

A BIVASH CHANDRA DEBNATH @ BIVASH D & OTHERS

v.

STATE OF WEST BENGAL

B (Criminal Appeal No. 157 of 2011)

APRIL 16, 2015

**[DIPAK MISRA AND PRAFULLA C. PANT, JJ.]**

C *Penal Code, 1860: s.302 r/w s.149 – Prosecution case was that fight took place resulting in death of one and injuries to others when appellants three in number along with 27 others started digging the land of the complainant party for constructing irrigation channel – Trial court convicted the appellants and acquitted other accused –*  
D *High Court upheld the order of trial court – Conviction challenged on the ground that only three of the accused were found guilty u/s.302 r/w s.149 and unless it is proved that unlawful assembly was formed by five or more persons*  
E *the appellants could not have been convicted with the aid of s.149 – Held: There was assembly of more than five persons with a common object to use the criminal force against the deceased – Only for the reason that 27 others*  
F *got acquitted as the charge could not be proved against them beyond reasonable doubt, it cannot be said that the persons who committed the crime were only three in number or that the assembly was of three persons only –*  
G *There was ample evidence to suggest that the appellants whose role was specifically proved were accompanied with others – In view of the facts and circumstances that there was a sudden fight and there was no premeditation on the part of the appellants to commit the murder, The offence is*

H

*not punishable u/s.302 but u/s.304 Part I.* A

**Partly allowing the appeal, the Court**

**HELD: 1. There are four eye witnesses who have deposed about the role of the appellants in commission of the crime. In his deposition, PW-1 specifically stated that the accused-appellants armed with "Daos" (sharp-edge weapons) caused death of the victim-deceased by assaulting him with the help of said weapon. PW-2, PW-3 and PW-4 (all eye witnesses) corroborated the oral testimony of PW-1. [Paras 10 and 11] [913-H; 914-B-C]** B C

**2. There was assembly of more than five persons with a common object to use the criminal force against the deceased. Only for the reason that 27 others got acquitted as the charge could not be proved against them beyond reasonable doubt, it cannot be said that the persons who committed the crime were only three in number or that the assembly was of three persons only. There was ample evidence to suggest that the appellants whose role is specifically proved on the record, were accompanied with others. Considering the facts and circumstances of the case at hand, particularly, the fact that there was a sudden fight between the appellants and the deceased who was accompanied by PW-1, PW-2, PW-3, and PW-4 and further considering that there was no premeditation on the part of the appellants to commit the murder, it is a fit case to hold that the offence committed by the appellants is not punishable under Section 302 IPC, but under Section 304 Part I IPC. [Paras 13, 20] [914-G-H; 915-A-B; 919-D-F]** D E F G

*Khem Karan and Ors. v. The State of U.P. and Anr. (1974) 4 SCC 603; 1974 (3) SCR 863; Dharam Pal and* H

- A - *Ors. v. The State of U.P.* (1975) 2 SCC 596: 1976 (1) SCR587; *Dahari and Ors. v. State of Uttar Pradesh* (2012) 10 SCC 256: 2012 (8) SCR1219; *Shaji and Ors. v. State of Kerala* (2011) 5 SCC 423: 2011 (6) SCR210; *Pulicherla Nagaraju alias Nagaraja Reddy v. State of A.P.* (2006) 11 SCC 444: 2006 (4)Suppl. SCR633 – relied on.

#### Case Law Reference

- |   |                         |            |         |
|---|-------------------------|------------|---------|
|   | 1974 (3) SCR 863        | relied on. | Para 14 |
| C | 1976 (1) SCR 587        | relied on. | Para 15 |
|   | 2012 (8) SCR 1219       | relied on. | Para 16 |
|   | 2011 (6) SCR 210        | relied on. | Para 17 |
| D | 2006 (4) Suppl. SCR 633 | relied on. | Para 19 |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 157 of 2011.

- E From the Judgment and Order dated 02.03.2010 of the High Court of Calcutta in C.R.A. No. 235 of 1994.

