Ram Tahal & Ors vs State Of U.P on 18 November, 1971

Equivalent citations: 1972 AIR 254, 1972 SCR (2) 423, AIR 1972 SUPREME COURT 254, 1972 SCD 76, 1973 MADLW (CRI) 110, (1972) 2 SCJ 303, 1972 MADLJ(CRI) 577, 1972 2 SCR 423

Author: P. Jaganmohan Reddy

Bench: P. Jaganmohan Reddy, D.G. Palekar

PETITIONER:
RAM TAHAL & ORS.

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT18/11/1971

BENCH:
REDDY, P. JAGANMOHAN
BENCH:
REDDY, P. JAGANMOHAN
PALEKAR, D.G.

CITATION:
1972 AIR 254 1972 SCR (2) 423
1972 SCC (1) 136

ACT:
Indian Penal Code (Act, 45 of 1860), ss. 34 and 149--Six persons named as the only members of unlawful assembly-Two acquitted Whether others can be convicted under s. 149--Conviction under s. 34--Conditions for.

HEADNOTE:
Six accused were charged with the offenses under ss. 148 and 302 and 307 read with s. 149 I.P.C., for having formed themselves into an unlawful assembly with the common object of demolishing a thatch belonging to the complainant and for causing death and injuries when resisted. The trial court convicted them. On appeal, two of the accused were acquitted and the appellants were convicted for offenses under ss. 148 and 304 and 307 read with s. 149.,
On the question of the validity of the conviction,
HELD : (1) Before s. 149, which prescribes constructive

criminal liability for members of an unlawful assembly, can be called in aid, the court must find with certainty that there were at least five persons sharing a common object. It is possible in some cases that though five were unquestionably present the identity of one or more is in doubt in which case a conviction of the rest with the aid of s. 149 would be good. Therefore, it is not necessary that in every Case five persons must always be convicted before s. 149 can be applied. But in such a, case, the court must find with unerring certainty, that at least five persons were present. [426 H; 427 A-C]

In the present case, the charge definitely named the four appellants who have been convicted, and the two who have been acquitted, a,% being the only members of the unlawful assembly. Since two of the named accused were acquitted the conviction of the other four under s. 148 and Es. 304 and 307 read with s. 149 cannot be sustained on the charge as framed. [427 F-H]

(2) The appellants, however, were guilty of offenses under ss. 304 Pan 1 and 307 read with s. 34. The totality of the circumstances indicated that there was a preconcerted plan and a common intention to remove the thatch and to attack any person who resisted. [432 E-H]

The common intention under s. 34, should be anterior in time to the commission of the crime showing a prearranged plan and prior concert., Generally, it has to be inferred from the acts or conduct of some or all the accused and the totality of relevant circumstances in the case, such as, the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which injuries were caused by one or some of them the acts done by others to assist those causing the injuries, and the concerted conduct subsequent to the commission of the offence as for instance that all of them left the scene of the incident together. [428 A-E]

Dalip Singh & Ors. V. State of Punjab [1954] S.C.R. 145 Mohan Singh v. State of Punjab, [1962] Supp. 3 S.C.R. 848 and Krishna Govind Patil v. State of Maharashtra, [1964] 1 S.C.R. 678, followed.

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JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 27 of 1969.

Appeal by special leave from the judgment, and order dated .May 22, 1968 of the Allahabad High Court in Criminal Appeal No. 2636 of 1967 connected with Criminal Appeal No. 2602 ,of 1967.

