Bhargavan & Ors vs State Of Kerala on 17 November, 2003

Equivalent citations: AIR 2004 SUPREME COURT 1058, 2003 AIR SCW 6745, 2003 (9) SCALE 627, 2003 (7) SLT 228, 2004 (1) SRJ 507, 2004 (12) SCC 414, (2003) 4 KHCACJ 667 (SC), (2003) 9 JT 513 (SC), 2003 (9) JT 513, 2004 CRILR(SC&MP) 145, (2003) 4 CURCRIR 396, (2003) 9 SCALE 627, (2003) 3 CHANDCRIC 413, (2004) 2 EASTCRIC 14, (2004) 1 GUJ LH 534, (2004) 1 KER LT 201, (2004) 27 OCR 462, (2004) 1 RECCRIR 452, (2004) 2 SUPREME 408, (2004) 13 INDLD 1024, (2004) 2 ALLCRILR 39, (2004) 1 CRIMES 412, 2004 (1) ALD(CRL) 629

Author: Arijit Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  530-531 of 2003

PETITIONER:
Bhargavan & Ors.

RESPONDENT:
State of Kerala

DATE OF JUDGMENT: 17/11/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
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J U D G M E N T ARIJIT PASAYAT, J.

Appellants question their conviction for offences punishable under Sections 143, 148 and 302 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Appellant Bhargaven was sentenced to undergo imprisonment for life for offence punishable under Section 302 read with Section 149 IPC and to pay a fine of Rs.60,000/- with default stipulation. The other four appellants were awarded similar custodial sentence but the fine in their cases was Rs.35,000/- each. No separate sentence was awarded for offences relatable to Sections 143 and 148 IPC. The Kerala High Court by the impugned common judgment dismissed the appeals filed by the appellants confirming the conviction and sentences imposed.

Prosecution version as unfolded during trial is as follows:

Chandran (hereinafter referred to as the deceased), a Gulf returned agriculturist while on his way to Panthalam market around midnight between 25.5.95 and 26.5.95 at a Panchayat road at Arunoottimangalam was brutally assaulted. Soon he was lifted to the Government Hospital, Mavelikara. After first aid, he was referred to the Medical College Hospital suspecting head injury. The injured was shifted to the Medical College hospital, Kottayam. While undergoing treatment he succumbed to the injuries at around 12.50 p.m. on 27.5.95. After return from his engagement abroad deceased was engaged in betel cultivation and trade. Valsala (PW-15) is his widow, and Manoharan (PW-4) was his brother. Santosh (PW-18) was his nephew. On 25.5.1995 he was on his way to Panthalam market, which starts functioning from early hours in the morning. When deceased and Santosh (PW-18) reached near the house of P.K. Ramachandran (PW-14), all the named accused (A-1 to A-6) and two others waylaid them. Bhargavan (A-1) dealt a blow on the head of the deceased with an iron rod stating that he should not live any more. Deceased slumped on receiving the blow. Then Dhanarajan alias Dhanan hit the deceased with motor cycle chain on his neck and back. Deceased cried out in pain, hearing which A-1 said that he was not dead and should be finished. Responding to this, accused Sudhakaran (dead), Chandran, Sadasivan and Radhakrishnan (A-2, A-3, A-5 and A-6 respectively) assaulted the deceased on the head and back with sticks. Santosh (PW-18) cried for help and ran towards home. Hearing the cry Manoharan (PW-4) and other neighbours rushed to the spot. On the way Santosh (PW-18) met Manoharan (PW-4). Meanwhile Anandan (PW-2) and Nalini (PW-3) rushed there. Anandan (PW-2) and Manoharan (PW-4) supinated the deceased who asked for water and named the accused persons to have assaulted him. PWs 3 and 4 gave water to the deceased. PW-18 Valsala (PW-15) and others in the meantime reached the place. PW-4, PW-18 and others shifted the deceased to the Government Hospital, Mavelikara. Dr. V.C. Alexander (PW-

5) attended the injured and opined that he should be shifted to Medical College Hospital, Kottayam as there was suspected head injury. He also sent an intimation to the Mavelikara Police Station. Since PW-4 and PW- 18 did not carry much money, they returned home, collected some money and clothes and along with PW-15 searched for a car. They went to the house of one Shajahan, Advocate requesting for a car. Later, they got a car and the injured was shifted to Medical College Hospital, Kottayam. Though he was admitted and treated at the Hospital in the intensive care unit, he did not survive. The Assistant Sub-Inspector of Police had received the intimation sent by PW-5. At about 3 p.m. on 26.5.1995, he recorded the First Information Report on the basis of narration by PW-

