A STATE OF RAJASTHAN

v.

SHIV CHARAN & ORS.

(Criminal Appeal Nos. 1425-1426 of 2007)

JULY 1, 2013

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[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860:

C *s.302/149/148 – Conviction under – By trial court – Sentence of life imprisonment with fine – High Court allowed the conviction to one u/s.323 and reduced the sentence to one year imprisonment on the ground inter alia that fatal injury was attributable to the absconding accused and the* D *complainant party was the aggressor – On appeal, held: Finding of High Court was based on no evidence and hence perverse – It is actually a case where common object of unlawful assembly stood translated into action and members of the assembly succeeded in their mission.*

E *s. 149 – Common object – Invocation of – Discussed.*

Criminal Trial – Non-explanation of serious injuries on the person of accused – Effect of – Held: Non-explanation of serious injuries on the person of accused may be fatal to the F *prosecution case, but if injuries are minor, even if not explained, prosecution case cannot be disbelieved.*

Respondent-accused were prosecuted u/ss. 302/149/ 148 IPC. The accused had also filed a cross-case. Trial court convicted the accused for the offences charged G **and sentenced them to life imprisonment. The High Court in view of the facts that the fatal injury was attributable to the absconding accused; that FIR was registered on the basis of hearsay information; and in view of the injuries on the accused and also that the pending cross-**

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case suggest that complainant party was the aggressor, converted the conviction to one u/s. 323 IPC and converted the life sentence to imprisonment for one year. Hence the present appeal by the State.

Allowing the appeal, the Court

HELD: 1.1. Applicability of Section 149 IPC has its foundation on constructive liability which is the *sine qua non* for its application. It contains essentially only two ingredients, namely, (i) offence committed by any member of any unlawful assembly consisting five or more members and; (ii) such offence must be committed in prosecution of the common object (Section 141 IPC) of the assembly or members of that assembly knew to be likely to be committed in prosecution of the common object. It is not necessary that for common object there should be a prior concert as the common object may be formed on spur of the moment. Common object would mean the purpose or design shared by all the members of such assembly and it may be formed at any stage. Even if the offence committed is not in direct prosecution of the common object of the unlawful assembly, it may yet fall under second part of Section 149 IPC if it is established that the offence was such, as the members knew, was likely to be committed. The court must keep in mind the distinction between the two parts of Section 149 IPC, and, once it is established that unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act, rather they can be convicted for vicarious liability. However, it may be relevant to determine whether the assembly consist of some persons which were merely passive witnesses and had joined the assembly as a matter of ideal curiosity without intending to entertain the common object of the assembly. However, it is only the rule of caution and not

A **the rule of law. Thus, a mere presence or association with other members alone does not *per se* be sufficient to hold everyone of them criminally liable for the offence committed by the others unless there is sufficient evidence on record to show that each intended to or**
B **knew the likelihood of commission of such an offending act, being a member of unlawful assembly as provided for u/s.142 IPC. It may also not be a case of group rivalry or sudden or free fight or an act of the member of unlawful assembly beyond the common object. [Para 16]**
C **[345-H; 346-A-H; 347-A]**

Baladin and Ors. vs. State of U.P. **AIR 1956 SC 181;** *Masalti vs. State of U.P.* **AIR 1965 SC 202: 1964 SCR 133;** *Chandra Bihari Gautam and Ors. vs. State of Bihar* **AIR 2002 SC 1836: 2002 (2) SCR 1164;** *Ramesh and Ors. vs. State*
D *of Haryana* **AIR 2011 SC 169: 2010 (12) SCR 799;** *Ramachandran and Ors. Etc. vs. State of Kerala* **AIR 2011 SC 3581: 2011 (13) SCR 923;** *Onkar and Anr. vs. State of Uttar Pradesh* **(2012) 2 SCC 273: 2012 (2) SCR 1164;** *Roy Farnandez vs. State of Goa and Ors.* **AIR 2012 SC 1030:**
E **2012 (1) SCR 477;** *Krishnappa and Ors. vs. State of Karnataka* **AIR 2012 SC 2946: 2012 SCR 1068 – relied on.**

1.2. Thus, for resorting to the provisions of Section 149 IPC, the prosecution has to establish that (i) there was
F **an assembly of five persons; (ii) the assembly had a common object; and (iii) the said common object was to consist one or more of the five illegal objects specified in Section 141 IPC. [Para 17] [347-C-D]**

