

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

**C.R.A 785 of 2008
Mannan Molla & Ors.
-Vs-
State of West Bengal & Anr.**

For the Appellants	:Mr. Manjit Singh Mr. Abhishek Bagal Mr. Gaganjyot Singh Mr. Biswajit Mal
For the State	:Ms. Faria Hossain Ms. Mamata Jana
Heard on	: 09.01.2023, 13.01.2023
Judgment on	: 17.03.2023

Ananya Bandyopadhyay, J. :-

1. This appeal is preferred against the judgement and order dated 05.12.08 passed by Additional Session Judge, Fast track, 1st Court, Baruipur in Session Trial No. 4(5)06 arising out of session case no. 69(1)06 convicting the appellant no. 1 under Sections 436/448/149 of Indian Penal Code and Kaluruddin Molla, Atiar Molla, Majeda Bibi, Khalek Molla, Azibar Molla, Hannan Molla and Kaharjan Bibi under Sections 448/149 of the Indian Penal Code sentencing the appellant Mannan Molla to suffer simple imprisonment for seven years and to pay a fine of Rs. 5000/- in default to suffer simple imprisonment for one year. The said appellant was further sentenced to suffer simple imprisonment for 1 year for committing the offence punishable under

Sections 448/149 of Indian Penal Code and to pay a fine of Rs 1000 in default to suffer simple imprisonment for six month. Both the sentences to run concurrently. If the fine was paid 50% of the realized amount was to be paid to the de facto complainant on proper receipt and identification. The rest of the appellants namely Kaliruddin Molla, Atiar Molla, Majeda bibi, Khalek Molla, Azibar Molla and Hannan Molla were sentenced to suffer simple imprisonment for one year each and to pay a fine of Rs. 1000/- each. If the fine was paid then 50% of the realized amount would be paid to the de facto complainant on proper receipt and identification. The convict Kaharjan Bibi is sentenced to pay a Rs. 100/- only in default to suffer simple imprisonment for 10 days.

2. The prosecution case originated on the basis of a complaint filed in the court of Ld. SDJM, Alipur, South 24 Parganas, filed by the complainant Saheda Bibi which precisely stated the accused persons to be the neighbours residing adjacent to their house who indulged in antisocial activities intending to grab their dwelling house through dispossession threatening to set them on fire if unwilling to go elsewhere. Complaints were lodged against the accused persons on earlier occasions. On 27.10.2004 in the evening the accused persons assaulted her husband and others resulting in bleeding injury. They further threatened to torture them until they left the village at their endeavour to rescue her husband and others. On report of the incident the duty officer of the police station conducted a G.D entry being diary no. 1778 dated 28.10.04. Being agitated by the aforesaid report to the police the

accused persons threatened of dire consequences. On 29-30/10/08 at about 12.30 am the complainant on her way to attend the nature's call being suspicious of whisper of certain people stood aside and saw accused no. 2 setting fire to the hay-made roof of her twin dwelling house and the roof was on blaze. The complainant cried aloud resulting in a gathering of people in the neighbourhood to extinguish the fire who were prevented by the accused persons threatening to kill anybody who advanced. Consequently the twin dwelling house converted into ashes destroying the household articles amounting to a value of Rs 100,000/- approx. The incident was reported to the police station whereby the police visited the place of occurrence in the night. On the next day a diary no. was given to the complainant by the Officer-in-Charge of the police station stating his inability to initiate the case without the order of court as the accused persons belonged to an influential political party. The complainant out of utter desperation and helplessness filed the complaint before the court after a delay owing to the intervening puja vacation.

