorous imprisonment each; A-3 and A-5 to A-10 acquitted.

Charge No. II : Against A-4 under Section 302 I.P.C. by causing the death of Boya Rushingamma (deceased,)

Finding: A-4 guilty under Section 304 (Part II) I.P.C. and sentenced to rigorous imprisonment for five years.

Charge No. III : Against A-1 to A-11 under Section 308 read with Section 34 I.P.C. or in the alternative under Section 302 read with Section 149 I.P.C.

Finding : All the accused not guilty.

Charge IV : Against A-4 under Section 324 I.P.C. for causing hurt to P.W. 7.

Finding : Conviction under Section 324 I.P.C. and sentenced to rigorous imprisonment for one year.

Charge V : Against A 4 under Section 324 I.P.C. for causing hurt to P.W.8 Narasamma.

Finding : A-4 not guilty.

Charge VI : Against A 4 under Section 324 I.P.C. for causing hurt to P.W. 9.

Finding : A-4 not guilty.

Charge VII: Against A-4 under Section 324 I.P.C. regarding P.W. 2.

Finding : Conviction under Section 324 I.P.C. and sentenced to rigorous imprisonment for one year.

Charge VIII : Against A-2 under Section 326 I.P.C. with gun to P.W. 4.

Finding : Not guilty.

Charge IX : Against A-2 under Section 324 I.P.C. for causing hurt with gun to P.W. 12.

Finding : A 2 not guilty.

Charge X : Against A-11 under Section 323 I.P.C. for causing hurt to Kurava Atchamma (P.W. 10).

Finding : A-11 not guilty.

Charge XI : Against A-2 and A-4 under Section 19(f) of the Indian Arms Act.

Finding : A-2 and A-4 guilty under Section 19(f) A 2 and A-4 were each sentenced to pay a fine of Rs. 200 in default to rigorous imprisonment for one month.

2. The learned Additional Sessions Judge directed all the sentences on A-4 to run concurrently.

3. A-1, A-2, A-4 and A-11 have filed Criminal Appeal No. 656 of 1959 against their convictions and sentences. The Public Prosecutor has filed Criminal Appeal No. 69 of 1960 as regards the acquittal of A-1 to A-11 under various charges to the extent to which each of them was acquitted on each charge. He has also filed Cri.R.C. No. 35 of 1960 in so far as the sentence on A-1, A-2, A-4 and A-11 on various charges.

4. All these appeals arose out of a common judgment, they have been heard together by common consent. They are disposed of by this common judgment.

5. The prosecution examined twenty live witnesses. Of these, P.Ws. 1 to 12 are eye-witnesses to the occurrence, P.W. 13 is the Village Munsii of Rappthadu who deposed to the background of the case including the factions and prior incidents. P.Ws. 16, 17 and 18 are Doctors. Their evidence relates to the injuries sustained by the various persons including the fatal gun-shot injury sustained by the deceased. P.W. 19 is the Fire-arms Expert. P.W. 23 is the Head Constable and P.Ws 24 is the Circle Inspector who investigated the case.

6. The prosecution case is briefly to the following effect:

7-17. Rappthadu is a village which is only about one mile from the Engineering College which is situated near the periphery of Anantapur town. In this village, there were two factions bitterly opposed to each other. One faction was led by the local karnam and its members included all the accused. The opposite faction was

led by the local V.M. (P.W. 13) and included among its members the various P.Ws. who were eye-witnesses. As a result of the factions, several offences were committed in the village including murder. (After narration of facts relating to the charge-sheet, nature of evidence, nature of injuries, the recoveries and the plea of not guilty, the judgment proceeded).

18. P.Ws. 1 to 12 have deposed as eye-witnesses about the occurrence. The main question is whether these eye-witnesses can be believed. They are persons belonging to the faction of the V.M. (P.W. 13) and opposed to the faction to which the accused belong. But, this is not a ground for completely rejecting their evidence altogether. Their evidence has to be scrutinized and accepted with care and caution.

