Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 965 OF 2018

Gurmail Singh & Anr. **...Appellant(s)**

Versus

State of Uttar Pradesh & Anr. **...Respondent(s)**

J U D G E M E N T

C.T. RAVIKUMAR, J.

1. The appellants along with eight others stood the trial before the Court of Additional Sessions Judge – III, Rampur in Uttar Pradesh in Sessions Trial No.167/1981 for offences under Sections 302/149, 307/149, 147 and 148 of the Indian Penal Code (for short 'IPC'). As per judgment dated 10.06.1982 all of them were convicted under Section 302/149, IPC. Further, it was found that offence u/S 307/149 was not made out against them, but offences under Sections 324/149 and 323/149 were made out. Consequently, they were also convicted under those Sections. In addition, seven of the accused persons including the appellants were convicted under Section 148, IPC and the three others were convicted under Section 147, IPC. For the conviction under Section

302, IPC they were sentenced to undergo imprisonment for life. For the convictions under the other Sections, they were handed down different terms of imprisonment and all the sentences were directed to be run concurrently. They jointly filed appeal viz., Criminal Appeal No.1510/1982 before the High Court of Judicature at Allahabad. During its pendency seven of them died and consequently, qua them the Appeal was dismissed as abated. As per the impugned judgment dated 19.08.2014, the said appeal qua the surviving appellants – Gurmail Singh, Kewal Singh and Karnail Singh was dismissed and the conviction and the sentences were confirmed. Though this appeal has been preferred jointly by Gurmail Singh and Kewal Singh the latter died during the pendency of this appeal. Hence, this appeal qua Kewal Singh got abated. Karnail Singh did not join in this appeal. In short, this appeal survives only in the case of the first appellant – Gurmail Singh and hence, in this appeal, hereafter, he is referred to as 'the appellant'.

2. The appellant was accused No.3 before the Trial Court. Realizing the real scope of the appeal, the learned counsel for the appellant confined his arguments only for alteration of the conviction to one under Section 304 of the IPC in place of the conviction under Section 302, IPC.

3. Heard, the learned counsel for the appellant and also the learned counsel for the State.

4. Briefly stated, the prosecution case is as under:

PW-1 Shri Darshan Singh lodged the First Information Report. Accused Nos. 1 and 2 Messrs. Thakur Singh and Chanan Singh are real brothers of his father Dalip Singh (hereinafter referred to as – the deceased). The siblings purchased sixteen acres of land in village Dhuriayee in district Rampur under two different sale deeds. A sale deed for ten acres of land was executed in favour of Messers Thakur Singh and Chanan Singh and the remaining six acres were registered in favour of the deceased under a separate sale deed. Based on mutual consent a partition of the lands covered by the said sale deeds was effected. Chanan Singh was a chronic bachelor and he was living with Thakur Singh and they were jointly cultivating on the ten acres of land lying towards west of the hedge raised to separate fields, referred to in Hindi by the parties '*Mend*', lying from north to south direction (vertical), raised to separate the lands of the parties. The deceased was cultivating on the portion lying towards east of the said Mend. While so, at a belated stage Thakur Singh and Chanan Singh sought for an exchange of the lands and asked the deceased to cultivate on six acres of land situating towards south of the total extent of sixteen acres so as to enable them to effect cultivation on the remaining extent. This was not agreeable to the deceased. The said sibling dispute initially led to civil litigations and later on, led to the unfortunate incident in which Dalip Singh lost his life. The genesis of the incident is a disputation over the sown field which is a strip of four acres out of the total extent of sixteen acres.

