Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1525 OF 2009

Vinubhai Ranchhodbhai Patel ... Appellant

Versus

Rajivbhai Dudabhai Patel & Others ... Respondents

WITH

CRIMINAL APPEAL NOS.1526-1527 OF 2009

J U D G M E N T

Chelameswar, J.

1. On 11.07.1992, at about 10.10 pm, an incident occurred in the village of Nana Ankadia leaving 3 persons dead and 5 persons injured. It appears from the judgment of the High Court:

> "...information about the incident was conveyed by wireless message by PSO of Amreli (Rural) Police Station to PSI, Mr. NG Rajput. On the basis of the said information, PSI, Rajput had gone to village Nana Ankadia and found three dead bodies lying near the shop of Bhikabhai and after getting some further information, he had gone to Amreli Hospital and recorded complaint from Vinu Ranchhod, which was registered at about 1.30 a.m. on 12.07.1992. On the basis of the said complaint, PSI, Rajput started investigation by recording statements, drawing panchnamas and sending the dead bodies for post mortem etc."

2. On completion of investigation, a charge-sheet came to be filed against 15 accused because the remaining two accused A-16 and A-17 were absconding for some time. The matter was committed to the Sessions Court of Amreli as offences were exclusively triable by the Court of Sessions. In Sessions Case No. 118/1992, trial was conducted against 15 accused. The trial insofar as the two absconding accused was segregated from the trial of the remaining even after they were apprehended and they were put to trial separately in Sessions Case No. 58/98 before the Special Judge of the Fast Track Court, Amreli.

3. In Sessions Case No.118/1992, the Sessions Court by its judgment dated 17.01.1996 recorded the conviction of A-1, A-5, A-10 and A-12 as follows:

> "Prosecution has proved the criminal offence punishable under section 302 and 148 of the Indian Penal Code and under section 135(1) of the B.P. Act, against the accused No. 10 and [12] respectively Nanjibhai Khodabhai and Ratilal Nagji, and therefore the accused No. 10 and 12 are convicted under sections 302, 148 IPC and section 135(1) of the B.P. Act. The accused No. 1 Ravji Duda is convicted for the criminal offence punishable under section 326 and 148 of IPC and section 135(1) of B.P. Act. Whereas the accused No. 5 Manubhai Makanbhia is convicted for the criminal offence punishable under section 326, 323 and 148 of the IPC and section 135(1) of the B.P. Act. Whereas the accused other than these accused, the prosecution has not been able to prove their case beyond doubt therefore the accused No. 2,3,4,6,7,8,9,11,13,14 and 15 are given the benefit of doubt and are acquitted, and if they are not required in any other matter, then the accused Nos. 2,3,4,6,7,8,11,13,14 be released from

judicial custody. The accused No. 2,4,9 and 15 are enlarged on bail, their bail bonds are ordered to be cancelled."

And by separate order dated 17.01.1996, A-10 and A-12 were sentenced to imprisonment for life for an offence punishable under Section 302 Indian Penal Code [hereinafter referred to as "IPC"]; one year rigorous imprisonment for an offence punishable under Section 148 IPC; and six months rigorous imprisonment for an offence punishable under Section 135(1) of the Bombay Police Act [hereinafter referred to as "BP Act"].

4. A-1 was sentenced to suffer six years rigorous imprisonment and a fine of Rs.1000/- for an offence under Section 326 IPC and one year rigorous imprisonment for an offence punishable under Section 148 IPC and six months rigorous imprisonment for an offence under Section 135(1) of the BP Act.

5. A-5 was sentenced to six years rigorous imprisonment and fine for an offence punishable under Section 326 IPC and one year rigorous imprisonment for an offence punishable under Section 148 IPC, six months rigorous imprisonment for an offence under Section 323 IPC and six months rigorous imprisonment for an offence under Section 135(1) of the BP Act.

6. All the convicted accused preferred appeal No. 166/1996 before the High Court of Gujarat challenging conviction and sentence. The State of Gujarat filed Criminal Appeal No.167/1996 challenging the acquittal of the remaining thirteen accused. It must be mentioned here that the original complainant also filed a Criminal Revision Petition No.138/1996 challenging the decision of the Sessions Court acquitting eleven of the accused.

