

Mani Vs. State of Kerala

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Court : Kerala

Decided On : Dec-03-2009

Judge : K. Balakrishnan Nair and; P. Bhavadasan, JJ.

Acts : Evidence Act - Sections 8, 27 and 165; ;Indian Penal Code (IPC) - Sections 34, 120B, 141, 143, 147, 148, 149, 302, 304 and 307; ;Code of Criminal Procedure (CrPC) - Sections 232, 313, 432, 433 and 433A; ;[Constitution of India](#) - Article 136

Appeal No. : Crl. A. No. 1516 of 2005

Appellant : Mani

Respondent : State of Kerala

Advocate for Def. : No Appearance

Advocate for Pet/Ap. : N. Bhaskaran Nair, Adv.

Judgement :

P. Bhavadasan, J.

1. Five persons were sought to be prosecuted for the offences punishable under Sections 143, 147, 148, 307 and 302 read with Section 149 Indian Penal Code. The second accused died during the pendency of the case before the trial court and hence the charge as against him stood abated. Accused Nos. 1, 3 and 5 were

acquitted of all the charges. The fourth accused was found guilty of the offences punishable under Sections 143, 147, 148, 302 and 307 read with Section 149 of IPC and convicted and sentenced to suffer rigorous imprisonment for six months for the offence punishable under Sections 143 IPC, rigorous imprisonment for two years for the offence punishable under Section 147 IPC, rigorous imprisonment for three years for the offence punishable under Section 148 IPC, imprisonment for life for the offence punishable under Section 302 IPC and rigorous imprisonment for ten years for the offence punishable under Section 307 IPC. He was also directed to pay an amount of Rs. 1,00,000/- (Rupees One Lakh) as compensation to the legal representatives of the deceased within twelve months from the date of the order, in default of payment of which, he has to suffer simple imprisonment for a further period of three years.

2. The incident took place on 12.4.1999 at about 11.30 a.m. P.W. 1 is residing with his family near the Marad Beach. He is a casual labourer. On the date of the incident, at about 11. a.m. he was on his way to buy provisions from a nearby shop. When he was about to reach his home on return, he heard a loud noise and he found a person lying on the road with injuries. The injured man called him for aid. However, the family members of P.W. 1, who were watching the incident, dissuaded P.W. 1 from going near the injured. P.W. 1 informed the police control room. Thereafter, he went near the injured. By that time police had arrived. Unfortunately the man was dead by then. Another person was also seen lying a little further away injured in the incident. P.W. 1 gave First Information Statement. It was recorded by P.W. 19, who registered crime as per Ext. P21 First Information Report as Crime No. 45 of 1999. Investigation was taken over by P.W. 21. He reached the place and made necessary arrangements for sending the injured to the hospital. He prepared Ext. P23 inquest report. He seized the clothes found on the body of the deceased at the time of inquest and also other materials found at the place of incident. Since the place of occurrence was described in the inquest report, he did not prepare a separate scene mahazar. The body was sent for autopsy. P.W. 10 attached to the Medical College, Kozhikode conducted autopsy over the body of the deceased and prepared Ext. P11 report. The report shows that Sujeesh, the victim died as a result of the injury suffered by him on his neck. P.W. 21 recorded the statements of witnesses. Subsequent investigation was

done by P.W. 22. He had the accused arrested. Based on the confession statement given by the first accused, M.O.1 and M.O.1(a) weapons were seized as per Ext. P17 mahazar. Confession statement given by the third accused was to the effect that he had thrown the weapon into a sea. Based on the confession statement said to have been given by the fourth accused M.O.2 was recovered as per Ext. P29 mahazar. The investigation was completed and final report was laid.

3. JFCM-V, Kozhikode before whom final report was laid took cognizance of the offences. On appearance of the accused before the said court, all legal formalities were complied with. The learned Magistrate, on going through the records, found that the case is exclusively triable by a court of Sessions and accordingly committed the case to Sessions Court, Kozhikode.

