Saddik @ Lalo Gulam Hussein Shaikh & Ors vs State Of Gujarat on 3 October, 2016

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Bench: Amitava Roy, Pinaki Chandra Ghose

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.1999-2000 OF 2010

SADDIK @ LALO GULAM HUSSEIN SHAIKH & ORS. APPELLANT(S)

:VERSUS:

STATE OF GUJARAT RESPONDENT(S)

JUDGMENT

Pinaki Chandra Ghose, J.

These appeals by special leave, have been directed against the judgment and order dated 24.10.2008 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal Nos. 117 of 2007 and 2274 of 2006 respectively, whereby the High Court dismissed the criminal appeals filed by the appellants herein and confirmed their conviction and sentence for various offences punishable under Section 302 read with Sections 143, 147, 148, 323 of the Indian Penal Code, 1860 [hereinafter referred to as "IPC"].

The brief facts necessary to dispose of these appeals are that on 04.03.2005 at about 8:00 p.m., one Rajubhai Jesingbhai Vasava(PW1), along with Rajubhai Ramubhai Vasava (deceased), Rakeshkumar Manharbhai Patel (PW2) and Prajeshkumar Ishwarbhai Patel (PW3), four persons, had gone to Amboli Cross-road, on two motorcycles, from the house of Rakeshbhai Tailor at Kholwad, for eating Biryani and after reaching at the Lari of Saddik @ Lalbhai Gulam Hussain Shaikh of Village Kathor (Accused No.1), they ordered four plates of Biriyani. But they were served only three plates of Biriyani with chicken pieces and one plate of Biriyani without chicken pieces.

When Accused No.1 insisted on payment for four plates of Biriyani, there was a hot altercation between Rajubhai Ramubhai Vasava and other prosecution witnesses, on the one hand and Accused No.1 i.e. Saddikbhai @ Lalbhai Gulam Hussain Shaikh, on the other. Thereafter, they had to pay money for four plates of Biriyani and all this while Accused No.1 was abusing PW1 and other prosecution witnesses and had also drawn out a knife. However, PW3 intervened and separated PW1 and other prosecution witnesses and Accused No.1.

Thereafter, when PW1 and other prosecution witnesses were travelling to Village Kholwad on two motorcycles, they met one Kishorbhai Kantibhai Dholia (PW5) who happened to be the uncle of PW1 and narrated the whole incident before him who assured that he would settle the dispute since he was well-acquainted with Accused No.1. Thereafter, while PW5 had gone to fill petrol in his motorcycle, the accused persons came in auto rickshaws to the spot where PW1 and other prosecution witnesses were waiting for the return of PW5 and according to the statement of the complainant (PW1) in the FIR, Accused Nos. 1, 2 and 3 caused knife injuries to the deceased Rajubhai Ramubhai Vasava while other accused persons started beating the complainant and other prosecution witnesses with sticks.

Thereafter, the complainant, PW2 and PW3 had to flee to save themselves and when they arrived at the house of PW1, they recounted the entire incident to his father Jesingbhai Chhaganbhai Vasava (PW14) who immediately rushed to the scene of occurrence in the car of one Shri Aminbhai and carried the severely injured Rajubhai to Dinbandhu Hospital wherefrom he was shifted to Mahavir Hospital where he expired.

The law was set into motion upon lodging of FIR by PW1 (complainant) on 04.03.2005 at 11.55 p.m., at Kamrej Police Station. The FIR was registered as C.R.No. I-30 of 2005. The postmortem of the deceased was performed by Dr. Pranav Vinodchandra Prajapati (PW15). Looking to the postmortem note, marked Exh. 67, there were injuries on chest, stomach and intestine by knives.

Upon completion of investigation, charge sheet under Sections 143, 147, 148, 149, 302, 323 and 504 of the IPC and Sections 3(1)(10) and 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, was filed on 26.04.2005 in the Court of Judicial Magistrate, First Class, Kathor. However, the case being exclusively triable by the Court of Sessions, Surat, the same was committed to the Hon'ble Sessions Court under Section 209 of the Cr.P.C. Accordingly, a Special Atrocity Case No.6 of 2005 was registered against the accused. Thereafter, upon the case being transferred to the Court of Additional Sessions Judge, 2nd Fast Track Court, Surat City, Surat, charges were framed against the accused persons vide Exh.8, for the offences punishable under Sections 143, 147, 148, 149, 302, 323, 504 of IPC and under Sections 3(1)(10) and 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. After they denied the said charges, the evidence of prosecution witnesses was recorded.

