

A KATTUKULANGARA MADHAVAN (DEAD) THR. LRS.

v.

MAJEED & ORS.

(Criminal Appeal No.400 of 2006 etc.)

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MARCH 30, 2017

[S. A. BOBDE AND L. NAGESWARA RAO, JJ.]

C *Penal Code, 1860: s.302 r/w s.149 – Murder – Unlawful assembly – 21 accused – Death caused by stabbing on account of political rivalry – Conviction by trial court set aside by High Court – Appeal by complainant against acquittal – Held: PW3 who was an independent witness and was believed by both the lower courts had given a vivid description of incident – PW4 was an eye witness and was believed by trial court – High Court was not correct in holding that the evidence of PW4 could be used only for corroboration of PW3’s evidence – PW4 categorically mentioned about involvement of A3, A14, A15 and A18 and, therefore, the finding of the High Court that they were entitled for acquittal on the ground that PW3 did not speak about their presence is set aside – The evidence on record showed that the deceased and accused belong to two political parties opposed to each other – There were three other incidents of clashes between the rival groups – On the fateful day, the accused along with others assembled and were searching for rival party workers travelling in the buses that were passing through the junction – The common object of the members of the unlawful assembly was to attack any rival party supporter who was passing through the junction – The deceased was in the bus and he was killed in the attack – Finding of High Court that merely because the accused did not plan to murder the deceased, there was no common object is not sustainable – As regards the conviction u/ss.302/149, considering that the incident occurred in the year 1993, and that accused attacked the deceased with sticks causing simple injuries on non-vital parts, their conviction u/ss.326/149 meet the ends of justice – A3, A4, A14, A15 and A18 sentenced to 7 years imprisonment u/ss.326/149 – Acquittal of A5 to A11, A13, A16 and A17 upheld.*

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s.149 – Common object – Presence of an accused as part of an unlawful assembly, when not as a curious onlooker or a bystander, suggests his participation in the object of the assembly – When the prosecution establishes such presence, then it is the conduct of the accused that determines whether he continued to participate in the unlawful assembly with the intention to fulfill the object of the assembly, or not – Prosecution is required to determine the point of time at which accused discovered that the assembly intended to kill the victim; having discovered that, if he made any attempt to stop the assembly from pursuing the object; if he did, and failed, did he dissociate himself from the assembly by getting away – The answer to these questions would determine whether an accused shared the common object in the assembly – In the instant case, there was no evidence that having participated in the unlawful assembly which resulted in the death of the victim, A4 made any attempt to either stop the incident from taking place, or having found out that he could not prevent it, dissociated himself from the assembly – Therefore, he was liable u/s. 326/149. (Per S. A. Bobde, J.)

Disposing of the appeals, the Court

HELD:

Per L. Nageswara Rao, J.

1. The High Court committed a serious error in not taking into consideration the evidence of PW4. After recording a finding that the evidence of PW4 cannot be rejected only on the ground that he was not questioned by the police, the High Court proceeded to hold that the evidence of PW4 can be used only for corroboration of PW3's evidence. The said finding was unreasonable and perverse. Unlike PW5 and PW6 who were cited as witnesses in the second list of witnesses given by the complainant five months after filing of the complaint, PW4 was named as a witness in the complaint. Further, his statement was recorded by the Magistrate under Section 202 Cr. P.C. The Trial Court was right in relying upon testimony of PW4 and the High Court was not correct in holding that it can be used only for corroboration of PW3's evidence. The finding of the High Court that A3, A14, A15 and A18 were entitled for acquittal on the basis that PW3 did not speak about their presence is set aside as PW4

A had categorically mentioned about their involvement. [Para 11]
[668-G-H; 669-A-C]

2. The High Court held that the deceased was attacked due to political rivalry but there is no evidence to show that the members of the unlawful assembly had a common object to commit his murder. The High Court also found that A1 and A21 alone
B inflicted stab injuries and the other members of the unlawful assembly who caused injuries on the non vital parts cannot be said to have shared the common object of causing the death of Suresh Babu. The common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them
C and the behaviour of the assembly at or before the scene of occurrence. It is also settled law that the mere presence in the unlawful assembly may vicariously fasten criminal liability under Section 149 IPC. The evidence on record showed that the deceased and accused belong to two political parties opposed to each other. There were three other incidents of clashes between the rival groups. The accused along with others assembled and were searching for BJP workers travelling in the buses that were passing through the junction. The finding of the High Court that merely because the accused did not plan to murder the deceased, there was no common object is not sustainable. The common
D object of the members of the unlawful assembly was to attack any BJP supporter who was passing through Ottappilavu junction. Unfortunately, the deceased was in the bus and he was killed in the attack. [Paras 12, 13] [669-E-F, G-H; 670-A-B]

