

PETITIONER:
SUDHIR SAMANNA

Vs.

RESPONDENT:
STATE OF WEST BENGAL & ANOTHER

DATE OF JUDGMENT: 21/10/1997

BENCH:
G.T. NANAVALI, M. JAGANNADHA RAO

ACT:

HEADNOTE:

JUDGMENT:
WITH
(CRIMINAL APPEAL NOS. 297 & 298 OF 1987)
J U D G M E N T

M. JAGANNADHA RAO. J.

These three Appeals arise out of the Judgment of the High Court of Calcutta in Criminal appeal No. 159 of 1982 date 21.2.1986. BY that judgment, the conviction and sentence of eight accused, has been confirmed. Aggrieved thereby Suchir Samanta (accused No.4) has filed Criminal Appeal No. 296 of 1987 S.K. Ejahar alias Asgar Hussain (accused No. 9) has filed Criminal Appeal No. 298 of 1987, Six others, namely, Supriya Parial (accused No. 1), Gajendra Nath Mondal (accused No. 2), Biswanath Bhowmick (accused No. 3) Kalachand Bharat (accused No. 5), Nemai Das (accused No. 7) and Jagannath Mondal (accused No. 8), filed Special Leave application No. 1656 of 1986 and in that petition by order dated 13.7.1987, leave was refused for Nemai Das and Biswanath Bhowmick (Accused No. 7 and 3 respectively). Leave granted to other and the appeal has been registered as Criminal appeal No. 297 of 1997, leaving Supriya Paris (accused No. 1), Gajendra Nath Mondal (accused No. 2), Kalachand Ghorai (accused No. 5) and Jagannath Mondal (accused No. 8) as appellants in Criminal Appeal No. 297 of 1986. We may also state that there was one more accused, (in all nine initially) before the Session Court, namely S.K. Eshak (accused) No. 6) but he died during the pendency of the case before the Session Court. The Sessions Court and the High Court, therefore, convicted and sentenced only eight accused. We have before us six accused, in there appeals, namely, A4, A9, A5 whose cases were argued separately and A1, A2, A8, whose cases stand on somewhat different footing.

Before the Session Court, Midnapore, all the nine accused stood charged with commission of offence under section 148 I.P.C section 304 (Part-I) I.P.C. read with section 149 I.P.C and section 323 I.P.C read with section 149. By his judgment dated 6.5.1982, the learned Sessions Judge convicted the accused under all the above counts. He sentenced them to suffer rigorous imprisonment for two years for the offence under section 148 I.P.C.; rigorous

imprisonment for seven years and fine of Rs. 1000 (in default, rigorous imprisonment for one year more) for the offence under Section 304 Part-I I.P.C read with Section 149 I.P.C.; and rigorous imprisonment for one year under section 323 I.P.C. read with section 149 I.P.C. The sentences were to run concurrently.

It is the prosecution case that in incident dated 28.11.1979 Gurudas Mondal (PW 1) suffered injuries while his son Chittaranjan Mondal died.

The prosecution case is that one lady Anange Manjari, widow of late Bhutnath Mondal (granduncle of Gurudas Mondal, PW 1) executed a deed on 14.9.1975 in respect of the property in question to a deity and appointed PW 1 as Shebait and put him in possession of land including plot no. 1855 of 99 decs, in Santipur in West Bengal. Later she filed a suit for cancellation of the deed, at the instigation of Ganjendra Mondal (A2) and at the cousins of PW 1. Four of five days prior to 28.11.1979 (the day of the incident), Gurudas (PW 1) got information that accused Sudhir Samanta (A4), Gajendra Mondal (A2), Supriya Paria (A1), Jagannath Mondal (A8) and one Gour Dhuiya had conspired together and were holding out threats to the effect that they would assault Gurudas (PW1) and his son and thereupon, Chittaranjan Das (son of PW 1) lodged a G.D. at Tamiuk Police Station on 25.11.79.

