

CASE NO.:

Appeal (crl.) 1150-1151 of 2001

Appeal (crl.) 42-43 of 2002

PETITIONER:

Chittarmal, Moti

RESPONDENT:

State of Rajasthan

DATE OF JUDGMENT: 08/01/2003

BENCH:

N. SANTOSH HEGDE & B.P. SINGH.

JUDGMENT:

J U D G M E N T

B.P. SINGH, J.

These appeals by special leave have been preferred by Chittarmal and Moti who have impugned the judgment and order of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in DB CrI. Appeal No.563 of 1997 and DB Cr. (Jail) Appeal No. 1 of 1998 dated 5th September, 2000. The High Court while acquitting the other accused of the charges levelled against them, found the appellants guilty of the offences punishable under sections 302 and 307 IPC. The appellants who had been sentenced to death by the trial court for committing the offence punishable under section 302 IPC, were sentenced to undergo rigorous imprisonment for life declining the death reference. The trial court had also sentenced the appellants to undergo five years rigorous imprisonment and to pay a fine of Rs.2000/- for the offence punishable under section 307 IPC, in default of payment of fine, six months simple imprisonment, which was upheld by the High Court. The conviction of the appellants under section 148 IPC was, however, set aside.

The case of the prosecution is that on the night intervening 27th - 28th April, 1989 deceased Bhura and Ram Narain and Lal Chand, PW.1 were sleeping in their house in village Joshian Ki Dhani when the appellants herein alongwith five other persons entered the house at about 10 or 11 p.m. and brutally assaulted Bhura and Ram Narain as also Lal Chand, PW.1. Bhura and Ram Narain succumbed to their injuries but Lal Chand, PW.1, who suffered as many as 24 injuries survived the assault. Bhura was the father of Ram Narain and the father-in-law of Lal Chand, PW.1. The first information report Ex.P.1 was lodged by Bhenru, PW.5 another son of Bhura (deceased) alleging that on the night of occurrence Moti (appellant) alongwith Ramsi, Ratan, Lala, Chhagan, Jaggu and 2-3 others armed with axes, farsies and swords entered the house of Bhura and mounted a murderous assault as a result of which Bhura and Ram Narain lost their lives while Lal Chand, PW.1 was severely injured. It may be noticed at this stage that Chittarmal was not named as one of the accused in the first information report. On the basis of the first information report a case was registered under sections 147, 148, 302, 307 and 447 IPC at P.S. Sanganer. In the course of investigation blood stained clothes and the weapons of offence are said to have been recovered at the instance of accused persons. The post-mortem examination of the bodies of Bhura and Ram Narain was conducted by Dr. Nirmal Kumar Sharma, PW.18 and Dr. H.C. Bairwa, PW.14. Lal Chand, PW.1 was examined by Dr. B.C. Temani, PW.15, who prepared the injury report Ext.P.26. The report

discloses that Lal Chand, PW.1 had suffered as many as 24 injuries, most of them incised wounds which, in the opinion of the doctor, could have been caused by a heavy long sharp edged weapon. Injuries No. 9 and 17 were of grievous nature, which were described as follows in the report :-

"(9) Traumatic amputation in an area of 12 cm x 4 cm x cut bones (metacarpals rounded clear cut) chopping from 2cm above wrist joint, little and ring finger missing out of the left hand with incised wound 3 cm x 2 cm x muscle deep on postero-medial part of middle finger.

(17) Incised wound (V shaped) 4 and half cm x half cm x muscle bone deep on postero-medial and lateral aspect of proximal and terminal phalynx covering anterior aspect of thumb. "

After investigation charge sheet was submitted only against the appellants herein since the investigating agency found no case against the other accused persons. After the trial commenced before the Sessions Court and 7 witness had been examined, the public prosecutor moved an application for summoning the remaining accused for trial under section 319 Cr. P.C. The said application was allowed by the Sessions Judge by his order dated 30th March, 1992 and the remaining five accused namely, - Ramsi, Rattan, Chhagan, Jaggu and Lala were also summoned for trial.