3. The incident occurred in the year 1993, that they attacked
F the deceased with sticks causing simple injuries on non-vital parts, their conviction under Section 326/149 IPC will meet the ends of justice. The Trial Court convicted A4 under Section 324/149 IPC and sentenced for imprisonment for 2 years along with his conviction under Section 302/149 IPC. The High Court acquitted A4 under Section 302/149 IPC and reduced the sentence
G under Section 324/149 IPC to 1 year. A4 was separated from A3, A14, A15 and A18 only on the ground that PW3 spoke about his presence. Otherwise, the role ascribed to A4 was the same as that of A3, A14, A15 and A18. In the result A3, A4, A14, A15 and A18 are sentenced to 7 years imprisonment under Section 326/149 IPC. Criminal Appeal filed by the complainant against the
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acquittal of A5, A6, A7, A8, A9, A10, A11, A13, A16 and A17 is A
dismissed. [Para 14] [670-F-H; 671-A-B]

Lalji v. State of U.P. (1989) 1 SCC 437 : [1989] 1 SCR
130; *State of UP v. Dan Singh* (1997) 3 SCC 747 :
[1997] 1 SCR 764; *Shivaji Sahabrao Bobade v. State*
of Maharashtra (1973) 2 SCC 793 : [1974] 1 SCR 489 B
– relied on.

Per S. A. Bobde, J.

1. Plea of A4 was that mere presence of an accused in the
unlawful assembly could not be inculpatory in the absence of
witnesses attributed an overt act to the accused. Such a plea cannot C
be accepted in the absence of concrete evidence enabling the
Court to infer that the accused did not in fact harbor the same
intention as that of the unlawful assembly. In the first place, the
presence of an accused as part of an unlawful assembly, when not
as a curious onlooker or a bystander, suggests his participation D
in the object of the assembly. When the prosecution establishes
such presence, then it is the conduct of the accused that would
determine whether he continued to participate in the unlawful
assembly with the intention to fulfill the object of the assembly,
or not. It could well be that an accused had no intention to
participate in the object of the assembly. [Paras 1, 2] [671-D-F] E

2. The questions that arise with regard to the conduct of
such an accused are: what was the point of time at which he
discovered that the assembly intended to kill the victim; having
discovered that, did he make any attempt to stop the assembly
from pursuing the object; if he did, and failed, did he dissociate F
himself from the assembly by getting away. The answer to these
questions would determine whether an accused shared the
common object in the assembly. Without evidence that the
accused had no knowledge of the unlawful object of the assembly
or without evidence that after having gained knowledge, he G
attempted to prevent the assembly from accomplishing the
unlawful object, and without evidence that after having failed to
do so, the accused disassociated himself from the assembly, the
mere participation of an accused in such an assembly would be
inculpatory. In the case of A4, there is no such evidence on record H

- A that having participated in the unlawful assembly which resulted in the death of the victim, he made any attempt to either stop the incident from taking place, or having found out that he could not prevent it, dissociated himself from the assembly. Therefore, he must be held liable under Section 326/149 of the Indian Penal Code. [Paras 2, 3, 4, 5] [671-H; 672-A-E]

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Case Law Reference

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| [1989] 1 SCR 130 | relied on | Para 12 |
| [1997] 1 SCR 764 | relied on | Para 12 |
| C [1974] 1 SCR 489 | relied on | Para 13 |

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 400 of 2006.

From the Judgment and Order dated 05.09.2005 of the High Court of Kerala at Ernakulam in Crl. A. No. 1207 of 2004.

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WITH

Crl. A. No. 661 of 2006 and

Crl. A. No. 141 of 2007.

- E Basant R., Sr. Adv., Raghenth Basant, Kartik Ashok, James Joseph, Mishal Johari, Senthil Jagadeesan, Ms. Bina Madhavan, Advs. for the Appellants.

