

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 432 of 2009

Azad & Ors.

-Vs-

State of West Bengal

For the Appellants : Mr. Tapan Dutta Gupta, Adv.
Mr. Pavej Anam, Adv.

For the State : Mr. Ranabir Roy Chowdhury, Adv.
Mr. Mainak Gupta, Adv.

Heard on : 22.03.2022 & 31.03.2022

Judgment on : 31st March, 2022

Joymalya Bagchi, J. :-

At the outset it is submitted that the appellant No. 5, Adil Sarkar has expired. Hence, appeal abates so far as appellant No. 5 is concerned.

Appellants have assailed judgment and order dated 28th May, 2009 and 29th May, 2009 passed by learned Additional District & Sessions Judge, 5th Fast Track Court, Malda, in Sessions Trial No. 12(03)/2007 arising out of Sessions Case No. 92/06 convicting the

appellants for commission of offence punishable under Section 448/148/302/307/323 of the Indian Penal Code read with Section 149 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Rs. 1,000/- each, in default, to suffer simple imprisonment for two months for their offence punishable under Section 302 read with Section 149 of the Indian Penal Code and to suffer rigorous imprisonment for ten years and to pay fine of Rs. 1,000/ each, in default, to suffer simple imprisonment for two months more for the offence punishable under Section 307 read with Section 149 of the Indian Penal Code, both the sentences to run concurrently. No separate sentence was awarded on other counts.

Prosecution case as alleged against the appellants is to the effect that on 14.07.2002 around 6:00 p.m. in the evening nephew and niece of Mokitul Islam (P.W. 1) were studying in their house. At that time, appellant No. 2 namely, Anarul was loudly playing a radio in the open courtyard in front of the house. When P.W. 1 protested, a quarrel started. At the intervention of villagers, the matter was temporarily settled. Thereafter, at 9.15 p.m. in the night under the leadership of appellant Nos. 5 and 6 i.e. Adil Sarkar and Abdul Malek respectively, other appellants came to the house of P.W. 1 and started abusing them in filthy languages. Elder brother of P.W. 1, Saukatul Islam (since deceased) and his wife, Marjina Bibi came out and protested. Appellant Nos. 6 and 7 namely, Abdul Malek and Shahe Alam (Meghua) pulled

Marjina to the road and beat her on the instruction of appellant No. 5 Adil Sarkar. When Saukatul tried to save his wife, appellant No. 1 (Azad) stabbed him with a 'bhojali' in the abdomen. Another brother of P.W. 1, Jahedul Islam rushed to the spot and was stabbed by Azad on the instigation of by appellant Nos. 5 and 6 i.e, Adil Sarkar and Abdul Malek. Saukatul and Jahedul were taken to hospital where Saukatul was declared dead. Jahedul was shifted to Malda hospital. P.W. 1 lodged complaint against the appellants at police station resulting in registration of Harishchandrapur P.S. case No. 95 of 2002 dated 15.07.2002 under Sections 143/447/323/326/324/506/304 I.P.C. Investigation was taken up by P.W. 12. In conclusion of investigation, charge-sheet was filed against the appellants. Charges were framed under Sections 148/448/323/307/302/149 of the Indian Penal Code. Appellants pleaded not guilty and claimed to be tried.

In course of trial, prosecution examined 12 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication. Appellants examined two witnesses namely D.W. 1 and D.W. 2 who sought to probabalise the defence case that the victim had died at a different place.

In conclusion of trial, the trial Judge by the impugned judgment and order dated 28th May, 2009 and 29th May, 2009 convicted and sentenced the appellants, as aforesaid.

Mr. Dutta Gupta, with Mr. Anam, learned advocates appearing for the appellants argued the prosecution case as narrated by the witnesses in Court is at variance to the First Information Report. While in First Information Report, appellant No. 1, Azad is attributed with the murderous assault both on Saukatul and his brother Jahedul Islam (P.W. 2), in Court, the witnesses stated appellant No. 2, Anarul had assaulted Saukatul while appellant No. 1 (Azad) attacked P.W. 2. Even in the charge framed by the trial Judge it is alleged Azad had murdered Saukatul. Evidence with regard to exhortation to kill is not supported by all the prosecution witnesses. Thus, the prosecution case has undergone substantial change during trial and ought not to be believed. Appellants are entitled to an order of an acquittal.

