

RAMU GOPE AND ORS.

v.

STATE OF BIHAR

October 29, 1968

[J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.]

Indian Penal Code, 1860, ss. 149, 302—Conviction by trial Court of H as one member of unlawful assembly under s. 302 for causing death of a person in pursuance of common object and of others under s. 302 read with s. 149—High Court acquitting H in appeal but confirming conviction of others—If conviction sustainable.

The appellants and one H were tried on the charge that on July 2, 1962 they had formed an unlawful assembly and in prosecution of the common object of the unlawful assembly i.e., to rescue their cattle which had damaged the maize crop of one B and had on that account been detained by the villagers, made an assault on persons resisting the rescue causing injuries to various persons including B as a result of which B died. The Trial Court, relying on the evidence of certain witnesses, held that H had caused injuries with a spear to B which resulted in her death. It therefore convicted H of an offence under s. 302 I.P.C. and the appellants for an offence under s. 302 read with s. 149 I.P.C. The High Court in appeal acquitted H as it entertained a doubt about his presence in the unlawful assembly, but confirmed the conviction of the other appellants.

In appeal to this Court it was contended on behalf of the appellants that because of the acquittal of H, the conviction of the other appellants for an offence under s. 302 read with s. 149 I.P.C. could not, in law, be sustained; when according to the prosecution case H was responsible for causing the death of B and he was acquitted, the appellants who were charged with sharing the common object of the unlawful assembly could not be convicted for the vicarious liability arising out of the offence committed in prosecution of the common object of the unlawful assembly.

HELD : Dismissing the appeal :

The order of conviction of the appellants for the offence under s. 302 read with s. 149 I.P.C. was not rendered illegal because H was held not to have been a member of the unlawful assembly. [562 B]

There was clear evidence to show that B was one of the persons upon whom an attack was made and injuries inflicted by the unlawful assembly of which the appellants and others were members. On the findings of the High Court, the offender who actually caused injuries to B could not be ascertained; it follows that the injuries were caused to B by some members of the unlawful assembly. [561 H]

Failure to prove the presence of the named offender among the members of the unlawful assembly will not affect the criminality of those who are proved to be members of the assembly if the other conditions of the applicability of s. 149 I.P.C. be established. [561 A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 145 of 1966.

A Appeal by special leave from the judgment and order dated January 29, 1966 of the Patna High Court in Criminal Appeal No. 231 of 1963.

D. Goburdhun, for the appellants.

B. P. Jha, for the respondent.

B The Judgment of the Court was delivered by

Shah, J. At mid-day on July 2, 1962, an unlawful assembly of about 30 persons armed with lethal weapons made an assault upon certain villagers of *Mananki Khandha* who were engaged in agricultural operations and caused injuries to six persons. **Budhia** one of the persons injured died as a result of the injuries, a few hours after the assault. The seven appellants in this appeal and one Harihar Gope were tried before the Additional Sessions Judge, Patna, for offences under s. 302 read with ss. 149, 147, 148, 323, 324, 325 read with 34 and 326 I.P. Code, on the charge that they had formed an unlawful assembly and had committed rioting and in prosecution of the common object of the unlawful assembly, *viz.* to rescue their cattle which had damaged the maize crop of Budhia and had on that account been detained by the villagers, and to assault persons resisting the rescue, and had caused injuries to the victims as a result of which Budhia died. The Sessions Judge held, relying on the evidence of four witnesses P.Ws. 5, 8, 12 and 18, that Harihar Gope had caused injuries with a spear to **Budhia** which resulted in her death. He accordingly recorded an order of conviction against Harihar Gope of the offence under s. 302 I.P. Code and against the other appellants for the offence under s. 302 read with s. 149 I.P. Code.

The High Court of Patna in appeal acquitted Harihar Gope for the offence under s. 302 I.P. Code for they entertained doubt about Harihar Gope's presence in the unlawful assembly in question. The High Court observed that Harihar Gope was a resident of another village and had no reason to bring his cattle to the village *Mananki Khandha* for grazing, and that the name of Harihar Gope was not mentioned in the first information which was given at the police station in the presence of the witnesses who deposed to the assault made on Budhia by Harihar Gope. The State has not appealed against that order of acquittal.

