

Mohar Singh And Ors. vs State Of U.P. on 4 May, 2018

Author: Mukhtar Ahmad

Bench: Mukhtar Ahmad

HIGH COURT OF JUDICATURE AT ALLAHABAD

Judgement Reserved on 17.4.2018

Delivered on 04.05.2018

A.F.R

Court No. - 47

Case :- CRIMINAL APPEAL No. - 2888 of 1983

Appellant :- Mohar Singh And Ors.

Respondent :- State Of U.P.

Counsel for Appellant :- R.P. Singh,V.S.Singh

Counsel for Respondent :- A.G.A.

Hon'ble Ram Surat Ram (Maurya), J.

Hon'ble Mukhtar Ahmad, J.

(Delivered by Hon'ble Mukhtar Ahmad, J.)

1. This criminal appeal arises out of the judgement and order dated 26.11.1983 passed by IV Additional Sessions Judge, Kanpur Dehat in S.T. No. 175 of 1980 (State Vs. Mohar Singh and Ors) whereby appellants were convicted and awarded sentence as under:

Accused Sec.

Sec.

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Sec.

Sec.

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Sec.

Sec.

1. Mohar Singh 2 yrs L.I. 5 yrs

2 yrs 1 year

2. Gaya Singh 2 yrs L.I. 7 yrs 2 yrs 1 year

3. Nattho Singh 2 yrs L.I. 5 yrs 2 yrs 1 year

4. Mool Chand 2 yrs L.I. 5 yrs 2 yrs 1 year

5. Brij Bhoshan 2 yrs L.I. 5 yrs 2 yrs 1 year

6. Kallu Singh 2 yrs L.I. 5 yrs 2 yrs 1 year

7. Hari Shankar 2 yrs L.I. 5 yrs 2 yrs 1 year

8. Sundar Singh 2 yrs L.I. 5 yrs 2 yrs 1 year

9. Ram Awtar 2 yrs L.I. 5 yrs 2 yrs 1 year

10. Badri Singh 2 yrs L.I. 5 yrs 2 yrs 1 year

2. The prosecution version in nutshell is that appellant Mohar Singh and his family members had illegally taken forceful possession over the trees belonging to one Sukhdei co-villager and a suit was filed by her in this regard wherein Shyamlal, grand-father of first informant and Ramnath Singh co-villagers were the witnesses. That suit was decreed in favour of Sukhdei and in execution of the decree, she-buffallow of Mohar Singh was attached, due to which Mohar Singh and his family members were having grudge and animosity with first informant and his family. Narrating the story

and manner of assault it was asserted that on 2.3.1980 at about 3:30 p.m. in village Gurgawan P.S. Sheoli district-Kanpur Dehat, Kamal Narain nephew of first informant, Ram Nath Singh-PW-2, Nanka Chamar-DW-3, Radhelal Chamar, Ram Kumar Nai-PW-3, Jai Ram Teli, Bhagwan Deen Nai and so many co-villagers were singing holy faag in front of the house of Ranjit Singh and did not stop in front of the house of Mohar Singh. At that time Mohar Singh armed with his licensee gun abusing the people in faag, shouted as to why they did not stop at his door and why stopped at the door of his nephew Ranjit Singh. He also exhorted his family members to keep them run away by beating. Upon this Gaya Singh having, tamancha, Naththu Singh, Harishankar, Mool Chand, Brij Bhushan, Sundar Singh, Ram Awtar Singh, Badri and Kallo armed with lathi danda came there and Mohar Singh opened fire from his licensee gun aiming at Kamal Narain which hit his chest, while accused Gaya Singh fired a shot on Nanka-DW-3 who received pellet injuries on his wrist and abdomen. The remaining accused started assaulting Radhe Lal Chamar, Ram Kumar Nai, Ram Nath and Nanka Chamar and caused them injuries. It was also contended that the incident was also witnessed by Jai Ram Teli and Bhagwan Deen Nai and so other persons of the village. The condition of Kamal Narain was serious, so he was immediately taken to the hospital for treatment but on the way before outpost Bhaupur in village Ate, he succumbed to the injuries. The FIR was got lodged by Jagannath @ Lallu Dubey PW1, which was registered by PW-5 constable Dharmendra Singh and concerning G.D. was also prepared by him. The case was investigated by Salik Ram Ratnakar, sub-inspector of police, PW-6, who recorded the statement of first informant Jagannath PW-1 at police station and rushed to the spot, where he prepared site plan, conducted inquest. Thereafter preparing necessary papers such as chalan nash, photo nash, chitthi C.M.O, chitthi R.I and send the dead body in a sealed cover through constable Vishwanath Singh-PW-4 and constable Shiv Shankar to the post mortem house. Investigating Officer also collected the blood stained and simple mud, empty cartridges, pallet, tikli etc. from the spot and prepared the fard. After concluding the investigation he submitted the charge sheet against all the accused persons. Concerned magistrate committed the matter to the court of session for trial, where from it was transferred to the court of Additional Sessions Judge, by whom charges were framed against accused persons who did not plead guilty and claimed to be tried.

