A

RAJ NATH

v.

STATE OF U.P.

(Criminal Appeal No.76 of 2009)

JANUARY 16, 2009

B

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860:

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ss.302/149, 307/149, 147 and 148 – Accused fired at victims with gun and country made pistols – Resulting in death of four and injuries to one witness – Conviction and sentence of life imprisonment awarded by trial court, affirmed by High D *Court – Held: There is nothing infirm in the conclusions of trial court and the High Court in placing reliance on the testimony of eye-witnesses – Medical evidence and forensic report corroborating ocular testimony – s.149 has clear application to the facts of the case – Conviction justified.*

E

ss. 141 and 149 – 'Common object' – Connotation of – Explained.

The appellant in Criminal Appeal No. 76 of 2009, his two sons and three others were prosecuted for F **commission of offences punishable u/ss.147, 148, 302/149 and 307/149 IPC. The prosecution case was that the accused had animosity with the informant as he had helped their rival 'RD' to their loss in a civil litigation, 'RD' sold some land to PW2, the nephew of the informant, this led to further ill will between the parties. On the fateful day** G **at about 6.00 p.m. when the informant, his sons 'N' and 'M' accompanied by PW2 and 'S' were returning from the village of the appellant after attending a 'Bhagwat', all the six accused waylaid them. The appellant fired at them with**

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his gun and the others by country made pistols resulting in injuries to PW-2, death of one of the victims at the spot, and another on his way to hospital, the third one died in the hospital the following day and the fourth one four days after the incident. The medical evidence and the forensic report corroborated the ocular testimony. The trial court acquitted one of the accused and convicted five of them of the offences charged, and sentenced all of them, *inter alia*, to imprisonment for life. The High Court having affirmed the conviction and sentence, the accused filed the appeals.

Dismissing the appeals, the Court

HELD: 1. So far as the reliability of evidence of the eye witnesses PWs 1 and 2 is concerned, their evidence has been analysed in great detail by the trial court and the High Court. PW-2 was one of the injured persons. Therefore, there is nothing infirm in the conclusions of the trial court and the High Court placing reliance on their evidence. It is to be noted that one of the deceased persons received nearly 30 injuries which is consistent with the prosecution case that the accused persons were holding country made pistols. [Paras 6 and 7] [343-B-C]

2.1. As regards the applicability of s.149 IPC, the emphasis is on the common object and not on common intention. `Common object' is different from a `common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The `common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the

A unlawful assembly, the conduct of each of the members of the unlawful assembly, before, at the time of attack and thereafter, as also motive for the crime, are some of the relevant considerations. [Para 8 and 9] [343-D-E; 344-F-H]

B 2.2. 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 C with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall u/s 141, if it can be held that the offence was such as the members knew was D 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 E 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. The distinction between the two parts of s.149 cannot be ignored or obliterated. In every case it would be an issue F to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases G which would be within first part, but offences committed in prosecution of the common object would be generally, if not always, within the second part, namely, offences which the parties knew to be likely committed in the prosecution of the common object. [Para 10] [345-E-H; H 346-A-F]

Chikkarange Gowda and others v. State of Mysore **AIR 1956 SC 731;** *State of U.P. v. Dan Singh and Ors.* **(1997) 3 SCC 747;** *Lalji v. State of U.P.* **(1989) 1 SCC 437;** *Gangadhar Behera and Ors. v. State of Orissa* **(2002) 8 SCC 381 and** *Shivjee Singh and Ors. v. State of Bihar* **(2008) 11 SCR 548, referred to.**

2.3 Section 149 IPC has clear application to the facts of the case. Therefore, the trial court and the High Court were justified in convicting the appellants. [Para 13] [347-C]

Case Law Reference:

AIR 1956 SC 731	**referred to**	**Para 10**
(1997) 3 SCC 747	**referred to**	**Para 11**
(1989) 1 SCC 437	**referred to**	**Para 11**
(2002) 8 SCC 381	**referred to**	**Para 12**
(2008) 11 SCR 548	**referred to**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 76 of 2009.

