VIJI & ANR. A

v.

STATE OF KARNATAKA

(Criminal Appeal No. 296 of 2006)

OCTOBER 20, 2008

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[C.K. THAKKER AND LOKESHWAR SINGH PANTA, JJ.]

Penal code, 1860: s.34 – Common intention – A-1 to A-3 caught hold of deceased and A-4 to A-7 attacked deceased C *resulting in his death – Conviction under s.302 r.w. s.149 – High Court acquitted A- 2 to A-6 giving benefit of doubt and in case of A-1 and A-7, converted conviction to s.302 r.w. s.34 – Appeal by A-1 and A-7 – Held: In view of acquittal of A-2 to A-6, and in the light of ocular evidence that A-7 assaulted de-* D *ceased while A-1 merely caught hold of deceased, ends of justice would be met if A-7 is convicted under s.326 and accused no.1 under s.326 r.w. s.34 IPC – Regarding sentence, since A-7 remained in jail for more than 7 years while A- 1 for more than 4 years, sentence already undergone by them was adequate and sufficient – s.326.* E

Criminal Jurisprudence: Administration of Criminal Justice – Punishment/Liability – Extent of – Held: No accused should end up with heavier liability than what is strictly contemplated by law nor should there be failure of justice by way of wrong exoneration. F

Prosecution case was that deceased was proceeding on his cycle to sell milk along with PW-1. On the way, accused no.1 to 3, caught hold of the deceased and the remaining accused no.4 to 7 administered several blows G **on him. Deceased succumbed to the injuries. The trial Court found them guilty under ss.143, 144, 147, 148, 149 and 302 IPC. All the accused were ordered to suffer rigorous imprisonment for life under s.302 r.w. s.149 IPC. Separate sentences were also awarded for other offences.**

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A The High Court allowed the appeal preferred by accused no.2 to 6. The appeal of accused 1 and 7 was partly allowed. Their conviction under s.302 r.w. s.34 IPC was modified and converted into conviction under s.302 r.w. s.34 IPC. Hence the instant appeals by accused no.1 and
B 7.

Appellants contended that when the appeal of accused Nos. 2 to 6 was allowed by the High Court and they were acquitted of all the offences with which they were charged, the same benefit ought to have been granted to
C them; that doubtful version of the prosecution is clear from the Accident Register wherein deceased himself stated that only two persons attacked him i.e. appellants-accused Nos.1 and 7, the prosecution witnesses, however, involved other five persons as well and they were
D even convicted by the trial Court; that the prosecution story, from the beginning, was that accused No.1 had not caused even a single injury to the deceased; that in view of acquittal of other accused and particularly, accused Nos. 4, 5 and 6 who also alleged to have participated in
E causing injuries to deceased accused No.7 (appellant No.2) could not have been convicted for an offence punishable under s.302 read with s.34, IPC; that in such cases, even if the appellants are liable to be convicted, the doctrine of 'minimum liability' ought to have been invoked by
F the High Court and at the most, they could be convicted for an offence punishable under s.326 read with s.34, IPC.

Partly allowing the appeals and modifying the conviction recorded by the High Court, the Court

G HELD: 1. Criminal law undoubtedly admits to the proposition that commonality of intent may develop on the spot, but on the other hand, citing the present case the intention of the group may have been to assault the victim whereas one or more of the persons may have acted otherwise and would possibly qualify individually for a
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heavier conviction and sentence. Undoubtedly, the Court has to go by the weapons used, the overt acts attributed, the degree of force that was exerted and such other finer features of the incident while recording its findings. It is equally essential that no accused person should end up with a heavier liability than what is strictly contemplated by the law and conversely, there should not be a failure of justice through too light a consequence or wrongful exoneration. These are all very fundamental principles of evaluation of evidence and of criminal jurisprudence. [Para 14] [770-E-H]

2. Where a crowd of assailants who are members of an unlawful assembly proceed to commit an offence in pursuance of common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assault a victim, it is not necessary that all of them must take part in the actual assault. Even in absence of actual assault, all members of unlawful assembly may be held vicariously liable for the acts of others provided there was common object to commit a crime. Appreciation of evidence in such a complex situation is indeed a difficult task, but Courts exercising powers in administering criminal justice have to do their best in dealing with such cases and it is expected of them to discharge their duty to sift the evidence carefully and to decide which part of it is true and which is not. [Para 15] [771-A-D]

Masalti v. State of U.P. (1964) 8 SCR 133 – relied on.

