Vijay Pandurang Thakre & Ors vs State Of Maharashtra on 2 February, 2017

Equivalent citations: AIR 2017 SC 897, 2017 (4) SCC 377, AIR 2017 SC(CRI) 387, 2017 (1) ABR (CRI) 770, (2017) 171 ALLINDCAS 119 (SC), (2017) 2 BOMCR(CRI) 44, (2017) 1 CRILR(RAJ) 144, 2017 CALCRILR 2 499, (2017) 4 MH LJ (CRI) 36, (2017) 1 DLT(CRL) 589, (2017) 1 CURCRIR 275, 2017 (2) SCC (CRI) 356, (2017) 1 UC 552, (2017) 2 ALLCRILR 346, (2017) 2 KCCR 120, (2017) 2 SCALE 236, (2017) 1 CRIMES 288, 2017 CRILR(SC MAH GUJ) 144, (2017) 2 RECCRIR 77, 2017 CRILR(SC&MP) 144, AIR 2017 SUPREME COURT 897, AIR 2017 SC (CRIMINAL) 387 2017 (1) ABR (CRI) 770

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Bench: R.K. Agrawal, A.K. Sikri

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1305 OF 2011

VIJAY PANDURANG THAKRE & ORS.	.....APPELLANT(S)	
VERSUS		
STATE OF MAHARASHTRA	.....RESPONDENT(S)	

W I T H

CRIMINAL APPEAL NO. 1300 OF 2011

CRIMINAL APPEAL NOS. 1302-1304 OF 2011

CRIMINAL APPEAL NO. 1306 OF 2011

CRIMINAL APPEAL NO. 1307 OF 2011

AND

CRIMINAL APPEAL NO. 1308 OF 2011

J U D G M E N T

A.K. SIKRI, J.

In all these appeals, there are 21 number of appellants who are all convicted for the offences punishable under Sections 302, 307, 324, 336, 427, 506-II, 148 read with Section 149 of the Indian Penal Code, 1860 (for short the 'IPC') by the Additional Sessions Judge, Nagpur vide his judgment dated 05.02.2010, which is substantially upheld by the High Court vide impugned judgment dated 24.01.2011. Judgment of the High Court in the criminal appeals, that were filed by the appellants, allowed the appeals in part thereby altering the charge under Section 307 IPC to Section 324 of the IPC. However, rest of the conviction recorded by the trial court has been maintained.

2. The appellants are the residents of Village Badegaon, Taluka Saoner, Nagpur. Victims of the said crime are also residents of the same village. Persons belonging to the victim's group (known as Deshmukh Group) as well as those who are accused persons (known as Choudhary Group) are the two rival political groups active in the village politics. On 24.10.2002, elections for Village Panchayat, Badegaon took place. The appellants were supporting Samata Party and four of their candidates got elected in the said elections. On the other hand, Deshmukh Group was representing Shetkari Shet Majoor Party and five of their candidates were elected in the said elections. Shetkari Shet Majoor Party was led by Vijay Deshmukh and Samata Party was led by Bhujangrao Choudhary. Two days after the elections i.e. on 26.10.2002, the incident in question took place.

As per the prosecution, members of the group of accused persons hatched a conspiracy to eliminate leading members of Deshmukh family for taking revenge of their defeat in Gram Panchayat election and in furtherance of their common object, committed the murder of Ashok Deshmukh, and attempted to commit murder of Vilas Deshmukh, Vivek Deshmukh (PW-9 and PW-8 respectively), assaulted Dinesh Deshmukh, Arun Deshmukh, Prafulla Deshmukh, Sau. Kalpana Deshmukh and Smt. Kausabai Choudhary (PW-6, PW-7, PW-13, PW-10 and PW-11 respectively), pelted stones on the houses of Deorao Nakhale and Bhimrao Nakhale (PW-12 and PW-16 respectively) and damaged the scooter of PW-4 Sushil Deshmukh. The incident was witnessed by seven injured witnesses and four eyewitnesses.

The prosecution examined, altogether, 26 witnesses. Out of these, PW-6, PW- 7, PW-8, PW-9, PW-10, PW-11 and PW-13 were the injured eyewitnesses and PW- 2, PW-4, PW-5 and PW-18 were eyewitnesses who did not suffer any injury in the incident. Other witnesses are the doctors (who examined the injured persons and conducted postmortem of the deceased Ashok Deshmukh), Investigating Officer, Executive Magistrate, Panch and other witnesses. On the other hand, defence examined 16 witnesses in all.

