

A THE STATE OF UTTAR PRADESH

v.

SUBHASH @ PAPPU

(Criminal Appeal No. 436 of 2022)

B APRIL 01, 2022

[M. R. SHAH AND B. V. NAGARATHNA, JJ.]

- Penal Code, 1860: ss.146, 148, 149, 302, 304 – Prosecution case was that six (out of which three persons were unknown) persons came to a shop and attacked the servant (deceased) of the shop with knife and hockey for refusing to provide articles asked by them – Trial Court convicted respondent-accused for offences u/s.302 and 148, however, acquitted the other two known accused – High Court acquitted the respondent for offences u/s.302 as well as s.148 – Instant appeal filed by State – Held: From the medical evidence on record, it was established and proved by prosecution that deceased sustained an injury by knife blow, which was inflicted by one of the six persons, who participated in commission of the offence – Prosecution could not establish and prove who actually inflicted the knife blow – From the dying declaration, it was established and proved that the respondent was part of the unlawful assembly – Therefore, even if the role attributed to him was that of hitting the deceased with a hockey stick, in that case also for the act of other persons, he can be held guilty of having committed the murder of deceased, with aid of s.149 – However, since deceased died due to septicemia after a period of thirty days, conviction u/s.302 r/w s.149 is not warranted and would fall within s.304 Part I – In regard to the conviction of accused u/s.148, merely because three persons were tried and even out of three tried, two persons were acquitted cannot be a ground to not convict the accused under s.148 – Using force or violence by unlawful assembly and one of them using deadly weapon, namely knife, attracts the ingredients of s.148 – Hence, accused is held guilty for the offences u/s.304 Part I r/w s.149 and s.148 – Judgment and order of High Court to be set aside.*

- Evidence Act, 1872: Dying declaration – Evidentiary value of – In the instant case, as per dying declaration six/seven persons*

attacked the deceased – Even in FIR, it was mentioned that six persons attacked – Merely because the weapon used is not recovered cannot be a ground not to rely upon the dying declaration, which was duly recorded and proved.

Evidence Act, 1872: Dying declaration – Deceased died due to septicemia after a period of thirty days – There is no absolute proposition of law that the dying declaration should be discarded as a whole in a case when at the time when the dying declaration was recorded there was no emergency and/or any danger to the life.

Code of Criminal Procedure, 1973: s.464 – Omission to frame charges – s.464 Cr.P.C states that mere defect in language, or in narration or in the form of charge would not render conviction unsustainable, provided the accused is not prejudiced thereby – If ingredients of the section are obvious or implicit in the charge framed then conviction in regard thereto can be sustained, irrespective of the fact that said section has not been mentioned – In the instant case, it can be said from the charges framed that the ingredients for the offences u/s.302 r/w s.149 and s.148 of IPC were specifically brought to the notice of the accused – Mere non-framing of a charge under s.149 IPC on face of charges framed against appellant would not vitiate the conviction in the absence of any prejudice caused to them – Hence, it cannot be said that the accused is prejudiced by non-mention of s.149 IPC in the charge – Penal Code, 1860 – s.302 r/w s.149 and s.148.

Partly allowing the appeal, the Court

HELD: 1. The dying declaration stated that six/seven persons attacked the deceased. Even in the F.I.R., lodged by PW-5, it was specifically mentioned that six persons attacked his brother Bengali, who assaulted him with hockey stick and knife. It is true that PW-5-informant turned hostile. However, at the same time, there is no reason to doubt the dying declaration recorded. As the deceased was having a stab injury by a knife, there was a possibility of danger to his life and therefore, by way of prudence, if the dying declaration was recorded on 05.12.1980, there is no reason to doubt the dying declaration. [Para 6] [842-C-D]