Ram Jethmalani, Bijan Kumar Ghosh, Rajeev Tewari, Pranav Diesh, P. R. Mala, Karan Kalia, Ashish Dixit for the Appellants.

- F Anip Sachthey, Mohit Paul, Shagun Matta for the Respondent.

The Judgment of the Court was delivered by

- G **PRAFULLA C. PANT, J.** 1. This appeal is directed against judgment and order dated 2.3.2010, passed by the High Court of judicature at Calcutta in Criminal Appeal No. 235 of 1994 whereby said Court has dismissed the appeal and upheld the conviction and sentence recorded by the

BIVASH CHANDRA DEBNATH @ BIVASH D v. STATE 909  
OF WEST BENGAL [PRAFULLA C. PANT, J.]

Additional Sessions Judge, 1<sup>st</sup> Court, Nadia, in Sessions A  
Case No. 11(6) 1986/S.T. No. II (3) 1994, against accused/  
appellants Bivash Chandra Debnath, Sambhu Ghosh and  
Sadananda Mondal under Section 302 read with Section  
149 of Indian Penal Code (IPC).

2. We have heard learned counsel for the parties and B  
perused the papers on record.

3. Prosecution story, in brief, is that PW-1 Satya Charan C  
Debnath and his sister's husband Ganesh Nath purchased  
two pieces of land situated on northern side of  
Panchanantaal of village Garibpur about a month before the  
incident. Both of them started cultivation on the land  
purchased and planted seeds of "Baro" paddy. Accused  
Bivash Chandra Debnath @ Patal (appellant No. 1) had his D  
land on the west of the land purchased by the Ganesh Nath.  
On 1.12.1983 at about 8.00 a.m., PW-1 Satya Charan  
Debnath and his brother-in-law Ganesh Nath came to know  
that accused Bivash Chandra Debnath along with many  
others was digging an irrigation channel through the land E  
of Ganesh Nath to his land. On this, PW-1 Satya Charan  
along with Ganesh Nath and his three brothers Ajit Nath,  
Dulal Nath and Kartik Nath, and his son Panchanan  
Debnath, rushed towards the land where the digging work  
was on. They saw that accused Bivash Chandra Debnath F  
@ Patal with the help of co-accused Sunil Nath, Jemini  
Debnath, Sambhu Ghosh (appellant No. 2), Sidiram Gosh,  
Sadananda Mondal (appellant No. 3) and 27 others, was  
engaged in digging the land of Ganesh Nath and  
constructing irrigation channel. Ganesh Nath objected to G  
and asked the appellant No. 1 as to why his land was being  
dug without his permission. This enraged the three  
appellants and their associates who brought Tangi, Spear,  
Ram Dao, Bow and Arrow, sticks, etc. from the village and H

A chased PW-1 Satya Charan Debnath, Ajit Nath, Panchanan  
Debnath and Basudeb Nath, upto the field of Jiten Nath,  
and assaulted them and left them bleeding at the spot. Out  
of the injured, Ajit Nath succumbed to the injuries, and rest  
of the injured PW-4 Dulal Nath, PW-2 Kartik Nath, PW-3  
B Panchanan Debnath and Basudeb Nath were taken to  
hospital for medical treatment.

4. The First Information Report of the incident was  
given orally by PW-1 Satya Charan Debnath to PW-6 S.I.  
C Nasrul Ismal of Police Station Tehatta on the very day  
(1.12.1983) at about 10.30 a.m. Said report was recorded  
as Ex. 1, and the crime was registered at 11.55 a.m. at the  
police station against 30 accused, namely, Bivash Chandra  
Debnath @ Patal (appellant No. 1), Sunil Debnath, Jemini  
D Debnath, Sambu Ghosh (appellant No. 2), Sidhram Ghosh,  
Budhadeb Ghosh, Sadananda Mondal (appellant No. 3),  
Surja Mondal, Dayal Mondal, Biswa Nath Mondal, Nemai  
Mondal, Ranjit Mondal, Jaganath Mondal, Adwaita Mondal,  
Anil Nath, Dulal Mondal, Kartick Biswas, Ganesh Biswas,  
E Srishtidhar Biswas, Dulal Biswal, Sunil Biswas, Santosh  
Biswas, Bhim Chandra Nath, Naba Kumar Nath, Narayan  
Chandra Nath, Nirmal Kumar Nath, Gopal Chandra Mondal,  
Anil Mondal, Lakshman Mondal and Biswanath Nath, in  
F respect of offences punishable under Sections 147, 148,  
149, 447, 326 and 302 IPC.

