Chikkarange Gowda And Ors. vs State Of Mysore on 9 May, 1956

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Bench: S.K. Das

JUDGMENT

S.K. Das, J.

1. This is an appeal by special leave from a decision of the High Court of Mysore, dated 22-7-1954, by which the convictions and sentences of the appellants were confirmed and their appeals dismissed by the said High Court.

2. The Appellants are four in number, (1), Chikkarange Gowda (accused 1), (2) Govindaraju (accused 3), (3) Govinda Gowda (accused 14), (4) Mathi Kulla (accused 19). The appellants, along with several others, were, tried by the learned Sessions Judge of Mysore, who convicted them of the offences under Sections 148, 302, and 302 read with Sections 34 and 149, Penal Code. They were sentenced to rigorous imprisonment for three years for the offence under Section 148, Penal Code, and to transportation for life for the offences under Section 302 and Section 302 read with Sections 34 and 149, Penal Code.

Either during the trial or at the time of recording the convictions, the learned Sessions Judge did not make any distinction, nor did he clearly state which of the appellants were guilty of the substantive offence of murder under Section 302, Penal Code, and which of them were guilty of the offence under Section 302 read with Section 149, Penal Code, or on the principle of liability embodied in Section 34, Penal Code. In the High Court also no such distinction appears to have been clearly made, and the concluding paragraph of the judgment of the High Court simply stated that the convictions and sentences of the appellants were confirmed and their appeals were dismissed.

3. It is not necessary to say anything about those others who were convicted by the learned Sessions Judge and whose convictions were upheld by the High Court of Mysore, but who have preferred no appeals to this Court. The facts so far as they are relevant for the purpose of this appeal may be very shortly stated. There were two brothers named Putte Gowda and Nanje Gowda. On 18-4-1951 the two brothers were in the house of one Madamma, a concubine of Putte Gowda, in the town of Talkad, stated to be a fairly populous town and a place of pilgrimage situate at a distance of about 30 miles from Mysore.

At about noon on that day, a mob of persons numbering about more than a hundred, rushed towards the house, sprinkled kerosene oil on the roof, and started burning the house. When the inmates of the house came out, the two brothers (Putte Gowda and Nanje Gowda) were brutally assaulted. Putte Gowda died then and there. Nanje Gowda lay unconscious and was taken to the hospital where he expired the same evening. The first information report of the occurrence was sent by the Daffadar to the Inspector of Police, who arrived the same night and made a preliminary investigation, So far as the four appellants are concerned, the allegation was that they were members of the aforesaid mob; and that appellant 1 (Chikkarange Gowda) hit Putte Gowda on the abdomen with a cutting instrument and appellant 4 (Mathi Kulla) hit Putte Gowda on the knee with a chopper; the second appellant Govindaraju, it was alleged, hit Nanje Gowda with a spear, and the third appellant Govinda Gowda hit Nanje Gowda on the head with an axe.

4. We have already stated that several charges were framed against the appellants. It is necessary to read at least one of the charges, viz., the charge which was framed for the offence stated to be under Section 302 read with Sections 149 and 34, Penal Code; because much of the argument before us has centerd round that charge. The fifth charge against appellant 1 was in these terms:

> "That you on or about the 18th day of April, 1951 at Talkad were member of an unlawful assembly and in prosecution of the common object or intention or such as you knew to be likely to be committed in prosecution of that object or intention, namely, in killing Putte Gowda, caused the death of Putte Gowda and Nanje Gowda, and you are thereby under Section 149 read with Section 34, Penal Code, guilty of causing the said murders, an offence punishable under Section 302, Penal Code and within the cognizance of the Court of Session."

Against the other appellants also there was a charge in similar terms. For the substantive offence of murder there was a charge under Section 302 against appellant 1 for killing Putte Gowda. Against appellant 4, who was stated to have hit Putte Gowda on the knee with a chopper, there was no charge of murder for killing Putte Gowda; though there was a charge of murder against him for killing Nanje Gowda.

