A SHAJI AND ORS.

v.

STATE OF KERALA

(Criminal Appeal No. 1618 of 2005)

MAY 3, 2011

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[P. SATHASIVAM AND H.L. GOKHALE, JJ.]

Penal Code, 1860:

C *s.302 r/w s.149 – Murder – Common object – Unlawful assembly armed with deadly weapons – Six accused – A-1 inflicted three cut injuries on head of victim-deceased with a chopper – A-5 and A-6 acquitted – Other four accused (A-1 to A-4) convicted – They filed appeals before Supreme Court*

D *– Appeal as regards A-1 dismissed as not pressed – Whether prosecution established the conviction of A-2 to A-4 under s.302 r/w s.149 – Held, No – All the eye-witnesses identified and attributed only A-1 for commission of offence and made no reference to the role of the other accused – Even the*

E *Investigation Officer did not mention anything about the role of the other accused except A-1 – Inasmuch as s.149 creates a specific offence and deals with punishment of that offence, in order to convict a person or persons with the aid of s.149, a clear finding regarding common object of the assembly must be available and the evidence discussed must show not*

F *only the nature of the common object but also that the object was unlawful – In the case on hand, these ingredients were not fulfilled or established by the prosecution insofar as the accused other than A-1 – Mere fact that they were armed not sufficient to prove common object – Even the Doctor opined*

G *that the injury sustained on the head of victim-deceased was sufficient to cause death in the ordinary course of nature – The Head injury was caused by A-1 which is also clear from the evidence of the PWs – In view of the same, the trial Court*

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and the High Court erred in convicting A-2 to A-4 under s.302 with the aid of s.149 – Their conviction and sentence set aside.

s.149 – Murder – Unlawful assembly – Six accused – Two acquitted – Conviction of the other four accused with aid of s.149 – Scope – Whether in order to bring home a charge under s.149 it is necessary that five or more persons must necessarily be brought before the court and convicted – Held, No – Constitution Bench decision in Mohan Singh's case followed – On facts, prosecution well within its jurisdiction to establish the charge under s.149 even after acquittal of two members of the unlawful assembly.

s.149 – Applicability of – Held: In order to attract s.149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object.

According to the prosecution, the accused persons formed themselves into an unlawful assembly and came in a van armed with deadly weapons with the common object of doing away with PW-1's cousin brother; that all the accused persons attacked him and finally, A-1 inflicted three cut injuries on his head with a chopper; that at the time of occurrence, PW-1 and PW-2 were also present there and that PW-1 along with PW-5, who came there, took the victim to the nearest hospital where he was declared brought dead.

The trial court held A-1 to A-4 guilty of the offences punishable under Sections 143, 147, 148, 342, 449 and 302 read with Section 149 of IPC and sentenced them to undergo rigorous imprisonment for six months under Section 143, for one year under Section 148, for another term of six months under Section 342, again for two years under Section 449 and to undergo life imprisonment under Section 302 read with Section 149

A IPC and acquitted Accused Nos. 5 & 6. No separate sentence was awarded under Section 147 IPC. Challenging the judgment of the trial court, accused Nos. 1-4 filed criminal appeal before the High Court. The High Court dismissed the appeal and confirmed their
B conviction and sentence.

Aggrieved, A-1 to A-4 (the appellants) preferred the instant appeal. However, in view of the order of the State Government for pre-mature release of A-1/appellant No.1, the appeal as regards A-1 was not pressed.
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The conviction of A-2 to A-4/ appellant nos. 2 to 4 was challenged on the ground that the trial Court and the High Court committed error in convicting them under Section 302 by applying the provision of Section 149 IPC
D particularly, when there was no material in the evidence of PWs 1, 2 and 5. It was contended that out of six persons charge-sheeted, two were acquitted by the trial Court and the assembly must be deemed to have been composed of only four persons, hence it cannot be
E regarded as an unlawful assembly in terms of Section 141 IPC.