It may be pointed out that there was no dispute that death of Ashok Deshmukh was homicidal in nature and the testimony of the doctors on this account is not under challenge. However, in respect of those who suffered injuries, dispute was as to whether injuries were such that there was an attempt to murder these persons. The trial court convicted the accused persons under Section 307 IPC accepting the version of the prosecution. However, the High Court in the impugned judgment

has converted the conviction from Section 307 IPC to Section 324 IPC. Since, neither the State nor the victim has challenged this part, the acquittal of appellants under Section 307 IPC has attained finality.

We may also mention at this stage itself that there was no serious challenge by the learned counsel, who appeared for the appellants, at the time of arguments to the conviction of the appellants under Section 324 IPC. Even otherwise we find that the conviction under Section 324 IPC warrants to be sustained. In view thereof, the only question is as to whether appellants could be convicted of offence under Section 302 IPC along with Section 148 read with Section 149 IPC. Discussion hereinafter would be focussed on this aspect.

It may be mentioned that in all 30 persons were charged under the various Sections mentioned above. As pointed out above, after analysing the evidence of the prosecution as well as that of the defence and other material produced on record, the learned Additional Sessions Judge convicted accused Nos. 1, 2, 4, 6, 9, 10, 12, 13, 16 to 25 and 28 to 30 for various offences giving different sentence ranging from one month to six months under Sections 324, 336, 427, 506-II and 148 IPC. Insofar as conviction under Section 307 read with Section 149 IPC is concerned, rigorous imprisonment for five years was awarded and for offence punishable under Section 302 read with Section 149 IPC, life imprisonment was inflicted upon the aforesaid convicted persons. The remaining accused persons were acquitted. Findings of the trial court are summarised by the High Court in the impugned judgment in the following manner:

> (a) Accused No. 4 Pandhari N. Khandal, Accused No. 10 Vijay P. Thakre, Accused No.13 Kailas Bhoyar, Accused No. 14 Ashok S. Pimparamule, Accused No. 18 Narayan Kothe, Accused No. 19 Baban Karale, Accused No. 20 Marotrao Gawande, Accused No. 23 Chandrashekhar Khorgade and Accused No. 30 Dilip S. Chachane were identified to be present and participating in various acts of assault.

(b) The accused possessed, and have used deadly weapons, such as big size sticks and medium size sticks (Ubharis and Zodpas etc.)

(c) The accused constituted unlawful assembly.

(d) The witnesses depose that the members of the unlawful assembly of accused persons proclaiming that they wanted to eliminate the main persons from Deshmukh family, because of the acrimony which they had due to defeat in the Panchayat election.

(e) Aspects, namely motive and intention, both were proved.

(f) The testimonies of the witnesses were adequate to prove the commission of offence charged and stood to the test of trustworthiness. The omissions relied upon by the defence were neither crucial or material, nor were omissions at all.

State as well as the complainant had filed the appeals against those who were acquitted, which were dismissed by the High Court. The High Court noted that defence of the appellants was that it was a case of stampede, though no attempt was made to explain as to how the stampede could have occurred. The fact of homicidal death and other injuries were not disputed. The enmity between the parties and commotion were also not in dispute. Therefore, one has to proceed on the basis that incident in question took place wherein certain persons belonging to Choudhary Group attacked the persons of Deshmukh family. The most vital question that becomes important in these circumstances is as to whether unlawful assembly had been formed by the convicted persons with common object of causing death of Ashok who lost his life in the said attack. The High Court has taken note of the injuries as revealed in the postmortem report which the deceased suffered and noted that the cause of death is one head injury. The High Court further summarised his conclusion in para 50 of the judgment which reads as under:

> "50. The fact that the evidence brought by the prosecution, tested from any point of view and permutations and combinations leads to the conclusion that:-
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> (1) It was an unlawful assembly.
>
> (2) It gathered after pre-conceived common object of eliminating the members of Deshmukh family and group.
>
> (3) The assembly was equipped with deadly weapons, such as Ubharis, Zodpas etc.
> (4) Unlawful assembly dealt a fatal assault on Ashok.
>
> (5) Unlawful assembly dealt a violent and brutal assault on other injured witnesses, namely PWs 6, 7, 8, 9, 10, 11 and 13 (Dinesh Deshmukh, Arun Bhaurao Deshmukh, Vivek Nanaji Deshmukh, Vilas Bhauraoji Deshmukh, Kalpana Vijayrao Deshmukh, Kausalyabai A. Chaudhari and Praful Uttamrao Deshmukh respectively), and did stone pelting and damaged the houses of PW 12 Deorao Nakhale and PW 16 Bhimrao Nakhale, and damaged the scooter of PW 4 Sushil Deshmukh." Questioning the propriety of the aforesaid approach adopted by the High Court, Mr. Tulsi, learned senior counsel appearing in Criminal Appeal No.1300 of 2011 which is filed by four appellants, submitted that large number of persons were implicated as accused persons and the manner in which the incident took place, it was difficult for the prosecution witnesses to identify as many as 30 persons and the possibility of implicating even those who were not present at the time of the incident, cannot be ruled out, particularly when there was political rivalry between the two groups. He further submitted that motive for false implication gets supported by the fact that in the elections which took place two days before the incident, five persons from Deshmukh Group were elected whereas from Choudhary Group, lesser number of persons i.e. four persons were elected. It was submitted that Deshmukh Group was more dominating group and in these circumstances, there was no question of taking any revenge.