D. P. Singh, V. J. Francis and Suresh Prasad Singh, for the appellants.

O. P. Rana, for the respondent.

The Judgment of the Court was delivered by P. Jagmohan Reddy, J. Six accused were charged with ,offenses under Section 302, read with Section 149, Section 307 read with 149 and Section 148 of the Indian Penal Code for having formed themselves into an unlawful assembly with the common object of demolishing the thatch of one Ram Badal, Complainant P.W. 1 on 30th November 1967 at about 9.30 a.m. at Mohalla Alawalpur, Qasba Utraula, District Gonda and for having committed the murder of Ram Harakh alias Harkhey and Jagga, the brother and mother-in-law respectively of said Ram Badal. It appears that Ram Badal had applied on 2-1-66 to the Notified Area Committee, Utraula for permission to construct a thatch on the parti land. Ram Tahal, accused filed an ,objection petition on 6- 1-66 objecting to the construction of the thatch on the ground that Ram Badal was constructing it on a public highway, but when these objections were being enquired into Ram Badal and Ram Tahal came to terms and entered into a compromise by and under which it was agreed that Ram Badal should leave six ft. wide passage between his house and the house of Gharib across the way. Notwithstanding this compromise it is alleged that accused Ram Tahal was not happy and during the Dussehra festival in October 1966 when he wanted to take the Ramlila Viman procession through that passage Ram Badal raised an objection on the ground that there was no precedent for taking such a procession. This dispute was however settled by the intervention of the Notified Area Committee which took an undertaking from the accused Ram Tahal that he would only take the Ranilila Viman procession through that way that year and in future when Ram Badal had completed his construction, the Ramlila procession could only be taken through the six feet wide passage that was being left, and if he could not do so, through that passage he will not have any right to take a procession. This settlement does not appear to have pacified Ram Tahal and it is stated that 10 or 11 days before the occurrence namely on the 19th November 1966 or 20th November 1966 after Ram Badal had constructed his Chhapar Ram Tahal asked him to pull it down and threatened him with consequences if he did not do so. Ram Badal however did not pull down his Chhapar. On the 30th November 1966 at about 9.30 a.m. Ram Tahal, his sons Prem, Mata Din, Pitamber, Pudki and his daughter Tara came to the Chhapar of Ram Badal armed and began to pull it down. Ram Tahal was armed with a Karpa, Prem and Pudki with Ballams, Pitamber and Mata Din with Lathis and Tara with a Bahangi which is a long pole on the two ends of which a weight is bound by ropes and it is carried by putting the pole on the shoulder. When these accused started pulling the Chappar down Ram Badal's brother Ram Harakh, the deceased, who was then present resisted the move of the accused and was beaten by the accused. On Ram Harakh raising an alarm Ram Badal, Ori Lal son of Ram Harakh, Ram Badal's mother-in-law Jagga who lived nearby, Sukhraj P.W. 3 wife's sister's son of Ram Badal rushed to the scene. They were also beaten by the accused. It is the case of the prosecution that Ram Badal had a lathi which he wielded to defend, but notwithstanding this, severe injuries were caused on Ori Lal, Jagga and Ram Harak and they all fell down and even after they had fallen down they had been struck. Accused Prem is said to have struck Jagga with his Ballam after she had fallen down. On Ram Badal and the injured persons raising an alarm Kallu, P.W. 2, Kunnu P.W. 6, Gopi P.W. 7, Bhagirath or Bhagi P.W. 8, Sri Kishan Lal, C.W. 1, Chhotu C.W. 2 and others came to the spot and on their intervention the accused ran away carrying their weapons with them. Jagga and Ram Harakh who were seriously injured were taken to the Police Station, Utraula accompanied by Sukhraj P.W. 3, while Ram Badal P.W. 1 went there on Rikshaw. On the way to the Police Station Jagga expired. Ram Badal, P.W. 1 lodged the First

