

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN
&
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

CRL.A.No. 2219 of 2009 (B)

AGAINST THE JUDGMENT IN SC 1118/2006 OF FIRST ADDL.SESIONS COURT,
KOZHIKODE DATED 16-10-2009

APPELLANT(S)/ACCUSED:

NANU, S/O.KANARAN
KATHIRIYA VEETIL HOUSE
VALAYAM AMSOM DESOM, NADAPURAM.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.M.REVIKRISHNAN

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY PUBLIC PROSECUTOR SMT.BINDU GOPINATH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T.SANKARAN & RAJA VIJAYARAGHAVAN.V., JJ.

Crl.Appeal No.2219 of 2009

Dated this the 8th day of October, 2015

JUDGMENT

K.T.Sankaran, J.

On 29.6.1997, at about 11.15 P.M., Bhaskaran Master, the victim in the present case, was murdered at his residence at Bhumivathukkal in Vanimel Panchayath in Vadakara Taluk. The allegation in the F.I.Statement was that about 50 people came to Bhaskaran Master's house of whom 5 to 6 persons entered into the varandha of the house and one of them inflicted fatal injury on his neck by cutting with MO1 chopper. On investigation, it was found that 13 persons were involved in the offence. In the police charge, those 13 persons were arrayed as accused numbers 1 to 13, accused No.1 being Nanu,

S/o.Kanaran, Kathiriya Veettil House. He was released on bail and later, he absconded. Charges were framed against the rest of the accused. They were shown as accused numbers 1 to 12 excluding the appellant Kathiriya Veettil Nanu. Those 12 persons, other than the present appellant, were tried in S.C.No.510 of 2000.

2. Those 12 persons were (1) Chathu, Son of Kelappan, Maniyalammal (2) Nanu, son of Kanaran, Kuthiparambath (3) Sadu @ Sadanandan (4) Prakasan (5) Asokan (6) Sanil (7) Balan (8) Nanu, son of Kannan (9) Raveendran (10) Purushu @ Purushothaman (11) Nanu, son of Onakkan and (12) Chathu, son of Kelappan, Velutha Paramban. The trial court found accused numbers 1, 3 and 12 as not guilty and they were acquitted. The other accused persons were found guilty for the offences under Sections 143, 147, 148, 449, 324 and 302

read with Section 149 I.P.C.. For the offence under Section 302 of the Indian Penal Code, the accused were sentenced to imprisonment for life and to pay a fine of ₹15,000/- each. Various terms of imprisonment were awarded under the other heads of offences.

3. Accused numbers 2, 4, 5, 6, 7, 8, 9, 10 and 11 who were convicted and sentenced by the trial court filed Crl.Appeal No.389 of 2003 before the High Court challenging the conviction and sentence. There was no appeal by the State challenging the acquittal of accused numbers 1, 3 and 12.

4. Crl.Appeal No.389 of 2003 was disposed of by the judgment dated 7.4.2005 by which this Court confirmed the conviction of accused Nos.5 and 10, but acquitted the other

accused granting them benefit of doubt. This Court held that those accused were not properly identified while accused numbers 5 and 10 were clearly identified.

5. After the disposal of Crl.Appeal No.389 of 2003, the present appellant surrendered before court. The case against the appellant was tried as Sessions Case No.1118 of 2006 on the file of the court of the First Additional Sessions Judge, Kozhikode. The court found the appellant guilty for the offences under Sections 143, 147, 449, 324 and 302 read with Section 149 of the Indian Penal Code. The appellant was sentenced to undergo imprisonment for life and to pay a fine of ₹20,000/- and in default to undergo rigorous imprisonment for two years under Section 302 read with Section 149 I.P.C., rigorous imprisonment for two years under Section 147 I.P.C., rigorous imprisonment for two years under Section 324 read

with Section 149 I.P.C. and rigorous imprisonment for ten years and a fine of ₹10,000/- and in default to undergo rigorous imprisonment for one year under Section 449 read with Section 149 I.P.C. No separate sentence was imposed under Section 143 I.P.C. The appellant challenges the conviction and sentence in this Crl.Appeal.