- F Siddharth Luthra, Sr. Adv., Deepak Prakash, Anoopam N. Prasad, Ali Chaudhury, Swati Ghildiyal, Kunal Singh, Subhash Chandran, Ms. Usha Nandini, G. Prakash, Jishnu M. L., Mrs. Priyanka Prakash, Mrs. Beenu Prakash, Manu Srinath, Ms. Bina Madhavan, Ms. Usha Nandini V, Advs. for the Respondents.

The Judgments of the Court were delivered by

- G **L. NAGESWARA RAO, J.** 1. The Sessions Court, Thrissur convicted A1 to A4, A14, A15, and A18 under Section 302 read with 149 Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and sentenced them to imprisonment for life. They were also convicted for offences under Section 143, 147, 148, 341, 342 and 324/149 IPC. A5 to A13, A16 and A17 were acquitted. A1 to A4, A14, A15 and A18 who were convicted, filed an Appeal before the High Court of Kerala. The

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State of Kerala and the complainant (father of the deceased) also filed appeals against the order of acquittal of A5 to A13, A16 and A17. By way of abundant caution the complainant also filed a Criminal Revision challenging the acquittal of the said accused. The judgment of the Trial Court acquitting A5 to A13, A16 and A17 was confirmed by the High Court. A1 was convicted under Section 302 and sentenced to imprisonment for life. A2 and A4 were convicted under Section 324/149 IPC and were sentenced to imprisonment of 1 year. A3, A14, A15 and A18 were acquitted. A1 filed an appeal before this Court which abated as he died. The complainant filed an appeal against the acquittal of A2 to A4, A14, A15 and A18. He also filed an appeal challenging the acquittal of A5 to A13, A16 and A17. The State of Kerala also assailed the acquittal of A2 to A4, A14, A15 and A18 by filing an appeal. It is relevant to take note of the fact that initially 21 persons were named as accused. A21 absconded and A19 and A20 died during the course of trial. A1, A2, A5 and A12 died during the pendency of the appeals.

2. The case of the prosecution was that PW-14, a Head Constable attached to Kunnamkulam Police Station, received a phone call in the evening on 10.03.1993 that there was a fight going on at Ottappilavu centre. He along with two other police men reached the place of the incident and found a person lying on the road margin on the western side of the road. As he was unconscious and was bleeding due to injuries, he was taken to the Government hospital, Kunnamkulam for treatment in a police jeep. The Doctor examined him and declared him dead. As the identity of the deceased was not known, PW 14 kept the body in the mortuary, went back to the police station and recorded the details in the General Diary. The First Information Statement of PW-1 Krishnankutty was recorded at 12:00 midnight on 10.03.1993. He stated that there was a dispute between people belonging to RSS and CPI (Marxist) party in connection with the festival at Korattikara Vishnu Bhagwati Temple. He further stated that at about 08:15 pm on 10.03.1993 when he was walking back home and reached Ottappilavu centre he saw A2 to A5, A13, A19 and A21 along with number of others attacking Suresh Babu. He also stated that Suresh Babu was stabbed to death by A13 and others. On the basis of the First Information Statement FIR No.95 of 1993 was registered at Kunnamkulam Police Station under Section 143, 147, 148, 341, 324, 302/149 IPC at 12:00 midnight on 10.03.1993 by PW15. Inquest was conducted between 9:45 am to 12:45 pm by PW15. The Assistant

- A Professor of Forensic Medicine at Medical College, Thrissur (PW13) conducted the autopsy immediately thereafter. The post-mortem certificate referred to 26 injuries on the body of the deceased Suresh Babu and the cause of death was stated as "*the deceased died of multiple injuries sustained to chest*". The FIR was sent to the Magistrate in the morning on 11.03.1993.

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3. Not satisfied with the investigation, Madhavan (PW12), the father of the deceased filed a private complaint on 01.04.1994 before the Judicial Magistrate 1st Class, Kunnankulam. He along with 4 other witnesses was examined and process was issued to the accused persons. PW4 Chandran was mentioned as a witness in the complaint. On 08.09.1994, Madhavan submitted another list of witnesses in which PW5 and PW6 were included. The cases of the prosecution and the private complainant were consolidated. The Sessions Court directed the prosecution to submit a schedule of witnesses which would include the witnesses mentioned in the private complaint also. The consolidated list of witnesses given by the prosecution included PW4, PW5 and PW6.

