

NAGESAR

v.

STATE OF CHHATISGARH
(Criminal Appeal No. 1096 of 2014)

MAY 5, 2014

[T.S. THAKUR AND C. NAGAPPAN, JJ.]

PENAL CODE, 1860:

ss. 304 (Part II), 147 and 148 – Out of seven convicts, two filed appeals stating that they were not named in FIR and their presence at place of occurrence was not established – Held: Mere presence or association of a person with other members alone is not per se sufficient to hold him criminally liable for the offences committed by the others unless there was sufficient evidence to show that he also intended to or knew the likelihood of commission of such an offending act — In the instant case, there is no legally acceptable material to prove that appellants either were present on the spot or they acted as members of unlawful assembly to connect them with the death of deceased — Appellants are, accordingly, given benefit of doubt and acquitted of all the charges.

The two appellant along with five others were prosecuted for commission of offences punishable u/ss. 147,148 and 302 IPC. The prosecution case was that on the date of incident in the evening while one 'KR' with PW-1 and another were sitting in the market chowk, accused nos. 1 to 7 were consuming 'ganja' and liquor there, which was objected to by 'KR', and in the altercation 'KR' slapped A-4 and left the place with PW1 and another. 'KR' again returned to the said place where the juvenile accused threw chilli powder in the eyes of 'KR' and assaulted him with sword, and when the victim fell down, he dropped a stone on his head, and other accused also

- A assaulted him. Accused no. 1 was said to have attacked 'KR' with a stick. When PW8 intervened, he was assaulted by A-1 with a sword. 'KR' was taken to hospital where he died. The case of juvenile accused was referred to Juvenile Justice Board. The trial court convicted A-1 to B A-7 of the offences charged and sentenced them to imprisonment for life. The High Court converted the offence from s. 302 to 304 (Part II) IPC and sentenced each of the accused persons to six years R.I.

- C In the instant appeals filed by two of the accused persons, namely, A-6 and A-7, it was contended for the appellants that they were not named in the FIR; that PW9 did not mention them as having been present during the occurrence; and that PW8 did not attribute any overt act to them, in the attack and, as such, their presence at the D place of occurrence was not established.

Allowing the appeals, the Court

- E HELD: 1.1. It is settled law that mere presence or association of a person with other members alone is not per se sufficient to hold him criminally liable for the offences committed by the others unless there was sufficient evidence on record to show that he also intended to or knew the likelihood of commission of such an offending act. [para 13] [644-G-H; 645-A]

- F *K.M Ravi and others vs. State of Karnataka* (2009) 16 SCC 337 – relied on.

- G 1.2. In the instant case, there is no legally acceptable material to prove that the appellants acted as members of unlawful assembly to connect them with the death of the deceased. At any rate in the absence of reliable evidence to prove that the appellants were either present on the spot or that they had committed any overt act that could show that they shared the common object of the H unlawful assembly it is not possible to support their

conviction and benefit of doubt has to be given to them. A
The appellants are, accordingly, given benefit of doubt
and the conviction and sentences imposed on them are
set aside and they are acquitted of all the charges. [para
13-14] [645-A-D]

Case Law Reference: B

(2009)16 SCC 337 relied on para 13

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1096 of 2014)

From the Judgment and Order dated 31.01.2012 in CRA C
No. 14/2007, 42/2007, 331/2007 of the High Court of
Chhattisgarh at Bilaspur.

WITH

Criminal Appeal No. 1082 of 2014 D

Dr. Rajesh Pandey, Jitender Kumar, Priyanka Pandey,
Mridula Ray Bharadwaj for the Appellant.

Atul Jha, Sandeep Jha, Dharmendra Kumar Sinha for the
Respondent. E

The Judgment of the Court was delivered by

C. NAGAPPAN, J. 1. Leave granted in both the special
leave petitions.

2. Both the appeals have been preferred against the F
common judgment dated 31.1.2012 of the Division Bench of
the High Court of Chhattisgarh, Bilaspur, in Criminal Appeal
No.12 of 2007 and Criminal Appeal No.331 of 2007. The
appellants herein Nagesar and Khetro accused Nos. 6 and 7 G
respectively, in Sessions Trial No.232 of 2005 on the file of 10th
Additional Sessions Judge (FTC) Durg, were tried along with
five other accused and all of them were convicted for the
offence under Sections 147, 148 and 302 IPC and each of
them was sentenced to undergo rigorous imprisonment for one
year and pay a fine of Rs.1000/-and in default to undergo

- A rigorous imprisonment for two months for offence under Section 147 IPC; one year rigorous imprisonment and to pay a fine of Rs.2000/-each and in default to undergo rigorous imprisonment for three months for the offence under Section 148 IPC and life imprisonment and to pay a fine of Rs.3000/-in default to undergo six months imprisonment for the offence under Section 302 IPC and the sentences were directed to run concurrently.