19. Where the occurrences are the outcome of very acute factions existing in the village one faction siding the deceased and the other, the accused, it is necessary to be quite sure not only that the witnesses who speak to the occurrence can be trusted to state the truth but also that they were in a position to see exactly who each one of the assailants was, because the danger in all such cases is that, if that is not certainly known, early steps will be taken to implicate persons of the opposite party who are either likely to have committed the offence or whose implication would be regarded as a benefit of the other side: *Vide Pedda Vemayya v. Emperor* 1935 Mad WN 87.

20. In *Ramakrishnayya v. State* : AIR1954 Mad442 , it was observed that the fact that the prosecution witnesses were partisans was not a ground for rejecting their testimony out of hand but to scrutinize them with care. The Madras High Court laid down various tests in order to find the culpability of the accused which include the following : (a) whether they had a motive to share in the common object and be present at the unlawful assembly and participate in the acts of violence therein; and (b) whether they committed the acts proved by well-corroborated evidence and which would establish affirmatively their common object, presence and participation.

21. In *Re Seshireddi*, (Unreported judgment of this Court dated 19.2.1960 in Criminal Appeal No. 65 of 1959) a Division Bench of this Court laid down the

following test in dealing with partisan evidence: it is true that in cases arising out of bitter factions, the tendency to rope in the innocent along with the guilty is unfortunately very pronounced and the court has to guard itself against the danger of condemning the innocent along with the guilty. It does not, however, follow that partisan evidence, even in this class of cases, should be rejected out of hand; but the true rule is that it should be subjected to very strict scrutiny and in particular, omnibus implications should be viewed with the utmost caution.

22. In *Narasimharao v. State* (Unreported) judgment of this Court in R.T. No. 40 of 1960 Cri A. Nos. 557, 596 and 689 of 1960 and Cr.R.C Nos. 667 and 707 of 1960, a Bench of this Court (of which one of us was a member, Satyanarayana Raju, J.) observed as follows:

It is a matter of common knowledge that in cases arising out of acute factions, there is a tendency in the witnesses to rope in the innocent along with the guilty, not so much out of personal animosity but in the hope of furthering the interests of the faction. To guard against the danger of condemning innocent persons on perjured testimony, it is imperative that the evidence should be scrutinized with more than ordinary care.

23. In *Mangal Singh v. State of Madhya Bharat* : 1957 CriLJ325 . the Supreme Court observed as follows (at page 202):

It was suggested that when the two eye-witnesses to the occurrence were interested persons there should be corroboration of their evidence by independent witnesses. It seems to us that this is a proposition which cannot be of universal application. In the present case, evidence of the eyewitnesses receives ample corroboration from the circumstances that the dead bodies of Suratsingh and Shardul Singh and the burnt bullock cart were found not far from the place where they were first attacked by the appellants.

24. The credibility of a witness depends upon his knowledge of the facts he testifies to, his disinterestedness his integrity, and how he has stood the test of cross-examination. In the present case, the evidence of the eye-witnesses is corroborated by many facts and circumstances. The gunshot on the deceased, the

pellets which were lying in that wound and near the deceased and the pellet marks on the Katter strongly corroborated the version that A-4 shot towards the deceased and fired another shot from the terrace of Chandrappa. The fact that five cartridges were lying in front of Chandrappa's house and that the empty cartridges were seized from the west of Chandrappa's house also from strong corroboration about tins version. Similarly, the presence of pellet marks round on the parapet wall of the well to the East corroborates the version of P.Ws. that A-2 shot with a can towards the people who were at the well. It is clearly proved by expert evidence of P.W. 19 that the cartridge cases (M.O. 7) must have been end from the gun which was made up of M.Os. 11 and 12. The pin mark on M.O. 8 was not sufficiently clear for comparison. But, it is quite possible that it was also fired from the same gun.

We find no reason to disbelieve the prosecution evidence of P.W. 24 that A-11 after arrest made statement and in pursuance of that statement produced M.Os. 11 and 12' from places where they had been concealed. P.W. 2 was found to have an injury which could have been caused by a gun pellet. The injury on P.W. 7 also could have been caused by a pellet. There were injuries on P.W. 4 which could have been caused by a stone. P.Ws. 9 and 10 had injuries which could have been caused by stones. The C.I. found slings as well as heaps of stones on the terrace in the house of Beerappa. Thus, there is ample corroboration of the evidence of the eye-witnesses that the assailants were on the top of the terrace of Beerappa's house and that the occurrence took place as alleged by them.