From the Judgment dated 14.05.2007 of the High Court of Judicature of Allahabad in Criminal Appeal No. 3023 of 1981.

WITH

Crl. No. 77 of 2009.

T.S. Doabia, Jaswant Persoya, Jagjit Singh Chhabra and Satish Vig for the Appellant.

Shail Kumar Dwivedi, AAG., Ratnakar Dash, Sahdev Singh and Anuvrat Sharma for the Respondent.

The Judgment of the Court was delivered by

A **DR. ARIJIT PASAYAT, J.** 1. Leave granted.

2. Challenge in these appeals is to the judgment of a Division Bench of the Allahabad High Court dismissing the appeal filed by the five appellants before the High Court. The B present appellants, his two sons Yatindra and Surendra alongwith Ram Kripal, Gajendra and Govind were tried by learned IInd Additional Sessions Judge, Mainpuri for alleged commission of offences punishable under Sections 147, 148, 302 read with Section 149 and Section 307 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). The C trial Court acquitted accused Govind but rest of the five accused were convicted for offences punishable under Section 302 read with Section 149 IPC, 307 read with Section 149 and Section 148 IPC. Life sentence, five years rigorous imprisonment and two years rigorous imprisonment D respectively were imposed.

3. Background facts in a nutshell are as follows:

The informant Vijay Bahadur is a resident of village Sakaragarhi, P.S. Kishni, district Mainpuri. There was a E litigation between Smt. Rama Devi and appellant Raj Nath resident of Nagla Tara in which Raj Nath lost in the litigation before court. In the said litigation, informant Vijay Bahadur had helped Smt. Rama Devi. Four months prior to the incident Rama Devi had sold 16 bighas of her land to Lokeshwar Nath F (PW-2) nephew of informant which sale was not relished by the appellant Raj Nath and his sons and they started nurturing animosity for the informant. On 18.5.1978 appellant Raj Nath and others plucked Jackfruits from trees standing over the land purchased by Lokeshwar Nath regarding which a first G information report was lodged by him.

On the date of the incident i.e. 5.6.1978 at 6.00 P.M. Vijay Bahadur along with his sons Narendra Nath and Mahendra accompanied by Lokeshwar Nath and Shrawan Kumar had H gone to the house of his cousin Ram Prakash in village Nagla

Tara, also the village of the accused, for hearing Bhagwat and to participate in the feast thereafter. After taking meal they were returning to their village along with Murari Lal and Mitthu Lal Gadaria. When they reached near the house of Kalka Prasad at 6 p.m. the accused appellants Raj Nath, his sons Satyendra and Surendra, Gajendra, Ram Kripal and Govind came there from the south western corner of the brick wall and threatened that they will teach a lesson to Lokeshwar Nath for purchasing the land and immediately thereafter appellant Raj Nath with his licensed gun and rest of the appellants with their country made pistols opened fire at the prosecution party. Lalit Kumar (hereinafter referred to as the 'deceased no.1') sustained gunshot injury and died instantaneously. Narendra Nath and Shrawan Kumar sustained firearm injuries and fell down at a short distance. Lokeshwar Nath and Mahendra Nath also sustained firearm injuries. Gun fire attracted Prem Narayan and many others to the place of the incident. When the injured were being transported to the hospital in the bullock cart by the informant, injured Narendra Nath (hereinafter referred to as deceased no.2) lost his life in the way. Shrawan Kumar, Mahendra and Lokeshwar Nath were dispatched to the District Hospital, Mainpuri. Informant got the FIR (Ex.Ka-7) of the said incident scribed through one Arun Kumar and lodged it at police station Kishni on the same day at 10.30 p.m. covering a distance of 8 miles south. Lajja Ram PW-4 Constable clerk prepared the chik Fir Ex. Ka-6 and G.D. entry Ex.Ka-7 and the investigation was immediately engineered by Mahendra Prasad Singh S.O. PW-10.