1.3. In light of fact-situation of the present case, it is
G **clear that 5 persons had come fully armed, in a vehicle and all of them caused injuries to the deceased. It is actually a case where common object of unlawful assembly stood translated into action and members of the assembly succeeded in their mission. Thus, the view**
H **taken by the High Court that the respondents are liable**

for the acts attributed to them individually and not collectively, being perverse is not worth acceptance. The High Court has committed an error in presuming that the case was one where a free fight had occurred, and therefore, the provisions of Sections 148 and 149 IPC were not attracted; the complainant party were aggressors; and there had been some soft pedaling in the investigation. Such findings are based on no evidence and hence perverse. [Paras 17 and 18] [347-F-H; 348-A]

2. Non-explanation of serious injuries on the person of accused may be fatal to the prosecution case. But where the injuries sustained by the accused are minor in nature, even in absence of proper explanation of prosecution, story of the prosecution cannot be disbelieved. High Court has not considered the issue of non-explanation of injuries on the person of accused in correct perspective. [Paras 20 and 21] [348-G; 349-G-H]

Laxman vs. State of Maharashtra **(2012) 11 SCC 158: 2012 (8) SCR 910;** *Mano Dutt and Anr. vs. State of Uttar Pradesh* **(2012) 4 SCC 79: 2012 (3) SCR 686 – relied on.**

Case Law Reference:

AIR 1956 SC 181	**relied on**	**Para 16**
1964 SCR 133	**relied on**	**Para 16**
2002 (2) SCR 1164	**relied on**	**Para 16**
2010 (12) SCR 799	**relied on**	**Para 16**
2011 (13) SCR 923	**relied on**	**Para 16**
2012 (2) SCR 1164	**relied on**	**Para 16**
2012 (1) SCR 477	**relied on**	**Para 16**
2012 SCR 1068	**relied on**	**Para 16**
2012 (8) SCR 910	**relied on**	**Para 20**

A **2012 (3) SCR 686 relied on Para 21**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos.1425-1426 of 2007

From the judgment and order dated 20.09.2005 of the B High Court of Judicature at Rajasthan at Jaipur Bench in D.B. Criminal Appeal Nos. 1454 and 1458 of 2002

Ajay Veer Singh, Nitin Jain Atul Agarwal, Milind Kumar, for the Appellant.

C G.K. Bansal, Reepak Kansal for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been D preferred against the impugned judgment and order dated 20.9.2005, passed by the High Court of Judicature of Rajasthan at Jodhpur (Jaipur Bench) in D.B. Criminal Appeal Nos.1454 and 1458 of 2002, by way of which, the High Court has converted the conviction of the respondents herein, from E one under Sections 302/149 of Indian Penal Code, 1860 (hereinafter referred to as 'the IPC') and Section 148 IPC to another under Section 323 IPC, and the sentence awarded by the Sessions Court to life imprisonment with fine, has also been substituted by a sentence of one year.

F 2. Facts and circumstances giving rise to these appeals are that:

A. A complaint was submitted by Batti Lal (PW.1) in the Police Station, Bamanwas on 28.8.2000 at about 9 a.m., that G on the said day, his brother Prahlad (since deceased), had been grazing buffaloes. The respondents herein alongwith one Mahesh, absconder, had attacked Prahlad and inflicted injuries on his person. Mahesh had hit Prahlad on the head with a rod, whereas the respondents had inflicted injuries with lathis. H Kedar-accused had tried to push Prahlad to crush him under

the tractor driven by the accused, but could not succeed. Prahlad had then been taken to the local hospital, from where he was referred to Jaipur Hospital, but he succumbed to his injuries while in transit. A

B. On the basis of the said report, a case under Sections 147, 148, 149 and 302 IPC was registered against the respondents and Mahesh, absconder, and investigation commenced. Autopsy on the dead body of Prahlad was performed. The respondents were arrested. All necessary memos were drawn up, and upon completion of the investigation, a charge sheet was filed against the respondents. However, the investigation against Mahesh remained pending, as he had been absconding. B C

C. The trial commenced. The prosecution examined 15 witnesses in support of its case. The respondents were examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.P.C.'). They not only pleaded innocence but also examined one witness in defence. Upon completion of the trial, the learned Trial Court convicted and sentenced the respondents as has been referred to hereinabove. D E

D. Aggrieved, the respondents preferred criminal appeals before the High Court, which were allowed vide impugned judgment and order. F

Hence, these appeals.

