REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 743 OF 2009
(Arising out of SLP(Crl.) No. 812 of 2008)

Bhupendra Singh & Ors. ..Appellants

versus

State of U.P. ..
Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Allahabad High Court dismissing the appeal filed by the appellants. Seventeen persons had filed the appeal questioning their conviction for

offence punishable under Sections 147, 302 read with Sections 149, 307 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Four of the accused persons namely Bishin Singh, Nathu Singh, Yatinder Singh and Kundan Singh were separately convicted for offence punishable under Section 148 IPC. During the pendency of the appeal eight of the accused persons died and their appeal was held to have abetted so far as they are concerned.

3. Prosecution versions as unfolded during trial is as follows:

On 13.4.19081 at about 7 a.m. in the Khlihan near village Hasanpur under Soron Police Station of District Etah, the incident resulting in the death of Jugendra Pal Singh (hereinafter referred to as the 'deceased') was occurred. A case under Section 366/376 IPC regarding abduction and rape of Kumari Asha and Munni both nieces (sister's daughters) of complainant was registered against the accused Yatendra Singh and others on 10.04.1981 at P.S. Soron. On 13.04.1981 at about 7:00 a.m., the complainant Suresh Pal Singh, his brothers Jugendra Pal Singh and Narendra Pal Singh and his nephew (sister's son) Mahesh Pal Singh, who was residing with him, were going to see their Khilihan. When they reached near the Khalihan, the accused Bishan Singh, Jangi Singh, Gajju @ Gajraj Singh, Yatendra Singh sons of Pyare Singh, Natthu Singh S/o Sahib Singh, Bhupendra Singh s/o

Natthu Singh, Ombvir Singh @ Munna S/o Udaivir Singh, Udai Pratap S/o Gajju Singh, Suraj Pal Sijngh S/o Amir Singh, Dhoom Singh, Munendra Singh @ Ram Singh, Ram Vir Singh sons of Mkut Singh Thakur, Bhoodev, Man Singh sons of)hamman, Mahendra Pal S/o Bhoodev, Ram Nath S/o Hardev and Lalau S/o Shivan Mallah all residents of Village Hasanpur P.S. Soron District Etah and Kundan Singh Tahkur R/o Village Kachhla, District Budaun, who was Samdhi of Natthu Singh, came out from the side of Khalihand having lathies, tamancha and Farsa. The accused Natthu Singh who-was armed with his licensed gun, exhorted saying, "Jugendra Pal Singh Ko Pakad lo tatha jan se mar do, Kyunki hamare khilaf jhutha mukadam darj karaya hai." On this exhortation, the accused persons with intention to cause the death of Jugendra Pal Singh began to assault him by lathi and other weapons. Somehow the complainant Suresh Pal Singh, his bother Narendra Pal Singh and his sister's Son Mahesh Pal Singh escaped and rushed towards village raising alarm. On hearing hue and cry, Smt. Ramwati sister of the complainant and his mother Smt. Ketuki, his nieces Munni and Asha and other village people came to the place of occurrence and saw the incident. When Smt. Ramwati and Smt. Ketuki tried to save Jugendra Pal Singh, they were also assaulted by the accused persons, due to which they sustained injuries. Thereafter, the accused persons considering

the injured Jugendra Pal Singh to have died, fled away towards Ganga Ji. The complainant carried his brother Jugendra Pal Singh, sister and mother by bullock cart to P.S. Soron, where he made over the their written report on the basis of which chik FIR Exh. Ka4 was prepared by Gurudutt (PW 4), who registered a case under Sections 147, 148, 149 and 307 IPC at Crime No. 97/81 against above named accused persons on 13.4.1981 at 9.05 a.m. entry of which was made in the GD No. 12.

4. After completion of investigation chargesheet was filed. As accused persons pleaded innocence, trial was held. The trial court as noted above found the accused persons guilty and convicted and sentenced them. In appeal the primary stand taken before the High Court was that evidence of the so called witnesses are of no consequence. It was also submitted that Section 149 has no application to the facts of the case. It was also submitted that the prosecution did not lead specific evidence as to which member of the alleged unlawful assembly did which or what act. The High Court found no substance in the plea and upheld the conviction.

5. In support of the appeal learned counsel for the appellant submitted that the alleged act was done on the spur of the moment and though it was stated that some of the accused persons were holding deadly weapons, they

were not used and therefore the conviction as recorded cannot be maintained.

6. Learned counsel for the respondent-State on the other hand supported the judgment.

7. In the instant case the prosecution version as noted above is to the following effect:

The accused Natthu Singh who-was armed with his licensed gun, exhorted saying, "Jugendra Pal Singh Ko Pakad lo tatha jan se mar do, Kyunki hamare khilaf jhutha mukadam darj karaya hai." On this exhortation, the accused persons with intention to cause the death of Jugendra Pal Singh began to assault him by lathies etc. Somehow the complainant Suresh Pal Singh, his bother Narendra Pal Singh and his sister's Son Mahesh Pal Singh escaped and rushed towards village raising alarm.

8. Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the

deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

9. In Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC 364) it has been laid down as under:-

> "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that

there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

10. The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan (1974 (3) SCC 698) in which Vadivelu Thevar v. State of Madras (AIR 1957 SC 614) was also relied upon.

11. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that

relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

> "We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in – 'Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

12. Again in Masalti and Ors. v. State of U.P. (AIR 1965 SC 202) this Court observed: (p. 209-210 para 14):

> "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

13. To the same effect is the decisions in State of Punjab v. Jagir Singh (AIR 1973 SC 2407), Lehna v. State of Haryana (2002 (3) SCC 76) and Gangadhar Behera and Ors. v. State of Orissa (2002 (8) SCC 381).

14. The above position was also highlighted in Babulal Bhagwan Khandare and Anr. v. State of Maharashtra [2005(10) SCC 404] and in Salim Saheb v. State of M.P. (2007(1) SCC 699).

15. However, one plea which was urged with some amount of vehemence was the applicability of Section 149 IPC.

16. The emphasis in Section 149 IPC 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. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. 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. 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 an 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. 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 with 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 has 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 a certain point beyond which they may differ in their objects and their knowledge, possessed by each member of what is likely to be committed in prosecution of their common object which 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.

17. "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 instanti.

18. 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, 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 unlawful 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 culled 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. The word "knew" used in the second branch 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 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 the first part but offences committed in prosecution of the common object; would be generally, if not always, be within the second part, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object.

19. Above being the position the trial court and the High Court were justified in holding the appellant guilty. We find no reason to interfere in the appeal which is accordingly dismissed.

……..…….....J.
(Dr. ARIJIT PASAYAT)

……..…….....J.
(ASOK KUAMR GANGULY)

New Delhi,
April 16, 2009