Upon recording the evidence of the prosecution witnesses and after considering all the relevant facts, the Trial court vide its judgment and order dated 16.11.2006 convicted the accused persons, mainly for the offence punishable under Section 302 read with Sections 143, 147, 148, 323 of the IPC and sentenced them to rigorous imprisonment for life and to pay a fine of Rs. 1,000/- and in case of

default, to undergo further simple imprisonment for six months. The accused persons were acquitted of the offences punishable under section 504 of IPC and Sections 3(1)(10) and 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Being aggrieved by the aforesaid judgment and order of the Trial Court, the accused persons filed appeals before the High Court. While Accused No. 5 preferred Criminal Appeal No. 2000 of 2010, Criminal Appeal No. 1999 of 2010 was preferred by original Accused Nos. 1 to 4, 6 and 7.

The High Court vide its judgment and order dated 24.10.2008, dismissed the aforesaid appeals filed by the accused persons and confirmed the judgment of conviction passed by the Trial court. Aggrieved by the aforesaid judgment and order passed by the High Court, the accused persons have sought to challenge the same before us in these appeals.

We have heard the learned counsel appearing for the accused appellants as also the learned counsel appearing for the respondents and have perused the oral and documentary evidence on record.

The principles for the exercise of jurisdiction in a petition under Article 136 of the Constitution of India have been succinctly summarized by a two-judge Bench of this Court in Ganga Kumar Srivastava Vs. The State of Bihar, (2005) 6 SCC 211, in the following terms:

> i. "The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of the fact save in exceptional circumstances. ii. It is open to this Court to interfere with the findings of fact given by the High Court if the High Court has acted perversely or otherwise improperly.
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> iii. It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.
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> iv. When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.
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> v. The appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record." Keeping in mind the above position of law as enunciated and settled by a series of decisions of this Court, we shall now examine the evidence adduced by the parties and the materials on record and see that in view of the nature of offence alleged to have been committed by the appellants, whether the concurrent findings of fact call for interference in the facts and circumstances of the case.
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> In the present case, there have been concurrent findings as to the guilt of the accused persons by both the courts below. In upholding the judgment and order of conviction

of the Trial Court, the High Court had primarily relied upon the evidence of eye-witnesses, namely, PW1, PW2 and PW3, who were found to be trustworthy and their statements corroborated each other. The High Court held that the accused were sharing the common object of causing injuries to the deceased and the prosecution witnesses.

Further, looking to the evidence given by PW15 (Exh. 63), who had performed the post-mortem of the deceased, the High Court found that there were three stab injuries on the chest, stomach and intestine which were sufficient in the ordinary course of nature, to cause death of the deceased, thereby attracting clause, "thirdly" of Section 300 read with Section 149 of the IPC.

The High Court relied upon the judgment of this Court in State of U.P. Vs. Virendra Prasad, AIR 2004 SC 1517= 2004 (9) SCC 37, in support of the aforesaid conclusion, wherein it was held that the intention to cause death is not an essential requirement of clause (2), but intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause of section 300. It has also been held by this Court in the aforesaid case that as per clause Thirdly of Section 300 of the IPC, if the act is done with the intention of causing bodily injury which injury is sufficient in ordinary course of nature to cause death and if the accused persons have common object to cause such injury, then also it will fall under Section 300 of IPC. Thus, intention to cause death is nothing decisive, but, as per clause Thirdly of Section 300 of the IPC, if the accused were having common object of causing only bodily injury, which were found sufficient in the ordinary course of nature, to cause death, such killing will fall within the ambit of this clause Third of Section 300 of IPC. Thus, looking to the deposition of the prosecution witnesses, the offence of murder of Rajubhai Ramubhai Vasava has been proved beyond reasonable doubt against the accused.

Learned counsel for the appellants has tried to assail the findings of the Courts below on more than one grounds. It has been contended that except Accused No.1, the involvement of other accused persons, even on looking to the injuries caused to the deceased and the complainant, does not seem to be probable and the prosecution has roped in accused persons as many as possible in the commission of the offence. In support of this contention, the counsel for the appellants has sought to rely upon the following decisions of this Court:

State of Maharashtra Vs. Kashi Rao & Ors., (2003) 10 SCC 434; Akbar Sheikh & Ors. Vs. State of West Bengal, (2009) 7 SCC 415; Rachamreddi Cheena Reddy Vs. State of A.P., (1999) 3 SCC 97; Fatta & Ors. Vs. State of U.P., (1980) Supp SCC 159; and Zahoor & Ors. Vs. State of U.P., (1991) Supp(1) SCC 372. All these decisions are to the effect that mere presence in an unlawful assembly without sharing the common object of the same, will not render a person liable for an offence under Section 149 of

the IPC and also as to what constitutes 'common object' in terms of Section 149 IPC.