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- A 2. While framing the charge, the respondent accused was not specifically charged for the offence under Section 302 r/w Section 149 IPC. From the charges framed it can safely be said that the ingredients for the offence under Section 302 r/w Section 149 and Section 148 of IPC were specifically brought to the notice of the accused. Therefore, at the most, it can be said to be a defective framing of the charge by not specifically charging under Section 149 IPC. Considering Section 464 Cr.P.C. it is observed that mere defect in language, or in narration or in the form of charge would not render conviction unsustainable, provided the accused is not prejudiced thereby. It is further observed that if ingredients of the section are obvious or implicit in the charge framed then conviction in regard thereto can be sustained, irrespective of the fact that said section has not been mentioned. Applying the law laid down by this Court to the facts of the case on hand and on noting the contents of the charges framed against the accused it shows that the ingredients of Section 149 IPC are satisfied. Therefore, it cannot be said that the accused is prejudiced by non-mention of Section 149 IPC in the charge. [Paras 7, 7.1, 7.3, 8][843-B; 844-F-G; 845-F-H; 846-A]
- B 3. The question whether the accused can be convicted for the offence punishable under Section 302 with the aid of Section 149 IPC is concerned, it is true that the prosecution has not established and proved, who actually inflicted the knife blow. However, from the medical evidence on record and even from the deposition of the doctors, it has been established and proved by the prosecution that the deceased sustained an injury by knife blow, which is inflicted by one of the six to seven persons, who participated in commission of the offence. From the dying declaration it has been established and proved that the respondent – accused Subhash @ Pappu was part of the unlawful assembly, who participated in the commission of the offence. Pappu s/o Baijnath – respondent herein was specifically named by the deceased in the dying declaration. Therefore, even if the role attributed to the respondent -accused was that of hitting the deceased by a hockey stick, in that case also for the act of other persons, who were part of the unlawful assembly of inflicting the knife blow, the respondent accused can be held guilty of having
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committed the murder of deceased Bengali, with the aid of Section 149 IPC. The next question, which is posed for consideration of this Court is whether respondent -accused can be convicted for the offence punishable under Section 302 IPC r/w Section 149 IPC when the deceased died due to septicemia after a period of thirty days. Considering the decision of this Court in the case of Sanjay, the conviction of the respondent accused for the offence punishable under Section 302 r/w Section 149 IPC is not warranted and the case may fall within Section 304 Part I of the IPC. [Paras 10, 11, 11.1][846-C-H]

4. It is the submission on behalf of the accused that the weapon alleged to have been used by the respondent accused was said to be a hockey stick, which cannot be said to be a deadly weapon and therefore, the respondent-accused cannot be punishable for the offence under Section 148 also has no substance. As per Section 148 of IPC, whoever is guilty of rioting, being armed with a deadly weapon or with anything which used as a weapon of offence, is likely to cause death, can be punished under that Section. The term “rioting” is defined under Section 146 IPC. As per Section 146, whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting. In the present case, six to seven persons were part of the unlawful assembly and they used force or violence and one of them used a deadly weapon, namely, knife and therefore, being a part of the unlawful assembly, the respondent accused can be held to be guilty for the offence of rioting and for the use of force/violence as a member of such an unlawful assembly. Therefore, the respondent was rightly convicted by the Trial Court for the offence under Section 148 IPC. [Para 12.1][847-C-G]

Fainul Khan v. State of Jharkhand, (2019) 9 SCC 549; Annareddy Sambasiva Reddy v. State of Andhra Pradesh, (2009) 12 SCC 546 : [2009] 6 SCR 755; Sanjay v. State of Uttar Pradesh, (2016) 3 SCC 62 – relied on.

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- A *Rohtas v. State of Haryana (2020) 14 SCALE 14; Alister Anthony Pareira v. State of Maharashtra (2012) 2 SCC 648 : [2012] 1 SCR 145; Laxman v. State of Maharashtra (2002) 6 SCC 710 – referred to.*

Case Law Reference

B	(2019) 9 SCC 549 [2009] 6 SCR 755 [2012] 1 SCR 145 (2002) 6 SCC 710	relied on relied on referred to referred to	Para 3.7 Para 3.7 Para 3.7 Para 4.4
C	(2016) 3 SCC 62	relied on	Para 4.6

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 436 of 2022.