Against the other two appellants, Govindaraju and Govinda Gowda, there was a charge for the substantive offence of murder for the death of Nanje Gowda. Against all the appellants there were charges under Section 148, Penal Code. In those charges, as also in the charge framed under Section 302 read with Sections 149 and 34, Penal Code, the common object of the unlawful assembly was stated to be the killing of Putte Gowda.

5. The learned Sessions Judge, it appears, found that the appellants had reasons to be angry with Putte Gowda reasons which in his opinion were sufficient to establish a motive for the offences committed; and the common object of the unlawful assembly or the intention of the appellants, as the learned Sessions Judge put it, was not merely to assault Putte Gowda but to kill him. The learned Judges of the High Court, however, held that there was no evidence to prove or establish any plan for concerted action or any common object to kill Putte Gowda, and they observed : "The evidence on record is altogether insufficient to prove expressly the common object alleged in the

charge so far as the appellants are concerned." On a consideration of the evidence, they found that whatever might have been the reasons for the people of the locality to be vexed with Putte Gowda, the common object which might properly be ascribed to the assembly as a whole was to give Putte Gowda a severe and open chastisement only. The learned Judges farther stated :

> " Such of the accused as were members of the assembly must be deemed to have had this object, and not that of killing Putte Gowda. They are liable only for acts in prosecution of the said object, the responsibility for acts not warranted by the common object being that of the individuals concerned."

Having given the aforesaid finding with regard to the common object, they proceeded to consider the individual acts committed by the appellants. They held that, so far as appellants 1 and 4 were concerned, they assaulted Putte Gowda--one on the abdomen and the other on the knee, along with another person who caused the fatal neck injury to Putte Gowda, and they said that these three persons acted jointly and had the common intention of killing Putte Gowda. It may be stated here that the particular accused person (accused 6) who was said to have caused the neck injury to Putte Gowda was acquitted by the High Court on the ground that the evidence against him was not sufficient for a conviction. As respects appellants 2 and 3, the High Court held that both had severely assaulted Nanje Gowda, and both were guilty of murder.

6. We have summarized above the findings of the High Court with regard to the four appellants. The main defence of the appellants was that they were not guilty, and the evidence against them was false.

7 Learned counsel for the appellants has contended before us that on the finding arrived at by the High Court with regard to the common object of the unlawful assembly, the conviction of the appellants for an offence under Section 302 read with Section 34 or Section 149, Penal Code is bad in law ; that not only was there no clear charge under Section 34 against the appellants, but in view of the findings of the High Court and the manner in which the charge under Sections 149 and 34 was mixed up, the appellants who have been held guilty on the principle of liability embodied in Section 34, have had no proper notice, nor a reasonable opportunity of meeting such a charge, and the conviction of two of the appellants for the offence under Section 302, Penal Code, in respect of the death of Nanje Gowda, is not justified on the findings of the High Court.

Learned counsel has also made grievance of a non-compliance with the provisions of Section 342, Criminal P. C., and has contended that the appellants have been prejudiced by the failure of the learned Sessions Judge to give them an opportunity of explaining the circumstances which have been used against them. Learned counsel has also addressed us on certain questions of fact depending on an appreciation of evidence, and has submitted that the witnesses who say that they saw the assault on the two brothers from the threshold of the house were not in a position to see the assault from that place.

It is, however, a well-settled practice of this Court that except where there has been an illegality, or an irregularity of procedure, or a violation of the principles of natural justice, resulting in an absence

of fair trial or a gross miscarriage of justice, this Court does not permit a third review of evidence with regard to questions of fact in cases in which two Courts of fact have appreciated and assessed the evidence with regard to such questions.

8. We propose, therefore, to deal with such of the contentions of learned counsel as are based on his submissions (a) that the findings of the High Court do not justify the convictions of the appellants, (b) that there has been a failure to comply with the provisions of Section 342, Criminal P. C., and (c) that the appellants had no notice, nor a reasonable opportunity, of meeting the case of a separate common intention of three persons, as distinct from the common object of the unlawful assembly.

9. It is quite clear to us that on the finding of the High Court with regard to the common object of the unlawful assembly, the conviction of the appellants for an offence under Section 302 read with Section 149, Penal Code cannot be sustained. The first essential element of Section 149 is the commission of an offence by any member of an unlawful assembly ; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.