6. The prosecution case is that the deceased was the Secretary of Bharatiya Janatha Party in Nadapuram Assembly Constituency. The accused persons belonged to Communist Party of India (Marxist). There was rivalry between the workers of B.J.P. and Marxist party. Several crimes were registered at Nadapuram Police Station in respect of the offence committed by one group or the other against the opposite group. On 29.6.1997, Bhaskaran Master (the deceased) came to his house at about 6 P.M. He was suffering from fever. He went to

bed early by about 7 P.M. At about 9 p.m., a few persons came to the house of the deceased and called him by name. PW1, the son of the deceased, opened the door. The persons who came to the house of the deceased stated that they had come as instructed by Kunhikrishnan who was running a medical store. PW1 stated to them that his father was not available in the house. They stated that probably they had not properly identified the house and left the place. By about 11 P.M., those persons came again and called the deceased by name. The wife of the deceased opened the window. PW1 also came to that place. The persons who came to the house of the deceased stated that they were workers of B.J.P. By that time, the deceased woke up and came near PW1 without others noticing his arrival. He directed PW1 to get the names of the persons who had come. PW1 asked the names of those persons. They stated the names of some of the B.J.P. workers.

At that time, the deceased opened the door and came to the varandha. One of the persons standing in the varandha asked for providing water. When the deceased turned around, accused No.10 (Purushu @ Purushothaman) attacked the deceased with MO1 chopper and inflicted a cut injury on the neck of the deceased. The deceased fell down. At that time, PW1 tried to close the door which was prevented by inflicting injury by the 11th accused on his hand with an iron pipe. On hearing the hue and cry, PW3, the uncle of PW1, and certain others came to the scene of occurrence. At that time, the accused ran away. It was alleged that there were about 50 people who came along with the accused at the place of occurrence. While the accused were returning, PWs 1 and 2 heard the sound of a bomb blast. Injured was immediately taken to the hospital by PW3 and others. PWs 1 and 2 came to know that Bhaskaran Master died while being taken

to the hospital.

7. Exhibit P1 F.I. Statement was given by PW1 at 9 A.M. on 30.6.1997 which was registered by PW9. The postmortem on the body of the deceased was conducted on 30.6.1997 at 12.45 P.M. by PW8 who issued Exhibit P7 postmortem certificate.

8. The investigation was conducted by PW10 and later by PW13. PW12 completed the investigation and laid the charge.

9. On behalf of the prosecution, PWs 1 to 13 were examined. Exhibits P1 to P18 were marked and MOs 1 to 9 were identified. Exhibits D1 to D8 were marked on the side of the defence. In the F.I. Statement, PW1 had not disclosed the

names of any of the accused. A test identification parade was conducted on 20.8.1997. In the test identification parade, PW1 identified the appellant, but PW2 did not identify. In the test identification parade both PWs 1 and 2 identified only accused numbers 5 and 10. There was no identification by both of them in respect of the other accused including the present accused.

10. The charge framed against the appellant reads thus :

“That, you along with other 12 accused in the case, namely, Chathu, S/o.Kelappan, Nanu, S/o.Kanaran, Sadhu @ Sadanandan, S/o.Kunhikannan, Prakasan, S/o.Kanaran, Asokan, S/o.Chekkini, Sanil, S/o.Kunhikannan, Balan, S/o.Pokkinan, Nanu, S/o.Kannan, Raveendran, S/o.Kunkar, Purushu @ Purushothaman, S/o.Krishnan, Nanu, S/o.Onakkan, Chathu, S/o.Kelappan, on 29.6.1997 at about 11.15 p.m.

