Bhuban Baisnab and Others Vs State of Assam

Court: Gauhati High Court

Date of Decision: May 14, 2004

Acts Referred: Penal Code, 1860 (IPC) â€" Section 115, 141, 149, 304, 323

Citation: (2004) GLT 142 Supp

Hon'ble Judges: P.G. Agarwal, J

Bench: Single Bench

Advocate: J.M. Choudhury, for the Appellant; P.C. Gayan, Public Prosecutor, for the Respondent

Judgement

P.G. Agarwal, J.
This Criminal Appeal is directed against the judgment and order dated 8.11.95 passed by the learned Additional

Sessions Judge, Cachar, Silchar in Sessions Case No. 34 of 1994.

2. Heard Mr. J.M. Choudhury, learned Sr. Counsel for the Appellants and Mr. B.M. Sinha, learned Public Prosecutor, Assam.

3. We have all heard as to how a neglected spark burnt the house. In the present case, a minor incident between the villagers of two neighbouring

villages have led to the loss of human life. The festival of "Rathyatra" was organized on a paddy field wherein the villagers pulled the "Rath"

(Chariot) for 30-35 minutes. Bhatgram and Mougram are the two contiguous villages. On the date of occurrence, i.e. 15.1.92, while this function

of Rathyatra was going on, the villagers of Mougram wanted to take/ pull the Rath towards their village and this was resisted by the villagers of

Kalain/Bhatgram. The accused persons before us, all belong to Mougram and according to the prosecution allegation, they left the place

threatening the villagers that they will teach them a lesson. After the function was over and after half an hour time, the six accused persons named

above, being armed with iron rod, cycle chain, lathi, iron pipe etc. came and assaulted the deceased Makhan who raised alarm. Kulendra Roy,

P.W. 1, Debeswar Biswas, P.W. 2 and other persons rushed to the place of occurrence which happened to be in front of the house of the

deceased. P.W. 1 -Kulendra objected to the assault and intervened to save Makhan but he was also assaulted. When the other villagers started

pouring in the accused persons fled the scene. The two injured persons were first removed to Kalain Hospital and thereafter finding the injury

severe on the person of Makhan he was removed to Silchar Medical College Hospital. After four days Makhan Biswas succumbed to the injuries

at Silchar Medical College Hospital.

4. Dr. K.K. Chakraborty, P.W. 7 held the autopsy over the dead body of the deceased and found as follows:

1. One lacerated injury situated on the left side forehead 8 cm above the middle left eyebrow 1 1/2 cm X 1/2 cm X bone deep surrounded by

contusions.

2. Abrasions with scalp formation in the back in thorolumber region 6cm X 5cm.

Neck extremely and internally healthy.

Cranium and spinal canal - Scalp haematoma all the areas on the inner surface of scalp present.

Skull bone - Multiple fracture of frontal bone, parietal and temporal bone present under the injury No. 1.

Vertebrae healthy.

Membrane- Lacerated under the fractured bone.

Extra-dural haemorrhage present on all the frontal areas.

Brain congested, spmal cord not open.

Thoreax -all healthy, lungs & pleurae congested.

Abdomen- all healthy, Liver spleen & kidneys congested.

Muscle, bones and joints.

Muscle injuries as described, desease or deformities not found.

Fracture as described. Dislocation- Nil. All the injuries were ante-mortem, about five to ten days old, caused by blunt object. Death m my opinion

was due to coma, as a result of ante-mortem intracranial haemorrhage caused by blunt object homicidal in nature, time passed since death six to

twelve hours approximately.

5. In this case the death of the deceased as a result of the above injuries was not disputed by the trial Court and this has not been challenged

before us also.

6. In this case there are three eye witnesses, P.W. 1, P.W. 2 and P.W. 3 who had seen causing of the injuries on the person of the deceased.

P.W. 1 is another injured of this case and he was the first person who arrived at the place of occurrence on hearing shout for help. He had seen all

the accused persons being armed with iron rod, iron pipe, cycle chain etc. chasing the deceased and assaulting him. The witness has categorically

stated to have seen the accused Bhubon dealing blows on the head of the deceased by a iron rod. The other accused persons also assaulted him.

He was assaulted with a cycle chain by accused Dharma. Likewise, P.W. 2 had also deposed that on hearing the shout for help they arrived at the

place of occurrence and saw the accused persons assaulting the deceased Makhan and P.W. 1 with the weapons in their hand. But when other

villagers started pouring in the accused persons fled away. P.W. 3, Shri Jogendra Roy is another co-villager, who came to the place of occurrence

and saw the accused persons leaving the place. He also saw the deceased Makhan lying therein an unconscious state P.W. 1 reported him about

the assault made by the accused persons Manadhir Biswas, P.W. 5 although claimed to be an eye-witness in his examination-in-chief but in his

cross-examination he admitted that when he arrived at the place of occurrence, he saw two injured persons lying there. The witness has

categorically stated that before his arrival the accused persons had left the scene. The prosecution witnesses have also deposed about the earlier

incident of altercation between the inhabitants of the two villages as regards the pulling of the Rath. The trial Court relied on the prosecution

evidence on record, as stated above, held that the accused persons were members of unlawful assembly with the common object to assault and

they have killed the deceased Makhan and caused injury to P.W. 1 and accordingly convicted them u/s 304 Part-II IPC with the help of Section

115 IPC and u/s 323/ 34 IPC. Shri Choudhury learned Sr. counsel has submitted that this is a case of mutual "marpit" and the injury on the head

caused by accused Bhubon proved fatal as per the medical evidence and, as such, Bhubon may be liable for the injury on the head but the other

accused persons cannot be roped in with the help pf Section 149 IPC. Be that as it may, we are not happy about the manner in which the

impugned judgment was delivered, for in one incident there were two injured and the Court has taken the help of Section 149 IPC for convicting

the accused persons in the above offence u/s 304 Part-II IPC but for the injury caused to other witness, the Court has considered it to be a case

u/s 34 IPC. A common object is different from common intention and when the Court has given two specific findings that the accused persons

were members of an unlawful assembly for the object described in Section 141 IPC, there were no scope to incorporate or invoke the provision

of Section 34 IPC to convict the accused persons for assaulting P.W. 1. The assault of P.W. 1 might be covered by Section 149 IPC, i.e. the

members of the assembly knew the act to be likely to be committed in prosecution of the common object.

