2023 INSC 354

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. of 2023

(@ SLP (Crl.) No.4241 of 2019)

Surendra Singh ...Appellant

Versus

State of Rajasthan and Anr. ...Respondents

J U D G M E N T

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 20.11.2018 passed by the High Court of Judicature for

Rajasthan Bench at Jaipur passed in D.B. Criminal Appeal No.818 of 2013 by which the Division Bench of the High Court has partly allowed the said appeal preferred by the respondent accused – Vijendra Singh and has set aside the conviction for the offence punishable under Section 302/149 IPC but has convicted for the offence punishable under Section 323 IPC, the original complainant/informant has preferred the present appeal.

2. The facts leading to the present appeal in nutshell are as under:

2.1 An FIR was lodged by the police on 01.12.2010 for an incident which took place on 28.11.2010. In the FIR it was alleged that on 28.11.2010, while

complainant's younger brother Narendra Singh was filling water from hand-pump at around 9.30 a.m. accused Bhupendra Singh, Vijendra Singh and Bhawani Singh, Sangeeta and Gulab Kanwar caused lathi blows to Narendra Singh. In the said incident Narendra Singh and Bhawani Singh became unconscious. Both of them were taken to the hospital. Bhawani Singh died. The FIR was registered as FIR bearing no.445/2010. Though the five persons were named in the FIR the police filed charge-sheet only against two persons namely Bhupendra Singh and Vijendra Singh for the offence under Sections 341, 323, 325/34, 308/34 and 302 and alternatively, Section 302/34 IPC. Both the aforesaid accused came to be tried for the aforesaid offence. To prove the

charge against the accused the prosecution examined ten witnesses and brought on record seven documentary evidences. The statements of the accused under Section 313 Cr.P.C. were recorded.

2.2 During the trial, the accused Bhupendra Singh died. Thus, the proceedings against him stood abated. The prosecution submitted an application under Section 319 Cr.P.C. against the remaining three accused persons so left out by the prosecution. The said application was dismissed by the learned Trial Court. However, on a challenge before the High Court and on remand, the learned Trial Court directed to try the remaining three accused as accused and passed a summoning order of additional accused.

However, as the remaining three accused absconded for number of years pursuant to the order passed by the High Court, the trial against the respondent herein accused Vijendra Singh came to be separated. Charge came to be reframed and the accused Vijendra Singh came to be charged for the offence under Section 302/149 IPC also. Thereafter on conclusion of the trial, the learned Trial Court convicted the accused Vijendra Singh for the offence punishable under Sections 147, 323, 302/149 IPC and sentenced him to undergo life imprisonment for the offence punishable under Sections 302 read with Section 149 IPC, one year R.I. for the offence under Section 323 IPC and two years R.I. for the offence under Section 147 IPC.

2.3 The respondent herein – accused preferred the present appeal before the High Court. By the impugned judgment and order the High Court has set aside the conviction of the accused Vijendra Singh for offence under Section 302 read with Section 149 IPC by observing that no case is made out for conviction with the aid of Section 149 IPC. That thereafter the High Court has considered the individual act of the accused and thereafter after taking into consideration the fact that the fatal blow on the head was given by accused Bhupendra Singh (who died during the trial) and the weapon used by the accused was lathi, the High Court by the impugned judgment and order has convicted the accused for the offence under Section 323 IPC.

2.4 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court convicting the accused for the offence under Section 302 read with Section 149 IPC, the original complainant/informant Surendra Singh has preferred the present appeal.

3. Shri Siddhartha Dave, learned Senior Advocate has appeared as Amicus Curiae on behalf of the appellant, Shri Vishal Meghwal, learned counsel has appeared on behalf of the respondent – State and Shri Abhishek Gupta, learned counsel has appeared on behalf of respondent no.2.

4. Shri Siddhartha Dave, learned Senior Counsel appearing on behalf of the appellant has vehemently submitted that in the facts and

circumstances of the case the Division Bench of the High Court has materially erred in observing that no case was made out for conviction with the aid of Section 149 IPC.

4.1 It is vehemently submitted by Shri Dave, learned Senior Counsel that the High Court has materially erred in observing that after the registration of the FIR, even the police found the case only against the two accused and the cognizance of the offence against the other accused are taken subsequently on the remand of the case by the High Court after rejection of application under Section 319 Cr.P.C. and the learned trial Court took cognizance against the accused later on and therefore no case is made out for conviction with the aid of Section

149 IPC.

4.2 It is vehemently submitted by Shri Dave learned Senior Counsel appearing on behalf of the appellant that the High Court has not properly appreciated and/or considered the fact that as such in the FIR the allegations were specific against five accused persons. However, at the relevant time the investigating officer filed the charge-sheet only against the two accused persons and the remaining three persons were arrayed as accused subsequently pursuant to the order passed by the learned Magistrate allowing the application under Section 319 Cr.P.C. It is submitted that therefore when all the five persons came to be tried may be separately there was an involvement of five persons who form the unlawful

assembly and therefore Section 149 IPC would be attracted.