7. The two absconding accused nos.16 and 17 "were tried separately for the offences punishable under sections 147, 148, 120B, 302 and 307 read with section 149 of IPC and under Section 25(1)(A) of the Arms Act and under Section 135 of Bombay Police Act in Sessions Case No.58/98."[1] They were found not guilty by the Fast Track Court, Amreli by judgment dated 19.07.2003. The State of Gujarat filed Criminal Appeal No.1226/2003 against the acquittal of accused nos.16 and 17.

8. All the appeals and the revision were clubbed together and disposed of by the High Court by a common judgment dated

1 2.2, Judgment of the High Court.

5.10.2004, which is the subject matter of the various appeals before us.

9. The appeal of A-10 and A-12 was dismissed by the High Court. The appeal of accused nos.1 and 5 was partly allowed. The State appeals challenging acquittals of various accused were dismissed along with the revision filed by the *de facto* complainant. Hence, these appeals, by the State and the *de facto* complainant.

10. Admittedly all the convicts have by now served out their sentences. Some of the accused have even died.

11. An examination of the record in these appeals left us in distress. The judgments of the Sessions Courts as well as the High Court leave too much to be desired.

12. We notice the following striking features from the judgment of the Sessions Court that:

(i) Charges have not been framed in accordance with the requirements of the CrPC;

(ii) There appears to be a charge (however defectively framed), conviction and sentencing of 4 accused for an offence under Section 148 IPC;

(iii) There is an omnibus accusation that the accused committed offences falling under Sections 143,

147, 148 and vicariously liable by virtue of Section 149 IPC for the offence of Section 302 IPC;

(iv) The judgment does not contain any clear finding:

(a) regarding the existence of an 'unlawful assembly' i.e. regarding the accusation of an offence punishable under Section 143 IPC;

(b) number of persons (identified or not) who participated in the attack on the deceased and the injured; or

(c) the identity of such participants.

(v) The judgment is singularly silent regarding the post mortem examination report of one of the 3 deceased and the evidence of the doctor who conducted the post mortem examination. It only discusses the evidence of the doctor who conducted the post mortem on the dead bodies of two of the deceased;

(vi) The judgment does not specify whether the accused 10 and 12 are guilty of causing the death of all the 3 deceased or one of them;

(vii) The legal analysis and appreciation of evidence in the context of the question of vicarious liability is wholly unsubstantial and not in accordance with the settled principles of law; and

(viii) There is material on record to indicate that even some of the accused received injuries in the transaction but no material is on record indicating whether any crime is registered and investigated or anybody is prosecuted in that regard.

13. The judgment in Sessions Case No.118/1992 commences with an omnibus statement:

> "In this case against the present accused, there are charges of offences under sections 302, 307, 324, 147, 148, 149, 120B of IPC and section 25(1)(aa) of the Arms Act and section 135 of the Bombay Police Act, for these offences the charge sheet is filed."

Later in the same paragraph it is stated:

> "Fifteen accused in the case have remained present before the court, my learned predecessor has on 21/3/1994 below Exh. 1 on charges of offences punishable under sections 143, 147, 148, 302 read with 149, 120-b, 307 read with 147, 114, 120-b of the Indian Penal Code and against the accused Nos. 7, 8 and 11 charges under section 27 of the Arms Act, and against all the accused the offence punishable under section 25 of the Indian Telegraphs Act, and for carrying weapons the charges of violation of the Notification by the District Magistrate Amreli, for which against the accused Nos. 2,4,9,15,10,12,13, 1, 3, 6, 7 and 8 the charges of offence punishable under section 135 of the Bombay Police Act, charges were pronounced against the accused."

It appears from the above that no clear charges appear to have been framed. At any rate, no document is brought to our notice showing the charges framed by the Court in spite of repeated enquiry. It must be remembered that it is a case where three persons died and five persons were injured allegedly in an attack by all the accused. Causing death to each one of the three persons or causing injury to each one of the five persons is a distinct offence. Similarly, an offence under Section 307 is a distinct offence specific to a particular victim. The offences under

Sections 147 and 148 are distinct offences. Section 149 IPC does not create a separate offence but only declares the vicarious liability of all the members of an unlawful assembly in certain circumstances.

14. It was held by a three-judge bench of this Court in *Shambhu Nath Singh & Others v. State of Bihar*[2]:

> "**Section 149 of the Indian Penal Code is declaratory of the vicarious liability of the members of an unlawful assembly** for acts done in prosecution of the common object of that assembly or for such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object"
>
> [emphasis supplied]

However, there are benches of a lesser smaller strength[3] which have observed that Section 149 creates a specific and distinct offence. In view of the fact that decision in *Shambu Nath Singh* was decided by a larger bench, the law declared therein must be taken to be declaring the correct legal position. With utmost respect, we may also add that the same is in accord with the settled principles of the interpretation of the statutes having regard to the language of Section 149 and its context.