Mr. Roy Chowdhury, with Mr. Gupta learned advocates appearing for the State rebutted the arguments of Mr. Dutta Gupta. They submit the substratum of the prosecution case is consistent and has been proved by the eyewitnesses P.Ws. 1, 2, 4, 5, 6 & 7. Their ocular evidence is corroborated by the medical evidence. All the appellants came in a body and abused P.W. 1 and his family members. They dragged Marjina (P.W. 7) wife of the deceased and assaulted her. When the deceased tried to save her, appellant No. 2 hit him with a knife resulting in his death. Appellant No. 1 assaulted P.W. 2 in similar fashion in the abdomen resulting in life threatening injury and hospitalization. Other appellants incited them to commit murder. Prosecution has been able to prove that

the appellants were the members of unlawful assembly and the murder was committed in furtherance of common object. Hence, prosecution case is proved beyond doubt.

In a case where accused persons are made vicariously liable under section 149 of I.P.C. for murder committed by one of the members of an unlawful assembly in persuasion of the common object, duty is cast on the prosecution to prove the following facts:

- (a) Formation of an assembly whose common object is unlawful and punishable under Section 141 of the Indian Penal Code.
- (b) Accused persons were members of such unlawful assembly and shared the common object at the time of commission of the offence.
- (c) Murder had been committed in persuasion of such common object.

In the backdrop of the evidence led by the prosecution witnesses, let me examine whether the prosecution has been able to prove the aforesaid facts or not.

P.Ws. 1, 2, 4, 5, 6 and 7 are the eyewitnesses.

P.W. 1 (Mokitul Islam) is the informant in the instant case. He deposed on 14.07.2002 in the evening a dispute had broken between him and appellant No. 2 (Anarul) over playing of radio in high volume in the courtyard. He protested and quarrel ensued. Local villagers intervened. They asked Anarul to switch off the radio and the matter was

temporarily settled. At 21.15 hrs. at night appellant Nos. 1 (Azad) 2 (Anarul) and 4 (Rafik) came to the courtyard and abused P.W. 1 and his family members. P.W. 7, Marjina (sister-in-law of P.W. 1) came out and asked them not to abuse. Thereupon the aforesaid appellants caught her hair and took her towards the road. Her husband Saukatul came to save his wife. At that juncture, appellant Nos. 5 (Adil Sarkar), 6 (Abdul Malek), 7 (Shahe Alam @ Meghua), and 8 (Sagre Alam) came to the courtyard. They incited others to finish Saukatul. Appellant No. 2, Anarul assaulted Saukatul with a 'bhojali' on the belly. He fell down. Another brother namely, Jahedul (P.W. 2) came to the spot and Azad hit him on the chest. All the accused persons shouted they would kill P.W.1 and others.

P.W. 2 (Jahedul Islam), the injured eye-witness, while narrating the incident stated appellant Nos. 2 (Anarul) and 6 (Abdul Malek) came to the spot and abused. When Marjina asked them not to abuse, appellant Nos. 1 (Azad), 2 (Anarul), 4 (Rafiq), 6 (Abdul Malek) and 7 (Shahe Slam @ Meghua) dragged her and assaulted her. When Saukatul intervened, appellant No. 5 (Adil Sarkar) insisted Anarul to kill Saukatul. Appellant No.7 (Shahe Alam @ Meghua) ordered appellant No.1 (Azad) to kill P.W.2. Azad assaulted with a knife on his chest.

P.W. 4 (Sajjad Hossain) deposed appellant Nos. 1 (Azad), 2 (Anarul), 4 (Rafiq), 5 (Adil Sarkar), 6 (Abdul Malek) and 7 (Shahe Slam @ Meghua) came to the courtyard and abused. When Marjina intervened, Azad and Rafiq dragged her. When Saukatul tried to save his wife,

Anarul stabbed him in his belly. Jahedul was also stabbed but the witness is unable to state who had stabbed him.

