

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 20 OF 2003**

The State of Maharashtra .. Appellant
Versus
Baban Bhaskar Patil and others .. Respondents

WITH

CRIMINAL APPEAL NO. 948 OF 2002

Baban Bhaskar Patil .. Appellant
Versus
The State of Maharashtra .. Respondent

WITH

CRIMINAL APPEAL NO. 1027 OF 2002

Kashinath Namdeo Vaze .. Appellant
Versus
The State of Maharashtra .. Respondent

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Mr. H.J. Dedhia, Advocate for the Appellant/State in Appeal No.20/2003 and for Respondent in Appeal No.948/2002 and Appeal No.1027/2002.

Mr.M.K. Kocharekar, Advocate for the Appellant in Appeal No. 948/2002.

Mr.Sudeep Pasbola a/w Mr.Karl Rustomkhan, Advocates for Respondent Nos.2 to 8 in Appeal No.20/2003.

None for the Appellant in Appeal No.1027.2002.

**CORAM: PRADEEP NANDRAJOG, C.J.
AND BHARATI DANGRE, J.**

**RESERVED ON : 13th SEPTEMBER 2019
PRONOUNCED ON : 20th SEPTEMBER 2019**

JUDGMENT:- (Per BHARATI DANGRE, J)

1 One Mr.Bandu K. Hare attached to Bhiwandi Police Station on 31st December 1997 received information on the wireless in patrolling about an untoward incident in Saravali pada. On reaching the police station, one Babybai Tare (PW 1) lodged a complaint wherein she stated that she was a resident of Saravali pada, Taluka Bhiwandi and was residing with her husband Madhukar (PW 6) and other family members. In the complaint, Babybai stated that in the previous year, during the marriage ceremony of her, brother-in-law Raghunath, a quarrel had taken place between the Tare family and Ganesh Namdeo Vaze and his clan and since then, they had developed an animosity. The complaint proceeded to state that on the eve of New Year. Her father-in-law Balaram Tare, Baliram Rathod and her brother-in-law Raghunath Tare, Bharat Tare were invited for dinner and mutton was being cooked. At around 10.30 p.m, when dinner was being served, Ganesh Songya Patil (A4) sought permission of Bharat to join the celebration, which he was permitted to. Thereupon, Ganesh Namdeo Vaze accompanied by all 13 accused persons entered the house armed with iron rods, wooden sticks,

stones, hunters and assaulted Balaram (deceased), Raghunath (PW 5), Madhukar (PW 6) and when Pandit Tare (PW 4) intervened, he was also assaulted. The complaint proceeded to state that Balaram and Raghunath sustained serious injuries and they were taken for treatment. Similarly, her husband Madhukar (PW 6) also received injuries on his nose and on the eyebrow of the right eye as well as his hands. Injuries were also received by Pandit (PW 4). Balaram succumbed to the injuries in the Indira Gandhi Memorial Hospital at Bhiwandi.

Based on the said complaint, FIR came to be registered under Sections 147, 148, 149, 324, 302, 452 IPC. Offence was also registered u/s.37(1) r/w Section 135 of the Bombay Police Act in light of the prohibitory orders issued by the District Magistrate on the night of 31st December 1997. The Investigating Officer (PW 14) when visited the spot found Ganesh Namdeo (A2) in an injured state and referred him to the hospital. After preparing the spot panchnama and Inquest panchnama, the body of Balaram was sent for post mortem. The post mortem came to be conducted at the IGM hospital, Bhiwandi by the Medical Officer. It noted the following injuries on the body of Balaram :

- (1) *Incised wound 6 cm x 3 cm transverse on left frontal region 1 cm above Left eye bone deep – Bleeding*
- (2) *Incised wound 3 cm x 2 cm oblique bone deep a post side of left parietal region.*

- (3) *Incised wound 3 cm x 2 cm oblique bone deep on post side of right parietal region.*
- (4) *Incised wound 4 cm x 1cm bone deep oblique on anterior side of right parietal region of scalp.*
- (5) *Incised wound 3 cm x 2 cm bone deep oblique on occipital region of scalp.*
- (6) *Contusion, red (dark) on left cheek.*
- (7) *Crush injury on upper and lower jaw.*
- (8) *Clw 2 cm x 12 cm with left ear upper part*
- (9) *Abrasions on anterior side of chest.*
- (10) *Contusion, red in colour oblique on abdomen about 10 cm x 2 cm*
- (11) *Abrasion 2 cm x 1 cm left fore arm lateral side lower end*
- (12) *Abrasion 1 cm x 1 cm right fore arm lateral side lower end*
- (13) *Abrasion 2 cm x 5 cm on lateral side of right thigh*
- (14) *Contusion 10 cm x 2 cm on right thigh lateral side vertical.*