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2 AIR 1960 SC 725

3 Sheo Mahadeo Singh v. State of Bihar, (1970) 3 SCC 46 paragraph 9; Lalji v. State of Uttar Pradesh, 1989 (1) SCC 437 paragraph 9

15. Chapter XVII of the Code of Criminal Procedure [hereinafter referred to as "CrPC"] deals with "charges" in a criminal case. Sections 211 to 213 deal with the particulars which are required to be contained in a charge in a criminal trial. These provisions are made to ensure a fair procedure by which a person accused of an offence should be tried – a procedure in compliance with the requirement of the mandate of Article 21 of the Constitution of India. The accused are entitled in law to know with precision what is the charge on which they are put to trial. It was held by this Court in *Esher Singh* v. *State of Andhra Pradesh*[4]:

> "It is the precise formulation of the specific accusation made against a person who is entitled to know its nature at the earliest stage. **A charge is not an accusation made or information given in the abstract,** but an accusation made against a person in respect of an act committed or omitted in violation of penal law forbidding or commanding it. In other words, it is an accusation made against a person in respect of an offence alleged to have been committed by him. A charge is formulated after inquiry as distinguished from the popular meaning of the word as implying inculpation of a person for an alleged offence as used in Section 224 of the IPC."
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> [emphasis supplied]

16. In the case on hand where three persons died, the charge under Section 302 must have been framed on three counts against specifically named accused with respect to each of the deceased. Assuming for the sake of argument, that all the 17

4 (2004) 11 SCC 585, para 20

persons are accused of causing the death of each one of the three deceased, distinct charges should have been framed with respect to each of the deceased. It is also necessary that the court should record a specific finding as to the guilt of the accused under Section 302 IPC *qua* the death of a named deceased. If different accused are prosecuted for causing the death of the three different deceased, then distinct charges should have been framed specifying which of the accused are charged for the offence of causing the death of which one of the three different deceased. Charges should also have been proved clearly indicating which of the accused is charged for the offence under Section 302 simpliciter or which of the accused are vicariously liable under Section 149 IPC for causing the death of one or more of the three deceased. Of course, none of the accused is eventually found vicariously guilty of the offence under Section 302 IPC read with Section 149 IPC.

17. By definition of the offences covered under Sections 147 and 148[5], a person cannot be charged simultaneously with both the offences by the very nature of theses offences. A person can only

5 Section 146 IPC defines the offence of rioting. Section 147, IPC prescribes punishment for offence of rioting. Section 148, IPC prescribes punishment for offence of rioting armed with deadly weapons.

be held guilty of an offence punishable either under Section 147 or Section 148.

18. The legal consequences of framing defective charges or omission in charges was considered by this Court in *Dalbir Singh* v. *State of U.P.*[6] and this Court held as follows:

> "Section 464 of the Code deals with the effect of omission to frame, or absence of, or error in, charge. Sub-section (1) of this section provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby."

It is obvious from the above that an erroneous or irregular or even absence of a specific charge shall not render the conviction recorded by a court invalid unless the appellate court comes to a conclusion that failure of justice has in fact been occasioned thereby.

19. In cases where a large number of accused constituting an 'unlawful assembly' are alleged to have attacked and killed one or more persons, it is not necessary that each of the accused should inflict fatal injuries or any injury at all. Invocation of Section 149 is essential in such cases for punishing the members of such

6 (2004) 5 SCC 334

unlawful assemblies on the ground of vicarious liability even though they are not accused of having inflicted fatal injuries in appropriate cases if the evidence on record justifies. The mere presence of an accused in such an 'unlawful assembly' is sufficient to render him vicariously liable under Section 149 IPC for causing the death of the victim of the attack provided that the accused are told that they have to face a charge rendering them vicariously liable under Section 149 IPC for the offence punishable under Section 302 IPC. Failure to appropriately invoke and apply Section 149 enables large number of offenders to get away with the crime.