D From the Judgment and Order dated 30.08.2019 of the High Court of Judicature at Allahabad in Criminal Appeal No. 1462 of 1985.

Ms. Garima Prasad, Sr. Adv., Vishnu Shankar Jain, Ms. Marbiang N. Khongwir, Advs. for the Appellant.

Deepak Goel, Ms. Urvashi Sharma, Advs. for the Respondent.

E The Judgment of the Court was delivered by

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court of Judicature at Allahabad in Criminal Appeal No. 1462 of 1985 by which the High Court has allowed the said

F appeal preferred by the respondent – original accused and has acquitted the respondent for the offences under Section 302 and 148 of Indian Penal Code (IPC), the State of Uttar Pradesh has preferred the present appeal.

2. The facts leading to the present appeal in nutshell are as under:-

G 2.1 One Hari Singh (PW-5) lodged the F.I.R. on 04.12.1980 at 05.15 PM at P.S. Firozabad (South) District, Agra, against the respondent herein – Subhash @ Pappu, Pramod, Munna Lal and three unknown boys. It was alleged in the F.I.R. that on 04.12.1980 at 2:00 PM, Subhash @ Pappu, Pramod and Munna Lal along with three unknown persons H came to the shop of one Hari Om situated in Gallamandi Firozabad,

armed with sticks, hockey stick and knife. They demanded to provide them sugar and kerosene oil without having any ration card but Bangali (the deceased) present at the shop in the capacity of a servant. refused to provide them those articles, then one of the persons gave him a knife blow and some other a hockey stick blow. Therefore, it was alleged that the named accused persons and other three unknown persons have committed the offence under Sections 147, 148, 323, 324 IPC. Bengali, the victim made his dying declaration on 05.12.1980 at 11:40 AM before Additional City Magistrate Agra at S.N. Hospital Agra, where the victim Bengali was taking treatment. That the injured Bengali died on 04.01.1981.

2.2 After the conclusion of the investigation, the Investigating Officer filed the charge sheet against all the accused persons on 25.01.1981 for the aforesaid offences. However, Subhash @ Pappu and other co-accused named in the F.I.R. were shown absconding. The accused Subhash @ Pappu thereafter surrendered before the Court on 06.02.1981. As the case was exclusively triable by the Court of Sessions, the case was committed to the court of IVth Additional Sessions Judge, Agra, which was numbered as Sessions Case No. 361 of 1982. All the accused came to be tried by the Sessions Court for the aforesaid offences. Accused Subhash @ Pappu was charged for the offences under Section 148 and Section 302 of IPC. The other co-accused Pramod and Munna Lal were charges for the offences under Sections 147, 149 and 302 IPC. As all the accused denied having committed any offence and denied the charges, they were put to trial. To bring home the charges, the prosecution examined in all 10 witnesses as under:-

	<u>Name</u>	<u>Deposition</u>
PW-1	Dr. Vijay Kumar	Who conducted the medical examination of the deceased Bengali
PW-2	Head Constable, Shri Gajendra	Who had written the First Information Report as stated by Hari Singh, PW-5
PW-3	Shri V.N. Saxena	Technician, S.N Hospital, Agra
PW-4	Shri Ram Ratan Ojha	Pharmacist, N.N. M. Hospital, Firozabad
PW-5	Hari Singh	Informant
PW-6	Munna Lal	
PW-7	Shri Bhopat Singh	
PW-8	Dr. Surendra Kumar Agrawal	Doctor, who certified Bengali was in his senses and fit at the time of recording of the dying declaration
PW-9	Shri Yudhishtir Sharma	Additional Divisional Transport Officer, who recorded the dying declaration
PW-10	Police Constable, Daya Ram	