In the case before us, the learned Judges of the High Court held that the common object of the unlawful assembly was merely to administer a chastisement to Putte Gowda. The learned Judges of the High Court did not hold that though the common object was to chastise Putte Gowda, the members of the unlawful assembly knew that Putte Gowda was likely to be killed in prosecution of that common object. That being the position, the conviction under Section 302 read with Section 149, Penal Code was not justified in law.

10. So far back as 1873, in Queen v. Sabed Ali 20 Suth W R (Cr) 5 (A), it was pointed out that Section 149 did not ascribe every offence which might be committed by one member of an unlawful assembly while the assembly was existing, to every other member. The section describes the offence which is to be so attributed under two alternative forms: (1) it must be either an offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly ; or (2) an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

In Barendra Kumar Ghosh v. Emperor the distinction between Sections 149 and 34, Penal Code was pointed out. It was observed that Section 149 postulated an assembly of five or more per ons having a common object, namely, one of those objects named in Section 141, and then the doing of acts by members of the assembly in prosecution of that object or such as the members knew were likely to be committed in prosecution of that object. It was pointed out that there was a difference between common object and common intention ; though the object might be common, the intention of the several members might differ. The leading feature of Section 34 is the element of participation in action, whereas membership of the assembly at the time of the committing of the offence is the important element in Section 149. The two sections have a certain resemblance and may to a certain extent overlap, but it cannot be said that both have the same meaning.

The distinction between the two sections was again explained in a recent decision of this Court. Nanak Chand v. State of Punjab, Cr App No. 132 of 1954, D/- 25-1-1955 .

11. In the case under our consideration the charge framed against the appellants mixed up the two sections in a very unusual manner. The charge which we have quoted in an earlier part of this judgment was really a charge under Section 149, Penal Code. It gave no notice to the appellants that three of them had a separate common intention of killing Putte Gowda different from that of the other members of the unlawful assembly. The charge did not mention any such separate common intention, and on the finding arrived at by the learned Judges of the High Court with regard to the common object of the unlawful assembly, none of the members of the unlawful assembly had the intention to kill Putte Gowda, nor did any of them know that Putte Gowda was likely to be killed in prosecution of the common object of chastisement.

In these circumstances, the learned Judges of the High Court were, in error in holding two of the appellants, appellant 1 and appellant 4, guilty of the offence of murder on the principle of liability embodied in Section 34, Penal Code. It is true that Section 34 embodies a principle of joint liability in the doing of a criminal act, and the essence of that liability is the existence, of a common intention. In the case before us, the two appellants who have been held to be liable under Section 34 are appellant 1 (Chikkarange Gowda) and appellant 4 (Mathi Kulla). None of these two persons caused any fatal injury to Putte Gowda. Appellant 1 hit Putte Gowda on the abdomen with a cutting instrument, and the learned Judges found, on the medical evidence in the record, that the injury on the abdomen was not fatal in nature.

The other appellant, Mathi Kulla, hit on the knee with a chopper, which was clearly not a fatal injury. In our view, on the findings of the High Court these two appellants were not liable under Section 302, read with Section 34, Penal Code, further more, the charge framed against them gave them no notice of any joint liability on the basis of a separate common intention to kill Putte Gowda. On the finding of the High Court, none of the members of the unlawful assembly had the intention of killing Putte Gowda.

We are further of the view that the way in which the charge under Section 302 read with Sections 149 and 34 was framed gave the appellants no effective notice that they had to meet the case of a separate common intention of three persons, as distinct from the object of the other members of the unlawful assembly. In these circumstances the question. was not whether a specific charge under Section 34 was or was not necessary the point is that the appellant had no notice nor a reasonable opportunity of meeting a case that some of them had a separate common intention different from that of other members of the unlawful assembly. Therefore, the conviction of the appellants Chikkarange Gowda and Mathi Kulla for an offence under Section 302 read with Section 34 cannot be sustained.

