Mohd. Aslam And Others vs State Of U.P. on 30 March, 2018

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Bench: Shabihul Hasnain, Raghvendra Kumar

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

Reserved on 28.3.2018

Delivered on 30.3.2018

Criminal Appeal No.711 of 1981

Mohd. Aslam alias Aslam and three others......Appellants

Versus

The State .....Respondent

Hon'ble Shabihul Hasnain, J.

Hon'ble Raghvendra Kumar, J.

(delivered by Hon'ble Shabihul Hasnain, J.) This criminal appeal has been filed against the judgment and order dated 30.9.1981, passed by Ist Additional Sessions Judge, Sultanpur, in Sessions Trail No.111 of 1980, convicting all the appellants under Section 302/149 IPC, 324/149 IPC and sentencing each of them to undergo life imprisonment under the first count, to two years' R.I., under the second count, further convicting appellants No.1 and 3 under Section 148 I.P.C., appellants No.2 and 4 under Section 147 IPC and awarding a sentence of 2 years' R.I. under Section 148 IPC and one year's R.I. under Section 147 I.P.C.. All sentences were ordered to run concurrently.

The prosecution story, in brief, is that Shri Bhagwan Tripathi, the younger brother of Om Prakash

Tripathi and Lalchan Tripathi, younger brother of Harish Chandra Tripathi were studying in class XII in Madhusudan Vidyalaya Inter College, Sultanpur. Both these boys were not attending the classes of Commercial Mathematics which was being taught by one Sri Rameshwar Prasad. The Principal of the College Sri Shobhnath Tripathi had summoned Harish Chandra Tripathi and Om Prakash Tripathi through Satya Prakash Tripathi to inform them about the conduct of their younger brothers Satya Prakash Tripathi informed Om Prakash Tripathi about it. Om Prakash Tripathi along with Harish Chandra Tripathi reached at the office of the Principal at about 11.15 A.M. on 11.8.1979. The Principal informed them that their brothers are not attending the class of Master Rameshwar Prasad. Both the brothers were called and were told to regularly attend the classes held by Master Rameshwar Prasad. The two boys also apologized. Both Om Prakash Tripathi and Harish Chandra Tripathi came out of the Principal's office at 11.45 A.M. They saw accused Mohd. Ayub and Mohd. Aslam armed with knives, accused Jaggannath Gareriya resident of Ahrauli, Police Station Gosainganj and Fajley armed with Hockey along with 5-6 unknown pe3rsons who were also armed with lathis, and dandas. All these accused persons proceeded towards Harish Chandra and Om Prakash after saying that these persons are doing goondai at Kamla Nehru Institute and they have been luckily spotted and he got spared and be done to death. All these accused started assaulting by lathi, danda and knives. At the same time Harish Chandra Dubey and Jitendra Singh also reached there and intervened. All the assailants started bearing Harish Chandra Dubey and Jitendra Singh. ON alarms being raised by them Shailendra, Rajendra Singh, teachers of the school and students intervened. Om Prakash Tripathi, harish Chandra Tripathi, Harish Chandra Dubey and Jitendera received injuries caused by lathi, hockey and knives. Harish Chandra Dubey received grievous injuries and he fell down. Haris Chandra Dubey was put on a rickshaw but died before he could reach the hospital. Dead body of Harish Chandra Dubey reached the hospital at about 12.30 in the noon. Injuries of the injured persons were examined and a report of the occurrence (Ex. Ka-1) was lodged by Om Prakash Tripathi at the police station Kotwali on the same day at 14.50 hours. Investigation of the case started. Dead body of Harish Chandra Dubey was inspected and taken into police possession. It was sent for post mortem examination. Post mortem was done by Dr. C. K. Gupta on 11.8.1979 at 4.40 p.m. and he found the following facts:-

> Deceased was aged about 27 years and about 1/4th day had elapsed since the time of death. He was of average built. Rigor mortis was present in uppar as well as in lower limbs. No foul smell or distension. Post mortem stains present over the back in patches.
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> The doctor found following ante mortem injuries on the body of the deceased:-
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> 1. Stab wound - 2.5 x 0.8 cm x cavity deep x vertical on the left side of chest 1.0 c.mk. Away from the right the nipple margins of the wound were clean out, averted slightly edges clear, direction of the wound inwards obliquely downards towards the left.
>
> 2. Incised wound - 5 cm. X 0.5 cm x scalp deep on the right side head, 4 c.m above the right upper eye brow, medial and margins of the wound were clean out slightly everted.

