Hanif and ors. Vs. the State

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Court : Allahabad

Decided On : Aug-18-1961

Reported in : AIR1962All272

Judge : R.A. Misra, ;A.N. Mulla and ;B.N. Nigam, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 149 and 302

Appeal No. : Criminal Appeal No. 698 of 1960

Appellant : Hanif and ors.

Respondent : The State

Advocate for Def. : Addl. Govt. Adv.

Advocate for Pet/Ap. : Iqbal Ahmad and ;D.N. Hatwal, Advs.

Judgement :

R.A. Misra, J.

1. This appeal has been preferred by 12 persons, namely, Hanif, Salim, Suleman, Mohd. Ilyas, Ghulam Dastgir son of Nankau, Mohi-uddin, Sarfaraz, Ashiq Ali, Sadiq Ali, Ghulam Dastgir son of Mohd. Ismail, Qasim and Wali Mohammad against their conviction and sentence imposed upon them by the learned Sessions Judge, Bara-banki. All the appellants have been sentenced to imprisonment for life

under Section 302 read with 149, I. P. C. In addition, Hanif has been sentenced to rigorous imprisonment for two years under Section 148, I. P. C., and the remaining appellants have been sentenced to one year's rigorous imprisonment each, under Section 147, I. P. C. The sentences in the case of each appellant have been made concurrent.

2. The charge against the appellants was that on 17th April, 1960, at about 1.30 p.m. in village Shahabpur. district Barabanki, they formed an unlawful assembly armed with a bhala and lathis and in prosecution of the common object of the unlawful assembly they committed the murder of one Darshan deceased.

3. The appeal was heard by a Bench constituted of Mulla and Nigam, JJ, Both the learned Judges delivered their judgments separately. While both the learned. Judges are agreed that all the twelve appellants are proved to have participated in the incident which resulted in Darshan's death, Mulla, J. is of opinion that, on the facts proved, Hanif alone should be convicted for committing the murder of Darshan and he should be sentenced to imprisonment for life under Section 302 simpliciter. About the remaining eleven appellants he is of opinion that they are not guilty of committing the offence under Section 302, read with 149, I. P. C. but that their guilt falls under Section 326, read with 149, I. P. C. and that each one of them should be sentenced to eight years' rigorous imprisonment.

On the other hand, according to Nigam, J., these eleven appellants we guilty of committing an offence under Section 302, read with 149, I. P. C. and that the sentence of imprisonment for life imposed upon them by the trial Court should be upheld. On account of this difference of opinion between the two teamed Judges, the case of the 11 appellants Salim, Suleman Mohd. Ilyas, Ghulam Dastgir son of Nankau, Mohmddin Sarfraz, Ashiq Ali, Sadiq Ali Ghulam Dastgir son of Mohd. Ismail, Qasim and Wali Mohammad has been referred to me under Section 429 Cr. P. C.

4. The facts of the case which have given rise to this appeal have been fully set out in the judgment of Nigam, J., and need not be repeated in detail. They may be referred to again only briefly.

5. There are two factions opposed to each other, in village Shahabpur, police station Safdar-ganj district Barabanki, one led by Munna Seth and the other headed by Mohammad Husain. Darshan, the deceased, who lost his life in this case belonged to the party of Mohammad Husain, He was a recent convert to Islam and was considered a village bully with undesirable antecedents. Munna Seth is a man of some means, who sells yarn and advances loans to the village people who are mainly weavers. In January 1960, Munna.