20. This Court in *Bala Seetharamaiah* v. *Perike S. Rao*[7] held:

> "8. Unfortunately, the Sessions Judge did not frame charge against the accused persons for offence punishable under Section 302 IPC read with Section 149 IPC. It is also important to note that the relevant prosecution allegations so as to bring in the ingredients of the offence punishable under Section 302 IPC read with Section 149 IPC also were not incorporated in the charge framed by the Sessions Judge. The accused were not told that they had to face charges of being members of an unlawful assembly and the common object of such assembly was to commit murder of the deceased and in furtherance of that common object murder was committed and thereby they had a constructive liability and thus they committed the offence punishable under Section 302 IPC read with Section 149 IPC. Of course the mere omission to mention Section 149 may be considered as an irregularity, but failure to mention the nature of the offence committed by them cannot be said to be a mere

7 (2004) 4 SCC 557, para 8.

> irregularity. Had this mistake been noticed at the trial stage, the Sessions Judge could have corrected the charge at any time before the delivery of the judgment. In the instant case, the accused were told to face a charge punishable under Section 302 simpliciter and there was no charge under Section 302 IPC read with Section 149 IPC. Therefore, it is not possible to reverse the conviction of the accused under Section 326 IPC and substitute the conviction for the offence punishable under Sections 302/149 IPC as there was no charge framed against them for such offence."

21. When a large number of people gather together (assemble) and commit an offence, it is possible that only some of the members of the assembly commit the crucial act which renders the transaction an offence and the remaining members do not take part in that 'crucial act' - for example in a case of murder, the infliction of the fatal injury. It is in those situations, the legislature thought it fit as a matter of legislative policy to press into service the concept of vicarious liability for the crime.[8] Section 149 IPC is one such provision. It is a provision conceived in the larger public interest to maintain the tranquility of the society and prevent wrong doers (who actively collaborate or assist the commission of offences) claiming impunity on the

8 Ram Gope v. State of Bihar, AIR 1969 SC 689 paragraph 5: "… When a concerted attack is made on the victim by a large number of persons it is often difficult to determine the actual part played by each offender. But on that account for an offence committed by a member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to be committed in prosecution of the common object, persons proved to be members cannot escape the consequences arising from the doing of that act which amounts to an offence."

ground that their activity as members of the unlawful assembly is limited.

The responsibility of the prosecution and/or of the Court (in a case like the one at hand where large numbers of people (5 or more) are collectively accused to have committed various offences and subjected to trial) - in examining whether some of the members of such group are vicariously liable for some offence committed by some of the other members of such group - requires an analysis. Such analysis has two components – (i) the amplitude and the vicarious liability created under Section 149; and (ii) the facts which are required to be proved to hold an accused vicariously liable for an offence.

22. To understand the true scope and amplitude of Section 149 IPC it is necessary to examine the scheme of Chapter VIII (Sections 141 to 160) of the IPC which is titled "Of the offences against the public tranquility". Sections 141 to 158 deal with offences committed collectively by a group of 5 or more individuals.

23. Section 141 IPC declares an assembly of five or more persons to be an 'unlawful assembly' if the common object of

such assembly is to achieve any one of the five objects enumerated in the said section.[9] One of the enumerated objects is to commit any offence.[10] "The words falling under section 141, clause third "or other offence" cannot be restricted to mean only minor offences of trespass or mischief. These words cover all offences falling under any of the provisions of the Indian Penal Code or any other law."[11] The mere assembly of 5 or more persons with such legally impermissible object itself constitutes the offence of unlawful assembly punishable under Section 143 of the IPC. It is not necessary that any overt act is required to be committed by such an assembly to be punished under Section 143.[12]

24. If force or violence is used by an unlawful assembly or any member thereof in prosecution of the common objective of such assembly, every member of such assembly is declared under Section 146 to be guilty of the offence of rioting punishable with two years imprisonment under Section 147. To constitute the offence of rioting under Section 146, the use of force or violence need not necessarily result in the achievement of the common

9 See *Yeshwant & Others* v. *State of Maharashtra*, (1972) 3 SCC 639
10 Section 40 **"offence".**- Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.
11Manga alias Man Singh Vs. State of Uttarakhand (2013) 7 SCC 629
12 *See* Dalip Singh and Ors. Vs. State of Punjab , AIR 1953 SC 364.

object.[13] In other words, the employment of force or violence need not result in the commission of a crime or the achievement of any one of the five enumerated common objects under Section 141.

