

PETITIONER:
NAMDEO NANASAHEB MISAL, TANAJL GOVIND MISAL

Vs.

RESPONDENT:
THE STATE OF MAHARASHTRA

DATE OF JUDGMENT: 12/09/1997

BENCH:
M. K. MUKHERJEE, M. JAGANNADHA RAO

ACT:

HEADNOTE:

JUDGMENT:
Tanajl Govind Misal
vs.
The State of Maharashtra

WITH

CRIMINAL APPEAL NOS. 501-502 OF 1987

Dadasahedb Patalu Misal
V.
The State of Maharashtra

WITH

CRIMINAL APPEAL NOS. 503-504 OF 1987

Shrimant Vishwanath Misal
V.
State of Maharashtra

WITH

CRIMINAL APPEAL NOS. 505-506 OF 1987

Babasaheb Chandu Misal & Ors.
V.
State of Maharashtra

WITH

CRIMINAL APPEAL NOS. 507-508 OF 1987

Raosaheb Shripati Misal
V.
The State of Maharashtra

WITH

CRIMINAL APPEAL NOS. 509-510 OF 1987

Shahji Govind Misal
V.

The State of Maharashtra

WITH

CRIMINAL APPEAL NOS. 511-512 OF 1987

J U D G M E N T

M.K. MUKHERJEE, J.

Twenty nine persons were arraigned before an Additional Sessions Judge of Solapur for rioting, two murders and other related offences. The trial Judge convicted nineteen of them under Section 148, 302/149, 307/149 and 324/149 I.P.C. and acquitted the rest. For the conviction under Section 302/149 I.P.C. the trial Judge sentenced three of the convicts to imprisonment for life and the remaining sixteen to rigorous imprisonment for two years each and fine. For

the other convictions he sentenced them to different terms of imprisonment and fine with a direction that the substantive sentences shall run concurrently. Assailing the above judgment the nineteen convicts filed one composite appeal. The State also filed two appeals: one for setting aside the acquittal of the ten accused persons and the other for enhancement of the sentences imposed upon the nineteen convicts. A revision application was also filed by the complainant seeking similar reliefs. While admitting the appeal of the convicts the High Court issued a suo motu rule calling upon them to show cause why their sentences recorded under Sections 302/149, 307/149 and 324/149 I.P.C. should not be enhanced. In disposing of all the matters by a common judgment the High Court set aside the convictions of five of the nineteen convicts and upheld those of the other fourteen. After upholding the conviction the High Court enhanced the sentences of those convicts who were imposed rigorous imprisonment for two years under Section 302/149 I.P.C. to imprisonment for life. Aggrieved by the dismissal of their appeals the fourteen convicts (who were arrayed as A1 to A8, A10, A12, A13, A17, A20 and A24 and henceforth will be so referred to) have filed these appeals which have been heard together and this judgment will dispose of them.

2. The prosecution case, briefly stated, is as under;

(a) In village Panchagaon Khurd, which is within the jurisdiction of Sangola Police Station, there is a small uninhabited open site (locally known as 'Padik') bearing Gram Panchayat No.106. The above Padik along with the babul trees stating thereon belonged to and was in possession of Sheshappa Vithoba Misal (P.W.15) and his associates. On or about July 18, 1980 A1, A3, A5 and A6 cut some branches of those trees and left them there. In the evening of July 29, 1980 P.W.15 and some of his associates removed those branches from the Padik and brought them to another open site near the house of one Sida Pandurang. When A6 asked P.W.15 about such removal the latter replied that the trees belonged to the. He also questioned the right of A6 to cut them.

(b) On the following morning i.e. on July 30, 1980 at or about 7 a.m. the twenty nine accused persons along with three more namely, Dattu (since dead), Bhausaheb Sidram and appasaheb Saidram (both absconding) came to the place where the branches were stacked, armed with deadly weapons such as axes, spears, iron bars and sticks and started removing them. On getting that information P.W.15, his brothers and associates reached there and asked the accused persons not to remove the branches. Immediately thereupon A1 inflicted an axe blow on the head of Ganpati felling him down. When Vithoba went to the rescue of Ganpati, A2 inflicted an axe blow on his head who instantly slumped down. All the accused persons then started assaulting Ganpati and Vithoba and other members of the complainant party as a consequence whereof Ganpati and Vithoba breathed their last on the spot, while Kashinath (P.W.8), Sarjarao (P.W.12), Murlidhar (P.W.14), Sheshappa (P.W.15) and Jalinder (P.W.17) sustained injuries. During the incident A3 to A7 also received injuries

(c) Accompanied by the other four injured P.W.8 then went to Singola Police Station in bus and lodged the First Information Report at 11.30 a.m. In course of the investigation that followed, usual steps for holding inquest, preparing panchnama of the scene of offence, seizures of blood stained clothes were taken and the two dead bodies were sent to the Medical Officer, Singola for autopsy. All the injured were also sent to the Medical

Officer for examination and treatment. Certain incriminating weapons were also recovered at the instance of some of the accused persons during investigation. After completion of investigation the police submitted charge sheet and In usual course the case was committed to the Court of Session.