Disposing the appeal, the Court

HELD:1. The appeal insofar as A-1/appellant No.1
F was concerned is dismissed as not pressed in view of the order of premature release by the State Government. [Paras 13, 15] [223-A-B; 224-D-E]

2. As regards the challenge to the conviction of the
G other accused (A-2 to A-4/ appellant nos. 2 to 4), it is true that out of six named persons, two were acquitted by the trial Court and only four were convicted under Section 302 read with Section 149 IPC. However, in the Constitution Bench decision in *Mohan Singh's* case, it

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has been held that if five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under Section 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under Section 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the Court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under Section 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted. In view of the said decision in *Mohan Singh's* case, in the case on hand, even after acquittal of two accused from all the charges leveled against them, if there is any material that they were members of the unlawful assembly, the conviction under Section 302 can be based with the aid of Section 149. [Paras 6, 7, 8] [218-H; 219-A-B; 220-A-H; 221-A]

Mohan Singh & Anr. vs. State of Punjab **AIR 1963 SC 174: 1962 Suppl. SCR 848 – followed.**

3. Though the prosecution is well within its jurisdiction to establish the charge under Section 149 IPC even after acquittal of two members of the unlawful assembly, however, in order to attract Section 149 IPC, it

must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. In the case on hand, admittedly the prosecution rests on the evidence of PWs 1, 2 and 5 who alleged to have witnessed the occurrence. PW-1, in his evidence, though mentioned that he knows all the six accused persons and identified them in the Court, has not attributed to any of the accused other than A-1. In categorical terms, he informed the Court that "A-1 cut the head of the deceased by the chopper (MO1)". He also deposed that the incident had completed within ten minutes. Though he deposed that he told about the incident to one 'A', the owner of the mill, that A-1 and others attacked the deceased, 'A' was not examined. Like PW-1, PW-2 also attributed only against A-1, who was in possession of a chopper. Though she mentioned that A-4 was carrying iron rod, she had not elaborated anything about the role of others except A-1. In the same way, the other eye witness, PW-5 identified and attributed only A-1 for the commission of offence. Absolutely, there is no reference to the role of other accused. Even the Investigation Officer examined as PW-14 had not mentioned anything about the role of other accused except A-1. In fact, in cross-examination, he had admitted that "PW-1 had not given statement specifically that A-2 beat the deceased by Iron rod". None of these witnesses attributed involvement of other accused except A-1. Before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such a finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Inasmuch as Section 149 creates a specific offence and

deals with punishment of that offence, in order to convict a person or persons with the aid of Section 149 IPC, a clear finding regarding common object of the assembly must be available and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. In the case on hand, these ingredients were not fulfilled or established by the prosecution insofar as the accused other than A-1. [Para 13] [222-E-H; 223-A-H; 224-A-B]

Kuldip Yadav & Ors. vs. State of Bihar **JT 2011 (4) SC 436;** *Bhudeo Mandal & Ors. vs. State of Bihar* **(1981) 2 SCC 755: 1981 (3) SCR 291;** *Ranbir Yadav vs. State of Bihar* **(1995) 4 SCC 392: 1995 (2) SCR 826;** *Allauddin Mian & Ors. Sharif Mian & Anr. vs. State of Bihar* **(1989) 3 SCC 5: 1989 (2) SCR 498;** *Rajendra Shantaram Todankar vs. State of Maharashtra & Ors.* **(2003) 2 SCC 257: 2003 (1) SCR 10 and** *State of Punjab vs. Sanjiv Kumar @ Sanju & Ors.* **(2007) 9 SCC 791: 2007 (7) SCR 1025 – relied on.**

4. Even the Doctor who was examined as PW-7 opined that the injury sustained on the head was sufficient to cause death in the ordinary course of nature. It was not in dispute that the Head injury was caused by A-1 which is also clear from the evidence of PWs. 1, 2 and 5. In view of the same, the trial Court and the High Court committed an error in convicting the appellants Nos. 2-4/ (A-2 to A-4) under Section 302 with the aid of Section 149 IPC. [Para 14] [224-C-D]

Case Law Reference:

1962 Suppl. SCR 848	followed	Para 7
JT 2011 (4) SC 436	relied on	Para 11
1981 (3) SCR 291	relied on	Para 11
1995 (2) SCR 826	relied on	Para 11

A	**1989 (2) SCR 498**	**relied on**	**Para 11**
	2003 (1) SCR 10	**relied on**	**Para 11**
	2007 (7) SCR 1025	**relied on**	**Para 11**

B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1618 of 2005.

