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Court : Chennai

Decided On : Jan-18-1967

Reported in : (1967)2MLJ503

Appellant : Kuttisamy thevar and ors.

Judgement :

K. Srinivasan, J.

1. Nine accused persons, including the appellants were tried for various offences such as rioting armed with deadly weapons, attempt to murder the prosecution witnesses, P.Ws. 1 and 2 and the causing of the death of one Duraipandi. In respect of the charges of the attempt to murder and of murder the accused other than the appellants were charged with constructive liability by reason of Section 149, Indian Penal Code. The learned Sessions Judge, however, found that there was no unlawful assembly, and that, except for the first three accused who are the appellants here, the charges were not proved as against the remaining accused, and they were accordingly acquitted. The sixth charge was under Section 302, Indian Penal Code against the first accused. That was found established and he was convicted and he stands sentenced to the extreme penalty. In the case of the first and the second accused, the charge under Section 307, Indian Penal Code in so far as their attack upon P.W. 2 was concerned, was also found established. Accused 3 was also convicted under Section 307 for his attack upon P.W. 1. Upon their conviction, each of these accused was sentenced to five years' R.1. Accused

1 and 2 were also convicted under Section 307 read with Section 34 in respect of the fifth charge which was under Section 307 read with Section 149, Indian Penal Code. That related to the attack upon P.W. 1. They were sentenced to five years' R.1. In a similar manner, the second and the third accused were also convicted under Section 302 read with Section 34, Indian Penal Code though the charge against them and the remaining acquitted accused was under Section 302 read with Section 149 and in respect of this conviction, the second and third accused were sentenced to life imprisonment. In effect, therefore, the three accused, accused 1, 2 and 3 alone were convicted, accused 1 being sentenced to death and accused 2 and 3 to imprisonment for life. The lesser sentence were directed to run concurrently with these sentences.

2. Most of these accused persons, the deceased and his cousins P.Ws. 1 and 2 belong to the village of Arianayagipuram and the other accused belong to the nearby villages. It is also not in dispute that accused 1 to 7 and 9 are interrelated. The precise relationship is not necessary to be set out. According to the evidence, there had been illwill between these accused and P.W. 1 Arjuna Thevar for about five years. It appears that this Arjuna Thevar was the President of the local Vivasaya Sangham and was again re-elected as President a short while before this occurrence. There had been some dispute over this Society. According to P.W. 1, the first accused demanded to be shown the accounts of the Society, but, as he was not a member P.W. 1 refused to do so. Another reason for the illwill is said to have been that P.W. 1 purchased some lands which were being cultivated by the elder brother of the fifth accused, and he got him evicted from the lands. Broadly stated, there had been quite a few criminal cases between the parties and, in particular it may be mentioned that even the police launched security proceedings both against the party of the accused and the party of the prosecution witnesses. It is unnecessary to follow those cases in any detail, but this background is sufficient to show that there was a general feeling of illwill between P.W. 1 on the one hand and these accused on the other.

3. The proximate cause for the occurrence is said to have been an incident which took place about a week before the incident leading to this trial. It is said that the fifth accused had been away at Bombay for the last two or three years and had

recently returned to his village. According to P.W. 1, he and the deceased Duraipandi met the fifth accused about 15 days before the occurrence in the bazaar and made some remark about the Undesirability of his presence in the village. Accused 5 took no action just then. But a few days later, accused 1 and 2 and some of the other accused or their relations pelted stones at P.W. 1 and caused him some injuries. In regard to this incident, P.W. 1 made a complaint Exhibit P-7 on 6th November, 1965 before the Village Munsif. No action appears to have followed upon this complaint. But P.W. 1 stated that from that day onwards, the accused were trying to attack him and that he was practically confined to his house.