Information Report at 10.32 a.m. on the same day at the Police Station which was six furlongs away from the place of the incident. In this report all the accused have been named. P.W. 13, the Station House Officer before whom F.I.R. was lodged started investigation and deputed constables for arresting the accused and sent Ram Badal, Ram Harakh, Ori Lal and Sukhraj to Utraula Dispensary where Dr. B. C. Paul, P.W. 12 medically examined and treated them. Subsequently on 5-12- 66 at about 3.15 p.m. Ram Harakh also died in the Hospital. Accused Ram Tahal and Mata Din were arrested on the same day i.e. 30th November 1966 at 3.30 p.m. Of these Ram Tahal was carrying a blood stained Karpa and wearing a blood stained Kurta while Mata Din was carrying a blood stained Lathi whose pieces were Exhibits 9, 10 and 11. There, were injuries found on both the above accused. Pitamber was arrested in the evening of the same day at 8.45 p.m. Ram Tahal and Mata Din were medically examined on 1-12-66 at the District Jail, Gonda and it was found that there were Ram Tahal 2 abrasion and one Traumatic swelling on the back of the left hand below the wrist. On Mata Din were found 3 abrasions, one abrased contusion and one lacerated wound on the right leg middle side. All the injuries on the accused were simple and could have been caused by a blunt weapon like a Lathi and were about two day,% old. Accused Prem and Pudki surrendered themselves on 6-12-66 before the Court while Tara surrendered on 23-12-66 after proceedings under Criminal Procedure Code were taken against her.

The Additional Sessions Judge, Gonda convicted Ram Tahal of offence under section 148, 302/149, 307/149 I.P.C. and sentenced him to death under Sec. 302 read with 149 to 10 years rigorous imprisonment under Sec. 307/149 and to 2 years under section 148 I.P.C. Accused Mata Din, Prem, Pitamber, Pudki and Smt. Tara were convicted and sentenced to life imprisonment under Sec. 302/149, 10 years rigorous imprisonment under Sec. 307/149 and 2 years rigorous imprisonment under Section 148.

Two appeals were filed against this-one by Ram Tahal and the other by the rest of the accused. In the latter appeal Pitamber and Pudki were given the benefit of doubt and were acquitted. The appeals of Ram Tahal and Prem, Mata Din and Tara were partly allowed and they were acquitted of the offenses under Sec. 302 read with 149 and instead the first two namely Ram Tahal and Prem were convicted under Sec. 304/149 and sentenced to life imprisonment. Appellants Mata Din and Tara were convicted under Sec. 304/149 I.P.C. and each of them sentenced to 10 years rigorous imprisonment. Convictions and sentences under the other sections namely under Sec. 307/149 and Sec. 148 I.P.C. against all the 3 accused were maintained but the sentences were directed to run concurrently. Against this Judgment the accused have appealed by special leave.

The first question that has been urged before us is that none of the accused were charged for individual acts but were found guilty under Sec. 304 Part I read with Sec. 149 which requires the presence of five persons who share the common object, but since 3 of them were acquitted the conviction of the appellant is illegal. It is true that before See. 149 which prescribes vicarious or constructive criminal liability for members of an unlawful assembly which under Sec. 141 I.P.C. must consist of 5 or more persons can be called in aid the Court must find with certainty, as observed by Bose, J. in Dalip Singh & Ors. v. State of Punjab(1), that there were at least 5 persons sharing the common (1) [1954] (Vol.V) S.C.R. 145.

object. However, as pointed out in that case "A finding that three of them may or may not have been there betrays uncertainty on this vital point and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation." While saying so it was also pointed out that it is not necessary that in every case 5 persons must always be convicted before Sec. 149 can be applied, because it is possible in some cases for Judges to conclude that though 5 were unquestionably there the identity of one or more is in doubt, in which case a conviction of the rest with the aid of Sec. 149 would be good. In such a case the Court must say so with unerring certainty. A 5-Judge Bench of this Court in Mahan Singh v. State of Punjab(1) has further reiterated this principle where it was pointed out that like Sec. 149 of the I.P.C. Sec. 34 of that Code also deals with cases of constructive liability but the essential constituent of the vicarious criminal liability under Sec. 34 is the existence of a common intention, but being similar in some ways the two sections in some cases may overlap. Nevertheless common intention, which Sec. 34 has as its basis, is different from the common object of unlawful assembly. It was pointed out that common intention denotes action in concert and necessarily postulates a prearranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character but must be actuated by the same common intention which is different from some intention or similar intention. It was also held in Krishna Govind Patil v. State of Maharashtra(2), that it makes no difference whether the acquittal of some of the accused, was by giving them the benefit of doubt or on the ground that evidence was not acceptable. In either case they cannot be said to have conjointly acted with the accused who is said to have com- mitted an offence. If they did not act conjointly with him he could not have acted conjointly with them and he cannot therefore be convicted under Sec. 302 read with 34. The position in law is therefore clear and it appears to us that in so far as the conviction and sentence of the appellants under Sec. 148; 304 read with 149 or 307 read with 149 are concerned they cannot be sustained on the charge as framed against them which definitely named the 3 appellants as also the 3 acquitted accused as being members of an unlawful assembly, who had in the prosecution of the common object of such assembly, unlawfully demolished the thatch of Ram Badal and were guilty of an offence of rioting under Sec. 148 and of murder of Ram Harakh and Jagga under Sec. 302 read with 149 of the attempted murder of Ram Badal, Sukhraj and Orilal under Sec. 307 read with 149.
(1) [1962] Suppl.