He also submitted that there was a delay in lodging the FIR which could further lend credence to the defence of the appellants that many were falsely roped in. Furthermore, there was no evidence of any conspiracy or common object and, thus, the ingredients of provision of Section 149 IPC could not be taken and the appellants were wrongly convicted under the said provision. In nutshell, his submission was fourfold on the following aspects:

> (1) The entire evidence in the case leaves a room for doubt with regard to the identification of accused persons. This is so, because of a large number of accused persons (30) and even 10-15 more alleged to be present at the time of the incident. Added to this is the fact that their identification is alleged to have taken place in the moonlight, no TIP thereafter, and identification only in court.
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> (2) Delay in lodging FIR, utilized for deliberations about how to implicate all political opponents.
>
> (3) There is a clear motive for false implication on account of rivalry arising out of Panchayat elections in which the accused party had won four seats and complainant party won five out of nine seats. The complainant, thus, in the absence of any evidence of conspiracy had all the opportunity for false implication.
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> (4) In the absence of any evidence of conspiracy, the accused at worst can be held responsible for their individual acts and others against whom there are no specific allegations cannot be held liable as they may be mere spectators, the incident having been taken place on a public road.

In support of the aforesaid submissions, learned counsel referred to various case laws as well. Other counsel appearing for remaining appellants adopted the submissions of Mr. Tulsi.

Learned counsel for the State, on the other hand, relied upon the discussion contained in the judgments of the courts below in support of the prosecution case with the submission that the appellants were rightly convicted and there was no reason to interfere with the same.

After going through the evidence in detail, we are of the opinion that the prosecution evidence is not sufficient to conclude that any conspiracy was hatched by the appellants with common object to cause the death of Ashok or the appellants are charged members of the other group with such an objective. Even as per the prosecution, the convicted persons were not carrying any deadly weapons. They were armed with Ubharis which are small sticks and Ubharis used by the farmers for disciplining the bullocks. This itself would be sufficient to negate the prosecution version that there was a conspiracy and common object to cause fatal harm to the members of the opposite group. At the most, the appellants wanted to inflict some physical harm to the members of the Deshmukh family in order to 'teach them a lesson'. Significantly, while discussing the charge under Section 307 IPC, the High Court itself has gone by the nature of injuries inflicted on other persons and concluded that there was no intention to cause death of any of those who got injured at the time of the incident. However, while dealing with the case of death of Ashok, the High Court went by the

injuries on his person and on that basis concluded that there was a premeditative motive on the part of the appellants to murder him. Except the above, there is no clear evidence of any conspiracy or common objective. In these circumstances, the accused persons, at worst, could be held responsible for their individual acts.

Section 149 IPC reads as under:

> "149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—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." As is clear from the plain language, in order to attract the provision of the Section, following ingredients are to be essentially established.
>
> (i) There must be an unlawful assembly.
>
> (ii) Commission of an offence by any member of an unlawful assembly.
>
> (iii) Such offence must have been committed in prosecution of the common object of the assembly; or must be such as the members of the assembly knew to be likely to be committed.

If these three elements are satisfied, then only a conviction under Section 149, I.P.C., may be substantiated, and not otherwise. None of the Sections 147, 148 and 149 applies to a person who is merely present in any unlawful assembly, unless he actively participates in the rioting or does some overt act with the necessary criminal intention or shares the common object of the unlawful assembly.

In the facts of the present case, we find that common object of the assembly, even if it is presumed that there was an unlawful assembly, has not been proved. The expression 'in prosecution of the common object' occurring in this Section postulates that the act must be one which have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. This expression is to be strictly construed as equivalent to in order to attain common object. It must be immediately connected with common object by virtue of nature of object. In the instant case, even the evidence is not laid on this aspect. As pointed out above, the courts below were influenced by the fact that one of the injuries on the person of Ashok was on his head which became the cause of death and from this, common object is inferred.