- A 2.3 PW-5, the informant turned hostile. Thereafter the statement of the accused under Section 313 of Code of Criminal Procedure (Cr.P.C.) was recorded. In the statement under Section 313 Cr.P.C., it was the case on behalf of the accused that in the dying declaration, the name of Pappu s/o Baijnath is mentioned and he is Subhash @ Pappu.
- B However, it was not his case that in the village, there is one other person named Pappu s/o Baijnath. It is not in dispute that Subhash @ Pappu is son of Baijnath. Relying upon the dying declaration, the Trial Court convicted the accused Subhash @ Pappu for the offences punishable under Section 302 and 148 IPC. The Trial Court, however, acquitted the accused Pramod and Munna Lal. The Trial Court awarded the sentence
- C of life imprisonment for the offence punishable under Section 302 IPC and three years R.I. for the offence under Section 148 IPC so far as accused Subhash @ Pappu is concerned.

- 2.4 Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence convicting the accused Subhash @ Pappu,
- D the accused Subhash @ Pappu preferred the Criminal Appeal before the High Court. By the impugned judgment and order, the High Court has acquitted the accused Subhash @ Pappu for the offence punishable under Section 302 IPC as well as Section 148 IPC mainly on the ground that in the dying declaration it was not stated, who inflicted the knife blow in the stomach of the deceased and on the contrary, it was stated that Pappu s/o Baijnath hit him by a hockey stick. Therefore, the High Court opined that as there is no allegation against Subhash @ Pappu that he inflicted the knife blow in the stomach of the deceased and that there are contradictions in the deposition of the witnesses examined on who gave the knife blow in the stomach of the deceased, the high Court
- F has acquitted the accused.

2.5 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the State has preferred the present appeal.

- G 3. Ms. Garima Prasad, learned Senior Advocate appearing on behalf of the State has vehemently submitted that in the facts and circumstances of the case, the High Court has committed a grave error in acquitting the accused for the offence under Section 302 and Section 148 IPC.
- H 3.1 It is vehemently submitted by Ms. Garima Prasad, learned Senior Advocate appearing on behalf of the State that in the dying

declaration dated 05.12.1980 recorded by Assistant Divisional Transport Officer, it was specifically mentioned that the respondent – accused was present alongwith others and as such has actively participated in commission of the offence. It is submitted that therefore, the respondent can be convicted for the offence under Section 302 IPC read with Section 149 IPC.

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3.2 It is further submitted that initially PW-5 in the complaint specifically alleged that respondent - Subhash @ Pappu inflicted the blow by knife, which was a deadly weapon and therefore, the respondent was charged for the offence under Section 148 IPC also.

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3.3 It is submitted that however, thereafter PW-5, the original complainant/informant turned hostile. It is submitted that in any case, there was a specific charge framed against the respondent -accused that he was a member of an unlawful assembly and in prosecution of a common object of that assembly to murder (injure) Bengali committed the offence of rioting. It is therefore submitted that merely because a wrong section was used while framing the charge and the respondent was not specifically charged for the offence under Section 149, that shall not vitiate the trial and the conviction and sentence imposed by the Trial Court.

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3.4 It is further submitted that it is an admitted position that the deceased Bengali died due to a knife injury. That though in the dying declaration it was stated that the respondent – accused - Subhash @ Pappu hit him by hockey stick, in that case also, being a part of the unlawful assembly, the respondent, who was a part of the unlawful assembly and committed the offence in furtherance of the common object to kill the deceased Bengali, still the respondent can be convicted for the offence under Section 302 r/w Section 149 IPC.