4. The said court, on receipt of records, issued summons to the accused and they entered appearance. After hearing both sides, charge was framed for the offences punishable under Sections 143, 147, 148, 307 and 302 read with Section 149 IPC. To the charge, the accused pleaded not guilty and claimed to be tried. Prosecution therefore had P.Ws. 1 to 22 examined Exts.P1 to P36 marked. M.Os. 1 to 19 were identified and marked. On the close of the prosecution evidence, the accused was questioned under Section 313 of the Criminal Procedure Code. They denied all the incriminating circumstances brought out against them and maintained that they were innocent. On finding that the accused could not be acquitted under Section 232 of Cr.P.C., they were directed to enter on their defence. They had examined D.Ws. 1 to 3 and Exts. D1 to D25 marked. Ext. C1 is the third party exhibit. On an appreciation of the evidence in the case, the court below came to the conclusion that the prosecution has not succeeded in establishing the guilt against accused Nos. 1, 3 and 5 and hence they were acquitted. But the fourth accused was found guilty and he was therefore convicted and sentenced as already mentioned. The said conviction and sentence are assailed in this appeal.

5. The fact that Sajeesh died as a result of the injury suffered by him in the incident and also that P.W. 3, Suresan was injured, are facts not in much dispute. Ext. P12, which is the wound certificate relating to P.W. 3 shows the injuries suffered by him. Ext. P23, the inquest report and Ext. P11, the postmortem

certificate show the injuries suffered by Sajeesh and also the fact that he died as a result of the injury sustained by him. It is also evident from the testimony of P.W. 10 that Sajeesh died as a result of the injury suffered by him on his neck and the injuries which caused the death are injury Nos. 3 and 4. The doctor has also stated that these injuries are fatal in nature and are sufficient in the ordinary course to cause death. It is therefore clear that the death of Sajeesh was caused by the injuries suffered by him and it is a case of homicide.

6. The main question that arises for consideration is whether the court below was justified in coming to the conclusion that the fourth accused, namely, the appellant herein was one of the members of the unlawful assembly, which caused the injuries to Sajeesh and P.W. 3 and which resulted in the death of Sajeesh.

7. The prosecution based its case on the testimony of P.Ws. 3 to 9 to prove the incident. It also relied on the recovery based on the confession statement said to have been made by the respective accused. Unfortunately for the prosecution, P.Ws. 4 to 9 turned hostile and betrayed the prosecution. Their evidence is therefore of no help to the prosecution. The result is that the prosecution case is based solely on the evidence of P.W. 3.

8. The evidence of P.W. 3 shows that he and the deceased were active members of CPI(M) political party. They had gone to the house of one Peethambaran, another loyalist of the party to attend a marriage. When they reached the house of Peethambaran, they came to know that the marriage party had already left the house. In order to attend the marriage, they went in search of a vehicle. They came near the shop of P.W. 9. In order to drink a soda, the deceased went near the shop of P.W. 9. P.W. 2, who was in the shop at the relevant time gave him a soda. Then accused Nos. 3 and 4 are said to have reached the place. Following them accused Nos. 1, 2 and 5 reached there. Accused No. 2 snatched the soda bottle from the deceased, broke it and stabbed the deceased with the same on his neck. Even though the first attack was warded off, the subsequent attacks caused injuries to the deceased. Others attacked him with swords and the fifth accused is said to have beaten him with an iron rod. The deceased fell on the road. P.W. 3 was also not spared. He also suffered injuries and he too collapsed. Even though

he tried to escape, he was not fortunate enough to do so. When people began to gather at the scene, the accused are said to have made good their escape. None came to the rescue of the injured. After some time, police reached the place. By that time, Sajeesh had died at the spot and police removed P.W. 3, the injured, to the hospital. P.W. 3 categorically stated before court that the five persons who attacked him belonged to BJP. They were familiar to him, even though he did not know their names. He identified the weapons used by the assailants.

9. The court below also relied on the evidence relating to the recovery of M.O.2 on the basis of the confession statement said to have been given by the fourth accused. It is at once to be noticed that the recovery based on the alleged confession statement of first accused was disbelieved.