5. On 26.10.1980, PW-1, his parents and brothers were in their house when their servant Rohtash came to inform them that Thakur Singh and Chanan Singh were getting the paddy crop (sown by Dalip Singh), reaped using 20-25 labourers and whereupon they proceeded thitherwards. PW-1 was holding a *lathi* fixed with *iron buri* and the others were unarmed. On reaching the spot Dalip Singh asked Thakur Singh and Chanan Singh to stop harvesting. Thakur Singh was armed with *Gandassi*, Karnail Singh was armed with sword, Chanan Singh and Harcharan Singh were armed with *lathis*, Gurmail Singh (first appellant) was armed with *ballam*, Singhara Singh was unarmed, Kewal Singh (the Second appellant) had a country-made pistol and Bachan Singh, Avtar Singh and Kartar Singh had guns in their hands. Then co-accused Singhara Singh ordered to drive Dalip Singh and his men off the field and meanwhile, the men engaged by them continued to reap the crops. Soon, Bachan Singh, Avtar Singh and Kewal Singh who were carrying firearms fired at Dalip Singh with a view to kill him and on sustaining firearm injuries he fell down. When PW-1 ran towards Dalip Singh the other accused persons inflicted injuries on him, his brothers Nirmal Singh and also Dalip Singh with their weapons. PW-1 wielded his *lathi* in self defence. When the accused persons fled from the scene, he managed to get a jeep and enroute to hospital Dalip Singh died.

6. In view of the concurrent findings against the accused persons founded on convincing reasons on the questions as to whether there was unlawful assembly and whether the death of Dalip Singh was homicidal in nature, we do

not find any compelling reasons or grounds to disturb those findings. So also, the Courts below concurrently found that Thakur Singh and his men (party accused) were the aggressors and the prosecution has succeeded in explaining the injuries found on two of the accused persons, namely Thakur Singh and Chanan Singh. On our careful consideration, we found that those concurrent findings also call for no interference. However, in view of the contentions raised on behalf of the appellants (to be referred infra) certain questions invite careful consideration.

7. The contention of the appellant is that none of the ante-mortem injuries found on the body of the deceased is attributable him even if the evidence of PW-1 and PW-2 Nirmal Singh are taken as credible. This contention and the contention that the conviction is liable to be converted to one under Section 304, IPC appear to be incongruous, though not fully irreconcilable. It is contended that the appellant was carrying only a *ballam* viz., a spear. Ext. Ka.4 postmortem report did not reveal any injury having been caused by a *ballam*. That apart, it is contended that no recovery of any weapon, much less a *ballam* was recovered from any of the convicts. Before proceeding further with such contentions, it is only apposite to refer to the evidence of PW-4 Dr. HB Bhatt who conducted the postmortem on the body of Dalip Singh on 27.10.1980 and prepare Ex.Ka.4 report. Going by Ext. Ka-4 postmortem report the following were the ante-mortem injuries sustained by the deceased:

(1) Gunshot wound of entry 1cm x 0.5cm present on inner aspect of right thigh, 12cm above from popliteal fossa which was connected to

wound of exist measuring 5cm x 1.5cm on the outer surface of front of right thigh 9cm above from right knee joint. All the blood vessels & tissues were torn in the passage of wound. The femur was broken in pieces. Four pieces of shots were found in the wound. No blackening, tattooing and scorching of skin was present.

(2) Gunshot wound of entry 0.5cm x 0.5cm present on left thigh inner aspect about 13cm above from left popliteal fossa aspect which was connected to wound of exist measuring 0.5cm 0.5cm 4cm above from wound of entry. No blackening was seen.

(3) Abraded contusion present on middle of back little, ring and middle fingers each measuring 2cm x1cm.

(4) Lacerated wound 6cm x 0.5cm x bone deep on left side of head 12cm above from left ear.

(5) Contusion 3cm x 1cm on back of right fore-arm about 3cm above from right wrist joint.