3. The High Court acquitted accused Nos. 2 to 6 giving them benefit of doubt. In the circumstances, the submission of the appellants deserved serious consideration that only two persons participated in assault and it was accused No.7 alone who had caused injuries to the deceased. Hence, even if s.34, IPC is attracted and is ap-

A plied and accused No.1 is also held liable for the act of accused No.7, the order of conviction for an offence punishable under s.302 read with s.34, IPC cannot be said to have been made out by the prosecution. It was the case of the prosecution that accused Nos. 1 to 3 caught hold B deceased and other accused, *i.e.* accused Nos. 4 to 7 attacked the deceased and caused injuries on his person which resulted in his death. The High Court, in the light of the entry in Accident Register, held that when the deceased himself had stated that he was assaulted by two C persons, *i.e.* accused Nos. 1 and 7, benefit of doubt should be given to accused Nos. 2 to 6 and accordingly, they were acquitted. The conviction of accused Nos. 1 and 7 (present appellants) was converted from an offence punishable under s.302 read with s.149 to s.302 read with s.34, IPC. D In view of acquittal of accused Nos. 2 to 6 and in the light of the ocular evidence that accused No. 7 assaulted deceased while accused No.1 merely caught hold the deceased, ends of justice would be met if accused No.7 is convicted for an offence punishable under s.326, IPC and accused No.1 for an offence punishable under s.326 read E with s.34, IPC. The accused No. 7 had remained in jail for more than seven years while accused No.1 had remained behind the bars for more than four years. In the circumstances, it would be appropriate if the sentence already undergone by the appellants is treated as adequate and F sufficient. The interest of justice would be served if substantive sentence is reduced to sentence already undergone by the appellants. The sentence of fine remains unaltered. [Paras 16-18, 19, 20] [771-D-G; 772-A-F; 773-A-B]

G CASE LAW REFERENCE

(1964) 8 SCR 133 relied on Para 15

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 296 of 2006

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From the Judgment and final Order dated 13.7.2005 of the High Court of Karnataka at Bangalore in Crl. Appeal No. 1348 and 1631 of 2004 A

A.B. Patel, Kiran Suri for the Appellants.

A. Rohan Singh (for Sanjay R. Hegde) for the Respondent. B

The Judgment of the Court was delivered by

C.K. THAKKER, J. 1. The present appeal is filed by two appellants, who were original accused Nos. 1 and 7 respectively, against the judgment and order of conviction, dated July 28, 2004 recorded by the Fast Track (Sessions) Court-II, Bangalore City in Sessions Case No. 460 of 1996 and partly confirmed by the High Court of Karnataka on July 13, 2005 in Criminal Appeal Nos. 1348 and 1631 of 2004. C D

2. To appreciate the contentions of the appellants herein, facts in brief may be stated.

3. It was the case of the prosecution that on June 1, 1996, at about 6.15 a.m. on the foot path in front of property bearing No. 57/63, 1st Main Road, Tippu Nagar, Mysore Road, Bangalore, accused Nos. 1 to 7 as members of unlawful assembly with the common object to commit murder of John Peter @ Kumar, armed with lethal weapons assembled and in furtherance of the said common object, committed various crimes including an offence of murder of John Peter. They thereby committed offences punishable under Sections 143, 144, 147, 148, 149 and 302, Indian Penal Code, 1860 (IPC). E F

4. According to the prosecution, on that day, John Peter (deceased) was proceeding on cycle to sell milk along with PW1-K.C. Nagaraj. Both of them *i.e.* the deceased John Peter and PW1-K.C. Nagaraj were prevented by accused Nos. 1 to 3, who caught hold of deceased John Peter and the remaining accused *i.e.* accused Nos. 4 to 7 administered several blows on the person of John Peter. Multiple injuries were caused to G H

A John Peter. He succumbed to the injuries and died at 8.30 a.m. on the same day. A complaint was registered, usual investigation was made and the 1st Additional Chief Metropolitan Magistrate, Bangalore committed the case under Section 209 of the Code of Criminal Procedure, 1973 ('Code' for short) since the B case was exclusively triable by a Court of Session. All the accused were called upon to face the trial. All of them pleaded not guilty to the charge and claimed to be tried.

