Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 223 OF 2008

Rattiram & Ors. ...
.....Appellants

Versus

State of M. P. Through
Inspector of Police .....Respondent

WITH

CRIMINAL APPEAL NO. 458 OF 2008

Satyanarayan & ors. .....Appellants

Versus

The State of Madhya Pradesh Through
Incharge, Police Station Cantt. .....Respondent

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J U D G M E N T

Dipak Misra, J.

In these two appeals assail is to the judgment of conviction and order of sentence passed by the Division Bench of the High Court of Judicature, Madhya Pradesh at

Jabalpur, in Criminal Appeal No. 1568 of 1996 whereby the High Court concurred with the judgment of conviction and order of sentence passed by the learned Additional Sessions Judge, Sagar, in Sessions Trial No. 97 of 1995, except in respect of one Gorelal, Appellant No. 2 before the High Court and Accused No. 2 before the trial court, wherein the present appellants along with Gorelal stood convicted for offences under Section 302 read with Section 149 Indian Penal Code and other offences and sentenced to imprisonment for life with fine of Rs.1000/-, in default of payment of fine, to further undergo rigorous imprisonment for three months.

2. The factual score, as depicted, is that on 29.9.1995, deceased Dhruv @ Daulat along with Ashok Kumar, PW-5, Dheeraj, PW-6, Naresh, PW-7, and Leeladhar, PW-12, was returning home about 11.00 p.m. after attending a wrestling event which was organised at “Kher Mata” (temple) in Makronia, a village in the district of Sagar. As Ashok Kumar, PW-5, complained of pain in the stomach, all of them went to the shop of Gorelal for purchasing medicine and when they

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reached the shop, all the accused persons coming from the house of Chhotelal surrounded deceased Daulat and started assaulting him and despite the beseeching and imploring by the companions the accused persons continued the assault, as a result of which the deceased fell unconscious. As the prosecution story proceeds, he was taken to the hospital and, eventually, succumbed to his injuries. On an FIR being lodged, the criminal law was set in motion and after investigation the appellants were charge-sheeted under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "the Act"), but, eventually, charges were framed under Sections 147, 148 and 302 read with Section 149 IPC. The accused persons pleaded innocence and false implication and claimed to be tried.

3. The prosecution, in order to establish its case, examined 13 witnesses and exhibited number of documents. The defence chose not to adduce any evidence.

4. The learned trial Judge, appreciating the evidence on record, came to hold that the prosecution had brought home the charges against accused, Mohan, under Sections 148 and 302 IPC and against the remaining accused persons under Sections 147 and 302 IPC read with Section 149 IPC and apart from imposing separate sentences under Section 147 IPC sentenced each of them to suffer imprisonment for life as stated hereinbefore.

5. Being dissatisfied with the judgment of conviction, the appellants along with others preferred a singular criminal appeal. In appeal, apart from raising various contentions on merits, it was submitted that the entire trial was vitiated as it had commenced and concluded without committal of the case to the Court of Session by the competent court inasmuch as the Sessions Court could not have directly taken cognizance of the offence under the Act without the case being committed for trial. To bolster the said contention reliance was placed on ***Gangula Ashok***

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and Another* v. *State of Andhra Pradesh[1]**, *Moly and Another* v. *State of Kerala***[2] and ***Vidyadharan* v. *State of Kerala***[3]. The High Court relied on decision in ***State of M. P.* v. *Bhooraji & Ors.***[4] and treated it to be a binding precedent and declined to set aside the conviction or remit the matter for *de novo* trial. The High Court proceeded to deal with the appeals on merits and came to hold that except accused Gorelal all other accused persons were present on the scene of occurrence and had participated in the assault and, accordingly, maintained the conviction and sentence in respect of other accused persons and acquitted appellant No. 2 before the High Court.

6. For the sake of completeness, it is necessary to state that when the matter was listed before a two-Judge Bench, it was noticed that there was a conflict between two lines of judgment of this Court and, accordingly, referred the matter to the larger Bench.