25. The learned Advocate for the appellants Sri C. Kondiah has contended that the report of the V.M. (Ex. F-43) must have been received in the Police Station even before the C.I. left the station and that, therefore, the report must be treated as First Information Report and that the report (Ex. P-1) which was recorded by the C.I. is not the real F.I.R. and that, therefore, it (Ex. P-1) is Inadmissible in evidence. In this matter there is the evidence of the C.I. (P.W. 24) that Ex. P-1 is the first information which he really recorded and that he did not receive any other report from anybody earlier than that. We see no reason to disbelieve his version. Further the evidence of P.W. 1 is available in regards the full contents of Ex. P-1 even if Ex. P-1 were not taken into account.

26. Shri Kondiah for the accused has urged that during the period which had elapsed between the occurrence and the time when the C.I. recorded Ex. P-1 the prosecution witnesses as well as the head of that faction namely, the V.M. had plenty of time to have joined in deliberation as to whom to implicate and to concoct a case so as to implicate such persons and that, therefore, it is unsafe to rely on the evidence of those witnesses. On a careful consideration of the matter we are satisfied that the prosecution evidence is reliable against the various accused as under various charges as found by us in discussion hereafter and that the prosecution evidence cannot be rejected altogether against all the accused on all the charges.

27. It has been pointed out that the report (Ex. P-44) which is the F.I.R. in the case, bears time of 7-15 p.m., put by the J.S.C.M. P.W. 23 says that he is unable to explain how the Magistrate happened to record the time of 7-15 p. m. It was a working day for the Magistrate. It is not possible to come to any conclusion on the basis of the Magistrate's note of time or in particular to come to a conclusion that Ex. P-1 was not recorded at the time mentioned by P.W. 24.

28. Shri Kondiah for the appellants has strenuously argued that Ex, P-2 must have reached the Police Station even before Ex. p-1 and that, therefore, Ex, P-1 is not the F.I.R (Their Lordships considered the evidence and proceeded). We see no reason to doubt the fact that Ex. P-1 was the first information which was received by the C.I. who was the Investigating Officer and is the F.I.R.

29-33. The next important question is as to whether the accused took part in the rioting and what offences they have committed. (Their Lordships reviewed the evidence and examined the case of each accused and proceeded.)

34. The principles as to when and how an appellate court can interfere with the findings of acquittal by the trial court have been laid down in various authoritative decisions of the Supreme Court. In *Surajpal Singh v. The State* : 1952 CriLJ331 it was observed as follows (page 54):

It is well-established that in an appeal under Section 417, Criminal P.C. the High Court has full power to review the evidence upon which the order of acquittal was

founded, but it is equally well-settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.

35. In *Aher Raja Khima v. State of Saurashtra* : 1956 CriLJ426 , the Supreme Court reiterating the principle in : 1952 CriLJ331 observed thus:

It is, in our opinion, well-settled that it is not enough for the High Court to take a different view of the evidence there must also be substantial and compelling reasons for holding that the trial court was wrong.. and If the trial court takes a reasonable view of the facts of the case, interference under Section 417 is not justifiable unless there are really strong reasons for reversing that view.

36. In *Balbir Singh v. Punjab State* : 1957 CriLJ481 , after affirming the decisions in : 1952 CriLJ331 and : 1956 CriLJ426 it was observed to the following effect:..the slowness of an appellate court in disturbing a finding of fact arrived at by Judge who had the advantage of seeing the witnesses must also be kept in mind, and there must be substantial and compelling reasons for the appellate court to come to a conclusion different from that of the trial Judge.