P.W. 5, Firoj Alam stated appellant Nos.1 (Azad), 2 (Anarul), 4 (Rafiq), 5 (Adil Sarkar), 6 (Abdul Malek), 7 (Shahe Alam @ Meghua) and 8 (Sagre Alam) had come to the spot and abused. Upon intervention by Marjina (P.W.7), appellant Nos.1 (Azad) and 4 (Rafiq) assaulted her. Then Anarul stabbed Saukatul and others stabbed Jahedul.

P.W. 6, Maheleza Bewa is the mother of the deceased. She stated appellant Nos.1 (Azad), 2 (Anarul), 4 (Rafiq), 5 (Adil Sarkar), 6 (Abdul Malek), 7 (Shahe Alam @ Meghua) and 8 (Sagre Alam) had come to the courtyard and abused. Her daughter-in-law Marjina intervened and they dragged her to the road. When her husband Saukatul had come to save her, Anarul attacked him with a knife in the belly and others stabbed Jahedul.

P.W. 7, Marjina is the wife of the deceased. She had intervened when the appellants had come to the open courtyard and abused her family members. She deposed appellant Nos.1 (Azad), 3 (Manoar Hossain [Bakkar]), 4 (Rafiq), 5 (Adil Sarkar), 6 (Abdul Malek), 7 (Shahe Alam @ Meghua) and 8 (Sagre Alam) had come and abused. When she intervened she was assaulted by appellant Nos. 1 (Azad), 4 (Rafiq), 7 (Shahe Alam @ Meghua) and 8 (Sagre Alam). Then her husband, Saukatul came to save her and was assaulted by Anarul with a knife on the belly. Jahedul Islam (P.W. 2) was assaulted by Azad with a knife.

It is contended though all the aforesaid prosecution witnesses have stated in unison that appellant No. 2, Anarul had stabbed Saukatul in the belly with a knife, in the F.I.R. it is alleged appellant No. 1, Azad had stabbed the deceased. Evidence with regard to the manner in which the incident occurred and the participation of the other appellants therein is not consistent. While other witnesses stated that most of the appellants came in a body and abused, P.W.1 stated appellant Nos.1 (Azad), 2 (Anarul) and 4 (Rafiq) came to the spot first and thereafter was joined by others. With regard to the assault on Jahedul, P.Ws.1, 2 and 7 have implicated Azad but P.Ws.4, 5 and 6 stated all the appellants assaulted him. Even with regard to exhortation, witnesses differ from one another as to whether there was any exhortation at all or which of the appellants had incited others.

When a large number of persons are involved in acts of violence, it is possible that eye witnesses may not be able to specifically identify the roles of each one of them in the incident. Hence, there may be some variation in their depositions with regard to the specific acts attributed by them to each of the accused persons. However, such variation should not be a ground to disbelieve such witnesses with regard to the incident as a whole. Their evidence requires to be analysed from the premise whether all the accused persons were members of the unlawful assembly, what was its object and whether the murder was committed in pursuance of such object. Mere presence of an accused at the spot is not

sufficient to establish his membership in an unlawful assembly. Manner in which the assembly developed, its object and the behaviour of the accused persons before, during and after the incident are relevant to determine whether they shared the common object of an unlawful assembly, one of whose member had committed murder. Assessing evidence of the witnesses from such angle it appears that the dispute had initially cropped up between P.W. 1, Mokitul Islam and appellant No. 2, Anarul over playing radio in an open courtyard in a loud volume. On the intervention of local people, matter was settled. Thereafter, some of the appellants came to the courtyard and abused P.W. 1 and other family members. P.W. 7, Marjina (sister-in-law of P.W. 1) came to the spot and protested. Other appellants also came to the spot and some of them dragged Marjina and assaulted her.

