

CASE NO.:
Appeal (crl.) 432 of 1996

PETITIONER:
STATE OF RAJASTHAN

RESPONDENT:
NATHU AND ORS.

DATE OF JUDGMENT: 28/04/2003

BENCH:
Y.K. SABHARWAL & H.K. SEMA

JUDGMENT:
JUDGMENT

2003 (3) SCR 967

The Judgment of the Court was delivered by

SEMA, J. This appeal by special leave is preferred by the State of Rajasthan against the order of the High Court dated 11.1.1995 whereby and whereunder the High Court has maintained the conviction of accused Dhulla under Section 302 IPC simpliciter and recorded acquittal of the accused-respondents Nathu s/o Nana, Walji (Balji) s/o Moola, Heera s/o Nana and Dheera S/o Moola, thereby reversing the sentences and convictions recorded by the Trial Court in case No. 90 of 1985 under Section 302 with aid of Section 149 IPC and sentenced them to RI for life. The accused Dhulla is not before us.

Two children of Bhima (PW-1) - son-Dinesh aged about four years and daughter-Jeevi aged about seven years, were butchered to death by inflicting axe blows between 12.00 - 1.00 noon on 26.6.1985. The post mortem shows that the necks of deceased Dinesh and Jeevi were choked and the same were connected with a thin layer of skin. The prosecution story briefly stated is that on 26.6.1985 at about 12.00 - 1.00 noon while the complainant Bhima (PW-1) was sleeping on the cot along with his son Dinesh aged 4 years and his daughter Jeevi aged 7 years who were also sleeping on the palm carpet on the earth near the cot, he heard the noise of persons coming from the backyard of his house. He then got up and saw from the wall, made of wood, the accused persons - Nathu armed with gun; Heera armed with gun; Dheera armed with 'dhariya'; Balji armed with axe and Dhulla armed with axe and the other persons armed with lathis. Being frightened he ran out of his house and hid himself behind the hut situated in front of his house and started watching from there. The accused persons entered into his house after breaking the wall of wood from the backyard of the house. When he heard his daughter Jeevi's sound of 'Aah', Bhima (PW1) presumed that both the children have been killed and he would also be killed. So he fled from the place towards the house of his father and raised an alarm. Being attracted by his alarm his mother Kanku, brother Shankar, Arun etc. reached there. They also saw the accused persons leaving the house. Thereafter, the mother of Bhima went to see the children. She found that both the children have been murdered. There was enmity between the accused persons and Bhima and a quarrel also took place between the complainant and the accused party 7-8 days prior to the incident. The accused were stated to have taken avenged by committing the crime. Thereafter, PW-1 along with his brothers went to the police station Pahara and lodged the FIR (Ext.P-1). Inspector Bakhtawar Singh (PW-15) investigated the case. He also prepared panchnama of dead bodies (Ext. P-2 and P-3) of Dinesh and Jeevi respectively. He also prepared sketch memo of the scene of crime. He also got the post mortem conducted of the deceased Dinesh and Jeevi by Dr. Ramesh Chander Ohri (PW-I2), (Ext.P-1 and P-12). The accused were arrested vide memo Ext.P-21 to Ext.P-27. The accused Nathu, Heera, Dhulla and Balji gave disclosure statements vide Ext.P-28 to P-32 and pursuant to the

disclosure statements lathis of cane were recovered vide Ext.P-11 and P-12. Pursuant to the disclosure statement of accused Nathu, gun was recovered vide (Ext.P-9). Pursuant to the disclosure statement of accused Dhulla and Balji axes were recovered vide Ext.P-8 and P-10. After the completion of the investigation seven accused persons were challened. Accused Dhulla and Balji were charged under Sections 148, 302 & 414 IPC. Accused Kalu and Jumji were charge-sheeted under Sections 148, 302 read with Section 149 IPC. Accused Nathu, Heera and Dheera were charged under Sections 148, 302 read with Section 149 and 454 IPC. The accused pleaded not guilty and sought to be tried. The learned trial court framed as many as five issues and after examining the evidence and documents on record found all the issues established against the accused and held the accused Dhulla guilty of offence punishable under Sections 302 read with Section 149, 454 and 148 IPC; accused Balji guilty of offence punishable under Sections 302 read with Section 149, 454 and 148 IPC; and the accused persons Heera, Dheera and Nathu also guilty for the offence punishable under Sections 302 read with Section 149, 454 and 148 IPC. Accused Jumji s/o Nanji and accused Kalu s/o Nanji were acquitted of the charges of the aforesaid offences. Accused Dhulla was awarded life imprisonment under Section 302 IPC and a fine of Rs.100 and in default RI for one month. He was also awarded life imprisonment under Section 302 read with Section 149 and a fine of Rs. 50 and in default RI for 15 days. He was also awarded two years RI for offence under Section 454 IPC and a fine of Rs.100 and in default RI for one month and two years RI for offence punishable under Section 148 IPC. Accused Balji was awarded life imprisonment under Section 302 read with Section 149 IPC and a fine of Rs.50 and in default RI for 15 days. He was also awarded two years RI for an offence punishable under Section 454 and a fine of Rs.100 and in default RI for one month and two years RI for the offence under Section 148 IPC. Accused Heera, Dheera and Nathu had been awarded life imprisonment under Section 302 read with Section 149 and a fine of Rs.50 and in default RI for 15 days. They were also awarded sentence of one year RI for the offence under Section 451 IPC and two years RI for the offence under Section 148 IPC. The sentences were ordered to run concurrently.