(3) S.C.R. 848.

(2) [1964] (1) S.C.R. 678.

L500Sup.CI/72 While this is so the question is whether the convictions under Sec. 302 and 307 can be sustained on the ground that they had a common intention to commit the said offence. The learned Advocate for the Appellant strenuously contends that before the appellants can be convicted under the aforesaid section read with Sec. 34 it must be shown that they had a prior concert to commit the said offence which cannot be concluded on the facts of this case. There is no doubt that a common intention should be anterior in time to the commission of the crime showing a prearranged plan and prior concert, and though, it is difficult in most cases to prove the intention of an individual, it had to be inferred from the act or conduct or other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries

caused by one or some of them, "he acts done by others to assist those causing the injuries the concerted conduct subsequent to the commission of the offence for instance that all of hem had left the scene of the incident together and other acts which all or some may have done as would help in determining the common intention. In other words, the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted. This Court had in Krishna Govind Patil's case already referred to earlier, held that the prearranged plan may develop on 'he spot during the course of the commission of the offence but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so before a Court can convict a person under Sec 302 or read with 34 of the I.P.C. it should come to a definite conclusion that the said person had a prior concert with one or more persons named or un- named for committing the offence.

This being the approach it now remains to be seen whether the evidence in this case would justify a conviction of the accused under Sec. 304 and 307 read with Sec. 34 of the I.P.C. The High Court no doubt held that the witnesses did not give the origin of the fight and there was thus no independent evidence to prove that the fight started, because the appellants came and demolished part of the thatch. The High Court goes on to observe as follows :

> "To our mind, the quarrel being a sudden one and the injuries having been caused in the heat of passion, the case is covered by the Fourth Exception to section 300 I.P.C. From the injuries it cannot be said that the action of the appellants was usually cruel. Each one of the appellants appears to have caused not more than one or two injuries to the fighters on complainant's side but in view of the fact that the spear injuries were caused on the chest which caused the death of Smt. Jagga and Ram Harakh, we think that the appellants have committed culpable homicide not amounting to murder and are punishable under section 304 Part I read with S. 149 I.P.C."

This finding in our view is not justified on the evidence. The Trial Court on an appraisal of the evidence has held that the accused Ram Tahal wanted to take the law into his own hands and along with his children had embarked upon the demolishing of the complainants Chhapar on that fateful day. It was contended that if he had such an intention he would have tried to demolish it immediately when it was been constructed but we agree with the Additional Sessions Judge that his no, doing so at that me when it was being constructed does no' preclude him from having that intention subsequently. According to P.W. 1, accused Ram Tahal had asked Ram Badal to pull it down and threatened him with consequences on his failure to do so. The dying declaration of Ram HaraKh also makes a reference about this dispute. The finding of the Investigating Officer on his local inspection shows that 2 Puras of Khar and 2 Korons were lying in the ground and a portion of Chhapar was pulled out. There was human blood found on the scene of the occurrence and certain pieces of Lathi and Bahangi were found thereon which were also sent to the Chemical Examiner and Serologist . The dying declaration of Ram Harakh to which the High Court does not make any reference much less gave any reason why that could not be relied upon shows that the marpit had started because the accused had pulled down the Chappar and on being asked not to pull down the Chappar they had struck him and other persons at that site. This statement is quite consistent with the evidence of Ram Badal and other eve witnesses of the occurrence that it was the accused who