The further case of the prosecution is that on 28.11.1979, at about 10 A.M., Gurudas Mondal (PW 1) with his sons Chittaranjan Mondal described as Chitta (deceased), Kishore (PW 8), Ashish, and step brother Bamandas (PW 10) and labourers (such as Madan Jaria (PW 9). Sudhir Mondal (PW 1), Sahedab Mondal (PW 12) and other went to harvest paddy in plot No. 1055 measuring 99 decs of Mouza Sartipur (within Tamluk Police Station), which was cultivated by PW1, as Shebait of the deity in whose favour the said Ananga Manjari (childless widow of late Bhutnath Mondal) had executed a deed on 14.9.1975. It is the prosecution case that at that time, the accused 1 to 9 came and other in a body armed with lethal weapons like lathi, ballam, katari etc. and directed Gurudas not to harvest the paddy. An exchange of words followed and Gurudas (PW 1) proceeded towards the western boundary of the said plot and stood on the all (which demarcated this plot from the adjacent plot belonging to one Abdul Hussain). It is said that there, on the all, Supriya Paria (A1) delivered a blow with lathi which hit Gurudas (PW 1) on his right ear causing bleeding injury. PW1 set down but then accused Jagannath (A8) and Nemai Das (A7) began to assault him with kicks and blows. PW 1 fell down on the land of Andul Hussain. At that time his son Chirta rushed to that place to rescue his father but accused Biswanath Bhowmick. As assaulted him with lathi on his head as a result of which Chitta fell down on the ground unconscious. Then accused Nemai Das (A7) also assaulted Chitta with lathi. At that time PW 2 (Sachin Bhowmick), PW 3 washed the wounds of Chitta with a napkin in water in a nearby pond. The injured persons were removed to Mecheda Bazar in a cycle rickshaw van and from there to the Police Station, Tamluk, PW 15 who was the Manager of a temporary cinema hall of which Chitta was a partner, accompanied. At the Police Station, PW 1 lodged a complaint against the accused. Chitta succumbed to the injuries and died on 29.11.79 at 5.30 P.M.

Thereafter, as stated earlier, the nine accused were charged under section 148; section 304 Part-I read with section 149 I.P.C and section 323 read with section 149 I.P.C. The accused pleaded not guilty. The trend of the

cross-examination read with the statements of the accused under Section 313 Cr. P.C was to the effect that the accused were falsely implicated that the alleged incident a few days before 28.11.79 was false and so far as the cultivation of the land was concerned their case was that Ananga Manjari was in possession and not Gurudas (PW 1).

The learned Session Judge divided the discussion of the evidence into several parts. He first held that, though plot no. 1855 was not mentioned in the FIR, the evidence of PWs, 2, 3, 8, 9, 10 and 11 showed that the incident took place in plot No. 1855 only where Gurudas (PW 1), his son Chitta and other went to harvest paddy. He next considered whether there was convincing evidence on record to show that Gurudas (PW 1) was in possession and whether he had raised the paddy in that plot. The learned Session Judge considered the prosecution case and held that Gurudas (PW 1) was in possession of this p-plot and that it was he who raised the paddy there. Thereafter, the learned Session Judge considered whether the incident, as alleged, had taken place. He then referred to the relevant evidence, including the medical evidence, and used the words "all the accused persons" when he came to the conclusion that

"all the accused persons, came up to a body being armed with lathis etc. When Gurudas and his men paid to head to the words of three of the accused person who had come earlier. The evidence on record thus shows that the accused person where members of an unlawful assembly. the common object of which was to commit criminal trespass upon the land which was in the possession of the defacto complainant and to assault the defacto complainant and his men including his sons. the evidence on record shows that all the accused persons were armed with lathis, baliams sickle etc."

Thereafter the learned Session Judge proceeded to hold further as follows:

"Considering the evidence on record and the circumstance of the case, I, therefore, hold that the prosecution has convincingly proved beyond all reasonable doubt that the accused persons, who more than five in number, assembled together, that the assembling came upon for the purpose of committing criminal trespass and to assault the defacto complainant and his mens, that some members of the assembly used force or violence, that such force or violence was used in the prosecution of such common object and the accused persons were armed with deadly weapons at the time of the incident."

He finally concluded.

"The evidence on record has also proved convincingly beyond all reasonable doubt that all the accused persons were members of an

unlawful assembly and that the offence under section 304 Part-I and section 323 I.P.C were committed by some members of such as such (six) as the members of the assembly knew to be likely to be committed in prosecution of the common object of that assembly."

