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TAIJUDDIN

v.

STATE OF ASSAM & ORS.

(Criminal Appeal No. 1526 of 2021)

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DECEMBER 01, 2021

[SANJAY KISHAN KAUL AND M.M. SUNDRESH, JJ.]

- Penal Code, 1860 – ss.147/148/324/302/201 r/w 149 – Unlawful assembly – When not part of – Land dispute – Victim died in a mob attack – 32 accused persons convicted and sentenced to life imprisonment – High Court convicted some while gave benefit of doubt to others – SLPs by unsuccessful appellants dismissed – However, notice issued in appellant's case – Held: Only role assigned to the appellant was that of pointing out the place where the victim was hiding – Family members of the deceased never even pointed a finger at the appellant – His presence at the site is explained – His house was almost adjacent to where the deceased was hiding – He did not come along with the mob – He was carrying no weapon, he did not assault anybody – Finding of his accompanying the mob is not sustainable – Mere fact that the appellant was not brave enough to conceal where the victim was hiding did not make him a part of the unlawful assembly – Acquitted.*

Allowing the appeal, the Court

- HELD : 1.1 PW-1, the informant, attributed to the appellant the role of pointing out the location of the deceased. Nothing more is stated qua the appellant. Further, PW-8 was not a witness who had seen the incident but he believed what others said and narrated the same. Thus, the reliance placed in the impugned judgment on the testimony of PW-8 to rope in the appellant under Section 149 of the IPC cannot be sustained. This is more so as PW-7 is also a hostile witness. The mere fact that the appellant was not brave enough to conceal where the victim was hiding did not make him a part of the unlawful assembly. The presence of the appellant is explained at the early hours in the morning because of his house being almost adjacent to where the deceased was hiding. He certainly did not come along with the mob. He was**

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carrying no weapon and he did not assault anybody. The finding of his accompanying the mob is not sustainable on the basis of the evidence. The only evidence of his involvement is that he pointed to the house where the victim was hiding. Given that a murderous mob fully armed was hunting for him, the appellant at best can be said not to be brave enough to conceal the deceased or even to have not pointed out where he was, but that by itself cannot rope in the appellant under Section 149 of the IPC. [Paras 5, 9, 10 and 11][447-A-B; 448-D-E; 448-E-F; 449-B-D]

1.2 Taking into consideration the inconsistency in the testimonies – inasmuch as the family members never even pointed a finger at the appellant as also some of the other witnesses, while the witnesses who did point a finger only assigned the role of pointing out the place where the victim was hiding, coupled with his natural presence at site, it cannot, thus, be said that by any stretch of imagination the case against the appellant has been proved beyond reasonable doubt or for that matter really no case seems to have been proved against the appellant given the role assigned to him in the testimony of the witnesses. The appellant is entitled to a clean acquittal in the given facts. The conviction under Section 147/148/302/201/149 is set aside [Paras 11, 14] [449-G-H; 450-A-B]

Subal Ghorai v. State of West Bengal (2013) 4 SCC 607 : 2013 (5) SCALE 275; Ranjit Singh v. State of Punjab and Ors (2013) 16 SCC 752 : [2013] 13 SCR 633; C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645 : [2010] 5 SCR 623 – relied on.

Case Law Reference

[2013] 13 SCR 633	relied on	Para 12
[2010] 5 SCR 623	relied on	Para 13

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1526 of 2021.

From the Judgment and Order dated 15.03.2019 of the High Court of Gauhati at Gauhati in Crl. A. No.166 of 2015.

Abir Phukan, Surya Prakash, Ashkrit Tiwari, Ms. Anisha Mathur for M/s Kmnp Law, Advs. for the Appellant.