8. PW-4 Dr. HB Bhatt deposed that cause of death was shock and hemorrhage due to injuries. He had also categorically deposed that the injuries were sufficient in the ordinary course of nature to cause death. We have already held that the concurrent findings that the death of Dalip Singh was homicidal is founded on convincing reasons and it calls for no interference. Injury No.1, which is a gunshot wound as described above, had completely torn the blood vessels and tissues in the passage of wound and the size of the said wound would reveal that it is very grievous. The second gunshot injury is also equally grievous in nature. The evidence of PW-1 and PW-2 would thus gain support from the evidence of PW-4 with Ext.Ka-4 report that the deceased had received firearm shots and died of gunshot wounds. Besides those gunshot injuries the deceased had sustained three more ante-mortem injuries as noted above. In view

of the contention of the appellant, as referred to above, it is relevant to the injuries sustained by PW-1 –Darshan Singh and PW-2 –Nirmal Singh who are the sons of the deceased. Their testimonies as PW-1 and PW-2 to the effect that they also sustained injuries in the same occurrence gain support from the evidence of PW-3 – Dr. N.K. Tandon with Exts. Ka.2 and Ka.3. Going by the evidence of PW-3 with Ext. Ka.3 PW-1 Darshan Singh had sustained the following injuries:-

(1) Abrasion, 2cm x ¼ cm, on the shoulder of left arm back side.

(2) Contusion 2½ cm x 1cm on left shoulder back side.

(3) Incised wound, 3cm x ¾ cm x ½ cm on left shoulder back-side.

(4) Contusion 5cm x 1½ cm in the upper portion of the left ear.

(5) Lacerated wound 3cm x ½ cm x bone deep in the back portion of the head. X-ray was advised.

(6) Contusion 5cm x 2cm on the back.

(7) Contusion 2cm x 1cm on the back side behind the left shoulder.

9. The evidence of PW-3 with Ext. Ka.2 would reveal that PW-2 – Nirmal Singh has sustained the following injuries:

(1) Abraded contusion measuring 3cm x 2cm in the lower arm, on the left side 5cm, above the wrist joint in upper side.

(2) Contusion, 5cm x 1½ cm on left arm on the upper portion.

(3) Lacerated wound, 3½ cm x ½ cm x bone deep on the middle of head. X-ray was advised.

10. Though it was found that no case under Sections 307/149, IPC was made against appellant and the other co-convicts, they were evidently, convicted

under Sections 324/149 and 323/149, taking into account the nature of the injuries inflicted on PWs 1 and 2. The Courts below held that PWs 1 and 2 had specifically deposed regarding the presence and participation of the appellant. Nothing was brought to our attention to point out that the finding of the courts below that no serious contradictions were brought out from PWs 1 and 2 to make their testimonies unbelievable. In such circumstances, the evidence of PWs 1 and 2 , which gain support from PW4 with Ext. Ka.4 and also from PW3 with Exts. Ka.2 and Ka.3 can only be taken trustworthy, as has been held by the courts below. Their evidence, as held by the Courts below, will reveal unlawful assemblage in which the appellant was also a member. Even otherwise, the contentions of the appellant as mentioned hereinbefore, would reveal that membership in the unlawful assemblage is not in serious challenge and his core contention is that the prosecution did not establish any overt act on his part. Its tenability for the purpose of appreciating the further contention for alteration of the conviction has to be tested by looking into the consequence, if any, of the further highlighted fact that eight of the ten convicts have died during the pendency of the appeal, either before the High Court or before this Court.

11. In the context of the aforesaid contentions it has become necessary to consider certain other allied questions. The first question in that regard is when once the prosecution established the membership of an accused / convict in the unlawful assembly whether the individual overt act also to be established by the prosecution to bring culpability on him on the principle of constructive /

vicarious liability. According to us, no such burden can be fastened on the prosecution in view of the phraseology under Section 149, I.P.C. Though there are catena of decisions on that question we think it suffice to refer to the decisions in **Amerika Rai & Ors. Vs. State of Bihar** (AIR 2011 SC 1379), **Surendra & Ors. Vs. State of Uttar Pradesh** (AIR 2012 SC 1743) and in **Yunis alias Kariya Vs. State of M.P.** (AIR 2003 SC 539). In **Amerika Rai's** case (supra) this Court held that even the presence in an unlawful assembly, with an active mind, to achieve the common object, would make a person vicariously liable for the acts of the unlawful assembly. In **Surendra's** case (supra) this Court held that inference of common object has to be drawn from the various factors such as the weapons with which the members were armed, their movements, the acts of violence committed by them and the result. In **Yunis'** case (supra) it was held that the presence of the accused as a part of the unlawful assembly is sufficient for his conviction. It was further held that when the presence of the accused at the place of occurrence as part of the unlawful assembly was not disputed it will be sufficient to hold him guilty even if no overt act was attributed to him.