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4. After completion of investigation, all the accused were charged for committing offences under Sections 143, 147, 148, 341, 323 and 302/149 IPC. As stated earlier A19 and A20 died during the course of trial and A21 absconded. The other accused pleaded not guilty and were tried for the aforementioned offences. There were 16 witnesses examined on behalf of the prosecution and 3 witnesses by the defence. PW1 Krishnankutty, who was the informant and PW2 Gopinathan who was an eyewitness turned hostile. Likewise, PW-8 Sulalman, PW9 Ashraf and PW10 Francis who were attestors to the scene mahazar and seizure of the weapon also turned hostile. PW11 Kuttikrishnan who was the driver of the bus in which the deceased was travelling also turned hostile.

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5. The testimony of PW3 was examined in detail by the Trial Court. After considering the submissions on behalf of the defence, the Trial Court held that the evidence of PW3 Subramanian was consistent, cogent and in conformity with the prosecution case. The Trial Court held that PW4 was also a credible witness. According to the Trial Court there was no material contradiction brought out in the evidence of PW5 Balan who was an eyewitness. PW6 Velayudhan was found to be a doubtful witness and the Trial Court held that it was not safe to rely on his evidence. The Trial Court concluded that there was corroboration to

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the oral testimony of PW3 to PW5 from the medical evidence. The oral A
evidence showed that A1 stabbed on the left side of the back of the
deceased which corresponds to injury No.24. The other stab injuries
inflicted by A1 and A21 as mentioned by the eyewitness also correspond
to the stab injuries in Exh.P-11 (post-mortem certificate). Injury No.24
had the depth of 7.5 c.m. caused by knife which entered the left chest B
cavity through the 5th intercostal space. It terminated at the upper part
of lower lobe of the left lung. The Doctor opined that this injury was
sufficient in the ordinary course of nature to cause death. The Trial
Court held that A1 had a definite intention to kill the deceased. Considering
the fact that the other accused continued to beat the deceased with
sticks even after stabbing by A1 and A21, the Trial Court held that there C
was a common object of murder on the part of the accused. A5 to A13,
A16 and A17 were acquitted by the Trial Court as there was no evidence
against them. A1 to A4, A14, A15 and A18 were convicted under Section
302/149 IPC and sentenced to imprisonment for life.

6. The appeals filed by the convicted accused, the appeals filed D
by the State and the complainant against the acquittal of some accused
were taken up along with the Criminal Revision filed by the complainant
against the acquittal. The High Court discarded the evidence of PW5
and PW6. The High Court held that PW3 is a trustworthy witness and
PW4's evidence can be used for corroboration. Placing reliance on the E
evidence of PW3 and PW4, the High Court upheld the conviction of A1
under Section 302 IPC. The High Court also held A2 and A4 guilty of an
offence punishable under Section 324/149 IPC by acquitting them of an
offence under Section 302/149 IPC. A3, A14, A15 and A18 were acquitted
for offences under Section 302/149 IPC by the High Court. The acquittal
of other accused A5 to A13, A16 and A17 recorded by the Trial Court F
was confirmed by the High Court. The High Court referred to the remand
report dated 17.03.1993 of the Circle Inspector in which it was recorded
that on 10.03.1993 sympathisers of CPI (M) were attacked by the
followers of BJP at Ottappilavu. In that incident Moidunny, Ali,
Subramannian, Shameer and Kunhikoya sustained serious injuries and
crime No.96 of 1993 in the Kunnamkulam Police Station under Section G
143, 147, 148, 323, 324, 307/149 IPC was registered. There were three
other cases which were registered against the sympathisers of CPI (M)
for incidents that took place at 06:15 pm on the same day. Taking note of
the series of clashes on 10.03.1993, the High Court repelled the submission

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- A of the defence about the unexplained delay in filing of the FIR and the delay in the FIR reaching the Magistrate only on the next day. The High Court relying upon the judgments of this Court held that the recovery of weapon not being proved is not fatal to the prosecution case. The submission made on behalf of the accused that PW3 and PW4 cannot be believed on the ground that their conduct was contrary to normal
- B human behaviour was also rejected on the ground that there cannot be any straight jacket formula for the reaction of a person who had witnessed a criminal act. The High Court relied upon the judgments of this Court in which it was held that human behaviour is unpredictable and there is no set rule of natural reaction. The defence witnesses were disbelieved by
- C the High Court. All the accused except A1, A2 and A4 were acquitted of all the charges against them on the ground that the prosecution was unable to prove the common object of the unlawful assembly for the murder of Suresh Babu.