Column No.19 of the post mortem recorded Incised wound corresponding to Injury Nos.1, 2, 3, 4, 5 and fracture of frontal bone 10 cm x 3 cm cavity deep. The death was opined to be a result of Cardio respiratory due to shock and hemorrhage due to injury to brain and fracture of skull bones. The other injured i.e. Raghunath (PW 5) and Lilabai (PW 2) were examined by Dr. Kishore Jain (PW 7). The accused persons were arrested. Memorandums of Recovery panchnama were executed and the accused were put on trial.

2 The Adhoc Additional District and Sessions Judge, Thane tried the accused persons and convicted the accused no.1 Baban under Sections 452, 148, 149 and 323 read with Section 34 IPC. He was also convicted under Section 304 Part I of IPC and sentenced to undergo imprisonment for a period of five years with benefit of set off and to pay fine of Rs.25,000/- in default to undergo imprisonment for another two years. Accused Nos.2, 3, 4, 5, 7, 11 and 12 were convicted under Section 452, 148, 149 and 323 read with Section 34 IPC and sentenced only under Section 452 of IPC to undergo imprisonment equivalent to the period they were confined in jail as under-trials. Accused Nos.6, 8, 9, 10, 13, 14 were acquitted of the offences with which they were charged.

3 The three Appeals before us arise out of the said judgment. Criminal Appeal No.20 of 2003 is filed by the State seeking enhancement of sentence of all the eight accused who have been convicted by the trial Court on ground of inadequacy of sentence. Criminal Appeal No.1027/2002 is filed by Kashinath (A5) against the judgment and order of conviction whereas Criminal Appeal No.948/2002 is filed by Baban (A1) against his conviction. The State has not filed any Appeal against the acquittal of A-6, A-8, A-9, A-10, A-13 and A-14.

4 The incident that took place on the fateful night of 31st December when the year 1997 was to come to an end, was witnessed by six eye witnesses – PW 1 to PW 6. PW 1 – Babytai the complainant in her complaint had narrated the incident sequentially and named all the 14 accused persons to have marched into her house armed with weapons and she attributes role to the accused persons in plurality. While deposing before the trial Court, PW 1 in sync of her statement, named the accused persons i.e. A1, A2, A5, A8, A11 and A12 and maintained her stand that they were armed with weapons. She identifies the accused persons and deposed that A1 hit Balaram who suffered injuries on head and chest. She also attribute a role to Kashinath (A5) of causing injuries to Balaram and A12 is also accused of hitting Balaram by stick when he fell on the ground. Role is also attributed to A-11 Hendar Patil who hit by chopper causing injuries on the back of the deceased and Hendar Patil is also attributed a role of holding the torch light. She identified the articles shown to her which were used to cause the assault on the deceased and the injured, except she states that the sticks are not the same and were bigger one. PW 2 Leelabai – the wife of the deceased Balaram was residing in an adjacent house and she testified that on the eve of 31st December, deceased Balaram was invited to Madhukar's house. When Lilabai was inside her own house which is adjacent to Madhukar's house, she heard the noise and commotion from the house of Madhukar at around 10.30

p.m which prompted her to immediately rush there. She then deposed that she saw her husband being attacked by A1, A3 and A5, in all seven. She attempted to shield her husband who was bleeding profusely from the head and the abdomen and she was also hit on her back. PW 2 attributed that A-1 operated the stone on the deceased and Kashinath (A-5) assaulted in abdomen. Bhagwan (A-3) is reported to have hit the deceased with stick and Patil (A-12) with an iron bar. A-12 is also alleged to have assaulted PW-4 and PW-6. More or less on similar lines with these two witnesses, PW-3 Bharat also deposed and it is he who permitted Ganesh Songya Patil to enter the house. Bharat speaks of 10 – 12 persons entering into the house and refers to abuses hurled by these persons and on being confronted with the reasons to do so, he has stated that A1, A3, A5, A7, A8, A10, A12 started assaulting and in the course of their act, A1 hit Balaram on the head and abdomen by means of sword and Kashinath threw stones which hit him on his head. A-12 is accused of having hitting Balaram with a stick on his limbs. The said witness do not give any further details since according to him at the relevant time, people rushed at the spot. Bharat also state that PW 6 received injuries while snatching the sword from A-1 and lost his consciousness. PW-4 Pandit Tare who was in his house when the incident took place rushed to Madhukar's house and speaks in sync with PW 3. PW-6 an injured, is the owner of the house where the incident took place. He attributes attack on the