3. Based on the complaint as stated above the Canning PS case no. 207/04 dated 25.11.04 under Sections 147/148/448/427/436/504/34 of Indian Penal Code was initiated. On completion of investigation charge sheet was filed against the Hannal Molla, Azibar Molla, Khalek Molla, Sahajan Bibi, Majida Bibi, Kaluruddin Molla, Atiar Molla and Mannan Molla under Sections 147/148/448/427/436/504/34 of Indian Penal Code charges were framed against the aforesaid accused person under Sections

148/149/436/448 of Indian Penal Code to which aforesaid person pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove its case cited 9 witnesses and exhibited certain documents.
5. The Mr. Manjeet Singh the Ld. Advocate appearing for the appellants submitted that :-

None of the witnesses have stated anything about who has set fire to the house therefore the prosecution is unable to prove the charge under Sections 436, Indian Penal Code against the Appellant No. 1. He further submitted that the Appellant No. 1 has been convicted under Section 436, Indian Penal Code for committing mischief by fire with intention to destroy the dwelling hut of Abdul Molla, being the husband of the de facto complainant. However, a perusal of the evidence of the witnesses indicates that none of them saw the Appellant No. 1 setting fire to the said house.

6. It is further submitted, the only place where the Appellant No. 1, Mannan Molla has been implicated as having set the house on fire is in the complaint under Section 156(3) of Criminal Procedure Code which formed the FIR. It is most humbly stated that it is settled law that the FIR is not a substantive piece of evidence and can only be used for the purpose of corroboration or contradiction. The Ld. Advocate for the appellants relied upon the decisions cited in :

Judgments relied upon:

- (i) ***Sheikh Hasib @ Tabarak vs. State of Bihar, (1972)***
4 SCC 773.

(ii) ***Baldev Singh vs. State of Punjab, (1990) 4 SCC 692.***

7. It was further contended that the GD Entry being the complaint made on 30.10.2004 has not been exhibited. This was the complaint made immediately after the incident and may have set out a clear picture. The application under Section 156(3) of Criminal Procedure Code being the FIR is likely to have contained embellishments and exaggerations to implicate the accused persons. As such, it is most humbly submitted that the charge under Section 436 of Indian Penal Code could not be proved against Appellant No. 1, Mannan Molla and his conviction in this respect may be set aside.
8. There is no proof of the house of PW 2 and her husband was actually burnt.
9. There is no evidence to the effect that any of the appellants committed house trespass, thereby rendering the conviction under Sections 448/149 of Indian Penal Code as incorrect.
10. It was further submitted that the Judgment and Order dated 05.12.2008 convicting the Appellant no. 1 under Sections 436/448/149 of Indian Penal Code the remaining appellants under Sections 448/149 of Indian Penal Code be set aside and the accused persons be acquitted from all charges.
11. Ms. Faria Hussain, the Ld. Advocate for the State submitted the absence of evidence on record concerning the person to have set the house on fire and left it to the discretion of the court.
12. A circumspection of the evidence of the prosecution witnesses revealed as follows :

PW 1 Sahida Bibi deposed to have seen the house of Abdul Molla on blaze with the household articles being destroyed. PW 2 Sahida Bibi stated of being threatened by the appellants as a consequence of a quarrel between the parties. She further stated on 10th Kartick two years ago in absence of her husband she was accompanied by her young sister-in law. At about 12.25. a.m. while she was sleeping she saw her house to have caught fire with flames all around. Thereafter she saw the accused person to flee from her house. The neighbours did not assist her to extinguish the fire due to scuffle with her husband. The fire burnt all her household articles along with sum Rs 100,000/- to be utilized for the marriage of her daughter. During her cross examination PW 1 stated to have heard Hannan, Mannan and others to sustain injury on their head who had lodged a complaint against her husband and her son. She further could not name person who assembled at her house after the incident. She agreed of a dispute between the parties over landed properties for 30 to 40 years. She further could not state as to who typed the written complaint and at whose instance the written complaint was filed. She further stated the accused person lived in the same homestead. There were 30 to 40 houses surrounding her house adjacent to each other but no other house was burnt.

13. PW 3 Liaquat Sardar in his testimony confirmed of a dispute over landed property between the parties and a scuffle to have taken place between the parties prior to the house of Sahida being set on fire. On endeavor, however the fire of the house could not be extinguished by

them. He did not know the person who set the house of Sahida on fire. During his cross examination PW 3 stated Hannan, Mannan and other accused persons were admitted in hospital with injuries, allegedly caused by the husband of Sahida Bibi and her son. He stated his house is situated at Chowrasta More at village Kumarsha, Majerpara. Hananan, Mananan, Ajibar and Khalek are the sons of the elder brother in law of Sahida.