3. Abrasion - 3 cm. X 1 cm. X oblique on the right side face just outer to right eye.

4. Abrasion - 2 cm. X 0.5 cm. Over the angle of right mandible.

5. Abrasion 2 cm. X ½ cm. Over the middle front of neck.

6. Abrasion ½ cm. X ½ cm. Over the middle of sternum.

7. Abrasion 1.5 cm. X 0.5 cm. On the back root of right index finger.

Heard Sri Rishad Murtaza, learned counsel for the accused-appellants as well as learned A.G.A.

It has been argued on behalf of the appellant that the case of Aslam- the present appellant will fall under Section 324 IPC. Simple injuries have been caused by the blow of Aslam. The fatal blow was not caused by him and, hence, the judgment convicting him under Section 302 read with 149 IPC is an erroneous finding. The deceased received fatal blow by another accused, namely, Ayub, whose knife pierced through his chest, which ultimately caused death.

It has been argued by learned A.G.A. that even if this plea has to be accepted, the case will be covered by Section 301 IPC and this will be a case under doctrine of transfer of malice. He has quoted Jagpal Singh and others Vs. State of Punjab, AIR 1991 Crlj. 597 (SC).

Before examining the case it will be proper to quote this Section as under:-

> "301. Culpable homicide by causing death of person other than person whose death was intended.--
>
> If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

We are of the view that learned A.G.A. has missed an important point and that is to the extent that the appellant has not caused injury which was fatal. According to post mortem report as well as examination of the Doctor it has come out that fatal blow was caused by Ayub, who is now dead and his appeal since has been abated. The blow caused by the present appellant Aslam, though on the head has not caused any grievous harm or injury. It is a superfluous injury. The opinion of the doctor with regard to this injury is as follows:-

"1. Scalp or skull bones. - NAD.

2. Membranes - N.A.D.

3. Brain- Pale N.A.D.

4. Base- N.A.D.

5. Vertebrae- N.A.D.

6. Spinal cord-Not exposed

7. Addl. Spl.Dexription - Nill.

The argument of learned A.G.A., thus, fails because death should have been caused by the blow of the accused or was likely to cause death for attracting Section 301 IPC. In the present case death is not being caused by the accused-appellant but rather his colleague against whom the appeal has been abated. His role is not that of inflicting fatal blow causing death. Blow by the present appellant is on the head causing simple injuries as shown above.

Learned A.G.A. has argued that the appellant will be guilty even if the fatal blow has not been caused by him through Section 149 IPC read with 302 IPC because though the fatal blow was caused by Ayub but Aslam was having common object for killing the deceased.

Let us examine Section 149 IPC which is quoted herein below:-

"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."

We see that there are three ingredients of this Section; first there must be an unlawful assembly; second commission of an offence by any member of unlawful assembly and third such offence must have been committed in prosecution of the common object of the assembly or must be such as the members of the assembly knew to be likely to be committed.

In Waman Vs. State of Maharashtra, AIR 2011 S.C. 3327 it has been held that in order to attract Section 149 of the Code it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly. It must be within the knowledge of the other members as one likely to be committed in prosecution of common object. If members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of a common object, they would be liable for the same under section 149. In the present case this knowledge is missing.

In Surendra Vs. State of U.P., AIR 2012 S.C. 1743 it has been held that inference of common object has to be drawn from various factors, such as, weapons with which the members were armed, their movements, the acts of violence committed by them and the result.

In Sabid Ali, (1873) 20 WR (Cr) 52011 Bengal LR 347 it was held that where a number of persons went together to eject a man from a piece of land, the title of which was in dispute, and upon a vigorous resistance being made, one of the party, who was armed with a gun, fired at and killed the resisting person, it was held that he was guilty of murder, but that the other members of the unlawful assembly were not guilty of murder under this section as the act of killing was not the common object of the assembly, or "likely to be committed in the prosecution of that object.".

Taking this view in a later case of Kshudiram Majhi vs The State Of West Bengal, 1972 CriLJ 756 (SC), it was held that where the accused were in a position to cause many deaths as each one of them was having firearms in his hands. It was held that murder committed by one of accused would not attract the provision of Section 149 as their common object was not to cause the death. Similarly when every one had not used the weapons, the conviction for injury caused would not constitute joint liability and in both the situations conviction will be under Section 302 and 307 and not under Section 302/149 and 307/149. Such accused persons could not be held vicariously liable with help of 142 IPC as it was not common object nor had common animosity against them.