4.3 Heavy reliance is placed on the decision of this Court in the case of ***Bharwad Mepa Dana & Anr. Vs. State of Bombay 1960 (2) SCR 172*** as well as ***Mizaji and Anr. Vs. The State of U.P. (1959) Supp. (1) SCR 940.***

5. Learned counsel appearing on behalf of the State has supported the appellant.

6. Shri Abhishek Gupta, learned counsel appearing on behalf of accused no.2 relying upon the decision of this Court in the case of ***Roy Fernandes vs. State of Goa and others, (2012) 3 SCC 221,*** has vehemently submitted that as such on facts no case is made out to convict the

accused with the aid of Section 149 IPC.

6.1 It is submitted that merely because the accused might have been present at the time of commission of the offence and in fact might have participated in commission of the offence but has not played a vital role unless it is proved that the other accused knew that in prosecution of the common object any one of them is likely to commit the murder of the deceased, Section 149 IPC shall not be attracted.

6.2 Now so far as the conviction of the accused for the offence under Section 323 IPC, it is vehemently submitted by learned counsel appearing on behalf of the accused that though the respondent no.2 has not preferred the appeal challenging the

conviction under Section 323 IPC, still in an appeal preferred by the State against the acquittal, the accused can submit that he could not have been convicted for other offence. Reliance is placed upon the decision of this Court in the case of **State of Rajasthan vs. Ramanand (2017) 5 SCC 695.**

6.3 In support of his submission that even the respondent - accused could not have been convicted even for the offence under Section 323 IPC, learned counsel appearing on behalf of the respondent – accused has made the following submissions:

(i) That there was a delay of 3 ½ days in lodging the FIR;

(ii) That the injury on the neck has not been established and proved;

(iii) That there are material contradictions on the injuries caused by the accused persons.

He has taken us to the deposition of doctor examined as PW7 and the injury report.

7. Making above submissions it is prayed to acquit the accused even for the offence under Section 323 IPC.

8. We have heard learned counsel appearing on behalf of the respective parties at length.

9. At the outset, it is required to be noted that the learned trial Court convicted the respondent – accused for the offence under Section 302 IPC

with the aid of Section 149 IPC. However, the High Court has observed and held that as the initial charge-sheet was filed only against two persons /accused and further three persons were subsequently arrayed as the accused and they are being tried separately, Section 149 IPC shall not be attracted. The High Court has also observed that even as per the FIR three accused came at the place of occurrence when they saw Narendra Singh was filling water and it was thus not assembly of five accused.

10. However, the High Court has not properly and considered the fact that in the report/FIR there were specific allegations against five accused persons and five accused persons were named in the FIR. However, the investigating officer charge-

sheeted only two persons. The remaining three accused persons came to be added as accused by the learned trial Court while allowing the application under Section 319 Cr.P.C. As they absconded and therefore their trial came to be ordered to be separated and it is reported that the trial against the remaining accused is still pending who are also facing the charges for the offence under Section 302/149 IPC. In that view of the matter when five persons were specifically named in the FIR and five persons are facing the trial may be separately, Section 149 IPC would be attracted. At this stage the decision of this Court in the case of ***Bharwad Mepa Dana (supra)*** on applicability of Section 149 IPC is required to be referred to. Before this Court it was the case on

behalf of the prosecution that thirteen named persons formed an unlawful assembly and the common object of which was to kill the three brothers. Twelve of them were tried by the Sessions Court who acquitted seven and the High Court acquitted one more. This brought the number to four. It was the case on behalf of the accused that as the High Court convicted only four persons falling below the required number of five, they could not have been convicted with the aid of Section 149 IPC. The aforesaid contention was negated by this Court. This Court observed that merely because two other persons forming part of the unlawful assembly were not convicted as their identity was not established, the accused cannot be permitted to say that they are not

forming part of the unlawful assembly and they cannot be convicted with the aid of Section 149 IPC. In the said decision it is specifically observed and held that the essential question in a case under Section 147 is whether there was an unlawful assembly as defined under 141, I. P. C., of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only, Section 147 still applies, if upon the evidence in the case the Court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified.

10.1 In view of the above facts and circumstances of the case the High Court has seriously erred in observing that no case is made out to invoke Section 149 IPC.