formed yourselves into an unlawful assembly, armed with deadly weapons like iron pipe, chopper etc. in furtherance of the common object of that assembly to commit house trespass into the dwelling house of Moothedath Bhaskaran Master in order to commit murder of the said Moothedath Bhaskaran Master and to cause hurt to CW.1 Sreejith, committed rioting and trespassed into the house of the said Moothedath Bhaskaran Master, bearing No.VI/360 of Vanimel Panchayath, and the 11th accused in the crime, namely Purushu @ Purushothaman inflicted cut injury on the right side of the neck of Moothedath Bhaskaran Master with a copper with the full knowledge that by the said act, death would be caused to Moothedath Bhaskaran Master, and the fifth accused in the crime, namely, Prakasan inflicted a blow on the hand of CW1 Sreejith with an iron pipe causing injuries on CW1 and the injury inflicted on Moothedath Bhaskaran Master was sufficient in the ordinary course of nature to cause the death of Moothedath Bhaskaran Master, and Moothedath Bhaskaran Master succumbed to the injuries on the same day

while undergoing treatment in the Medical College Hospital and thereby, you have committed the offence punishable under Sections 143, 147, 148, 324, 449 and 302 I.P.C. read with Section 149 I.P.C., within the jurisdiction of this Court and within my cognizance.”

11. In Exhibit P1 F.I. Statement, there was mention of about 50 persons being present at the scene of occurrence. However, on investigation, it was found that only 13 persons including the appellant were involved in the offence. There is no case for the prosecution that any unidentifiable person was also involved in the unlawful assembly. On the other hand, the prosecution confined the unlawful assembly with the complicity of only accused numbers 1 to 12 who were tried in S.C.No.510 of 2000 and the appellant who was tried in S.C.No.1118 of 2006.

12. The learned senior counsel for the appellant submitted that there is no case for the prosecution that the appellant inflicted any injury on the deceased. There is also no case that the appellant committed any overt act. On a careful consideration of the evidence on record, it is seen that the consistent version of PWs 1 and 2 is that the present appellant was one among the persons who was standing in the courtyard of the house of the deceased. There is no case for PWs 1 and 2 that at any point of time, the appellant entered into the varandha of the house or inside the house. There is also no allegation that the appellant inflicted any blow or injury on the deceased or PW1. There is also no case that the appellant was having in his possession any weapon for committing the offence. The appellant is sought to be implicated in the case only with the aid of Section 149 of the Indian Penal Code. The learned senior counsel for the appellant submitted that when

thirteen accused persons were alleged to have committed the crime and when it was found by the trial court that three persons were not involved and the appellate court found that 7 other persons were also not involved in the case and convicted only two of the accused, there cannot be any conviction of the appellant invoking Section 149 of the Indian Penal Code since the number of accused including the persons who were found guilty and the appellant do not constitute a total number of five persons. The learned senior counsel relied on various decisions of the Supreme Court which are being discussed hereunder.

13. It is apposite to note that PW2 stated in evidence that though she could identify the appellant at the time of test identification parade, she did not state so before the learned Magistrate. That means she did not identify the appellant in the

test identification parade. It is relevant to note that PW2 stated in evidence thus :

“20-8-1997-ൽ ഞാൻ തിരിച്ചറിയൽ പരേഡിന് വേണ്ടി വടകര മജിസ്ട്രേറ്റ് കോടതിയിൽ പോയി. കുറച്ച് പ്രതികളെ ഞാൻ തിരിച്ചറിഞ്ഞു. പക്ഷേ കുറച്ചു പ്രതികളെ മജിസ്ട്രേറ്റിന് ഞാൻ കാണിച്ച് കൊടുത്തില്ല. പ്രതികളെ കണ്ട സമയത്ത് എന്തോ വിഷമം പോലെ തോന്നിയതുകൊണ്ടാണ് കാണിച്ചുകൊടുക്കാത്തത്. ഈ പ്രതിയെ ഞാൻ തിരിച്ചറിഞ്ഞു. പക്ഷേ, മജിസ്ട്രേറ്റിനു കാണിച്ചു കൊടുത്തില്ല. 4 പേരെ ഞാൻ തിരിച്ചറിഞ്ഞ് മജിസ്ട്രേറ്റിനു കാണിച്ച് കൊടുത്തിരുന്നു.”

14. Thus it is clear that there was no proper and convincing identification of the appellant at the time of test identification parade.