Initially when the appellants were put up for trial charges were framed against them under sections 307 and 302 IPC and in the alternative under sections 307/149 IPC and 302/149 IPC. However, after the remaining accused were summoned for trial the charges were re-framed and they were all charged under sections 148, 302/149 and 307/149 IPC. At the trial the informant Bhenru, PW.5 claiming to be an eye witness stated that at about 10 or 11 p.m. he was at the house of Ramjiwan where they were enjoying a smoke. He heard noise from the side of his house and, therefore, rushed to his house followed by his cousin Bhanwar. When he reached his house, he saw the appellants Moti and Chittar inflicting injuries to Lal Chand while the remaining accused namely, Chhagan, Jaggu, Ramsi, Ratan and Lala were surrounding him. The accused also caused injuries to his father Bhura and brother Ram Narain. He cried for help which attracted Ramjeewan, Hanuman, Kesra and Chittar to the place of occurrence, but by that time the accused had fled. The prosecution also examined Bhanwar Lal, PW.2, Chittar, PW.3, Ramjiwan, PW.4, Kesra, PW.6 and Hanuman, PW.7 to support the version given by the informant. Lal Chand (PW.1), an injured witness, was also examined to prove the case of the prosecution. Accepting the testimony of the witnesses the trial court found all the accused guilty of the offence under sections 148 IPC. It convicted the appellants Moti and Chittarmal of the offences under sections 302 and 307 IPC while finding the remaining accused guilty of the offences under sections 302 read with section 149 IPC and 307 read with section 149 IPC. The trial court sentenced the appellants herein to death for the offence under section 302 IPC and made a reference to the High Court for confirmation of the death sentence.

The appellants as well as the other accused preferred appeals before the High Court which were heard alongwith the death reference. The High Court while declining the death reference allowed the appeals in part in as much as the accused, other than the appellants herein, were acquitted of all the charges levelled against them while the appellants herein were found guilty of the

offences punishable under sections 302 and 307 IPC.

We have heard learned counsel for the parties and with their assistance we have perused the evidence on record.

The High Court did not accept the claim of Bhenru, PW.5 of being an eye witness. In a detailed judgment the High Court has recorded its clear finding and given good and cogent reasons for disbelieving the claim of the informant of being an eye witness. The High Court noticed the evidence of the other witnesses and finding considerable inconsistency in the testimony of the witnesses came to the conclusion that neither Bhenru nor those witnesses had witnessed the occurrence. In all likelihood they had reached the place of occurrence after the assailants had made good their escape. After perusing the evidence on record we find ourselves in complete agreement with the High Court on this aspect of the matter. Moreover the acquittal of the remaining accused is not the subject matter of challenge before us in these appeals, nor has the State preferred an appeal against acquittal of the remaining accused. It is, therefore, not necessary for us to consider in detail the evidence pertaining to the complicity of the accused who have been acquitted by the High Court.

The High Court, however, found that so far as Lal Chand, PW.1 was concerned, his presence at the place of occurrence could not be disputed. He was subjected to merciless assault and had suffered as many as 24 injuries. According to Lal Chand, PW.1 on the night of occurrence he was sleeping in the house of his father-in-law Bhura. His brother-in-law Ram Narain was also sleeping there on a separate cot. At night he heard the sound of 'thali' and woke up. He saw Moti assaulting his brother-in-law Ram Narain with a sword while Chittar was assaulting his father-in-law Bhura with a sword. When he got up he was also assaulted by both of them with swords and he suffered a large number of injuries on his head, hands and legs. At the trial, this witness no doubt implicated Chhagan, Jaggu, Ramsi, Ratan and Lala as well stating that they were with the appellants with axes and farsies and that all of them had caused injuries to him. This part of the evidence of Lal Chand has not been accepted by the High Court and for good reasons. Lal Chand in his statement before the police had not stated that the remaining accused, apart from the appellants, had come armed with the appellants and had assaulted him. His statement before the police was to the effect that when the appellants were going away from the place of occurrence he had seen Chhagan, Ramsi and Lala standing by the side of the wall near the babool tree. The other two accused were not even named by him. The babool tree was at a distance of about 60 yards from the place of occurrence. The High Court, therefore, rightly held that this part of his evidence was clearly an improvement and ought to be ignored. However, the rest of the evidence of Lal Chand was accepted by the High Court as truthful and on the basis of his evidence the High Court recorded the conviction of the appellants herein.

We have carefully read the evidence of Lal Chand and we are in agreement with the High Court that his evidence cannot be discarded on the grounds urged by the defence. It was sought to be urged before us that there is no mention of any artificial light at the time of occurrence. The High Court has discussed the evidence on record and come to the conclusion that there was an electric bulb in front of the gate of the house. It was so found by the investigating officer who had prepared the site inspection memo Ext.P.2 on 28th April, 1989. He was not cross-examined on this aspect of the matter even though he had asserted that he had seen the site and had prepared the site inspection memo correctly. Moreover the failure to mention about existence of electric light in the FIR was

not of much consequence and was not fatal to the case of the prosecution particularly when on site inspection such an electric bulb was found in front of the gate of the house. Moreover, as noticed by the High Court, the assailants belong to the same village and were known to Lal Chand. They had caused numerous injuries to Lal Chand with swords and, therefore, Lal Chand had abundant opportunity to identify them even if there was no light. Moreover the testimony of Lal Chand was corroborated by the medical evidence on record. It was also sought to be urged that though Lal Chand stated that he woke up on hearing sound of 'thali', he had not said so in his police statement. That also to our mind is not of much significance because he was sleeping next to his father-in-law and brother-in-law in a same room on a separate cot. When the appellants attacked his father-in-law and brother-in-law, that would have awakened Lal Chand from his sleep because in normal course the two persons sleeping next to him on being attacked must have resisted the attack and in that process there must have been some noise enough to awaken the witness. It is too much to assume that two persons sleeping on two separate cots nearby in the same room would be assaulted and killed and the sleep of the third person sleeping in the same room will not be disturbed.