From the Judgment & Order dated 8.4.2005 of the High Court of Kerala at Ernakulam in Crl. No. 952 of 2004.

C T.N. Singh, Vikas K. Singh, Vikram Singh for the Appellants

T.S.R. Venkata Ramana, R. Sathish, S. Geetha for the Respondent.

D The Judgment of the Court was delivered by

P. SATHASIVAM, J.1. This appeal is filed against the final judgment and order dated 08.04.2005 passed by the Division Bench of the High Court of Kerala at Ernakulam in Criminal E Appeal No. 952 of 2004 whereby the High Court dismissed the appeal of the appellants herein and confirmed their conviction and sentence under Sections 143, 147, 148, 342, 449 and 302 read with Section 149 of Indian Penal Code (hereinafter referred to as "IPC") passed by the trial Court.

F 2. **Brief facts:**

(a) The victim, Usman @ Haneefa, aged about 24 years is the brother of Yasin (PW-4) and cousin brother of Mohd. Rafi (PW-1), the first informant. One Nasar (CW-15) was running G Kodakassery Oil Mill at Mannambatta during the relevant period. The Oil Mill belonged to Appachan (CW-14) which was taken on rent by Nasar (CW-15). The victim is the brother's son of Nasar and was also a worker and helper in the Oil Mill. There was enmity between Shaji (A-1), first appellant herein and the H victim. Devarajan (A-2) and Haridas (A-3) are the brothers of

A-1 and Kannan @ Gopalakrishnan (A-4) is the brother-in-law of A-1. A

(b) On 31.12.2000, at about 3 p.m., the accused persons (Shaji, Devarajan, Haridas, Kannan @ Gopalakrishnan, Latheef and Unnikrishnan) formed themselves into an unlawful assembly B came in a van armed with deadly weapons such as chopper, iron bars, iron pipe, wooden sticks etc. with the common object of doing away with Usman, who was sitting in the Verandah of the smoke house of the Oil Mill at Mannambatta. All the accused persons attacked him and finally, A-1 inflicted three C cut injuries on his head with a chopper. Thereafter, they left the place of occurrence in the Van in which they came. At the time of occurrence, Mohd. Rafi (PW-1) and Geetha (PW-2), a worker in the Oil Mill were also present there. Mohd. Rafi (PW-1) along with Baby (PW-5), who came there, took Usman @ Haneefa to the nearest hospital where he was declared brought dead. D At 6.00 p.m., PW-1 furnished his statement before the police and thereafter, the police registered a crime against Shaji and five other unnamed persons. During the investigation, the identities of other accused persons were also revealed. After the completion of investigation, the Circle Inspector of Police, E Cherpulassery filed the charge-sheet against all the six accused persons before the Court.

(c) The Additional Sessions Judge, Palakkad, after examining 17 witnesses and other relevant materials passed F an order dated 08.06.2004 and held A-1 to A-4 guilty of the offences punishable under Sections 143, 147, 148, 342, 449 and 302 read with Section 149 of IPC and sentenced them to undergo rigorous imprisonment for six months under Section 143, for one year under Section 148, for another term of six G months under Section 342, again for two years under Section 449 and to undergo life imprisonment with fine of Rs.10,000/- with a default sentence under Section 302 read with Section 149 IPC and acquitted Accused Nos. 5 & 6. No separate sentence was awarded under Section 147 IPC. H

(d) Challenging the judgment of the Additional Sessions Judge, Palakkad, Accused Nos. 1-4 filed Criminal Appeal No. 952 of 2004 before the High Court of Kerala. The Division Bench of the High Court, by impugned order dated 08.04.2005, dismissed the appeal and confirmed their conviction and sentence passed by the trial Court. Aggrieved by the said judgment, the appellants preferred this appeal by way of special leave before this Court.