7. The complainant filed Criminal Appeal No.400 of 2006 against the acquittal of A2 to A4, A14, A15 and A18. He also filed Criminal Appeal No.661 of 2006 assailing the acquittal of A5 to A13, A16 and A17. The State of Kerala has filed Criminal Appeal No.141 of 2007 challenging the judgment of the High Court by which A2 to A4, A14, A15 and A18 were acquitted. A1 also approached this Court by filing an Appeal against his conviction under Section 302 IPC. However, the said
- E appeal abated in view of the death of A1. We have heard Mr.Basant R., learned Senior Counsel for the appellant/ complainant in Criminal Appeal Nos.400 of 2006, Mr. G. Prakash, Advocate for the State of Kerala in Crl. Appeal No. 141 of 2007 and Mr. Siddharth Luthra, learned Senior Counsel for the accused. Mr. Basant submitted that the complainant
- F was compelled to file a private complaint in view of the perfunctory investigation into the murder of Suresh Babu. He submitted that there was a consolidation of the prosecution case and the case filed by the complainant under Section 210 Cr.P.C. He further submitted that a consolidated list of witnesses was prepared. According to the learned Senior Counsel, the High Court committed a serious error in eschewing
- G the evidence of PW5 from consideration. He also stated that the evidence of PW4 should have been relied upon by the High Court instead of using it only for corroborating the evidence of PW3. He urged that the High Court erred in holding that the common object of the accused was not proved. He also argued that admittedly there was a homicide and A1

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was convicted for causing the death of Suresh Babu. The High Court also convicted A2 and A4 for offences under Sections 143, 147, 148, 324/149 IPC. He submitted that all the accused are liable for conviction under Section 302/149 IPC especially when A2 and A4 were convicted under Section 143, 147, 148, 324/149 IPC and A1 convicted under Section 302 IPC. Mr.G.Prakash, Advocate, appearing for the State of Kerala adopted the submissions made by Mr. Basant.

8. Mr.Siddharth Luthra, learned Senior Counsel appearing for the accused took us through the evidence of PW4, PW5 and PW6 and submitted that they are all interested witnesses who deposed at the instance of the complainant. He submitted that the informant PW1 and another eyewitness PW2 turned hostile. He stated that the offence took place on a public road and no independent eyewitnesses were produced by the prosecution to prove the case. He further submitted that apart from PW4 no other witness cited in the private complaint was examined. The partisan and interested testimonies of eye witnesses who belonged to the opposite political party ought not to have been taken into consideration by the Courts below. He also commented upon the unnatural behaviour of PW3 and PW4 after the incident. Mr. Luthra finally submitted that the appeals against acquittal should not be interfered lightly by this Court. In any event, according to him, when there are two views possible, the accused should be given the benefit.

9. As stated earlier, A1, A2, A5 and A12 died during the pendency of the appeals before this Court. The remaining accused can be categorised into three groups. The first group consists of A5 to A13, A16 and A17 who were acquitted both by the Trial Court and the High Court. The second group consists of A3, A14, A15 and A18 who were convicted by the Trial Court under Section 302/149 IPC but acquitted by the High Court. A4 forms the third group whose conviction under Section 302/149 IPC by the Trial Court was set aside by the High Court. However, he was convicted under Section 324/149 IPC and sentenced for a period of 1 year.

10. PW3, who was an independent witness and was believed by both the Courts below, gave a vivid description of the incident. He stated that he was a resident of Ottappilavu and that he was acquainted with the deceased Suresh Babu who was residing about 1 k.m. away from his house. He deposed that he went to Kunnamkulam to purchase