Seth was severely beaten and Darshan deceased and seven others were being prosecuted for it udder Section 307, I. p. C. During the pendency of the case Darshan and the other accused were released on bail. After being released from the jail, Darshan gave up his residence in village Shahabpur on account of the fear of Munna's party. He started living in another village Darahra, about a mile from Shahabpur, A bi-weekly market is held in village Shahabpur on Sundays and Wednesdays. On April. 1960 (sic), wnich was a Sunday, Darshari came to visit the bazar of Shahab-pur on a cycle. Taking advantage of Darshan's presence in village Shahabpur, the 12 appellants, out of whom some are relations of Munna Seth and the others are his employees or his partymen, collected together in the bazar. Hanif was armed with a spear and the remaining appellants had lathis with them. They chased Darshan in a body, Finding that he could not run away on his cycle, Darshan threw down the cycle and ran for his life pursued by the appellants. Darshan in his anxiely to save himself entered inside the house of, one Rjyasat Ali P. W. 1, which is close to the market. Except Mohiuddin, Ashiq Ali and Sadiq Ali, the other appellants entered inside the house of Riyasat Ali. They surrounded Darshan inside the Ekdara of Riyasat Ali. The Ekdara was low rooted, on account of which latliis could not be plied freely on Darshan, Blows were, therefore, given to Darshan with the butt ends of the lathis and he was struck with the blade of the spear also. Darshan tried to save himself with a bamboo which he had picked up there. As a result of the injuries received by Darshan, he fell down in the Ekdara and then the assailants went out of the house into the bazar. Riyasat Ali P. W. 1 was lying on a Takhat outside his house when the assailants had entered inside his house and his son Siddiq P.W. 2 was taking his food inside the house. They had requested the assailants to stop beating Darshan but they did not listen to them. On the contrary, Siddiq was also given one or two blows. The womenfolk of

Riyasat Ali were not present in the house as they had gone out to the neighbouring house for spinning. It may also be mentioned that according to the prosecution, Mohiuddin, Ashiq Ali and Sadiq Ali who had remained outside the house, were inciting their companions who had gone inside the house to drag out Darshan and to kill him. Riyasat Ali ,his son Siddiq and some others who had also seen the assault, then went inside the Ekdara and found Darshan lying in a pool of blood. He expired soon after.

6. Riyasat Ali lodged the first information report at 5-30 p. m. the same day at police station Safdarganj, which is nine miles away. The first information report gives the relevant details of the story narrated above. It also mentions the names of the twelve appellants and the witnesses. Investigation followed as a result of which the appellants were prosecuted.

7. The post mortem examination, which wasconducted by Dr. Dharmendra Gupta, MedicalOfficer in charge Leprosy Centre, Barabanki, disclosed the following injuries on the dead body ofDarshan.

1. Abrased) contusion 2 1/2' x 1/2' x on the under surface on right mandible.

2. Incised wound 1/2' x 1/3' x bone deep on the left side of chin.

3. Incised wound 1/2' x 1/3' x bone deep along the mandible on the left side,

4. Stab wound with sharp margins 3/4' x 1/2,' x 2' deep on the back of the lower part of the left arm,

5. Stab wound with sharp margins 1 1/4' x 3/4' x 2 1/2' on the front of the left thigh cutting through the femoral artery.

According to Dr. Gupta, injury No. 1 had been caused by some sharp-edged pointed weapon. Death in the opinion of Dr. Gupta was due to shock and haemorrhage as a result of rupture of femoral artery on the left thigh.

8. The appellants pleaded not guilty and they gave various reasons for their false implication in the case including enmity with Mohammed Husainand the Police (sic) on their behalf it was not challenged that Darshan died as a result of an

attack made on him by the weapons alleged by the prosecution. It was also not disputed that he was killed inside the house of Riyasat Ali. However, it was suggested on behalf of the appellants that Darshan was killed inside the house of Riyasat All by one Ram Phal, According to the accused, Darshan and Ram Phal both had illicit intimacy with the wife of Siddiq, son of Riyasat Ali and the two rivals accidentally happened to visit her inside Riyasat Ali's house at the same time whatever it was and thus when they came across each other, Ram Phal killed Darshan.

