

STATE OF KARNATAKA

v.

CHIKKAHOTTAPO @ VARADE GOWDA & ORS.
(Criminal Appeal No. 313 of 2001)

MAY 16, 2008

(DR. ARIJIT PASAYAT, P. SATHASIVAM AND AFTAB
ALAM, JJ.)

Penal code, 1860, SS 148, 302 r/w s.149 :

Murder – Rivalry between eight accused persons and deceased – Accused persons assaulted deceased with weapons causing multiple injury on his body which resulted in his death – Accused, A4 allegedly Assaulted by deceased and other causing serious injuries – F.I.R. lodged by mother of deceased and complaint by A4 – Investigation – Charge sheet – Trial Court found all the accused persons guilty of committing offences punishable u/s 148, 302 r/w S. 149 IPC and sentenced them to R.I. for life and also imposed fine – Conviction altered u/s 326 r/w S.149 IPC by High Court acquitting accused A4 – Correctness of – Held : In correct – Accused persons inflicted multiple injuries on the body of the deceased – Most of injuries were deep incised wounds of varying sizes – Intention of assailants as established by the evidence of the witness was to cause the death of the deceased and not to cause grievous injury – Hence, the judgment of High Court altering conviction from s. 302 r/w s. 149 IPC to S. 326 r/w s. 149 IPC not sustainable and set aside restoring the conviction and the sentence imposed by Trial Court – Sentencing.

Words & Phrases

'Unlawful assembly' 'common object' 'common intention' – meaning of in the context of s. 149 IPC.

According to the prosecutrix, (there was some rivalry between the accused persons and the deceased and oth-

- A ers). Allegedly eight accused persons, members of an unlawful assembly assaulted the deceased with machus, sticks and wooden reaper, the deceased succumbed to injuries. PW1 mother of the deceased lodged an F.I.R. in the Police Station. Accused no.4 also received injuries of serious nature and admitted to the hospital and he also filed a complaint in the Police Station that the deceased and two other persons had assaulted him on the day of occurrence. The police after completion of investigation submitted the charge sheet against accused persons.
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- C Trial Court found all the accused persons guilty of the offences punishable u/s.302 r/w.s.149 IPC and sentenced them to undergo rigorous imprisonment for life and imposed fine etc. High Court affirmed conviction of all the accused persons except A4, acquitting him of the offences charged but altered the conviction of accused persons u/s. 326 r/w.S.149 IPC. Hence the present appeal.
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- E Appellant-State contended that the reasons indicated by the High Court are palpably wrong and cannot be sustained; that the intention of the unlawful assembly was clear from the weapons held by the assailants; That the injuries inflicted on the eyewitnesses i.e. PW1, PW3 and PW6 clearly described the role of the accused persons in surrounding and assailing the deceased; that the High Court has wrongly held that there were only two injuries on the head and that the rest of the injuries on the lower part of the body and limbs. In fact, there were three injuries on the head. Additionally, the injuries 6 & 7 clearly show the force with which the injuries were inflicted, and in fact, injury No.7 shows that a hand was severed; and that the doctor's evidence also shows that there were multiple fractures of base of the occipital bone.
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Respondent-accused submitted that the acquittal of A4 because of non-explanation of injuries on him by the prosecution shows the falsity of the prosecution case;

and that the occurrence took place in the course of free fight and therefore the High Court's judgment does not warrant any interference. A

Allowing the appeal, the Court

Held: 1.1 The pivotal question is applicability of Section 149 IPC, said provision has its foundation on constructive liability which is the *sine qua non* for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141 IPC. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149 IPC. [Para 6] [1176-C-D] B C D

1.2 It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of such an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. [Para 6] [1176-E-F] E

1.3 A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may F G H

- A exist only up to a particular stage, and not thereafter.
[Para 6] [1176-G-H; 1177-A-B]

- B 1.4 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.
- C Under the Explanation to Section 141 IPC, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. [Para 7] [1177-D-G]
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- 1.5 The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instante. [Para 7] [1177-G-H; 1178-A]
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- 1.6 Section 149, IPC 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
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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 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 IPC, 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. [Para 8] [1178-B-C]

1.7 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 IPC, 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. [Para 8] [1178-E-H; 1179-A-B]

Chikkarange Gowda and others vs. State of Mysore AIR (1956) SC 731 and *Chandra & Ors. vs. State of U.P. and Anr.* (2004) 5 SCC 141 – *relied on.*

A 2.1 In the instant case, there were three injuries on
the head of deceased and injury No.6 was of such nature
that the plura and lung were exposed. Injury No.7 was a
deep incised cut injury on right wrist joint. Right hand was
detached from the body at the level of wrist joint. Further,
B rest of the injuries were not on the lower parts of the body
as noted by the High Court. In fact the injury No.4 was an
injury on the right shoulder joint and injury No.5 was a
deep incised wound 5"x 2"x 1", on middle 1/3rd of right
arm humerous expose. Most of the injuries were deep in-
C cised wounds of varying sizes. Additionally, the multiple
fractures on the base of the occipital bone was noticed.
The intention of the assailants as established by the evi-
dence of the witnesses was the cause of death of the de-
ceased and not to cause grievous injury. Hence, the judg-
D ment of High Court is clearly unsustainable and is set
aside. The respondents are convicted for offence pun-
ishable under Section 302 read with Section 149 IPC in-
stead of Section 326 read with Section 149 IPC as held by
the High Court. The sentences imposed by the Trial Court
stand restored. [Para – 10,11 &12] [1181-B-F]

E CRIMINAL APPEALLATE JURISDICTION : Criminal Ap-
peal No. 313 of 2001

F From the Judgment and final Order dated 9.9.1999 of the
High Court of Karnataka at Bangalore in Crl. Appeal No. 598/
1998

Sanjay R. Hegde, Amit Kr. Chawla and A. Rohan Singh for
the Appellant.

G N.D.B. Raju, Bharathi raju, Guntur Prabhakar and N.
Ganpathy for the Respondents.

The Judgment of the Court was delivered by.

H Dr. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to
the judgment of a Division Bench of the Karnataka High Court
partially allowing the appeal filed by the respondent who were

convicted for offence punishable under Sections 148,302 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). By the impugned judgment the High Court held that the respondents were to be convicted under Section 148 and Section 326 read with Section 149 IPC. A

2. Background facts as projected by the prosecution in a nutshell are as follows: B

Eight persons faced trial for allegedly committing murder of one Rajanna (hereinafter referred to as the 'deceased') on 13.7.1992. It was also alleged that they committed offence punishable under Sections 143, 147 & 148 IPC. First Information Report (in short the 'FIR') was lodged on 13.7.1992 at about 9.30 p.m. C

It was alleged that in an incident that took place at Bandihalli at about 7 p.m. on 13.7.1992, the eight accused who were members of an unlawful assembly had assaulted the deceased Rajappa with machus, sticks and a wooden reaper and as a result of the injuries sustained by him, he died shortly thereafter. The accused are all inter-related and there was some rivalry between the two groups which is of a long standing nature and that this was the real reason for the incident. The mother of the deceased Ningamma (P.W.I) stated that the accused persons had come to her house shortly before the incident and some of them were armed with machus and remaining persons had clubs and a wooden reaper with them. They asked her as to where her son Rajanna was. She informed the persons who had come there that Rajanna had gone out and she bolted the door because they were in an aggressive mood. According to her, they threw stones on the house and once again enquired about Rajanna and since she told them that he was not in the house, they left the place stating that they would finish him. Shortly after this, she went in the direction in which these persons have proceeded and saw Rajanna approaching from the opposite side. On seeing the accused persons, he tried to escape from them but the accused caught hold of him and se- D
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A verely assaulted him. Rajanna fell on the ground with several
injuries on his head and different parts of the body and the lower
limbs and that he was bleeding. The accused left the place with
the weapons stating that Rajanna was finished. Attempt was
made to take the injured person to the hospital at Huliurdurga
B in a car. Rajanna died on the way and ultimately, the body was
taken to the Police Station and from there to the hospital. The
complainant Ningamma (PW1) lodged the complaint at 9.30
p.m. and this complaint which has been treated as the F.I.R.,
was ultimately sent to the J.M.F.C., Kunigal, which reached him
C at 7.30 am, the next morning. Accused No.4-Lokesh had also
sustained two injuries of considerable seriousness on his left
thigh and right leg respectively and he came to be admitted to
the hospital at Huliurdurga on the same evening at about 7.30
p.m. A-4 had lodged a complaint with the police to the effect
that deceased Rajanna and two other persons had assaulted
D him near his house at about 5.30 p.m. on 13.7.1992 and that he
had sustained the injuries in the course of that incident. Ulti-
mately, the Police filed a report in respect of this complaint. As
far as the complaint lodged by Ningamma is concerned, the
Police registered an offence being Crime No. 92/1992 under
E Section 302 IPC read with Section 149 IPC and after comple-
tion of the investigation, put up eight accused for trial. The
learned trial Judge found the eight accused persons guilty of
the offences punishable under Sections 302 read with 149 IPC
and convicted all of them and sentenced them to suffer R.I. for
F life under the main charge along with a fine of Rs.5,000/- in de-
fault, to undergo further R.I. for a period of one year. The ac-
cused were also convicted of offence punishable under Sec-
tion 148 IPC and imposed fine of Rs.500/- in default, to undergo
simple Imprisonment for three months.

G 3. In appeal, the High Court found that A4 i.e. Lokesh was
not guilty but the rest of the accused persons were responsible
for the death of the deceased. But, however altered the convic-
tion as noted above. The High Court for the purpose of altering
the conviction noted as follows:

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"On behalf of the appellants, it was pointed out to us that on the basis of the oral evidence, it has not been established as to which accused dealt which blow and the number of blows that each of the accused had inflicted. Secondly, on a careful scrutiny of the medical evidence, we find that there is a serious lacunae is in so far as the doctor has not indicated as to which of them are not. Of the twenty injuries that were found on the person of deceased Rajanna, it is true that two of them are on the head, the majority of them are aimed at the lower part of the body and the limbs and consequently, having bestowed our very serious attention to the cumulative effect of this record. We find that it was incorrect on the part of the trial court to have invoked the provisions of Section 302 IPC. Having regard to the weapons used and the nature of injuries that have been inflicted, the accused would be liable to be convicted of the offence punishable under Section 326 read with 149 IPC."

4. In support of the appeal learned counsel for the appellant submitted that the reasons indicated by the High Court are palpably wrong and cannot be sustained. With reference to the injuries sustained it was submitted that the intention of the unlawful assembly is clear from the weapons held by the assailants. The injuries inflicted on the eyewitnesses i.e. Ningamma (PW1), Appaji (PW3), Sivappa (PW6) clearly described the role of the accused persons in surrounding and assailing the deceased. It is submitted that the High Court has wrongly held that there were only two injuries on the head and that the rest of the injuries on the lower part of the body and limbs. It is not factually correct on a bare reading of the injury report. In fact, there were three injuries on the head. Additionally, the injuries 6 & 7 clearly show the force with which the injuries were inflicted, and in fact, injury No.7 shows that a hand was severed. The doctor's evidence also shows that there were multiple fractures of base of the occipital bone.

5. Learned counsel for the respondent on the other hand

- A shows that the acquittal of A4 because of non-explanation of injuries on him shows the falsity of the prosecution case. It was stated that the occurrence took place in the course of free fight and therefore the High Court's judgment does not warrant any interference. It was submitted High Court's judgment shows that
- B Section 149 IPC was ruled out.

6. The pivotal question is applicability of Section 149 IPC. Said provision has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence
- C in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help
- D of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved
- E against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of such an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The
- F word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may
- G be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to
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be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

7. 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently

A become unlawful. In other words it can develop during the course of incident at the spot eo instante.