deceased by A-1 with sword, A-5 with crow-bar, A-12 with iron bar and A-11 with stones. He also allege that A-3 entered with stick, A-9 entered with hunter, A-14 had a stick and he attribute a positive role to A-1 who hit Balaram on his head and in an attempt to prevent Balaram from being injured when he snatched the sword from the hand of A-1, it is alleged that he went out and brought a stone and as he was to hit, PW 4 intervened and he hit PW4 by a crow-bar in his hand. Madhukar also lost consciousness and clearly recollect that he had seen the accused persons mounting an attack on the victims by use of iron bars and stones which resulted into death of deceased Balaram.

5 Corroborating with the testimony of these witnesses is the post mortem notes which record injuries in Column No.17 which establish the vicious attack on the deceased by multiple persons by multiple weapons. The injuries are in the nature of incised wound resulting into fracture of frontal bone, fracture of upper jaw and mandible. It also refer the contusion and abrasions on other parts of the body and the cause of these injuries have been traced to hard and sharp object for the incised wound, hard and blunt object for the contusion and the crush injuries and a hard and rough object being responsible for the abrasions on the body of the deceased.

6 The minor discrepancies in the testimony of the witnesses are attempted to be encashed by the counsels for the accused, so also the testimony of the complainant is subjected to severe criticism on the ground that the deposition before the Court by the complainant is an improvement. We have perused the statements of PW 1 to PW 6 and we do not find any major inconsistencies in the said statement. The spot panchnama drawn by PW 8 disclose that the incident took place in an enclosed room measuring 10" x 12" and with the prosecution witnesses and the accused persons being cloaked up in the enclosed premises and when the injured victims were taken by surprise by the sudden attack mounted on them by multiple persons, the likelihood of the witnesses being at variance on minor particulars is but expected. However, the prosecution witnesses in sync had deposed that the accused persons, more than five in number, entered into the room being armed with weapons and assaulted the deceased Balaram by using the said weapons and caused his death. The conduct of accused clearly reflect the knowledge that the bodily injury caused is likely to result in his death. The accused persons are charged with forming an unlawful assembly with an object to commit mischief or criminal trespass and found guilty of committing offence under Sections 148 and 149 IPC.

7 Section 148 prescribes a penalty for an act of rioting being committed by a person being armed with a deadly weapon

or with anything which, used as a weapon of offence is likely to cause death and a person found guilty of such an act is liable for being punished with imprisonment of either description for a term which makes into three years or with fine or with both.

The accused are charged with Section 149 which has its foundation on the constructive liability and has the common object as its foundation. By virtue of the said section, every Member of an unlawful assembly at the time of committing of the offence in prosecution of the common object of the assembly is guilty of that offence.

8 On consideration of the evidence brought on record by the prosecution through the eye witnesses and recovery of the incriminating material from the accused persons, the trial Court has convicted eight accused of whom Accused No.1 has been convicted under Section 304 Part I of the IPC. The other seven accused have been convicted under Sections 452, 148, 149 and 323 IPC but they have been sentenced only under Section 452 IPC. The learned trial Court accepted the case of the prosecution to the extent that all the aforesaid accused persons form an unlawful assembly and were armed with weapons and participated in the perilous attack on deceased and the eye witnesses. However, on the ground that the participation of the accused cannot be stretched beyond the offence is simple hurt or sharing the common intention and not the common object, no

penalty was imposed on the said accused persons under Section 149 IPC. The other accused persons in absence of any evidence brought on record have been acquitted.