ON that basis, he convicted the eight accused (A6 having died earlier) and sentenced them as mentioned hereinbefore.

In the appeal preferred by the eight accused before the High Court the aforesaid conviction and sentences were confirmed against all the accused. The high Court rejected the contention that the incident did not take place in plot No. 1855 and observed that the omission of the plot No. 1855 in the FIR was immaterial, it held that though the FIR did not specifically mention as to who was assaulted by whom.

"but nonetheless, it is absolutely plain and clear from the FIR that Gurudas and Chitta were assaulted by the appellants. and convincing the circumstances of assault, namely, that the assailants came together armed with members, non disclosure of the individual part taken by the different assailants is not a substantial defect to affect the case of the prosecution. Sachin (PW 2) and Panchanan (PW 3) were independent witnesses and they came from the neighbourhood, after the incident started and that the evidence showed that there was a unlawful assembly and its object was to commit trespass and assault and in prosecution thereof. Some members of the assembly voluntarily caused hurt to Gurudas while some others assaulted Chitta which resulted in his death shortly thereafter."

On these findings, the appeal was dismissed.

Learned senior counsel for Sudhir Samanta (A4) in Criminal Appeal No. 296 of 1987 and for S.K Ejahar alias Asgar Hussain (A()) in Criminal Appeal NO. 298 of 1987 contended that the learned Session Judge as well as the High Court ought to have held that there was no evidence against these appellants that they with other accused formed into an unlawful assembly with the common object of committing trespass and assault and further that there was no evidence that they had any motive or were carrying any weapons nor that they hit PW 1 or Chitta with the said weapons resulting injury to PW 1 and death of Chitta. Even assuming they were present at the time of the incident somewhere near the scene of the offence, it could not be assumed that they had become part of the unlawful assembly and shared the common object of committing the offence of criminal trespass and assault, in fact, there were a large number of villagers, even according to the prosecution - and there was no material to distinguish these two appellants from the rest of the crowd and include them in the list of accused along with those against whom specific acts were alleged.

Learned counsel for the four other appellants, namely A1, A2, A3 and A8 in Criminal appeal Nos. 297 of 1987

contended that the infirmity in the prosecution case against Kalachand Ghorai (A5) was no different from the infirmities against accused A 4 and A 9. Even assuming A (was present on the scene, his presence was not different from that of the other villagers, there was no proof that he was part of the unlawful assembly and in fact no specific act was attributed to him. So far as the others, A1, A2 and A8 were concerned, learned counsel made a submission that firstly the evidence adduced was not sufficient to treat them as part of the unlawful assembly or that they had taken specific part in the actual incident of criminal trespass and assault on PW 1 and Chitta and alternately the conviction against A1, A2 and A8 was liable to be converted into one under Section 304 Part-II I.P.C in as much as the ingredients of Section 304-Part-I I.P.C have not been fulfilled.

On the other hand, learned counsel for the respondent contended that though there was no specific evidence as to the role of A4, A9, and A5, still there was evidence that they were members of the unlawful assembly and that was sufficient to maintain their conviction and sentence. It was not necessary to prove any overt act on respect of every person who was a member of an unlawful assembly. So far as accused A1, A2 and A8 were concerned they were rightly convicted and for the specific acts attributed to them. In particular, their hitting Chitta on the "head" brought the case under section 304 Part I and therefore the plea to convert the conviction into one under section 304 Part-II should not be accepted.

We have already extracted the relevant portions from the judgments of the learned Sessions Judge and the High Court and the word underlined by us in the said paragraphs show that all the accused A1 to A9 were dealt with together thought at the same time it was also stated that there was proof that "some of these accused" have dealt the blows on PW 1 and Chitta. We have, therefore, to consider whether the contention of the appellants that the approach of the Session Court and of the High Court in this behalf was not correct, has any merit.

