SUNIL BALKRISHNA BHOIR

v.

THE STATE OF MAHARASHTRA

MAY 15, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Penal Code, 1860:

s.302/149—Common object—Vital injury caused to deceased by accused no.2, while other injuries found on his person only by blows—No specific overt act attributed to appellant—Appellants were not armed—Witnesses did not identify them in Test Identification parade—Hence, appellants did not form common object to cause death of deceased.

Prosecution case was that on the fateful day at 7.30 P.M. deceased and his friend PW-1 were standing in front of deceased's house. All the accused persons came there. Accused no. 1 started quarreling with deceased over a gold pendant. At that the accused No. 2 caught hold of the shirt of the deceased, a scuffle ensued between the accused No. 2 and the deceased. P.W. 1, wife of the accused No. 1 intervened and separated them.

At about 9 P.M., when deceased was taking dinner in his house, PW-1 was sitting in the front room. PW-1 saw accused persons standing in front of the deceased's house. Accused No. 2 was having a knife and the accused Nos. 3 to 6 were having swords in their hands. PW-1 was assaulted by accused no. 3 by a sword by its blunt side on the shoulder, whereafter the accused entered into the house of the deceased. Father of the deceased who examined himself as P.W. 5 tried to resist them and in the process, caught hold of the sword which was in the hands of the accused no. 6 resulting in sustaining of bleeding injuries. The accused allegedly entered into the room. The deceased was assaulted with kicks and fist blows. Accused No. 2, stabbed the deceased with a knife. While the accused persons were going out of the house, 'B', brother of the deceased came whereupon accused No. 2 asked him not to enter into the house. While P.W. 1 was going to report the matter to the police Outpost, he met the other brother of the deceased. The deceased was taken to hospital where doctor declared him dead. Trial Court convicted accused persons. High

A Court upheld the same. During pendency of trial or appeal, accused no.1 to 3 expired.

In appeal to this Court, appellants contended that they were not armed and were not known to deceased or his family and had no motive to commit crime.

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Allowing the appeals, the Court

HELD: 1. Indisputably, a vital injury was caused to the deceased by the accused no. 2, while other injuries found on his person were caused only by blows. The accused No. 3 is said to have caused injury to P.W. 1, but no specific C overt act was attributed to any of the appellants. No witness stated before the trial court in regard to the specific roles played by each of the appellants.

[Para 8] [674-G]

2. Admittedly, test identification parades were held for identification of the accused persons. The first test identification parade was held only in D respect of accused Nos. 1 to 4, whereas the second test identification parade was held in respect of accused Nos. 5 to 7. It is, therefore, evident that even the identity of the appellants was in doubt. Even the full name of the appellant was not disclosed in the First Information Report. He in the test identification parade was not identified by witnesses and even the first informant K and was identified only by the father of the deceased . Even father of deceased did not E attribute any specific overt act so far as the appellant is concerned. He did not say that appellant was having any weapon. P.W.s 2 to 4 did not identify the accused No. 4 and accused No. 7.

[Paras 9,10 and 11] [675-A, B, C]

F 3. Indisputably, all the witnesses are interested witnesses. P.W. 1 was the complainant. P.W. 2 was allegedly at the relevant time have been named to the deceased. P.W. 4 is brother of the deceased. P.W. 5, was the father of the deceased. P.W. 3 was also one of the brothers of the deceased.

[Para 12] [675-D, E]

G 4. The Trial Judge did not place any reliance whatsoever on the evidence of P.W. 3 and P.W. 5. Only one stab injury was inflicted on the deceased by accused No. 2 . It was not repeated. [Para 13] [675-E, F]

5. The Trial Judge as also the High Court proceeded on the basis that for establishing common object, no prior meeting of mind was necessary.

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According to the courts below, it may develop on the spot. The dispute between the parties which was said to be the motive for committing the offences was an ornament. First of the quarrels between the accused No. 1 and the deceased took place a fortnight prior to the date of occurrence. Appellants were not involved. Accused No. 1 on the one hand and the deceased on the other quarreled on the second occasion. A scuffle took place. The wife of the accused No. 1 and P.W. 1 tried to intervene. The deceased allegedly at that time touched the person of the wife of accused No. 1. They went to lodge their respective complaints but then the matter was settled. Accused No. 1 therefore may have a grudge as against the deceased, who had touched his wife. It is unlikely that the appellants who were wholly unarmed and who were even not known to the deceased would form a common object to cause his death. Had it been so, they would have gone armed with weapons. Specific overt acts had not been attributed against them. Allegations made in the first information report show that whereas the accused Nos. 3 and 6 were armed with sword, accused No. 2 had a knife. The knife was used by accused No. 2 all of a sudden. Evidently nobody wanted to cause any serious injury to others. The medical evidence does not specifically mention as to how the wounds were caused. The size of the wound shows that nobody had used any weapon with much force. The wounds might have also been caused during scuffle. In the aforementioned situation, it is difficult to apply the test of common object.