25. Section 148 declares that rioting armed with deadly weapons is a distinct offence punishable with the longer period of imprisonment (three years). There is a distinction between the offences under 146 and 148. To constitute an offence under Section 146, the members of the 'unlawful assembly' need not carry weapons. But to constitute an offence under Section 148, a person must be a member of an unlawful assembly, such assembly is also guilty of the offence of rioting under Section 146 and the person charged with an offence under Section 148 must also be armed with a deadly weapon.[14]

26. Section 149 propounds a vicarious liability[15] in two contingencies by declaring that **(i)** if a member of an unlawful assembly **commits an offence in prosecution of the common object of that assembly,** then every member of such unlawful assembly is guilty of the offence committed by the other members

13 *See Sundar Singh Vs. State*, *AIR* 1955 All 232 (FB)
14*See* Sabir *v*. Queen Empress, (1894) ILR 22 Cal 276; In re Choitano Ranto and Others, AIR 1916 Mad 788
15 *See* Shambu Nath Singh Vs. State of Bihar, AIR 1960 SC 725.

of the unlawful assembly and (ii) even in cases where all the members of the unlawful assembly do not share the same common object to commit a particular offence, **if they had the knowledge of the** fact that some of the other members of the assembly are likely to commit that particular offence in prosecution of the common object. The scope of Section 149 IPC was enunciated by this Court in *Masalti*[16]:

> "The crucial question to determine in such a case 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 by section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this court in the case of *Baladin* assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence, and that emphatically brings out the principle that the punishment prescribed by section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

27. It can be seen from the above, Sections 141, 146 and 148 create distinct offences. Section 149 only creates a vicarious

16 *Masalti* v. *State of U.P.*, AIR 1965 SC 202.

liability. However, Sections 146, 148 and 149 contain certain legislative declarations based on the doctrine of vicarious liability. The doctrine is well known in civil law especially in the branch of torts, but is applied very sparingly in criminal law only when there is a clear legislative command. **To be liable for punishment under any one of the provisions, the fundamental requirement is the existence of an unlawful assembly as defined under Section 141 made punishable under Section 143 IPC.**

28. The concept of an unlawful assembly as can be seen from Section 141 has two elements;

(i) The assembly should consist of at least five persons; and

(ii) They should have a common object to commit an offence or achieve any one of the objects enumerated therein.

29. For recording a conclusion, that a person is **(i)** guilty of any one of the offences under Sections 143, 146 or 148 or **(ii)** vicariously liable under Section 149 for some other offence, it must first be proved that such person is a member of an 'unlawful assembly' consisting of not less than five persons

irrespective of the fact whether the identity of each one of the 5 persons is proved or not. If that fact is proved, the next step of inquiry is whether the common object of the unlawful assembly is one of the 5 enumerated objects specified under Section 141 IPC.

30. The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of the overt acts committed by such individual members of the assembly, in our opinion is impermissible. For example, if more than five people gather together and attack another person with deadly weapons eventually resulting in the death of the victim, it is wrong to conclude that one or some of the members of such assembly did not share the common object with those who had inflicted the fatal injuries (as proved by medical evidence); **merely** on the ground that the injuries inflicted by such members are relatively less serious and non fatal.

31. For mulcting liability on the members of an unlawful assembly under Section 149, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence **by the members of the assembly** is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his death by gunshot injuries, the fact that one or two of the members of the assembly did not in fact fire their weapons does not mean that they did not have the knowledge of the fact that the offence of murder is likely to be committed.

32. The identification of the common object essentially requires an assessment of the state of mind of the members of the unlawful assembly. Proof of such mental condition is normally established by inferential logic. If a large number of people gather at a public place at the dead of night armed with deadly weapons like axes and fire arms and attack another person or group of persons, any member of the attacking group would have to be a moron in intelligence if he did not know murder would be a likely consequence.

33. The Sessions Court purported to frame 'issues' – a practice statutorily mandated under the Code of Civil Procedure as one of the ingredients of the adjudication of a suit. But, we are informed that in the State of Gujarat the practice of framing "issues" is prevalent even in the trial of a criminal case. Be that as it may, obviously 'issues' are not the same as "charges". They are not framed prior to the commencement of trial. They are only 'identified' at the time of writing the judgment.

