

Maheswar Gouda and ors. Vs. the State

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Court : Orissa

Decided On : Feb-11-1983

Reported in : 1983CriLJ1029

Judge : P.K. Mohanti and ;B.K. Behera, JJ.

Appellant : Maheswar Gouda and ors.

Respondent : The State

Judgement :

P.K. Mohanti, J.

1. The appellants along with seventeen others stood charged with the offence under Section 148. I. 'P.C. for having formed themselves into an unlawful assembly with the common object of causing the death of one Rama Murty Choudhury. They stood further charged under Section 302 read with Section 149, I.P.C. for having caused the death of the said Rama Murty Choudhury in prosecution of their common object. Appellant 10 Ladu Das, Appellant 11 Gangadhar Gouda and Appellant, 12 Odaya Behera were alternatively charged under Section 302 read with Section 34, I.P.C. for having caused the (death of the said Rama Murty Choudhury in furtherance of their common intention. Appellant 6 Somanath alias Khadal Gouda, Appellant 11 Gangadhar Gouda and Appellant 19 Jaganjiath Behera stood further charged under Section 323, I.P.C. with having caused hurt to PW 4 Gajendra Choudhury. After trial, the learned Sessions Judge

acquitted all the accused persons of the charge under Section 148, I.P.C. but convicted the appellants under Section 302 read with Section 149, I.P.C. and sentenced each of them to undergo imprisonment for life. He also convicted Appellants 6, 11 and 19 under Section 323, I.P.C. and sentenced each of them to undergo R. I. for six months.

2. Prosecution case was that on 23-9-1975 morning while the deceased Rama Murty Choudhury was taking bath in a tank, locally known as Naliabandha, the accused persons being armed with deadly weapons went there in a body and attacked him with lathis and other weapons. As a result of the assault the deceased fell down with bleeding injuries all over his body. His son (PW 4) and wife (PW 2) ran to his rescue, but they were prevented by the accused persons. They, however, managed to remove the deceased to the verandah of one Igini Patra. But there also the accused persons committed further assault on the deceased as a result of which he died on the same day about 12.30 p.m. in Kural Dispensary where he had been admitted for treatment.

3. At the trial, the appellants denied the charge and contended that the case was falsely foisted against them.

4. The learned Sessions Judge relying mainly on the evidence of PWs 2, 3 and 4 convicted the appellants as aforesaid. It is urged in this appeal that the order of conviction is contrary to law and against the weight of evidence on the record.

5. The main question that arises for consideration in this appeal is whether the appellants could be legally convicted under Section 302/149, I.P.C. when they were acquitted of the charge under Section 148, I.P.C.

6. The charge under Section 302/149, I.P.C. as framed by the learned Sessions Judge runs as follows;

That you on the same day, time and place were members of an unlawful assembly in prosecution of the common object of which some of the members of the said assembly caused the death of Rama Murty Choudhury which offence you knew to be likely to be committed in prosecution of the common object of such assembly

and you are thereby under Section 149 of the Penal Code guilty of causing- death of Rama Murty Choudhury an offence punishable under Section 302, I.P.C. and thereby committed an offence punishable under Section (sic) Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

The charge as reproduced above does not contain all the necessary ingredients to bring home to the accused persons the offence of murder with the aid of Section 149. No doubt, it says that the accused persons formed themselves into an unlawful assembly but does not specify the common object of unlawful assembly. The offence of rioting requires specified common object as described in Section 141, I.P.C. It is, therefore, essential that the common object of the unlawful assembly should be specified in the charge so as to bring home to the accused persons the offence of murder by application of Section 149, I.P.C.

7. The learned Sessions Judge framed a specific charge under Section 148, I.P.C. specifying the common object of the unlawful assembly. But he acquitted all the appellants of that charge while convicting them under Section 302/149, I.P.C. The State Government have not preferred any appeal against the order of acquittal in respect of the charges under Sections 148 and 302/34, I.P.C.