From the aforesaid evidence it appears in retaliation to the dispute which had occurred earlier in the evening over playing of radio, appellants had come to the spot and abused the family members of P.W. 1. When Marjina protested, some of the appellants assaulted her. The aforesaid conduct of the appellants show they had prior concert to come in the courtyard and abuse P.W.1 and his family members. Their conduct also shows their intention to assault the family members. However, it is relevant to note the appellants, apart from appellant Nos. 1 (Azad) and 2 (Anarul) were unarmed. There is nothing to show that the other appellants were even aware that appellant Nos. 1 and 2 had come

to the spot with arms. In the course of altercation it appears from the evidence on record that appellant No. 2, Anarul struck Saukatul with a knife blow resulting in his death, while appellant No. 1 (Azad) wounded Jahidul (P.W. 2) in the chest.

Mr. Dutta Gupta asserts in the first information report assault on the deceased is attributed to appellant no.1 Azad. Charge had also been framed in similar lines. Hence, prosecution case has undergone substantial alteration in the course of trial and ought not to be believed.

As discussed earlier, assault on the deceased had occurred in the course of a melee where all the appellants were present. In this backdrop, it is possible P.W. 1 erroneously attributed the knife blow upon appellant No. 1 (Azad) and not to appellant No. 2 (Anarul). In fact, consistent evidence of other eye witnesses P.Ws. 2, 4, 5, 6 and 7 without a shadow of doubt establish appellant no.2, Anarul had dealt the knife blow on the deceased. Attributing such blow to Azad in the first information report, therefore, appears to be an inadvertent error and cannot be treated to be an inherent wedge in the prosecution case which goes to its very root and affects its veracity. Similar defect in the charge has not adversely affected the appellants particularly appellant No. 2, Anarul. All the prosecution witnesses stated that he had dealt the knife blow on the deceased. Such fact was put to him in course of examination under Section 313 of the Code of Criminal Procedure. Hence, appellant No. 2, Anarul was fully conscious of the prosecution case levelled against

him and had fullest opportunity to controvert the same. Hence, I am of the view appellant No. 2 (Anarul) had dealt the fatal blow on the deceased and had not been prejudiced in any manner on this score during trial.

Evidence on record also show in course of the incident, appellant No. 1, Azad dealt a knife blow on P.W. 2. As a result of such attack, he was hospitalised.

It is argued on behalf of the State P.Ws. 5 and 6 have implicated other appellants in the assault of Jahedul (P.W. 2). P.W. 11, Dr. Manoj Kr. Jha treated Jahedul (P.W. 2) at Malda District Hospital. He found one stab injury measuring 1½” x 1” on the left side of liver. He opined that injury was due to a sharp cutting weapon.

The aforesaid medical evidence lends credence to the fact that P.W. 2 had been assaulted by Azad alone as contended by P.Ws. 1, 2 and 7 and not collectively by all the appellants. Thus, knife blows dealt by appellant No.1 (Azad) on Jahedul (P.W. 2) resulting in a life threatening injury on a vital part of the body viz., belly is proved beyond doubt.

Similarly, knife blow by appellant No. 2, Anarul upon the deceased Saukatul has also been proved.

However, evidence on record does not establish the other appellants had shared the common object to murder Saukatul or attempt to murder Jahedul. At its best, it appears other appellants had come to the spot with a pre-concert to abuse and assault P.W. 1 and his

family members owing to previous dispute regarding playing of radio. In the course of the melee, appellant Nos. 1 and 2 (who were armed with knives) had caused murderous assault on Saukatul and his brother Jahedul. Nothing has come on record to show that the other appellants were aware appellant Nos. 1 and 2 had come to the spot armed with knives. Hence, it cannot be said that they had reasons to believe that murder could be caused in furtherance of their common object to assault P.W. 1 and his family members.

Mr. Roy Chowdhury, learned Advocate appearing for the State argued other appellants had exhorted Anarul and Azad to commit the murderous assault on Saukatul and Jahedul. Hence, they share the common object to murder.

