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KOTTA PRAKASHAN AND ORS.

v.

STATE OF KERALA

DECEMBER 11, 1997

B

[M.K. MUKHERJEE AND K.T. THOMAS, JJ.]

*Penal Code, 1860 : Sections 149, 302/149 and 307/149.*

C

*Group rivalry—Riotous mob surrounded house of PW-7 and attempted to commit murder of deceased and cause injuries to others—Subsequently, mob chased the deceased for about half a kilometer and killed him—There was no evidence to show that the five accused persons also chased the deceased—Held : Person who ceases to be a member of the unlawful assembly before commission of the offence, not liable for the offence with the aid of*

D

*S. 149 IPC—In the circumstances of the case a conclusive inference that the five accused persons also continued to be the members of the unlawful assembly which killed the deceased, cannot be drawn—They are entitled to the benefit of reasonable doubt regarding their liability for murder—However, they are liable for the offence under S.307/149.*

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The five appellants-accused were convicted and sentenced for offences under Sections 143, 147, 447, 449, 324, 326 and 302 read with Section 149 of the Penal Code, 1860. The High Court upheld the convictions and sentences of the five appellants. Hence this appeal.

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According to the prosecution, a riotous mob including the five accused persons surrounded the house of PW-7 and started pelting stones and hammering the windows of the said house. Realising that it was not safe to remain there the deceased opened the door and ran for his life. The mob then chased the deceased for about half a kilometer to the house of one K where they killed the deceased. During the trial PW-2 had stated that all the persons who had surrounded the house of PW 7 did not follow the deceased to the house of K where the deceased met with his death.

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Disposing of the appeal, the Court

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HELD : 1. To hold a person vicariously liable under Section 149 of

the Indian Penal Code, 1860 for a particular offence committed by an unlawful assembly it has to be conclusively proved that he was a member of the unlawful assembly at the time of commission of that offence. In other words, if the person arraigned ceases to be a member of the unlawful assembly before commission of the offence he cannot be held liable for the offence with the aid of Section 149 I.P.C. Since in the instant case the possibility that the appellants might not have chased the deceased, when the other member of the mob went to the house of K and killed him, cannot be reasonably excluded, they are entitled to the benefit of reasonable doubt regarding their liability for the murder. There is no evidence to show that the five appellants also chased the deceased. Hence, a conclusive inference that the five appellants also continued to be the members of the unlawful assembly, cannot be drawn. [414-B-D]

2. In the proved facts and circumstances, therefore, the only conclusive inference that can be drawn against the five appellants is that they were the members of an unlawful assembly which had shared the common object of committing the murder of the deceased and that in furtherance of their common object they criminally trespassed into the house of PW-7 and attempted to commit his murder. Resultantly, the conviction of the five appellants under Section 302/149 I.P.C. for the murder of the deceased cannot be upheld, but they would be liable for the offence under Section 307 read with Section 149 I.P.C. for attempting to commit the murder of the deceased in the house of PW-7. [414-D-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1947-1949 of 1996.

From the Judgment and Order dated 26.2.96 of the Kerala High Court in CrI. A. Nos. 334-36/94.

V.A. Arunachalam and R. Satish for the Appellants.

G. Prakash for the Respondent.

The Judgment of the Court was delivered by

**M.K. MUKHERJEE, J.** Fourteen persons were tried by the Sessions Judge, Thalassery for rioting, criminal trespass, murder and other cognate offences. The trial ended in an order of acquittal of four of them and

- A conviction and sentence of the other ten under Sections 143, 147, 447, 449, 427, 324, 326 and 302 read with Section 149 I.P.C. Against their convictions and sentences the ten convicts filed separate appeals in the High Court. While disposing of the appeals by a common judgment, the High Court acquitted five of them, but upheld the convictions and sentences of the five appellants before us (who were arrayed as A1, A4, A6, A7 and A8 in the trial Court and hereinafter will be so referred to).

2. Briefly stated, the prosecution case is as under :-

- (a) Vishwanathan (the deceased) was a member of the Rashtrya Sewak Sangh (RSS) whereas the appellants are the sympathisers of the Communist Party (Marxist), (CPM). These two parties have a long standing political rivalry and it has percolated down to students of some schools. On August 3, 1989, around 9 A.M. a group of students belonging to Kerala Students Union, (KSU) and Akhil Bhartiya Vidya Parishad (ABVP) (which own allegiance to RSS) of Government High School, Aroli in Pappinissery, resorted to strike as a mark of protest against the inadequate facilities given to the students of the local Government Engineering College. Another group of students, who were sympathisers of CPM and members of its students' wing, namely the Students Federation of India (SFI), resisted the strike. Over that issue there was an exchange of blows between the two groups. Following the rumpus, some outsiders belonging to CPM including the appellants, came to the school compound and beat some of the students belonging to ABVP.