- A Debojit Borkakati, Vivek Sonkar, Advs. for the Respondents.
The Judgment of the Court was delivered by
SANJAY KISHAN KAUL, J.
1. Leave granted.
- B 2. A land dispute caused the loss of life of Abdul Wahab ('the victim'). A house was being constructed on land stated to be of the victim and others when the accused persons came in a mob towards the house of the victim armed with lathis, spears, daggers, etc. The endeavour of the victim to escape by taking shelter in the house of Shorab Ali did not succeed as the house was surrounded, walls of the house were broken and a mounted assault made on the victim. Different accused were assigned different roles to the extent of the weapon they wielded. The body of the victim was carried and disposed of by throwing in the river Brahmaputra.
- C 3. Case No.145 of 1998 was registered by Bagbar police station under Sections 147/148/149/324/326/302/201 of the IPC. The decomposed body of the victim was recovered subsequently, which was sent for post-mortem. Charges were framed against the accused under Sections 147/148/324/302/201 read with Section 149 of the IPC and all the accused pleaded not guilty. The learned Sessions Judge convicted all the 32 accused and sentenced them to life imprisonment vide judgment dated 8.5.2015.
- D 4. The convicted persons preferred appeals. During the pendency of the appeal four accused passed away. A Division bench of the Gauhati High Court decided the appeals on 15.3.2019 convicting some of them while giving benefit of doubt to others. The unsuccessful appellants preferred appeals before this Court and their SLPs were dismissed vide order dated 6.9.2019. The only exception was the present criminal appeal/ special leave petition filed by Taijuddin, in which notice was issued on the plea that the role assigned to the appellant was only of having pointed out the house where the victim was hiding.
- E 5. We have heard learned counsel for the parties. Learned counsel for the appellant took us through a summary chart filed qua the appellant and others which specified which witness had stated what. The chart qua the appellant before us would show that PW-3 (wife of the deceased), PW-6 (daughter of the deceased), PW-10 (son of the deceased) and
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PW-11 (son of the deceased) did not mention the appellant at all. PW-1, the informant, attributed to the appellant the role of pointing out the location of the deceased. A perusal of his testimony shows that he stated "Tajuddin showed that my father Abdul Wahab was inside the house of Sorab." Nothing more is stated qua the appellant. PW-4, PW-5 and PW-15, once again, stated to the same effect, i.e., that the appellant pointed out the location of the deceased. Interestingly, PW-15 is stated to have controverted the testimony of PW-1 while going along with PW-4 and, once again, contradicting the testimony of PW-7.

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6. Learned counsel for the appellant referred to a sketch map of the site, placed on record to submit that house "F" belongs to the appellant, which was almost adjacent to the house where the deceased was found. That explains the presence of the appellant at 6:30 a.m. in the morning when the incident is stated to have occurred.

7. Our attention was invited to how the High Court had dealt with the aspect of conviction of the appellant, which was based on the testimony of PW-7 and PW-8. PW-7 stated that the appellant was armed, he assaulted the deceased, and also pointed out where the deceased was hiding. However, PW-7 turned hostile but the High Court found that the relevant testimony of the hostile witness could be segregated to the extent of pointing out the location of the deceased. The discussion about the appellant is contained in para 33 of the impugned judgment. Relevant in this behalf is PW-4's statement, to the effect that when the accused persons moved forward and were about to cross the house of Shorab, the appellant told them "where are you proceeding? Abdul Wahab is there in the house of Shorab." It is only thereafter that the accused persons surrounded the house of Sohrab and mounted an assault on Abdul Wahab, causing his death. The testimony of PW-7 was believed to the extent it supported what other prosecution witnesses, PW-1, PW-4, and PW-5 had stated – showing the presence of the appellant at the place of occurrence and helping other accused persons in tracing out the victim. PW-8 and another independent witness are also noticed as having stated that the appellant along with others chased the victim. The impugned judgment takes note of the testimony of PW-8 that he was scared of seeing the occurrence and did not come out of his house. The fact that PW-8 categorically stated that he had seen the appellant along with other accused persons chasing the victim was stated to be the testimony which was undouted and could not be disbelieved only because

