Subran @ Subramanian And Ors vs State Of Kerala on 24 February, 1993

Equivalent citations: 1993 SCR (2) 84, 1993 SCC (3) 32, 1993 AIR SCW 1014, 1993 (3) SCC 32, 1993 CRI. L. J. 1387, (1993) 2 SCR 84 (SC), 1993 ALLAPPCAS (CRI) 164, 1993 (2) SCR 84, 1993 (2) CRIMES 15, (1993) IJR 137 (SC), 1993 (2) CHANDCRIC 178, 1993 (1) CURCRIR 83, 1993 (1) UJ (SC) 478, 1993 CRIAPPR(SC) 164, 1993 SCC(CRI) 583, 1993 BBCJ 108, (1993) SC CR R 487, (1993) MAD LJ(CRI) 538, (1993) 2 RECCRIR 70, (1993) 2 SCJ 124, (1993) 1 CURCRIR 83, (1993) ALLCRIC 350, (1993) 2 CHANDCRIC 178, (1993) 1 ALLCRILR 728, (1993) 2 CRIMES 15

Author: B.P. Jeevan Reddy

Bench: B.P. Jeevan Reddy

PETITIONER:
SUBRAN @ SUBRAMANIAN AND ORS.

Vs.

RESPONDENT:
STATE OF KERALA

DATE OF JUDGMENT24/02/1993

BENCH:
ANAND, A.S. (J)
BENCH:
ANAND, A.S. (J)
VENKATACHALLIAH, M.N.(CJ)
JEEVAN REDDY, B.P. (J)

CITATION:
1993 SCR (2) 84 1993 SCC (3) 32
JT 1993 (2) 194 1993 SCALE (1)685

ACT:
Indian Penal Code, 1860:
Sections 141, 149, 299, 300, 302 and 326-Unlawful assembly-What is-Six accused charged with offences under section 302 read with section 149-Two acquitted-Effect of-Held other four being less than five would not be members of unlawful assembly-Where Existence of unlawful assembly not proved conviction with aid of section 149 cannot be recorded-Accused cannot be convicted for offence with which not

charged-Accused liable for offences committed individually.

HEADNOTE:

Six accused persons were arrayed by the investigating agency for offences punishable under Sections 302, 324, 323, 341, 148 read with Section 149 IPC, for an occurrence that took place on 24th December, 1986 in which one Suku succumbed to injuries as a result of the assault during the occurrence. They were put on trial, and the prosecution sought to establish its case by examining as many as six eye-witnesses besides other evidence, documentary and oral.

According to the prosecution case, all the six accused persons were armed with weapons like chopper, iron rod, knife, cycle chain and torches and that the accused had held PW.2 George and while the first accused kicked him, the third accused inflicted injuries on him with a cycle chain. So far as Suku deceased was concerned, all the accused except the first accused caused him injuries with a torch, a cycle chain and a knife. The first accused was alleged to have caught hold of Suku by the collar and inflicted injuries on his hands, arms and legs with a chopper. The assault took place in front of an arrack shop. It was alleged that enmity between the two groups on account of suspicion of information being passed on to the Excise Officials, regarding illicit distillation was the cause of the occurrence, but no evidence was led in support of this allegation and no motive for commission of the crime was established at the trial.

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At the trial, four eye-witnesses PW3, P.W. 6, PW.7, the salesman and his assistant in the arrack shop and PW.8 turned hostile and did not support the prosecution case. The prosecution case was sought to be proved by the ocular testimony of PW.4 and PW.5 both aged about 13 years, at the time of the occurrence and other evidence. Both these eye-witnesses supported their statements recorded under section 161 Cr. P.C. during their testimony in Court. The trial court on the basis of prosecution evidence found accused No. 1, Subran, guilty of an offence punishable under Section 302 IPC and sentenced him to suffer rigorous imprisonment for life. Accused Nos. 2 to 6, namely, Rajan, Preman, Viswan, Sura and Shajan, were found guilty of an offence under Section 326/149 IPC and each one of them was sentenced to undergo rigorous imprisonment for three years Besides, accused 1 to 4 were convicted for an offence under Section 148 and sentenced to suffer rigorous imprisonment for one year. All the accused were also convicted for offences under Sections 14, 341, 323,324 read with Section 149 IPC but no separate sentences were awarded on any of those counts.

