

CASE NO.:
Appeal (crl.) 241 of 1998

PETITIONER:
Chanda and Ors.

RESPONDENT:
State of U.P. & Anr.

DATE OF JUDGMENT: 29/04/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J

Conviction of the accused-appellant was altered by the Division Bench of the Allahabad High Court from Section 302 read with Section 149 to Section 304 Part I read with Section 149 of the Indian Penal Code 1860 (in short 'IPC'). Life imprisonment as awarded by the Trial Court was altered to 10 years imprisonment for the altered conviction under Section 304 Part I IPC. The Trial Court had not awarded any separate sentence for the other offences.

Background facts alleged by the prosecution leading to the trial are essentially as follows:

Hashim Khan (PW-1) lodged an FIR at about 1330 hours on 3.10.1977 in which the time of incident was stated to be 1300 hours on the same day. Distance of place of incident from police station was about one mile. As per FIR, PW-1, the complainant is the resident of village Lodhipur. The accused Chanda fired a shot at his uncle in the year 1975, a case was registered against him and that case was pending. Second time, in the year 1976, Sayeed and accused Chanda fired a shot on Qasim, the brother of the complainant. This case was about to be proceeded for trial in the Court. Accordingly, there was an old enmity between Qasim (hereinafter referred to as 'deceased') and the accused. Because of this enmity on 3.10.1977 at about 1.00 p.m., when deceased was coming back from Shahjahanpur city to his native village Lodhipur, near the Check post at Lodhipur accused-Chanda and his brothers accused Zakir and Shakir sons of Shujat Ali and Abbas son of Jameeluddin, Hameeduddin head of the village (Mukhia), Zaheer Shah son of Ghafoor (of the same village) and Nanneh alias Ishaq son of Ishtiayaq who is the brother-in-law of Chanda were standing there. Accused Sartaj and Chanda were holding country made pistol in their hands. Accused Zaheer exhorted and asked others to take Qasim, and he should not escape. Thereupon deceased Qasim raised alarm and ran towards the city. All of a sudden, Chanda fired a shot at him, which did not hit

him. Thereafter, all the accused persons chased deceased Qasim, and after some distance accused Zakir, Shakir, Nanneh, Abbas and others caught hold of deceased and Sartaj fired a shot at him from a close distance due to which he fell down on the road. This incident was witnessed by complainant (PW-1), Naim (PW-2) and Sajid Ali of the same village and by-passers that sight persons after shooting the gun went away towards Lodhipur. The complainant came to police station by putting Qasim on a Rickshaw in the injured condition. The deceased breathed his last on 11.1.1978. He prayed for the registration of the case and for appropriate action.

On completion of investigation charge sheet was placed. To substantiate its accusations 8 witnesses were examined including PW-1 Hashim Khan, Naim (PW-2) and Samiulla (PW-3) who claimed to be eye witnesses. Accused persons pleaded innocence and stated that they were falsely implicated due to enmity.

After considering the evidence on record the Trial Court found that there was mistake in describing the father's name of accused Sartaj. Accused-Zakir was acquitted because he was a crippled person and in the dying declaration of the deceased no role was ascribed to him. Similar was the position so far as accused Hameeduddin is concerned.

In appeal, the High Court altered the conviction so far as the accused persons who were found guilty by the Trial Court to Section 304 Part I IPC read with Section 149. Custodial sentence of 10 years was imposed. Conviction in terms of Section 307 read with Section 149 was maintained.