8. It is not obligatory to frame a charge under Section 147 or Section 148 in addition to a charge for an offence with the aid of Section 149, I.P.C. though it may be useful to add a charge under Section 147 or Section 148 with the charges under other offences read with Section 149 to guard against failure of the charge for an offence read with Section 149. Section 149 postulates an assembly of five or more persons having a common object as specified in Section 141 and then the commission of an offence by one of the members in prosecution of that object. Thus the ingredients of Section 147 or Section 148 are implied when a charge under Section 149 is framed. But if a specific charge under Section 147 or Section 148 has been framed and that charge has failed against the accused persons Section 149 cannot be used against them, vide : 1966 CriLJ197 (Mahadev Sharma v. State of Bihar). In the case of Nanda Kishore Mohanty v. State (1960) 26 Cut LT 111: (1961 (1) Cri LJ 132 (2)) this Court held that the acquittal of the

accused in respect of the offence under Section 148, I.P.C. would affect his conviction for other offences with the aid of Section 149, I.P.C. In his usual fairness, Mr. R. K. Patra, the learned Addl. Govt. Advocate also cited the case of Ramaswami Ayyangar v. State of Tamil Nadu : 1976 CriLJ1563 wherein their Lordships held that if a person is acquitted of the charge under Section .148, I.P.C. Section 149 could not. be pressed into service against, him. (Vide para 13). Relying on the principles laid; down in the aforesaid decisions we hold that once the accused persons are acquitted of the offence of rioting under Section 147 or Section 148, I.P.C. it is no longer possible to convict them under Section 302 read with Section 149, I.P.C. As laid down by the Supreme Court in Mahadev Sharrha v. State of Bihar, referred to above, the area which is common to Section 147 and Section 149 is the substratum on which different degrees of liability ate built and there cannot be a conviction with the aid of Section 149 when there is no offence of such substratum. In the present cas.e, as we have stated earlier the appellants were acquitted of the charge under Section 148, I.P.C. The clear implication of the acquittal is that either there was no unlawful assembly or that the employment of force or violence, even if any such force or violence was used, was not in prosecution of the common object of the assembly. In our opinion, the acquittal of the appellants in respect of the offence under Section 148, I.P.C. made it impossible for the learned Sessions Judge to convict them of the offence under Section 302 read with; Section 149, I.P.C.

9. The conviction of appellants 6, 11 and 19 under Section 323, I.P.C. is based on the solitary statement of PW 4. The other eye-witnesses did not implicate these appellants as the assailants of PW 4. In his evidence PW 4 stated that PW 5 and one Bidyadhar had witnessed the assault on him. But he was not supported by PW 5. Bidyadhar was not examined a the trial. The learned Sessions judge did not bring it to the notice of those appellants while they were under' examination under Section 313, Cr. P.C. that they had been implicated by PW 4 as his assailants. Though the First Information Report was lodged by an eye-witness, * it is' completely silent about the assault on PW 4, We are not inclined to place any reliance on the sole uncorroborated testimony of PW 4. The conviction of the appellants 6, 11 and 19 under Section 323, I- P. C is liable to be set aside.

10. In the result the appeal is allowed and the convictions and the sentences are set aside. The appellants, except appellants 10, 11 and 12, are on bail. They need not surrender to their bail bonds. Appellants 10, 11 and 12 be set at liberty forthwith.

11. Before concluding we must observe that the way in which the trial of this case has been conducted leaves much to be desired. The charges framed against, the accused are defective and the questioning of the accused under Section 313, Cr. P.C. is improper. The learned Judge has framed a series of long and complicated questions and has called upon the accused to answer them. The question about medical evidence covers one and half pages. Almost the entire evidence of the doctor has been reproduced in the question and the accused has been asked whether he has anything to say about the same, Questions should be put in such a manner as to be easily understandable and they should not be lengthy.

B.K. Behera, J.

12. I agree, The presiding officer of a Court of Session must take an intelligent part in the proceedings and exercise due care while framing the charges or examining the accused persons as these are not matters of empty formality. He should not merely be a disinterested auditor of the contest between the prosecution and the defence and should come to a clear understanding of the actual events that occurred and ensure that proper and necessary steps have been taken to arrive at the truth. As observed in : 1981 CriLJ609 Ram Chander v. State of Haryana, the adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine.