

K. NAGAMALLESWARA RAO AND ORS.

v.

STATE OF ANDHRA PRADESH

MARCH 14, 1991

[A. M. AHMADI, V. RAMASWAMI AND  
M. FATHIMA BEEVI, JJ.]

*Criminal Law: Indian Penal Code, 1860—Sections 302 and 34—Deceased attacked by several persons—No specific overt act attributed to the accused and instead bald statements that 15 persons caused injuries to deceased made in the F.I.R. and Dying Declaration which was later treated as statement under section 157 Cr. P.C.—Conviction of the accused under section 302 and section 302 read with section 34 I.P.C. cannot be sustained.*

*Sections 302 and 149—When 15 persons were specifically charged of forming unlawful assembly and committing murder in prosecution of the common object of the assembly but 11 of them were acquitted, the remaining 4 cannot be convicted under section 302/149 as being members of the unlawful assembly.*

**The 4 appellants alongwith 11 others were tried for murder and for causing injuries. The learned sessions judge while acquitting all others of all the charges, convicted A-1, A-2, A-5 and A-11 on different counts. The sentences awarded to them under various charges including the sentence of life imprisonment under section 302 IPC were ordered to run concurrently. The convicted accused preferred appeal to the High Court against their conviction and sentences and the State appealed against the acquittal of the rest of the accused. The High Court altered the conviction of A-1 and A-2 under section 302 I.P.C. and 302 read with section 34 respectively into one under section 302 read with section 149 I.P.C. and confirmed the sentence for imprisonment for life. Except for this modification the convictions and sentences in respect of all the four accused were confirmed. The state appeal against acquittal of all other accused was dismissed.**

**In this appeal preferred by the four convicted accused namely, A-1, A-2, A-5 and A-11 their counsel confined his arguments against their convictions and sentences under section 302 read with section 149 I.P.C. only as the appellants had either already served or had almost finished serving their sentences awarded to them under other charges.**

- A The argument was that in the absence of a specific finding to the effect that apart from the 4 appellants the prosecution has proved the involvement of other persons, section 149 I.P.C. cannot be invoked for convicting them under section 302 I.P.C. Confirming the convictions and sentences of the appellants under other charges but allowing their appeal against their conviction and sentence under Section 302 I.P.C. read with section 149 I.P.C. this Court,
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- HELD: 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 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
- C A1, A2, A5 and A11 can be held to be the members of an unlawful assembly along with some other unidentified persons on the facts and circumstances of this case. The charge was not that accused 1,2,5, and 11 "and others" or "and other unidentified persons" formed into an unlawful assembly but it is that "you accused 1 to 15" formed into
- D 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
- E 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. [882A-D]

*Amar Singh v. State of Punjab*, [1987] 1 SCC 679 and *Maina Singh v. State of Punjab*, [1976] 3 SCR 651, followed.

- F CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 680 of 1987.

From the Judgment and Order dated 16.8.1984 of the Andhra Pradesh High Court in CrI. A. No. 604 of 1982.

- G N. Santosh Hegde, A.D.N. Rao and A. Subba Rao for the Appellants.

G. Prabhakar for the Respondent.

- H The Judgment of the Court was delivered by

**V. RAMASWAMI, J.** The appellants along 11 others were tried for causing the murder of one Appikatla Tataiah, and for causing injuries on Jarugu Rama Koteswararao (PW 2) on 24th June, 1981 near 'Manchineeti Cheruyu' (fresh water tank) at or about 8.00 P.M. in Machavaram Village.

The learned Sessions Judge, Krishna Division, Machilipatnam by his Judgment dated 16.7.1982 acquitted A-3, A-4, A-6 to A-10, A-12 and A-15 of all the charges. He convicted Kurakula Nagamelleswararao (A-1), Jarugu Kotaiah (A-2), Appikatla Krishnamurthy (A-5) and Appikatla Nagulu (A-11) under section 148, Indian Penal Code and sentenced each of them to undergo two years rigorous imprisonment. A-1 was further convicted under section 302, IPC and sentenced to imprisonment for life. A-2 was convicted under section 302 read with section 34, IPC and sentenced to imprisonment for life. A-5 and A-11 were convicted under section 302 read with section 149, IPC and each of them were sentenced to undergo imprisonment for life. Regarding the attack on PW-2 Jarugu Rama Koteswararao the learned Sessions Judge convicted A-1 and A-2 under section 326, IPC read with section 149 and sentenced each of them to undergo rigorous imprisonment for four years. The learned Judge further convicted A-5 and A-11 under section-324, IPC for causing simple hurt to PW-2 and sentenced each one of them to undergo rigorous imprisonment for two years. A-1 and A-2 were also convicted under section 324 read with section 149, IPC and each of them were sentenced to two years rigorous imprisonment. The sentences awarded against each accused under various grounds were ordered to run concurrently.

The convicted accused preferred Criminal Appeal No. 604 of 1982 and the State appealed against the acquittal of the rest of the accused in Criminal Appeal No. 630 of 1983. At the time of admission of appeal, however, the State appeal was dismissed as against A-9, A-10, A-12, A-13, A-14, and A-15 and it was admitted only as against acquittal of A-3, A-4 and A-6 to A-8. The High Court confirmed the conviction and sentence of A-1, A-2, A-5 and A-11 under section 148, IPC. However, it altered the conviction of A-1 and A-2 under section 302, IPC and Section 302 read with section 34 respectively into one under section 302 read with section 149, IPC and the sentence for imprisonment for life was confirmed. The conviction of A-5 and A-11 under section 148 and section 302 read with section 149 and the sentence awarded thereunder were also confirmed. The High Court also confirmed the conviction and sentences on the accused under sections 326 and 324 read with section 149 and sections 324 and 326 read with

A section 149, IPC. The sentences were directed to run concurrently. The learned Judges of the High Court dismissed the appeal preferred by the State in respect of acquittal of the other accused.

B In this appeal Sh. Santosh Hedge, Senior Advocate appearing for the accused appellants did not canvass the conviction of the four appellants, namely, A-1, A-2, A-5 and A-11 under sections 324 and 326, IPC and section 324 read with section 149, IPC and section 326 read with section 149, IPC in relation to the attack on PW-2 but without prejudice to his contention that on the facts section 149, IPC could not have been invoked in relation to the offence under section 302, IPC. This stand was taken on the basis that the appellants had already served or had almost finished serving the four year term which was  
C awarded for those offences. The conviction and sentence under section 148 was also not canvassed for the same reason without prejudice the above said contention. He confined his arguments against the convictions and sentences of A-1, A-2, A-5 and A-11 under section 302 read with section 149, IPC. The argument of the learned counsel for the  
D appellant was that in the absence of specific finding to the effect that apart from the four appellants the prosecution has proved the involvement of other persons, section 149, IPC cannot be used for convicting the four appellants under section 302. In this connection, he also relied on the decisions of this Court in *Amar Singh v. State of Punjab*, [1987] 1 SCC 679 and *Maina Singh v. State of Punjab*, [1976] 3 SCR 651.

E So far this part of the case is concerned in the present case the High Court observed:

F “The lower court has convicted A-1 under section 302 of the Indian Penal Code for attacking the deceased. A-2, was convicted under sections 148, 302 r.w. section 34, 324 r.w. section 149 and 326 I.P.C. for attacking the deceased. A-5 and A-11 were convicted under sections 148, 302 r.w. section 149, 324 and 326 r.w. section 149 IPC. As already observed the facts and circumstances undoubtedly show that there was an unlawful assembly consisting of more  
G than five persons and the common object of the unlawful assembly was to attack and kill the deceased and attack PW 2. As already observed only such of accused whose presence and participation is established can safely be held to be the members of the unlawful assembly. To arrive at such  
H a conclusion we have indicated that the evidence of PW 2 to extent consisting with the earlier versions of Ex. P-2 can

safely be accepted to be the basis and if corroboration is necessary the same can be found in the evidence of PWs 1, 3 and 4 P. Ws. 2's evidence is subjected to scrutiny in the light of the contents in Ex. P-2. The consistent version regarding the presence and participation by A-1, A-2, A-5 and A-11 can safely be accepted and they can be held to be the members of the unlawful assembly along *with some others unidentified persons*. The common object of the unlawful assembly was to commit murder of the deceased. All of them can be conviction under section 302 read with section 149 IPC inasmuch as there can be no doubt whatsoever that the object of such an unlawful assembly of which A-1, A-2, A-5 and A-11 are members is to attack the deceased and PW-2. In this context it must also be remembered that P.W. 2 who received the serious injuries, would be the last person to leave out the real assailants and implicate the innocent persons."

(Emphasis supplied)

We are of the view that there is some confusion in the statement of the High Court. The charges under section 324 and section 326 read with section 149 and section 326 and section 324 read with section 149 are in relation to the injuries inflicted on P.W. 2. So far as injuries inflicted on PW 2 is concerned as already stated the conviction and sentence in regard to the same are not canvassed in this appeal. So far as the attack on the deceased is concerned P 1 the statement of PW 1 given to the village Munsiff on 24.6.1981 immediately after the occurrence stated that:

"... surrounded my husband and my elder brother armed with axes, curved knives, and spears. Then Kurakula Nagamalleswararao hacked my elder brother with curved knife (Yerukala kathi) on the left shoulder. Jargugu Kotaiah hacked my elder brother with an axe on the left shoulder. Appikatla Krishna Moorthy speared my elder brother. Appikatla Nagulu beat my elder brother on the head with stick portion of the spear. I raised hue and cry loudly that they are killing my husband and my elder brother. On hearing my cries Ummadisetti Poornaiah and my sister-in-law Srikrishna came there. The above fifteen persons caused injuries to my husband by beating and hacking with axes, spears and curved knives (Yerukala kathi) which were in their hand. My husband succumbed to the knife injuries."

- A It may be seen from this report that there is a bald statement that fifteen persons caused injuries to her husband (deceased) by beating and hacking with axes, spears and curved knives (Yerukala Kathi) which were in their hands and her husband succumbed to the knife injuries. It did not attribute any overt act to A-1, A-2, A-5 and A-11, who are the appellants in this case. The PW 2 gave the statement Ex. P 2 dated 25.6.1981 recorded by the Munsiff Magistrate, Avamigadda as a dying declaration which was later taken as a statement under section 157 Code of Criminal Procedure. In this so far as the injuries inflicted on the deceased are concerned he had merely stated:
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- C "The aforesaid four persons and the other eleven persons, beat and hacked my younger sisters' husband Appikatla Tataiah and felled him down."

The charges framed against the accused appellants also stated:

- D "That you, accused No. 1 to 15, on the night of 24th day of June, 1981, at about 8 P.M. near the Manchineeti Cheruvu' in Machavaram Village, Divi taluk, were members of an unlawful assembly and did, in prosecution of the common object of which viz., in killing Appikatla Tataiah, S/o Chittonna alias Chinna Ammanna and Jarugu Rama Koteswara Rao, S/O Mangaiah of Machavaram village . . . . ."

- E Thus the specific prosecution case was that accused 1 to 15 attacked the deceased and no specific overt act was attributed to any of the accused. It is true that PW 1 in her evidence stated that A-1 hacked the deceased on the left side of neck with Yerukala Kathi and the evidence of doctor PW 8 showed that this is injury No. 2 which proves fatal by itself. But in the light of the first information report P-1 and the dying declaration Ex. P-2 dated 25-6.1981 of P.W. 2 recorded by the Munsiff Magistrate which was later on treated as statement under section 57 of the Criminal Procedure Code which did not attribute any specific overt act to any of the appellant accused in this case, this case was not accepted by the High Court. It is because of this reason the High Court did not accept the conviction of the appellants 1 and 2, namely, accused 1 and 2 under section 302 and section 302 read with section 34, IPC and altered the conviction into one under section 302 read with section 149, IPC.
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- H The learned counsel for the appellant also contended that the evidence of PW 1 apart from the fact it was not accepted by the High