15. PW3 is the brother in law of the deceased. He was

running an Ayurveda Vaidyasala in the locality. He identified some of the accused during trial while he was examined. He stated that he identified some of the accused while they were running from the place. He stated that he identified Kathiriya Veettil Nanu (appellant), Chathu (first accused), Sadu @ Sadanandan (accused No.3) and Sanil (accused No.6) while they were running away from the scene of occurrence. Accused numbers 1 and 3 were acquitted by the trial court and accused No.6 was acquitted by this Court in Crl.Appeal No.389 of 2003. It is relevant to note here that on a perusal of the judgment in Crl.Appeal No.389 of 2003, it can be seen that PW3 (who was examined as PW4 in that case) identified accused numbers 2, 3, 4 and 6 as the persons who ran away from the scene of occurrence. In the present case, he said that he identified the appellant as well. But PW3 did not say the name of accused No.2 Nanu as one of the persons whom he

identified earlier. The name of the appellant is Nanu while the name of accused No.2 is also Nanu.

16. In **Mohan Singh v. State of Punjab (AIR 1963 SC 174)**, a Constitution Bench of the Supreme Court after elaborately considering the various aspects of the application of Section 149 of the Indian Penal Code, held thus :

“8. The true legal position in regard to the essential ingredients of an offence specified by Section 149 are not in doubt. Section 149 prescribed for vicarious or constructive criminal liability for all members of an unlawful assembly where an offence is committed by any member of such 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. It would thus be noticed that one of the essential ingredients of Section 149 is that the offence must have been committed by any member of an unlawful assembly, and Section 141 makes it clear that it is only where five or more persons constituted an assembly

that an unlawful assembly is born, provided, of course, the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. In other words, it is an essential condition of an unlawful assembly that its membership must be five or more. The argument, therefore, is that as soon as the two Piara Singhs were acquitted, the membership of the assembly was reduced from five to three and that made Section 141 inapplicable which inevitably leads to the result that Section 149 cannot be invoked against the appellants. In our opinion, on the facts of this case, this argument has to be upheld. We have already observed that the point raised by the appellants has to be dealt with on the assumption that only five persons were named in the charge as persons composing the unlawful assembly and evidence led in the course of the trial is confined only to the said five persons. If that be so, as soon as two of the five named persons are acquitted the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly.

9. *In dealing with the question as to the applicability of Section 149 in such cases, it is necessary to bear in mind the several categories of cases which come*

before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under Section 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under Section 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under Section 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted. Similarly, less than five persons may be charged under Section 149 if the

prosecution case is that the persons before the Court & others, numbering in all more than five composed an unlawful assembly, these others being persons not identified & so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and unnamed assailants or members composed an unlawful assembly, those before the Court can be convicted under Section 149 though the unnamed & unidentified persons are not traced & charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried then Section 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily

displace the charge under Section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under Section 149 because on the evidence the court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly un-named and unidentified may conceivably raise the point as to whether prejudice would be caused to the persons before the court by reason of the fact the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified. That appears to be the true

legal position in respect of the several categories of cases which may fall to be tried when a charge under Section 149 is framed.”

17. In **Nagamalleswara Rao and others v. State of Andhra Pradesh (1991 (2) Supreme Court 532)**, the appellants along with 11 others were tried for committing murder of the deceased and causing injuries on certain others. The trial court acquitted some of the accused while some others were convicted. The convicted accused persons preferred Crl.Appeal. The State filed appeal against the acquittal of the rest of the accused. The High Court confirmed the conviction and sentence of some of the accused and dismissed the appeal preferred by the State. The number of accused persons so convicted fell short of five. It was contended that those four persons cannot be found guilty of the offence invoking Section 149 of the Indian Penal Code. Answering the contention, the

Supreme Court held thus :