37. In *Radha Prasad v. Gajandhar Singh* : [1960]1SCR663 the Supreme Court stated the position of law thus:

The position in law, in our opinion, is that when an appeal lies on facts, it is the right and duty of the Appeal Court to consider what its decision on the question of facts should be; but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the trial Judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanor of the witness in Court. But, this does not mean that merely because an appeal court has not heard or seen the witness it will in no case reverse the findings of the trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the Appeal Court that important

considerations bearing on the question of credibility have not been taken into account or properly weighed by the trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the trial Judge is wrong, the Appeal Court shall have no hesitation in reversing the findings of the trial Judge on such questions. Where the question is not of credibility based entirely on the demeanor of witnesses observed in court but a question of inference of one fact from proved primary facts the court of Appeal is in as good a position as the trial Judge and is free to reverse the findings if it thinks that the inference made by the trial Judge is not justified.

38. In *Dharam Das v. State of Bombay* : AIR 1960 SC 734 the Supreme Court held to the following effect:

It is true that in exercising its appellate powers in dealing with orders of acquittal the High Court should not interfere unless there is sufficient ground to do so. If the questions decided by the trial court are pure questions of fact and their decision depends merely on appreciation of oral evidence the High Court would not be justified in interfering with the order of acquittal passed by the trial court. But where the trial court's appreciation of evidence has been vitiated by its failure to take note of a very important fact the position becomes different.

In that case, the judgment of the trial Magistrate showed that his appreciation of the evidence given by all the witnesses was somewhat halting, and he hesitated to express any definite opinion about the credibility of most of them and yet the Magistrate had in substance accepted the defence evidence which was inconsistent with the specific case set up by the accused in his written statement. The Supreme Court held that the infirmity in the judgment vitiated the conclusion of the Magistrate and the High Court was, therefore, justified in considering the evidence for itself. We have applied the principles set out in the above decisions in coming to our conclusion that the finding of the learned Additional Sessions Judge that A-5 and A-6 did not participate in the rioting is wrong and that we have to interfere with the finding for the following reasons.

(1) He has not taken into account the evidence of the well witnesses (P.Ws. 10 and 11) at all. He has not discussed their evidence or considered the effect of their

evidence as eyewitnesses; he neither disbelieved them nor commented about their demeanour.

(2) The evidence of P.Ws. 10 and 11 satisfactorily proves that A-5 and A-6 participated in the offence,

(3) There are other features (already referred to by us) which makes believable the evidence of eye-witnesses about the presence and participation of A-5 and A-6 in rioting in their own house.

(4) The evidence Of the katta witnesses that A-5 and A-6 shouted out challenge along with A-2 and A-4 has been rejected on insufficient grounds. We believe that A-5 and A-6 did challenge.

(5) If A-5 and A-6 shouted challenge for fight, then they would have been conspicuous like A-1, A-2, A-4 and A-11 and so the evidence of the katta witnesses regarding the presence of A-5 and A-6 would stand on the same footing as evidence regarding A-1, A-2, A-4 and A-11. The learned Additional Sessions Judge has accepted the evidence of those witnesses regarding A-1, A-2, A-4 and A-11.

39. We proceed to deal with the guilt or the various accused on various charges in the light of the principles laid down in the above-mentioned decisions and other relevant aspects of law.

CHARGE No. 1: In Sukha v. State of Rajasthan : 1956 CriLJ923 it was held by the Supreme Court that there need not be a prior meeting of minds and that it was enough that each had the same object in view and their number was five or more and that they act as an assembly to achieve that object and that commonness of purpose is an inference of fact which courts of fact would be entitled to make. The common object has to be gathered from the facts f the case. (Their Lordships considered the evidence and proceeded).

On consideration of the entire evidence, we agree with the learned Additional Sessions Judge that A-1, A-2, A-4 and A-11 were members of an unlawful rioting assembly with common object of causing hurt to members of the Village Munsiff's

party (including the V.M.) who came in response to the beating of drum by A-1 and that A-2 and A-4 were armed with guns and are guilty under Section 148, I.P.C. and that A-1 and A-11 are guilty under Section 147, I.P.Code accordingly confirm the convictions and sentences of A-1, A-2 A-4 and A-11 on Charge No, 1, We disagree with the finding of the learned Additional Sessions Judge regarding A-5 and A-6 and find them guilty under Section 147 I.P.C. and sentence each of them to R.I. for six months like A-1, and A-11. We confirm the finding of acquittal regarding A-3, A-7 to A-10 on Charge No. I.