14. PW 4 Momena Bibi deposed the accused persons habitually troubled Abdul Molla and assaulted him and had to be hospitalized. The male members of her family were detained in judicial custody and in their absence the accused persons ablazed the house of Sahida Bibi. No one assisted to extinguish the fire on the house of Sahida Bibi. The accused persons fled from the place of occurrence, having set the house on fire concerning a dispute over homestead. She further stated that accused person were her relatives.
15. During her cross examination PW 4 stated the house of Sahida Bibi was situated adjacent to the house of the accused persons. The accused persons did not allow the villagers to enter the house of Saheda Bibi to extinguish the fire. She further stated at the time of incident she was sleeping and reiterated of a dispute between the parties over landed properties for a considerable period of time.
16. PW 5 Abdul Khaleque Molla stated of being aware of the differences between the parties over landed properties and witnessed the parties to quarrel amongst themselves. PW 5 further stated to have seen the house of Sahida Bibi on fire and extinguished the same in the presence

of Hannan and other accused persons who stood there without pouring water to extinguish the fire.

17. PW 6 deposed to have seen 8 persons whispering and instantly the house of Abdul Molla caught fire. She stood there and saw the accused persons to flee from the place of occurrence at about 12 to 12.30 o'clock, on 10th Kartik. During her cross examination PW 6 stated her house or any house of any one of her neighbours did not catch fire.
18. PW 7 Apchar Molla was declared hostile by the prosecution.
19. PW 8 identified the written complaint mark as Ext. 1/1 and also identified his signature on the formal FIR marked as Ext. 2.
20. PW 9 Shri Jitendranath Pal on being endorsed to investigate visited the place of occurrence, prepared the rough sketch map of the place of occurrence with index marked Ext. 3. PW 9 prepared a seizure list marked Ext. 4 of certain burnt articles. He recorded the statement of available witnesses under section 161 Code of Criminal Procedure. On 25.11.2004 he arrested the accused persons and on completion of investigation submitted the charge sheet as aforesaid. PW 9 did not send the seized burnt articles to the FSL for chemical examination.
21. From the testimony of the prosecution witnesses an enmity between the parties who are related to each other is evident. The acrimonious relationship is a consequence of land disputation and the family of the complainant and the appellants resided in the same homestead. The inquest report marked Ext.3 depicts the place of occurrence to be muddy wall and roof straw. On its western side the house of the appellant Hannan Molla is situated and on the eastern side the house

of Abdul Molla exits, which however according to the inquest report is not the place of occurrence in contradiction to the deposition of PW-1 to have seen the house of Abdul Molla to be ablazed with destruction of house hold articles. She stated to have poured water on the house of Abdul Molla along with others, however did not name them. PW-2 saw the appellants to escape but did not attribute any individual miscreancy to them or deposed to have seen them to set fire on the house of Abdul Molla. PW-2 in contradiction to PW-1 stated the neighbors did not come to assist them in extinguishing the fire. She stated of a complaint lodged by Hannan Molla and Mannan Molla against her husband and son being injured on their heads. It is astounding that the other houses in the vicinity did not catch fire which would have otherwise created an inferno and inflagrate engulfing other houses too without being concentrated to one place. PW-3 did not see the person to have set the house on fire and contradicted PW-2 to have tried to douse the fire. PW-5 saw the appellants at the spot who did not pour water but did not confront them. The evidence of PW-6 is self contradictory.

22. The Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra***¹ observed as follows :

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

¹ (1984) 4 SCC 116

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all

human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal case where this Court observed thus: [SCC para 30, p. 43: SCC (Cri) p. 322]

“Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstances, if other circumstances point unfailingly to the guilt of the accused.”