34. Issue Nos.2 and 4 framed by the Sessions Judge are with respect to offence of unlawful assembly, rioting and the vicarious liability under the IPC. Issue Nos. 2 and 4 read as follows:-

> "(2) Whether the prosecution has proved that, the accused and the persons of the complainant party are the Kadva and Leuva Patels of teh Nana Ankadiya, Taluka Amreli, and due to the enemity between them on 11/7/92 at about 22-15 at night near the Nana Ankadiya village Bus stand, near the shop of Bhikhabhai in the public place **all the accused in this matter and the absconding accused** Chandubhai Vallabhbhai and Vallabhbhai Khodabhai, **thus all of these had constituted an illegal assembly** and with the common intention of killing the Leuva Patels of the Nana Ankadiya village, attempted to murder, and at that above time and place, all these accused and the absconding accused with the intentions of achieving their common object, caused rioted and committed criminal offence punishable under section 143, 147?
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> (4) Whether the prosecution is able to prove that, the accused had for achieving the common object of their illegal assembly, made use of the weapons carried by them and had assaulted Chhaganbhai Premjibhai Patel, Madhubhai Mohanbhai Patel and Pragjihai Parbatbhai Patel and fired at them and by such act they were well aware that they would certainly be killed and

> inspite of this intentionally and with the intentions of killing, caused grievous injuries, and all the three persons were assaulted and murdered, the said act was committed by the accused No. 2,4,5 and 9 using stick, and accused No. 10, 12 using sword, and accused No. 1, 3 and 6 using their dhariya, all three deceased were caused injuries and murdered, and thus the accused have committed criminal offence punishable under section 302, 149 and 114 of the IPC"
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> [emphasis supplied]

35. Issue No. 2 makes a reference **to all the accused** put to trial along with absconding accused (put to trial subsequently in Sessions Case No. 58) in the context of the offences of the unlawful assembly and rioting. Issue No. 4 does not make a reference to "all the accused", in the context of the offences under Sections 302 read with Section 149 IPC. But in view of the reference to the illegal (obviously the learned Judge meant unlawful) assembly we assume that the Sessions Court intended to examine the vicarious liability under Section 149 of all the accused in the context of the death of the three victims. Since the prosecution invoked Section 149, charges should have been framed specifying which of the accused are sought to be punished for which offence with the aid of Section 149.

36. From the judgment of the Sessions Court, we do not see any clear findings recorded (i) as to the existence of an unlawful assembly, (ii) if it existed, how many (number of the members)

were present in the unlawful assembly. It must be remembered that the accusation is that all the 17 accused were members of the unlawful assembly. There appears to be an accusation of the commission of the offence under Section 143 IPC. There is no finding whether the assembly consisted of 17 members or less (number) and which of the 17 accused were present (the identity) in the assembly. Nor is there any clear finding regarding the common object of the assembly. Consequentially, there is no finding recorded by the Sessions Court whether an offence of unlawful assembly punishable under Section 143 was committed by all or some of the accused. The Trial Court recorded the conviction under Section 148 IPC against 4 accused. Logically it should follow that the trial court was of the opinion that there was an unlawful assembly. That means more than 5 people participated in the attack. In such a case even assuming for the sake of argument the identity of the accused (other than the 4 convicts) is not proved beyond reasonable doubt, A-1 and A-5 who were found to have been guilty of the offence under Section 148 should normally have been found vicariously guilty of the offence of murder along with A-10 and A-12 (provided of course that they are not prejudiced by the improper framing of charges).

The record is not very clear whether the accused were told they were to face a charge of being members of the unlawful assembly, whose common object was to commit murder of the three deceased.

37. Coming to the conviction of A-10 and A-12, the mere statement in the Sessions Court's judgment that two of the accused were found guilty of offence punishable under Section 302 of the IPC falls short of the requirement of law in a case where more than one person died in the transaction. Equally the other two accused who are convicted of other offences mentioned earlier are entitled to know the details of the offence for which they are convicted.

38. We shall now examine the judgment of the High Court. The High Court completely failed to take note of the defects in framing of the charges.

The High Court recorded a finding at paragraph 19, that the prosecution witnesses are trustworthy and they had witnessed the incident. However, in paragraph 20[17], the High Court records

17 "20.… However, all the PWs have not specifically involve all the accused. Likewise, there are certain discrepancies in their evidence regarding the part played by them, the weapons carried by them etc., that in our opinion is natural as all the accused, 17 in number came all of a sudden and started assaulting and that too during night hours when visibility was also low. Because of the same, the learned trial judge acquitted A-2, A-3, A-4, A-6, A-7, A-8, A-9, A-11, A-13, A-14 and A-15 by giving benefit of doubt. **In other words, the learned**

that there are discrepancies in the evidences of PWs regarding the part played by each of the accused, the weapons carried by them, etc.. The High Court takes note of the fact that the Sessions Court acquitted 11 accused by giving the benefit of doubt. To us, it is not very clear whether the Sessions Court doubted the very presence of the 11 accused in the unlawful assembly or the Sessions Court doubted the very existence of an 'unlawful assembly' for the lack of proof of either the requisite number of the accused to constitute the unlawful assembly or for the lack of proof of the common object which renders the assembly to be an unlawful assembly (even if the court concluded that more than 5 people participated in the transaction). The High Court readily drew an inference that the Sessions Court disbelieved the case of the prosecution regarding the existence of an unlawful assembly, in our opinion, a very unsatisfactory way of analyzing the case of the prosecution vis-à-vis the vicarious liability of the accused under Section 149.