9 The appellants did not examine any witness in support of this counter version but they produced three persons namely, Ram Nath D. W. 1, Sohail D. W. 2 and Rameshwar D. W. 3 whose testimony is intended to contradict the prosecution case that Darshan was surrounded, chased and then killed inside the house of Riyasat Ali by the appellants. Their testimony is further intended, to suggest that the murder of Darshan inside the house of Riyasat Ali Was committed secretly and nobody knew or heard about it nor was any alarm raised.

10. The prosecution case rests on the evidence of six witnesses namely, P. W. 1 Riyasat Ali P. W. 2 Siddiq, P. W. 3 Shaft, p, W. 4 Shabu Ahmad, P. W. 6 Abdul Ali and P. W. 7 Mumtaz. The first five state to have seen the assault on Darshan by the appellants inside Riyasat Ali's house in the manner suggested by the prosecution. P. W. 7 though not an actual eye-witness, resides close to the house, of Riyasat Ali. According to him, he came out of his house on hearing the alarm but by the time he reached Riyasat Ali's house the incident was over. He states that he found Riyasat Ali and Siddiq present inside their house and Darshan lying dead in the Ekdara, hiS testimony is, therefore of a circumstlantial na-eurc.

11. The learned Counsel for the appellants has argued that the guilt against the eleven appellant whose cases have been referred to me, is not free from doubt and, therefore, they should be acquitted. He has criticised the case against them on a numbeer of grounds. It has been urgedthat the first information report which purports to have been lodged at the police station at 5 p. m on 17th April 1960, is not a genuine document and that in fact it was drafted in the village in consultation with the enemies of the appellants after the police had reached there. Next it has

been urged that the witnesses produced in the case, are all enemies of the accused and they are the camp followers and relations either of Riyasat Ali or Mohammad. Husain and that even though, according to the prosecution the indent, which happened In the bazar was witnessed by a large number of persons, not a single independent witness has been produced, to support the prosecution case. The evidence of the eye-witnesses, according to the appellants is also inconsistent with the medical evidence. Next it has been argued that the prosecution story appears to be doubtful and improbable because, if Darshan was riding on a cycle, which he threw down, on seeing his assailants, the cycle should have been recovered. But the police have failed to give any satisfactory explanation for the non-recovery of the cycle. An improbability pointed out in the prosecution case is that the appellants would not have chosen such an hoar i.e. 1.30 p. m., for an assault On Darshan and that if they had. realty any such intentions against him, they could have beaten him, at any other conve nient time and place. According to their learned Counsel this circumstance and the evidence in the ease support the defence suggestion that in all probability Darshan was killed by Ram Phal when they both accidentally happened to meet each other inside the house of Riyasat Ali in connection with their intimacy with Siddiq's wife.

It has been vehemently argued that, in any view of the matter, considering the very small number of injuries found on the deceased the number of assailants could not have been 12 and thus there is clear evidence of false implication in the case. As the guilty and the innocent have been inseparably mixed with each other, all the accused except Hanif, who had struck with a spear, are entitled to the benefit of doubt. In the alternative, their learned counsel has contended that the offence of these 11 appellants falls only under Section 326/149 I. P. C.

12. On behalf of the State it is contended that under Section 429, Cr. P. C, the third Judge is only empowered to give his own filing on the point or points on which the learned, Judges of the referring Bench have disagreed with each other and that the third Judge is not authorised to give a contrary finding on a point on which the learned Judges of the Bench are agreed. It is argued that both the learned Judges of the Bench Who heard the appeal and have referred the case to me, are of opinion that the participation of these eleven appellants in this crime is

satisfactorily made out, hence it is not open to me to hold that the case against them is doubtful and that they should be acquitted. According to the learned Counsel for the State the law permits me to give my own finding, only on the point which is the subject-matter of disagreement between Mulla & Nigam. JJ. viz., whether these eleven appellants, should be found guilty under Section 326/149 I.P.O., or 302/149, I. p. c., and not on the fact whether their partici-pation in this crime is proved or not. In answerto this objection, the learned Counsel for the appellants has cited several cases including Sarat Chandra Mitra v. Emperor ILR 38 Cal 202 and Subedar v. State : AIR1956 All529 and some others which seem to support his contention that the entire case is referred to the third Judge and that the third Judge is permitted to reach a contrary finding even on point or points on which thy learned Judges of the referring Bench are agreed.