5. PW-6 Nasrul Islam, along with police personnel, after  
getting the case registered, as above, went to the spot, took  
G the dead body of Ajit Nath into possession, sealed the same  
and prepared the inquest report. He interrogated the  
witnesses. The dead body was sent for post mortem  
examination. CW-1 Dr. Rabindra N.Kundu conducted  
autopsy on the dead body of the deceased on 2.12.1983  
and recorded as many as eight ante mortem injuries,  
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**BIVASH CHANDRA DEBNATH @ BIVASH D v. STATE 911  
OF WEST BENGAL [PRAFULLA C. PANT, J.]**

including six incised wounds. The Medical Officer prepared the Post Mortem Report (Ex. 5) and opined that the deceased had died due to shock and haemorrhage due to the ante mortem injuries suffered by him. The Investigating Officer arrested the accused and on completion of investigation, submitted charge sheet against as many as thirty accused, including appellants Bivash Chandra Debnath, Sambhu Ghosh @ Ram Pada and Sadananda Mondal. The case was committed to the Court of Sessions for trial.

6. The trial court, after hearing the parties, framed charge of offences punishable under Sections 147, 447/149, 326/149 and 302/149 IPC against all the thirty accused on 4.9.1989 to which they pleaded not guilty and claimed to be tried. On this, the prosecution got examined PW-1 Satya Charan Debnath (informant and eye witness), PW-2 Kartik Nath, PW-3 Panchanan Debnath, PW-4 Dulal Nath (all the three eye witnesses), PW-5 S.I. Ajay Kumar Ghosh, PW-6 S.I. Nasrul Islam (who recorded First Information Report and prepared the Inquest Report), PW-7 Nirmal Adhikari (Driver of the police vehicle), PW-8 S.I. Sanjib Kumar Biswas (Arresting Officer of some of the accused), PW-9 Dinabandhu, and PW-10 Const. Jiaul Islam. Apart from this, CW-1, Dr. Rabindra N. Kundu (who conducted post mortem examination) was also examined.

7. The oral and documentary evidence was put to the accused under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") on 19.7.1994 in Bangla, in reply to which they stated that they knew nothing about the incident, and pleaded that the evidence adduced against them, is false. However, no evidence in defence appears to have been given.

8. After hearing the parties, the trial court came to the

A conclusion that accused Bivash Chandra Debnath @ Patal, Sambhu Ghosh and Sadananda Mondal, with some others, in furtherance to common object, committed murder of Ajit Nath, and held all the three guilty of charge of offence punishable under Section 302 read with Section 149 IPC  
B on 5.8.1994. As to the rest of the accused, the trial court found that the prosecution has failed to prove charge as against them, as such they were acquitted. The Public Prosecutor and the counsel for the accused, thereafter, were heard on sentence, and each one of the three convicts  
C Bivash Chandra Debnath, Sambhu Ghosh and Sadananda Mondal were sentenced to imprisonment for life and directed to pay fine of Rs.1000/-, in default of payment of which the defaulter was directed to undergo rigorous imprisonment for a further period of two years. Aggrieved  
D by said judgment and order dated 5.8.1994, the three convicts challenged the same before the High Court and filed Criminal Appeal No. 235 of 1994. The High Court, on re-assessment of the evidence, concurring with the view taken by the trial court, dismissed the appeal. Hence, this  
E appeal through special leave.