3. Heard Mr. T.N. Singh, learned counsel for the appellants and Mr. T.S.R. Venkata Ramana, learned counsel for the respondent-State.

4. Mr. T.N. Singh, learned counsel appearing for the appellants, at the outset, submitted that in view of the order of the State Government releasing Shaji (A-1), Appellant No.1 herein, by G.O. [MS] No. 47/2011/Home dated 18.02.2011 before the date of expiry of his life imprisonment by executing a bond on the conditions specified therein, he is not pressing the appeal insofar as A-1 is concerned. The same has been taken on record.

5. Now in the present appeal, we are concerned with other three accused, namely, Appellant Nos. 2 to 4. Mr. T.N. Singh submitted that the trial Court and the High Court committed an error in convicting these appellants under Section 302 by applying the provision of Section 149 IPC particularly, when there was no material in the evidence of PWs 1, 2 and 5. He further submitted that out of six persons charge-sheeted, two were acquitted by the trial Court and the assembly must be deemed to have been composed of only four persons, hence it cannot be regarded as an unlawful assembly in terms of Section 141 IPC.

6. Insofar as the second submission of the learned counsel for the appellants is concerned, it is true that out of six named persons, two were acquitted by the trial Court and only four were convicted under Section 302 read with Section 149 IPC.

7. On the other hand, Mr. T.S.R. Venkata Ramana, learned counsel appearing for the respondent-State, by drawing our attention to the judgment of the Constitution Bench in *Mohan Singh & Anr. Vs. State of Punjab*, AIR 1963 SC 174, submitted that even after acquittal of two accused, in order to bring home the charge under Section 149 IPC, it is not necessary that five or more persons must necessarily be brought before the Court and convicted. The following principles laid down by the Constitution Bench are relevant for our consideration:

> **"8.** The true legal position in regard to the essential ingredients of an offence specified by Section 149 are not in doubt. Section 149 prescribes for vicarious or constructive criminal liability for all members of an unlawful assembly where an offence is committed by any member of such 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. It would thus be noticed that one of the essential ingredients of Section 149 is that the offence must have been committed by any member of an unlawful assembly, and Section 141 makes it clear that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided, of course, the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. In other words, it is an essential condition of an unlawful assembly that its membership must be five or more. The argument, therefore, is that as soon as the two Piara Singhs were acquitted, the membership of the assembly was reduced from five to three and that made Section 141 inapplicable which inevitably leads to the result that Section 149 cannot be invoked against the appellants. In our opinion, on the facts of this case, this argument has to be upheld. We have already observed that the point raised by the appellants has to be dealt with on the assumption that only five persons were named in the charge as

A persons composing the unlawful assembly and evidence led in the course of the trial is confined only to the said five persons. If that be so, as soon as two of the five named persons are acquitted, the assembly must be deemed to have been composed of only three persons and that clearly
B cannot be regarded as an unlawful assembly.

9. In dealing with the question as to the applicability of Section 149 in such cases, it is necessary to bear in mind the several categories of cases which come before the criminal courts for their decision. If five or more persons
C are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted
D before a charge under Section 149 can be successfully brought home to any members of the unlawful assembly It may be that less than five persons may be charged and convicted under Section 302/149 if the charge is that the persons before the Court along with others name
E constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149
F inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the Court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under Section 149 it is
G not necessary that five or more persons must necessarily be brought before the court and convicted....."

8. In view of the decision of the Constitution Bench, in the case on hand, even after acquittal of two accused from all the charges leveled against them, if there is any material that they
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were members of the unlawful assembly, the conviction under Section 302 can be based with the aid of Section 149. A

9. Now let us consider whether the prosecution has established the conviction of the remaining accused-appellants under Sections 302/149 IPC? B

10. In order to understand the rival claims, it is useful to refer Section 149 IPC which reads as under:

> *"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.*—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." C D

11. While considering the applicability of necessary ingredients of Section 149 IPC, we had an occasion to consider the same in *Kuldip Yadav & Ors. vs. State of Bihar,* JT 2011 (4) SC 436. After analyzing the conditions therein, it was held in paragraph 26 of the judgment as under: E

> "26 The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must F G H

A be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 IPC must be established. ....."