3. Shri Ajay Veer Singh, learned counsel appearing for the State, has submitted, that in light of the grievous injuries found on the body of Prahlad (deceased), which are undeniably homicidal in nature, the case certainly did not warrant the conversion of the conviction of the respondents from under Sections 302/149/148 IPC, to one under Section 323 IPC. There was sufficient evidence on record to show that the respondents were the aggressors, and the mere pendency of G H

A the cross case before the Trial Court should not give leverage to the High Court to take such a lenient view. Therefore, the appeals deserve to be allowed.

4. Per contra, Shri G.K. Bansal, learned counsel appearing for the respondents has submitted, that the High Court has B appreciated the entire evidence in correct perspective, and upon realising that it was a free fight, has held that it was not possible to determine, who were the actual aggressors? The view taken by the High Court does not require any interference whatsoever. Thus, the appeals lack merit and are liable to be C dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

D 6. Post-mortem on the body of Prahlad, deceased, was conducted by the team/Board consisting of Dr. N.K. Meena and Dr. Ramesh Chand Gupta (PW.9). The report (Ex.P-14), revealed the following ante-mortem injuries:

(1) "Lacerated wound 3" x ½" x bone deep - Mid of E scalp.

(2) Contusion 2" x ½" (Rt.) wrist joint of both bones.

(3) Abrasion ½ x ½ on front of Rt. ear.

F (4) Multiple linear abrasion on the left lower limb.

In the opinion of the Doctors, the cause of death was shock due to injury on scalp leading to brain hemorrhage.

G 7. The injuries found on the person of respondent Shiv Charan were as follows:

(1) Abrasion with swelling on Lt. Hand dorsal aspect of palms at 1 cm below junction of little finger.

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(2) Abrasion with swelling of Rt. Side parietal region at skull.

(3) Complaint of pain whole back with injury.

8. The injuries found on the person of respondent Kedar were as follows:

(1) Lacerated wound on Rt. Parietal region on skull. Scalp deep soft clotted blood, 5 cm x ½ cm.

(2) Lacerated wound on center of skull soft clotted blood 4 cm x ½ cm scalp deep.

(3) Complaint of Pain Lt. Parietal region with swelling 2 cm x 2 cm.

(4) Complaint of pain Rt. Arm.

9. Ramdhan Meena (PW.2) has deposed that while Prahlad had been grazing the buffaloes in the morning, Mahesh, armed with an iron rod, alongwith the co-accused – respondents, who were armed with lathis, had come there. They all started abusing Prahlad. Mahesh had inflicted a blow on the head of Prahlad with an iron rod, and Shiv Charan had hit him with a lathi on the left side of the face. Nehru had then pushed Prahlad in front of the tractor driven by the accused-respondents, to crush him under it, but could not succeed. Prahlad, injured, had then been taken to a hospital in Jaipur, but died on the way.

This witness was declared hostile, as he did not support the case of the prosecution.

10. Khushi Chand (PW.5), deposed that Prahlad (deceased), had been grazing buffaloes. The respondents, alongwith Mahesh had come there on a tractor. They had started quarrelling with Prahlad. Mahesh had first assaulted Prahlad on the head with an iron rod, and thereafter, the

A respondents herein had assaulted Prahlad with lathis. The witnesses had tried to save Prahlad, but the accused had fled in their tractor by road after beating him. Prahlad had then been taken to the Gangapur Hospital in a cart, after which he had been referred to Jaipur Hospital. He died on the way.

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11. Gopal (PW.4) and Phool Chand (PW.7), had given the same version of events, as they had also been grazing their buffaloes/cattles alongwith Prahlad (deceased).

12. Dr. Shiv Singh Meena (PW.15), who had examined C Prahlad in his injured condition, has proved the injuries on his person.

Dr. Ramesh Chand Gupta (PW.9), who was the member of the board, which conducted the postmortem, deposed that D the layer around the brain had been fractured. There was fracture in his right parietal bone, and fractures on the right radius and alina bone. In his opinion, the cause of death was hemorrhage inside the brain. The injury found on the head of the deceased was sufficient to cause death in the normal course of nature.