CHARGE No. 2: It is clearly proved by the evidence that A-4 was armed with a gun when he, along with A-2, A-5 and A-6 challenged the people of the opposite party for a fight and that, after the deceased threw out a counter-challenge land abusive language, A-4 deliberately walked from Beerappa's terrace up to Chandrappa's terrace so as to get a closer range against the deceased and that he took deliberate aim and shot the deceased. Hg shot with a Section G. cartridge, not with a blank cartridge. One of the pellets hit the deceased in the chest and killed her on the spot. beyond doubt, A-4 caused the death of the deceased. The learned Additional Sessions Judge has concluded regarding the intention as follows:

The circumstances in which the offence was committed do not show that 4th accused had the intention of killing Rushingamma (deceased) or for the matter of that anyone else of the opposite party. The circumstances only proved that by firing shots with his gun he must; have done so with the knowledge that he is likely by such act, to cause death and as such, he must be deemed to have committed an offence under Section 304 I.P.C. (Part II)

This conclusion is obviously wrong and untenable.

40. Section 300 I.P.C. illustration (d) runs as follows:

A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a pre-meditated design to kill any particular individual.

41. In Mathura Adi Reddy v. Hyderabad State : 1956 CriLJ341 , a contention was raised on behalf of the appellant as follows:..It is urged that his comrade, Narasimha Reddy, (?) misunderstood the directions. of the appellant (direction of the appellant was 'People are collecting. Let us open fire') and that in such a situation the appellant cannot be held responsible if some person not intended by him was shot at and as a result died.

Their Lordships of the Supreme Court repelled that contention in the following terms (at page 180):..if his direction was a direction to fire indiscriminately as against the members of the hostile group consisting of the eight persons as above stated, the appellant would clearly be guilty his direction brought about a shooting and death of any one or more out of these eight persons. There is, therefore, no substance in this contention ingeniously put forward by learned Counsel for the appellant.

42. In this particular case, even if A-4 had merely fired with the loaded gun at the crowd of people in the katta and near the house of Thimmappa without aiming at the deceased and intending to kill her, the offence committed by him in causing the death of the deceased would be clearly one of murder (under Section 302 I.P.C). But actually we find on good evidence that A-4 intended to kill the deceased, took aim at her and shot her dead. The offence committed by him is clearly one under Section 302 I.P.C.

43. In Virsa Singh v. State of Punjab 1958 SCJ 772 at p. 775 : : 1958 CriLJ818 the Supreme Court observed as follows at page 775 of SCJ : at p. 467 of AIR:

The prosecution must prove the following facts before it can bring a case under Section 300 thirdly, First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other

kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 'thirdly. It does not matter that there was no intention to cause death.' It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is (purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequence and they can only escape if it can be shown or reasonably deduced, that the injury was accidental or otherwise unintentional.

In this case, it is true that the deceased used provocative language challenging the accused to come out of the house and fight. The calling for a fight cannot be said to be grave and sudden provocation because the accused themselves including A-4 had started the whole trouble and offered earlier provocation by collecting the opponents by beat of drum and calling them for a fight. The fact that the return challenge by the deceased was couched in strong indecent language cannot be considered to be grave and sudden provocation such as contemplated under Exception I of Section 300 I.P.C. especially when it is read along with the first proviso to that Section. When A-4 and other accused armed themselves with

deadly weapons and secured themselves on the terrace of a house, collected those people by beating a drum and threw out a challenge for fighting, they had no right to expect soft words or decorous language to be used by the victims to whom the challenge was thrown. The intention of A-4 was unmistakable. It was to kill the deceased. The offence which he committed was certainly one under Section 302 I.P.C. So, we modify the conviction of A4 on this charge to one under Section 302 I.P.C. All the same, we consider that the extreme penalty of law is not called for as A-4 shot after the deceased had used abusive and insulting language. So, we sentence A-4 to the lesser sentence of imprisonment for life.