8. Section 149, IPC 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
B a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected 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
C 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
D 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
E 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 therefrom. 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
F 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
G 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 be-
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tween 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].

9. The injuries which were inflicted by the accused persons on the deceased as noted by the High Court-are as follows:

1. One contusion 4" X 4" on occipital region of head.
2. Deep incised wound 2" X 1" x 2" right side of the partial region of head.
3. Incised wound 6 X 3" X 1" on the left side of the forehead. Bone exposed on both bounds. Blood stains seen on all the wounds.
4. Contusion 3"x4" on right shoulder joint.
5. Deep incised wound 5"-X 2" x1" on middle 1/3rd of right arm humerous exposed.
6. Incised wound 4"x3" x2" on right axilla in horizontal direction, pleura and lung exposed.
7. Deep incised cut injury on right wrist joint. Right hand detached from the body at the level of wrist joint, only skin flap is connecting, all the bones are exposed.
8. Deep incised wound 2" X 2" on dorsum of the left

- A hand bones exposed wound is in horizontal direction.
9. Incised wound 2" x 1" x 1" on left elbow joint, horizontal direction, bones exposed, Radial artery and small blood vessels cut open.
- B 10. Deep incised wound upper 1/3rd of the left fore arm 2"x2"x1 just below the elbow joint, bones exposed.
11. Deep incised wound 4" x 3" x 2" on middle, 1/3rd and the left thigh, shaft of left femur exposed and blood vessels cut open. Wound is in a horizontal direction.
- C 12. Deep incised wound 3" x 2" x 1" on the left knee joint, pattellar tendon are cut and bone exposed. Horizontal direction femoral artery and saphenous vein cut open.
- D 13. Deep incised wound 3" x 2" x 2" right knee joint, pattella bone exposed 2" x 2" x 2" blood vessels are cut open, horizontal direction.
14. Deep incised wound 6" x 3" just below the left knee joint. Head of the tibia exposed. Blood vessels cut open, horizontal direction.
- E 15. Incised wound 3" x 2" x 3" on lateral aspect of right thigh, shaft of femur exposed, blood vessels cut open, horizontal in direction, blood clots seen on the wounds.
- F 16. Deep incised wound 6" x 4" x 5" middle 1/3rd of right leg, tibia and febul also cut superficially, horizontal in direction, femoral artery saphenous vein cut open.
- G 17. Left ankle joint and tendo achilus tender also cut into pieces.
18. Deep incised wound 3"x2"x1" on the left popliteal fossa, all the blood vessels cut open, horizontal in direction.

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19. Incised wound 6"x4" on right leg on the medial aspect, all the muscles and blood vessels cut open, horizontal in direction. A

20. Incised wound 2"x 2" x1" on dorsum of right foot, horizontal in direction. B

10. As noted above, there were three injuries on the head and injury No.6 was of such nature that the plura and lung were exposed. Injury No.7 was a deep incised cut injury on right wrist joint. Right hand was detached from the body at the level of wrist joint. Further, rest of the injuries were not on the lower parts of the body as noted by the High Court. In fact the injury No.4 was an injury on the right shoulder joint and injury No.5 was a deep incised wound 5"x 2"x 1", on middle 1/3rd of right arm humerus exposed. C

11. Most of the injuries were deep incised wounds of varying sizes. Additionally, as noted above, the multiple fractures on the base of the occipital bone was noticed. The intention of the assailants as established by the evidence of the witnesses was the cause of death of the deceased and not to cause grievous injury. D E

12. Above being the position the High Court's judgment is clearly unsustainable and is set aside. The respondents are convicted for offence punishable under Section 302 read with Section 149 IPC instead of Section 326 read with Section 149 IPC as held by the High Court. The sentences imposed by the Trial Court stand restored. Respondents shall surrender to custody forthwith to serve remainder of sentences. F

13. Appeal is allowed.

S.K.S.

Appeal allowed.