13. In my opinion it is not necessary to decide this legal controversy in the present case for after going through the evidence of the case and the judgment of Nigam J., and with which Mulla, J. has also agreed, in this regard, I am not satisfied that any ground has been made out for disagreeing with the finding recorded by the two learned Judges that the prosecution evidence satisfactorily proves the complicity of all the 12 accused including these eleven appellants in this crime. The criticisms which have been levelled against the prosecution case before me and are summarised above, were also submitted before the Bench. I may respectfully say that they have been fully dealt with in the judgment of Nigam, J., and found to be without any merit. Mulla, J;, who delivered his judgment separately after reading the judgment of Nigam; J. agreed with the conclusions recorded by Nigam, J. that the prosecution had succeeded in proving the participation of these appellants in this crime beyond any doubt I am in respectful agreement with the opinion of the two learned Judges that the case against these appellants is not doubtful and their participation in this crime is proved beyond doubt. Thus the only question that remains to decide for me is whether the appellants should be convicted under Section 326/149, I. P. C. as held by Mulla, J. or under Section 302/149, I. P. C, as is the opinion of Nigam, J.

14. Section 149, I. P. C., holds vicariously guilty all the members constituting an unlawful assembly for an offence committed by one or more members of that

unlawful assembly in two contingencies firstly, if the offence is committed in prosecution of the common object of the unlawful assembly and secondly, also if the offence committed is such as the members of that unlawful assembly knew to be likely to be committed in prosecution of that common object This is evident from the words of Section 149 itself reproduced below.

"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.'

Explaining the scope of the section their Lord ships in Mizaji v. State of U. P. : 1959 CriLJ777 held:-

'This section has been the subject-matter of interpretation in the various High Courts of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object, it is enough if it is adopted by all the members and is shared by all of them. In Order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed, and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be

committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all. There is a great deal to be said for the opinion of Couch, C. J. in Queen v. Sahed Ali, 20 Suth WR Cr 5 that when an offence is committed in prosecution of the common object it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, docs not make the converse proposition true, there may be cases which would come within the second part, but not within the first. The distinction between the two parts of Section 149 Indian Penal Code cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls within the fist part of Section 149 as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part."

It has been found by both the learned Judges who have referred the case to me and to whose opinion I respectfully subscribe that the eleven appellants whose case was referred to me were members of an unlawful assembly along with Hanif and that the offence committed by Hanif fell under Section 302, I. P. C.

15. On behalf of the State it has been contended that these eleven appellants, whose case is before me should be held guilty under Section 302 read with Section 149, I. P. C., because their case Is covered by both the parts of Section 149 I. P. C. According to the learned Counsel for the State, the murder of Darshan was committed in pursuance of the common object of the unlawful assembly and, in any case the eleven appellants, in view of the evidence and circumstances of the case, fully knew that the murder of Darshan is likely to be committed in the prosecution of the common object of the unlawful assembly,

16. It has therefore, to be decided whether the case of these eleven appellants is covered byany or both the parts of Section 149, I. P. C. in order to hold them guilty of murder.

17. After referring to the evidence and circumstances of the case Mulla, J., is of opinion that the murder of Darshan was not committed in furtherance of the

common object of the unlawful assembly. He has observed:-

'In this particular case there is clear evident that there was no common intention to cause the death of Darshan and the injuries which were inflicted upon Darshan were only five in number. These five injuries were not on any vital part of the body and four of them were not even grievous. If was only one injury which was grievous and was proved fatal.'