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3.5 It is further submitted by Ms. Prasad, learned Senior Advocate appearing on behalf of the State that the High Court has acquitted the respondent – accused for the offence under Section 148 on the ground that as two other co-accused were acquitted and therefore, the respondent -accused - Subhash @ Pappu cannot be said to be part of the unlawful assembly being less than five persons. It is submitted that in the present case, even as per the dying declaration, six to seven persons participated in the commission of the offence. It is therefore submitted that merely because subsequently, only three persons were chargesheeted and out

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- A of which, two came to be acquitted, it shall not bring the case out of the scope of Section 148 IPC. It is submitted that therefore, the High Court has committed a grave error in acquitting the respondent accused even for the offence under Section 148 IPC. In support of the above submission, reliance is placed upon the decision of this Court in the case of **Rohtas Vs. State of Haryana, (2020) 14 SCALE 14**.
 - B 3.6 Ms. Garima Prasad, learned Senior Advocate appearing on behalf of the State has next submitted that the High Court has materially erred in acquitting the respondent accused on the contradictions in the F.I.R./complaint given by PW-5 that the respondent - Subhash @ Pappu inflicted the knife blow and that in the dying declaration, the deceased
 - C has stated that Pappu s/o Baijnath hit him by a hockey stick. It is submitted that once PW-5, the informant was declared hostile, nothing mentioned in the F.I.R./complaint should have been considered. That, as a result the only evidence, which was available was the dying declaration in which it was specifically stated that Pappu hit him by a hockey stick. It
 - D is submitted that therefore being a part of the unlawful assembly and some person inflicted the knife blow in the stomach of the deceased, who died due to the injury by knife blow, still the respondent accused can be convicted for the offence under Section 302 r/w Section 149 as well as Section 148 of IPC. It is submitted that as such the Trial court
 - E rightly convicted the accused for the offences under Sections 302 and 148 relying upon the dying declaration dated 05.12.1980. It is submitted that in the impugned judgment and order the High court has not as such doubted the credibility of the dying declaration recorded by Assistant Divisional Transport Officer. It is submitted that therefore, there can be a conviction based on the dying declaration, which has been established
 - F and proved by the prosecution.
- 3.7 Making the above submissions and relying upon the decisions of this Court in the case of **Fainul Khan Vs. State of Jharkhand, (2019) 9 SCC 549; Annareddy Sambasiva Reddy Vs. State of Andhra Pradesh, (2009) 12 SCC 546; Alister Anthony Pareira Vs. State of Maharashtra, (2012) 2 SCC 648** and **Rohtas Vs. State of Haryana, (2020) 14 SCALE 14**, it is prayed to allow the present appeal and quash and set aside the impugned judgment and order passed by the High Court.
4. Present appeal is vehemently opposed by Shri Deepak Goel,
- H learned Advocate appearing on behalf of the respondent accused.

4.1 It is vehemently submitted by learned counsel appearing on behalf of the accused that in the facts and circumstances of the case, the High Court has not committed any error in acquitting the accused for the offence under Section 302 and Section 148 IPC. It is contended that in the F.I.R., it was alleged that Subhash @ Pappu inflicted the knife blow and in the dying declaration, it was stated that Pappu hit by a hockey and therefore as there are material contradictions, the High Court has rightly acquitted the accused.

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4.2 It is further contended by learned counsel appearing on behalf of the accused that even in the dying declaration nothing was mentioned as to who, in fact, inflicted the knife blow. That on the contrary, it was specifically stated in the dying declaration that Pappu hit by a hockey. Therefore, in absence of any specific allegations against the accused inflicting the knife blow and the accused was not charged for the offence under Section 149 IPC, the accused cannot be convicted for the offence under Section 302 with the aid of Section 149 IPC.

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4.3 It is further urged by learned counsel appearing on behalf of the accused that, even as stated in the dying declaration, Pappu hit the deceased by hockey, which cannot be said to be a deadly weapon and considering the fact that only three accused were charge sheeted/charged and out of which two accused came to be acquitted, the respondent accused cannot be convicted for the offence under Section 148 IPC.

