

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

CRIMINAL APPLICATION (BA) No.1171/2022

Abhijit s/o Amrutrao Tale

vs.

State of Maharashtra

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. K.H. Dodani, Advocate for applicant.
Mr. N.R.Rode, APP for respondent.

CORAM : ANIL L. PANSARE J.

DATE : 20/01/2023

1. The applicant has filed application under Section 439 of the Code of Criminal Procedure Code, 1963. The applicant was arrested on 20.10.2021 in Crime No.409/2021 for the offences punishable under Sections 302, 143, 147, 148, 149 & 201 of the Indian Penal Code read with Sections 4 and 25 of the Arms Act and read with Sections 142 and 135 of the Maharashtra Police Act registered with Police Station Kotwali, Nagpur. There are six persons involved in the crime namely.(1) Subodh @ Subhash Dashrath Bhute (2) Sarang Ramu Bawankule (3) Kiran @ Krushna Chandrabhan Moudekar (4) Shubham Sanjay Mondhe (5) Abhijit Amrutrao Tale and (6) Prajwal @ Shivam @ Ganga Prashant Kakde.

They have allegedly killed one Vicky Rokde. The informant Mukesh Wasnik is a friend of the deceased. He has witnessed the incident.

2. It appears that the incident occurred at 11.00 p.m. on 21.10.2021. One and half hours prior to the incident i.e. at about 9.30 p.m., there occurred altercation between Vicky and accused no.1 – Subodh Bhute. It further appears that Vicky, annoyed with earlier altercation, again approached Subodh at 11.00 p.m., Subodh and his three friends were standing near Shivaji nagar gate. Vicky and Mukesh took up quarrel with Subodh on the ground of the earlier incident. Subodh and his three friends assaulted Vicky by means of knives. Accused nos.1 – Subodh @ Subhash Dashrath Bhute, accused no.2 - Sarang Ramu Bawankule and accused no. 4 – Shubham Sanjay Mondhe were holding knives. While the assault was ongoing, two persons i.e. applicant and another came there. They joined the assault but, by means of kicks and fists blows.

3. The learned counsel for the applicant submits that the role played by the applicant could be distinguished and is of a lesser gravity than the other accused.

4. The learned APP however, submits that the assault was such that Vicky sustained 58 injuries. The cause of death is injury to vital part. The query report

shows that the injuries could be caused by knives. He has invited my attention to the judgment of the Apex Court in the case of ***Manjit Singh Vs. State of Punjab*** reported in ***(2019) 8 SCC 529***. The Apex Court has referred to earlier rulings and held in paragraph 14.5 as under:

“14.5. We need not expand on the other cited decisions because the basic principles remain that the important ingredients of an unlawful assembly are the number of persons forming it i.e. five; and their common object. Common object of the persons composing that assembly could be formed on the spur of the moment and does not require prior deliberations. The course of conduct adopted by the members of such assembly; their behaviour before, during, and after the incident; and the arms carried by them are a few basic and relevant factors to determine the common object”.

5. On the basis of the aforesaid finding, learned APP submits that the common object of the persons composing that assembly could be formed on the spur of the moment and does not require prior deliberations.

6. Learned APP has then relied upon a judgment of Constitution Bench reported in the case of ***Munga Ram, Bhagwati, Chandan Singh, Laxmi Prasad and***

others Vs. The State of UP reported in AIR 1965 SC 202.

He has invited my attention to the findings recorded in paragraph 17, which reads thus:

“17.....What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by S.141, IPC. Section 142 provides that

however, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said person entertained one or more of the common objects as specified by S.141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without

intending to entertain the common object of the assembly. It is in that context that the observations made by the Court in the case of Baladin, (S) AIR 1956 SC 181 assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, S.149 makes it clear that 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; and that emphatically brings out the principle that the punishment prescribed by S.149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of Baladin, (S) AIR 1956 SC 181 must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law such as Mr. Sawhney suggests”.

7. As against, learned counsel for the applicant has relied upon judgment in the case of **Puran Vs. State of Rajasthan reported in (1976) 1 SCC 28**. The Apex Court while considering the applicability of Section 149 of the Indian Penal Code, held in paragraph no.4, which reads thus:

“4. Now, two important circumstances clearly emerge from the evidence and they are based on concurrent findings of facts recorded by the learned Additional Sessions Judge as well as the High Court. First, this was a case of sudden mutual fight between the parties and there could, therefore, be no question of invoking the aid of Section 149 for the purpose of imposing constructive criminal liability on the appellant. The appellant could be convicted only for the injuries caused by him by his individual acts. Secondly, the fight between the parties took place in one stage and not in two stages as deposed to by the prosecution witnesses. There was no break of ten minutes during which the appellant and Sohan went to the village and came back armed with axes and accompanied by Ramnath and Ramu. The version of the prosecution that the appellant and Sohan proceeded to the village and returned after ten minutes armed with axes was clearly not believable. The appellant and Sohan continued