5. The prosecution, in order to prove the case against the accused, examined 29 witnesses, out of them three were shown C to be eye-witnesses being PW1-K.C.Nagaraj, PW5-Mathaias and PW6-Pratap Singh @ Babu. The Court also examined PW14-Dr. Shivanagouda, to prove injuries sustained by the deceased John Peter. The Court considered evidence of other witnesses and the documents produced by them and also the D evidence of defence witnesses. It heard the learned counsel for the parties and by a judgment and order dated July 28, 2004 held all the accused guilty of the offences with which they were charged. In accordance with the provisions of Section 235 of the Code, the Court afforded hearing to the accused on the E quantum of sentence and by an order dated July 29, 2004, the Court ordered all the accused to suffer rigorous imprisonment for life for the offence punishable under Section 302 read with Section 149, IPC. Separate sentences were also awarded for other offences. All the sentences, however, were ordered to run F concurrently.

6. Three appeals were filed in the High Court being Criminal Appeal Nos. 1348, 1396 and 1631 of 2004. The High Court, by the impugned judgment, allowed Criminal Appeal No. 1396 of 2004 preferred by accused Nos. 3 and 6. The Court also G allowed Criminal Appeal No. 1348 of 2004 so far as accused Nos. 2, 4 and 5 were concerned. Thus, accused Nos. 2 to 6 in Sessions Case No. 460 of 1996 were ordered to be acquitted of all the charges.

7. Criminal Appeal No. 1348 of 2004 preferred by accused H

No.1 as also Criminal Appeal No. 1631 of 2004 preferred by accused No.7 were partly allowed. Both the accused were acquitted of the offences punishable under Sections 143, 144, 147 and 148, IPC. Their conviction under Section 302 read with Section 149, IPC was modified and converted into conviction for the offence punishable under Section 302 read with Section 34, IPC and both of them were ordered to undergo rigorous imprisonment for life and also to pay fine of Rs.5,000/- in default to undergo rigorous imprisonment for six months. The said order has been challenged by the present appellants (accused Nos. 1 and 7) in this Court.

8. Notice was issued on October 21, 2005. Respondents entered appearance. Meanwhile, the appellants were asked to put on record relevant part of original record along with the translation. Additional documents were also filed. On March 3, 2006, leave was granted but bail was refused. Again, on February 22, 2007, prayer for bail was rejected but the appeal was expedited for hearing and the Bench presided over by Hon'ble the Chief Justice of India directed the Registry to place the matter for final hearing during vacation and that is how the matter has been placed before us.

9. We have heard learned counsel for the parties.

10. The learned counsel for the appellant contended that the High Court has committed an error of law in convicting the appellants herein. It was submitted that when the appeal of accused Nos. 2 to 6 was allowed by the High Court and they were ordered to be acquitted of all the offences with which they were charged, the same benefit ought to have been granted to the appellants herein. It was submitted that no appeal against an order of acquittal recorded by the High Court has been filed by the State in this Court. The order of acquittal of those accused thus has attained finality. The order of acquittal of accused Nos. 2 to 6 clearly goes to show that the case of the prosecution was not believed by the High Court and the genesis of the prosecution was held doubtful. In that case, according to the counsel,

A the said benefit ought to have extended to present appellants as well. By not recording acquittal, the Court has committed an error which deserves to be corrected by this Court.