*In the case of **Devilal Vs. State of Rajasthan {(2019) 19 SCC 447}**, wherein this Court on noting the decision of the case Sharad Birdhichand Sarda (supra) has held as hereunder;*

*“17. It has further been considered by this Court in **Sujit Biswas vs. State of Assam {2013(12) SCC 406}** and **Raja v. State of Haryana {2015(11) SCC 43}**.*

It has been propounded that while scrutinising the circumstantial evidence, a court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straightjacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must

establish the conclusive nature consistent only with the hypothesis of the guilt of the accused.

18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of “may be true” to the plane of “must be true” as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same.”

13. In the instant case not a single person saw the appellants to set fire to the house of the complainant. The inquest report did not mention the house of Abdul Molla to be the place of occurrence. The parties are inimical to each other with cases filed against each other concerning rivalry over landed property with every possibility of false implication. The contradictions and inconsistencies in the statements of the prosecution witnesses fail to create the chain of circumstances to indict the appellants.

14. Section 149 of the Indian Penal Code states as follows :

“Section 149. Every member of unlawful assembly guilty of offence committed in prosecution of common object. – *If an offence is committed by any member of 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, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”*

*In **STATE OF KARNATAKA vs. CHIKKAHOTTAPPA @ VARADE GOWDA & ORS**² it was observed that Section 149, Indian Penal Code 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*

² 2004 (5) SCC 141

immediately with the common object of the unlawful assembly of which the accused was 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 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 there from. 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 the time of or before or after the occurrence. The word 'knew' used in the second limb 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 also 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. (See Chikkarange Gowda and others v. State of Mysore AIR 1956 SC 731). These aspects were also recently highlighted in Chandra & Ors. v. State of U.P. and Anr. [2004 (5) SCC 141].

*In **MAHENDRA & ANR vs. THE STATE OF M.P**³ it was observed that the legal position in regard to essential ingredients of an offence referred to in Section 149 are not in doubt. Section 149 prescribes for vicarious or constructive criminal liability for all members of an unlawful assembly where an offence is committed by any member of such an*

³ 2022 LiveLaw (SC) 22

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 may be noticed that the essential ingredients of Section 149 are 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. To say in other words, it is an essential condition of an unlawful assembly that its membership must be five or more. At the same time, it may not be necessary that five or more persons necessarily be brought before the Court and convicted. Less than five persons may be charged under Section 149 if the prosecution case is that the persons before the Court and other numbering in all more than five composed an unlawful assembly, these others being persons not identified and unnamed. However, in the instant case, the persons are specifically named by the complainant and against them, after the investigation, charge-sheet was filed and all the 20 accused persons faced trial. It was not the case of the prosecution that there are other unnamed or unidentified persons other than the one who are charge sheeted and faced trial. When the other co-accused persons faced trial and have been given benefit of

doubt and have been acquitted, it would not be permissible to take the view that there must have been some other persons along with the appellant in causing injuries to the victim. In the facts and circumstances, it was as such not permissible to invoke Section 149 Indian Penal Code.

“Section 436. of the Indian Penal Code states as follows :

Mischief by fire or explosive substance with intent to destroy house, etc.- Whoever commits mischief by fire or any explosive substance intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

“Section 448. of the Indian Penal Code states as follows :

Punishment for house-trespass.- Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.”

23. The prosecution failed to establish an offence to have been committed by any member of the unlawful assembly since none of the prosecution witnesses saw any of the appellants to set fire on to the house of the complainant. Nobody apprehended them or prevented them from the commission of the offence if at all they were involved in order to

strengthen the alleged malefic act. The seized articles were not sent for FSL examination and the same were not produced before the court. The surrounding witnesses were not examined. The place of occurrence is doubtful. The complainant, her family and the appellants reside within the same precinct adjacent to each other's house, no one saw the appellant to ingress or egress the house of the complainant negating the possibility of house-trespass. Admitted animosity and hostility between the parties buttressed and reinforced by a proximate vengeance as an after math of a scuffle between the parties predominantly provoked the appellants to be falsely implicated.

24. The prosecution was unsuccessful to establish the ingredients to constitute the offences as discussed to implicate the appellants and accordingly the appeal is allowed.
25. CRA 785 of 2008 is allowed and disposed of accordingly.
26. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
27. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)