9 On analysis of the role played by the accused persons at the time of incident, it is necessary to ascertain if the offence was committed to accomplish a common object or was the one which the members knew to be likely to be committed. For a person to be convicted under Section 149 IPC, the necessary ingredients of the said offence, being a member of the unlawful assembly and sharing the common object of the assembly need to be satisfied. If the aforesaid two ingredients are satisfied, it would not be open for the Court to discern as to who has actually committed the offensive act nor is it open to search for the existence of evidence by the prosecution as to which of the members of the unlawful assembly committed which act. The principle underlying in Section 149 is by now well settled and is based on the concept of vicarious liability as a result of which when large number of accused constitute an unlawful assembly, can be held guilty without it being made imperative for the prosecution to establish as to each of the accused inflicting a fatal injury. In case of Vinubhai Ranchhodbhai Patel Vs. Rajiv Dudabhai Patel, (2018) 7 SCC 743, the principle has been succinctly set out in para 28, 32 and 33 of the judgment which read thus :

28 Section 149 propounds a vicarious liability in two contingencies by declaring that (i) if a member of an unlawful assembly commits an offence in prosecution of the common object of that assembly, then every member of such unlawful assembly is guilty of the offence committed by the other members of the unlawful assembly and (ii) even in cases where all the members of the unlawful assembly do not share the same common object to commit a particular offence, if they had the knowledge of the fact that some of the other members of the assembly are likely to commit that particular offence in prosecution of the common object.

32 For recording a conclusion, that a person is (i) guilty of any one of the offences under Sections 143, 146 or 148 or (ii) vicariously liable under Section 149 for some other offence, it must first be proved that such person is a member of an “unlawful assembly” consisting of not less than five persons irrespective of the fact whether the identity of each one of the 5 persons is proved or not. If that fact is proved, the next step of inquiry is whether the common object of the unlawful assembly is one of the 5 enumerated objects specified under Section 141 IPC.

33 The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of the overt acts committed by such individual members of the assembly, in our opinion is impermissible. For

example, if more than five people gather together and attack another person with deadly weapons eventually resulting in the death of the victim, it is wrong to conclude that one or some of the members of such assembly did not share the common object with those who had inflicted the fatal injuries (as proved by medical evidence); merely on the ground that the injuries inflicted by such members are relatively less serious and non-fatal.

10 The emphasis in Section 149 being a common object and whether the members of the unlawful assembly shared the common object can be gathered from the surrounding circumstances. Perusal of the facts of the present case would unequivocally establish that the accused persons marched in the house of PW 6 with weapons and the weapons involved were stick, choppers, iron bar, crow-bar and sword capable of inflicting deadly injuries. The prosecution has brought on record that immediately after entering the house, the members of the assembly started assaulting the injured persons and at the stage when the prosecution witnesses intervened, they were also attacked. The assembly therefore perceived the common object from the moment when they marched to the house and the object was attained when they assaulted the deceased, who suffered multiple injuries and ultimately succumbed to the same. Unfortunately, the prosecution was only able to establish through PW 7 the injuries sustained by PW2 and PW 5 but according to PW 6, PW 4 was assaulted by A-5 by a crow-bar and he became

unconscious. PW 6 who attempted to rescue the deceased from the attack and snatched sword from the hand of A-1 also suffered an assault and he lost consciousness. In the cross-examination, he had admitted of the injuries above right eye and nose received by him during the attack and that he suffered a hand injury for which he was required to undergo treatment. The attack mounted by the accused persons was a pre-mediated and aggravated and the members of the assembly shared the common object and all the participants were initialized by that object i.e. to do away with the members of Tare family and the object was shared by the members of the assembly who walked in and in an attempt to threaten the members of hose family brought in deadly weapons.

11 The Apex Court in case of Shaji and others Vs. State of Kerala reported in (2011) 5 SCC 423, an authority relied upon by the learned counsel Shri Pasbola deal with a case where the prosecution rests its evidence on three witnesses who were alleged to have witnessed the occurrence. PW 1 – one of the eye witnesses in categorical terms inform the Court that A-1 (Shaji) cut the head of Usman by chopper. The Apex Court on analyzing the evidence of the eye witnesses opined that none of the witnesses attributed involvement of other accused except A-1. It further held that in order to establish the charge under Section 149, the Court must record a clear finding recording the nature of

common object and that the object was unlawful and in absence of any such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove the common object. The head injury sustained by the deceased was caused by A-1 and in absence of a clear finding regarding common object being shared by A-2 to A-4, the Apex Court set aside the conviction of the accused nos.2 to 4 under Section 302 IPC with the aid of Section 149 of the IPC. The said judgment relied by the learned counsel is not of any succor to him since it is in the peculiar facts when the Court concluded that no common object was shared the conviction by the High Court was set aside.