11. It was also submitted that there were inherent improbabilities in the case of the prosecution. Though PW1-K.C. Nagaraj was with the deceased, he did not intervene even though the deceased was attacked by the accused. It was also submitted that it has come on record that PW1-K.C. Nagaraj had reported the incident to the police. But that complaint has not come on record and suppressed by the prosecution. It creates doubt about the prosecution story and involvement of as many as seven accused. Doubtful version of the prosecution is also clear from the Accident Register which was produced in the Court wherein the history as to incident had been narrated by the deceased himself wherein he stated that only two persons attacked him *i.e.* present appellants-accused Nos.1 and 7. The prosecution witnesses, however, involved other five persons as well and they were even convicted by the trial Court. The High Court took into account the said fact which was important and material and granted benefit of doubt to accused Nos. 2 to 6. The High Court, however, failed to appreciate in its proper perspective, the defence version that in such eventuality, prosecution witnesses could not be relied upon even for convicting the present appellants-accused Nos. 1 and 7. It was also submitted that the prosecution story, from the beginning, was that accused No.1 had not caused even a single injury to the deceased. The allegation was that accused Nos. 1 to 3 caught hold of deceased John Peter and the remaining accused *i.e.* accused Nos. 4 to 7 administered blows and caused injuries to the deceased. Accused No.1, therefore, could not have been convicted by the High Court for an offence punishable under Section 302 read with Section 34, IPC. As to accused No.7 (appellant No.2), the counsel contended that in view of acquittal of other accused and particularly, accused Nos. 4, 5 and 6 who also alleged to have participated in causing injuries to deceased John Peter, accused No.7 (appellant No.2) could

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not have been convicted for an offence punishable under Section 302 read with Section 34, IPC. In such cases, even if the appellants are liable to be convicted, the doctrine of 'minimum liability' ought to have been invoked by the High Court and at the most, they could have been convicted for an offence punishable under Section 326 read with Section 34, IPC. The counsel submitted that appellant No.2 (accused No.7) who was alleged to have participated in the beating of deceased John Peter is in jail since more than seven years. Likewise, accused No.1 (appellant No.1) who, as per the evidence of the prosecution itself, did not cause any injury to deceased John Peter is in jail since more than four years. On the facts and in the circumstances of the case, even if this Court is of the view that the findings recorded by the High Court cannot be said to be contrary to law or against the evidence on record, this is a fit case in which the sentence which the appellants had undergone should be treated as sufficient and adequate and the appeal deserves to be allowed to that extent.

12. The learned counsel for the State, on the other hand, supported the order of conviction and sentence recorded by the trial Court and modified by the High Court. According to the learned counsel, on the basis of prosecution evidence, the trial Court recorded a finding that all the accused were responsible for committing murder of deceased John Peter and the said finding did not call for interference.

13. The counsel submitted that it is true that the High Court partly set aside the order of conviction and sentence recorded by the trial Court and accused Nos. 2 to 6 were acquitted of all the charges and the State accepted the said order and did not challenge that part of the order of the High Court. But that does not mean that accused Nos. 2 to 6 were innocent. Even the High Court did not record such a finding. Keeping in view the entry in the Accident Register and disclosure of two names by the deceased himself as the persons who attacked him being accused Nos. 1 and 7 (present appellants), the High Court thought it proper to give 'benefit of doubt' to the remaining accused *i.e.* accused

A Nos. 2 to 6. But, so far as the present appellants are concerned, on the basis of Accident Register as also on appreciation of evidence of prosecution witnesses, the High Court partly allowed the appeals and set aside conviction of the appellants for the offences punishable under Sections 143, 144, 147 and 148, IPC.
B In view of acquittal of accused Nos. 2 to 6, the High Court rightly altered conviction of appellants for the offence punishable under Section 302 read with Section 149 to Section 302 read with Section 34, IPC. It was, therefore, submitted that no interference is called for and the appeal deserves to be dismissed.