On appeal to the High Court, the conviction and sentence

awarded to accused 1 to 3 and 5 were confirmed, while accused 4 and 6 were acquitted and the conviction and sentence recorded against them by the Sessions Judge was set aside. Ile participation of the 6th accused and the role assigned to him by the prosecution was doubted by the Judges of the High Court and he was given the benefit of doubt and acquitted. Similarly, the High Court disbelieved the role assigned to accused No. 4 and doubted his participation in the commission of the crime.

]Me accused appealed to this Court by Special Leave. After preliminary hearing it was ordered that the appeal be heard on the limited question regarding the nature of the offence and the quantum of the sentence only.

On the question : Whether after the acquittal of the two accused, could the High Court Convict appellant No. 1 for the substantive offence under Section 302 IPC an offence with which he had not been charged, and appellants 2 to 4 for an offence under section 326/149 IPC,

Partially allowing the appeal, the Court,

HELD: 1. A combined reading of Section 141 and Section 149 IPC

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show that an assembly of less than five members is not an unlawful assembly within the meaning of Section 141 and cannot, therefore, form the basis for conviction for an offence with the aid of Section 149 IPC. [92F]

2. The existence of an unlawful assembly is a necessary postulate for invoking Section 149 IPC. Where the existence of such an unlawful assembly is not proved, the conviction with the aid of Sections 149 IPC cannot be recorded or sustained. The failure of the prosecution to show that the assembly was unlawful must necessarily result in the failure of the charge under section 149)PC. [92H,93A]

3. A person charged for an offence under Section 302 IPC read with Section 149 cannot be convicted of the substantive offence under Section 302 IPC without a specific charge having been framed against him as envisaged by law. Conviction for the substantive offence in such a case is unjustified because an accused might be misled in his defence by the absence of the charge for the substantive offence under Section 302 IPC. [93D]

4. The conviction of appellants 2 to 4 for an offence under Section 326/149 IPC cannot be sustained and the same would be the position with regard to the conviction of all the appellants for other offences with the aid of Section 149 IPC also. [93B]

5. The High Court failed to draw the distinction between an offence under clause (b) and (c) of Section 299 IPC and the one failing under clause (3) of Section 300 IPC. [93G]

6, The effect of the acquittal of the two accused persons by the High Court and without the High Court finding that some other known or unknown persons were also involved in the assault, would be that for all intent and purposes the two

acquitted accused persons were not members of the unlawful assembly. Thus, only four accused could be said to have been the members of the assembly but such an assembly which comprises of less than five members is not an unlawful assembly within the meaning of Section 141 IPC. [92G]

7. Appellant No. 1 Subran not having been charged for the substantive offence of murder under Section 302 IPC, even the trial court, which tried the six accused persons, was not justified in recording a conviction against him for the substantive offence of murder punishable under Sec-

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tion 302 IPC after framing a charge against him for the offence under Section 302 read with Section 149 IPC only. [93C]

8. Appellant No. 1, Subran, was never called upon to meet a charge under Section 302 IPC simplicitor and, therefore, in defending himself, he can not be said to have been called upon to meet that charge and he could very well have considered it unnecessary to concentrate on that part of the prosecution case during the cross-examination of the prosecution witnesses. Therefore, the conviction of the appellant No. 1 for an offence under Section 302 was not permissible. [93E]

9. The intention to cause murder of Suku deceased, could not be attributed to appellant No. 1 and the medical evidence also shows that the injuries attributed to him were not sufficient in the ordinary course of nature to cause the death of the deceased. The conviction of appellant No. 1 for the substantive offence under Section 302 IPC is therefore unwarranted and cannot be sustained. That Suku deceased died as a result of injuries inflicted on him by all the four appellants is not a matter which is in doubt. From the ocular evidence read with the medical evidence, it stands established that the injuries on the deceased had been caused by all the four appellants and that the death of Suku had occurred due to the receipt of multiple injuries. [93H, 94A-B]