3. In order to substantiate the charges against the accused persons, the prosecution examined 8 witnesses. PW-1 Jagannath @ Lallu Dubey, is the first informant of this case he has proved the FIR. PW-2 Ram Nath Singh and PW-3 Ram Kumar are examined as eye witnesses of the incident who as per prosecution had sustained injuries in the same incident. PW-4 constable Vishwanath Singh is the witness who along with constable Shiv Shankar had taken the dead body after inquest to the post mortem house. PW-5 is the constable Dharmendra Singh, who had registered chik FIR and concerned G.D of this case. PW-6 Salik Ram Ratnakar is the Investigating Officer of this case. PW-7 Dr. A.N. Singh is the witness who conducted post mortem on the dead body of deceased Kamal Narain on 3.3.1980 at 3 p.m. PW-8 Dr. A.K. Chauhan was medical officer of Primary Health Centre Chaubepur, who had examined injured Radhe Lal, Ram Kumar, Nanka, Ram Nath and Kali Charan on 3.3.1980.

4. After concluding the prosecution evidence, statements of accused persons under Section 313 Cr.P.C. were recorded. The accused denied the prosecution version and claimed their false implication due to enmity, besides this they jointly filed written statement.

5. On behalf of the accused persons three witnesses were examined in defence. DW-1 Dr. R.C. Dhimri, who was posted in K.P.M. Hospital, Kanpur as medical officer. On 3.3.1980 he examined the injured Natthu Singh at 6.05 p.m.

6. DW-2- Dr. S.K. Chaddha, medical officer, District Jail, examined Mool Chand on 4.3.1980 at about 6.15 p.m.

7. DW-3- Nanka is the person who is said to have sustained injuries in the same incident as he was one of the person who was singing faag. It has been stated by him that on the day of incident at about 3.30-4.00 p.m. He was sitting at the door of his house, his brother Radhey Lal and Kali Charan also came there. He further states that in front of the house of Hari Shankar, Mohar Singh, Jagannath, Kamal Narain, Ram Nath, Mam Kumar, Virendra Singh were singing Kabira faag, 3-4 persons were also with them but he did not recognize them. He further states that Mool Chand and others were resisting them not to sing Kabira but Jagannath and others did not stop. Describing the manner of sustaining injuries on his own body he further says that Virendra Singh opened fire by country made pistol targeting Mohar Singh but he was standing between them and fire hit him. In course of cross examination he denied from causing the injuries by accused Gaya Singh.

8. Learned trial Court scrutinized the evidence produced on behalf of the parties and came to the conclusion that all the accused persons were involved in the crime, he found them guilty, convicted them and awarded the sentence as stated above.

9. Feeling aggrieved with the Judgment and order aforesaid, this appeal was preferred by all the 10 accused persons but during pendency of the appeal, appellant Mohar Singh, Natthu Singh and Mool Chand have passed away and the appeal in their respect has already been abated.

10. We have heard Sri V.S. Singh along with Sri Vishwanath Singh learned counsel for the surviving appellants and Sri Brijesh Yadav learned A.G.A. for the State and gone through the record.

11. First of all applicability of section 149 IPC read with section 302 and 307 IPC has been challenged by learned counsel appearing on behalf of the surviving appellants by saying that accused Mohar Singh and Gaya Singh were convicted under 302 and 307 IPC respectively and remaining accused were convicted in both the sections read with section 149 IPC. The question arises as to whether the conviction of the remaining accused persons under section 302 and 307 IPC read with section 149 IPC is legally sustainable.