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trial judge disbelieved the case of the prosecution of unlawful assembly and convicted the accused of their individual act. After carefully examining the evidence on record, we are of the view that the presence of A-2, A-4, A-9 and A-15 who were alleged to have carried sticks, is not established. The complainant involved them in his further statement. Likewise other PWs are also contradicted about the presence of these accused with their previous statement. Apart from that in the post mortem reports of the deceased as well as in the injury certificates of the injured, the injuries do not reveal any injury possible with sticks."

The High Court recorded a finding with reference to 4 accused (A-2, A-4, A-9 and A-15) who according to the prosecution were alleged to have carried sticks, that there is no evidence on record to prove the same on three grounds: (i) that their names were not to be found in the FIR (ii) that there were improvements in the evidence of the PWs at various stages regarding the presence of the four accused and (iii) that the medical evidence does not disclose any injury which could have been attributed to the beatings by sticks. In our opinion, the first two reasons given by the High Court are legally tenable, however, the third reason, i.e. the absence of injuries attributable to a stick, **need not necessarily result** in a conclusion that the accused were not present in the unlawful assembly. But the absence of such injuries cannot said to be an irrelevant consideration in arriving at a conclusion whether the four accused participated in the unlawful assembly in the background of the other two factors mentioned above. But a similar analysis with respect to the seven of the other accused who were given the benefit of doubt by the Sessions Court is lacking in the judgment of the High Court.

Another important aspect of the matter is that at least one of the accused (A-7) appears to have been injured in the transaction and it appears from the judgment of the High Court that an FIR in that regard was lodged. A submission was made that there was tampering with the record to screen the offence.[18] This aspect of the matter has not been considered either by the trial Court or by the High Court. In fact, the judgment of the trial Court contains further details regarding this aspect of the matter but without recording any conclusive finding.

39. The question is whether this court would be justified in reversing the finding of acquittal in the case on hand on the grounds that (i) the framing of charges is egregiously erroneous and not in accordance with the provisions of the CrPC; or (ii) the courts below failed to record appropriate findings with respect to the various offences which the accused are said to have committed; or (iii) the 1st appellate court's reasoning in declining to reverse a finding of acquittal recorded by the trial court is

18 Impugned Judgment Para 6.

> " … Finally, Mr. Shethna submitted that investigation in the instant case is also not free from doubt. According to him, the manner in which the FIR given by A-7, being the first in point of time, was treated and the manner in which the investigating officer expresses his ignorance in the hospital of the erasure made in the station diary etc. would go to show that a deliberate attempt is made to falsely involve the accused."

defective? The answer to the question, in our opinion, should be in the negative.

40. In Sessions Case No.58/98 against A-16 and A-17, no evidence was recorded independently. On the other hand, the evidence recorded in Sessions Case No.118/1992 was marked as evidence in Sessions Case No.58/1998. The Indian Evidence Act, 1872 does not permit such a mode of proof of any fact barring in exceptional situations contemplated in Section 33[19] of the Indian Evidence Act.

41. There is no material on record to warrant the procedure adopted by the Sessions Court. On that single ground, the entire trial of Sessions Case No.58/98 is vitiated and is not in accordance with procedures established by law. It is a different matter that both the accused put to trial in Sessions Case No.58/98 were acquitted by the Fast Track Court and the High

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19 "**33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. — Evidence given by a witness** in **a judicial proceeding**, or before any person authorized by law to take it, **is relevant for the purpose of proving**, in **a subsequent judicial proceeding**, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided —

that the proceeding was between the same parties or their representatives in interest; that **the adverse party in the first** proceeding **had the right** and **opportunity to cross-examine**;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.— A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

Court did not interfere with the conclusions recorded by the Fast Track Court.