were the aggressor and had come together armed with the weapons to which we have made reference. This would clearly indicate the common intention of all of them to achieve their object of pulling down the Chhapar and to do so with force, if resisted. If as a result of this aggressive action by the accused who started beating Ram Harakh and others including Ram Badal who came to defend their Chhapar from being demolished they had a right of private defence in exercise of which if they had caused some injuries to the accused side that does not exculpate the action of the accused. Even the High Court does not reject the evidence that the accused Ram Tahal was armed with Karpa, Prem was armed with Ballams, and Mata Din was armed with Lathis and Tara armed with Bahangi and had caused the death ,of two persons, and severe injuries to 3 others.

It is true that according to the accused Ram Tahal the dispute of the Chhapar had nothing to do with the occurrence in question. Ms version in his statement under Sec. 342 before the Additional Sessions Judge was that when he got knocked over a brick of the Thiha and he dug out the brick Harkhey and Ram Badal ran to beat him. , He fell at the feet of Harkhey as to why he was calling his men for 3 Chhataks of brick bat. Thereupon Orilal, Harkhey, Ram Badal and Jagga went to beat him with Lathis. He shouted and raised an alarm when accused Mata Din and Prem came there with lathis and Tara with a Bahangi and they defended themselves and retreated to their Angan. In the Angan they had received 3 or 4 blows and they struck out in self defence. When they fell down Mata Din and he went to the Police Station Utraula. It was there that Kunnu announced that Jagga had expired. He (Ram Tahal) had a Karpa. Pitamber was in school and Pudki was grazing cattle at that time. Accused Mata Din and Prem had lathis. This version of Ram Tahal would corroborate the prosecution evidence that Ram Tahal was armed with a Karpa, Mata Din had lathi and Tara had a Bahangi though as far as the weapon in Prem's hand is concerned he does not admit that he had a Ballam in his hand. While we recognise that the statement of Ram Tahal either incriminating the other accused or in respect of the weapons in their hands, cannot be used against them, there is ample justification for the Trial Court relying upon the evidence of the prosecution witnesses in holding that Ram Tahal had a Karpa, Prem a Ballam, Mata Din a lathi and Tara a Bahangi. The nature of the injuries also to a large extent corroborate the evidence of the eye witnesses upon whom the Trial Court relied.

As already pointed out while the injuries on accused Ram Tahal and Matadin were simple injuries which could be caused by blunt weapon, they are consistent with the evidence of P.W. 1 Ram Badal that he waived a stick in defence. As against this, the injuries on the complainant and the other injured on his side, indicate a much more severe action on the part of the accused and that also with dangerous weapons. Ram Badal had one lacerated wound on the front of the chin which could have been caused by some blunt weapons like a lathi and another punctured injury having the appearance of a cross of two lacerated wounds each 3/4" X 1`/2" on the left side of the back, with surgical emphysema round the wound which according to the Doctor could have been caused by some pointed weapon like the Karpa. Both these injuries were about 2 hours old at the time of the examination and could have been received about 9.30 a.m. that day, namely the day of the incident.

Ram Harakh the deceased had 4 punctured wounds, two lacerated and one abrasion. The place where these injuries were given was : (1) a lacerated wound on the left side of the skull, (2) punctured wound on the left hypochondrium, 4"

below the nipple, (3) punctured wound on the left side of the chest below the axilla with surgical emphysema around the wound and irregular and ill-defined borders, (4) punctured wound on the upper part of the back in between the two axilla with surgical emphysema around the wound, (5) punctured wound in the shape of a cross of two lacerated wounds each 4/5", (6) abrasion on the right mandibular angle and (7) a lacerated wound on the back of the right ring finger at the middle. In the opinion of the Doctor, injuries 2, 3, 4 and 5 were grievous and had been caused by a pointed blade with cross section which could be the blade of Karpa. Injuries 1, 6 and 7 could be caused by a blunt weapon like a lathi.