Investigating Officer proceeded to the village Kusmara where the corpse of Narendra was lying and there he conducted the inquest on his dead body as Ex.Ka-38. Thereafter, he came to the place of the incident in village Nagla Tara near the dead body of Lalit Kumar and conducted the inquest. Thereafter he conducted spot inspection and prepared site plan Ex. Ka-47 collected blood stained and plain earth Ex. Ka-48. He also recovered empty cartridges (material Ex.1 to 3) from the roof

A of Kalka Prasad and prepared its recovery memo Ex.Ka-49. He thereafter arrested appellant Ram Kripal and recovered country made pistol and three cartridges from him. On 5.6.1978 he recorded the statement of the informant and thereafter in the morning he prepared the inquest report of Narendra Nath B deceased who had expired in the hospital at 5.20 a.m. next day. Thereafter he was transferred. Shrawan Kumar also lost his life after four days in the hospital because of the sustained injuries in the incident. The post mortem examination on the dead bodies of Shrawan Kumar, Lalit Kumar, Narendra Nath and C Mahendra Nath was held and various gunshot injuries and ante mortem injuries were found on their bodies.

The report of Forensic Science Laboratory, Lucknow, U.P. dated 31.7.1978 brought out the fact the cartridges E.C.-3 was fired from countrymade pistol marked as 1/79.

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After investigation charge sheet was filed and charges were framed against all the six accused persons. Since the accused persons pleaded innocence trial was held. PWs 1 and 2 were stated to be the eye witnesses. Placing reliance on the E evidence of the eye witnesses the trial Court found the prosecution case to have been established and recorded conviction as noted above.

Before the High Court the stand was that there was no recovery of gun and no injury is relatable to any act purported F to have been done by the appellants. The High Court did not accept this plea and held that because of application of Section 149 IPC the prosecution case has been fully established.

4. In support of the appeal, learned counsel for the G appellants submitted that the Forensic Science Laboratory report clearly shows that no injury could be inflicted with the weapon held by the appellants.

5. Learned counsel for the respondent-State on the other hand submitted that four persons lost their lives because of acts H

of the accused persons. The role of the present appellants has been clearly established. Therefore, the High Court's judgment does not suffer from any infirmity. A

6. So far as the reliability of evidence of the eye witnesses PWs 1 and 2 is concerned their evidence has been analysed in great detail by the trial Court and the High Court. PW-2 was one of the injured persons. Therefore, there is nothing infirm in the conclusions of the trial Court and the High Court placing reliance on their evidence. B

7. It is to be noted that one of the deceased persons received nearly 30 injuries which is consistent with the prosecution case that the accused persons were holding country made pistols. C

8. A plea which was emphasized by the appellant relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object D E F G H

A should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the B assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain C the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point D beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, E IPC may be different on different members of the same assembly.

9. 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting F of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all G the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the H motive for the crime, are some of the relevant considerations.

What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co instanti.

10. 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 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, 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

A can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the B assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is C committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within D the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and E falls within the second part. However, there may be cases which would be within first part, but offences committed in prosecution of the common object would be generally, if not always, be within the second part, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See F *Chikkarange Gowda and others v. State of Mysore* : AIR 1956 SC 731.)

11. In *State of U.P. v. Dan Singh and Ors.* (1997 (3) SCC 747) it was observed that it is not necessary for the prosecution G to prove which of the members of the unlawful assembly did which or what act. Reference was made to *Lalji v. State of U.P.* (1989 (1) SCC 437) where it was observed that:

> "while overt act and active participation may indicate common intention of the person perpetrating the crime, the

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mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149". A

12. This position has been elaborately stated by this Court in *Gangadhar Behera and Ors. v. State of Orissa* (2002 (8) SCC 381 and *Shivjee Singh and Ors. v. State of Bihar* (SLP (Crl.) No.1494/2004 disposed of on 30.7.2008). B

13. Section 149 IPC has clear application to the facts of the case. Therefore, the trial Court and the High Court were justified in convicting the appellants. The appeals are dismissed. C

R.P. Appeals dismissed.