CHARGE 3: From the beginning, the members of the rioting assembly knew what strength they had and what weapons they had. They had collected stones and All had a sling A2 and A-4 had guns. A-1 beat drum and collected the people with a view to throw challenge to them. A-11 was also an active participant throwing stones with the sling. A-2, A-4, A-5 and A-6 called out to the people and challenge them to come for a fight, knowing full well that their party was armed with two guns. A-4 fired towards the deceased and others on the Western front with S.G. Cartridges which were loaded with pellets. One of the pellets struck the deceased dead. A-4 fired more than once aiming at people who were assembled near Thimappa's house and katta. A-2 also fired his shot gun loaded with pellets towards the people assembled near the well; this is clear from the fact that the parapet wall was hit by gun pellets. When A-2 and A-4 fired like that, they must - certainly have intended to shoot at the people. Their intention must have been to cause death or injury such as would in all probability cause death.

44. Other participants in the rioting must have known that these guns were likely to be used. This is obvious from the following facts. The accused wanted to fight. For that purpose, they had collected opponents by beating a drum. They had taken position of vantage on a terraced roof of a house. They had armed themselves with weapons including two guns. They had stock piled stones and had slings. They were also armed with sticks. It is obvious that the accused wanted to have a fight, intended to have a fight and for that purpose, relied on the superiority in weapons and in position which they occupied like shakers sitting in a machan with guns, to shoot at wild animals. The accused must have felt that they

were in a position of vantage for inflicting injuries with the weapons which they had. Stones could be thrown in plenty. But, the opponents In the street could also throw stones to equally good effect; stones would be available to them in plenty. The accused had sticks. But, sticks which the accused had would not give them an advantage. A stick used for beating is repeater type of weapon in the Sense that it can be used for Inflicting blows again and again. But its range when used as such a weapon was only its length. The opponents were far beyond that wise. If a stick were used as a missile for being thrown at the opponents, it would have less range and worse aim than a Pelted stone. So, sticks could not give any advantage to the accused. On the other hand, the guns if they were used for firing shots could be more effective than stones. If only blank cartridges were available and not shot cartridges, the guns would give no advantage to the accused.

The result would be that, on the whole, they would have no advantage over the opponents and there would be no meaning in their challenging people of the opposite party for a fight. A-2 and A-4 certainly knew that they had shot-cartridges (i.e., cartridges loaded with pellets).The other accused would not have started the game and challenged the others for a fight if they had not known that the guns could be fired effectively with shots at the opponents. In such a case, they must have known that death was likely to be caused by shooting with gun. It is true that, on a previous occasion, A-4 is said to have fired shots in the air for terrifying opponents, The evidence of some of the P.Ws, indicates that on this occasion also they expected that A-4 would fire only for terrifying. But, they were soon disillusioned when they saw the deadly effect of A-4's firing on the deceased and others near the katta and when A-2 fired shots on the people who were to the East near the wall. The fact that some P.Ws., wrongly thought that guns would be fired only for terrifying does not affect the act that the accused must have known that shots with pellets were likely to be fired from the gun and that death was likely to be caused.

45. In *Gajanand v. State of Uttar Pradesh* : AIR 1954 SC695 the following passage from *Ram Charan Rai v. Emperor* AIR 1946 Pat 242 was approved:

Under Section 149, the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. 'Such knowledge may reasonably be collected from the nature of the assembly, arms or behaviour, at or before the scene of action.' If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise.

On the facts of that particular case in : AIR 1954 SC695 their Lordships of the Supreme Court observed as follows:

According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and Sosa, who is alleged to have had a spear, is absconding. We are not prepared therefore to ascribe any knowledge of the existence of deadly weapons to the appellants much less that they would be used in order to cause death.

In this particular case, all the members of the rioting assembly must certainly have known of the existence of deadly weapons namely the guns which A-2 and A-4 had in their assembly and the behaviour of A-1, A-2, A-4, A-6 and A-11 already referred to shows that they must have surely known that offence under Section 302 I.P.C. was likely to be committed in prosecution of the common object.

48. The learned additional Sessions Judge has observed as follows:

The learned Additional Public Prosecutor has conceded that the prosecution have not proved that they had either the intention or knowledge that anybody should (would) be killed and, therefore, these 3 accused cannot be held liable for the offence committed by the 4th accused.