10. Learned Counsel appearing for the appellant raised two points for consideration. They are i) there was no proper identification parade conducted and the identification by P.W. 3 of accused No. 4 cannot be accepted, and ii) even assuming that the fourth accused had caused any injuries, Sections 143, 147, 148 and 149 of IPC cannot be taken aid of, and he can at best be made liable for his individual acts.

11. As already noticed, the prosecution case now rests on the solitary evidence of P.W. 3. He has stated that he and his companion were attacked with sharp edged weapons and iron rods. The swords, which were alleged to have been recovered were marked as M.Os. 1 and 2. The medical evidence shows that the injuries suffered by the deceased as well as P.W. 3 could be caused by the weapons like M.O.1 series and M.O.2. It is true that the wound certificate is slightly confusing, in that injuries were not properly described. But P.W. 11 has stated the reasons and has given convincing evidence to show that the injuries could have been caused by the weapons shown to him.

12. The court below then considered issue of identification of the assailants. It appears that P.W. 3 had identified accused Nos. 1 and 3 to 5 before court. P.W. 2, the other staunch witness for the prosecution failed to identify any of the accused persons and did not speak much about the incident also. The main attack is regarding the faulty identification of the accused during investigation. The

contention which was taken was that the accused were strangers to P.W. 3 also and his identification before court cannot therefore be accepted. It is also contended before the court below that the identification alleged to have been conducted by the investigating agency is not acceptable.

13. The court below chose to accept the contention regarding the identification during investigation and it was held that it was not properly done. However, the court below rightly held that, that by itself is not a ground to reject the identification made before court. As noticed by the court below, it is not the law that unless the identification parade is conducted at the investigation stage, the identification of the accused before the court cannot be accepted. It is well settled that it is the identification before court that forms substantive evidence. The identification during investigation is only to ensure that the investigating agency is proceeding in the right direction. Well, it may be that a proper identification parade done during investigation stage may support the identification in court. But to say that unless there is an identification parade conducted during investigation, the identification before court in all cases cannot be accepted, may not be correct in law.

14. Learned Counsel appearing for the appellant pointed out that the earlier version of P.W. 3 does not indicate that the accused were familiar to him. The court below has considered this aspect in detail and has come to the conclusion that in the facts and circumstances of the case and also in the light of the evidence adduced before court, the identification of the accused before court can be safely accepted. At the same time, the court below was of the view that to base a finding solely on the basis of that identification would be hazardous and the court had to look for corroborative evidence. The court below mainly relied on the recovery said to have been made on the basis of the confession statement alleged to have been given by the respective accused persons as corroborative evidence.

15. The evidence shows that P.W. 3 was not aware of the names of the accused. But he was able to identify the accused in court. The court below has given cogent reasons as to why it has accepted the identification by P.W. 3 of the accused in court. No legal or factual infirmities are established to hold that the said finding is incorrect.

16. As far as the first accused was concerned, the prosecution sought to prove the recovery of M.O.1 and M.O.1(a) on the basis of the information said to have been furnished by the first accused. M.O.1 and M.O.1(a) are alleged to have been recovered from the wedge of the cudjan screen on the western side of the shop of P.W. 9. The prosecution examined P.Ws. 15 and 16 to prove the recovery. But the court below on an analysis of the evidence has come to the conclusion that the evidence adduced by the prosecution regarding the recovery of M.Os. 1 and 1(a) cannot be accepted for various reasons. As far as the fourth accused was concerned, it is found that the relevant portion of the confession statement was marked as Ext. P19(a), M.O.2 is alleged to have been recovered as per Ext. P19 mahazar and the evidence of recovery was given by P.Ws. 17 and 22.

17. Fortunately for the prosecution, P.W. 17, an independent witness for the recovery of M.O.2 weapon supported the prosecution. As per his evidence, it is seen that he along with the attestor to Ext. P19 were returning after taking their meals to their work place. They happened to see a police jeep coming along and enthusiasm carried them to the place where the police jeep was stopped. They happened to see the police bringing out the fourth accused from the jeep and he pointed out the place to the police personnel. He also speaks about the police man taking a weapon from under the grass. P.W. 22, the investigating officer, speaks about the recovery of M.O.2. Fortunately for the prosecution, the chemical analysis report shows that M.O.2 contained human blood belonging to O group, which compared well with the blood stains found on M.O.3, the pant which P.W. 3 was wearing at the relevant time.