3. Aggrieved by the conviction and the sentences accused Nos. 1 to 7 preferred five criminal appeals and the High Court by the impugned common judgment dated 31.1.2012 partly allowed the appeals by setting aside the conviction and sentence imposed upon them and acquitted them for the offence under Section 148 IPC and also altered conviction under Section 302 IPC to Section 304 Part II of IPC and sentenced each of them to undergo rigorous imprisonment for a period of 6 years and imposed a fine of Rs. 3000/-on each of them and in default to undergo rigorous imprisonment for six months and maintained the conviction and sentence imposed on them for the offence under Section 147 IPC. Challenging the same accused Nos.6 and 7 have preferred the present appeals.

4. Background facts of the case in a nutshell are as follows: On 13.6.2004 in the evening Korma Rao was sitting along with PW1 Pramod and Pradeep near Priyadarshini Market Chowk, Khursipar, Bhilai. Accused Nos. 1 to 7 were consuming 'Ganja' and liquor in the above said place and this was objected to by Korma Rao and in the altercation Korma Rao slapped accused No.4 Rajendra Prasad Shukla @ Tukna. Korma Rao left the place with PW1 Pramod & Pradeep by scooter. Again at 11.45 PM he came back to the same place where juvenile accused Pitambar @ Panto threw chilli powder on the eyes of Korma Rao and assaulted him on the head with sword. When Korma Rao fell down juvenile Pitambar took out a stone and dropped it over his head and the other accused assaulted him. Accused No.1 Bhimsen @ Bhim attacked Korma Rao with stick. When

PW8 Gopi Rao intervened he was attacked on the head with sword by accused No.1 Bhimsen @ Bhim. PW9 Ram Lalit Yadav also witnessed the occurrence. PW 8 Gopi Rao informed PW5 Bhaskar Rao, who is the brother of Korma Rao about the occurrence and they took injured Korma Rao to BSP Hospital, Bhilai. Korma Rao was examined by PW4 S.K. Bhoi and Ex.B4 wounds Certificate was issued by him. He also examined PW 8 Gopi Rao and found a lacerated wound over the back of his head and issued Exh.P5 Injury Certificate. Korma Rao died at 3.00 P.M.. PW5 Bhaskar Rao lodged complaint and the death of Korma Rao was intimated by the Doctor vide Exh. P32 and FIR Exh.P21 came to be recorded. The Investigating Officer conducted inquest over the body vide Exh.P8 Inquest Report. He seized blood stained earth, blood stained stone and broken bricks by Exh. P13 and sent the body for post-mortem.

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5. PW13 Dr. Padmakar Mishra conducted the autopsy on the body of Korma Rao and found the following injuries:

- (i) Incised wound of 4 c.m. x 1 c.m. x 1 c.m. over back of head with fracture of bone.
- (ii) Two incised wounds of 2 c.m. x ½ c.m. x 1 c.m. and 2 c.m. x ½ c.m. over back of head.
- (iii) Incised wound of 7.5 c.m. over left temporo parietal region.
- (iv) Incised wound of 9 c.m. length over right parietal region.
- (v) Incised wound of 4 c.m. length just below right eye.
- (vi) Incised wound over upper part of nose.
- (vii) Fracture of right and left mandible bone.
- (viii) Incised wound over ring finger of 2 c.m. in length with fracture of metacarpal bone.
- (ix) Incised wound of 2 c.m. x ½ c.m. over wrist.

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A (x) Incised wound of 20 c.m. x ½ c.m. over back.

(xi) Haematoma of fronto parietal bone of 20 c.m. length.

B He expressed opinion that death has occurred due to shock on account of ante-mortem injuries and issued Exh.P20 post-mortem certificate.

C 6. Pursuant to Ex.P.10 disclosure statement of accused No.4 Rajender Prasad wooden plank was recovered under Ex.P22. Pursuant to the disclosure statement of accused No.3 Pradeep stone was recovered under Exh.P.11. On Exh.P.12 disclosure statement of PW1 Bhimsen stick was recovered under Exh.P.16. On the disclosure statement of juvenile accused Pitambar sword and clothes Exh.P.23 were recovered D under Exh.P.14 and Exh.P15. Blood stained clothes of other accused were also seized. The seized articles were sent for clinical examination under Exh.P38 and Exh.P40 is the report. On completion of investigation final report was filed. The case against the juvenile accused Pitambar was filed before the E Juvenile Justice Board.

F 7. In order to prove the guilt of the accused the prosecution examined PWs 1 to 17 and marked the documents. No evidence was adduced by the accused. The trial court found all the accused guilty of charges and sentenced them as narrated above. The appeal preferred by them was partly allowed as indicated above. Challenging the same accused No.6 Nagesar and accused No.7 Khetro have preferred the present appeals.