10.2 Now once the respondent – accused was found to be member of the unlawful assembly of more than five persons and he actually participated in commission of the offence may be the fatal blow might have been given by the another accused, in the present case Bhupendra Singh, still with the aid of Section 149 IPC, Respondent Accused can be convicted for the offence under Section 302 IPC with the aid of Section 149 IPC. The case would certainly fall within first part of Section 149 IPC. As per first part of Section 149 IPC if an offence is committed by any member of unlawful assembly

in prosecution of the common object of that assembly, every person who, at the time of that offence, is a member of the same assembly, is guilty of that offence. In the case of ***Mizaji and Anr. (supra),*** this Court had occasion to consider Section 149 of the IPC and the distinction between two parts of Section 149 IPC. It is observed and held as under:

> "This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. - The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common

object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under s. 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression I know' does not mean a mere possibility, such as might or might not happen. For instance, it is a. matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part 'of s.149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all. There is a great deal to be said for the opinion of Couch, C. J., in Sabid Ali's case (1) that when an offence is 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 the second

> part, but not within the first. The distinction between the two parts of s.149, Indian Penal Code 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 of s. 149 as explained above or it was an offence such as the members of the assembly know to be likely to be committed in prosecution of the common object and falls within the second part."

10.3 Now so far as the reliance placed upon the decision of this Court in the case of ***Roy Fernandes (supra)***, relied upon on behalf of the respondent – accused is concerned, on facts the said decision shall not be applicable. In the said decision this Court had considered the second part of Section 149 IPC. This Court did not consider the first part of Section 149 IPC and the distinction between the first part and the second part of Section 149 which has been considered by this Court in the case of ***Mizaji and Anr. (supra).***

11. Now, so far as the submission on behalf of the accused that he ought not to have been convicted for the offence under Section 323 IPC is concerned, though the accused has not challenged the impugned judgment and order passed by the High Court challenging the offence under Section 323 IPC we have heard the learned counsel appearing on behalf of the accused on merits on his conviction under Section 323 IPC.

11.1 The submission on behalf of the accused that there was a delay of 3 ½ days has been elaborately dealt with and considered by the learned trial Court in detail. A proper explanation has been given by the complainant - Surendra Singh. Immediately after the occurrence the injured were taken to the hospital for treatment.

The condition of Bhawani Singh was serious. Complainant concentrated on his treatment. Another injured Narendra Singh was also remained busy for the treatment. Thus, when the delay has been sufficiently and properly explained, we see no reason to give benefit of doubt to the accused on the aforesaid ground that there was a delay of 3 ½ days in lodging the FIR.

11.2 Now so far as the submission on behalf of the accused on the injuries and the contradictions in the injuries, at the outset, it is required to be noted that the deposition of the eye-witness PW1 and PW4 and the deposition of the doctor - PW7 are relevant material/deposition against the accused. The deceased sustained following injuries:

1. 2xl/2 cm scratched injury in the middle of head with red color soft clotting and hematoma beneath the skin of the head

2. Blue colored swelling on right head measuring 2.SxL INTERNAL hematoma in frontal head lobe.

3. 2cm stitch wound on occipital region of head. Blood clotting a parietal region of right side of head.

4. 3x2 cm scratched injury in front parietal part.

5. lxl/2 cm injury over nose.

6. 2xl/2 cm scratched I injury over right knee.

7. 5X0.5 cm scratched injury on the lower part of left leg.

8. 0.5X0.5 cm scratched injury on the middle part of left leg.

9. 6xl.5 cm blue colored wound on the back of neck. While further dissecting it was found that on left muscles there is hematoma and fourth and fifth cervical ribs were broken. There was swelling on it. 10. On front of stomach 2.5xl.5 cm Blue coloured wound on naval side.

All these wounds and injuries lead to death as per the opinion of the doctor. As per the medical opinion and the deposition of doctor the death occurred due to injury no.9 from the shock of wound at spinal bone of neck. Though the injury no.9 was caused by the accused Bhupendra Singh as observed and held hereinabove the respondent accused being a part of the unlawful assembly and who also participated in commission of the offence, he shall also be liable

to be convicted for the offence under Section 302 IPC with the aid of Section 149 IPC, even for the act of the accused Bhupendra Singh who gave the fatal blow.

12. Under the circumstances the impugned judgment and order passed by the High Court acquitting the accused for the offence under Section 302 read with Section 149 IPC is unsustainable and the same deserves to be quashed and set aside.

In view of the above and for the reason stated above the present appeal succeeds. The impugned judgment and order passed by the High Court acquitting the respondent – accused for the offence under Section 302 under Section 149 IPC is hereby quashed and set aside. The judgment and order passed by the learned Trial Court

convicting the respondent – accused for the offence under Sections 147, 323 and 302/149 IPC is hereby restored. The respondent no.2 – accused to undergo life imprisonment for the offence under Section 302/149 IPC. The respondent no.2 now to surrender before the concerned authority/court to undergo the remaining sentence of life imprisonment within a period of three weeks from today, failing which, he shall be taken into custody forthwith.

Present appeal is accordingly allowed.

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.....J.
(M. R. SHAH)

.....J.

(C.T. RAVIKUMAR)

New Delhi,
April 11, 2023.