18. Learned Counsel appearing for the appellant pointed out that the court below was not justified in taking aid of Section 27 of the Indian Evidence Act in support of the recovery of M.O.2. It was pointed out that Ext. P19(a) the relevant portion of the confession statement does not disclose the authorship of concealment and therefore the alleged confession statement cannot fall under Section 27 of the Indian Evidence Act. It is pointed out that true the court had extracted an answer from P.W. 22 regarding this aspect. According to learned Counsel since the averment under Section 27 did not contain authorship of concealment, the testimony of P.W. 22 in that regard before court is of no value. If that be so, the

court below was not justified in taking those items of evidence against the accused. According to learned Counsel, like in the case of other accused, accused Nos. 1, 3 and 5, he is entitled to the benefit of doubt and can claim acquittal on that basis.

19. We are afraid that we cannot accept the above contention. It is true that unless the confession statement which led to the recovery contained the authorship of concealment, it may not fall within the ambit of Section 27 of the Indian Evidence Act. But it is not the law that unless it is stated in the mahazar, which evidences the recovery, it cannot be said that the authorship of concealment is not revealed. It is by now well settled that the court by virtue of Section 165 of the Indian Evidence Act can ask the investigating officer regarding the authorship of concealment and if the witness gives an answer in the right direction, that can be accepted. Even though the disclosure statement may not as such contained authorship of concealment, in the light of the fact, a court, conscious about its duty during trial if it chooses to get an answer from the investigating officer, it cannot be said that the court has erred in any manner. In fact it shows that the court was actively participating in the trial and was keenly following the same and it is the duty of the court to do so, which is well recognised in law.

20. Even assuming that the contention of the learned Counsel for the appellant is accepted, and that the statement which led to the recovery cannot be brought under Section 27 of the Act, the fact that the weapon was recovered at the instance of the accused constitute a conduct relevant under Section 8 of the Indian Evidence Act and will form a corroborative piece of evidence. May be that it is not as strong as an evidence under Section 27 of the Act, but nevertheless it is a piece of evidence which goes against the accused. Viewed from that angle also it cannot be said that the court was unjustified in taking the aid of a clinching item of evidence against the appellant. We shall not forget that M.O.2 weapon, which was recovered at the instance of the fourth accused contained human blood of O group, which matched with the blood group of P.W. 3. The contention based on identification and authorship of concealment will therefore have to fail.

21. What now remains is the contention regarding the offences said to have been committed by the fourth accused. One may first refer to the finding of the court below in this regard. It is established from the evidence on record that Sajeesh died as a result of the injury suffered by him and P.W. 3 had suffered injuries at the hands of the assailants. As already noticed, the court below was disinclined to hold that the prosecution has succeeded in establishing the guilt against accused Nos. 1, 3 and 5 for reasons already made mention of. The evidence of P.W. 3 shows that the fourth accused, who was found guilty by the court below had in fact inflicted injuries on P.W. 3 as well as on the deceased. The question would be whether the court can take the aid of Section 149 to fasten vicarious liability on accused No. 4.

22. The court below observed that, even though it was slow to accept the evidence of P.W. 3, there is convincing evidence of an assembly of five persons including accused Nos. 2 and 4 armed with deadly weapons, had attacked P.W. 3 and the deceased on the relevant day. The court below goes on to say that the deceased Pushparajan, accused No. 2, and accused No. 4 came to the scene of occurrence with deadly weapons, and they all assaulted P.W. 3 and the deceased in front of the shop of P.W. 9. Even though P.W. 3 ran to escape, he was followed and assaulted by the assailants. The court below was therefore persuaded to hold that Section 149 is attracted.

23. The question is whether the above view is correct. It needs to be noticed that the prosecution has no case that except the five named accused persons, any other person had any role in the incident. It is important to notice that the second accused died even before the trial had started and he has not faced trial at all. The charge against him stood abated also. It cannot be said that he was a member of the unlawful assembly for the simple reason that he has not faced trial at all. To hold that he is a member of the unlawful assembly would be indicting him without trial, which may not be proper in law. The court below had chosen to hold that the evidence regarding the involvement of accused Nos. 1, 3, and 5 is not sufficient, and the court acquitted them of all the charges. That leaves accused No. 4 alone in the field.