Per contra, the learned counsel for the State has submitted that every member of the unlawful assembly who had joined Accused No. 1 has to be punished under Section 302 read with section 149 ingredients whereof have been squarely met. In support of this submission, the learned counsel for the State has placed reliance on the judgment of this Court in Lalji & Ors. Vs. State of U.P., (1989) 1 SCC 437, particularly paragraphs 8, 9 and 10, which have been reproduced below:

"8. Thus, whenever so many as five or more persons meet together to support each other, even against opposition, in carrying out the common object which is likely to involve violence or to produce in the minds of rational and firm men any reasonable apprehension of violence, then even though they ultimately depart without doing anything whatever towards carrying out their common object, the mere fact of their having thus met will constitute an offence. . . .

9. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. 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. It must be noted that the basis of the constructive guilt under section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.

10. Thus, once the Court hold that certain accused persons formed in unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it." In this regard, the observations made by the

High Court in the present case on this point are worth reproducing:

"It is vehemently contended by learned counsel for the appellants that accused Nos.2 to 7 were not sharing common object, which is described under Section 141 of the Indian Penal Code and they ought not to have been punished for an offence punishable under Sections 143 and 147, 302 read with Section 149 of the Indian Penal Code. This contention is not accepted by this Court mainly for the reasons that Looking to the evidence, it appears that initially there was hot altercation between the deceased and P.W.Nos.1, 2 and 3 with accused No.1 at lari of accused No.1 for payment of four plates of biriyani. Accused No.1 pointed a knife to the deceased.

Accused No.1 thereafter had gone and called his brothers and friends. They all came in two rickshaws with knives and sticks. Thus, all the accused were going for a particular purpose, they were going with knives and sticks, their object was common.

The common object is also revealed by their assault. No sooner did, they saw the deceased, P.W.Nos.1, 2 and 3, they alighted from the rickshaws, assaulted them with knives and sticks.

Rajubhai Vasava sustained three stab injuries, as per medical evidence and postmortem note, which corroborate the evidence given by injured eye- witness P.W.No.1 and evidence given by other eye-witnesses P.W.no.2 and 3. P.W.No.1 has also sustained two injuries by sticks, who is examined by Doctor i.e. P.W.No.12, who has stated that P.W.No.1 was brought with police yadi (Exh- 62), who has examined P.W.No.1 and issued Injury Certificate at Exh-63. Looking to his deposition and cross-examination, injuries by sticks were fresh. Thus, both knives as well as sticks were used." In Gangadhar Behera and Ors. Vs. State of Orissa, (2002) 8 SCC 381, this Court has held:

"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." Further, once it is established that the unlawful assembly had a common object, it is not necessary that all the persons forming the

> unlawful assembly must be shown to have committed some overt act. For the purpose of incurring vicarious liability under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. [See: Daya Kishan Vs. State of Haryana, (2010) 5 SCC 81; Sikandar Singh Vs. State of Bihar, (2010) 7 SCC 477, State of U.P. Vs. Krishanpal & Ors., (2008) 16 SCC 73, Debashis Daw Vs. State of W.B., (2010) 9 SCC 111, and Ramachandran & Ors Vs. State Of Kerala, (2011) 9 SCC 257].

In the light of the above discussion, we are of the opinion that none of the cases cited above help the cause of Accused Nos. 2 to 7 to warrant acquittal under Section 149 IPC. Thus, we find no reason to differ with the findings of the High Court on this point and we do not accept the contention of the learned counsel for the appellants that a case under Section 149 is not made out against Accused Nos. 2 to 7.

The contention of the counsel for the appellants that there was no reason for Accused No.1 to commit assault on the deceased, is liable to be dismissed as unsustainable in view of the evidence of the eye-witnesses, namely, PW1, PW2 and PW3.

It is settled legal position that even if the absence of motive, as alleged, is accepted, that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence cannot be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. [See: Hari Shankar Vs. State of U.P., (1996) 9 SCC 40; Bikau Pandey & Ors. Vs. State of Bihar, (2003) 12 SCC 616; Abu Thakir & Ors. Vs. State of Tamil Nadu, (2010) 5 SCC 91; State of U.P. Vs. Kishanpal & Ors., (2008) 16 SCC 73; and Bipin Kumar Mondal Vs. State of West Bengal, (2010) 12 SCC 91].