[1] AIR 2000 SC 740
[2] AIR 2004 SC 1890
[3] (2004) 1 SCC 215
[4] AIR 2001 SC 3372

The three-Judge Bench noticed that the real conflict or discord was manifest between ***Moly and Another*** (supra)***, Vidyadharan*** (supra) on one hand and ***Bhooraji & Ors***. (supra) on the other and after due deliberation in ***Rattiram and others*** **v.** ***State of Madhya Pradesh through Inspector of Police***[5], came to hold as follows: -

> "**66.** Judged from these spectrums and analyzed on the aforesaid premises, we come to the irresistible conclusion that the objection relating to non-compliance of Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial and, therefore, the decision rendered in ***Bhooraji*** (supra) lays down the correct law inasmuch as there is no failure of justice or no prejudice is caused to the accused.
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> **67.** The decisions rendered in ***Moly*** (supra) and ***Vidyadharan*** (supra) have not noted the decision in ***Bhooraji*** (supra), a binding precedent, and hence they are *per incuriam* and further, the law laid down therein, whereby the conviction is set aside or matter is remanded after setting aside the conviction for fresh trial, does not expound the correct proposition of law

[5] (2012) 4 SCC 516

> and, accordingly, they are hereby, to that extent, overruled."

7. As the controversy on the said score has been put to rest, we are presently required to advert to the merits of the appeal. At this juncture, we may state that Chhotelal died after pronouncement of the decision in appeal by the High Court and Babulal has expired during the pendency of the appeal before this Court and, therefore, the appeal, as far as Babulal is concerned, stands abated.

8. Mr. Fakhruddin, learned senior counsel for the appellants in Criminal Appeal No. 223 of 2008, has contended that the finding by the trial court which has been accepted by the High Court that all the accused persons had assaulted is founded on absolutely non-appreciation of evidence inasmuch as there is nothing to implicate them in any of the overt acts. It is his alternative submission that all the accused were not present at the scene of occurrence and, therefore, the conviction in aid of Section 149

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IPC of all the appellants herein is wholly unsustainable.

9. Mr. Anis Ahmed Khan, learned counsel appearing for the appellants in Criminal Appeal No. 458 of 2008, has submitted that there has been delay in lodging the FIR and further copy of the report had not been sent to the Magistrate as required under Section 157 of the Code and, therefore, the trial is vitiated. It is also his submission that due to previous animosity the informant has tried to rope in number of persons though they had no role to play in the commission of the crime in question and, hence, they deserve to be acquitted.

10. Per contra, Ms. Vibha Dutta Makhija, learned counsel for the State, would contend that there is evidence implicating all the accused persons in the assault and even assuming no overt act is attributed to them, they were a part of the unlawful assembly being aware of the common object of assault and, hence, the conviction under Section 149 IPC does not warrant any interference.

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11. First, we shall advert to the issue whether all the accused persons had participated in the assault or not. Be it noted, the learned trial Judge as well as the High Court has taken into consideration that Ext. P-7, the FIR and relied on the testimony of PW-5, Ashok Kumar and PW-12, Leeladhar, to record a finding that all the accused persons had assaulted the deceased. On a perusal of the FIR, it is seen that the allegation against Ramesh, Kanchedi, Babulal, Ramcharan and Rattiram is that they came with lathis to assault the deceased. There is mention in the FIR that Kanchedi Kurmi hit the deceased with a big piece of stone and Ramcharan Kurmi hit with a stick. The accused Babulal, Rattiram, Satyanarayan and Ramesh gave blows with fists and kicks. In the FIR it has been mentioned that Chhotelal exhorted to kill the deceased and Dhaniram Kurmi, Govardhan Kurmi, Badri Kurmi and Mohan Kurmi assaulted and specific overt acts have been attributed to them. Ashok Kumar, PW-5 in examination-in-chief has deposed that Dhaniram hit Daulat on the head with a stick,

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Mohan gave a blow on the head with a sword and Badri and Govardhan hit him on the back and hand. Thereafter, he has proceeded to depose that rest of the accused gave fists and kick blows. In the cross-examination, this witness, who had lodged the FIR, has stated that accused Chhotelal, Kanchedi, Ramcharan, Ramesh and Gorelal did not possess sticks. Thus, he has not stated that Kanchedi hit with a big stone. Leeladhar, PW-12, has stated about the exhortation made by Chhotelal and the blows given by Dhaniram and Mohan. As far as Chhotelal, Babulal, Satyanarayan, Rattiram and Gorelal are concerned, he has stated that they hit the deceased with their feet and clenched fists. In the cross-examination he has deposed that Babulal was not present at the place of occurrence. He has also stated that Daulat did not sustain any lathi blow on his legs. He has admitted that some persons were unarmed. Dheeraj, PW-6, and Naresh, PW-7, who were cited as eye-witnesses, have turned hostile. The learned trial Judge, as is evident from the