In Mukteshwar Rai v. State of Bihar[1], the accused persons were alleged to have formed an unlawful assembly, gathered in a village and set some houses on fire and ransacked. Two persons died as they got burnt and two could not be traced. This Court agreed with the finding of the High Court as to formation of the unlawful assembly. But as to the finding that the common object of the

unlawful assembly was to commit murder took somewhat a different view and observed:

> "The specific overt acts attributed to A-1 and five others who are said to have actively participated in setting the fire and thrown some of the victims into the fire stand disbelieved. It may also be noted that none of the P.Ws. Is injured and we find from the judgment of the High Court that none of the witnesses say that any one of these appellants were armed. The learned Judge has extracted the incriminating part in each of the witnesses against these appellants. It stated that these accused were identified by those respective witnesses mentioned therein in discussing the case against each of th accused. There is nowhere any mention that any one of these appellants were armed. In such a situation the question is whether these appellants also had a common object of committing the murder. We have given earnest consideration to this aspect. Taking a general picture of the case and after a close scrutiny of the evidence we find that two persons were charred to death. This must have been the result of setting fire to those houses. With regards the other two missing persons it cannot be concluded that they were murdered in the absence of any iota of evidence. Under these circumstances we find it extremely difficult to hold that a common object of the unlawful assembly was to commit murder." We would also like to quote the following passage from Thakore Dolji Vanvirji & Ors. v. State of Gujarat[2]:
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> "3. ...Now the question is whether all the accused would constructively be liable for an offence of murder by virtue of Section 149 IPC. So far A-1 is concerned, it is the consistent version of all the eyewitnesses that he dealt a fatal blow on the head with a sword and the medical evidence shows that there was a fracture of skull and the blow must have been very forceful because even the brain was injured. Therefore, he was directly responsible for the death of the deceased and the High Court has rightly convicted him under Section 302 IPC. Now coming to the rest of the accused, all the eyewitnesses have made an omnibus allegation against them. Even A- 2, according to the eyewitnesses, gave only one blow and that the remaining accused gave stick blows. All these injuries were not serious and were simple. The injury attributed to A-2 was on the cheek and the doctor did not say that it caused any damage. So it must also be held to be a simple injury. Then we find only a bruise and an abrasion on the right arm and some bruises on the back. These injuries did not result in any internal injuries. There was not even a fracture of rib. Therefore they must also be simple injuries. It is only injury No. 1 which was serious and proved fatal. Therefore the question is whether under these circumstances common object of the unlawful assembly was to cause the death of the deceased and whether every member of the unlawful assembly shared the same? No doubt Section 149 IPC is wide in its sweep but in fixing the membership of the unlawful assembly and in inferring the common object, various circumstances also have to be taken into consideration. Having regard to the omnibus allegation, we think it is not safe to convict every one of them for the offence of murder by applying Section 149 IPC. On a careful examination of the entire prosecution case and the surrounding circumstances, we think the common object of

the unlawful assembly was only to cause grievous hurt. But A-1 acted in his own individual manner and caused one injury with the sword which proved fatal." No doubt, in the scuffle that took place, one blow came to be inflicted on the head of Ashok which injury proved fatal. However, this by itself cannot be the reason to conclude that there was any intention to commit his murder. If 30 persons had attacked the members of Deshmukh Group, there are no injuries on the vital parts of other persons who got injured in the said episode. Ashok also suffered only one injury on his head and no other injury is on vital part of his body. Had there been any common objective to cause murder of the members of Deshmukh Group, there would have been many injuries on deceased Ashok as well as other injured persons on the vital parts of their body. On the contrary, it has come on record that the injuries suffered by other persons are on their back or lower limbs i.e. legs etc. We, thus, hold that there was no preconceived common object of eliminating the members of Deshmukh family and group and the assembly was not acquired with any deadly weapons either, as held by the High Court. Even the High Court has not pointed out any such evidence. These findings are hereby set aside. The conviction of the appellants under Section 302 IPC is converted into Section 304-II IPC for which the appellants are sentenced for rigorous imprisonment of seven years each. We were informed that all the appellants have already undergone sentence of seven years or more. If that is correct, these appellants shall be released forthwith, if not required in any other case.

Appeals are allowed partly in the aforesaid terms.

.....J. (A.K. SIKRI) .....J. (R.K. AGRAWAL) NEW DELHI;

FEBRUARY 02, 2017.

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[1] 1992 Supp (1) SCC 727 [2] 1993 Supp (2) SCC 534