4. On the date of the occurrence, 14th November, 1965 at about 12 noon, P.W. 1, his brother P.W. 2 and their cousin the deceased Duraipandi were proceeding to the village Puthupatti by bus. They claim to have gone there, as P.W. 1's services were sought by one Ena Konar for mediating in a panchayat to settle the dispute between the daughter and son-in-law of Ena Konar. On the way, the bus stopped at Mukkudal, in front of a Printing Press. The Conductor got off the bus and was issuing tickets. The driver had also gone to a latrine nearby. In the last row of the seats of this bus P.W. 1, the deceased, one Subramaniam alias Subbiah, and P.W. 2 were seated in that order. Adjacent to this last row is the opening by which passengers get in and get out, and the Conductor usually takes the last seat in this row of seats near the entrance. When the bus was halting at this spot, these several accused are said to have come there, all of them except the sixth accused being armed with vel-sticks, and the sixth accused having an aruval. The fifth accused poked his vel-stick through the entrance and stabbed P.W. 2 who was in the seat nearest to the entrance. The second accused also aimed a similar stab on the chest of P.W. 2. Thereafter, the first and the third accused ran round the bus by the rear, and made a similar attack upon P.W. 1 through the window near the seat which P.W. 1 was occupying. The third accused stabbed P.W. 1 and the stab fell on the back of the right shoulder. The first accused also aimed another stab, but which however fell upon the deceased who was sitting next to P.W. 1 and hit him on the left flank. An alarm was raised, and thereupon the Conductor of the bus P.W. 6, hurriedly fetched the driver and the bus was driven away immediately to the Police Station at Pappakudi about a mile and a half away.

5. According to the evidence, both P.W. 2 and the deceased man appeared to be unconscious. The Sub Inspector, P.W. 12 immediately got all the passengers out of the bus except P.W. 2 and the deceased and directed the bus to be taken to Ambasamudram Hospital. At the Police Station, he recorded a complaint Exhibit P-8 from P.W. 1 Arjuna Thevar. The evidence of the Sub-Inspector also shows that he examined the passengers in the bus, as many as 28 of them, and apparently sent them away as they gave no useful information. But one witness P.W. 3 who was seated in the row immediately ahead of the one in which these injured persons were seated, claimed to be able to give information, so that the Sub-Inspector examined her later on after the inquest.

6. When the bus reached the Hospital, it was found that Duraipandi was dead. The Doctor P.W. 5 examined P.W. 2 the other injured person, at 2-15 P.M. and found an incised wound bone-deep on the lower end of the sternum and a penetrating wound on the right thigh, both of which were found to be simple. P.W. 1 who was sent from the Police Station by a taxi reached the Hospital at 3-15 P.M. He was found on examination to have a penetrating wound on the back of the right shoulder which injury was also declared to be a simple one.

7. After the inquest, the body of Duraipandi was produced before the Doctor, and it should suffice to say that the post-mortem showed that corresponding to the penetrating wound below the left axilla, the lower border of the left third rib and the upper border of the left fourth rib disclosed cracks. The entire upper lobe of the left lung was found pierced. There was also a penetrating wound on the left side of the pericardium which had entered the left ventricle. There was no doubt that this injury was a necessarily fatal one. There were two other simple incised wounds, one on the left side of the neck 2' above the left collar bone and another at the outer end of the left collar bone. While the prosecution evidence clearly speaks to the stab which was delivered upon the deceased on his left flank, which is the penetrating injury below the left axilla as found by the Doctor, the evidence is silent as to how the two simple wounds found on the left side of the neck and left collar bone were sustained.

8. The defence of the accused, as disclosed both by the cross-examination of the prosecution witnesses and by their statements under Section 342, Criminal Procedure Code, is one of complete denial.

9. In view of the fact that the learned Sessions Judge has found that there is no evidence to establish the existence of an unlawful assembly and the participation of the accused 4 to 9, we shall confine our discussion of the arguments addressed to us, only in so far as the evidence against these appellants has been criticised in the course of such arguments.

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10. [After analysing the evidence and the criticisms thereon made by the Counsel, His Lordship proceeded]:

11. There is, therefore, no doubt in our minds that the injuries upon P.W. 1 and P.W. 2 and the deceased were in fact caused by the three accused in the manner stated by the prosecution witnesses. We have already referred to the fact that two of the simple injuries on the deceased were not accounted for by the evidence, but that in the circumstances is not a vitiating feature.

12. The more important question which has been urged before us is with regard to the conviction of the second and the third accused under Section 302 read with 64 Section 34, Indian Penal Code. We have already stated that the case started as one of rioting by an unlawful assembly, the second and third accused being made liable by reason of Section 149 for the fatal injury caused by the first accused. The question is whether, in the circumstances of the case and in the light of the evidence that is available, this conviction can be sustained.