12. Section 149 of the Indian Penal Code provides that 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. This Section consists two clauses and both the clauses vary in degree of certainty.

The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly.

The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly nevertheless the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object.

The common object may be commission of one offence while there may be likelihood of the commission of yet another offence the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the Court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behavior of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 either clause is attracted and the Court is convinced, on facts and in law both, of liability capable of being fastened vicariously by reference to either clause of Section 149 of IPC merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act.

13. It would be proper to refer the observation of the Hon'ble Supreme Court made in *State of Punjab vs Sanjiv Kumar* AIR 2007 S.C. 2430 in para no.10, that the distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it 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 part of the offences committed in prosecution of the common object would also be generally, if not always, within the second part, 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).

14. In *Alauddin Mian v. State of Bihar* AIR 1989 SC 1456 the import of Section 149 IPC was explained as under :

"..... This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be safely construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed

to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of anyone or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, it is not the intention of the legislature in enacting Section 149 to render every member of an unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to invoke Section 149 it must be shown that the incriminating act done to accomplish the common object of the unlawful assembly. Even if an act incidental to the common object is committed to accomplish the common object of the unlawful assembly, it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149."

15. In this matter there are 10 accused persons. For ascertaining the applicability of section 149 it seems to be proper to reproduce the relevant portion of FIR:-

"vkt fnu esa xkWo dh gksyh esa Qkx xkrs gq, esjk Hkrhtk dey ujk;u o xkWo ds jkeukFk flag uUdk pekj jkedqekj ukbZ tSjke rsyh o Hkxoku nhu ukbZ o cgqr ls yksx eksgj flag ds ?kj ds lkeus jkLrs ls gksdj tc Qkx jathr flag ds njokts ij djho lk

16. PW1 Jagannath in his cross examination in para no. 38 describes the manner of assault in following way :-

38 aftlds Hkh njokt Qkx tkrh gS og jaax vkSj vchj ls Lokxr djrk gS vkSj vius njokts feNkSuk foNk dj Qkx dk bartkj djrk gS A tc Qkx jathr dē njokts iWagqpk rc ekSgj flag us yydkj mlh ds ckn ekSgj flag canwd ysdj vk;sA ckdH yksx ykfB;kWa oxSjg ysdj ekSgj flag dh yydkj ij ckn esa vk;s A ekSgj flag igys ls rS;kj [kMs Fks A ckdH yksx ekSgj flag dh yydkj ds ckn rS;kj gksdj vk;s A

17. Ram Kumar PW3 in this regard says in para 7 of his oral testimony that "igys eksgj flag us yydkj dj Qk;j dj fn;k mlds ckn vkSj yksxksa us ?ksjk Fkk "

18. Careful perusal of FIR and statements of the witnesses aforesaid show that accused persons came on the spot in two parts. Firstly accused Mohar Singh came on spot and challenged the faag party, there after on his exhortation other accused arrived on the spot. Very important and notable point is that Mohar Singh exhorted his family members to keep them run away by beating "ekj dj Hkxkvks lkyksa dks" He did not use the word to kill them. On his exhortation other accused persons came there with lathi dandas except Gaya Singh, who is said to be armed with country made pistol. All this shows that the common object of the unlawful assembly was only to make the faag party run

away by beating and in no case to kill any body. Oral testimony of PW1 also shows that initially Mohar Singh shouted the people of faag party and thereafter he bring the gun and made a fire. In the same way opening of the fire by accused Gaya Singh was not the common object of the assembly and remaining accused persons such as the members of that assembly had no knowledge of likelihood of the commission of the offences under section 302 and 307 as stated above. As such it is clear that the act of firing made by accused Mohar Singh and Gaya Singh were not knew to be likely to be committed in prosecution of the object of that assembly. It may also be considered at this stage that DW-3 Nanka, who is said to have sustained injuries in the same incident has stated in his oral testimony that Mool Chand etc. were resisting for singing kabira but Jagannath etc did not stop then Kamal Narain, Ram Kumar, Ram Nath, Jagannath assaulted Hari Shankar, Natthu, Mool Chand by lathis. Thereafter Mohar Singh came on the spot bringing gun and opened fire in air. In this regard we are of the considered opinion that act of making fire by accused Mohar Singh and Gaya were their individual acts for which they shall be liable personally and other accused persons can not be held liable vicariously with the help of section 149 IPC and their conviction under section 302, 307 IPC read with section 149 IPC is not legally sustainable and we set aside the same.