3. The accused persons pleaded not guilty to the charges levelled against them and contended that they had been falsely implicated. Some of them took the plea of alibi while others, through A1 gave a written statement detailing their version of the incident. The version so given is that the open space whereon babul trees grew belonged to some of them and for years together they had been cutting the trees for using them as fuel. As in previous years, they had cut the tress some 15 days prior to the incident and left them there to dry. In the evening of July 29 1980 when A3 and A6 saw that some members of the complainant party were carrying those cut branches in the bullock-cart of P.W.12, A3 and A6 accosted them and asked them not to do so. Without paying any heed to their objection, the members of the complainant party carried the branches to the farm of Sida Pandurang Misal and kept them there. A6 had then told them that they would take away the branches on the next day. Accordingly, when in the following morning A1 along with ten to fifteen persons were going to the farm of Sida Pandurang Misal with axes and sticks to remove the thorny branches, they saw the complainant party approaching them armed with axes and sticks. While they were at some distance from them A5 requested Ganpati (P.W.2) to be prudent and get the claim regarding the trees decided by a competent Court of law. Instead of heeding to his advice, the members of the complainant party started beating them with sticks and axes. At that stage they 9th accused persons) attacked them in self defence. They asserted that they had no intention to beat any of the persons of the complainant party. They lastly stated that A9, A11, A12, A14, A15, A18, A19, A21, A22 and A25 to A28 were not present at all at the time of the incident.

4. From the respective cases of the parties narrated above the following undisputed facts emerge: (i) On or about July 18, 1980 some of the accused persons cut some branches of babul trees from the Padik and left them there; (ii) In the evening of July 29, 1980 some members of the complainant party removed those branches from the Padik and brought them to another open site near the house of Sida Pandurang, inspite of objections raised by some members of the accused party. At that time, one of them namely A6 told that they would take away the branches on the next day.; (iii) On the following morning i.e. on July 30, 1980 at or about 7 A.M., some of the accused persons went to remove those branches armed with axes and sticks; and (iv) a little later an incident of assault took place in which two members of the complainant party, namely, Ganpati and Vithoba met with their death and five members of each of the parties sustained injuries.

5. With the above uncontroverted factual matrix, the trial Judge proceeded to consider the questions of fact on which the parties had joined issue. On a detailed discussion of the evidence adduced by the prosecution (no witness was examined on behalf on the appellants) the trial Judge held that the complainant party was in actual possession of the Padik and the babul trees standing thereon and that the accused party had no concern whatsoever with the said property so as to entitle them to exercise their purported right of private defence in respect thereof. The trial

Judge further held that the accused party were the aggressors and, therefore, they had no right of private defence of their bodies also. In effect he held that all the nineteen accused (whom he convicted) had formed themselves into an unlawful assembly with the common object of committing the murders and assault; and accordingly convicted them in the manner stated earlier. In appeal the High Court re-appraised the entire evidence and concurred with each of the findings of fact recorded by the trial Judge against the appellants.

6. Mr. Lalit, the learned counsel appearing for the appellants first submitted that the Courts below failed to appreciate that the manner in which the incident took place and the members of both the parties sustained injuries was clearly indicative of a free fight between them and, therefore, none of the appellants could be convicted. According to Mr. Lalit, in case of a free fight an offender can be made liable for his own act and not vicariously liable for the acts of others. Mr. Lalit next contended that if it was to be held that it was not a case of free fight, the acts of the appellants would be protected by their right of private defence of their property and persons. At the worst it could be said that some of them exceeded such right, in which case only those appellants would be liable for punishment under Section 304 and not 302 I.P.C., argued Mr. Lalit. Mr. Lalit lastly submitted that even if the entire case of the prosecution was accepted as true, still all the appellants could not be said to have shared the common object of committing the murders of Ganpati and Vithoba. In celebrating this contention Mr. Lalit submitted that from the manner in which - according to the prosecution - the incident took place it was evident that the fatal blows inflicted by A1 upon Ganpati and by A2 upon Vithoba were their individual acts for which they could be convicted under Section 302 I.P.C. (simpliciter), but the other appellants could not be held liable for those acts with the aid of Section 149 I.P.C. as there was no material to indicate that they shared the common object of committing such murders.