B The above principles have been reiterated in *Bhudeo Mandal & Ors. vs. State of Bihar* (1981) 2 SCC 755, *Ranbir Yadav vs. State of Bihar* (1995) 4 SCC 392, *Allauddin Mian & Ors. Sharif Mian & Anr. Vs. State of Bihar,* (1989) 3 SCC 5, *Rajendra Shantaram Todankar vs. State of Maharashtra &* C *Ors.* (2003) 2 SCC 257 and State of Punjab vs. Sanjiv Kumar @ Sanju & Ors. (2007) 9 SCC 791.

12. The following conclusion in *Kuldip Yadav* (supra) is also relevant which reads as under:

D "It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it E must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were F aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC"

13. Though as per the decision of the Constitution Bench, the prosecution is well within its jurisdiction to establish the G charge under Section 149 IPC even after the acquittal of two members of the unlawful assembly, however, in order to attract Section 149 IPC, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other H members as one likely to be committed in prosecution of the

common object. In the case on hand, admittedly the prosecution rests on the evidence of PWs 1, 2 and 5 who alleged to have witnessed the occurrence. We have already mentioned that we are not concerned with A-1 (Appellant No.1 herein) in the present appeal in view of the order of premature release by the State Government. PW-1, in his evidence, though mentioned that he knows all the six accused persons and identified them in the Court, has not attributed to any of the accused other than A-1. In categorical terms, he informed the Court that "A-1 (Shaji) cut the head of Usman by the chopper (MO1)". He also deposed that the incident had completed within ten minutes. Though he deposed that he told about the incident to one Appachan, the owner of the mill, that Shaji and others attacked Usman, the said Appachan was not examined. Like PW-1, PW-2 also attributed only against A-1, who was in possession of a chopper. Though she mentioned that A-4 was carrying iron rod, she had not elaborated anything about the role of others except A-1. In the same way, the other eye witness, PW-5 identified and attributed only A-1 for the commission of offence. Absolutely, there is no reference to the role of other accused. Even the Investigation Officer examined as PW-14 had not mentioned any thing about the role of other accused except A-1. In fact, in cross-examination, he had admitted that "PW-1 had not given statement specifically that A-2 beat Usman by Iron rod". In view of the claim of the learned counsel for the appellants about the evidence of PWs 1, 2 and 5, we have carefully analysed the same. As rightly submitted by Mr. T.N. Singh, none of these witnesses attributed involvement of other accused except A-1. As observed in ***Kuldip Yadav*** (supra), before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such a finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Inasmuch as Section 149 creates a specific offence and deals with punishment of that offence, in order to

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convict a person or persons with the aid of Section 149 IPC, a clear finding regarding common object of the assembly must be available and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. In the case on hand, we are satisfied that the above-mentioned ingredients have not been fulfilled or established by the prosecution insofar as the accused other than A-1.

14. Even the Doctor who was examined as PW-7 opined that the injury sustained on the head is sufficient to cause death in the ordinary course of nature. It is not in dispute that the Head injury was caused by A-1 which is also clear from the evidence of PWs. 1, 2 and 5. In view of the same, we are satisfied that the trial Court and the High Court committed an error in convicting the present appellants (A-2 to A-4) under Section 302 with the aid of Section 149 IPC.

15. In view of the above discussion, the appeal insofar as Appellant No.1 (A-1) is concerned, is dismissed as not pressed. Insofar as Appellant Nos. 2-4 (A-2 to A-4) are concerned, the conviction and sentence under Sections 302/149 IPC are set aside. Inasmuch as Appellant Nos. 2-4 were enlarged on bail by this Court vide order dated 02.11.2007, their bail bonds shall stand discharged. The appeal is allowed on the above terms.

B.B.B. Appeal disposed of.