10. On a consideration of the circumstances of the case, the type of weapons with which the accused were armed and the nature and seat of the injuries, it is not possible to hold that all the four appellants had shared the common intention of causing such bodily injuries on the deceased as were likely to cause the death of Suku or were sufficient in the ordinary course of nature to cause his death. The appellants would, therefore be liable for the offence committed individually by each one of them. [94D-E]

11. The case of appellant No. 1 therefore, falls within Section 299 I PC punishable under Section 304 Part-1 [PC. He is accordingly, convicted for the said offence and sentenced to suffer rigorous imprisonment for a period of seven years and to pay a fine of Rs. 2,000 and in default of payment suffer further rigorous imprisonment for one year. Fine if realised to be paid to the heirs of the deceased.

[94G-H]
12 (a) With regard to the three other appellants their conviction for
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an offence under Section 326 with the aid of Section 149 is not sustainable in law, it is accordingly set aside and they are convicted under Section 326/149 IPC. They would be responsible for their individual acts. The injuries caused by appellants 2 and 3 were with a torch, iron rod and a cycle chain. None of the injuries caused by them according to the post-mortem report were on any vital part of the body, though some of the injuries caused by blunt weapons were grievous in nature. Each of them are convicted for an offence under Section 325 IPC and sentenced to suffer rigorous imprisonment for two years each. [95B-C]
12 (b) Appellant No. 4 caused grievous injuries to the deceased with a knife, the offence would therefore, fall under Section 326 IPC. He is therefore convicted for the said offence and sentenced to suffer rigorous imprisonment for a period of three years and to pay a fine of Rs. 500/- and in default of payment to suffer rigorous imprisonment for a period of three months. The fine, if realised shall be paid to the heirs of the deceased.
[95D]
12 (c) The conviction of all the appellants for the offence under Section 324 as recorded by the High Court as also for the other offences are maintained but without the aid of Section 149 IPC. [95E]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 237 of 1993.

From the Judgment and Order dated 4.9.91 of the Kerala High Court in Crl. A. No. 537 of 1988.

M.M. Kashyap, Sudhir Gopi, A.G. Prasad and Roy Abraham for the Appellants.

M.T. George for the Respondent.

The Judgment of the Court was delivered by DR. ANAND, J. On 9.3.1992, when this special leave petition, directed against the judgment and order dated 4th September, 1991, of the High Court of Kerala in Criminal Appeal No. 537 of 1988, came up for preliminary hearing, the following order was made:

> "Issue notice limited to the question as to the nature of offence and the quantum of sentence.
>
> No orders on bail."

Heard learned counsel for the parties. Leave is granted confined to the limited question on which notice was issued as referred to above.

For an occurrence which took place on 24th, December 1986, in which one Suku succumbed to the injuries as a result of the assault during the occurrence, six accused persons were arrayed by the investigating agency for offences punishable under Sections 302, 324, 323, 341, 148 read with Section 149 IPC. They were put on trial and the prosecution sought to establish its case by examining as many as six eye-witnesses besides other evidence, documentary and oral. At the trial however, four eye- witnesses, PW3 Devassykutty, PWs 6 and 7 salesman and his assistant in the arrack shop and PW8 Unni @ Velayudhan turned hostile and did not support the prosecution case. The prosecution case was sought to be proved by the ocular testimony of PW4 Biju and PW5 Anil, both aged about 13 years at the time of occurrence and the other evidence. Both the eye-witnesses supported their statements recorded under Section 161 Cr. P.C. during their testimony in court. The trial court on the basis of prosecution evidence found accused No. 1, Subran, guilty of an offence punishable under Section 302 IPC and sentenced him to suffer rigorous imprisonment for life. Accused Nos. 2 to 6, namely, Rajan, Preman, Viswan, Sura and Shajan were found guilty of an offence under Section 326/149 IPC and each one of them was sentenced to undergo rigorous imprisonment for three years. Besides, accused 1 to 4 were convicted for an offence under Section 148 and sentenced to suffer rigorous imprisonment for one year. All the accused were also convicted and sentenced to suffer rigorous imprisonment for six months each under Section 147 IPC. All the accused were also convicted for offences under Sections 143, 341, 323, 324 read with Section 149 IPC but no separate sentences were awarded on any of those counts. On an appeal before the High Court, the conviction and sentenced awarded to accused 1 to 3 and 5 were confirmed while accused 4 and 6 were acquitted and the conviction and sentence recorded against them by the learned Sessions Judge was set aside. In view of the limited notice issued by this Court, we are relieved of the necessity to reappreciate the prosecution evidence in extenso and shall therefore confine ourselves to the determination of the nature of the offence and the award of appropriate sentence to the four appellants accepting, as established the prosecution case against the four appellants beyond a reasonable doubt.

