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MartIn and ors. Vs. the State

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Court : Kerala

Decided On : Feb-27-1991

Reported in : 1991CriLJ2391

Judge : K.T. Thomas and; P.K. Shamsuddin, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 149, 302 and 324

Appeal No. : Criminal Appeal No. 130 of 1989

Appellant : MartIn and ors.

Respondent : The State

Advocate for Def. : Public Prosecutor and; K.M. Stalin, Adv.

Advocate for Pet/Ap. : M.N.S. Nayar,; S. Vijayakumar and; B. Raman Pillai,

Judgement :

K.T. Thomas, J.

1. Thirteen persons were convicted for the offence of murder. Such a mass scale conviction relates to the death of one Remanan who sustained a stab wound (which became fatal) and a lacerated wound: Twelve of them were tagged in with the aid of Section 149 of the Indian Penal Code and the remaining person was found to have inflicted the fatal wound. All the thirteen were sentenced to

imprisonment for life. These appeals are in challenge of the said conviction and sentence.

2. At the outset, we are constrained to express our disapproval of the supercilious manner in which evidence was recorded by the trial court. Eye witnesses examined in court mentioned the names of assailants in their deposition, but Sessions Judge worte down such names in the recorded deposition without indicating whether each name pertains to a particular accused arraigned in the trial court. We do not know whether those Witnesses referred to the names by pointing out the accused in the dock. If they did so, learned Sessions Judge ought to have taken down in the record the rank allotted to the accused concerned. We may also observe that if a Public Prosecutor fails to elicit from witness whether the name mentioned is the name of one of the accused in court, it is the duty of the trial judge to ascertain that fact and indicate it in the record. It is enough that he writes the rank of the accused concerned without the name. We are at a terrible disadvantage in this case as we could not discern from the recorded deposition whether the name mentioned in the deposition refers to a particular accused in the case or to any witness or to somebody else. The difficulty the aggravated in this case since there are more than one person bearing the same name among the accused and witnesses. Naturally, defence tried to take advantage of this amorphous situation.

3. Synopsis of the prosecution case is this : Thirteen persons including first accused formed themselves into an unlawful assembly at about 8 p.m. no 13-6-1988 on the public road at Puzhavathu in Chenganassery with the common object of murdering the deceased. This was in retaliation for what the deceased and his henchmen did on the previous day by hurling abuses against first accused in front of his house. Members of the unlawful assembly were armed with lethal weapons and moved from one spot to another on the public road. First, P. W. 2 was attacked by inflicting a cut injury on his back with a sword-stick. This was followed by pelting stones at P.W. 3. As they moved northwards, they met the deceased Remanan. Accused 5 and 6 pointed at the deceased and said that it was this man who hurled abuses on the previous night and exorted 1st accused to finish him off. 1st accused then plunged the sword stick into his chest and 2nd accused dealt a

blow on his head with a wooden reaper. P.W. 4 felt indignant and questioned the assailants about their acts. Then 3rd accused beat him on the cheek with a cricket-bat. All the accused ran away from the place thereafter. Deceased later died.

4. Learned Sessions Judge found that the evidence has proved conclusively that all the thirteen accused formed themselves into an unlawful assembly and committed the murder of the deceased.

5. We may observe that evidence of the prosecution in this case would, at the most, show that thirteen persons including some of the accused were on a rampage on the road and 1st accused cut P.W. 2 with a sword-stick and a few yards away from that spot he inflicted the fatal stab on the deceased whom they saw accidentally when two other assistants exhorted him to do so, and further 2nd accused dealt a blow on deceased's head with a wooden reaper. Nothing more has been established. On the said evidence, all the thirteen accused were convicted for murder under the ubiquitous shield of Section 149 of the Penal Code.

6. It is distressing to note that conviction of accused on a mass scale with the aid of Section 149 of Penal Code is made without careful judicial consideration. Mechanical application of that provision has the risk of sending innocents to incarceration. It is the judicial function to marshall the facts and to discern the chaff from the corn and prevent innocents being flowed in the flush. On mere evidence of presence of a person at or near or even in the company of principal assailants, no conviction shall be made by pedantic invocation of Section 149. The individual act perpetrated by a person in an encounter must be tested to ascertain whether he intended only that much or whether it was done in furtherance or in prosecution of the common object of the assembly. This filtering exercise may involve some difficulty. But trained judicial mind can make that exercise, and has to do it to prevent miscarriage of justice.

7. No doubt, philosophy behind Section 149 of Indian Penal Code is to fasten a person with vicarious liability for the offence committed by another person. Even then, it is essential that the offence should have been committed in prosecution of the common object of the unlawful assembly. One can be nailed to conviction with

the help of Section 149 only if he was a member of the unlawful assembly. He could be tagged with membership of the assembly when common object of the assembly was to commit the offence which anyone among them has committed. Unless the offence was committed '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), even membership of the assembly is insufficient to drag him to the net. The word 'prosecution' in Section 149 means follow up or pursue. There must be some proximate connection between the offence perpetrated and the common object perceived. The expression 'in prosecution of the common object' therefore means that the offence committed must had a perceptible nexus with the common object. For fastening a person with vicarious liability under Section 149, it is not enough to show that the particular member of the unlawful assembly intended to commit a particular offence. Unless the court can with reasonable certainty held that persons assembled together were huddled by a common object, no person can be convicted for what another has done even though the presence of the former at or near the place of occurrence stood established.