“8. However, the learned Judges overlooked that since the accused who are convicted were only four in number and the prosecution has not proved the involvement of other persons and the courts below have acquitted all the other accused of all the offences, Section 149 cannot be invoked for convicting the four appellants herein. The learned Judges were not correct in stating that A-1, A-2, A-5 and A-11 “can be held to be the members of the unlawful assembly along with some others unidentified persons” on the facts and circumstances of this case. The charge was not that A-1, 2, 5 and 11 “and others” or “and other unidentified persons” formed into an unlawful assembly but it is that “you A-1 to 15” who formed into an unlawful assembly. It is not the prosecution case that apart from the said 15 persons there were other persons who were involved in the crime. When the 11 other accused were acquitted it means that their involvement in the offence had not been proved. It would not also be permissible to assume or conclude that others named or unnamed acted conjointly with the charged accused in the case unless the charge itself specifically said so and there

was evidence to conclude that some others also were involved in the commission of the offence conjointly with the charged accused in furtherance of a common object.”

18. In **Maina Singh v. State of Rajasthan (1976(2) SCC 827)**, the Supreme Court held thus:

“14. It would thus appear that even if, in a given case, the charge discloses only the named persons as co-accused and the prosecution witnesses confine their testimony to them, even then it would be permissible to come to the conclusion that others named or unnamed, besides those mentioned in the charge or the evidence of the prosecution witnesses, acted conjointly with one of the charged accused if there was other evidence to lead to that conclusion, but not otherwise.”

19. In **Ramanlal and another v. State of Haryana (2015(2) KLD 360 (SC))**, the Supreme Court considered the decisions in **Mohan Singh v. State of Punjab (AIR1963 SC 174)**

and Nagamalleswara Rao and others v. State of Andhra Pradesh
(1991 (2) Supreme Court 532) and held thus :

“12. Applying the above principles to the case at hand, we are of the view that the provisions of Section 149 of the I.P.C. are no longer available to the prosecution for convicting the appellants whose number is reduced to 4 consequent upon the acquittal of the remaining accused persons. The facts of the case at hand are not covered by situations one and two referred to in Mohan Singh's case (supra). It is a case which, in our opinion, falls more appropriately in situation three where the prosecution had named all those constituting the unlawful assembly, but, only four of those named were eventually convicted, thereby reducing the number to less than five. There is no evidence to suggest that any one, apart from the persons named in the charge-sheet were members of the unlawful assembly, but, were either not available or remained unidentified. Such being the position, the conviction of the appellants with the help of Section 149 of the I.P.C. does not appear to be legally sustainable.”

20. In the light of the facts mentioned above and applying the principles laid down by the Supreme Court in the aforesaid decisions, we do not think that the appellant can be found guilty invoking Section 149 of the Indian Penal Code. There is no specific case for the prosecution that apart from the named accused, other unidentified persons were involved in the case. There was also no proper identification of the appellant. Since no overt act was alleged against the appellant and since there is no allegation that he inflicted any injury or used any weapon, he cannot be found guilty invoking Section 34 I.P.C. and there is no evidence that the appellant shared any common intention along with accused numbers 5 and 10. In these circumstances, we are of the view that the appellant is entitled to be acquitted of the charge levelled against him.

21. Accordingly, the Criminal Appeal is allowed and the

conviction and sentence against the appellant are set aside and he is acquitted of the charge levelled against him.

The appellant shall be set at liberty forthwith unless his detention is required in connection with any other case.

**K.T.SANKARAN
JUDGE**

**RAJA VIJAYARAGHAVAN.V.
JUDGE**

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K.T.SANKARAN & RAJA VIJAYARAGHAVAN.V., JJ.

Crl.Appeal No.2219 of 2009

Dated this the 8th day of October, 2015

Gist of the Judgment

The conviction and sentence of the appellant, namely, Nanu, S/o.Kanaran, Kathiriya Veettil House, Valayam Amsom Desom, Nadapuram, in S.C.No.1118 of 2006, on the file of the court of the First Additional Sessions Judge, Kozhikode, is set aside and the appellant is set at liberty forthwith unless his detention is required in respect of any other case.

The Registry will communicate the gist of the judgment to the Superintendent of Central Prison where the appellant is

undergoing sentence.

**K.T.SANKARAN
JUDGE**

**RAJA VIJAYARAGHAVAN.V.
JUDGE**

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