24. A close reading of the records produced by the prosecution and the evidence of P.W. 3 and other prosecution witnesses does not indicate that anybody other than the five persons named in the charge was actually involved in the incident. True the records reveal that initially the prosecution had a case that there were seven persons. But when the final charge was filed before court, the number was confined to five and those five persons had been clearly identified. P.W. 3, nowhere in his evidence has stated that, apart from the five named persons, any other person was involved. P.W. 22 has also no such case. It is in this context one has to consider the finding of the court below regarding the vicarious liability cast on accused No. 4. The court below has taken aid of Section 149 IPC. The question is whether that is proper. It will be first useful to read the Section. It reads as follows:

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.- 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.

The essential ingredients are:

- 1) Commission of offence by a member of the unlawful assembly, and
- 2) Such offence must have been in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed.

An important ingredient is that the number of members constituting the unlawful assembly must be five or more. When the prosecution has tried to establish the case against five assailants put forward in the charge, and when some of them are acquitted, whether Section 149 IPC will have any application?

25. It has been held that even though the number of the convicted persons is less than five, the court can still take the aid of this provision under certain

circumstances. There is nothing which prevents the court from entering a finding that the unlawful assembly consisted of convicted persons, or acquitted persons and unidentified persons, who together exceeded five. In that circumstance, it cannot be said that the court creates a new assembly than the one contained in the charge. In such case, the assembly remains the same, but only the identity is in dispute.

26. When out of the five persons, two are acquitted and the other three are convicted, it may be possible to take aid of Section 34 of IPC. But in a case where there are five named persons in the charge sheet and they faced trial and the entire evidence was directed against those five persons, when three of them were acquitted and one was no more, is not the position different? Though not strictly applicable, in the context of application of Section 120B, in the decision reported in *Topandas v. State of Bombay* : AIR 1956 SC 33 it was held as follows:

By the terms of the definition itself, there ought to be two or more persons who must be parties to such an agreement and it is trite to say that one person alone can never be held guilty of criminal conspiracy for the simple reason that one cannot conspire with oneself. If, therefore, 4 named individuals were charged with having committed the offence under Section 120B, Penal Code, and if three out of these 4 were acquitted of the charge, the remaining accused, who was the accused No. 1 in the case before us, could never be held guilty of the offence of criminal conspiracy.

In the decision reported in *Bharwad Mepa Dana v. State of Bombay* : AIR 1960 SC 289 it is seen that the appellant in the case along with ten others were prosecuted. Seven persons were acquitted and others were convicted with the aid of Sections 34 and 149 IPC. Before the High Court one more person was acquitted. The question arose was whether Section 149 can have any application. The Apex Court held as follows:

There are two other decisions, one of the Federal Court and the other of this Court. In *Kapildeo Sing v. The King* 1949 FCR 834 : AIR 1950FC 80 the prosecution case was that 60 of 70 men constituted the unlawful assembly, but the appellant in that case was charged with thirteen others with having committed

certain offences in furtherance of the common object of the unlawful assembly. The appellant was found guilty, but the thirteen others who were charged along with the appellant were acquitted as they were not properly identified. One of the contentions raised in the Federal Court was that in all fourteen persons having been charged with rioting and thirteen of them having been acquitted, it could not be held that there was any unlawful assembly of five or more persons whose common object was to commit an offence. With regard to this contention, it was observed at pp.837-838 (of FCR): (at p.81 of AIR):

The essential question in a case under Section 147 is whether there was an unlawful assembly as defined in Section 141, IPC, of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only, Section 147 still applies, if upon the evidence in the case the court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified. In the present case, there is such a finding and that concludes the matter. We consider that these observations apply with equal force in the present case, and we do not think that the distinction sought to be made by learned Counsel for the appellants on the basis that in Kapildeo's case the prosecution allegation was that there were 60 or 70 men in the unlawful assembly, makes any difference in the legal position. The same view was expressed again by this Court in *Dalip Singh v. State of Punjab* : 1954 SCR 145 at p.150 : AIR 1953 SC 364 at p. 366:

Before Section 149 can be called in aid, the court must find with certainty that there were at least five persons sharing the common object. A finding that three of them 'may or may not have been there' betrays uncertainty on this vital point and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation.