- (b) A little later Vishwanathan (the deceased), a local leader of RSS, along with Kauprath Rajesh (P.W.5) came there and openly gave out that if any body dared to attack students of ABVP he would be taught a good lesson and then left the place. Muralidharan (P.W.2), Pramod (P.W.3) and some other students of their group then proceeded to Keecheri Hills where RSS have a *Sakha*, (a place where RSS workers meet for their organisational activities). On the way they met Rajendran and Jayarajan (P.W.4), two other RSS workers, who also accompanied them. When, reaching there, they were discussing with Vishwanathan and Rajesh about the necessity of taking the injured to the hospital for treatment, a mob of 15/20 persons, including the appellants, came there armed with daggers, sticks, iron rods and stones and attacked them. On being so attacked they ran for their life in different directions. While P.W. 4 rushed into the house of

Santha (P.W.6), which is near the *Sakha*, deceased Viswanathan, P.W.2 and Rajendran took shelter in the neighbouring house of Parvathi (P.W.7) and Kunhiraman (P.W.8). The other RSS workers escaped to the nearby jungle. In chasing them the riotous mob came to the house of P.W.7 and surrounded it. The mob then started pelting stones towards and hammering the windows of the house. Probably, realising that it was not safe to remain there Vishwanathan opened the door and ran for his life. The mob then chased Vishwanathan who, finding no other alternative, entered the house of one Kumaran, which was at a distance of half a kilometre from the house of P.Ws. 7 & 8. The mob followed him there and after killing him brutally disappeared from the scene.

(c) Ashraf (P.W.1), a resident of the neighbourhood, went to Valappattanam Police Station and lodged a report about the incident. On that report a case was registered by S.I. Domminic (P.W.19), against unknown members of CPM. Shri P. Jayaraj (P.W.21), Circle Inspector of Police, took up investigation of the case and first went to the house of Kumaran, held inquest over the dead body of Vishwanathan and sent it for post mortem examination. After completion of investigation he initially submitted a charge sheet against eight of the accused persons and thereafter supplementary charge sheets against the other six.

3. The appellants denied their involvement in the offences alleged and contended that they had been falsely implicated due to political rivalry.

4. In support of its case the prosecution examined twenty one witnesses and defence one. Of the witnesses examined by the prosecution, Ashraf (P.W.1), Santha (P.W.6), Smt. Parvathi (P.W.7), Kunhiraman (P.W.8) and Smt. Sudha (P.W.9), daughter of Kumaran, in whose house Vishwanathan ultimately met with his death, turned hostile and did not support its case. The prosecution, therefore, rested its case upon the evidence of Muraleedharan (P.W.2), Pramod (P.W.3), Jayarajan (P.W.4), Rajesh (P.W.5) and Prasad (P.W.13) to prove the incident and the participation of the persons arraigned in it.

5. On a detailed discussion of the evidence adduced during trial, including that of Unnikrishnan (D.W.1), the trial Court recorded the following findings :-

- A (i) in the morning of August 3, 1989 there was a fracas between the students of the two rival groups, one owning allegiance to RSS and the other to CPM in the Government High School, Aroli in which some outsiders belonging to the latter took sides;
- B (ii) on hearing about the incident the deceased Vishwanathan, a leader of RSS, came to the school and hurled threats and abuses on the sympathisers of the rival group;
- C (iii) a few hours later when Vishwanathan along with P.Ws. 2, 3, 4, 5 and some other students of the school and one Rajendran were confabulating at their *Sakha*, 15/20 CPM workers, armed with deadly weapons including daggers, sticks, iron rods and stones, came there and attacked them. Owing to such attack P.W. 4 sustained grievous injuries, including fracture of the left upper incisor and left canine, and P.Ws. 2, 5 and Rajendran sustained simple injuries;
- D (iv) on being so attacked when Vishwanathan, P.W.2 and Rajendran took shelter in the nearby house of P.W.7 the mob trespassed there and started pelting stones and breaking the doors and windows to compel them to come out of the house;
- E (v) when apprehending danger to his life, Vishwanathan darted out of the house of P.W.7 and took shelter in the house of Kumaran, the mob chased him there and beat him mercilessly causing sixty two bodily injuries, which resulted in his instantaneous death; and
- F (vi) ten of the accused persons, including the five appellants, were members of the riotous mob which committed the above offences.

G 5. In re-appraising the evidence, the High Court found that the evidence of P.W.13, who claimed to have seen the riotous mob to bring the dead body of Vishwanathan from inside the house of Kumaran and keeping the same on its verandah, was unreliable and accordingly left it out of its consideration. However, relying upon the ocular evidence of the other four H- eye-witnesses, namely, P.Ws. 2, 3, 4 and 5, the doctor and the Investigating

Officer, the High Court concurred with all the above findings of the trial Court qua the five appellants, giving benefit of doubt of the other five convicts regarding their participation.