7. In the case of Lalji and Others Vs. State of U.P., the apex Court held:

Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly

at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

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While over act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful

assembly may fasten vicariously criminal liability u/s 149.

8. In the present case, we find that all the prosecution witnesses have categorically stated that when a dispute arose regarding the pulling of the

Rath towards Maugram village and when it was not yielded to, the accused persons who were present there left the scene threatening the villagers

and they returned after sometime being armed with various weapons like iron rod, iron pipe, cycle chain, lathis etc. and assaulted the deceased and

P.W. 1. From the above action of the accused persons it can be safely gathered about the common object of the assembly and we have no

hesitation to hold that the common object of the assembly was to assault and teach the villagers of Kalain a lesson and it is covered by the Section

141 IPC. The prosecution witnesses have further deposed that the members of the said assembly being armed with different weapons assaulted

the P.W. 1, causing injuries. In the case of State of U.P. Vs. Dan Singh and others, the Apex Court has held that it is not necessary for the

prosecution to prove which of the members of the unlawful assembly did which or what act. A similar view was taken by the Apex Court in the

case of Masalti Vs. State of U.P.,

Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the

assailants, that evidence should not have been accepted. This criticism again is not well founded. Where a crowd of assailants who are members of

an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not

possible for witnesses to describe accurately he part played by each one of the assailants. Besides, if a large crowd of persons armed with

weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault.

9. Now coming to the plea of applicability of Section 149 IPC, in the present case, we are tempted to re-capitulate the observations of the Apex

Court in the case of Gangadhar Behera v. State of Orissa (2002) 2 SCC 381. The Apex Court observed:

Another plea which was emphasized relates to the question whether Section 149 IPC has any application for fastening the constructive hability

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 an 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 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 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 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 a certain point 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 IPC may be different on different members of the same assembly.

23. ''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 a consideration of all

the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. 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 became 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 on the spot eo instanti.

24. 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 u/s 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 our 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 top 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 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

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 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 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 falls with the second

part. However, there may be cases which would be within the first, offences committed in prosecution of the common object would be generally, if

not always, within the second, namely, offences which the parties knew were likely to be committed in the prosecution of the common object. (See

Chikkarange Gowda and Others Vs. State of Mysore,

10. In the instant case, we find that all the accused persons came together from their village being armed with different weapons and they assaulted

the first person whom they con- fronted and then P.W. 1 arrived at the scene, he was also assaulted. Accused persons took to their heels when

other villagers arrived at the scene. Hence, we find no force in the submission that the other accused persons did not share the common object of

Bhubon, who caused the death of the deceased. The accused persons had used the weapons brought by them and the two injuries on head proved

fatal. There is no scope for holding that Bhubon should be liable for his own act and other accused persons did not share his object. We, therefore,

hold that Section 149 IPC is squarely applicable. We may refer to the observations of the Apex Court in Lalji (Supra):

Section 149 makes every member of an unlawful assembly at the time of committing that offence guilty of that offence. Thus this section created a

specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful

act committed pursuant to the common objects by any other member of that assembly. However, the vicarious liability of the members of the

unlawful assembly extends only to the act done in pursuance of the common objects of the unlawful assembly or to such offence as the members of

the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of this

section, the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not within his own

hands commit the offence committed in prosecution of the common objects of the unlawful assembly or such as the members of the assembly knew

to be likely to be committed in the prosecution of that object. Everyone must be taken to have intended the probable and natural results of the acts

in which he joined.

11. Thus, we find that the accused persons were not satisfied with the assault on the deceased only and when it was resisted by P.W. 1 he was

also assaulted. When the accused party came from their village to the place of occurrence they knew that their attempt to assault may be resisted

and, as such, the assault on P.W. 1 was the likely consequences of their earlier actions. The assault on Makhan Biswas is covered by Part-I of

Section 149 IPC and the assault on P.W. 1 is covered by Part-II of the said Section.

12. In view of the above, we find no force in the submission that the other accused persons, except Bhubon, cannot be held guilty by application of

Section 149 IPC. We find no merit in the appeal and as such the conviction stands affirmed. However, we modify the conviction u/s 323 read with

Section 149 IPC.

13. As regards the sentence, we sentence the accused persons to R.I. for 4 years and to pay a fine of Rs. 1,000/- each, in default to R.I. for 1

month each for the offence u/s 304 Part-II IPC read with Section 149 IPC. For the offence u/s 323/149 IPC, the accused persons are sentenced

to fine of Rs. 1,000/- in default to imprisonment for 1 month each. With the above modification in the sentence the appeal stands disposed of The

accused persons are directed to surrender forthwith to serve out the sentence and to pay the fine. Send down the records to the Chief Judicial

Magistrate, Cachar, Silchar who shall take up tile follow up action.