A medicines for his brother who was unwell. He boarded a stage carriage bus by name Babu bus at Kunnamkulam. The deceased Suresh Babu was travelling in the same bus. He stated that when the bus reached Ottappilavu junction, A1, A2, A4 and A5 entered the bus, pulled Suresh Babu out of the bus and took him to the front side of the bus and attacked him. He further stated that A1 inflicted a stab injury on the back of the
B left side of the chest of Suresh Babu. The deceased fell down and A1 inflicted two more stab injuries. When the deceased was struggling to stand up and escape the other accused indiscriminately beat him with a reaper and sticks. He did not alight from the bus and continued his travel and got down at Chalissery junction. He stated that he was questioned
C by the police after two days. He identified M.O.1 knife used by A1. PW4 was also an eyewitness to the incident. He stated that A2 to A4, A10, A13, A14, A15, A18 and A20 attacked the deceased with sticks and a reaper after A1 and A21 inflicted stab injuries on the deceased. He stated that his house is situated 2/3 k.m. from the house of the deceased and that he also attended the funeral of Suresh Babu. He was
D cited as a witness in the private complaint filed by PW12 (appellant). His statement was recorded by the Magistrate under Section 202 Cr. P.C. PW6 was disbelieved by the Trial Court as well as by the High Court. The evidence of PW5 disbelieved by the High Court. The High Court acquitted A3, A14, A15 and A18 of the charges under Section
E 302/149 IPC on two grounds. The first ground was that PW3 did not depose about their presence and it was only PW4 who stated about their involvement. The second ground was that there is no evidence to show that the members of the unlawful assembly had a common object to cause the death of Suresh Babu. Modification of the conviction and sentence of A4 from Section 302/149 IPC to Section 324/149 IPC was
F on the ground that A4 who was a member of the unlawful assembly did not share a common object of causing the death of Suresh Babu along with A1 and A21.

11. We are of the opinion that the High Court committed a serious error in not taking into consideration the evidence of PW4. The finding
G recorded by the High Court that the evidence of PW4 can be considered only for the limited purpose of corroboration of evidence of PW3 is unreasonable and perverse. After recording a finding that the evidence of PW4 cannot be rejected only on the ground that he was not questioned by the police, the High Court proceeded to hold that the evidence of
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PW4 can be used only for corroboration of PW3's evidence. Unlike PW5 and PW6 who were cited as witnesses in the second list of witnesses given by the complainant five months after filing of the complaint, PW4 was named as a witness in the complaint. Further, his statement was recorded by the Magistrate under Section 202 Cr. P.C. There was a consolidated list of witnesses given by the prosecution. The High Court has not given any reason as to why the evidence of PW4 can be used only for corroboration. On a careful examination of the evidence of PW4 we are of the considered opinion that the Trial Court was right in relying upon his testimony and the High Court was not correct in holding that it can be used only for corroboration of PW3's evidence. The finding of the High Court that A3, A14, A15 and A18 are entitled for acquittal on the basis that PW3 did not speak about their presence is liable to be set aside as PW4 had categorically mentioned about their involvement.

12. The High Court held that the accused were not aware that the deceased was travelling in the bus and there is no evidence to show that they formed an unlawful assembly with a view to attack and commit his murder. The High Court referred to the clash between the supporters of CPI (M) and BJP workers on 10.03.1993. The High Court held that the deceased was attacked due to political rivalry but there is no evidence to show that the members of the unlawful assembly had a common object to commit his murder. The High Court also found that A1 and A21 alone inflicted stab injuries and the other members of the unlawful assembly who caused injuries on the non vital parts cannot be said to have shared the common object of causing the death of Suresh Babu. The common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the fact and circumstances of the case (*See Lalji v. State of U.P., (1989) 1 SCC 437 ¶8*). It is also settled law that the mere presence in the unlawful assembly may vicariously fasten criminal liability under Section 149 IPC (*See. State of UP v. Dan Singh (1997) 3 SCC 747*).

13. We are not in agreement with the High Court regarding the absence of common object of the A3, A4, A14, A15 and A18. The evidence on record shows that the deceased and accused belong to two political parties opposed to each other. There were three other incidents of clashes between the rival groups. The existence of a CPI (M) office

- A at Ottappilavu junction is proved by a sketch of the site of the incident. The accused along with others assembled and were searching for BJP workers travelling in the buses that were passing through the junction. We do not agree with the finding of the High Court that merely because the accused did not plan to murder Suresh Babu (deceased), there was no common object. The common object of the members of the unlawful assembly was to attack any BJP supporter who was passing through Ottappilavu junction. Unfortunately, Suresh Babu was in the bus and he was killed in the attack.