[Paras 15 and 16] [675-G; 676-A-D]

Bishna alias Bhiswadeb Mahato and Ors. v. *State of W.B.*, [2005] 12 SCC 657, referred to.

6. S.149 per se constitutes a substantive offence. The object of this section is to make clear that an accused person whose case falls within its terms cannot put forward the defence that he did not, with his own hand, commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Unlawful assembly was formed originally to assault and something might have happened all of a sudden.

[Para 17] [676-F, G]

Radha Mohan Singh alias Lal Saheb and Ors. v. *State of U.P.*, [2006] 1 SCC (Cri) 661 and *Rabindra Mahto and Anr.* v. *State of Jharkhand*, [2006] 10 SCC 432, relied on.

Ram Dular Rai and Ors. v. *State of Bihar*, AIR (2004) SC 1043; *Munna*

A *Chanda* v. *State of Assam,* **[2006] 3 SCC 752 and** *Mummidi Hemadri and Ors.* v. *State of Andhra Pradesh,* **(2007) 4 SCALE 431, referred to.**

11. No case had been made out as against the appellants to arrive at a conclusion that they are guilty of commission of an offence under ss.302/ 149 IPC. [Para 24] [679-C]

B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 415 of 2006.

From the Judgment and Order dated 1.2.2005 of the High Court of Judicature at Bombay in Crl. A. No. 1042/1988.

C

WITH

Crl. Appeal No. 416-417 of 2006.

V.A. Mohta, Nitin S. Tambwekar, B.S. Sai, K. Rajeev, Nilkanta Naik and D Shivaji M. Jadhav for the Appellants.

Sushil Karanjkar and V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

E **S.B. SINHA, J.** 1. These appeals arising out of the judgment and order dated 1.2.2005 passed by a division Bench of the Bombay High Court were taken up for hearing together and are being disposed of by this common judgment. Altogether 7 persons were charged for commission of murder of one Ramdas on 3.2.1987 at 9 p.m. at his house. The accused were charged under Sections 147, 148, 302/149, 452 of the Indian Penal Code. Accused No. F 3 was also charged for causing simple hurt to P.W. 1 Kishor. The learned Trial Judge convicted the accused persons. The High Court has affirmed the said judgment. It is stated that during the course of the trial and/or pendency of the appeal, accused Nos. 1 to 3 have expired. Accused No. 6 has not preferred any special leave petition before us.

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2. The motive for commission of the offence is said to be that the deceased and accused no. 1 had quarreled with each other about a fortnight prior to the date of incident.

3. Prosecution case is said to be as under :

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On 3.2.1987, the deceased Ramdas and his friend Kishor, P.W. 1, the first informant were standing in front of the deceased's house. All the accused persons allegedly came there at about 7.30 in the evening. Accused No. 1 asked for a gold pendent from the deceased Ramdas which was the subject matter of the dispute between the parties and in relation whereto quarrel had taken place as the earlier occasion. The deceased, in response thereto is said to have stated, that he had returned the said gold pendent to some persons hailing from Panchpakhadi area. At that the accused No. 2 allegedly caught hold of the shirt of the deceased, a scuffle ensued between the accused No. 2 and the deceased. P.W. 1 with the wife of the accused No. 1 intervened and separated them. Allegedly, the deceased touched the person of the wife of accused no. 1, for which complaints were made by both the parties before the Outpost of the Police at Kopri. However, no report was accepted and the police officers said to have pacified allegedly pacified both the parties and sent them back. On 3.2.1987 at about 7.30 p.m., P.W. 1 came to the house of the deceased. They went to a pan stall and took a round in the Bazar. At about 9.00 p.m. both of them came back to the house of the deceased. Ramdas expressed his desire to have his dinner and requested P.W. 1 at his place to wait whereafter he promised to go to the complainant's house. While P.W. 1 was sitting on the cot in the front room of the deceased's house and the deceased Ramdas had been taking his dinner, he saw 6 to 7 persons coming to the front of the house. When he went out to see as to who they were, found the accused persons standing there. Allegedly, accused No. 2 was having a knife in his hands, and the accused Nos. 3 to 6 were having swords in their hands. P.W. 1 was asked to call the deceased to which he replied that he was taking his dinner, and they could talk to him after he finished taking meal. He was then allegedly assaulted by accused no. 3 by a sword by its blunt side on the shoulder, whereafter the accused entered into the house of the deceased. Baburao, father of the deceased who examined himself as P.W. 5 tried to resist them and in the process, caught hold of the sword which was in the hands of the accused no. 6 resulting in sustaining of bleeding injuries. The accused allegedly entered into the room. The deceased was assaulted with kicks and fist blows. Accused No. 2, Anil Mhatre stabbed the deceased Ramdas with a knife. While the accused persons were going out of the house, Bhaskar, brother of the deceased came whereupon accused No. 2 asked him not to enter into the house. While P.W. 1 was going to report the matter to the police Outpost Kopri, he met the other brother of the deceased, Sudhakar. Sudhakar was asked by P.W. 1 to bring the deceased to the police outpost, and he went to the police outpost. The deceased was brought to the said outpost by Sudhakar, whereafter he was referred to the Civil Hospital. A