18. The occurrence was witnessed by Santosh (PW-18) who was accompanying the deceased at the time the accused persons assaulted him. Subsequently, information was lodged at the police station and investigation was undertaken, on completion of which charge sheet was filed. According to prosecution the accused persons in furtherance of their common intention to commit murder formed into an unlawful assembly and being members of unlawful assembly they were armed with deadly weapons like iron rod, motor cycle chain and sticks and with intend to commit murder of the deceased Chandran, he was brutally assaulted at his head and body and due to the head injuries

sustained Chandran breathed his last.

Six persons faced trial. One of them i.e. accused no.2-Sudhakran died during the pendency of the appeal on 3.6.99. Twenty eight witnesses were examined to further the prosecution version. Santosh (PW-18) was stated to be an eye-witness wheres Anandan, Nalini, Manoharan (PWs 2, 3 and 4 respectively) were stated to be persons before whom the deceased made dying declaration implicating the accused-appellants. Accused persons pleaded innocence and false implication because of previous litigation. A-1 Bhargavan additionally took the plea of alibi to the effect that he was hospitalized at Medical College Hospital, Kottayam at the time of occurrence and the possibility of his assaulting the deceased is improbable. Learned Additional Sessions Judge, Alappuza, found the prosecution version cogent, credible and trustworthy and convicted and sentenced the accused persons-appellants as aforesaid.

In support of the appeals, learned counsel for the appellants submitted that the trial Court and the High Court have erroneously held the accused persons guilty as the prosecution version is clearly unacceptable. Evidence of PW-18 is not only unreliable because of his relationship with the deceased, but also on the ground that he had litigation with the accused persons' family. The so-called dying declaration before PWs. 2, 3 and 4 is a myth. The doctor clearly stated that he was unconscious when brought to the hospital and, therefore, the question of his making a coherent declaration before PWs. 2, 3 and 4 as claimed is impracticable. Additionally, in the so-called dying declaration, accused no.1 was not specifically named. The conduct of PW- 18 is not natural. Though claimed that PW-18 had accompanied the deceased, said fact has not been established. His reaction does not appear to be normal. It is highly improbable that one person was assaulted by several persons, and he did not react and remained passive onlooker. It is equally improbable that after having allegedly made murderous assaults on a person, no attempt was made to even cause a scratch on a person who claims to have witnessed the entire occurrence. The Trial Court noticed that accused persons knew the deceased and PW18 were going to the market on particular day. It is, therefore, improbable that they would leave unscathed a relative of the deceased who claims to have witnessed the occurrence. Additionally, PW-18 did not mention the names of the assailants to the doctor who first treated the deceased. Though it may not be the duty of the doctor to enquire the names, it is a question of attaching credibility to the evidence of PW-18. The conduct shown by the PW-18 and others in delaying to take the deceased to the hospital and first going to the house of their advocate on the unacceptable plea that they wanted to use his vehicle shows that the first information report was lodged after deliberation and falsely implicating the accused persons. The first information report was lodged on the next day of occurrence. PWs. 2 and 3 claimed that they had seen the deceased in an injured condition. Their evidence goes to show that Santosh (PW-18) was not present when they reached the spot of occurrence. PW-18 claimed to have seen the assailants in the light of the shed of PW-14. But the said witness stated that light was not on when he reached the site. Reliance has been erroneously placed on the basis of statement of PW-14 (P.K. Ramachandran) recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short the 'Cr.P.C.'). Even after the movements starting from the assault till the deceased was taken to the hospital is accepted in the manner described, even then there is unexplained delay in lodging the first information report. No credible motive has been established and the least for A-1 there is no apparent motive. The plea of alibi has been erroneously rejected on hypothetical basis. When the

doctor himself has admitted that appellant-accused no.1 was admitted to the hospital, on the surmise that he was not there having been permitted to stay outside. It is nothing but a hypothetical conclusion. Further it was submitted that Section 149 has no application as the ingredients necessary to bring application of the said provision have not been established. The discrepancies in the evidence of witnesses are not minor and irretrievably affect credibility of their evidence.