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judgment, has not adverted to this facet and reached the conclusion that all the accused persons were armed and had assaulted the deceased. The High Court in one line has stated that considering the overall evidence on record it could be said that barring Gorelal all the other accused persons were present and jointly assaulted the deceased. The concurrence of the High Court, we may respectfully state, is bereft of any scrutiny of evidence. On a studied evaluation of the evidence on record, we are of the considered opinion that Chhotelal exhorted and he along with Dhaniram, Mohan, Badri and Govardhan assaulted the deceased. We are disposed to think so because there is clear cut evidence of their involvement and PW-5 and PW-12 have categorically spoken about their overt acts whereas as far as others are concerned, there are material contradictions about their assaulting the deceased. Thus, their involvement in any overt act is not proven by the prosecution and, therefore, we are unable to accept the view of the learned trial Judge which has

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been concurred with by the High Court that all the accused persons had assaulted the deceased.

12. The next limb of submission relates to justifiability of conviction of all the accused persons in aid of Section 149 IPC. The learned trial Judge has held that all the accused persons were present and had assaulted the deceased. The High Court has opined that there is no evidence against the appellant Gorelal. Ms. Makhija, learned counsel for the State would contend that there is ample material that the accused-appellants were present at the place of occurrence and their common object is clear from the facts and circumstances that they shared the common object to assault the deceased and they were in know of the act to be done. Elaborating the same, it is urged by her that it is not a case where the accused persons were just bystanders but, in fact, came with others being aware that some of the accused persons were carrying lathis amd Mohan was carrying a sword. Mr. Fakhruddin and Mr. Anis Ahmed Khan, learned counsel for the appellants, per contra, would

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vehemently urge that the prosecution has really not proven, barring the people who were involved in the assault, that the other accused persons were really present and further assuming that they were present, their mere presence would not attract the concept of common object as engrafted under Section 149 IPC.

13. Before we proceed to analyse the evidence on this score, we think it appropriate to refer to certain pronouncements pertaining to attractability of Section 149 IPC. In ***Baladin and others* v. *State of Uttar Pradesh***[6], a three-Judge Bench has opined as follows: -

> "It is well settled that mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under section 142, Indian Penal Code."

14. The dictum in the aforesaid case was considered by a four-Judge Bench in ***Masalti* v. *The State of Uttar Pradesh***[7], wherein the Bench distinguished the

[6] AIR 1956 SC 181
[7] AIR 1965 SC 202

observations made in the case of ***Baladin*** (supra) on the ground that the said decision must be read in the context of special facts of that case and may not be treated as laying down an unqualified proposition of law. The four-Judge Bench, after explaining the said decision, proceeded to lay down as follows: -

> "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, S. 149 make 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 S. 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."

15. In ***Lalji* v. *State of U.P.***[8] it has been observed that common object of the unlawful assembly can be

[8] (1989) 1 SCC 437

gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

16. In ***Bhargavan and others* v. *State of kerala***[9] it has been held that it cannot be laid down as general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141 IPC. The Bench emphasised on the word "object" and proceeded to state that it means the purpose or design and, in order to make it "common", it must be shared by all.

17. In ***Debashis Daw and others* v. *State of West Bengal***[10], this Court, after referring to the decision in

[9] (2004) 12 SCC 414
[10] (2010) 9 SCC 111

***Akbar Sheikh* v. *State of W.B.*[11],** observed that the prosecution in a case of such nature is required to establish whether the accused persons were present and whether they shared a common object.

18. In ***Ramachandran and others* v. *State of Kerala*[12]**, this Court has opined thus: -

> "**27**. Thus, this Court has been very cautious in a catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under the second part of Section 149 IPC, if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as to what was the number of persons; how many of them were merely passive witnesses; what were their arms and weapons. The number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident."