7. So far as the first contention of Mr. Lalit is concerned law is now well-settled that if a sudden unpremeditated free fight takes place between two groups, the members thereof cannot be said to have formed an unlawful assembly within the meaning of Section 141 I.P.C. In such a case each of them would be liable for their individual acts and not for the acts of others. (Lalji & Ors. Vs State of U.P. A.I.R. 1973 S.C. 2505, Puran Vs. State of Rajasthan - A.I.R. 1976 S.C. 912 and Ishwar Singh Vs. State of U.P. - A.I.R. 1975 S.C. 2423). The above principle however has no manner of application to the facts of the instant case as the concurrent findings of the Courts below - which in our opinion are unexceptionable - clearly and completely rule out a conclusion of sudden unpremeditated free fight' between the parties. The findings also negative the second contention of Mr. Lalit. To appreciate the findings recorded by the High Court in this regard we may now refer to the evidence; first the medical evidence.

8. Dr. Suryawanshi (P.W.19) who held the post-mortem examination upon the two deceased, found nine injuries on the person of Ganpati. Seven of them were incised injuries, one was a contusion and the other a fracture of left maxilla. On internal examination he found fractures of the base of the skull and severe damage to the right pleura and corresponding part of the lung. He also found the larynx, trachea and large vessels cut. He opined that the incised

injury on the neck (6" x 5" deep to the spinal cord) was fatal. On the dead body of Vithoba he found two inside wounds and one contused lacerated wound. One of the incised wounds was over the neck, cutting large blood vessels and causing fracture to the cervical vertebra. As regards the five eye-witnesses whom he examined, we get that P.W.8 had seven, P.W.12 two, P.W.14 five, P.W.15 seventeen and P.W.17 eight injuries. While the injuries on the persons of P.Ws. 8, 12 and 17 were simple, P.W.14 had a fracture of the right frontal bone and P.W.15 had a number of fractures on his face. So far as the accused are concerned, P.W.19 found that A3 had one, A4 five, A5 four, A6 two and A7 three injuries. P.W.19 testified that the injuries of A5, A6 and A7 were insignificant, but A4 had a fracture of the left ulna and A3 had a simple injury on the forehead.

9. To narrate the events that took place on that fateful morning in which the above injuries were suffered by the members of both the parties, the prosecution examined, besides the above five injured eye-witness, Yashoda (P.W.5), Sopan (P.W.10) and Hari (P.W.11). The High Court found them to be reliable witnesses and on an elaborate discussion of their evidence held that the assault started with the axe blow given by A1 on the neck of Ganpati at the place where the cut branches were kept, when the latter asked the accused persons not to take them away and this was followed by a similar blow inflicted by A2 on Vithoba when he tried to rescue Ganpati. Scanning the evidence further the High Court held that the prosecution succeeded in conclusively establishing that A3, A5 and A6 also assaulted Ganpati and A2 and A4 assaulted Vithoba.

10. The High Court next posed the question which of the two rival groups were the aggressors and considering the sequence of events answered the same in favour of the prosecution. Agreeing with the findings of the trial Court the High Court concluded that the Padik belonged to the complainant party and that the accused had no right of private defence either of property or person. In arriving at that conclusion the High Court not only relied upon the eye-witnesses but also upon the fact that the total tally of injuries suffered by the members of the complainant party went upto 51, while the corresponding tally for the five injured on the accused side was just 15, and except one fracture of the left ulna of A4 all other injuries were insignificant.