At this stage it will be pertinent to point out that altogether eight accused were mentioned in the FIR. Accused Kana was separately tried by the Juvenile Court and the remaining seven accused faced trial before the Trial Court - out of which five accused were convicted as noticed above and two were acquitted by the Trial Court.

Aggrieved by the above conviction five accused Nathu, Balji, Heera, Dheera and Dhulla filed criminal appeal before the High Court of Rajasthan being Criminal Appeal No. 342 of 1986. The High Court on re-appraisal of the evidence on record and after hearing counsel for both the sides maintained the conviction of accused Dhulla under Section 302 IPC and acquitted accused Nathu, Balji, Heera and Dheera for the offence under Section 302 read with Section 149 IPC on the ground that common object has not been established by the prosecution and no overt act whatsoever has been attributed to them. This is what the High Court has said:

"We are, however, of the opinion that in the absence of any common object on behalf of the other accused to cause culpable injury either to Bheema or any member of his family. Provisions of Sec. 149 of the I.P.C. cannot be resorted to in order to attract the theory of any common object of revenge. There must be on record evidence of formation of such object and in any case, there must be a statement regarding such being object of the accused. In the absence of any such statement and evidence it is impermissible in law to take recourse to provisions of Sec. 149 of the I.P.C. or convicting others who admittedly are present and who have not been attributed over tact whatsoever.

The maximum that has been proved in the present case is that the accused persons did assemble together and went towards the house of Bheema. Having found that he is not there, three remained away, five entered the premises.

Dheera is alleged to have hit the children of Bheema who has run away but even this is not proved and only Dhoola has struck a fatal blow. We are, therefore, unable to agree with the learned Sessions Judge in convicting the other accused persons under Sec. 302 read with Sec. 149 of the I.P.C."

(Emphasis supplied)

From the above finding of the High Court the accused formed themselves an unlawful assembly and went together towards the house of Bhima is proved. Having found the unlawful assembly of five accused proved, the High Court proceeded on wrong assumption of law that only accused Dhulla had struck a fatal blow and no overt act has been attributed to the rest of four accused. The view taken by the High Court, in our opinion, is a complete negation of the settled position of law enunciated by a catena of decisions of this Court, which we shall be dealing at an appropriate time.

As already noticed, accused Dhulla did not challenge his conviction affirmed by the High Court and, therefore, only remaining four accused are before us.

Before we advert further, we may dispose of a few arguments of Mr. Sudhir Walia, learned amicus curiae as we are of the view that such submissions should not detain us any longer. It is the contention of Mr. Walia that in the FIR PW-1 had mentioned that a lalkara had been raised by the accused whereas in the evidence before the Court he had not stated so, and therefore, there is inconsistency in the FIR and in the statement of PW1 in the Court. Such minor discrepancy, in our view, is inconsequential and that would not demolish the prosecution story otherwise found established by convincing evidence. The other contention of Mr. Walia is that the recovery of axe pursuant to the disclosure statement of accused Dhulla (Ext.31) is doubtful inasmuch as the voluntary disclosure about axe by the accused Dhulla was made on 27.6.1985 whereas vide Ext.P-8 the axe was recovered on 30.6.1985 after a delay of three days. Apart, from this aspect the matter has been dealt in detail by the Trial Court, which has rejected the contention. As already noticed, accused Dhulla is not before us and the recovery of the axe pursuant to the disclosure statement of the accused Dhulla has attained its finality.

The main thrust of submission of Mr. Walia is that the prosecution has failed to establish common object to eliminate Bhima (PW-1) by leading convincing evidence.

Section 141 IPC defines an unlawful assembly to be an assembly of five or more persons, where the common object of the persons comprising that assembly is to commit any of the acts enumerated in the five clauses of that Section. Section 149 provides that every member of unlawful assembly is guilty of offence committed in prosecution of common object and 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. In the instant case, the accused persons were comprised of five and they had formed an unlawful assembly, is being found by both the courts concurrently.

The next question that remains to be considered is as to what is the common object of that assembly.