G 8. The learned counsel appearing for the appellants submitted that both the appellants were not named in the First Information Report and the eye witness Ram Lalit Yadav in his testimony has not mentioned the names of the appellants as having been present during the occurrence and even the other H eye witness has not attributed any overt act to the appellants

in the attack made on the deceased and their presence at the occurrence place is itself doubtful and they are entitled to an acquittal. Per contra the learned counsel appearing for the respondent-State contended that the appreciation of evidence by the Courts below was proper and did not, thereby, call for any interference.

9. Korma Rao suffered a homicidal death is sought to be proved by the medical evidence adduced by the prosecution. The autopsy was conducted by PW13 Dr. Padmakar Mishra and as per his testimony, he found 6 incised wounds on the head with fracture of right and left mandible bone and he opined that death has occurred on account of the shock due to ante-mortem injuries. Exh. P20 is the post-mortem certificate issued by him. Thus it is amply clear that Korma Rao died of injuries sustained during the occurrence.

10. The prosecution case is that accused Nos. 1 to 7 in furtherance of their common object attacked Korma Rao at the time of occurrence and caused his death. PW8 Gopi Rao and PW9 Ram Lalit Yadav were examined as having witnessed the occurrence. According to PW8 Gopi Rao on 13.6.2004 late in the evening accused nos. 1 to 7 were sitting at Priyadarshini Market Chowk and were consuming Ganja and Cigarette and Korma Rao objected the same and in the altercation he slapped accused No.4 Rajender Prasad Shukla and left the place with PW1 Promod and Pradeep by scooter and again at 11.45 P.M. Korma Rao came back to the same place and juvenile Pitambar threw chilli powder in the eyes of Korma Rao and assaulted him on the head with sword and when he fell down juvenile Pitambar dropped a stone over his head and the other accused assaulted him. It is his further testimony that accused No.1 Bhimsen attacked Korma Rao with stick and when he intervened he was attacked on the head with sword by accused No.1 Bhimsen and he rushed to inform PW5 Bhaskar Rao, who is the brother of Korma Rao and they took injured Korma Rao to hospital where he died at 3.00 A.M..

- A According to PW8 Gopi Rao the appellants Nageswar and Khetro were found in inebriated state having consumed cigarette and Ganja. Though PW8 Korma Rao had mentioned the names of both the appellants in his testimony as having been present at the place of occurrence, he has not attributed
 B any overt act to them in the attack made on the deceased as well as himself.

11. PW9 Ram Lalit Yadav is the other eye-witness and he has testified that he went to the place of occurrence at about 11.15 P.M. in the night and the accused persons were sitting
 C there and PW8 Gopi Rao also joined him and when Korma Rao came there, accused persons Khetro, Bhim, Pitambar and others attacked Korma Rao with sword and danda and Korma Rao sustained injuries on the head and other parts of his body and when PW8 Gopi Rao intervened he also sustained sword
 D injury on the head. It is his further testimony that he and PW8 Gopi Rao informed the occurrence to the family members of Korma Rao and they took him to hospital where he succumbed to the injuries. PW9 Ram Lalit Yadav has not mentioned the names of the appellants as having been present during the
 E occurrence. In other words this witness, in his testimony has not stated about the presence of the appellants and did not attribute any role to them in the occurrence.

12. Exh. P21 is the First Information Report lodged by
 F PW5 Bhaskar Rao, the brother of deceased Korma Rao. Of course he has not witnessed the occurrence and the information was conveyed to him by PW8 Gopi Rao who is an eye-witness. The names of the appellants Nagesar and Khetro are not mentioned in the First Information Report and in the facts of the case a doubt is created in the mind as to whether
 G they could be really involved in the offence.

13. It is settled law that mere presence or association with other members alone does not per se be sufficient to hold everyone of them criminally liable for the offences committed
 H by the others unless there was sufficient evidence on record to

show that one such also intended to or knew the likelihood of commission of such an offending act. (*K.M Ravi and others Vs. State of Karnataka* (2009) 16 SCC 337). As already seen in this case there is no legally acceptable material to prove that the appellants acted as members of unlawful assembly to connect them with the murder of the deceased Korma Rao. At any rate in the absence of reliable evidence to prove that the appellants were either present on the spot or that they had committed any overt act that could show that they share the common object of the unlawful assembly it is not possible to support their conviction and benefit of doubt has to be given to them.

14. In the result both the appeals are allowed and the appellants are given benefit of doubt and the conviction and sentences imposed on them are set aside and they are acquitted of all the charges framed against them. They are directed to be released from the custody forthwith unless otherwise required in connection with any other case.

Rajendra Prasad

Appeals allowed.