With regard to the evidence of exhortation, I find the prosecution case is a divided house. While P.Ws. 1 and 2 spoke of exhortation by some of the appellants, other eye-witnesses, i.e., P.Ws. 4 to 7 are significantly silent with regard to such exhortation. Even P.Ws. 1 and 2 are not consistent with regard to the roles of the appellants vis-à-vis exhortation. While in first information report, it is alleged exhortation was given after the murder, P.W. 1 in Court claimed appellant Nos. 5 (Adil Sarkar), 6 (Abdul Malek), 7 (Shahe Alam @ Meghua) and 8 (Sagre Alam) had exhorted others to kill Saukatul. P.W.2, however, gives a different version with regard to exhortation and claims only appellant No. 5 (Adil Sarkar) exhorted Anarul and appellant No. 7 (Shahe Alam

[Meghna]) exhorted Azad to attack. When the prosecution witnesses are not consistent with regard to the exhortation and the roles of the appellants therein, it cannot be said that the exhortation by the appellants has been proved and can form the basis to come to a conclusion that they shared the common object to murder. In this regard reference may be made to ***Shri Gopal And Another Vs. Subhash And Others.***¹

It is trite law when a large number of persons participate in acts of violence, common intention/common object of all the members of the assembly may not be the same. While appellant Nos. 1 and 2 who were armed with knives had shared common intention to murder, other appellants who had assembled at the spot unarmed and were unaware that appellant Nos. 1 and 2 were armed with knives, cannot be said, in the facts of the present case, to have shared the common object to murder or attempt to murder. They, however, shared the common intention to cause assault and in pursuance to such common intention had assaulted Marjina, P.W. 7.

With regard to the defence evidence led on behalf of the appellants, I find that none of them are eye witnesses. In the face of the convincing evidence of eye-witnesses, namely P.Ws. 1, 2, 4, 5, 6 and 7 with regard to the manner in which the incident occurred, little credence can be given to the defence witnesses.

¹ (2004) 13 SCC 174 (See para 19)

With regard to the offence of committing house trespass, evidence on record shows that the incident occurred in the open courtyard in front of the house of P.W. 1. There is also no evidence that the courtyard was in the exclusive possession of P.W. 1 and his family members. Hence, this offence punishable under section 448/149 of I.P.C. is not proved.

In view of the aforesaid discussion, I am of the opinion it was incorrect to convict all the appellants for commission of offence punishable under section 302 read with section 149 of I.P.C. on the score they shared common object to murder or attempt to murder. Hence, I am inclined to alter the conviction of the appellants as follows:

- a) Appellant No. 1 (Azad) and appellant No. 2 (Anarul) shared common intention to murder Saukatul and attempt to murder Jahedul (P.W. 2). Pursuant to such common intention, they murdered Saukatul and stabbed Jahidul on the belly endangering his life. They are accordingly convicted under Section 302 read with Section 34 I.P.C. and Section 307 read with Section 34 I.P.C.
- b) Appellant No. 3 (Manoar Hossain [Bakkar]), appellant No. 4 (Rafiq), appellant No. 6 (Abdul Malek), appellant No. 7 (Shahe Alam @ Meghua) and appellant No. 8 (Sagre Alam) cannot be said to have shared common object or common intention with appellant Nos.1 and 2 to commit murder or attempt to

murder, as aforesaid. They, however, shared the common intention to assault and in pursuance to such common intention had assaulted Marjina. Hence, they are convicted for commission of offence punishable under Section 323 read with Section 34 I.P.C.

Coming to the issue of sentence in view of the conviction of appellant Nos. 1 and 2 under Section 302 and 307 read with Section 34 I.P.C sentences imposed upon them by the trial Court are upheld.

With regard to appellant Nos. 3, 4, 6, 7 and 8 they have suffered incarceration for various terms in course of investigation and trial. Hence, they are directed to suffer sentence for the periods already undergone for the offence punishable under section 323/34 of the I.P.C.

Appellant Nos. 3, 4, 6, 7 and 8 shall be released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of section 437A of the Code of Criminal Procedure.

Period of detention suffered by the appellants during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon them in terms of Section 428 of the Code of Criminal Procedure.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

cm/as/akd/PA (Sohel)