19. Now we examine the validity of conviction of accused Mohar Singh and Gaya Singh under section 302 and 307 IPC respectively. Since Mohar Singh has expired and appeal in his respect has already been abated, so to examine his conviction under section 302 IPC lost its relevance. Let we examine conviction of accused Gaya under section 307 IPC. As per prosecution version Nanka Chamar PW-3 sustained fire arm injuries caused by Gaya Singh. Injured Nanka Chamar was medically examined by Dr. A.K. Chauhan PW-8, who recorded following injuries on his body:

Nanka Chamar

1. One circular punctured wound at dorsum of right thub at junction of metacarpophalangeal joint about 2 mm in diameter, direction postere anterior, round solid object palpable at anterior aspect of thumb about size of a pea wound of exit is not visible. Advised x-ray of right hand for final opinion.
2. One oval punctured wound about size of .4 mm on right side of abdomen about 17 cm from the midline. There is blackening present round solid object palpable in subcutaneous tissue. Advised x-ray anterior posterior view of abdomen.
3. One lacerated wound about 2 cm x 1/2 cm on right side of back, about 4 cm from injury no.2 towards the back.

All the injuries were simple and were caused by some firearm and an x-ray was advised for further opinion. The duration was within 24 hours. Ex. Ka-2 is the x-ray report of Nanka and there was one radio opaque shadow of metallic consistency and with fracture of the proximal phalynx right thumb and on x-ray of abdomen there was one rounded radio opaque shadow of metallic consistency right side of chest in soft tissue. X-ray plates are Ext. II and III respectively.

20. Injured Nanka has been produced by defence as DW3. He has stated that Virendra Singh had opened fire aiming Mohar Singh but he was standing in between them so he received the injuries. In cross examination he has denied from making fire on him by Gaya Singh. Considering the evidence on record in this regard we come to the conclusion that defence has succeeded in raising doubt as to whether accused Gaya Singh caused injuries to Nanka and in our view this fact could have not been proved against accused Gaya Singh beyond reasonable doubt. As such accused Gaya Singh is liable to be acquitted under Section 307 and 148 IPC and we acquit him accordingly under section 307 and 148 IPC giving benefit of doubt.

21. Now we have to proceed in respect of commission of the crime under section 325/149 and 323/149 I.P.C. As per prosecution version Radhey Lal, Ram Kumar, Ram Nath Singh and Kali Charan sustained injuries in this incident. They were examined by Dr. A.K. Chauhan PW-8 who found following injuries which are given below.

Radhey Lal

1. Swelling about 6 cm x 4 cm on dorsum of right hand, including the right hand, including the right index and middle fingers. Advised X-ray of right hand.
2. Abrasion about 1/2 cm x 1/2 cm on dorsum of right index finger, at junction of metacarpophalangeal joint.

Injury no.1 was kept under observation and an X-ray was advised while injury no.2 was simple. The injuries were caused by some blunt object and the duration at the time medical examination was about 24 hours. Ext. Kaa-3 is the x-ray report of Radhey Lal and there was fracture of right second metacarpal bone at its distal end. The x-ray plate is Ext.I Ram Kumar

1. Swelling about 3 cm x 3 cm at dorsum of right hand including right index finger.
2. Abrasion about 2 mm x 2 mm on dorsum of right index finger at junction of first and second phalynx.

Both the injuries were simple and were caused by some blunt object and were within 24 hours old.

Ram Nath

1. Lacerated wound 3 cm x 3 cm at right side of scalp about 9 cm from the right eye brow.
2. Lacerated wound about 3.1/2 cm x 1 cm at right side of scalp about 2 cm away from the injury no.1.

Both the injuries were simple and were caused by some blunt object and were caused within 24 hours.

Kali Charan

1. Lacerated wound 3 cm x 1 cm on left side of scalp about 9 cm from the left ear.

The injury was simple and most probably caused by some blunt object and was within 24 hours and found following injuries.

22. As per prosecution version the accused persons who were having lathi danda in their hands assaulted the aforesaid injured persons. This fact has been proved by the prosecution witnesses in their oral testimony and learned trial Court has taken much pain in analyzing the evidence of the witnesses and we have no hesitation in observing that prosecution has succeeded to prove the case under Section 147, 325/149 and 323/149 I.P.C. beyond the reasonable doubt. We confirm the conviction of the appellants in the aforesaid Sections as there is no justifiable ground for making any interference in the conclusion arrived at by the learned trial Court in this regard.