8. In an early decision in Gheba v. The Crown, AIR 1949 Lahore 44 : (1949 (50) Cri LJ 290) where common object of the unlawful assembly was to abduct a woman and one of them murdered the woman, the question considered was whether each one of the members of the assembly could be convicted for murder. It was pointed out that murder cannot be said to have been committed, in prosecution of the common object since murder was not essential to achieve the common object of abducting the woman. In Mizaji v. State of U.P., AIR 1959 SC 572 : (1959 Cri LJ 777) Supreme Court vivisected Section 149 into two parts and held that the first part means that 'The offence committed in prosecution of the Common object must be one which is committed with a view to accomplish with the common object'. Their Lordships further observed that 'the offence committed must be connected immediately with the common object of the unlawful assembly of which accused were members'. If it is to come under the second part, the court must be in a position to hold that the offence committed was such as the members knew was likely to be committed, even if the offence was not committed in direct prosecution of the common object. But in that event mere possibility of

commission of offence by one of the members of the assembly is not enough. Mere possibility would swing only in the range of 'might or might not happen'. A higher degree of possibility is required to say that the member of the assembly knew that the offence was reasonably likely to be committed. In Muthu Naicker v. State of T.N., AIR 1978 SC 1647 : (1978 Cri LJ 1713) Supreme Court made the following observations, which should always be borne in mind by the courts while considering the application of Section 149 of the Penal Code.

'Whenever an uneventful rural society something unusual occurs, more so where the local community is faction ridden and a fight occurs amongst factions, a good number of people appear on the scene not with a view to participating in the occurrence but as curious spectators. In such an event mere presence in the unlawful assembly should not be treated as leading to the conclusion that the person concerned was present in the unlawful assembly as a member of the unlawful assembly'. (Para 7)

In that case the Supreme Court held that where a large crowd collected, and one among them committed a stray assault on a victim, the said assault cannot be treated as an act committed in prosecution of the common object of the unlawful assembly. Nor can the remaining accused be imputed with the knowledge that such an offence was likely to be committed in prosecution of the common object of the assembly. In P. S. Sawant v. State of Maharashtra, AIR 1979 SC 1265 : (1979 Cri LJ 856) Supreme Court observed that it is an over statement of law that when a morcha moved on to a stage when it became unlawful any person who was a member of that morcha must be presumed to share the common object of the unlawful assembly. The court must enter satisfaction that a particular accused was a member of the unlawful assembly either through his active participation or otherwise. It must further be shown that he shared the common object of the assembly. Of course the court can draw necessary inference from the conduct, but mere presence in the assembly is hardly sufficient to draw any adverse inference against him. The question whether or not the offence having been committed in prosecution of the common object of the assembly to one of fact, depending upon facts and circumstances of each particular case.

9. In this case, there is no evidence against any of the accused, except three or four persons, to show that anything more than their presence was registered at the scene. They are accused 1, 2, 5 and 6. The role imputed to accused 5 and 6 in evidence is a clear development since that story was absent in the First Information Statement which was given by one of the eye witnesses. We find it difficult to place reliance on witnesses who said that two accused (accused 5 and 6) used the same words at the same time against same victim, as though those two accused had rehearsed earlier to utter those words in the same rythm. P.W. 1 has stated that 2nd accused dealt a blow on the head of the deceased. No other witness has connected 2nd accused with the crime. (Some witness said that one Jeejo had done some acts, but that Jeejo was not identified in court as an accused). We cannot forget, in this context, that it is P.W. 1 who made a serious mistake regarding identity of one of the principal assailants (second accused named in the FIR based on P.W. 1's information was proved to be an innocent person who was not even present at the scene). We cannot safely rely on P.W. 1's uncorroborated testimony to enter a conviction against 2nd accused.

10. Evidence against 3rd accused is that; he beat P.W. 4. with a cricket bat. In the FIR the case is that cricket bat was used by another person who, according to the present stand of the prosecution, was not even present at the scene. It is difficult to convict 4th accused in view of the ostensible ambivalence.

11. As we went through the evidence we find that there is no safisfactory evidence against accused except 1st accused. Prosecution failed to show that there was unlawful assembly. Nor did the prosecution establish beyond reasonable doubt that any other accused did any act against the deceased, or other persons.

12. There is overwhelming evidence against 1st accused. P.W. 1 had identified him correctly in court. He mentioned 1st accused's name and role in the First Information Statement with vivid details. P.W. 2 who received a cut injury on the back said that it was inflicted by 1st accused. P.W. 3 supported that version. P.Ws. 5 and 6 also identified 1st accused and they said that they saw him inflicting, the fatal injury on the deceased. Learned counsel for the appellants contended that there is much inconsistency in the sequences of events as between the narrations

made by witnesses. True, there is some variation in the narration of sequences of events particularly in the testimony of P.Ws. 5 and 2. But, this variation mainly relates to the direction in which the assailants were moving at different stages. We do not think that the said variation is so serious as to affect the core of the prosecution case that 1st accused inflicted stab injury on the deceased and a cut on P.W. 2 with a sword stick.

We confirm the conviction and sentence as against 1st accused for the offence under Sections 302 and 324 of the Indian Penal Code and dismiss his appeal. We allow the other appeals and set aside the conviction and sentences passed on the rest of the accused. We acquit them and direct them to be set at liberty forthwith, if not wanted in any other case.

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