We have heard the submission of the learned counsel limited to these aspects and have been taken through the evidence. Ordinarily, this Court does not review the findings of fact if based on evidence considered by the High Court and the Sessions Court but where this Court is satisfied that the courts have not considered the evidence of the witness from the proper perspective or that they have gone by general conclusions drawn from vague or generalised evidence, it may sometimes become necessary to go into the evidence to find out if the approach, having regard to the facts of the case, was proper. In the present case, we find that no effort was made by the Sessions Court and the High Court to find whether accused A4, A5 and A9 were at all members of an unlawful assembly and we feel, therefore, that the High Court and Session court ought to have gone into these aspects in greater detail.

While it is true that before a person could be held to be a member of an unlawful assembly, it is not necessary that he should have done some overt act or guilty of some omission in pursuance of the common object of the unlawful assembly, it is well settled that first, it must be established that he was a member of the unlawful assembly. When as in this case, a large number of villagers were present at the scene of the offence and common object and specific acts were attributed only to a few among the nine accused and there was nothing so far as A4, A9 and A5 were

concerned as regards common object or overt acts or motive were concerned, question arises whether there was proof that A4, A9 and A5 went there with the same common object as those accused to whom overt acts were attributed. It has been held that in such a context and with a view to guard against convicting person who were not part of the unlawful assembly, it is permissible to consider the nature of the gathering, how they assembled and what weapons they were armed with how they proceeded and further the part played by them.

At the outset, we may point out that the medical evidence of PW 13, who examined PW 1 and Chitta on 28.11.79 at the Tamluk B.D. Hospital initially, is to the effect that PW 1 sustained a single lacerated injury over the centre of the scalp measuring 2" x 1/2" x 1/2". It appeared to him it was single injury, PW 1 another Doctor who examined him at 11.15 P.M. on 28.11.79 when Chitta was brought to SSKM Hospital, said Chitta was semi-conscious. Chitta died at 5.30 P.M. on 29.11.79 and PW 20 who conducted the post-mortem said that the found on stitched wound over the vault of the skull one linear crack-fracture over the middle of the left parietal bone to down left parietal region and one abrasion over the left shoulder and that death might be homicidal. In other words, the medical evidence reveals one simple accelerated injury on the right PW 1 and two injuries on Chitta one on the skull and another on the parietal region as stated above and one abrasion.

So far as the oral evidence is concerned PW 4, PW3, PW6, and PW7 were declared hostile. Among the other witnesses, we have of course the evidence of PW 1 Gurudas, who is an injured witness, and the evidence of Sachin Bhowmick PW2 and Panchanan Bhowmick PW3. PWs2 and 3 have been rightly treated as independent witnesses, they were ploughing the adjoining fields and they were eye witnesses. PW.1's relatives are PW8, Kishore who is the son of PW1 and P.W. 10, step-brother of deceased; Labourers employed by P.W. 1 are PW 9, (Madan Jena), PW1 in this evidence, refers to the manner in which disputes regarding land came into existence and speaks to his possession of the plot in question. He says that Gajendra Nath Mondal (A2) is his cousin and it was Gajendra who got Ananga Manjari to file the suit. 4/5 days before 28.11.79, he got information that Sudhir Samanta (A4), Gajendra (A2) Supriya (A1) and Jagannath (A8) had conspired together and had been holding out threats to the effect that they would assault PW 1 and others. His son Chitta lodged as S.D. in the police station on 25.11.79. PW1 knows all the accused, they are his co-villagers. A1 is the son-in-law of Gajendra brother (i.e. A2's brother). A8 is also related as his (PW1's) cousin. Accused Biswanath (A3) cultivates land for Gajendra (A2). PW1 says that accused persons are members of S.U.C. party. thus, it is clear that A2, A8, A3 are related to PW 1 while A3 and A8 and A2's supporters. As regards the incident on 28.11.79, PW1 says that first A1, A8 and A2 came on to the field 1855 and directed PW 1 not to harvest the paddy but to have the dispute amicably settled by adjudication. (The Civil Suit was already pending), PW1 says, he did not pay heed and in fact told them he would harvest the paddy and then he started harvesting the paddy. Then A1, A8 and A2 left and about 5 minutes afterwards came back with all the remaining accused and "several others" whom, he did not know with lathi, ballams, katani and sickle and directed PW1 and others not to harvest, There was hot exchange of words and when PW1 proceeded to the western boundary, and stood on the all, A1 hit him with a lathi. It hit his right ear causing a

bleeding injury. PW1 sat down on the all and then Jagannath (A8) and Nemai (A7) began to kick him and hurled blows. PW1 fell down into the rescue of PW1. At that time Biswanath (A3) inflicted a lathi blow on Chitta's head. Chitta fall down unconscious. Thereafter Nemai (A7) hurried a blow with lathi on Chitta.