- A he did not come out of the house out of fear. A finding was thus reached that the appellant accompanied the accused persons in chasing the victim and it was the appellant who assisted other members of unlawful assembly to locate the victim in the house of Sohrab. On this basis a common intention was found of seeking to kill the victim especially when the accused persons, being armed with deadly weapons, chased the victim with the war cry “catch and kill Wahab” and the appellant also accompanied them and actively participated and guided others to locate the victim.
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- C 8. It was the submission of the learned counsel for the appellant that the testimony of PW-8 had not been read correctly. Learned counsel invited our attention to the cross-examination of PW-8 wherein he stated that he did not see who had killed the victim, tied him and carried him away. He stated that “...later on I heard about it. Today I have stated whatever I had heard.” He further went on to state “I have mentioned the names of the (accused) persons after hearing them from other people.”
- D 9. The aforesaid testimony leaves us in no manner of doubt that PW-8 was not a witness who had seen the incident but he believed what others said and narrated the same. Thus, the reliance placed in the impugned judgment on the testimony of PW-8 to rope in the appellant under Section 149 of the IPC cannot be sustained. This is more so as
- E PW-7 is also a hostile witness.
- F 10. In our view, learned counsel for the appellant rightly contended that the mere fact that the appellant was not brave enough to conceal where the victim was hiding did not make him a part of the unlawful assembly.
- G 11. Learned counsel for the appellant sought to rely upon the judgment of this Court in *Subal Ghorai v. State of West Bengal*¹, more specifically paras 42 and 53 to canvas that constructive liability cannot be stretched to lead to the false implication of innocent bystanders. This Court considered the possibility of often people gathering at the scene of offence out of curiosity but that did not make them share the common object of the assembly. The Court must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. There must be reasonable direct or indirect circumstances which lend assurance to the prosecution case that they
- H ¹(2013) 4 SCC 607

shared common object of the unlawful assembly. Not only should the members be part of the unlawful assembly but should share the common object at all stages. This has to be based on the conduct of the members and the behaviour at or near the scene of the offence, the motive for the crime, the arms carried by them and such other relevant considerations. Once we examine the factual matrix of the case at hand, the presence of the appellant is explained at the early hours in the morning because of his house being almost adjacent to where the deceased was hiding. He certainly did not come along with the mob. That does not preclude him from being part of the mob or acquiring the common intention at that stage, but then that is not what happened. He was carrying no weapon and he did not assault anybody. The finding of his accompanying the mob is not sustainable on the basis of the evidence discussed above. The only evidence of his involvement is that he pointed to the house where the victim was hiding. Given that a murderous mob fully armed was hunting for him, the appellant at best can be said not to be brave enough to conceal the deceased or even to have not pointed out where he was, but that by itself cannot rope in the appellant under Section 149 of the IPC.

12. Learned counsel for the appellant also referred to the judgment of this Court in *Ranjit Singh v. State of Punjab and Ors.*² Specifically, para 39, where the Court referred to the aspect of faction-ridden village community having a tendency to implicate innocents along with the guilty especially when a large number of assailants are involved in commission of the offence – which is a matter of common knowledge. The depositions have to be carefully scrutinised in such a scenario.

13. Learned counsel also referred to the judgment in *C. Magesh and Ors. v. State of Karnataka*³ especially paras 45 and 46 to emphasise the importance of evidence being evaluated on the touchstone of consistency. The eye-witness require a careful assessment and their testimony must be evaluated for its credibility.

14. On the touchstone of the aforesaid judgments, taking into consideration the inconsistency in the testimonies – inasmuch as the family members never even pointed a finger at the appellant as also some of the other witnesses, while the witnesses who did point a finger only assigned the role of pointing out the place where the victim was

² (2013) 16 SCC 752

³ (2010) 5 SCC 645

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- A hiding, coupled with his natural presence at site, we cannot, thus, say that by any stretch of imagination the case against the appellant has been proved beyond reasonable doubt or for that matter really no case seems to have been proved against the appellant given the role assigned to him in the testimony of the witnesses. In our view the appellant is entitled to a clean acquittal in the given facts.
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 - 15. The conviction under Section 147/148/302/201/149 is set aside. The appeal is accordingly allowed leaving the parties to bear their own costs.
 - 16. The appellant be released forthwith, if not required in any other case.

Divya Pandey

Appeal allowed.