9. Before further discussion, we think it just and proper to mention the ante mortem injuries found on the body of the deceased (Ajit Nath) recorded by CW-1 Dr. Rabindra N. Kundu, after post mortem examination, in Ex. 5. The same are reproduced as under: -  
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G "1) One incised wound 5" x 1½" muscle deep over the front of right elbow.

2) One incised wound 3" x 1½" bone deep over the right side of head beyond right ear.

H On exploring the wound, the temporal bone was found cut.

- 3) One incised wound 2½" x ½" muscle deep over the right side angle of jaw. A
- 4) One incised wound 2" x 1" muscle deep over the lateral side of right knee.
- 5) One incised wound 4" x 1½" muscle deep over the lateral side of right leg. Bone fibula was found cut in two pieces. B
- 6) One incised wound 6" x 2" over the right scapula region. Bone scapula was found cut. C
- 7) One incised wound 2½" x 1" muscle deep over the left side of neck.
- 8) A number of bruises over different parts of the body." D

The Medical Officer opined that the deceased had died of shock and haemorrhage resulting from the ante mortem wounds described above. He further mentioned in his report (Ex. 5) that the ante mortem injuries were homicidal in nature. CW-1 Dr. Rabindra N. Kundu stated that the wounds suffered by the deceased could have been caused by Tangi, Dao and the death could have been resulted in ordinary course of nature by such injuries. From the evidence of the Medical Officer read with the autopsy report, it is proved on the record that Ajit Nath died a homicidal death. E F

10. Now, we have to examine as to whether the courts below have rightly found that the appellants, along with others, with common object, committed murder by causing the ante mortem injuries suffered by the deceased, or not. On this point there are four eye witnesses who have deposed about the role of the appellants in commission of the Crime. PW-1 Satya Charan Debnath has narrated the H

A entire prosecution story and deposed about the role of the appellants Bivash Chandra Debnath @ Patal, Sambhu Ghosh and Sadananda Mondal, and some other accused. He has also explained as to how the quarrel started over digging the field of Ganesh Nath by the accused. In his deposition he has specifically stated that the accused-appellants armed with "Daos" (sharp edge weapons) caused death of Ajit Nath by assaulting him with the help of said weapon.

C 11. PW-2 Kartik Nath, PW-3 Panchanan Debnath and PW-4 Dulal Nath (all eye witnesses) have corroborated the oral testimony of PW-1 Satya Charan Debnath. No doubt, these eye witnesses are related to the informant (PW-1), but merely for that reason their testimony cannot be disbelieved, particularly, when their presence with the appellants at the spot appears to be natural. It is relevant to mention here that the incident had taken place in village Garibpur, and all the four witnesses belong to the same village. There appears to be no personal enmity on the part of these witnesses as against the appellants.

F 12. On behalf of the appellants it is argued that only three of the accused have been found guilty of the charge of offence punishable under Section 302 read with Section 149 IPC, and unless it is proved on the record that unlawful assembly was formed by five or more persons, the appellants could not have been convicted with the aid of Section 149.

G 13. We have examined the lower court record and we concur with the view taken by the courts below that there was assembly of more than five persons with a common object to use the criminal force against the deceased. Only for the reason that 27 others got acquitted as the charge

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could not be proved against them beyond reasonable doubt, A  
it cannot be said that the persons who committed the crime  
were only three in number or that the assembly was of three  
persons only. There is ample evidence on the record to  
suggest that the appellants whose role is specifically proved  
on the record, were accompanied with others. Even B  
otherwise, since there is sufficient evidence proving the role  
of the appellants that they caused injuries, as quoted above,  
to the deceased which resulted in his death, even without  
aid of Section 149 IPC they are liable to be held guilty for  
causing death of Ajit Nath with common intention with the C  
aid of Section 34 IPC.