19. Applying the aforesaid principles, we are required to see whether all the appellants were present at the

[11] (2009) 7 SCC 415
[12] (2011) 9 SCC 257

time of occurrence. We have already opined that Chhotelal exhorted and other accused persons, namely, Dhaniram, Mohan, Badri and Govardhan had assaulted the deceased and there is ample evidence on record to safely conclude that they formed an unlawful assembly and there was common object to assault the deceased who, eventually, succumbed to the injuries inflicted in the assault. As far as other accused persons, namely, Babulal, Satyanarayan, Rattiram, Kanchedi, Ramcharan and Ramesh are concerned, there are really contradictory statements with regard to the presence of the accused persons because PW-12 has stated that Babulal was not present at the place of occurrence. Ashok Kumar, PW-5, has contradicted himself about the weapons carried by Kanchedi, Ramcharan, Ramesh and Gorelal. Leeladhar, PW-12, has not mentioned anything about Ramesh and Govardhan. From the apparent contradictions from the depositions of PW-5 and PW-12 it seems that they have implicated Babulal, Satyanarayan, Rattiram, Ramesh and

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Ramcharan in the crime. As far as Govardhan is concerned, PW-5 has clearly stated that he and Badri hit Daulat with sticks on the back and the neck. The medical evidence corroborates the same. Nothing has been elicited in the cross-examination of PW-5 to discard his testimony. It has come out in the evidence of PW-13 that PW-5 was going along with Babulal, Kanchedi and his brother. We are referring to the same only to highlight that there is an attempt to implicate number of persons. It is borne out in the evidence that the deceased was involved in many criminal offences and there was some bad blood between the accused persons and the deceased. In such a situation it is not unusual to implicate some more persons as accused along with the real assailants.

20. Regard being had to the totality of the evidence on record, filtering the evidence of PW-5 and PW-12 and on studied evaluation we are of the considered opinion that it is not safe to hold that the accused-appellants Ramesh, Kanchedi, Rattiram and

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Satyanarayan were present at the spot and, therefore, it will be inappropriate to record a conviction in aid of Section 149 IPC and we are inclined to think so as we entertain a reasonable doubt about their presence at the scene of occurrence.

21. We will be failing in our duty if we do not deal with the contention of Mr. Khan that when there has been total non-compliance of Section 157 of the Code of Criminal Procedure, the trial is vitiated. On a perusal of the judgment of the learned trial Judge we notice that though such a stance had been feebly raised before the learned trial Judge, no question was put to the Investigating Officer in this regard in the cross-examination. The learned trial Judge has adverted to the same and opined, regard being had to the creditworthiness of the testimony on record that it could not be said that the FIR, Ext. P-7, was ante-dated or embellished. It is worth noting that such a contention was not raised before the High Court. Considering the facts and circumstances of the case,

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we are disposed to think that the finding recorded by the learned trial Judge cannot be found fault with. We may hasten to add that when there is delayed despatch of the FIR, it is necessary on the part of the prosecution to give an explanation for the delay. We may further state that the purpose behind sending a copy of the FIR to the concerned magistrate is to avoid any kind of suspicion being attached to the FIR. Such a suspicion may compel the court to record a finding that there was possibility of the FIR being ante-timed or ante-dated. The court may draw adverse inferences against the prosecution. However, if the court is convinced as regards to the truthfulness of the prosecution version and trustworthiness of the witnesses, the same may not be regarded as detrimental to the prosecution case. It would depend on the facts and circumstances of the case. In the case at hand, on a detailed scrutiny of the evidence upon bestowing our anxious consideration, we find that the evidence cannot be thrown overboard as the version of the witnesses

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deserves credence as analysed before. Thus, this colossal complaint made by Mr. Khan pales into insignificance and the submission is repelled.

22. In the result, we allow the appeals in part and affirm the judgment of conviction and order of sentence recorded against the appellants, namely, Dhaniram, Mohan, Badri and Govardhan. Accused Mohan has been released after completing fourteen years of imprisonment on getting the benefit of remission under Section 433A of the Code of Criminal Procedure. As far as Dhaniram is concerned, he is in custody. The accused-appellants, namely, Badri and Govardhan are on bail. Their bail bonds are cancelled and they be taken into custody forthwith. The accused-appellants, namely, Satyanarayan, Ramesh, Kanchedi and Rattiram are acquitted and as they are on bail, they be discharged from their bail bonds.

.....J.
[K. S. Radhakrishnan]

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.....J.
[Dipak Misra]

New Delhi;
April 18, 2013.

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