According to the prosecution case, all the six accused persons were armed with weapons like chopper, iron rod, knife, cycle chain and torches. It is the prosecution case that the accused had held PW2 George and while the first accused kicked him, the third accused inflicted injuries on him with a cycle chain. So far as Suku deceased is concerned, according to the prosecution, all the accused except the first accused caused him injuries with a torch, a cycle chain and a knife. The first accused is alleged to have caught hold of Suku by the collar and inflicted injuries on his hands arms and legs with a chopper. The assault took place in front of an arrack shop. According to the prosecution case there was enmity between the two groups on account of illicit distillation and suspicion of information being passed on to the Excise officials. However, no evidence was led in support of this allegation by the prosecution and no motive for commission of the crime was established at the trial.

The postmortem on the deceased was conducted by Dr. Sivasankara Pillai PW12. He had found as many as 38 injuries on the deceased. Most of the injuries found by him, however, were abrasions or contusions on different parts of the body though the deceased had also suffered stab wounds on the

right upper arm and left forearm and sharp weapon injuries on his hands and legs. The bones of the legs and arm had been fractured. According to the medical witness, death of Suku deceased was caused due to multiple injuries. According to the medical evidence, there was no stab or incised wound inflicted on any of the vital parts of the body i.e. neck, chest or abdomen. The Doctor has opined that the deceased had died due to multiple injuries and that the injuries could have been caused by beating him with torches, knife, iron rod, cycle chain and the chopper. According to him, the cumulative effect of all the injuries, taken together, had resulted in the death of the deceased. The doctor further stated that as a result of the chemical analysis of the viscera, blood and urine, there was indication that the deceased had consumed alcohol before he had been assaulted, though he was unable to give the quality or quantity of liquor consumed by the deceased. From an analysis of the record of injuries as detailed in the post-mortem report, it transpires that there were 18 contusions of different dimensions but minor in their gravity on the body of the deceased. Eight of the injuries recorded, out of the 38 in the post mortem report., were abrasions on different parts of the body. According to the medical witness, nine out of those injuries could have been caused by a fall or the deceased coming into contact with any rough surface or area. Out of the remaining injuries, seven were chop wounds while two were stab wounds, besides three were incised injuries. it was the cumulative effect of the injuries which resulted in the death of the deceased and according to the doctor, the injuries when taken together were sufficient to cause death in the ordinary course of nature. None of the injuries by itself was found to be sufficient in the ordinary course of nature to cause death of the deceased. According to the medical opinion about the cause of death, "deceased died due to multiple injuries".