In Lalji and Ors. v. State of U.P., [1989] 1 SCC 437, this Court pointed out at SCC p.441 as under:

"The two essentials of the section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed 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. Not

every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in Section 141 IPC. 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 scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case. " (Emphasis supplied)

In *Masalti v. State of U.P.*, [1964] 8 SCR 133, a Constitution Bench of five learned Judges presided over by P.B. Gajendragadkar, CJ (as his Lordship then was) considered the scope of Section 149 in depth and held at SCR pp. 148-149 thus:

"The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more the common objects as specified by s. 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of *Baladin* (AIR 1956 SC 181) assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, s. 149 makes it clear that 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; and that emphatically brings out the principle that the punishment prescribed by s. 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of *Baladin* (AIR 1956 SC 181) must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law such as Mr. Sawhney suggests,"

The principle enunciated by this Court in *Masalti* (supra) and *Lalji* (supra) has been followed consistently by this Court thereafter in catena of decisions. Avoiding multicaplity see: *State of U.P. v. Dan Singh and Ors.*, [1997] 3 SCC 747; *State of A. P. v. Thakkidiram Reddy and Ors.*, [1998] 6 SCC 554; *Anil Rai v. State of Bihar*, [2001] 7 SCC 318; *Gangadhar Behera and Ors. v. State of Orissa*, [2002] SCC 381.

Reverting to the facts of the case, evidence on record clearly established that accused Dhulla, Balji, Nathu, Heera and Dheera entered into the house of Bhima by breaking down the wall of the house and amongst them accused Dhulla was armed with axe, Balji was armed with axe, Heera and Dheera were armed with lathis and Nathu was armed with gun. A long standing enmity between PW-1 Bhima and the accused persons is proved from the statements of Bhima, Shankar, Vasu, Nani and Kanku. It is also revealed from the above evidence that 7-8 days prior to the incident Bhima and others had a quarrel with other members of the families of the accused persons.

As noticed above, the murder has been committed in broad day light between 12.00 noon and 1 p.m. Witnesses and accused are known persons. The accused persons had formed an unlawful assembly armed with formidable weapons; came to the house of Bhima; broke down the wall and entered into the house. They found Bhima not in the house and butchered his two children by inflicting axe injuries. As has been held by this Court in *Lalji* (supra) the common object of an unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. Deduced from the aforesaid facts and circumstances, it

is quite apparent that the accused had formed an unlawful assembly with object to eliminate Bhima to take aveng of long standing animosity and the quarrel ensued 7-8 days prior to the incident. It is quite apparent, therefore, that the accused persons had formed an unlawful assembly with a common object to take aveng from Bhima and family members and committed the murder. The common object to murder Bhima and his family can be gathered from the formidable arms carried by the accused, entering the house by breaking the wall and finding Bhima not there, butchered his children. Gathered from the above facts and circumstances and evidence on record it cannot be said that the four accused joined the assembly as a matter of idle curiosity or they were passive onlookers without intending to entertain the common object of that assembly.

Mr. Walia, learned amicus curiae contended that the prosecution did not prove the breaking down of the wall by all the accused persons. We are unable to countenance this submission. The Trial Court after careful appreciation of the evidence gave a clear finding that two accused persons Dhulla and Balji entered into Bhima's house after breaking the rear wall of the house and the remaining three accused persons Nathu, Heera and Dheera entered through the door. This would go to show that all the five accused had entered into the house of Bhima. The question whether two accused came to the house after breaking the rear wall and remaining accused persons entered through door is inconsequential for determining their common object. The fact that all the accused persons formed an unlawful assembly and entered into the house of PW1 with formidable weapons is clearly deducible that they formed common object to eliminate Bhima and his family. As already noticed, the common object to kill Bhima can be gathered from the formidable weapons, which the accused carried and their aggressive behaviour of entering the house by breaking down the wall. No other conclusion is possible. Mr. Walia next contended that the prosecution has failed to prove as to which of the accused from the members of the unlawful assembly had caused the death of deceased Dinesh. This contention is also liable to be rejected. If death had been caused in prosecution of common object of unlawful assembly, it is not necessary to record a definite and specific finding as to which particular accused out of the members of the unlawful assembly caused the fatal injury. Once an unlawful assembly has come into existence, each member of the assembly becomes vicariously liable for the criminal act of any other member of the assembly committed in prosecution of the common object of the assembly. See: Rajendra Shantaram Todankar v. State of Maharashtra, [2003] 2 SCC 257 at SCC p.264).

For the afore-stated reasons, we allow the appeal, preferred by the State, by setting aside the order of acquittal recorded by the High Court and restore the convictions and sentences recorded by the Trial Court against the accused persons viz., Nathu s/o Nana, Walji s/o Moola, Heera s/o Nana and Dheera s/o Moola. They are directed to surrender to their bail bonds to serve out the sentence imposed by the Trial Court.

Before parting with the record we record our deep appreciation to Mr. Walia, learned amicus curiae for rendering abled assistance to the Court.