42. It is the grievance of the appellant that in spite of the gravity of the offence and the evidence of the 5 injured witnesses, most of the accused went scot free without any punishment and, hence, this appeal.

We do understand the grievance of the appellant. The following prophetic words of Justice V.R. Krishna Iyer[20] deserve to be etched on the walls of every criminal court in this country:

> **"6. ... The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned Author [Glanville Williams in 'Proof of Guilt'.] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted "persons" and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. ..."**
>
> [emphasis supplied]

20 In *Shivaji Sahabrao Bobade & Anr.* v. *State of Maharashtra*, (1973) 2 SCC 793, para 6

The prophecy came true when Section 21 of TADA Act, 1987 burdened the accused to prove his innocence, and when the Parliament responded to the public outcry to impose more and more harsher punishments to persons found guilty of the offence of rape under Section 376 IPC etc.

43. For all the abovementioned reasons, we should have recorded a conclusion that there is a failure of justice in the case on hand looked at from the point of view of either the victims or even from the point of view of the convicted accused. The most normal consequence thereafter should have been to order a fresh trial, but such a course of action after a lapse of 26 years of the occurrence of the crime, in our opinion, would not serve any useful purpose because as already indicated some of the accused have died in the interregnum. We are not sure of the availability of the witnesses at this point of time. Even if all the witnesses are available, how safe it would be to record their evidence after a quarter century and place reliance on the same for coming to a gist conclusion regarding the culpability of the accused?

44. We are of the opinion that the only course of action available to this court is that the victims of the crime in this case

are required to be compensated by the award of public law damages in light of the principles laid down by this Court in *Nilabati Behera*[21]. In the circumstances, we are of the opinion that the families of each of the deceased should be paid by the State an amount of Rs. 25,00,000/- (Rupees Twenty Five Lacs Only) each and the injured witnesses, if still surviving, otherwise their families are required to be paid an amount of Rs.10,00,000/- (Rupees Ten Lacs Only) each. The said amount shall be deposited within a period of eight weeks from today in the Trial Court, and on such deposit the said amounts shall be distributed by the Sessions Judge, after an enquiry and satisfying himself regarding the genuineness of the entitlement of the claimants.

45. This case, in our opinion, is a classic illustration of how the State failed in its primary constitutional responsibility of maintaining law and order by its ineffectiveness in the enforcement of criminal law. In our opinion, the reasons for such failure are many. Some of them are - (i) inefficiency arising out of either incompetence or lack of proper training in the system of

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21 *Nilabati Behera (Smt) alias Lalita Behera (Through the Supreme Court Legal Aid Committee)* v. *State of Orissa & Others*, (1993) 2 SCC 746.

criminal investigation; (ii) corruption or political interference with the investigation of crime; (iii) less than the desirable levels of efficiency of the public prosecutors to correctly advise and guide the investigating agencies contributing to the failure of the proper enforcement of criminal law; and (iv) inadequate efficiency levels of the bar and the members of the Judiciary (an offshoot of the bar) which contributed to the overall decline in the efficiency in the dispensation of criminal justice system.

Over a period of time lot of irrelevant and unwarranted considerations have crept into the selection and appointment process of Public Prosecutors all over the country. If in a case like the one on hand where three people were killed and more than five people were injured, if charges are not framed in accordance with the mandate of law, the blame must be squarely taken by both the bar and the bench. Another distressing feature of the record in this case is the humungous cross examination of the witnesses by the defense which mostly is uncalled for.

46. In view of the above, the appeals stand disposed of.

.....J.
(J. CHELAMESWAR)

.....J.
(SANJAY KISHAN KAUL)

New Delhi
May 16, 2018.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1525 OF 2009

VINUBHAI RANCHHODBHAI PATEL **APPELLANT(S)**

VERSUS

RAJIVBHAI DUDABHAI PATEL & ORS. **RESPONDENT(S)**

WITH

CRIMINAL APPEAL NO.1526-1527 OF 2009

O R D E R

In view of the situation obtaining on the record, we thought it fit to call for the assistance of Mr.S.Nagumuthu and Ms.Tarannum Cheema, learned counsel to assist this Court. We place on record the invaluable assistance rendered by them as amicus curiae.

We also deem it appropriate to place on record the appreciation for the effort put in by Mr.A.Selvin Raja, learned counsel, a young member of the Bar, appearing for the appellant.

.....J.
[J.CHELAMESWAR]

.....J.
[SANJAY KISHAN KAUL]

NEW DELHI
MAY 16, 2018