Having considered all aspects of the matter and perused the evidence on record, we find ourselves in complete agreement with the High Court that on the testimony of Lal Chand, PW.1 the participation of the appellants in the commission of the crime must be held to have been proved. Both the courts have concurrently found Lal Chand, PW.1 to be a reliable witness and even though he sought to make an improvement in the course of his deposition by naming the other accused persons, for that reason his entire evidence cannot be rejected. The High Court has rightly ignored that part of his evidence which appears to be in the nature of embellishment.

It was then urged by counsel for the appellants that the High Court was in error in convicting the appellant for the offence under section 302 IPC in the absence of any specific charge framed under that section. It was contended, relying upon several decisions of this Court including *Subran @ Subramanian and others vs. State of Kerala* : (1993) 3 SCC 32 that a person charged of an offence under section 302 read with section 149 IPC cannot be convicted of the substantive offence under section 302 IPC without a specific charge having been framed against him as envisaged by law. It was submitted that section 149 creates a specific and distinct offence and, therefore, a specific charge under section 302 IPC is a mandatory requirement of law before one can be found guilty of the offence under section 302 IPC. The fact that a charge under section 302 read with section 149 IPC is framed, is not sufficient.

On the other hand counsel for the State submitted, relying upon the decision of this Court in *Willie (William) Slaney vs. State of Madhya Pradesh* AIR 1956 SC 116 and *State of Andhra Pradesh vs. Thakkdiaram Reddy and others* : JT 1998 (5) SC 398 that in all cases of constructive liability the absence of specific charge under one or other head of criminal liability by itself is not fatal and no conviction can be set aside unless prejudice is shown by such defective charge. The true test is whether the error, omission or irregularity in the proceedings has in fact occasioned a failure of justice. In the facts of this case, she submitted no prejudice was caused to the appellants and no failure of justice was occasioned by convicting the appellants under section 302 IPC even in the absence of a specific charge under section 302 IPC.

We do not consider it necessary, in the facts and circumstances of this case, to consider the aforesaid submissions,

because we are clearly of the view that in any event the conviction of the appellants can be sustained under section 302 read with section 34 IPC.

It is well settled by a catena of decisions that section 34 as well as section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre-concert. Though there is substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both sections 34 and section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of section 34 for section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non applicability of section 149 is, therefore, no bar in convicting the appellants under section 302 read with section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See *Barendra Kumar Ghosh Vs. King Emperor* : AIR 1925 PC 1; *Mannam Venkatadari and others vs. State of Andhra Pradesh* : AIR 1971 SC 1467 ; *Nethala Pothuraju and others vs. State of Andhra Pradesh* : AIR 1991 SC 2214 and *Ram Tahal and others vs. State of U.P.* : AIR 1972 SC 254).

Applying these principles to the facts of this case, we find no difficulty in convicting the appellants under section 302 read with section 34 IPC, even though the charge framed was one under section 302 read with section 149 IPC. On the facts proved, it must be held that the appellants came together armed with lethal weapons and simultaneously started the assault on Ram Narain and Bhura, who succumbed to their injuries. When Lal Chand, PW.1 woke up, he was also mercilessly assaulted by both of them inflicting as many as 24 injuries. The remaining accused, apart from the appellants, have been acquitted on a finding that they did not come with the appellants duly armed, they did not share the common object, nor did they take part in the assault on the two deceased or PW.1. Thus the charge under section 302 read with section 149 could not stand, the number of participants in the crime being less than five.

But so far as the appellants are concerned, it cannot be doubted on the findings recorded that they shared a common intention and had acted pursuant thereto. Overt act and active participation is indicative of common intention of the persons perpetrating the crime, and in the facts and circumstances of this case we have no doubt that the appellants shared the common intention to commit the murders of the deceased and acting in concert they executed their pre-arranged plan to eliminate them. Their conviction under section 302 read with section 34 can be safely recorded.

Accordingly the conviction of the appellants is altered to one

under section 302 read with section 34 IPC instead of one under section 302 IPC and the sentence of life imprisonment is maintained. Subject to the above, the appeals are dismissed.

JUDIS