

CASE NO.:
Appeal (crl.) 359 of 2007

PETITIONER:
Mummidi Hemadri and Ors

RESPONDENT:
State of Andhra Pradesh

DATE OF JUDGMENT: 16/03/2007

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Crl.) No.2060 of 2006)

Dr. ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the judgment rendered by a Division Bench of the Andhra Pradesh High Court which upheld the conviction of the appellants for the offence punishable under Sections 148 and 302 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC').

In all, six accused persons faced trial. The present appeal is by accused 2, 3 and 6 (in short described as A-2, A-3 and A-6). It is to be noted that the present special leave petition so far as it relates to accused 1, 4 and 5 (in short described as A-1, A-4 and A-5) was dismissed by order dated 21.4.2006 while A-4 and A-5 were convicted for the offence punishable under Section 302 IPC, A-1, A-2, A-3 and A-6 were convicted for offence punishable under Section 302 read with Section 149 IPC and each of the accused persons were convicted for the offence relatable to Section 148 IPC, for which they were sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.100 each with default stipulation. In respect of offence punishable under Section 302 read with Section 149 IPC each accused was sentenced to undergo imprisonment for life and to pay a fine of Rs.300/- with default stipulation.

Prosecution version as unfolded during trial is as follows:

On 21.10.1997 at about 5 O'clock near old K.B.S. Office at Chinthareddipalem Donka, Stone Housepet, Nellore, the accused persons formed an unlawful assembly and in pursuance of their common object, they caused the death of one Nellisetti Venu (hereinafter referred to as the 'deceased') by stabbing with knives.

According to the prosecution, PW-2 is the paternal uncle's son of the deceased. The deceased and the material witnesses were living in Wood House Sangham in Nellore whereas the accused persons were living in

different localities in Nellore Town. A-1 was doing business in gunny bags at Wood House Sangham and accused Nos. 2 to 6 were working as coolies. One week before the incident, accused No.1 harassed PW-6, who is the daughter in law of PW-7. On 20.10.1997 at about 3.00 p.m. PWs 1, 8, 10 Kapu Subba Rao (the husband of PW-6) and the deceased went to the shop of A-1 and chastised A-1 for spreading rumours that PW-6 was having illicit intimacy with one painter.

On 21.10.1997 at about 3.30 p.m. a mediation was held at the shop of A-1 in the presence of mediators PW-9 and one Mekala Ramaiah. Both the elders advised the parties to settle the dispute amicably. However, A-1 did not listen to the said advice, while the deceased stated that it is proper to abide by the advice of the elders. Since the mediation failed, both the parties left the place. Subsequently, PWs 1 to 5 and the deceased together joined at Bhaskar's Tea Stall for discussion about the mediation. Then the deceased told them that he had to talk to one Gas Dealer near Sivalayam and he started to go to that place. PWs 1 to 5 accompanied him. On reaching near KBS office, they saw the accused persons. A-1 instigated the other accused persons to attack them. Then all the accused persons surrounded them with weapons. A-2, A-3 and A-6 caught hold of the deceased. A-4 dealt two blows with a knife on the back of the deceased. A-5 stabbed the deceased with a knife on the left side of chest below the ribs and also on the right thigh. Seeing this PW's 1 to 5 raised cries. On hearing their cries, number of people gathered there and upon their arrival, the accused persons went away. Thereafter, PW's 1 to 5 shifted the deceased to Government Head Quarters Hospital in an auto rickshaw. The Doctors examined the deceased and declared him as dead. After 20 minutes, the Sub-Inspector of Police, on receipt of telephonic information, came to the hospital and examined PWs 2 to 5. On the same day at about 6.45 p.m. PW-1 gave a report (Ex.P1) to PW-18 whereupon he registered a case in Crime No.135 of 1995 under Sections 147, 148, 302 and 506 read with Section 149 IPC and recorded FIR in Ex.P 9. At about 7.30 p.m. PW-19 the Circle Inspector of Police took up investigation, visited the scene of offence and recorded the statements of PW's. PW-19 conducted inquest over the dead body of the deceased in the presence of PW-14 and another. During the course of inquest, PW-19 seized M.Os. 4 to 7 from the dead body of the deceased. At about 1.30 p.m. PW-17 the Civil Assistant Surgeon, Government Maternity Hospital, conducted autopsy over the dead body of the deceased and opined that the cause of death was due to shock and hemorrhage due to multiple injuries as per the post mortem report (Ex.P 7). On 8.11.1997, PW-19 arrested the accused persons at Ayyappa Swamy Temple, Nellore. Later PW-21 the Circle Inspector of Police sent the material objects to FSL who submitted the report (Ex.P24). On completion of investigation PW-21 filed charge sheet. The plea of the accused was that of total denial.

Twenty one witnesses were examined to further the prosecution version. PWs 1 to 5 were claimed to be eye-witnesses. Placing reliance on the evidence of PWs 1 to 5 the trial Court recorded the order of conviction.

The conviction was challenged before the High Court. The main plank of the appellants' argument before the High Court was that there were various inconsistencies

and infirmities and the prosecution has failed to establish its case beyond reasonable doubt. It was further submitted that there was discrepancy in the evidence so far as A-1, A-4 and A-5 are concerned. It was further pleaded that A-2, A-3 and A-6 did not make use of any weapon. There was no common intention to kill the deceased and even according to the prosecution the only role attributed to A-2, A-3 and A-6 was that they caught hold of the deceased while the other accused persons inflicted the injuries. Therefore, it was contended that Section 149 IPC has no application.

Stand of the prosecution before the High Court was that there was clear cut and direct evidence attributed against all the accused persons and even though the A-2, A-3 and A-6 did not inflict injuries, they facilitated the attacks and in that view Section 149 IPC has been rightly applied.

The High Court found that all the accused persons came together, they were armed and even though A-2, A-3 and A-6 did not attack the deceased, they caught hold of the deceased and that facilitated the attack by the other accused persons. The High Court found no substance in the plea of the accused persons and dismissed the appeals.

The stand taken by the accused and the prosecution before the High Court were reiterated in this appeal. The pivotal question is applicability of Section 149 IPC. Said provision has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141 IPC. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149 IPC. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141 IPC. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141 IPC. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 IPC have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature

of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instante.

Section 149 IPC, consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141 IPC, 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 occurrence. The word 'knew' used in the second limb of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 IPC, 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) and Chanda and Ors. v. State of U.P. and Anr. (2004 (5) SCC 141).

Considering the background facts and the roles attributed to the accused persons it is crystal clear that the accused persons had caught hold of the deceased and thereafter the attacks by the other A-4 and A-5 came. A-1 instigated the other accused persons to attack the deceased.

There is some discrepancy in the evidence as to whether A-2, A-3 and A-6 were armed. While some of the witnesses stated that they were without arms, some have specifically stated that they were armed. Their version is that before the attacks A-2, A-3 and A-6 caught hold of the deceased. In view of aforesaid background, though Section 149 IPC has to be applied, yet it has to be Section 304 Part II read with Section 149 IPC. The conviction is accordingly altered. Custodial sentence of 8 years would meet the ends of justice.

The appeal is allowed to the aforesaid extent.