14. In *Khem Karan and others v. The State of U.P. and another*<sup>1</sup>, in paragraph 6 this Court has made following observations: - D

"..... the fact that a large number of accused have been acquitted and the remaining who have been convicted are less than five cannot vitiate the conviction under Section 149 read with the substantive offence if — as E  
in this case the Court has taken care to find — there are other persons who might not have been identified or convicted but were party to the crime and together constituted the statutory number." F

15. In *Dharam Pal and others v. The State of U.P.*<sup>2</sup>, in paragraph 10, expressing similar opinion, this Court observed as under: -

"..... If, for example, only five known persons are G  
alleged to have participated in an attack but the courts find that two of them were falsely implicated, it would

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1 (1974) 4 SCC 603

2 (1975) 2 SCC 596

A be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the Court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, B acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding, based on good evidence and sound reasoning, that the participants were five or more in number.”

C 16. In *Dahari and others v. State of Uttar Pradesh*<sup>3</sup>, in paragraph 20, this Court has held as under: -

D “20. Undoubtedly, this Court has categorically held that in such a situation, a conviction cannot be made with the aid of Section 149 IPC, particularly when, upon the acquittal of some of the accused, the total number of accused stands reduced to less than five, and it is not the case of the prosecution that there are in fact, some other accused who have not yet been put to trial. E However, it is also a settled legal proposition that in such a fact situation, the High Court could most certainly have convicted the appellants, under Section 302 read with Section 34 IPC.”

F 17. In *Shaji and others v. State of Kerala*<sup>4</sup>, this Court, in paragraph 12, has observed as under: -

G “12. In view of the decision of the Constitution Bench in *Mohan Singh v. State of Punjab (AIR 1963 SC 174)*, in the case on hand, even after acquittal of the two accused from all the charges levelled against them, if

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3 (2012) 10 SCC 256

H. 4 (2011) 5 SCC 423

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." A

18. Shri Ram Jethmalani, learned senior counsel for the appellants, next submitted before us that even if the prosecution story is taken to be true, the act allegedly committed by the appellants only constitutes culpable homicide not amounting to murder, punishable under Section 304 Part II IPC. In this connection, attention of this Court is drawn to Exception 4 to Section 300 IPC, which reads as under: - B C

*"Exception 4 – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.* D

*Explanation - It is immaterial in such cases which party offers the provocation or commits the first assault."* E

19. On appreciation of evidence on record of the present case, we agree with the contention of the learned senior counsel for the appellants that since it is a case of sudden fight and there was no premeditation on the part of the appellants and the offenders have not acted in "unusual manner", their acts are covered under Exception 4 to Section 300 IPC. In the similar case in ***Pulicherla Nagaraju alias Nagaraja Reddy v. State of A.P.***<sup>5</sup>, in paragraph 29, this Court has discussed the issue as to when the conviction can be converted from an offence F G

3 (2012) 10 SCC 256

4 (2011) 5 SCC 423

5 (2006) 11 SCC 444

A punishable under Section 302 IPC to Section 304 Part I or 304 Part II IPC and the same is reproduced hereunder:

B “29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters — plucking of a fruit, straying of  
C cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or  
D suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other  
E end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts  
F to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are  
G treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the  
H weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was

any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may.”

20. In view of the above principle of law laid down by this Court, and considering the facts and circumstances of the case at hand, particularly, the fact that in the present case it is clear that there was a sudden fight between the appellants and the deceased who was accompanied by PW-1 Satya Charan Debnath, PW-2 Kartik Nath, PW-3 Panchanan Debnath and PW-4 Dulal Nath, and further considering that there was no premeditation on the part of the appellants to commit the murder, we are of the view that it is a fit case to hold that the offence committed by the appellants is not punishable under Section 302 IPC, but under Section 304 Part I IPC.

21. Accordingly, the appeal is partly allowed. Conviction and sentence recorded by the courts below under Section 302 read with Section 149 IPC is set aside. Instead, all the three appellants, namely, Bivash Chandra Debnath @ Patal, Sambhu Ghosh @ Sambhu Charana Ghosh and Sadananda Mondal, are convicted under Section 304 Part I read with Section 34 IPC, and each one of them is sentenced to rigorous imprisonment for a

A period of seven years. The period of sentence already undergone by them shall be set off from the sentence awarded by this Court.

Devika Gujral

Appeal partly allowed.