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4.4 It is further submitted by learned counsel appearing for the accused that even otherwise, considering the fact that the dying declaration was recorded on the very next day and nothing is on record to the effect that at that time his condition was serious, therefore, there was no reason at all to record the dying declaration on 05.12.1980. Hence, the said dying declaration is not reliable and may not to be considered. In this context, reliance is placed on the decision of this Court in the case of **Laxman Vs. State of Maharashtra, (2002) 6 SCC 710**.

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4.5 It is submitted by learned counsel appearing for the accused that in the present case, the weapon – hockey stick alleged to have been used by the respondent accused has not been recovered.

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4.6 It is further submitted by learned counsel appearing on behalf of the accused that even otherwise, in the present case, the deceased died after thirty days and while taking treatment in the hospital he died because of septicemia, the case may hence fall under Section 304 Part

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- A II IPC. Reliance is placed on the decision of this Court in the case of **Sanjay Vs. State of Uttar Pradesh, (2016) 3 SCC 62**. Therefore, it is alternatively submitted to alter the conviction from Section 302 IPC to Section 304 Part II IPC.

In rejoinder, Ms. Garima Prasad, learned Senior Advocate appearing on behalf of the State has submitted that even in the case of **Sanjay (supra)** relied upon by the learned counsel appearing on behalf of the accused, the conviction was altered to Section 304 Part I IPC.

5. Heard the learned counsel for the respective parties at length.

6. At the outset, it is required to be noted that as per the dying declaration recorded by Assistant Divisional Transport Officer on 05.12.1980, six/seven persons attacked the deceased. Even in the F.I.R., lodged by Hari Singh (PW-5), it was specifically mentioned that six persons attacked his brother Bengali, who assaulted him with hockey stick and knife. It is true that Hari Singh (PW-5) – informant turned hostile.
- D However, at the same time, we see no reason to doubt the dying declaration recorded by Assistant Divisional Transport Officer on 05.12.1980. The submission on behalf of the accused relying upon the decision of this Court in the case of **Laxman (supra)** that the day on which the dying declaration was recorded, there was no extreme emergency and/or his condition was not so serious or there was any danger to his life and therefore there was no reason and/or cause to record the dying declaration and therefore the dying declaration is not believable, has no substance. In the case of **Laxman (supra)**, which has been relied upon by learned counsel appearing on behalf of the accused there is no absolute proposition of law laid down by this Court that, in a case when at the time when the dying declaration was recorded, there was no emergency and/or any danger to the life, the dying declaration should be discarded as a whole. In the present case, as the deceased was having a stab injury by a knife, there was a possibility of danger to his life and therefore, by way of prudence, if the dying declaration was recorded on 05.12.1980, there is no reason to doubt the dying declaration, which was recorded by Assistant Divisional Transport Officer. Therefore, in our view the Trial Court has rightly relied upon and/or believed the dying declaration recorded by Assistant Divisional Transport Officer on 05.12.1980.
- H 6.1 From the dying declaration it emerges that six to seven persons attacked the deceased including Pappu s/o Baijnath. Thus, from the dying

declaration, prosecution has been successful in establishing and proving that Subhash @ Pappu s/o Baijnath was present at the time of the incident; he was part of the unlawful assembly and that he participated in the commission of offence.

7. It is true that while framing the charge, the respondent accused was not specifically charged for the offence under Section 302 r/w Section 149 IPC. However, it is to be noted that while framing the charge, the Trial Court specifically observed that accused did commit murder by knowingly and intentionally causing death of Bengali and thereby committed the offence punishable under Section 302 IPC (vide charge framed on 06.10.1983). It also appears from the record that the respondent – accused was also charged for the offence under Section 148 IPC, vide charge framed on dated 04.05.1983, in which it has been mentioned that the accused and others were members of an unlawful assembly and in carrying out the common object of that assembly i.e. to murder Bengali, committed the offence of rioting with a deadly weapon, namely, knife to stab Bengali and thereby committed an offence punishable under Section 148 IPC. The charges framed against the accused on 04.05.1983 and 06.10.1983 read as under:-