This is not to say that five persons must always be convicted before Section 149 can be applied. There are cases and cases. It is possible in some cases for Judges to conclude that though five were unquestionably there the identity of one

or more is in doubt. In that case, a conviction of the rest with the aid of Section 149 would be good. But if that is the conclusion it behoves a court, particularly in a murder case where sentences of transportation in no less than four cases have been enhanced to death, to say so with unerring certainty.

The same view was reiterated in *Nar Sing v. State of Uttar Pradesh* AIR 1854 SC 457 at p.459. We have stated earlier what the finding in the present case is : it is a clear finding - a finding with certainty- that the number of persons who constituted the unlawful assembly was more than five, though the identity of four only has been established; and the killing was done in prosecution of the common object of the entire unlawful assembly. Therefore, we see no serious difficulty in applying Section 149, Indian Penal Code in the present case.

26. Another decision that has to be noticed is the decision reported in *Krishna v. State of Maharashtra* : AIR 1963 SC 1413. In the above decision, four persons were charged for the offence punishable under Section 302 read with Section 34 of IPC. The High Court acquitted three out of the four persons, who were charged for the offences under Section 304 read with Section 34 giving them the benefit of doubt. But convicted the fourth accused for the offence punishable under Section 302 read with Section 34 IPC and that was challenged before the Apex Court. The Apex Court held that it is not possible to take the aid of Section 34 in such cases. In the decision reported in *Ram Tahal v. State of U.P.* : AIR 1972 SC 254 it is seen that six persons were prosecuted for the offences punishable under Sections 148 and 302 read with Section 149 of the IPC. The High Court in appeal acquitted two of them giving them the benefit of doubt and convicted the rest of the four accused persons under Section 304 read with Section 149 of IPC and Section 307 read with Section 149 and Section 148 IPC. When challenged, the Apex Court held as follows:

The position in law is therefore clear and it appears to us that in so far as the conviction and sentence of the appellants under Sections 148; 304 read with Section 149 are concerned, they cannot be sustained on the charge as framed against them which definitely named the three appellants as also the 3 acquitted accused as being members of an unlawful assembly, who had in the prosecution

of the common object of such assembly, unlawfully demolished the thatch of Ram Badal and were guilty of an offence of rioting under Section 148 and of murder of Ram Harakh and Jagga under Section 302 read with Section 149 of the attempted murder of Ram Badal, Sukhraj ad Orilal under Section 307 read with Section 149.

While this is so the question is whether the convictions under Section 302 and Section 307 can be sustained on the ground that they had a common intention to commit the said offence. The learned Advocate for the appellant strenuously contends that before the appellants can be convicted under the aforesaid section read with Section 34 it must be shown that they had a prior concert to commit the said offence which cannot be concluded on the facts of this case. There is no doubt that a common intention should be anterior in time to the commission of the crime showing a pre-arranged plan and prior concert, and though, it is difficult in most cases to prove the intention of an individual, it as to be inferred from the act or conduct or other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrive on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them, the acts done by others to assist those causing the injuries the concerted conduct subsequent to the commission of the offence for instance that all of them had left the scene of the incident together and other acts which all or some may have done as would help in determining the common intention. In other words, the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted. This Court had in Krishna Govind Patil's case : AIR 1963 SC 1413 already referred to earlier, held that the pre-arranged plan may develop on the spot during the course of the commission of the offence but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so before a Court can convict a persons under Section 302 or Section 304 read with Section 34 of the I.P.C it should come to a definite conclusion that the said person had a prior concert with one or more persons named or un-named for committing the offence.