In response, learned counsel for the State submitted that the plea about A-1 having nothing to do with any litigation of deceased and accused except being the latter's advocate is clearly not correct factual position because the Trial Court itself noticed about cases instituted by A-1 against the accused. The evidence of PW-14 has rightly been discarded on the question of availability of light. Evidence of PW-13 (R. Ramachandran) and PW18 clearly shows that light was on. It is not that the deceased was unconscious althrough as claimed by the accused-appellant. On the contrary evidence of PW-3 shows that he became unconscious after dying declaration as would be evident from the fact that he asked for and was given a glass of water which he took. Section 149 has been rightly applied as all the accused persons carried weapons and their presence and acts done have been established. The time of occurrence was after mid-night and the distance to the hospital was such as it took nearly 3 hours to reach it. PW-18 has also stated as to why he could not come to the rescue of the deceased. The plea of alibi has been rightly rejected in view of the evidence of doctor and the nurses i.e. PWs. 19 to 22. In essence it was submitted that the concurrent findings recorded by the Trial Court and the High Court about the guilt of the accused did not warrant any interference.

The plea relating to interested witness is a regular feature in almost every criminal trial.

We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent ad credible.

In Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC 364) it has been laid down as under:-

> "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely.
>
> Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan (1974 (3) SCC 698) in which Vadivelu Thevar v. State of Madras (AIR 1957 SC 614) was also relied upon.

We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

> "We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in 'Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

Again in Masalti and Ors. v. State of U.P. (AIR 1965 SC 202) this Court observed: (p. 209-210 para 14):

> "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

To the same effect is the decision in State of Punjab v. Jagir Singh (AIR 1973 SC 2407), Lehna v. State of Haryana (2002 (3) SCC 76) and Gangadhar Behera and Ors. v. State of Orissa (2002 (8) SCC 381). As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi and Ors. v. State of Bihar etc. (JT 2002 (4) SC 186).

Another plea which was emphasized relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful

assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co instanti.

Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction betweens the two parts of Section 149 cannot be ignored or obliterated. In every case is would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore, AIR 1956 SC 731.) The other plea that definite roles have not been ascribed to the accused and, therefore, Section 149 is not applicable, is untenable. A 4-Judge Bench of this Court in Masalti's case (supra) observed as follows:

> "Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of

> the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."

To similar effect is the observation in Lalji v. State of U.P. (1989 (1) SCC 437). It was observed that:

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

In State of U.P. v. Dan Singh and Ors. (1997 (3) SCC 747) it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to Lalji's case (supra) where it was observed that "while overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149".

Above being the position, we find no substance in the plea that evidence is not sufficient to fasten guilt by application of Section

149. So far as non-disclosure of names to the doctor, same is really of no consequence. As rightly noted by the Courts below, his primary duty is to treat the patient and not to find out by whom the injury was caused. The plea in this regard is clearly unacceptable. The question was examined by this Court in Pattipati Venkaiah v. State of Andhra Pradesh (AIR 1985 SC 1715) and similar view was taken.

The evidence of PWs. 2, 3 and 4 is cogent and credible, clearly supporting the claim that dying declaration was made before them. The names of the accused persons were claimed to have been stated before PWs. 2, 3 and 4. Merely because PW-2 says that he did not hear the name of accused no.1 clearly, that cannot dilute evidentiary value of the evidence of PWs. 3 and 4 who categorically stated that the name of accused no.1 was stated.

The plea of alibi was rejected by the Trial Court and the High Court. The appellant no.1 had not established that he was in the hospital on the trial. The evidence of doctor and the nurses (PWs. 19 to 22) clearly shows that he was not given any medicines after initial examination and that itself was conclusive of the fact that he was not in the hospital in the evening when the medicines were given to the patients. It has been specifically stated that he was permitted to stay outside.

It has also been explained as to why there was delay in lodging the first information report. The Trial Court and the High Court considered the evidence and came to hold that the paramount attempt was to save the life of the deceased, and witnesses tried to take him to the hospital at Kottayam. The evidence of PW-18 was sufficient in itself to uphold the conviction. Additionally, there is evidence of

the dying declaration.

Trial Court and the High Court were justified in convicting the accused and awarding sentences consequentially, and there is no infirmity in the reasons indicated by the Trial Court, the conclusions arrived at by it as affirmed by the High Court, to warrant interference. The appeals fail and are dismissed.