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13. Jitendra Jain (PW.12), the Investigating Officer, proved all the recoveries, and answered all questions relating to the investigation. He also admitted that a cross case had been registered by the respondents in regard to the very same F incident, against the complainant party, as accused Kedar and Shiv Charan had also sustained injuries in the said incident.

14. The Trial Court has appreciated the entire evidence on record and has thereafter, rejected the version of Shiv G Charan and Kedar, that they had received injuries as referred to in the cross case, while acting in self-defence. The court has also rejected the theory of grave and sudden provocation, and also that the quarrel had taken place suddenly, and that maar-peet had started without any previous intention or planning. In the instant case, the previous enmity between the parties on

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mortgaging the land also stood established. Considering the gravity of the injuries and the evidence on record, the Trial Court has convicted and sentenced the respondents as has been referred to hereinabove.

15. The High Court while deciding the appeals, has taken the following circumstances into consideration:

(i) The fatal injury on the head of Prahlad (deceased), has been attributed to Mahesh, the absconding accused;

(ii) The informant Batti Lal, was not an eye witness to the incident, and who got the FIR registered on the basis of hearsay information;

(iii) The injuries sustained by the accused, particularly by accused Kedar, suggest that the complainant party had in fact been aggressors; and

(iv) A cross case was registered against the complainant party and the same was pending.

The High Court came to the conclusion after taking into consideration the number of injuries suffered by the accused Kedar and Shiv Charan, that an inference could easily be drawn to the effect that there had been some soft pedaling in the investigation, and that the prosecution had not revealed the genesis of the incident. The High Court, thus, very abruptly reached the conclusion that as there had been no meeting of minds just prior to the incident, or even at the time of incident, the respondents were responsible for their individual acts. Since a fatal injury had been found on the head of the deceased, which had been attributed to be caused by co-accused Mahesh, an absconder, the conviction and sentences were altered as referred to hereinabove.

16. The pivotal question of applicability of Section 149 IPC has its foundation on constructive liability which is the *sine qua*

A *non* for its application. It contains essentially only two ingredients, namely, (I) offence committed by any member of any unlawful assembly consisting five or more members and; (II) such offence must be committed in prosecution of the common object (Section 141 IPC) of the assembly ***or*** members B of that assembly knew to be likely to be committed in prosecution of the common object. It is not necessary that for common object there should be a prior concert as the common object may be formed on spur of the moment. Common object would mean the purpose or design shared by all members of C such assembly and it may be formed at any stage. Even if the offence committed is not in direct prosecution of the common object of the unlawful assembly, it may yet fall under second part of Section 149 IPC if it is established that the offence was such, as the members knew, was likely to be committed. For D instance, if a body of persons go armed to take forcible possession of the land, it may be presumed that someone is likely to be killed, and all the members of the unlawful assembly must be aware of that likelihood and, thus, each of them can be held guilty of the offence punishable under Section 149 IPC. E The court must keep in mind the distinction between the two parts of Section 149 IPC, and, once it is established that unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act, rather they can be convicted F for vicarious liability. However, it may be relevant to determine whether the assembly consist of some persons which were merely passive witnesses and had joined the assembly as a matter of ideal curiosity without intending to entertain the common object of the assembly. However, it is only the rule of caution and not the rule of law. Thus, a mere presence or G association with other members alone does not per se be sufficient to hold everyone of them criminally liable for the offence committed by the others unless there is sufficient evidence on record to show that each intended to or knew the likelihood of commission of such an offending act, being a H member of unlawful assembly as provided for under Section

142 IPC. It may also not be a case of group rivalry or sudden or free fight or an act of the member of unlawful assembly beyond the common object. (Vide: *Baladin & Ors. v. State of U.P.,* AIR 1956 SC 181; *Masalti v. State of U.P.,* AIR 1965 SC 202; *Chandra Bihari Gautam & Ors. v. State of Bihar,* AIR 2002 SC 1836; *Ramesh & Ors. v. State of Haryana,* AIR 2011 SC 169; *Ramachandran & Ors. Etc. v. State of Kerala,* AIR 2011 SC 3581; *Onkar & Anr. v. State of Uttar Pradesh,* (2012) 2 SCC 273; *Roy Farnandez v. State of Goa & Ors.,* AIR 2012 SC 1030; and *Krishnappa & Ors. v. State of Karnataka,* AIR 2012 SC 2946).