“In the Court of Xth Addl. Sessions Judge, Agra

S.T. No.361/1982

CHARGE

I, Gangoo Ram, Xth Addl. Session Judge, Agra hereby charge you Subhash Chand @ Pappu as follows:

Firstly:- That you on 04.12.1980 at 3.00 p.m. at Galle Ki Mandi within Police Circle P.S. Firozabad South were member of unlawful assembly and did in prosecution of common object of that assembly to murder (injure) Bengali committed the offence of rioting with a deadly weapon knife to stab Bengali and thereby committed an offence punishable under Section 148 I.P.C. within cognizance of this Court.

And hereby direct that you be tried by this Court on the said charge.

Xth Addl. Session Judge
Agra

Dated: May 4th, 1983

A Charge read over and explained in Hindi.

Accused not pleaded guilty to be tried.

Xth Addl. Sessions Judge

Agra

B Dated: May 4th, 1983

In the Court of IX Adj. Se.Judge Agra

S.T. No. 361/82

I, G.L. Gupta IX Adj.SJ. Agra do hereby charge you

C Subhash @ Pappu

as follows:-

D That you on 4.12.80 at about 3 P.M. in Mohalla Galle Ki Mandi in Firozabad town, within the circle of PS Firozabad South Distt. Agra, did commit murder by knowingly and intentionally causing the death of Bengali and thereby committed an offence punishable u/s 302 IPC and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

E Dated: Oct.6, 1983

IX Adj.S.J. Agra

Charge read over and explained to the accused.

In (Hindi) who pleaded not guilty & claimed to be tried.

F IX Adj.S.J. Agra”

G 7.1 From the aforesaid charges framed it can safely be said that the ingredients for the offence under Section 302 r/w Section 149 and Section 148 of IPC were specifically brought to the notice of the accused. Therefore, at the most, it can be said to be a defective framing of the charge by not specifically charging under Section 149 IPC. Therefore, Section 464 Cr.P.C. is attracted to the instant case. Section 464 Cr.P.C. reads as under: -

H “**464. Effect of omission to frame, or absence of, or error in, charge.—(1)** No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground

that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

7.2 While interpreting Section 464 of Cr.P.C., this Court in the case of **Fainul Khan (supra)** has observed and held that in case of omission or error in framing a charge, the accused has to show failure of justice/prejudice caused thereby.

7.3 In the case of **Annareddy Sambasiva Reddy (supra)**, it was submitted on behalf of the accused that in the absence of a specific charge under Section 149, accused persons cannot be convicted under Section 302 r/w Section 149 as Section 149 creates a distinct and separate offence. This Court negated the said submission and observed and held that mere non-framing of a charge under Section 149 on face of charges framed against appellant would not vitiate the conviction in the absence of any prejudice caused to them. Considering Section 464 Cr.P.C. it is observed and held that mere defect in language, or in narration or in the form of charge would not render conviction unsustainable, provided the accused is not prejudiced thereby. It is further observed that if ingredients of the section are obvious or implicit in the charge framed then conviction in regard thereto can be sustained, irrespective of the fact that said section has not been mentioned.

8. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and on noting the contents of

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A the charges framed against the accused on 04.05.1983 and on 06.10.1983 it shows that the ingredients of Section 149 IPC are satisfied. Therefore, it cannot be said that the accused is prejudiced by non-mention of Section 149 IPC in the charge.

9. Now, so far as the submission on behalf of the accused that as B the weapon – hockey stick alleged to have been used by the accused is not recovered and therefore he may not be convicted is concerned, the aforesaid has no substance. Merely because the weapon used is not recovered cannot be a ground not to rely upon the dying declaration, which was recorded before the Executive Magistrate, which has been C proved by the prosecution.