12. As the learned Judges of the High Court themselves put it, the appellants will be held responsible for such of their individual acts as went beyond the common object of the unlawful assembly. The conviction of the appellants for the offence under Section 148, Penal Code is correct but not their conviction under Section 302 read with Section 149, Penal Code, nor their conviction under Section

302, read with Section 34, Penal Code.

13 Turning now to the individual acts of the appellants, Chikkarange Gowda, appellant 1 hit Putte Gowda on the abdomen with a sickle. The medical evidence on the record shows that the injury caused was an oblique, boat shaped, incised wound of 6" x 31/2" x 3" deep leading to the abdominal cavity. There can be no doubt that the injury was caused by a cutting instrument like a sickle and was one which endangered life. It was a grievous hurt of the nature mentioned in the last clause of Section 320, Indian Penal. Code. For this individual act of assault, Chikkarange Gowda is, undoubtedly guilty of an offence under Section 326, Penal Code. There was a substantive charge under Section 302, Penal Code against him for killing Putte Gowda, and there can be no legal difficulty in convicting him of the lesser offence of causing grievous hurt under Section 326, Indian Penal ode.

14 Mathi Kulla, appellant 4 hit Putte Gowda on the knee with a chopper, an offence which may come under Section 324, Penal Code. There was, however, no charge against him under Section 302, Penal Code in respect of the assault on Putte Gowda and in view of his conviction and sentence under Section 148, Penal Code, it is unnecessary to consider the application of Section 324, Penal Code. There was a charge under Section 302, Penal Code against him for causing the death of Nanje Gowda. He was not, however, convicted of that charge by the learned Judges of the High Court.

15. Govindaraju, appellant 2 is said to have hit Nanje Gowda with a spear. We have examined the medical evidence with regard to the injuries sustained by Nanje Gowda. There was no spear wound on Nanje Gowda, which could be definitely connected with the blow said to have been given by Govindaraju. In this state of the evidence the conviction of Govindaraju for an offence under Section 302, Penal Code for the death of Nanje Gowda cannot be sustained.

16. Lastly, there is Govinda Gowda, appellant 3. He hit Nanje Gowda on the head with an axe. The medical evidence shows that Nanje Gowda had six injuries on his head. The doctor, prosecution witness 10, said that each of these injuries sustained by Nanje Gowda was individually fatal. Having regard to the blows which Govinda Gowda gave on the head of the Nanje Gowda by means of an axe and the medical evidence that each of the injuries which were sustained by Nanje Gowda on the head was sufficient in the ordinary course of nature to cause the death of Nanje Gowda, there can be no doubt that for his individual act Govinda Gowda was rightly found guilty under Section 302, Penal Code.

17. It is necessary now to say a few words about the failure to comply with the provisions of Section 342, Criminal P. C. This Court has, on more than one occasion, stated that compliance with the provisions of Section 342 is not a mere idle formality and we are in agreement with the comment made by the learned Judges of the High Court that in this case the examination of the appellants to enable them to explain the circumstances appearing against them was neither full nor very satisfactory.

We also agree with them that no serious prejudice was caused--such as to vitiate the vitiate the whole trial. The case of the appellants was that they were not in the mob and the evidence against

them was false. The Courts below took that defence into consideration, and any questions as to the weapons used--questions which learned counsel for the appellants has suggested should have been put--would only have elicited a denial from the appellants. In any view, such questions were put to Govinda Gowda, whose conviction we are upholding.

18. The result, therefore, is that though there are no reasons for interference with the convictions and sentences of the appellants under Section 148, Penal Code, their convictions and sentences under Section 302 read with Section 149, Penal Code or Section 302 read with Section 34, Penal Code are set aside. Appellant 1, Chikkarange Gowda, is also acquitted of the charge under Section 302, Penal Code, but is instead convicted under Section 326, Penal Code and sentenced to rigorous imprisonment for five years, and the conviction of Govinda Gowda under Section 302, Penal Code for having caused the death of Nanje Gowda is confirmed and"the sentence of transportation for life imposed on him is maintained. The two other appellants, Govindaraju and Mathi Kulla, are acquitted of all the charges except the charge under Section 148, Penal Code, under which their convictions and sentences are maintained.