12. The next question to be looked into to appreciate the contentions of the appellant is whether the reduction in number of the convicts below five on account of death of the co-accused got any impact or effect on the surviving convict(s) in the matter of consideration of his/their, vicarious liability in view of Section 149, I.P.C. There can be no two views on the position that reduction

of number of accused/convicts in an appeal, below five on account of acquittal of co-accused/co-convicts and such reduction in numbers below five due to death of co-convicts are different and distinct. The impact and effect of the former situation is no longer res integra. In the decision in **Amar Singh & Ors. Vs. State of Punjab** ((1987) 1 SCC 679) seven persons were charged for offences punishable under Section 148, Section 302 read with Section 149, IPC. There was no case for the prosecution that other persons had also involved in the commission of the offence. It was held that because of the acquittal of three out of the seven accused the remaining four could not have been convicted under Section 148 read with Section 149, IPC.

13. In **Nethala Pothuraju & Ors. Vs. State of Andhra Pradesh** ((1992) 1 SCC 49) also this position was reiterated. That was a case where the case of the prosecution was that seven accused persons formed an unlawful assembly and committed murder in pursuance of a common object and they were charged under Section 302/149, IPC. Four of them were acquitted. In the appeal this Court held that in the said factual situation the remaining three accused could not have been convicted by applying Section 149, IPC. At the same time, it was further held that the non-applicability of Section 149, IPC would not be a bar for convicting accused/appellants if evidence would disclose commission of offence in furtherance of a common intention.

The said provision and the decisions referred above would reveal that the test is that persons having the common object must be five or more. We may

also hasten to add that persons who are simple onlookers are to be excluded in that matter.

14. As stated above, the effect and impact of reduction of the number of convicts pending an appeal owing to the death of co-convicts is bound to be different from the effect and impact of reduction of the number of accused/convicts on account of acquittal. Going by Section 394(1), Cr.P.C. every appeal under Section 377 or Section 378 shall finally abate on the death of the accused. Sub-section (2) thereof provides that every other appeal under Chapter-XXIX (except an appeal from a sentence of fine) shall finally abate on the death of the appellant. The position is that every appeal, except an appeal against the sentence of fine, would abate on the death of the appellant, because the sentence under appeal in such circumstances, could no longer be executed. Though the phraseology in Section 394, Cr.P.C. would suggest that the provisions thereunder got no application in respect of appeal by special leave under Article 136 of the Constitution of India that position was settled otherwise by this Court in the decisions in **Harnam Singh Vs. State of Himachal Pradesh** ((1975) 3 SCC 343) and in **Hari Prasad Chhapolia Vs. UOI** ((2008) 7 SCC 690). In **Harnam Singh's** case (supra) this Court held that Section 394, Cr.P.C. got no application in respect of appeal by special leave under Article 136 of the Constitution of India and, therefore, the question is whether the appeal thereunder would abate on the death of the appellant when it is not governed strictly by that Section. Further it was held that in the interest of uniformity,

there is no valid reason for applying to appeals under Article 136 of the Constitution of India, a set of rules different from those which govern the appeal under the Code. In **Hari Prasad Chhapolia's** case (supra) this Court held that principles of Section 394, Cr.P.C. would apply to appeals filed before the Supreme Court under Article 136 of the Constitution of India.