C 14. Now, this Court has held in several cases that there are situations in which several accused participate in an assault and there is often the tendency to spread the liability to all of them whenever a conviction is recorded and vice-versa where an acquittal results, regardless of the very fundamental propo-
D sition of criminal law that even in such instances where there may be a charge of common intention, unlawful assembly or rioting, that the Court is still required to sift the evidence and decide as to whether there is evidence of commonality of intent on the part of all the accused or whether a distinction will have
E to be made between some of them and the rest. Criminal law undoubtedly admits to the proposition that commonality of intent may develop on the spot but on the other hand, citing the present case the intention of the group may have been to assault the victim whereas one or more of the persons may have
F acted otherwise and would possibly qualify individually for a heavier conviction and sentence. Undoubtedly, the Court will go by the weapons used, the overt acts attributed, the degree of force that was exerted and such other finer features of the incident while recording its findings. This is very important because
G it is equally essential that no accused person should end up with a heavier liability than what is strictly contemplated by the law and conversely, that there should not be a failure of justice through too light a consequence or wrongful exoneration. These are all very fundamental principles of evaluation of evidence and of criminal jurisprudence.
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15. It is equally well-settled that where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence in pursuance of common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults a victim, it is not necessary that all of them must take part in the actual assault. Even in absence of actual assault, all members of unlawful assembly may be held vicariously liable for the acts of others provided there was common object to commit a crime. Appreciation of evidence in such a complex situation is indeed a difficult task, but courts exercising powers in administering criminal justice have to do their best in dealing with such cases and it is expected of them to discharge their duty to sift the evidence carefully and to decide which part of it is true and which is not [*vide Masalti v. State of U.P.,* (1964) 8 SCR 133].

16. In the instant case, the High Court acquitted accused Nos. 2 to 6 giving them benefit of doubt. In the circumstances, in our opinion, the submission of the learned counsel for the appellants deserves serious consideration that only two persons participated in assault and it was accused No.7 alone who had caused injuries to the deceased. Hence, even if Section 34, IPC is attracted and is applied and accused No.1 is also held liable for the act of accused No.7, the order of conviction for an offence punishable under Section 302 read with Section 34, IPC cannot be said to have been made out by the prosecution.

17. It was the case of the prosecution that accused Nos. 1 to 3 caught hold deceased John Peter and other accused, *i.e.* accused Nos. 4 to 7 attacked the deceased and caused injuries on his person which resulted in his death. The trial Court believed the ocular evidence of prosecution witnesses and convicted all the accused for offences punishable under Section 302 read with Section 149, IPC. The High Court, however, allowed the appeals filed by accused Nos. 2 to 6 *fully* and acquit-

A ted them of all the charges. The High Court, in the light of the entry in Accident Register, held that when the deceased himself had stated that he was assaulted by two persons, *i.e.* accused Nos. 1 and 7, benefit of doubt should be given to accused Nos. 2 to 6 and accordingly, they were acquitted. The High Court did B not record a finding that along with accused Nos. 1 and 7, other *unidentified* persons also attacked the deceased and caused his death in furtherance of common object of unlawful assembly. Precisely for that reason, conviction of accused Nos. 1 and 7 (present appellants) was converted from an offence punish- C able under Section 302 read with Section 149 to Section 302 read with Section 34, IPC. The said decision has attained finality as the State has not come to this Court against the decision of the High Court.

D 18. We find considerable force in the argument. In view of acquittal of accused Nos. 2 to 6 and in the light of the ocular evidence that accused No. 7 assaulted deceased John Peter while accused No.1 merely caught hold the deceased, in our opinion, ends of justice would be met if we convict accused E No.7 for an offence punishable under Section 326, IPC and accused No.1 for an offence punishable under Section 326 read with Section 34, IPC.

19. We have already observed in the earlier part of the judgment that accused No. 7 has remained in jail for more than F seven years while accused No.1 has remained behind the bars for more than four years. In the circumstances, in our considered view, it would be appropriate if the sentence already undergone by the appellants is treated as adequate and sufficient.

G 20. For the aforesaid reasons, the appeal is partly allowed and the conviction recorded by the High Court against the appellants is modified. Appellant No.2 (accused No.7) is convicted for an offence punishable under Section 326, IPC whereas appellant No.1 (accused No.1) is convicted for an offence punish- H able under Section 326 read with Section 34, IPC. Since ap-

pellant No.1 has remained in prison for more than seven years and appellant No.2 has suffered imprisonment for more than four years, in our considered opinion, the interest of justice would be served if we reduce substantive sentence already undergone by the appellants. The sentence of fine remains unaltered. A B

21. Ordered accordingly.

D.G Appeals partly allowed.