In the decision reported in Dharam Pal v. The State of U.P. : AIR 1975 SC 1917 the question was again considered. The principle of vicarious liability both under

Section 149 and Section 34 IPC was discussed. It was observed that the principle of vicarious liability does not depend upon necessity to convict a required number of persons. It depends upon proof of facts beyond reasonable doubt, which made the principle applicable. In the above decision it was observed as follows:

It is true that the acquittal of an accused person does not raise in the eye of law, a presumption that he is innocent even if he was actually guilty. But, it is only the acquitted accused person and not the convicted accused persons who can, as a rule, get the benefit of such a presumption. The effect of findings on questions of fact depends upon the nature of those findings. If, for example, only five known persons are alleged to have participated in an attack but the Courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the Court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding, based on good evidence and sound reasoning, that the participants were five or more in number. Such a case is one of doubt only as to identity of some participants and not as to the total number of participants. It may be that a definite conclusion that the number of participants was at least five may be very difficult to reach where the allegation of participation is confined to five known persons and there is doubt about the identity of even one. But, where a large number of known persons (such as eighteen, as is the case before us), are alleged to have participated and the Court acts on the principle that it is better to err on the side of safety, so that no injustice is done to a possibly wrongly implicated accused, and benefit of doubt is reaped by a large number, with the result that their acquittal, out of abundant caution, reduces the number of those about whose participation there can be no doubt to less than five, it may not be really difficult at all as it is not in the case before us, to reach the conclusion that, having regard to the undeniable facts, the number of participants could not possibly be less than five. We have, for the reasons given above, also reached the same conclusion as the learned Judges of the Allahabad High Court. We wish that the High Court had itself given such reasons, which are not at all difficult to find in this case, so that its conclusion on the number of participants

may not have appeared rather abrupt. Justice has not only to be done, but, as has been often said, must manifestly appear to be done.

.... A case like the one before us stands on the same footing as any other case where there is certainty that the number of participants was not less than five but there is doubt only as to the identity of some of the participants. It has to be remembered that doubts may arise with regard to the participation of a particular accused person in circumstances whose benefit can only be reaped by the accused who raises such doubt. Doubts may also arise about the veracity of the whole prosecution version and doubts about the participation of individual accused persons may contribute to the emergence of such doubts which may cover and engulf the whole case. Nevertheless, if, as in the instant case, the Court, whose duty is to separate the chaff from the grain, does hold that the convicted persons were certainly members of an unlawful assembly which must have consisted of more than five persons, we do not see any principle of law or justice which could stand in the way of the application of Section 149 I.P.C for convicting those found indubitably guilty of participation in carrying out of the common object of an unlawful assembly.

The above decision was considered in the decision reported in *Maina Singh v. State of Rajasthan* : AIR 1976 SC 1084 which also considered the other decisions on the point in issue, and held that the decision *Dharam Pal's Case* (Supra) must remain confined to the facts of the case and it was held as follows:

As has been stated, the charge in the present case related to the commission of the offence of unlawful assembly by the appellant along with the other named four co-accused, and with no other person. The trial in fact went on that basis throughout. There was also no direct or circumstantial evidence to show that the offence was committed by the appellant along with any other unnamed persons. So when the other four co-accused have been given the benefit of doubt and have been acquitted, it would not be permissible to take the view that there must have been some other person along with the appellant Maina Singh in causing the injuries to the deceased. It was as such not permissible to invoke Section 149 or Section 34 IPC. Maina Singh would accordingly be responsible for the offence, if

any, which could be shown to have been committed by him without regard to the participation of others.

In the decision reported in *Jayantibhai Bhenkarbhai v. State of Gujarat* : (2002) 8 SCC 165 the issue regarding the applicability of Section 149 again arose for consideration in the light of the fact that when the number of culprits who participated in the incident fell short of five on trial. The court held as follows:

Though we are holding Jayantibhai Bhenkarbhai, the accused-appellant before us entitled to acquittal, we are conscious of the fact that the High Court has held five accused persons guilty and convicted them with the aid of Section 149 IPC. With the acquittal of Jayantibhai Bhenkarbhai (A-9), the accused-appellant before us, the number of culprits who participated in the incident is reduced to less than five and the charge with the aid of Section 149 IPC falls to the ground. We could have, in exercise of our jurisdiction under Article 136 of the Constitution, entered into the legality and propriety of the conviction of the non-appealing accused persons also. However, in the facts and circumstances of the present case,, we are not inclined to do so. Though the charge with the aid of Section 149 IPC may fail, yet the non-appealing accused persons could still have been held liable to conviction with the aid of Section 34 PC in which event the sentences would have remained the same. Be that as it may, inasmuch as the other accused have chosen not to file any appeal of their own, we are not inclined to enter into examining the sustainability of the conviction of the non-appealing accused persons.