23. In this case from defence side accused Natthu Singh Hari Shankar Singh and Mool Chand are also said to have sustained injuries in the same incident. Accuses Natthoo Singh and Hari Shanker Singh were examined by Dr. Ramesh Chand Dhimri-DW-1, who noted following injuries on their bodies:

Natthu Singh

1. Lacerated wound on the middle of head region size 4 cm x 1 cm x bone deep with clotted blood 13 cm above the left ear.
2. Lacerated wound on the right hand exterior aspect just below the middle finger size 2 cm x 1/2 cm x 1/2 cm
3. Abrasion contusion on the exterior aspect of the right hand just below the index finger size 1 cm x 1/2 cm
4. Reddish brown contusion on the right arm exterior aspect size 5 cm x 2 cm, 12 cm above the right elbow joint.
5. Contusion on the left elbow exterior aspect region size 3 cm x 2 cm painful on touch.
6. Painful right thigh lateral aspect no external injury seen.

All the injuries were found simple and their duration was of about 24 hours, they were likely to be caused by some blunt objects.

Hari Shanker Singh

1. Lacerated wound on the right side forehead region just below the hairline size 4 cm x 1/2 cm x bone deep with clotted blood.
2. Reddish brown bruises on the right side back of chest region size 10 cm x 2 cm, 5 cm lateral on the right side at thoracic spine region.
3. Complaint of pain on the right area. No sign of injury is seen clinically.

All the injuries were found simple their duration was of about 24 hours and in the opinion of the doctor they were likely to be caused by some blunt objects.

24. Accused Mool Chand was examined by Dr. S.K. Chaddha-DW-2. This witness proved the injuries by producing original injury register, and found following injuries:

1. Abrasion 4 cm x .5 cm scabbed on back of right fore arm middle part.
2. Swelling 3 cm x 2 cm on back of right thumb Both the injuries were found simple in nature their duration was about 1 and 1/2 hours and in the opinion of the doctor they were likely to be caused by some blunt and hard object.

25. Perusal of the injury reports show that the injuries found on the body of aforesaid injured accused persons were simple in nature. The version of defence is that prosecution has failed to explain the injuries found on the body of accused persons, which is fatal for the prosecution but this submission is not appealing to us. In *Bishna @ Bhiswadeb Mahato and others vs State of west Bengal* 2006 AIR (Criminal) 51. The Hon'ble Supreme court has observed that Injuries on accused persons are not always necessary to be explained by the prosecution. Further the injuries found on their bodies were simple and superficial type. As such the arguments advanced on behalf of the appellants in this regard are not accepted and prosecution case can not be doubted.

26. Going through the discussions made above, the conviction of surviving accused persons, made under Section 148 IPC, 302 IPC read with Section 149 IPC and 307 IPC read with Section 149 IPC is set aside and they are acquitted in these Sections accordingly. However their conviction under Section 147, 325/149 and 323/149 is confirmed.

27. Now question arises as to what would be the appropriate punishment to meet ends of justice. At this stage it is also to be considered that appellants are facing the trial of murder in respect of the incident occurred on 2.3.1980 and they are acquitted in major offences under sections 302 and 307 IPC read with section 149 IPC. Considering the totality of the facts and circumstances of the case, while maintaining the conviction under aforesaid sections the substantive sentence of the surviving appellants is modified to the period already under gone which would be sufficient to meet the ends of justice.

28. Hence, the appeal is partly allowed. Surviving appellant Gaya Singh is acquitted under Section 148, 307 and 302/149 IPC, and remaining surviving appellants Brij Bhushan, Kallu Singh, Hari

Shanker Singh, Sunder Singh, Ram Autar and Badri Singh are acquitted under section 302/149, 307/149 I.P.C. However conviction of all the surviving appellants under Section 147, 325 read with Section 149 and 323 read with Section 149 I.P.C. is maintained but sentence awarded is modified to the period already undergone. Their bail bonds are hereby cancelled and sureties are discharged from their liabilities.

29. Copy of the judgment along with Trial Court record be sent back.

Order Date: 4th May 2018.

Fhd.