In Chikkarange Gowda And Ors. vs State Of Mysore, AIR 1956 SC 731, the charge found by the court was merely to administer a chastisement to the deceased as the same did not mention that the members of unlawful assembly knew that the deceased was likely to be killed in prosecution of common object. Certain members of unlawful assembly killed the deceased by causing fatal injury. It was held that the conviction under Section 302 read with Section 149, IPC was not justified in law. However, appellant was convicted under Section 326 and conviction of another accused who had caused the death was confirmed.

We also refer to Chandrapal alias Rajpal Vs. State of U.P., 2004 Crl 287 SC wherein the deceased when tried to intervene in the clash and without any motive the conviction under Section 302/149 was held improper. All the accused were convicted under Section 326/149 IPC So far common object as given in Section 149 is concerned, the trial court has ruled in the judgment that common object was for the purpose of assaulting other student group but we cannot imagine that common object was to kill a stranger who intervened all of a sudden and got fatal blow by Ayub while Aslam also gave a knife blow causing simple injury. It is accepted that there was an unlawful assembly with common object of assaulting the other group but since during the altercation having taken place the deceased Harish Chandra Duey and Jitendra Singh suddently reached and intervened, it can be said that at the spur of the moment blows were hurled and Harish Chandra Dubey died receiving grievous injuries. At the most it can be said that offence punishable under Section 301 IPC was made out against the accused-appellant Ayub alone. At that moment, the applicability of Section 149 IPC in the present case cannot be invoked. There was no common object to kill the deceased who suddenly appeared and was total stranger to the appellant Mohd. Aslam. His presence could not have been imagined by unlawful assembly which was formed, as alleged by the prosecution. Examining the circumstances such as the background of the incident, the motive, the nature of

assembly, the age of the students and general college atmosphere, it cannot be said that there was any common object with the appellant Mohd. Aslam to commit the murder. Appellant Aslam assaulted the deceased with knife on his head as alleged by the prosecution but the injury which was received by the deceased on account of assault by the knife by accused Aslam as per opinion of the Doctor was not fatal.

The appellant was a student of tender age. Admittedly, there was a scuffle but the person who died was not a party to this scuffle, rather he intervened and his appearance was sudden. He was a previous convict having many cases behind him, yet he had nothing to do with the present altercation. It has come in lower court judgment that there was a meeting of mind only to the extent of causing harm covered under Section 323 IPC. No doubt the appellant had the intention of causing hurt to the opposite parties group but there can be no intention to kill the deceased, who was neither a party to the scuffle nor is a student of that college nor known to the opposite parties. Hence, it cannot be imagined that there was any meeting of mind to cause his death. It can be safely assumed that in the confusion prevailing in the circumstances of scuffle and altercation between two groups of students, a total stranger with criminal antecedent appeared and got involved in the scuffle. Ayub (since dead) discharged the fatal blow with knife on his chest and Aslam assaulted him with knife on his head but simple injury was caused. Since death had not been occurred because of the assault of Aslam, 301 IPC against Aslam cannot be made out by any stretch of imagination. There cannot be a transfer of malice also if Section 149 IPC does not cover the case.

Having considered the circumstances in which the simple head injuries has been received by the deceased, we are of the view that it cannot be reasonably inferred that the accused -Aslam had any common object to commit the offence of murder of the deceased. He cannot be attributed with the knowledge that the offence of murder was likley to be caused or occur in prosecution of the common object because at the time of assault between the two groups. Common object was only to assault the student group. Deceased Harish Chandra Dubey, on the spur of the moment, reached there and intervened. At this stage, we cannot shut our eyes on the consistent evidence with regard to inflicting of knife by the accused - appellant Aslam on the head of Harish Chandra Dubey, the deceased, because of which who received minor injuries on his head. We are of the considered opinion that it can safely be said that accused- appellant Aslam has committed an offence punishable under Section 324 IPC for voluntary causing hurt by the knife, a dangerous weapon on the head of the deceased.

For convenience Section 324 IPC is quoted hereinbelow:-

> "324. Voluntarily causing hurt by dangerous weapons or means.--
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> Whoever, except in the case provided for by section 334, volun□tarily causes hurt by means of any instrument for shooting, stab□bing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to in□hale, to swallow, or to receive into the blood, or by means of any

> animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

In the present case, the appellant is said to have given a blow with the knife on the head of the deceased causing injury which was not grievous in nature.

It has also been argued that the deceased was a life convict and was on bail. He was a intervenor during the fight between the students. The accused- appellants and the students against whom the fight erupted were the students of High School and a normal kind of group clash was in the offing. The presence of a hardened criminal gave it a different colour and the context of the fight was changed. Knife was not used against any other student nor any other student got seriously hurt.