He has further observed:-

'It is therefore, obvious that the death of Darshan was the result of this injury and the other Injuries played a negligible part. This is also in evidence that eight persons armed with lathis had reached the close proximity of Darshan and yet for some reason did not use the lathis against Darshan. This picture satisfies me that the other offenders apart from Hanif were not wanting that Darshan should, be killed. The position is not merely a lack of proof of agreement to cause Darshan's death but it clearly shows that the converse intention of not causing death was present in the mind of the others.'

I respectfully agree with this view of Mulla, J., that, except Hanif the other eleven accused even though, equipped with necessary weapons and there being ample opportunity for them if they so intended, did not really mean to kill Darshan. Darshan when he was chased by the twelve accused, was admittedly unarmed. He ran and he hid himself inside the Ekdara of Riyasat Ali. At least nine of the accused, one of them being armed with a spear and the remaining eight with lathis, followed Darsan to the Ekdara without any obstruction. It is true that On account of the low roof of the Ekdara the eight assailants, who were armed with lathis, could not ply them freely. Still if they really intended, they would have dragged out Darshan from inside the Ekdara into the courtyard and reduced him to pulp with their lathis. After he had been disabled, they did not even make sure when leaving the place that Darshan was dead. He was left only injured in the Ekdara While the assault was continuing, it is not suggested that Riyasat Ali and Siddiq Ali put any obstructions in the way of the assailants. Riyasat Ali and Siddiq only made a request to the assailants to spear Darshan. The resistance offered by Darshan with the bamboo which he is said to have picked up from the Ekdara,

also appears to have been wholly negligible because Darshan too could not have plied it from inside the Ekdara and no injury was caused to any assailant. Anyway, after Dar-shan had been injured by Hanif with the ballam, Darshan became powerless and there was nothing to prevent the assailants from dragging out Darshan and then killing him with lathis. When the assailants left Darshan ho was still alive. the assaillints did not try even to make sure that they had killed him. In fact, three of them namely, Mohiuddin, Ashiq Ali and Sadiq Ali did not enter inside the house at all and did not touch the bodyof Darshan with their lathis. They were satisfied by simply giving the empty verbal instigation to drag out Darshan and kill him. The wordy threats uttered by these appellants as said before, were simply bogus and not intended to be acted upon, for if they were really serious about them these three appellants would have also gone in and joined the other accused in striking the deceased or at least they should have made sure that their intention was carried Out.

In view of these circumstances, there can be no manner of doubt that except Hanif, who gave a fatal blow the other accused intended to avoid causing the death of Darshan. Nigam, J., also seems to hold that the common object of the assembly excluding Hanif was not to kill Darshan. He has observed:

"I am prepared to concede that probably the common object of the assembly was not to cause death of Darshan. I am led to this conclusion as, in the absence of any evidence as regards conspiracy or the formation of the unlawful assembly, the number of the injuries would go to show that probably it was not the common object of the un-lawful assembly that Darshan be done to death. There is also the evidence that when the assailants left the house, Darshan had not actually died Thus if the common object was to cause death, more injuries would probably have been caused to Darshan.'

He, however is of opinion that even though the eleven accused whose case is before me did not intend to cause the death of Darshan, they would still be liable for the offence of murder because of the extended vicarious liability which the first part of Section 149, I. P. C. imposes upon constituent's of an unlawful assembly.

18. In holding these 11 appellants guilty of the charge of murder, Nigam, J. has made it very clear that he has not made use of the second part of section 149 for he has observed:

'I make it clear that I do not utilise the second part of section 149, Indian Penal Code at all. My submission is that so long as the thing has been done in prosecution of the common object of the unlawful assembly the vicarious liability of the members of the unlawful is brought in. If any member of the unlawful assembly in prosecution of the common object beats a person, the other members of the unlawful assembly are to be held liable.'