11. Coming now to the third contention of Mr. Lalit we find that to ascertain what was the common object of the unlawful assembly which attacked the complainant party the High Court first pointed out that to decide the same the relevant considerations were, inter alia, the motive, the weapons used in the attack and the conduct of the assailants both before and at the time of the attack. Applying the above principles the High Court observed that taking a comprehensive view of all the relevant materials, the conclusion was irresistible that the common object of the unlawful assembly was to remove babul wood from the scene of offence at any cost, even by committing murders, if necessary. After having considered the evidence in the light of the sequence of events we are however unable to fully subscribe to the above view of the High Court. Judged in the connect of the admitted fact that on the previous evening i.e. in the evening of July 29, 1980, A6 had openly given out that on the next morning they would remove the babul trees it is obvious that when on the following morning the accused party came to the spot armed with axes, spears, this etc. their purpose was to remove the babul trees at

any cost and cause such injury as may be necessary for achieving that object. Along with the above facts and circumstances when the injuries sustained by P.W.15 are taken notice of, it appears to us that all the accused shared the common object of causing grievous hurt to the members of the complainant party. It was, however, contended by Mr. Lalit that the weapons were being carried by the accused to help them in removing the branches as they were thorny, but we find this contention too tenuous. From the manner in which A1 suddenly started the assault on Ganpati immediately after all the accused persons reached the spot followed by the assault on Vithoba by A2 and subsequent assaults on the former by A3, A5 and A6 and on the latter by A4, it cannot be conclusively said that the other accused persons knew that the murders were likely to be committed in prosecution of their common object so as to attract the second part of Section 149 I.P.C. In other words, in conjointly committing the two murders - that of Ganpati by A1, A3, A5 and A6 and of Vithoba by A2 and A4 - the above six accused persons acted beyond the common object of the unlawful assembly. It is true that the mere fact that no overt act has been attributed to the accused persons except A1 to A6 in the two murders is not sufficient to exonerate them from the charge under Section 302/149 I.P.C. But applicability of Section 149 I.P.C. would depend on the facts of each case. In the instant case we are satisfied that the accused shared the common object of causing grievous hurt by deadly weapons to the two deceased - and not of their murders - and P.W.15, who also sustained grievous injuries. They would, therefore, be guilty of rioting as also an offence under Section 326/149 I.P.C. but not under Section 302/149 I.P.C. A1, A3, A5 and A6 are however guilty of the offence under Section 302/34 I.P.C. for committing the murder of Ganpati. Similarly A2 and A4 are guilty under Section 392/34 I.P.C. for committing the murder of Vithoba.

12. That brings us to the individual roles of the appellants, other than A1 to A6. From the record we find that A7, A8, A10, A12, A13 to A17 have been identified by two or more witnesses as the miscreants. Their participation in the incident, therefore, stands fully established. As regards A20 he was identified only by one witness, namely, P.W.17 as one of the miscreants who assaulted Jalinder. But then we find that in the first statement that he made before the police he did not name him. He is, therefore, entitled to the benefit of reasonable doubt. Similar benefit should also go to A24 for though PW.8 testified about his involvement in the incident, in the F.I.R. he did not assign him any role.

13. For the foregoing discussion we alter the conviction of A1 (Dadasaheb Patalu Misal), A2 (Pandurang Bhimrao Bhagat), A3 (Raosaheb Shripati Misal), A4 (Shrimant Vishwanath Misal), A5 (Tanaji Govind Misal) and A6 (Shahaji Govind Misal) under Section 302/149 I.P.C. to one under Section 302/34 I.P.C. For the altered conviction, we maintain the sentences of imprisonment for life imposed upon A1, A2 and A3 by the trial Judge, as affirmed by the High Court and the enhanced sentences of imprisonment for life imposed for life imposed upon A4, A5 and A6 by the High Court. The conviction of A7 (Namdeo Nanasaheb Moisal), A8 (Babasaheb Chandu Misal), A10 (Vasant Shamrao Bhagat), A12 (Abasaheb Bhimrao Bhagat), A13 (Bappusaheb Bhimrao Bhagat) and A17 (Mahadeo Patalu Misal) under Section 302/149 I.P.C. for the two murders is altered to one under Section 26/149 I.P.C. and for the altered conviction they are sentenced to suffer

rigorous imprisonment for three years each. The conviction of appellant Nos. A1 to A8, A10, A12, A13 and A17 under Section 307/149 I.P.C. for attempting to commit the murder of P.W.15 is altered to one under Section 326/149 I.P.C. and they are sentenced to suffer rigorous imprisonment of three years each. The conviction and sentence under Section 324/149 i.P.C. and the conviction under Section 148 I.P.C. of the above twelve appellants are upheld. Their substantive sentences shall run concurrently. The above twelve appellants who are on bail will now surrender to their bail bonds to serve out the sentences. All the convictions of A20 (Kashinath Daulu Misal) and A24 (Ramchandra Nivrutti Bhagat) are set aside and they are acquitted of all the charges. They are discharged from their respective bail bonds. The appeals are, thus, disposed of.