13. Broadly stated the conviction under Section 302, Indian Penal Code read with Section 34 is sustainable, though the charge proceeded as one under Section 302 read with Section 149, Indian Penal Code so long as the person charged was made aware of the facts brought against him, and he was not prejudiced in any way. In *Karnail Singh v. State of Punjab* (1954) S.C.J. 269 : A.I.R. 1954 S.C. 204, it was held that though there is a substantial difference between Section 34 and

Section 149 the sections overlap and it is a question to be determined on the facts of each case whether the charge under Section 149, Indian Penal Code overlapped the ground covered by Section 34, Indian Penal Code. It was further stated therein that if the common object which was the subject-matter of the charge under Section 149 did not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused, but that if the facts to be proved and the evidence to be adduced with reference to the charge under Section 149 would be the same if the charge were under Section 34, then the failure to charge the accused under Section 34 could not result in any prejudice. This view has been followed in all succeeding cases, though the precise form in which the opinion has been rendered in the decisions varies somewhat. In *Nanak Chand v. State of Punjab* : 1955 CriLJ721 , it was pointed out that while Section 149 creates a specific offence, Section 34 does not. In particular, it was noticed herein that it was the common intention to commit a particular crime that was the principal element in Section 34, while under Section 149 even in the absence of a common intention to commit the offence and even if the accused person had done no overt act, so long as the accused person was a member of the unlawful assembly and knew that the offence was likely to be committed in prosecution of the common object of the unlawful assembly, this section would make him liable. To put it briefly, while Section 149 would appear to be of a more general kind, Section 34 requires evidence of a particular common intention. In certain cases where Section 149 is employed, it may well be that the common intention to commit a particular act in the course of the incident may not be established. But before Section 34 can be used, such a common intention must necessarily be made out. That the omission of Section 34 in a charge is not conclusive but that the question is whether the absence to mention it has caused prejudice has been laid down in *B.N. Srikantiah v. Mysore State* : 1958 CriLJ1251 . We find no difficulty in holding that in this case the substitution of Section 34 has not created any prejudice to the accused. But nevertheless, in so far as the conviction is under Section 34, we have to discover what the common intention was, for, if it should so happen that the act by one of the accused has exceeded that common intention or has been different from that common intention the other accused cannot possibly be made liable under Section 34 for such excess.

14. Having regard to the evidence relating to the illwill and the mode of attack, we are hard put to it to believe that the common intention could have been to murder or attempt to murder any of these persons. Had that been the intention, we would have visualised a more direct action on the part of the assailants. The assailants did not, as far as we could judge from the manner of attack aim to kill any one. We may also refer to the fact that the learned Sessions Judge who dealt with the common object of the unlawful assembly, has not found that such common object was to commit murder. At the highest, we can only say that the common intention was to cause grievous hurt to the victims. This will, of course, not in any way affect the liability of the particular accused who has been found to have caused the death of Duraipandi. In so far as the conviction of the first accused under Section 302 for having caused the death of Duraipandi is concerned, the offence would clearly fail within the third clause of Section 300, Indian Penal Code and he would be guilty of murder. In the case of accused 2 and 3, however, even by reason of Section 34, the offence of which they can be found guilty cannot be anything higher than one under Section 326 read with Section 34. These observations would equally apply to the convictions under Section 307 and Section 307 read with Section 34, Indian Penal Code.

15. We accordingly confirm the conviction of the first accused under Section 302, Indian Penal Code and confirm also the sentence of death imposed upon him. The convictions of the appellants under Section 307 and 307 read with Section 34 are altered to convictions under Section 324, Indian Penal Code and Section 324 read with Section 34, Indian Penal Code respectively. We reduce the sentence of five years' rigorous imprisonment imposed on them under Section 307 and 307 read with Section 34, Indian Penal Code to one of two years' rigorous imprisonment under each count or 324 and 324 read with 34, Indian Penal Code; but we set aside the life imprisonment passed on accused 2 and 3 under the seventh charge and convict them under Section 326, Indian Penal Code read with Section 34, Indian Penal Code and impose a sentence of five years' rigorous imprisonment. The sentences are directed to run concurrently.