12 In the case in hand, the common object of the assembly of more than five accused persons was clearly established by the prosecution and the common object being of the unlawful assembly the accused persons acted in furtherance of the common object. The purport of Section 149 being to cover the common object which could be attributable to the members of the unlawful assembly, the inference which can be drawn from the evidence that has been brought on record by the prosecution brings on record the motive, the nature of assembly, the nature of arms carried out by the members, their common object and the act on the part of the accused soon before, at or after actual commission of the crime.

13 The State is in Appeal against the inadequacy of sentence against all the accused persons and in particular, against the accused No.1 being held guilty only under Section 304 I of the IPC and according to it, all the accused ought to have been held guilty under Section 302 r/w Section 34 and 149 IPC. The Accused Nos.2, 3, 4, 5, 7, 11 and 12 though convicted under Section 148, 149 and 323 r/w Section 34 are sentenced only under Section 452 of IPC. Once the prosecution has brought on record the relevant evidence to establish that all the aforesaid accused persons had formed an unlawful assembly not a common object, we find no justification in the trial Court not sentencing the said accused persons under Section 149 IPC. On scanning through the evidence, we record that as far as accused No.2 is concerned, he was found to be in an injured condition by the Investigating Officer. There is an inconsistency amongst the witnesses about the role played by this accused as he has not been named either by PW 2, PW 4 or PW 5. There is no recovery of any articles from him during the course of investigation. As far as accused No.7 is concerned, he is not named by PW-1, the complainant. He is only named by the complainant PW 1 nor he has been named either by PW-2, PW-4, PW-5 or PW-6. PW-3 who allowed the accused persons to enter the house mentioned about 10-12 persons entering the house and this included A-7. PW-3 speaks of all the persons hurling abuses. The said version of the witness is in contrast to that of PW-1 who has deposed that

on entering the house, Ganesh Songya i.e. PW-4 started abusing. The prosecution has attributed recovery of an iron rod, pant and a shirt having blood stains from the said accused and this has been brought on record by PW-10. PW-10 who is a panch on Exhibit-79, 80, 82, 83 and 85 in regards to the recovery panchnama, in cross-examination has admitted that he signed four panchnamas on the said date and he do not remember as to from which accused which property was recovered. In absence of the corroborative evidence implicating A-2 and A-7, we record that the sentence imposed on the accused persons under Section 452 IPC calls for no interference. However, as far as accused Nos.1, 3, 4, 5, 11 and 12 is concerned, the presence of the accused in the unlawful assembly and sharing of the common object is brought on record through the eye witnesses and it is also corroborated by the recovery of articles from the said accused persons. The prosecution has conclusively proved that the aforesaid accused are guilty of rioting with the weapons used by them and have been rightly convicted by the Sessions Court u/s. 148 and 149 IPC. On being convicted u/s.149 IPC, the trial Court has fallen in a grave error in violating the dictum enumerated in Section 149 of IPC, when it was established by the prosecution that the incriminating act was done by the said accused persons to accomplish the common object of the unlawful assembly and all the aforesaid accused persons possess the knowledge of the offence likely to be committed in prosecution of the common

object. In light of the aforesaid position, we accede to the contention of the State that the Sessions Court has committed an error in sentencing the Accused Nos. 3, 4, 5, 11 and 12 only under Section 452 IPC. Since we are satisfied that the said error needs to be rectified, we are inclined to allow the Appeal filed by the State and for the purposes of determining the quantum of sentence of the aforesaid accused, we direct the matter to be listed on 30th September 2019.

14 We do not find any merit in Criminal Appeal Nos.1027/2002 and 948/2002 and we dismiss the same. Criminal Appeal No.20/2003 filed by the State is partly allowed and directed to be listed on 30th September 2019 as directed above.

15 In light of the aforesaid observations, we direct the matter to be listed on 30th September 2019 for hearing Accused Nos.3, 4, 5, 11 and 12 on sentence since we are of the opinion that the said accused persons on being convicted under Sections 148, 149 IPC are liable to be imposed with a penalty.

SMT. BHARATI DANGRE, J

CHIEF JUSTICE