Mr. U.R. Lalit, learned senior counsel appearing for the appellants submitted that since Sartaj who is supposed to have fired the gunshot he has been acquitted, Section 149 cannot have any application. Though the alleged occurrence took place on 3.10.1977, the deceased died on 11.1.1978. In all nine injuries were found at the time of post-mortem though at the first instance one injury was noticed on his back. It is not known as to what happened in between. According to the medical evidence, the death was on account of septicemia. Other injuries could have also attributed to septicemia. It is not possible to arrive at a conclusion, as injuries were difficult to be identified. From the nature of the injury attributed to be the fatal shot, it cannot be said that there was any intention or knowledge about the injury. Therefore, Section 302 has been rightly taken out as inapplicable. Consequently the case is out of the scope of Section 299 and, therefore, Section 304 Part I cannot have any application. There is no concrete evidence to show that the accused persons were the members of the unlawful assembly which had any common object. Eight persons were named and it is not a case of the prosecution that any other person committed the murder. The definite case was that Sartaj accused had fired fatal shot. That being so, after his acquittal Section 149 cannot be applied and the Trial Court and the High Court have lost sight of this fact. The deceased was first taken to one hospital for treatment and subsequently taken to another hospital and finally

post-mortem was conducted after his death in the third hospital. What type of treatments were given and what was the effect of different injuries has not been established by the prosecution. Definite roles have not been attributed to the accused persons. It was, therefore, submitted that Courts below were not justified in holding accused persons guilty.

Learned counsel for the State submitted that Sartaj was not acquitted on the ground that he has not fired a shot. The acquittal was on the ground of mistake in the father's name. The evidence also shows that Chanda had fired a shot which did not hit the deceased. Therefore, clearly common object was killing of the deceased. Apart from that other accused persons restrained the deceased to facilitate the killing. Pellets were found inside the body as clearly noted by the doctor.

The pivotal question is applicability of Section 149 IPC. Said provision has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence

of this the effect of Section 149, IPC may be different on different members of the same assembly.

'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instante.

Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of occurrence. The word 'knew' used in the second limb of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is

necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first part of the offences committed in prosecution of the common object would also be generally, if not always, within the second part, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore AIR 1956 SC 731).

The other plea that definite roles have not been ascribed to the accused and therefore Section 149 is not applicable, is untenable. A 4-Judge Bench of this Court in Masalti and Ors. v. State of U.P. (AIR 1965 SC 202) observed as follows:

"Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well-founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."

To similar effect is the observation in Lalji v.

State of U.P. (1989 (1) SCC 437). It was observed that:

"Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

In State of U.P. v. Dan Singh and Ors. (1997 (3) SCC 747) it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to Lalji's case (supra) where it was observed that "while overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149". It is not really necessary to determine as to which of the accused persons forming part of the unlawful assembly inflicted what particular or specific injury in the course of the occurrence. That the number of actually convicted persons are less than five or that the case projected certain one or more named persons as having inflicted the injury but the same could not vis-a-vis that person actually be proved to have actually committed it or that such persons came to be acquitted for some reason or other peculiar to him does not in any manner prejudice the case of the prosecution or the liability of others who formed the unlawful assembly to be convicted for having carried out the object by merely being the members of the unlawful assembly, as long as the participation of others in furtherance of the common object of the unlawful assembly remained sufficiently substantiated.

The medical evidence is that death was the result of vertebral injury. The prosecution has established that the injury was on account of firing. Therefore, it is not correct as contended by learned counsel for the appellant that the death was due to septicemia and cannot in any manner be attributed to the gunshot which turned out to be fatal. It is significant that on post-mortem three pellets were found on cutting open the wound over the lower part of left leg. The medical evidence fits in with the ocular evidence. The physical consequences of the gunshot as noticed on post-mortem when read with ocular evidence leaves no manner of doubt about application of Section 304 Part I IPC. The evidentiary effect of the fire-shot fired by accused Chanda which missed the deceased has been clearly established. The evidence on record clearly establishes that there was an unlawful assembly whose common object was to kill the deceased. That being so, acquittal of accused Sartaj does not wipe out application of Section 149 IPC. The second part of Section 149 IPC clearly has application to the facts of the case.

It cannot, therefore, be said that the prosecution has failed to establish its accusations so far as accused persons are concerned. We find no merit in this appeal which is accordingly dismissed.

JUDIS