Though PW1 speaks of conspiracy 4-5 days before the incidence to which Sudhir Samanta (A4) is said to be a party, we find that later section 120-B was dropped. The case again A4 was that he was a member of a unlawful assembly. From the evidence of PW1 set out above, it does not show why the A4, A5 and A9 were treated as accused rather than being treated as part of several others and there is nothing in the evidence either expressly or otherwise to say that A4, A5 and A9 came there on 28.11.79 with the common object of trespass and assault on PW1 and Chitta on the fateful day.

PW2, Sachin Bhowmick, ploughs an adjacent Land, Accused Biswanath (A3) is his cousin. He say that when he was in his field at 9/9.30 A.M he saw PW1 harvesting paddy with his brother PW 10 & sons and PW1 cultivated the land that year. At that time Supriya (A1), Jagannath (A8) and Gajendra (A2) came there and asked PW1 not to harvest the crop. PW1 did not pay heed and continued harvesting. The above persons left and came back after 5 minutes along with accused persons and along "with some others". Lathis were "in the hands of 2 of 3 persons". This shows that there were no ballams, sickles or other weapons and that even the lathis were there only with 2 or 3 persons, A1 hit PW1 with lathis which injured the PW1's right ear and he sat down, and the "5 or 6 persons" amongst the persons began to assault PW1 with kicks and blows. Chitta rushed and then Biswanath (A3) hit him on his head with lathi. Accused persons left behind them 'one or 2 latins'. (In fact, police recovered one big lathi and one small lathi from the scene of offence). PW1 stated that Chitta was assaulted with a big lathi. In cross-examination, he stated that he did not recollect whether he stated before the Investigating Officer that 5 or 6 persons also assaulted PW1 with kicks and blows. He could not also recollect whether he stated before the Investigation Officer that at first Jagannath (A8), Supriya (A1) and Gajendra (A2) came to the spot. Thus except to say that accused A4, A6 and A9 came there along with other accused and villagers, PW1 could not say whether A4, A3 and A9 had come there with any common objective such as committing trespass and assault as contemplated by some of the other accused.

PW3 is the brother of PW2 and cultivates a neighbouring piece of land. He knows all the accused. Accused Biswanath (A3) is his cousin. He refers to the land dispute and says that initially Jagannath, Gajendra and Supriya (A8, A2, A1) came and asked PW1 not to harvest but PW1 did not agree and proceeded to go ahead with the harvesting. Then the above said three persons left and came there late with all the accused persons "being armed with lathis". (This conflicts with the evidence of PW2 that only 2 or 3 persons were carrying lathis. He also speaks to the fact that the accused persons asked PW1 to await the adjudication of the civil dispute but PW1 did not agree. Then Gajendra (A2) ordered Assault and thereupon Supriya (A1) hurled a lathi blow which hit PW1 on his right ear, and he fell down. Chitta rushed there and Biswanath (A3) hit him with a lathi on his head. He fell down unconscious. The accused persons ran away later. Before the Investigation Officer, he did not state about Supriya, Jagannath and Gajendra (A1, A8 and A2) coming

to PW1 earlier.

So, even this evidence of PW3 is general and vague and it does not show that A4, A5 and A9 had come there with any common objective and for the purpose of forming an unlawful assembly to trespass and to assault PW1 and Chitta.

So far as the evidence of the labourers PW9, 11 and 12 is concerned, neither the Sessions Court nor the High Court has relied upon any specific part of their evidence to show that A4, A5 and A9 had come to the scene of incident with the common objective of trespass and assault.

The case of conspiracy 4 or 5 days prior to 28.11.1979 which could bring the case under section 120-B, based on the G.D. report of Chitta, referred to by PW', -having been given up, we have no positive material to show that A4, A5 and A9 came there with the common objective of trespass and assault as members of an unlawful assembly and not as part of the group of other villagers present.