From the above analysis of injuries, it cannot be said that any one of the four appellants, who alone stand convicted by the High Court had inflicted injuries intending to cause death or such bodily injury as is sufficient in the ordinary course of nature to cause death. As already noticed, six accused persons had been charged by the investigating agency for offences punishable under Sections 143, 147, 148, 341, 323, 324, 326 and 302 read with Section 149 IPC and put on trial. The trial court convicted accused 2 to 6 under Section 326 IPC with the aid of Section 149 IPC. It convicted accused No. 1 for an offence under Section 302 IPC. While convicting accused 2 to 6 for the offence under Section 326/149 IPC, the trial court came to the conclusion that 'the accused did not share the common object to murder Suku and that the common object was only to cause grievous hurt' to the deceased. Being of the opinion, that accused No. 1 had caused injuries with a chopper and those injuries "could" have resulted in the death of the deceased, he was convicted for an offence under Section 302 IPC. The High Court acquitted two of the accused and convicted the remaining four only. The High Court found that clear evidence of the eye-witnesses was only against accused Nos. 2, 3 and 5 besides appellant No. 1. The participation of the 6th accused and the role assigned to him by the prosecution was doubted by the learned Judges of the High Court and he was given the benefit of doubt and acquitted. Similarly, the High Court disbelieved the role assigned to accused No. 4 and doubted his participation in the commission of the crime. He was also' given the benefit of doubt and acquitted. While setting aside the conviction and sentence of the said two accused, the High Court did not hold that beside the four accused convicted by it, there were some other known or unknown accused who had also been a party to the commission of the crime. It is in this above background that we have to consider the nature of the offence committed by the four appellants. Admittedly, none of the accused persons individually had been charged for the substantive offence

of murder under Section 302 IPC. In the trial court all the six accused were charge sheeted for an offence under Section 302 read with Section 149 IPC. Other charges were also framed against the accused but only with the aid of Section 149 IPC. After the acquittal of the two accused, could the High Court convict appellant No. 1 for the substantive offence under Section 302 IPC (with which he had not been charged) and the appellants 2 to 4 for an offence under Section 326/149 IPC ?

Section 141 IPC defines an unlawful assembly to be an assembly of five or more persons, where the common object of the persons comprising that assembly is to commit any of the acts enumerated in the five clauses of that Section. Section 149 IPC reads as under:

> "Sec. 149. Every member of unlawful assembly guilty of offence committed in prosecution of common object If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

A combined reading of Section 141 and Section 149 IPC (supra) show that an assembly of less than five members is not an unlawful assembly within the meaning of Section 141 and cannot, therefore, form the basis for conviction for an offence with the aid of Section 149 IPC. The effect of the acquittal of the two accused persons by the High Court and without the High Court finding that some other known or unknown persons were also involved in the assault, would be that for all intent and purposes the two acquitted accused persons were not members of the unlawful assembly. Thus, only four accused could be said to have been the members of the assembly but such an assembly which comprises of less than five members is not an unlawful assembly within the meaning of Section 141 IPC. The existence of an unlawful assembly is a necessary postulate for invoking Section 149 IPC. Where the existence of such an unlawful assembly is not proved, the conviction with the aid of Section 149 IPC cannot be recorded or sustained. The failure of the prosecution to show that the assembly was unlawful must necessarily result in the failure of the charge under Section 149 IPC. Consequently, the conviction of appellants 2 to 4 for an offence under Section 326/149 IPC cannot be sustained and the same would be the position with regard to the conviction of all the appellants for other offences with the aid of Section 149 IPC also.

Since, appellant No. 1 Subran had not been charged for the substantive offence of murder under Section 302 IPC, even the trial court, which tried the six accused persons, was not justified in recording a conviction against him for the substantive offence of murder punishable under Section 302 IPC after framing a charge against him for the offence under Section 302 read with Section 149 IPC only. A person charged for an offence under Section 302, IPC read with Section 149 cannot be convicted of the substantive offence under Section 302, IPC without a specific charge having been framed against him as envisaged by law. Conviction for the substantive: offence in such a case is unjustified because an accused might be misled in his defence by the absence of the charge for the substantive offence under Section 302 IPC. Appellant No. 1, Subran, was never called upon to meet a charge under Section 302 IPC simplicitor and, therefore, in defending himself, he can not be said to have been called upon to meet that charge and he could very well have considered it unnecessary