17. Thus, for resorting to the provisions of Section 149 IPC, the prosecution has to establish that (i) there was an assembly of five persons; (ii) the assembly had a common object; and (iii) the said common object was to consist one or more of the five illegal objects specified in Section 141 IPC.

There is evidence on record to show that all the respondents had, in fact, come together on a tractor. They had started abusing Prahlad (deceased). Mahesh, absconding accused, had hit Prahlad (deceased), with an iron rod, on his head, and the respondents- accused had also hit him with lathis. Even after inflicting first injury on the head by Mahesh, beating by the present respondents went on and thereafter, the accused ran away. Therefore, in light of such a fact-situation, it is clear that 5 persons had come fully armed, in a vehicle and all of them caused injuries to Prahlad, who succumbed to such injuries. Here, it is actually a case where common object of unlawful assembly stood translated into action and members of the assembly succeeded in their mission. Thus, the view taken by the High Court that the respondents are liable for the acts attributed to them individually and not collectively, being perverse is not worth acceptance.

18. The High Court has committed an error in presuming that the case was one where a free fight had occurred, and therefore, the provisions of Sections 148 and 149 IPC were not

A attracted; the complainant party were aggressors; and there had been some soft pedaling in the investigation. Such findings are based on no evidence whatsoever, and hence, are held to be perverse.

B 19. So far as the injuries found on the person of accused Shiv Charan and Kedar are concerned, the injuries of Shiv Charan are merely abrasions. Dr. M.K. Meena (DW.1) opined that as injuries found on the person of Kedar could be caused by fall on stone and some of his injuries were of superficial nature. The Trial Court dealt with issue of injuries suffered by C the said accused by making reference to the statement of Mohanlal (DW.2), who had stated that all the accused persons were going on a tractor to attend a claim case. The said witness was also with them and when they reached near Bandawal, 6-7 persons surrounded the tractor and stopped it. They started D beating Kedar and Shiv Charan and caused injuries to them.

In fact, this has been a consistent case of all the accused persons while their statements were recorded under Section 313 Cr.P.C. None of the accused has explained how the injuries E were caused to Prahlad (deceased). The Trial Court appreciated the evidence and came to conclusion that the respondents-accused were the aggressive party and they were five in numbers and all of them were armed. Thus, the High Court could not be justified in reversing the findings of fact F recorded by the Trial Court without making reference to any evidence.

20. Non-explanation of serious injuries on the person of accused may be fatal to the prosecution case. But where the injuries sustained by the accused are minor in nature, even in G absence of proper explanation of prosecution, story of the prosecution cannot be disbelieved. (Vide: *Laxman v. State of Maharashtra,* (2012) 11 SCC 158)

21. This Court considered the issue in *Mano Dutt & Anr.* H *v. State of Uttar Pradesh,* (2012) 4 SCC 79 and held as under:

"38. The question, raised before this Court for its consideration, is with respect to the effect of non-explanation of injuries sustained by the accused persons. In this regard, this Court has taken a consistent view that the normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail.

39. Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the existence of two conditions:

(i) that the injuries on the person of the accused were also of a serious nature; and

(ii) that such injuries must have been caused at the time of the occurrence in question.

40. Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be the sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. Reference in this regard can be made to Rajender Singh v. State of Bihar, (2000) 4 SCC 298, Ram Sunder Yadav v. State of Bihar, (1998) 7 SCC 365 and Vijayee Singh v. State of U.P., (1990) 3 SCC 190."

In view of the above, we are of the opinion that the High Court has not considered the issue of non-explanation of injuries on the person of accused in correct perspective.

A 22. In view of above, the appeals succeed and are allowed. The judgment and order impugned before us is set aside and the judgment and order of the Trial Court is restored. The respondents are directed to surrender within a period of 4 weeks from today, failing which, the learned Additional
B Sessions Judge (Fast Track), Gangapur City, is directed to take them into custody and send them to jail to serve the remaining part of the sentence. A copy of the order be sent to the learned Additional Sessions Judge (Fast Track), Gangapur City, for information and compliance.

C K.K.T. Appeals allowed.