For the aforesaid reasons, we are of the view that it will not be safe to treat Sudhir Samata (A4), Kalachand Ghorei (A5) and S.K. Ejahar Elias Asgar Hussain (A9) as part of the unlawful assembly and make them vicariously liable for the overt acts of other accused which resulted into an injury to PW1 and death of Chitta. We, therefore, set aside their conviction under all the provisions under which they were charged and acquit them.

We shall next take up the question whether the prosecution has established the guilt of A1, A3 and A8 under section 304 Part-I I.P.C. or whether the facts proved can only bring their case under section 304 Part-II I.P.C.

We shall once again first refer to the medical evidence. PW13, Khatua who examined Chitta at 1.p.m. in the Taluk hospital on 28.11.1979 stated that he found one big lacerated injury over the centre of the scalp and at that time, the patient complained of severe head ache. That means Chitta had retained consciousness. Dr. A.K. Rakshit, PW14 of S.S.K.M Hospital, Calcutta (who examined Chitta at 11.15.p.m. on 28.11.1979 said that Chitta was semi-conscious, Chitta expired at 5.30.p.m. on 29.11.1979. (i.e. nearly 32 hours after the incident). Dr. P.B. Das PW20) who conducted the post-mortem examination on Chitta on 3.12.79 stated that he found one stitched wound over the vault of the skull, one linear crack fracture over the middle of the left parietal bone down left parietal region. He also found one abrasion over the left shoulder. He said that dealt "might be homicidal in nature" and the injuries were sufficient in the ordinary course to cause death.

PW1, father of Chitta, stated that initially Supriya. Jayanath and Gajendra (i.e. A1, A8 and A2) came for the plot and directed him not to harvest paddy and have it settled by adjudication. (The Civil suit was already pending in Court). PW1 said no head. When the accused again returned after 5 minutes, they again directed him not to harvest the paddy. PW1 did not agree. Then there was not exchange of words, initially PW1 was hit, later Chitta came there and gave one blow on his head with a lathi. Later A3, Biswanath hit Chitta on his head. Nemai (A7) hit Chitta on his body. PW2 says only 2 or 3 of the accused carried lathis. According to him even after the accused carried lathis. According to him even after the accused returned after 5 months after the first incident, they asked PW1 not to harvest and await the adjudication by Civil Court. PW3 says that after the accused went back and came after 5 minutes even then they asked PW1 not to cut the crop but await the adjudication in Court. PW2 and PW3 also say that one blow was given by A1 and one by A3 on the head of Chitta and PW7 gave blows on his body. Chitta

lost consciousness, but regained it on way to Taluk hospital, and later in the night, he was semi-conscious and died next evening on 29.11.79 at 5.30 p.m. This is the relevant material on this aspect.

To start with, there is no charge under Section 302 I.P.C. The charge itself was under Section 304 Part-I. Hence the question of accused having common intention - as required for the third clause of Section 300 I.P.C. - to cause bodily injury to Chitta and intending such bodily injury as is sufficient in the ordinary course of nature to cause death, has to be excluded, even going by the prosecution case. Therefore the evidence of the doctor, PW20, cannot help in bringing the case under Part-I of Section 304 I.P.C. Further, the circumstance that the accused pleaded with PW1, father of deceased Chitta, more than once to have the land dispute adjudicated through Court because the matter was already in Court, the fact that A1 gave only one blow with lathi though on the head of Chitta and stopped there and that later A3 hit Chitta with lathi in the parietal region and A7 on the body, and the fact that Chitta gained consciousness soon and was alive for over 32 hours after the incident, - all these facts lead to the inference that each of these accused did not have any intention of causing death or of causing such bodily injury as was likely to cause death. They can only be imputed with knowledge that if force was used it was likely to cause death. Therefore, the case, in our view, falls under Section 304 Part-II and not under Section 304 Part-I I.P.C.

For the aforesaid reasons, we modify the conviction of A1, A3 and A8 to one under Section 304, Part II read with Section 149 IPC and award them a sentence of 5 years. They are ordered to surrender to custody to serve out the remaining part of the sentence.

A4, A5 and A9 are acquitted of all charges as already stated. Their bail bonds are ordered to be cancelled.

Appeals allowed as stated above.