It has also been contended by the counsel for the appellants that the evidence is silent and vague as to who inflicted the stick injuries upon PW1. Moreover, the injuries were only on the back and thigh of PW1 while there was no evidence of any injury upon PW2 and PW 3. It was further submitted that though appellant Nos.2 and 3 were armed with knives, the evidence on record shows that appellant Nos.2 and 3 did not inflict any injury upon anyone with their knives. Further, since the original quarrel did not involve appellant Nos. 2 to 7 and the same was confined to the deceased and the prosecution witnesses on one side and Appellant No. 1 on the other, Appellants nos. 2 to 7 did not have any motive/intention to murder the deceased.

These contentions made by the learned counsel for the appellants are not liable to be accepted in light of the observations of this Court in Masalti Vs. State of U.P., AIR 1965 SC 202= 1964(8) SCR 133, wherein it was held:

"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." It has been next contended by the learned counsel for the appellants, as an alternative submission, that Accused Nos.2 to 7 are liable to be sentenced under Section 304 (Part-II) of the IPC since they did not have any intention of committing the murder of the deceased. We are not inclined to agree with the learned counsel for the appellants in the light of the findings of fact recorded by the High Court as well as the judgment of this Court in State of U.P. Vs. Virendra Prasad (supra).

Moreover, the locus classicus on the interpretation of Sections 299 and 300 of the IPC is the often quoted decision of this Court in Virsa Singh Vs. State of Punjab, AIR 1958 SC 465 = 1958 SCR 1495, where Vivian Bose, J. speaking for the Court, explained the ingredients that must be satisfied for a culpable homicide to amount to murder. Dealing with clause 'Thirdly' under Section 300 of the IPC, the Court explained the essentials of that clause in the following words:

"12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 'thirdly';

First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender." This Court then went on to explain the third

ingredient referred to the above passage and made the following observations:

"The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion." Applying the above tests to the case at hand, we have no difficulty in holding that, keeping in view the nature of the injury, the vital part of the body on which the same was inflicted and the weapon used by the Accused No. 1, and the medical evidence, the said injury was sufficient in the ordinary course to cause death.

Finally, it has been argued by the counsel for the appellants that there was no prior enmity between Accused No.1 and the deceased and the prosecution witnesses and that he committed the crime in the heat of passion upon a sudden quarrel and therefore, his case, is covered under Exception 4 of Section 300 IPC and therefore, he may at best be convicted under Section 304 Part II of the IPC.

On the other hand, it has been submitted by the counsel for the State that the incident did not happen in the middle of any heated exchange between parties but as a result of a cold blooded plan to murder the deceased. Had the incident occurred in the heat of the moment during violent altercations, then it would have happened in Accused No.1's Biriyani stall. The very fact that Accused No.1 had arrived at the scene of the crime with nine armed men in two auto rickshaws goes to show that he had the fullest intent to commit the murder of the deceased Rajubhai. Thus, Accused No.1 was liable to be punished only under Section 302 of IPC and not under Part I or Part II of Section 304, he urged.

The law relating to appropriate invocation of Exception 4 to Section 300 of the IPC, has been laid down by this Court in Surinder Kumar Vs. Union Territory, Chandigarh, (1989) 2 SCC 217, in the following words:

"To invoke this Exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must

have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly." Applying these tests to the case at hand, we find that they do not help the cause of Accused No.1. In the present case, Accused No.1 had arrived at the scene of occurrence with nine armed men out of which three were equipped with knives and the rest were equipped with sticks. Sufficient amount of time had elapsed between the initial altercation at the restaurant of Accused No.1 and the subsequent arrival of the accused persons at the spot of the crime. Moreover, it was also established from the evidence on record that Accused No.1 had inflicted knife injury of such a nature, upon the unarmed deceased, that was sufficient in the ordinary course of nature to cause death. Hence, we are not inclined to grant the benefit of this Exception clause to Accused No.1 in the present case.

Thus, in the light of the above discussion, we are of the view that the present appeals are devoid of merits, and we find no ground to interfere with the judgment passed by the High Court. The appeals are, accordingly, dismissed.

.....J (Pinaki Chandra Ghose) .....J (Amitava Roy) New Delhi;

October 03, 2016.