A doctor upon examining him declared him dead. Complainant Kishor and witness Baburao were also examined by the doctor. They were rendered medical assistance.

4. The short question which arises for consideration in these appeals is the nature of involvement of the appellants before us. It is contended that B the appellants were unarmed, and they were not known to the deceased or his family by even P.W. 1 Kishor. They had no motive to commit the crime.

5. The post mortem report shows that the following injuries were found on the body of Ramdas:

C "1. Stab wound on epigastric region right to midline 1" x 1/2" x deep to peritoneal cavity direct cavity direct into backward and upward.

2. Incised wound over left index finger at metocarpus fallengial joint 1/2" x 1/4" x 1/8"

D 3. Incised wound on left thumb metocarpus fallengial joint 1/2" x 1/4" x 1/8""

6. Only injury no. 1 was found by the doctor to be sufficient in the natural course to cause death.

E 7. The injuries on the person of Kishor was only a clean wound on left infra clavicular region middle third of the clavic 1/4 cm x 1/4 cm x 1/4 cm. whereas Baburao suffered the following injuries:-

"Clean incised wound on the right hand at the distal former kreez 1/2 cm. 1/2 cm x 1/4 cm. and on first web space 1/2 cm. x 1/2 cm x 1/F 2 cm. Injury on first web space is also a clean incised wound and it is injury no. 2.

Clean incised wound on left thumb terminal fale x 1/2 cm. x 1/2 cm. x 1/2 cm."

G 8. Indisputably, a vital injury was caused to the deceased by the accused No. 2, while other injuries found on his person were caused only by blows. The accused No. 3 is said to have caused injury to P.W. 1, but no specific overt act was attributed to any of the appellants before us. No witness stated before the trial court in regard to the specific roles played by each of the appellants.

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9. The learned counsel for the appellants questioned the identification of the appellants by the prosecution witnesses before us. Admittedly, test identification parades were held for identification of the accused persons. The first test identification parade was held only in respect of accused Nos. 1 to 4, whereas the second test identification parade was held in respect of accused Nos. 5 to 7. It is, therefore, evident that even the identity of the appellants before us was in doubt.

10. Even the full name of the appellant Sunil was not disclosed in the First Information Report. He in the test identification parade was not identified by witnesses Ratna Kajale, Sudhakar Kajale, Bhaskar Kajale and even the first informant Kishor and was identified only by the father of the deceased Baburao Kajale. Even Baburao did not attribute any specific overt act so far as the said Sunil is concerned. He did not say that Sunil was having any weapon.

11. P.W. Nos. 2 to 4 did not identify the accused No. 4 and accused No. 7 being the appellants in Criminal Appeal Nos. 415 of 2006 and 416 of 2006 respectively.

12. Indisputably, all the witnesses are interested witnesses. P.W. 1 was the complainant. P.W. 2 Ratna was allegedly at the relevant time have been named to the deceased. P.W.4 is Bhaskar, brother of the deceased. P.W. 5, Baburao was the father of the deceased. P.W. 3 Sunil was also one of the brothers of the deceased.

13. The learned Trial Judge did not place any reliance whatsoever on the evidence of P.W. 5 Baburao and P.W. 3 Sunil. We have noticed hereinbefore that only one stab injury was inflicted on the deceased by accused No. 2. It was not repeated.

14. Mr. V.A. Mohta, learned senior counsel appearing on behalf of the appellant would submit that in the aforementioned fact situation, no case has been made out to arrive at a finding that the appellants herein had a common object to cause the death of the deceased Ramdas.

15. The learned Trial Judge as also the High Court proceeded on the basis that for establishing common object, no prior meeting of mind was necessary. According to the courts below, it may develop on the spot. The dispute between the parties which was said to be the motive for committing the offences was an ornament. First of the quarrels between the accused No.