On going through the above decisions, it can be seen that the issue must be decided depending upon the facts of each case. The approach appears to be that if prosecution case is that the convicted or the acquitted persons along with others, whose number is more than five, then the mere fact that if one is acquitted does not make Section 149 inapplicable. If on the other hand there are only five named persons in the charge, trial proceeds only as against five of them, evidence is also adduced against only five of them, and the prosecution has no case that any other person is involved, then if one person is acquitted, then it may not be possible to take the aid of Section 149 IPC to cast vicarious liability on the rest of the four convicted persons. That seems to be the proper way to understand the above

decisions.

27. In the case on hand, as already been discussed, there is nothing to indicate that more persons than five mentioned in the charge were involved in the incident. The first information statement, namely Ext. P1 states that about four to five persons have committed the atrocities. P.W. 3, whose evidence has been accepted by the court below also does not show anybody else other than the persons mentioned in the charge sheet were involved. It may not be possible to say that the second accused, who is no more, to be treated as a member of the unlawful assembly. One cannot omit to note that he has not stood trial since charge against him stood abated. That the acquittal of accused Nos. 1, 3 and 5, the only man who remains is accused No. 4. On the basis of the principles already mentioned, it may not be possible to find that the fourth accused guilty of the offence taking aid of Section 149 IPC. Therefore he can be made liable only for his individual acts.

28. The next question that arises for consideration is what are the offences committed by the appellant. It has already been found that he had caused injuries to the deceased as well as to P.W. 3. The evidence of P.W. 3 is to the effect that the appellant had caused injuries to the neck of the deceased using a sword. He would say that repeated injuries were caused by the appellant to the neck of the deceased. The postmortem certificate shows that there are several injuries on the neck especially injury Nos. 3 and 4. The Doctor, who has conducted the postmortem, namely, P.W. 10 and who has issued Ext. P11 certificate has opined that the cause of death of Sajeesh was injury Nos. 3 and 4 inflicted on his neck. According to him, those are two vital injuries, which in the ordinary course of nature cause death. This shows that the appellant was responsible for inflicting the injuries, which resulted in the death of Sajeesh. If that be so, he was liable for murder.

29. Again he had repeatedly attacked P.W. 3 with the sword and caused several injuries to him also. The manner in which the injuries were inflicted and also the fact that P.W. 3 was chased and injuries were inflicted on him would clearly show that the appellant had the intention to cause the death of P.W. 3. If that be so,

Section 307 is attracted, which reads as follows:

307. Attempt to murder.-Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of order, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned. Attempt by life convicts.- When any person offending under this Section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

It could thus be seen that the acts of the appellant fall within the second part of the first limb of Section 307 IPC.

In the result, this appeal is partly allowed, and the conviction and sentence passed by the court below against the appellant under Sections 143, 147, 148, 302 and 307 read with Section 149 IPC are set aside and instead he stands convicted for the offence punishable under Sections 302 and 307 IPC and he is sentenced to undergo imprisonment for life and to pay a sum of Rs. Rs. 25,000/- as fine, in default of payment of which, he shall suffer rigorous imprisonment for a period of three years for the offence punishable under Section 302 IPC and directed to suffer rigorous imprisonment for a period of ten years and to pay a fine of Rs. 15,000/-, in default of payment of which, he shall suffer rigorous imprisonment for a further period of one year for the offence punishable under Section 307 IPC. Substantive sentences shall run concurrently. Set off as per law will be allowed in case the appropriate Government seeks to exercise its power under Section 432 or 433 Cr.P.C. as the case may be subject ofcourse to Section 433A Cr.P.C..

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