Accused Jafrul alias Jafrul Hasan was admittedly a juvenile at the time of the incident. This Court has declared him a juvenile by order dated 22.2.2018.

It has been forcefully argued by Sri Rishad Murtaza that there is no motive for the crime. The deceased was a life convict but was totally unknown to the accused persons. They had no prior enmity with the deceased and hence there would not have been any intention or premeditation for killing the deceased. The incident happened on the spur of the moment. It was a student group clash. Sudden appearance of a life convict from the other side perhaps caused panic and as a result they attacked the deceased. With these aspects of the matter, Sri Murtaza argued that a lenient view in the matter be drawn while imposing the sentence against the accused-appellant Aslam under Section 324 IPC.

Since the edifice of the prosecution has fallen down with regard to applicability of Section 149 IPC, the overt act committed by the other accused has to be taken into consideration for adjudging the guilt committed by him. As discussed above, this Court, in the preceding paragraphs, has already held that there was no such common object to commit the offence by the accused involved in this case. We also found that the offence committed by accused Ayub was under Section 301 IPC and simultaneously we hold that offence committed by accused-appellant Aslam is punishable under Section 324 I.P.C.

So far as accused - appellant Jagannath is concerned, in the light of aforesaid facts, we are left with no option except to examine as to what offence has been committed by accused-appellant Jagannath. In the F.I.R. the allegation against him is that he was armed with Hockey. Injuries of Om Prakash Tripathi, Harish Chandra Tripathi and Jitendra Pratap Singh were examined by P.W. 4 -Dr. R. D. Tripathi. As per opinion of doctor, Om Prakash Tripathi received injuries which could have been caused by blunt object or by friction. Similarly, injury reports of Haris Chandra Tripathi and Jitendra Pratap Singh reveal that they also received injuries caused by blunt object as well.

We have also gone through the statements of injured witnesses and it has come in their evidence that accused Jagannath was armed with Hockey and the injuries received by them is corroborated by the medical examination report of P.W. 4 Dr. R. D. Tripathi. Nothing material has come in their statements which may discredit their statement regarding receiving of blunt object injuries by them,

which was caused by accused Jagannath, who has been assigned the role of inflicting blunt object injuries with Hockey. At this stage the only inference which can be drawn against appellant Jagannath is, that he has committed an offence punishable under Section 323 I.P.C. simpliciter.

For the aforesaid reasons, so far as appellant Mohd. Aslam alias Aslam is concerned, his appeal is partly allowed with the modification of conviction under Section 302 I.P.C. read with 149 I.P.C., under Section 324 I.P.C. read with Section 149 I.P.C. and under Section 323 I.P.C. read with Section 149 I.P.C. to that of under Section 324 I.P.C. and is sentenced to undergo R.I. for two years only.

We also partly allow the appeal so far it relates to appellant Jagannath by reverting his conviction from under Section 302 I.P.C. read with 149 I.P.C., under Section 324 I.P.C. read with Section 149 I.P.C. and under Section 323 I.P.C. read with Section 149 I.P.C. to that of Section 323 I.P.C. and is sentenced to undergo six months' R.I. So far accused-appellant Mohd. Ayub is concerned, he has been reported dead by the Chief Judicial Magistrate vide his report dated 1.2.2008. Therefore, his appeal stands abated.

Appellant Jafrul alias Jafrul Hasan had admittedly been declared juvenile vide order of this Court dated 22.2.2018. The Court is of the considered opinion that no useful purpose will be served in remanding the matter of juvenality of appellant Jafrul alias Jafrul Hasan to the concerned Juvenile Justice Board for passing the sentence. His role is identical to that of other appellant Jagannath. We think it proper to award appropriate sentence considering the juvenaility of accused-appellant at the time of commission of the offence.

We, therefore, modify the conviction of appellant Jafrul alias Jafrul Hasan under Section 302 I.P.C. read with 149 I.P.C., under Section 324 I.P.C. read with Section 149 I.P.C. and under Section 323 I.P.C. read with Section 149 I.P.C. to that of under Section 323 I.P.C. and sentence him to a fine of Rs.500/-, which shall be deposited before the trial court within ten days from the date of the judgment. In case of default in payment of fine, learned trial court shall be competent to realize the fine in accordance with the provisions of Cr.P.C.

The record be remitted back to the trial court for necessary compliance.

Dt.30.3.2018.

RKM.