A 1 and the deceased took place a fortnight prior to the date of occurrence. Appellants herein were not involved. Accused No. 1 on the one hand and the deceased on the other quarreled on the second occasion. A scuffle took place. The wife of the accused No. 1 and P.W. 1 tried to intervene. The deceased allegedly at that time touched the person of the wife of accused No. 1. They went to lodge their respective complaints but then the matter was B settled. Accused No. 1 therefore may have a grudge as against the deceased, who had touched his wife. It is unlikely that the appellants before us, who were wholly unarmed and who were even not known to the deceased would form a common object to cause his death. Had it been so, they would have gone armed with weapons. Specific overt acts had not been attributed against C them. Allegations made in the first information report show that whereas the accused Nos. 3 and 6 were armed with sword, accused No. 2 had a knife. The knife was used by accused No. 2 all of a sudden. Evidently nobody wanted to cause any serious injury to others. The medical evidence does not specifically mention as to how the wounds were caused. The size of the wound shows that nobody had used any weapon with much force. The wounds might have D also been caused during scuffle.

16. In the aforementioned situation, it is difficult to apply the test of common object. Mr. Sushil Karanjkar, learned counsel appearing on behalf of the respondent, however, would inter alia rely upon a decision of this court E in *Bishna alias Bhiswadeb Mahato and Ors.* v. *State of W.B.*, [2005] 12 SCC 657.

In that case itself, it was held

"62. For the purpose of attracting Section 149 IPC, it is not necessary F that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose."

17. Section 149 per se constitutes a substantive offence. The object of this section is to make clear that an accused person whose case falls within G its terms cannot put forward the defence that he did not, with his own hand, commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Unlawful assembly was formed originally to assault and something might have happened all of a sudden.

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18. Common object is defined under Section 141 of the Indian Penal Code in the following terms:- A

> "141. Unlawful assembly. An assembly of five or more persons is designated an 'unlawful assembly', if the common object of the persons composing that assembly is-
>
> First - To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or
>
> Second - To resist the execution of any law, or of any legal process; or
>
> Third - To commit any mischief or criminal trespass, or other offence; or
>
> Fourth - By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
>
> Fifth-By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do."

B C D E

19. Section 142 provides that whoever being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. F

20. The question which is required to be seen in each case is, what was the initial common object, if at all.

21. In *Ram Dular Rai and Ors.* v. *State of Bihar,* AIR (2004) SC 1043, this Court held: G

> "7...Section 149 does not require that all the five persons must be identified. What is required to be established is the presence of five persons with a common intention of doing an act. If that is established merely because the other persons present are not identified that does not in any way affect applicability of Section 149, IPC." H

22. In *Munna Chanda* v. *State of Assam,* [2006] 3 SCC 752, this Court in the fact situation obtaining therein held:-

> "12. It is, thus, essential to prove that the person sought to be charged with an offence with the aid of Section 149 was a member of the unlawful assembly at the time the offence was committed.
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> 13. The appellants herein were not armed with weapons. They except Bhuttu were not parties to all the three stages of the dispute. At the third stage of the quarrel, they wanted to teach the deceased and others a lesson. For picking up quarrel, they wanted to teach the deceased and others a lesson. For picking up quarrel with Bhuttu, they might have become agitated and asked for apologies from Moti. Admittedly, it was so done at the instance of Nirmal, Moti was assaulted by Bhuttu at the instance of Ratan. However, it cannot be said that they had common object of intentional killing of the deceased. Moti, however, while being assaulted could free himself from the grip of the appellants and fled from the scene. The deceased was being chased not only by the appellants herein but by many others. He was found dead the next morning. There is, however, nothing to show as to what role the appellants either conjointly or separately played. It is also not known as to whether if one or all of the appellants were present, when the last blow was given. Who are those who had assaulted the deceased is also not known. At whose hands he received injuries is again a mystery. Neither Section 34 nor Section 149 of the Penal Code is, therefore, attracted (See *Dharam Pal* v. *State of Haryana* and *Shambhu Kuer* v. *State of Bihar*)."

23. Yet again in *Mummidi Hemadri and Ors.* v. *State of Andhra Pradesh,* (2007) 4 SCALE 431, a division bench of this Court opined as under:-

> "14. 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 a 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 IPC, 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....." A B

[See also *Radha Mohan Singh alias Lal Saheb and Ors.* v. *State of U.P.*, [2006] 1 SCC (Cri) 661 and *Rabindra Mahto and Anr.* v. *State of Jharkhand*, [2006] 10 SCC 432. C

24. Applying the tests laid down by this Court in the aforementioned decisions, we are of the opinion that no case had been made out as against the appellants to arrive at a conclusion that they are guilty of commission of an offence under Section 302/149. We would assume that they were guilty under Section 452 of the Indian Penal Code but they have remained in custody for sufficiently long time. We, therefore, are of the opinion that having regard to the facts and circumstances of this case, these appeals should be accepted. Appellants herein are in custody. They are directed to be set at liberty unless wanted in connection with certain other cases. The appeals are allowed and the impugned judgment is set aside. D E

D.G. Appeals allowed.