Orilal had 4 punctured wounds and 2 lacerated wounds. These were : (1) lacerated wound on the left side of the skull, (2) punctured wound on the left side of the face, (3) punctured wound on the front of the neck on the back of the chin, (4) lacerated wound on the cleft between the left middle and ring fingers, (5) punctured wound with appearance of a cross of two lacerated wounds on the chest. The margins were ill-defined, (6) punctured wound with the appearance of a cross of two lacerated wounds each 1/2" X 1/10" on the left side of the back at the middle near the spine with surgical emphysema round the wound. The opinion of the Doctor was that injuries 2, 3, 5 and 6 could be caused by a pointed blade which could be a blade of Karpa;

the rest of the injuries could be caused by a blunt weapon like lathi. These injuries were also about 2 hours old. On Sukhraj P.W. 3 were found 2 punctured wounds and one bruise. These are: (1) punctured wound having the appearance of a cross of two lacerated wounds each 1/2" X 2/5" on the front of the left forearm, margins ill-defined and slightly inverted, (2) punctured wound having the appearance of a lacerated wound each 1/5"X 1/ 10" on the back of the left forearm and (3) a bruise 4" X 1" on the right side of the back in the middle. The medical evidence is that while injury No. 3 was simple injuries 1 & 2 were caused by some pointed blade with 4 edges and square cross section like Karpa. These injuries were also 2 hours old and could have been received at about 9.30 a.m. on the day of the incident.

On the deceased Jagga there were two abrased contusions one on the upper part of the nose and the other below the left eye. A contusion on the left lower jaw and a stab wound with sharp margins 1/2" X 1/3" chest deep, below the inferior angle of the left scapula and 1" towards the outer part. Internal examination had revealed that in the left lung on the upper part of the lower lobe there was a stab wound 1/2" X 1/8"

through and through around which there was 6 oz. of coagulated blood and on the left ventricle of the heart there was a stab wound 1/3" X 1/8". While the first 3 injuries had been caused by a blunt weapon like a Lathi injury No. 4 according to Doctor Gupta was caused by some sharp pointed weapon which could be a Ballam. These injuries clearly show that they must have been given by Ram Tahal who had a Karpa, Prem who had a Ballam and Matadin who had a Lathi. They caused injuries to five persons on the opposite side; on 4 of them severe injuries, of these two died.

There is also evidence to show that Tara was wielding a Bahangi and whether any of the injuries can be traced to her or not she was acting in concert with the others in furtherance of their common intention. Further when on the shouts for help given by the complainant and the injured, others came to their rescue, all of them ran away together. There is no justification therefore for holding as the High Court did that there was no evidence to show as to how the quarrel started. In our view the totality of the circumstances indicate without doubt the inference that there was a preconcerted plan and a common intention to remove the thatch and to attack any person if he resisted. The accused in the furtherance of that common intention began to remove the Chhapar and when Ram Harakh obstructed, they beat him and others who came to resist their attack and aggression.

On these findings the Trial Court convicted them of the offenses of rioting, murder and attempted murder but since two of the accused had been totally acquitted of all charges and the others have been acquitted of the charge of murder and there is no appeal against these acquittals we are unable to say whether these findings by the High Court are justified. Nevertheless the appellants are clearly guilty of offenses under Sec. 304 Part I read with Sec. 34 and also Sec. 307 read with 34 and accordingly we so convict them and substitute these convictions for the convictions of which they were held guilty by the High Court which we have set aside. We however maintain the sentences awarded to them. On these findings Ram Tahal and Prem are sentenced to life imprisonment under Sec. 304 Part I read with 34 while Matadin and Smt. Tara are each sentenced to 10 years rigorous imprisonment for the same offence namely 304 Part I read with Sec. 34 I.P.C. Each of them is further sentenced to 10 years rigorous imprisonment for offence under Sec. 307 read with Sec. 34 I.P.C. The sentences on each of them are directed to run concurrently. The appeal is accordingly dismissed with the said modifications.

V.P.S.