- C 14. Justice V. R. Krishna Iyer in *Shivaji Sahabrao Bobade v. State of Maharashtra*, (1973) 2 SCC 793 ¶ 6 held as follows:

- D “The evil of acquitting a guilty person light heartedly as a learned Author [Glanville Williams in ‘Proof of Guilt’.] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted “persons” and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that “a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent....” In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic.”

- F The point that remains to be considered is whether A3, A4, A14, A15 and A18 are liable to be convicted under Section 302/149 IPC. Taking into account the fact that the incident occurred in the year 1993, that they attacked the deceased with sticks causing simple injuries on non-vital parts, their conviction under Section 326/149 IPC will meet the ends of justice. The Trial Court convicted A4 under Section 324/149
- G IPC and sentenced for imprisonment for 2 years along with his conviction under Section 302/149 IPC. The High Court acquitted A4 under Section 302/149 IPC and reduced the sentence under Section 324/149 IPC to 1 year. A4 was separated from A3, A14, A15 and A18 only on the ground that PW3 spoke about his presence. Otherwise, the role ascribed to A4

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is the same as that of A3, A14, A15 and A18. In the result A3 Majeed, A4 Ummer alias Podi Ummer, A14 Balaji, A15 Muralleedharan and A18 Hasheem alias Muhammed Hasheem are sentenced to 7 years imprisonment under Section 326/149 IPC. They shall surrender within 4 weeks to serve the sentence. Criminal Appeal No. 661 of 2006 filed by the complainant against the acquittal of A5 Siddik, A6 Asharaf, A7 Sundaran, A8 Rajan, A9 Monutty alias Dharmarajan, A10 Kunhippa, A11 Kunhimon, A13 Sathyan, A16 Shaji Alias Kuttamon and A17 Kurukkal Rassak is dismissed. Criminal Appeal No. 400 of 2006 and 141 of 2007 filed by the complainant and State respectively against the acquittal of A3 Majeed, A4 Ummer alias Podi Ummer, A14 Balaji, A15 Muralleedharan and A18 Hasheem alias Muhammed Hasheem are allowed.

S. A. BOBDE, J. 1. I am in complete agreement with my learned brother Nageswara Rao J. I would, however, like to deal with one submission made at the bar in relation to the culpability of an accused participating in an unlawful assembly in general, and that of A4 Ummer alias Podi Ummer in particular. It has been argued on behalf of A4 that his mere presence in the unlawful assembly could not be inculpatory since none of the witnesses attributed an overt act to the accused. Such a submission without any concrete evidence enabling the Court to infer that the accused did not in fact harbor the same intention as that of the unlawful assembly, cannot be accepted.

2. In the first place, the presence of an accused as part of an unlawful assembly, when not as a curious onlooker or a bystander, suggests his participation in the object of the assembly. When the prosecution establishes such presence, then it is the conduct of the accused that would determine whether he continued to participate in the unlawful assembly with the intention to fulfill the object of the assembly, or not. It could well be that an accused had no intention to participate in the object of the assembly. For example, if the object of the assembly is to murder someone, it is possible that the accused as a particular member of the assembly had no knowledge of the intention of the other members whose object was to murder, unless of course the evidence to the contrary shows such knowledge. But having participated and gone along with the others, an inference whether inculpatory or exculpatory can be drawn from the conduct of such an accused. The following questions arise with regard to the conduct of such an accused:-

- A 1. What was the point of time at which he discovered that the assembly intended to kill the victim?
2. Having discovered that, did he make any attempt to stop the assembly from pursuing the object?
- B 3. If he did, and failed, did he dissociate himself from the assembly by getting away?
3. The answer to these questions would determine whether an accused shared the common object in the assembly. Without evidence that the accused had no knowledge of the unlawful object of the assembly or without evidence that after having gained knowledge, he attempted to prevent the assembly from accomplishing the unlawful object, and without evidence that after having failed to do so, the accused disassociated himself from the assembly, the mere participation of an accused in such an assembly would be inculpatory.
- C 4. In the case of A4, there is no such evidence on record that having participated in the unlawful assembly which resulted in the death of Suresh Babu, he made any attempt to either stop the incident from taking place, or having found out that he could not prevent it, dissociated himself from the assembly.
- D 5. Therefore, he must be held liable under Section 326/149 of the Indian Penal Code.
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