in the fight without any interruption. Once these two circumstances are accepted, it becomes impossible to sustain the conviction of the appellant. When the fight began, it was the case of the prosecution that the appellant was armed with a dantli and it was with the dantli that he gave a blow on the back side of the head of Lalu. But the injury, which resulted in the death of the deceased Bhanwaria, was, according to the prosecution, caused by an axe blow. The evidence of Dr. Duggar, who examined the deceased Bhanwaria and performed the post-mortem examination of his dead body, also shows that the injury received by the deceased Bhanwaria was a severe injury on the left frontal parietal and temporal region resulting in comminuted fracture of left temporal and parietal bones and it appeared to Dr. Duggar that this injury must have been caused by a heavy blow with some sharp cutting object like an axe, since the injury had gone "deep into the brain matter". We thus have the position that the injury resulting in the death of the deceased Bhanwaria was caused by a heavy blow with an axe while the appellant was armed only with a dantli. Obviously, the appellant could not have been responsible for causing the fatal injury to the deceased Bhanwaria, unless it could be shown that at some stage the appellant picked

up an axe. It was precisely for this reason, in order to implicate the appellant by fobbing off on him the murderous assault on the deceased Bhanwaria, that the prosecution witnesses invented the story that the fight was in two stages and after the first stage was over, the appellant and Sohan went to the village and returned after ten minutes armed with an axe, But this story was manifestly incorrect as it did not find even the faintest echo in the first information report lodged by Lalu immediately after the incident and in fact both the learned Additional Sessions Judge and the High Court disbelieved it. If this story of the prosecution explaining how the appellant came by an axe is disbelieved, it is obvious that the appellant, who was armed with dantli, could not have inflicted the fatal blow on the head of the deceased Bhanwaria. In fact this story appears to have been invented by the prosecution witnesses with a view to falsely implicating the appellant in the offence of causing the death of the deceased Bhanwaria. The falsity of this story reflects adversely on the prosecution case that it was the appellant who gave an axe blow on the head of the deceased Bhanwaria resulting in his death. We do not think that the evidence led on behalf of the prosecution is sufficient to establish beyond a reasonable doubt that the appellant

was responsible for causing the death of the deceased Bhanwaria by giving an axe blow on his head”.

8. Section 141 defines unlawful assembly as under:-

“141. Unlawful assembly - An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is:

First - To overawe by criminal force, or show of criminal force, [the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

Second - To resist the execution of any law, or of any legal process; or

Third - To commit any mischief or criminal trespass, or other offence; or

Fourth - By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right

of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth - By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation _ An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.”

9. The Constitution Bench has held that an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. It further held that the crucial question to determine in such a case is whether the said persons entertained one or more of the common objects, as specified by Section 141. In the present case, the common object is said to be committing murder of Vicky. Thus, the present case will fall in the third category that is to say the common object of unlawful assembly was to commit an offence of murder.

10. The entire incident, therefore, will have to be looked into keeping in mind that six persons had

allegedly formed unlawful assembly with intention to commit an offence. In this backdrop, the role of the applicant will have to be examined. He was not party to the first incident that occurred at 9.30 p.m. He was impliedly not party to the second incident at 11.00 p.m. as well appears to have joined the co-accused and has beaten deceased by means of fist and kicks blows. Whether the said act by itself could attract ingredients of Section 149 of the Indian Penal Code is definitely an arguable point.

11. The Apex Court has held that the course of the conduct adopted by the members of said assembly, their behaviour before, during and after the incident and the arms carried by them are few basic and relevant factor to determine the common object. In the present case, the applicant did not carry any arm though has joined the assault in which the co-accused were armed with the weapons.

12. In the given facts and circumstances of the case when the applicant is 21 years old and has no criminal antecedents, the question that crops up is whether further incarceration of this applicant is necessary. The charge-sheet has been filed. Trial has been committed to the Sessions Court (Sessions Case No.108/2022). The trial is yet to commence. In the circumstance, no purpose will be served by keeping the applicant behind bars. The interest of prosecution could

be protected by putting the applicant at appropriate terms. Hence, the following order:-

- (i) Criminal Application is allowed.
- (ii) The applicant be released on bail, on executing a PR bond in the sum of Rs.25,000/- (Rupees twenty five thousand) with one solvent surety in the like amount in respect of Crime No.409/2021 for the offences punishable under Sections 302, 143, 147, 148, 149 & 201 of the Indian Penal Code read with Sections 4 and 25 of the Arms Act and read with Sections 142 and 135 of the Maharashtra Police Act registered with Police Station Kotwali, Nagpur.
- (iii) The applicant shall furnish his address and telephone / mobile number to the Investigating Officer. The applicant shall not change the same without permission of this Court.
- (iv) The applicant shall not directly or indirectly make any inducement, threat or promise to any witness acquainted with the facts of the case so as to dissuade them from disclosing such facts to the Court or any Police Officer.
- (v) The applicant shall not enter the territory of Police Station Kotwali, Nagpur without prior permission

of the Court, till the trial is over, except once i.e. for compliance of condition No.(iii).

(vi) The applicant shall maintain law and order.

(vii) The applicant shall regularly attend the court and co-operate the learned trial court to complete the trial for the above offences.

(viii) In case of breach of any conditions, the learned trial court is at liberty to cancel their bail after giving opportunity of hearing to both the sides.

JUDGE

Signed By: MUKUND
LAXMANRAO AMBULKAR
Private Secretary

Signing Date: 23.01.2023 19:10