The concession made by the learned Additional Public Prosecutor was obviously wrong. In *Public Prosecutor v. Subbanna* AIR 1947 Mad 239 at p-241 the Madras High Court observed as follows (at page 241):

A concession wrongly made on behalf of the accused cannot stand in the way of the appellate court setting aside a conviction based on such a concession; similarly a concession wrongly made by the Public Prosecutor should not, in our opinion stand in the way of an appeal against acquittal based on that concession being allowed.

We differ from the learned Additional Sessions Judge and hold that A-1, A-2, A-5, A-6 and A-11 are guilty under Section 302 read with Section 149 I.P.C. We agree with the learned Additional Sessions Judge that A-3 and A-7 to A-10 are not guilty. We consider that the lesser sentence of imprisonment for life is adequate to meet the ends of justice and accordingly award that sentence to A-1, A-2, A-5, A-6 and A-11. As A-4 has been convicted under Section 302 I.P.C. for the direct offence of murder and sentenced to imprisonment for life under Charge No. 2 we do not find it necessary to convict him (A-4) on this charge.

47-54. (Their Lordships considered other charges and proceeded):

55. In the result We Order as follows:

56. Criminal Appeals No. 656 of 1959 and 69 of 1960. Charge No. 1: The conviction of A-2 and A-4 under Section 148 I.P.C. and the sentence of two years' R.I. on each are confirmed. The conviction of A-1 and A-11 under Section 147; I.P.C. and the sentence of six months' R.I on each are confirmed. A-5 and A-6 are also found guilty under Section 147 I.P.C. and we sentence each of them to R.I. for six months. We confirm the finding of acquittal regarding A-3 and A-7 to A-10; on this charge.

Charge No. 2: The conviction of A-4 under Section 304 (Part II) I.P.C. is modified to one under Section 302 I.P.C. and A-4 is sentenced under Section 302 I.P.C. to the lesser sentence of imprisonment for life.

Charge No. 3: We hold that A-1, A-2, A-4, A-5, A-6 and A-11 are guilty under Section 302I read with Section 149 I.P.C. and award each of A-1, A-2, A-5, A-6 and A-11 the lesser sentence of imprisonment for life on this charge. As A-4 has been convicted of the direct offence of murder under Section 302 I.P.C. and

sentenced to the lesser sentence of imprisonment for life on Charge No. 2, we do not find it necessary to convict A-4 under this charge. A-3 and A-7 to A-10 are not guilty and they are acquitted of this charge.

Charge No. 4: The conviction of A-4 under Section 324 I.P.C. for voluntarily causing hurt to P.W. 7 and the sentence of one year rigorous imprisonment are confirmed.

Charge No. 5 : We confirm the order of acquittal of A-4 on this charge.

Charge No. 6: We confirm the order of acquittal of A-4 on this charge.

Charge No. 7: The conviction of A-4 under Section 324 I.P.C. for voluntarily causing hurt to P.W. 2 and the sentence of one year rigorous imprisonment are confirmed.

Charge No. 8: We confirm the acquittal of A-2 on this charge f

Charge No. 9: We confirm the acquittal of A-2 on this charge.

Charge No. 10: We confirm the acquittal at A-11 on this charge,

Charge No. 11: The conviction of A-2 and A-4 under Section 19(f) of the Indian Arms Act and the sentence of fine of Rs. 2,00/- in default to suffer R.I. for one month, on each are confirmed.

57. We confirm the order of acquittal of A-3, and A-7 to A-10 completely of all the charges. A-1, A-2, A-4, A-5, A-6 and A-11 are convicted and sentenced as mentioned above. All the substantive sentences of imprisonment imposed on each of them will run concurrently. We decide the appeals accordingly.

58. Cr.R.C. No. 35 of 1960. In view of our modifying the conviction of A-1, A-2, A-4 ; and A-11 and sentencing each of them to imprisonment for life in Crl.A. Nos. 656 of 1959 and 69 of 1960, no orders are necessary in this revision.