Court in so far as it related to the specific overt acts of A-1, 2, 5 and 11 are concerned are also not acceptable as they are full of infirmities and improbabilities and also by reason of the possibility of improving the case. He had pointed out that though PW 2 and deceased were said to have gone to the Manchineeti Cheruyu (fresh water tank) to verify whether the paddy bags kept by them for soaking were in tact, paddy bags were not found by the investigating officer or anybody and they were not recovered. The learned counsel also pointed out, the story that PWs 1 and 3 had gone that side for calls of nature are also not believeable as the place where ladies ease was on the opposite direction and not in the direction of the fresh water tank. The house of the deceased and PW 2 and that of PW 4 were about 150 yards away from the scene of occurrence and the occurrence is stated to have taken place at 8.00 P.M. These ladies ran to the scene of occurrence on hearing the cries of the deceased and PW 2. It was also pointed out that though they stated that when they (ladies) went to answer the calls of nature they had taken along with them chambus or lotas with water, and those chambus or lotas were not recovered. In her evidence PW 1 stated that when she found her husband lying dead with number of injuries and blood everywhere she fell over her husband and wept but none of her blood stained clothes were recovered or sent for chemical examination. Similarly PW 3 also stated that when she found her husband PW 2 injured she carried him but her blood stained clothes were also not recovered. Though they had stated before going to the village Munsiff for giving the complaint and after taking PW 2 to the house they have changed the clothing their evidence clearly throw a doubt as to the presence at the time of occurrence. It should be kept in mind that PW 1 is the wife of the deceased PW 3 is the wife of the injured PW 2 and PW 4 is the brother of PW 3. And thus they are all closely related and the possibility of an exaggeration or of improving in their evidence cannot be ruled out. It may also be pointed out that these witnesses stated that there was electric lamp post and the light was on in the place of occurrence, but it is the evidence of the investigating officer that on the day when the occurrence took place there was no electric lamp post and there was no question of any electric light being on. There is ample evidence of rivalry between the parties also. In these circumstances their presence at the time of occurrence is doubtful and it is also not possible to believe the evidence of PWs 1, 2, 3 and 4 in respect of overt acts attributed to the four appellants herein. In fact, as already stated the High Court was not willing to accept their evidence in this regard and that is why the conviction was made under section 302 read with section 149, IPC.

- A However, the learned Judges over-looked 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 A1, A2, A5 and A11
- B "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 accused 1,2, 5 and 11 "and others" or "and other unidentified persons" formed into an unlawful assembly but it is that "you accused 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.
- C 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
- D others also were involved in the commission of the offence conjointly with the charged accused in furtherance of a common object.

- E In *Maina Singh's* case (supra) the appellant in that case and four others were charged with offences under sections 302/149, IPC, the appellant with having shot at the deceased and the other accused with giving blows to the deceased with a sharp-edged weapon. The Trial Court acquitted the four accused and convicted the appellant under section 302 read with section 34. IPC. The High Court dismissed the appeal of the State against the acquittal as also the appellants appeal against the conviction. In the appeal before the Supreme Court it was contended for the appellant that it was not permissible to take the view
- F that a criminal act was done by the appellant in furtherance of the common intention of other co-accused when those accused who had been named had all been acquitted and that all that was permissible for the High Court was to convict the appellant of an offence which he might have committed in his individual capacity. The head note in the report brings the ratio of the judgment correctly and that may be
- G quoted:

- H "In a given case even if the charge disclosed only the named persons as co-accused and the prosecution witnesses confined their testimony to them, it would be permissible to conclude that others, named or unnamed, acted conjointly with one of the charged accused if there was other



evidence to lead to that conclusion, but not otherwise.

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The charge in the present case related to the commission of the offence of unlawful assembly by the appellant along with four named co-accused, and with no other person. The trial in fact went on that basis throughout. There was also no direct or circumstantial evidence to show that the offence was committed by the appellant along with any other unnamed person. So when the other four co-accused had been given the benefit of doubt and acquitted, it would not be permissible to take the view that there must have been some other person along with the appellant in causing injuries to the deceased. The appellant would accordingly be responsible for the offence, if any, which could be shown to have been committed by him without regard to the participation of others."

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The facts in the *Amar Singh's* case (supra) in short were that seven accused were charged for murder under section 302 read with section 149 IPC. Two out of the seven accused were acquitted by the Trial Court and on appeal the High Court acquitted one more accused. However, the High Court convicted four of the accused under section 302 read with section 149 IPC and sentenced them for life imprisonment. The four convicted accused appealed to this Court and it was contended on their behalf that after the acquittal of three accused persons out of seven, the appellants who were remaining four cannot be held to have formed an unlawful assembly within the meaning of Section 141, IPC and accordingly the charge under section 149 was not maintainable. Accepting this contention this Court observed:

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"As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of section 141 IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under section 148 or section 149 IPC for any offence, for, the first condition to be fulfilled in designating an assembly an 'unlawful assembly' is that such assembly must be of five or more persons, as required under section 141 IPC. In our opinion, the convictions of the appellants under sections 148 and 149 IPC cannot be sustained."

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A The ratio of these judgments are also applicable to the facts and circumstances of this case.

B In the result the appeal of the appellants against the conviction and sentence under section 302 read with section 149, IPC is allowed and the same is set aside. We, however, confirm the conviction and sentence of the appellants under the other charges.

R.N.J.

Appeal allowed.