10. Now, the question whether the accused can be convicted for D the offence punishable under Section 302 with the aid of Section 149 IPC is concerned, it is true that the prosecution has not established and proved, who actually inflicted the knife blow. However, from the medical evidence on record and even from the deposition of the doctors, it has been established and proved by the prosecution that the deceased sustained an injury by knife blow, which is inflicted by one of the six to seven persons, who participated in commission of the offence. From the dying declaration it has been established and proved that the respondent – accused Subhash @ Pappu was part of the unlawful assembly, who E participated in the commission of the offence. Pappu s/o Baijnath – respondent herein was specifically named by the deceased in the dying declaration. Therefore, even if the role attributed to the respondent - accused was that of hitting the deceased by a hockey stick, in that case also for the act of other persons, who were part of the unlawful assembly F of inflicting the knife blow, the respondent accused can be held guilty of having committed the murder of deceased Bengali, with the aid of Section 149 IPC.

11. Now, the next question, which is posed for consideration of G this Court is whether respondent -accused can be convicted for the offence punishable under Section 302 IPC r/w Section 149 IPC when the deceased died due to septicemia after a period of thirty days.

H 11.1 Considering the decision of this Court in the case of **Sanjay (supra)**, the conviction of the respondent accused for the offence punishable under Section 302 r/w Section 149 IPC is not warranted and the case may fall within Section 304 Part I of the IPC.

12. Now, so far as the conviction of the respondent accused for the offence under Section 148 IPC is concerned, it is the case on behalf of the respondent accused that in the facts and circumstance of the case, Section 148 shall not be attracted as the number of accused chargesheeted/charged/tried were less than five in number, the same has no substance. It to be noted that right from very beginning and even so stated in the dying declaration six to seven persons attacked the deceased. Therefore, involvement of six to seven persons in commission of the offence has been established and proved. Merely because three persons were chargesheeted/charged/tried and even out of three tried, two persons came to be acquitted cannot be a ground to not to convict the respondent accused under Section 148 IPC.

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12.1 It is the submission on behalf of the accused that the weapon alleged to have been used by the respondent accused was said to be a hockey stick, which cannot be said to be a deadly weapon and therefore, the respondent – accused cannot be punishable for the offence under Section 148 also has no substance. As per Section 148 of IPC, whoever is guilty of rioting, being armed with a deadly weapon or with anything which used as a weapon of offence, is likely to cause death, can be punished under that Section. The term “rioting” is defined under Section 146 IPC. As per Section 146, whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

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In the present case, six to seven persons were part of the unlawful assembly and they used force or violence and one of them used a deadly weapon, namely, knife and therefore, being a part of the unlawful assembly, the respondent accused can be held to be guilty for the offence of rioting and for the use of force/violence as a member of such an unlawful assembly. Therefore, the respondent was rightly convicted by the Trial Court for the offence under Section 148 IPC.

G

13. In view of the above and for the reasons stated above, present appeal succeeds in part. The impugned judgment and order passed by the High Court acquitting the accused for the offence punishable under Section 302 IPC is hereby quashed and set aside. The respondent accused is held guilty for the offence under Section 304 Part I r/w Section 149 IPC and for the offence under Section 148 IPC.

H

A The respondent accused is sentenced to undergo ten years R.I. for the offence punishable under Section 304 Part I r/w Section 149 IPC with a fine of Rs. 5,000/- and in default to undergo further six months R.I.

B The respondent accused is also sentenced to undergo three years R.I. for the offence under Section 148 IPC with fine of Rs. 5,000/- and in default to undergo further two months R.I.

Both the sentences to run concurrently. The respondent to surrender within a period of four weeks to undergo the remaining part of the sentence as per the present judgment and order.

C Present appeal is allowed accordingly to the aforesaid extent only. However, in the facts and circumstances of the case, there shall be no order as to costs.

Pending application, if any, also stands disposed of.

Devika Gujral
(Assisted by : Shevali Monga, LCRA)

Appeal partly allowed.