6. From the above quoted findings it is obvious that the incident that took place in the school in the morning coupled with the role that Vishwanathan played immediately thereafter operated as the motive to the group of CPM workers to attack RSS workers in general, and Vishwanathan in particular, at the *Sakha*. In that background when the weapons they were carrying and the manner in which they started beating the RSS workers, chased them from one house to another where they took shelter and ultimately hacked Vishwanathan to death are considered, there cannot be any manner of doubt that their common object was to commit his murder and cause injuries to his followers and that in prosecution of that common object they committed the murder and caused injuries to P.Ws. 2, 4 and 5.

7. The next and the crucial question is whether the concurrent findings of the Courts below that the appellants were guilty of the above offences is proper or not. To seek an answer to this question it will be necessary to refer to the evidence of the four eye-witnesses, namely, P.Ws. 2, 3, 4 and 5 which was found by the Courts below to be reliable. Of them P.Ws. 3, 4 and 5 identified all the five appellants as the members of the mob which attacked and assaulted two of them (P.Ws. 4 and 5) and Rajendran at the *Shaka*. They however could not throw any light as to what happened thereafter as they fled away. Therefore, to prove the later part of the incident, the prosecution fell back upon the evidence of P.Ws. 2 and 13. As the evidence of P.W. 13 was found unreliable by the High Court (in our opinion for justified reasons) we leave his evidence out of our consideration. That brings us to the evidence of P.W.2, on whom both the Courts relied, more so, as he was one of the persons who sustained injuries at the hands of the mob. After having gone through his evidence we also find no reason to disbelieve him. His evidence fully corroborates the evidence of P.Ws.3, 4 and 5 that all the appellants were members of the unlawful assembly which attacked them at the *Shaka*, and further proves that they chased him, Vishwanathan and Rajendran (who could not be examined as he had left the place and his whereabouts were not known) to the house of P.W.7, ransacked it, and pelted stones towards them and

A that when Vishwanathan darted out of the house, they followed him. In cross-examination, however, he stated that all the persons who had surrounded the house of P.W. 7 did not follow Vishwanathan to the house of Kumaran where, as already noticed, Vishwanathan met with his gruesome death. In view of the above statement of P.W. 2 a conclusive inference that the five appellants also continued to be members of the unlawful assembly which proceeded to the house of Kumaran and killed Vishwanathan cannot be drawn. To hold a person vicariously liable under Section 149 I.P.C. for a particular offence committed by an unlawful assembly it has to be conclusively proved that he was a member of the unlawful assembly at the time of commission of that offence. In other words, if the person arraigned ceases to be a member of the unlawful assembly before commission of the offence he cannot be held liable for the offence with the aid of section 149 I.P.C. Since in the instant case the possibility that the appellants might not have chased the deceased, when the other members of the mob went to the house of Kumaran and killed him, cannot be reasonably excluded (in view of the earlier mentioned statement of P.W.2) they are entitled to the benefit of reasonable doubt regarding their liability for the murder. In the proved facts and circumstances, therefore, the only conclusive inference that can be drawn against the appellants are that they were the members of an unlawful assembly which had shared the common object of committed the murder of Vishwanathan and assaulting other RSS workers and that in furtherance of their common object they criminally trespassed into the house of P.W. 7 and attempted to commit his murder. Resultantly, the conviction of the appellants under Section 302/149 I.P.C. for the murder of Vishwanathan cannot be upheld, but they would be liable for the offence under Section 307 read with Section 149 I.P.C. for attempting to commit the murder of Vishwanathan in the house of P.W.7.

8. As regards their other convictions, the trial Court - and, for that matter, the High Court also - ought to have held, having regard to the fact that the appellants were guilty of the offences under Sections 147 and 449 I.P.C., the question of convicting them under Sections 143 and 447 I.P.C. which were minor offences in relation to the former two offences respectively, did not arise. However, the convictions of the appellants under Section 427/149 I.P.C. for causing mischief to the house of P.W.7, under Section 324/149 I.P.C. for causing hurt to P.W. 5 with sharp cutting

instrument, and 326/149 I.P.C. for causing grievous injury to P.W.4 with lethal weapons must be upheld. A

9. On the conclusions as above, we set aside the convictions and sentences of the appellants under Sections 143, 447 and 302 read with Section 149 I.P.C. but convict all of them under Section 307/149 I.P.C. and sentence each of them to suffer rigorous imprisonment for 7 years. We also maintain their convictions and sentences under Sections 147, 324/149, 427/149 and 449/149 I.P.C. All their substantive sentences shall run concurrently. B

10. The appeals are, thus, disposed of. C

V.S.S.

Appeals disposed of.