15. The term 'abatement' or 'abate' has not been defined in Cr.P.C. In the said circumstances, its dictionary meaning has to be looked into. As relates criminal proceedings going by the meaning given in Black's Law Dictionary, 10th Edition, abatement means 'the discontinuation of criminal proceedings before they are concluded in the normal course of litigation, as when the defendant dies'. Thus, it can be seen that the meaning of abatement can only be taken in criminal proceedings as `discontinuation of such proceedings owing to the death of the accused/convict pending such proceedings'. In short, it would reveal that an appeal against conviction (except an appeal from a sentence of fine) would abate on the death of the appellant as in such a situation, the sentence under appeal could no longer be executed. The abatement is certainly different from acquittal and a mere glance at the proviso to Section 394 (2), Cr.P.C., will make this position very clear. The said proviso reads thus :

> "Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate."

16. The long and short of the aforesaid discussion is that the mere fact that seven out of the ten convicts died, either during the pendency of Criminal Appeal No. 1510/1992 before the High Court or during the pendency of this appeal, could not be a reason, by that itself, to canvass non applicability of the provision for constructive/vicarious liability, arising out of the achievement of the common object by the unlawful assembly.

17. Having held the aforesaid points as above, we will now consider the question whether the contention of the appellant that conviction under Section 302/149 is liable to be altered as one under Section 304, either Part-I or Part-II, read with Section 149, IPC. We have already taken note of the fact that the appellant was not charged with offence punishable under Section 302, IPC simpliciter. He was convicted under Section 302 and Section 149, IPC hence, in view of our agreement with the concurrent finding about membership of the appellant in the unlawful assembly, the appellant cannot escape from the constructive/vicarious liability for the act committed by any one of the members of that assemblage by virtue of Section 149, IPC if the common object of the unlawful assembly was to commit murder and not causing grievous injury. We say so, because the object of Section 149 is to make specific that person whose case comes within its gamut cannot be permitted to put forth a defence that he did not, with his own hand, commit the offence committed in prosecution of the common object of the unlawful assembly.

18. We have already referred to the decision in **Surendra's** case where this Court held that inference of common object had to be drawn from various factors, such as, the weapons with which the members were armed, there movements, the acts of violence committed by them and the result. In **Kuldeep Yadav & Ors. Vs. State of Bihar** ((2011) 5 SCC 324) this Court held that in order to attract Section 149, IPC, it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly and it must be within the knowledge of the other members as one likely to be committed in prosecution of the common object. In the decision in **Jai Karan & Ors. Vs. State of U.P.** ((2003) 12 SCC 655) the appellants Jai Karan and Babu were convicted under Section 148, 302 read with Sections 149 and 323 read with Section 149, IPC and the other appellant Veer Bhadra was convicted under Sections 148, 302 read with Sections 149 and 323 read with Section 149, IPC. The court below found that the accused persons were armed with the guns, *kanta* and *banka*, and found to have caused death of the deceased and injured others. This Court held that the evidence of the witnesses stood corroborated by medical evidence and consequently the conviction of the accused for charged offences was upheld. Bearing in mind the decisions and the positions of law emerged from the decisions we will consider the question stated above.

19. Now, we will consider the effect, if any, of non-recovery of weapons allegedly used in the commission of offences charged against the accused. In that regard, the it is only appropriate to refer to the decision in **Rakesh and Anr.**

Vs. State of Uttar Pradesh & Anr. ((2021) 7 SCC 188). It, insofar as relevant, reads thus:

> "For convicting an accused recovery of the weapon used in commission of offence is not a sine qua non. PW1 and PW2, as observed hereinabove, are reliable and trustworthy eye witnesses to the incident and they have specifically stated A-1 Rakesh fired from the gun and the deceased sustained injury. The injury by the gun has been established and proved from the medical evidence and the deposition of Dr Santosh Kumar, PW5. Injury 1 is by gun shot. Therefore, it is not possible to reject the credible ocular evidence of PW1 and PW2 - eyewitnesses who witnessed the shooting. It has no bearing on credibility of deposition of PW1 and PW2 that A-1 shot deceased with a gun, particularly as it is corroborated by bullet in the body and also stands corroborated by the testimony of PW2 and PW5. Therefore, merely because the ballistic report shows that the bullet recovered does not match with the gun recovered, it is not possible to reject the credible and reliable deposition of PW1 and PW2."