to concentrate on that part of the prosecution case during the cross-examination of the prosecution witnesses. Therefore, the conviction of the first appellant for an offence under Section 302 was not permissible. That apart, according to the medical evidence, none of the injuries allegedly caused by this appellant was either individually or taken collectively with the other injuries caused by him, sufficient in the ordinary course of nature to cause death of Suku. Medical evidence is clear on this aspect of the case and it is not possible to say that the injuries inflicted by the first appellant with the chopper were inflicted with the intention to cause the death of Suku. The High Court failed to draw the distinction between an offence under clause (b) and (c) of Section 299 IPC and the one falling under clause (3) of' Section 300 IPC. The intention to cause murder of Suku deceased, could not be attributed to him and the medical evidence also shows that the injuries attributed to him were not sufficient in the ordinary course of nature to cause death of the deceased. The conviction of appellant No. 1, Subran, for the substantive offence under Section 302 IPC is therefore, unwarranted and cannot be sustained. That Suku deceased died as a result of injuries inflicted on him by all the four appellants is not a matter which is in doubt. From the ocular evidence read with the medical evidence, it stands established that the injuries on the deceased had been caused by all the four appellants and that the death of Suku had occurred due to receipt of multiple injuries. What offence can then be said to have been committed by the four appellants ?

According to the medical evidence, the injuries caused were cumulatively sufficient to cause death and the death had occurred due to multiple injuries which were found sufficient in the ordinary course of nature to cause death. According to the ocular testimony of witnesses namely, Biju (PW4) and Anil (PW5), who have been believed by both the courts below and with which finding we have no reason to differ, all the four appellants had caused those injuries. It is, therefore, necessary in a case like this to determine as to which of the accused is guilty of a particular offence. On a consideration of the circumstances of the case, the type of weapons with which they were armed and nature and seat of the injuries, it is not possible to hold that all the four appellants had shared the common intention of causing such bodily injuries on the deceased as were likely to cause the death of Suku or were sufficient in the ordinary course of nature to cause his death. The appellants would, therefore be liable for the offence com- mitted individually by each one of them.

As already noticed, though it may not be possible to attribute to appellant No. 1, Subran, the necessary intention to cause death of Suku so as to hold him guilty of an offence of murder under Section 302 IPC since the injuries inflicted by him were not found to be sufficient in the ordinary course of nature to cause death of Suku, but looking to the weapon with which he was armed and the nature number and seat of injuries inflicted by him though not on any vital part, he can certainly be attributed with the knowledge that with those injuries it was likely that death of Suku may be caused and, therefore, he can be cloathed with the liability of causing culpable homicide not amounting to murder. The case of the first appellant, therefore, falls within Section 299 IPC punishable under Section 304 Part-1 IPC. We, accordingly, convict him for the said offence and sentence him to suffer rigorous imprisonment for a period of seven years and to pay a fine of Rs. 2000 (two thousand) and in default of payment of fine suffer further rigorous imprisonment for one year. Fine if realised shall be paid to the heirs of the deceased.

Coming now to the case of the other three appellants. Since, their conviction for an offence under Section 326 with the aid of Section 149 is not sustainable in law, we set aside their conviction under Section 326/149 IPC. They would be responsible for their individual acts. The injuries caused by Rajan and Preman appellants 2 and 3, were with a torch, iron rod and a cycle chain. None of the injuries caused by them according to the postmortem report were on any vital part of the body, though some of the injuries caused by blunt weapons were grievous in nature. We, therefore, convict each of the two appellants Rajan and Preman, for an offence under Section 325 IPC and sentence them to suffer rigorous imprisonment for two years each. So far as the fourth appellant Sura Surendran is concerned, he caused grievous injuries to the deceased with a knife. His offence would, therefore, fall under Section 326 IPC and convicting him for the said offence, we sentence trim to suffer rigorous imprisonment for a period of three years and to pay a fine of Rs. 500 (five hundred). In default of payment of fine he shall further suffer rigorous imprisonment for a period of three months. Fine, if realised shall be paid to the heirs of the deceased. The conviction of all the appellants for the offence under Section 324 as recorded by the learned Judges of the High Court as also for the other offences are maintained but without the aid of Section 149 IPC. In view of the sentences recorded for offence under Section 304 Part I against the first appellant Subran, Section 325 IPC against appellants 2 and 3, Rajan and Preman, and Section 326 IPC against Sura Ca, Surendran, appellant 4, no separate sentence are recorded for the other offences. The appeal is accordingly partially allowed and disposed of in the above terms.

N.V.K. Appeal allowed partially.