Thus Nigam, J., holds that these eleven appellants can be held guilty under Section 302, I. P. C., with the aid of the first part of Section 149, C. P. C alone.

19. Mulla, J., while holding clearly that the first part of Section 149 I. P. C., does not apply to the facts of the present case, has impliedly held that it is not covered by the second part of section 149 I. P. C. also.

20. On the interpretation of the second part of Section 149, I. P. C., without reference to the facts of this cage, he has agreed with Nigam J., as appears from the following observation;-

'So far as the second part of this section is concerned, there does not seem to be any difference of opinion between my brother and me. It is onlythe interpretation of the words 'in prosecution of the common object of that assembly' that we do not see eye to eye with each other.'

Supporting the conviction of these eleven appellants under Section 302 I. P. C. with the aid of the first part of Section 149 I. P.- C., the learned counsel for the State has argued that under that part all the members of an unlawful assembly are. liable to punishment for any and every offence committed by one or more members of that assembly, even if that offence be without and in excess of the known, agreed or intended common object) of the unlawful assembly, only because that offence was also committed while, the unlawful assembly was acting in the accomplishment of the known, agreed or intended common object. I am

unable to agree with this argument. The plain meaning of the first part of Section 149 I. P. C, in my opinion, is that all the members of an unlawful assembly render themselves liable to punishment for any and every offence committed by any member or more members of that assembly in prosecution of the common object of the unlawful assembly which, as I understand it, means that its commission was In the contemplation of the unlawful assembly directly or impliedly. In the present Case, in view of the finding of Mulla J., with which J have respectfully agreed, that the killing of Darshan was not in the contemplation of or intended by any other member of the unlawful assembly except Hanif, it cannot be said that his furder was committed in furtherance of the common object of the assembly and so the eleven, appellants, whose case is before me are not liable to punishment under the first part of Section 149, I. P. C.

21. In view of the particular circumstances of the case, in my opinion, they cannot be held guilty under section 302, I. P. C., even with the aid of second part of Section 149 I. P. C.

22. In the case of Ram Gharan v. Emperor AIR 1946 Pat 242 at P. 248 their Lordships have observed:

'The question to which, in my opinion, Sessions Judges ought to address themselves in considering whether Part II of Section 149 penal Code applies is this: "Was the nature of the enterprise, to borrow the expression used in Rex v. George Edward Pridmore, (1913) 8 CM App. Rep. 198, such that every member of the unlawful assembly ought to have realised that murder was likely to be committed.'

Again their Lordships in the same case while enunciating the principle on the subject, have quoted and approved a passage from Russel on Crimes which reads as below:-

'If a murder is committed in prosecution of some unlawful purpose, ... all persons whowent to give assistance, if need were, in carrying the unlawful purpose into execution are guilty of murder. But this applies only where the murder is committed in prosecution of some unlawful purpose, in which the combining

parties united and for the effecting whereof they are assembled; for unless this appears, though the persons giving the mortal blow may himself be guilty of felonious homicide yet the other who come together for a different purpose will not be involved in his guilt.'

23. In the present case the murder of Darshan was committed by Hanif in disregard of or at least in excess of the common object of the eleven accused who earned lathis. Between eleven persons, who were armed with lathis they caused only one minor injury with a lathi. In the circumstances, it cannot be held that the eleven accused, who were armed with lathis and who by then conduct gave a positive indication of their mind not to kill Darshan but only to beat him, realised or knew that the murder of Darshan was likely to be committed in prosecution of their common object. Therefore, they cannot be held guilty under Section 302, F. P. C, even with the application of the second part of Section 149, I. P. C.

24. In the result, respectfully adopting the reasoning of Mulla, J., which I need not repeat I also hold that the offence committed by the eleven appellants, whose case has beep referred to me falls under Section 326/149, I. P. C. and not 302/149 I. P. C., and they should be punished with eight years' rigorous imprisonment each.

This opinion will be submitted to the Bench. Ordered accordingly.