In the said circumstances and in the light of the decision in **Rakesh and Anr. Vs. State of Uttar Pradesh & Anr. (supra)**, the non- recovery of the weapons cannot be a ground to discard the evidence of the injured eye witnesses viz., PWs. 1 and 2. Now, we will refer to the evidence in the instant case. The evidence of PW-1 and PW-2 who were the injured witnesses cannot be disbelieved or brushed aside solely because they are the sons of the deceased. There is no need to mention about any decision holding the position that being a relative of the deceased is no reason to discredit their version as this position is well-nigh settled. In this case, the courts below found that nothing was elicited from PWs 1 and 2 by the defence so as to make them untrustworthy. In fact,

their evidence regarding carrying of firearms and their use by the members of the unlawful assembly gets corroboration from the evidence of PW-4 with Ext. Ka.4. Their version that some of the members of the unlawful assembly were carrying other lethal weapons also get corroboration from the evidence of PW-3 with Exts. Ka.2 and Ka.3. We referred to those aspects only to emphasize the fact that PWs 1 and 2 are rightly held as trustworthy witnesses by the courts below.

20. The evidence of PWs. 1 and 2 would reveal that the members of the unlawful assembly were carrying firearms and they used them against the deceased Dalip Singh. The other lethal weapons were used against Dalip Singh and also against them. When the fact is that Dalip Singh sustained two gunshots and even thereafter, he was attacked by the members of the unlawful assembly, how the common object can be said to be one other than committing murder of Dalip Singh. One of the shots was made from a near proximity is evident from the fact that it not only caused tear of blood vessels and tissues in the passage of wound but also caused the femur, which is the strongest bone of a human body, to break into pieces. It cannot be presumed that there was only one gunshot injury as the other gunshot wound was on the left thigh inner aspect. The evidence of PWs 1 and 2 would reveal that on sustaining such gunshot injuries Dalip Singh fell down and when they attempted to go for his rescue they were attacked with weapons. That apart Dalip Singh, who by then, fell on the ground

was again attacked. When someone who sustained gunshot injuries and profusely bleeding was attacked again and the persons who attempted to come to his rescue were also attacked the only inference that can be drawn from such circumstances is that the common object was to do away with the life of that person. In the facts and circumstances, revealed from the evidence appreciated by the courts below the conclusion arrived by them that the unlawful assembly was having the common object to commit murder of Dalip Singh cannot be said to be perverse warranting interference by this Court in exercise of power under Article 136 of the Constitution of India. The very fact that the members of the unlawful assembly, ten in numbers assembled at the place armed not only with firearms but with other lethal weapons as well and the manner in which they committed the violence and the ultimate result would definitely lend support to the said finding.

21. There can be no doubt with respect to the position that in order to make culpable homicide as murder the act by which death is caused should fall not only under any one or more of clauses firstly to fourthly under Section 300, IPC but they should also not fall under any of the five exceptions to Section 300, IPC. Though the appellant contended that the conviction under Sections 302/149 is liable to be altered to one under 304/149 it is a fact that he had failed to bring it within any of the five exceptions to Section 300, IPC. When that be so, there is absolutely no question of considering the contentions that the offence of culpable homicide falls either under 304 (Part I) or 304 (Part II).

22. When the above being the position obtained in this case, we have no hesitation to hold that the High Court was justified in dismissing the appeal filed by the appellant herein, confirming the conviction and sentences passed against him. There are no merits in this appeal and hence it is dismissed.

……. J.
(C.T. RAVIKUMAR)

……. J.
(SUDHANSHU DHULIA)

NEW DELHI;
October 17, 2022