The High Court has however, confirmed the conviction of the other appellants for the offence under s. 302 read with s. 149 I.P. Code.

H In this Court, counsel for the appellants contends that because of the order of acquittal passed by the High Court in favour of Harihar Gope, conviction of the other appellants for the offence under s. 302 read with s. 149 I.P. Code cannot, in law, be sus-

tained. Counsel argues that if Harihar Gope who was according to the case of the prosecution responsible for causing the death of Budhia is acquitted the appellants who were charged with sharing the common object of the unlawful assembly cannot be convicted for the vicarious liability arising out of the offence committed in prosecution of the common object of the unlawful assembly. There is no substance in that argument. The case for the prosecution when analysed consists of four parts—(1) that there was an unlawful assembly of 30 persons the common object of which was to forcibly rescue cattle detained by the villagers of *Mananki Khandha* and to beat up all those who resisted; (2) that six villagers of *Mananki Khandha* were beaten up by the members of the unlawful assembly and Budhia died in consequence of the injuries suffered by her; (3) that the injuries were caused to the six victims by the members of the unlawful assembly in prosecution of the common object of the unlawful assembly or the injuries were such that the members of the assembly knew to be likely to be caused; (4) that Harihar Gope was a member of the unlawful assembly, and he caused injuries to Budhia in prosecution of the common object of the assembly in consequence of which she died. The result of the findings of the High Court is that the first three parts are made out but not the last. On that account however we are unable to hold that the appellants who are proved to be members of the unlawful assembly escape liability for conviction under s. 302 read with s. 149 I.P. Code. On the finding recorded by the High Court it inevitably follows that fatal injuries were caused to Budhia by a member of the unlawful assembly which the members of the assembly knew to be likely to be caused in prosecution of the common object of the unlawful assembly. The State, however, failed to establish that it was Harihar Gope who caused those injuries. Failure to establish that a member or members of the unlawful assembly named by the witnesses for the State cause the particular injury which resulted in the death of Budhia will not result in the rejection of the case of the State against persons proved to be members of the unlawful assembly, if the common object of the unlawful assembly and the commission of the offence in the prosecution of the common object or which the members knew to be likely to be committed be proved.

Where a member of an unlawful assembly is named as an offender who committed an offence for which the members of the unlawful assembly are liable under s. 149 I.P. Code, and the evidence at the trial is insufficient to establish that the named person committed the act attributed to him, he may still be convicted of the offence if it is proved that he was a member of the unlawful assembly and that the act was done by some member of the assembly in prosecution of the common object or which the members knew was likely to be committed in prosecution of that

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[A] object. In our judgment, failure to prove the presence of the named offender among the members of the unlawful assembly will not affect the criminality of those who are proved to be members of the assembly if the other conditions of the applicability of s. 149 I.P. Code be established. If the Court refuses to accept the testimony of witnesses who speak to the presence of and part played by a named offender, the weight to be attached to the testimony of those witnesses insofar as they involve others may undoubtedly be affected, but it cannot be said that because the testimony of witnesses who depose to the assault by the named offender is not accepted, other members proved to be members of the unlawful assembly escape liability arising from the commission of the offence in prosecution of the common object of the assembly.

C The High Court found that on the day in question more than 30 persons formed an unlawful assembly, the common object of which was to rescue cattle detained by the villagers of *Mananki Khandha*, and to kill those who resisted, and that members of the unlawful assembly committed an assault on the villagers and severely beat up the villagers including Budhia in prosecution of the common object. The offence being such that it was known to be likely to be committed, every person who was a member of that unlawful assembly at the time of the commission of the offence would by virtue of s. 149 I.P. Code be guilty of the offence committed. The argument that Harihar Gope alone had the object of causing the death of Budhia cannot on the evidence be accepted as correct. The object to beat up and kill those who resisted the rescue of the cattle detained was according to the case for the prosecution common to all members of the unlawful assembly, and that object was established by abundant evidence. Proof of the common object of the unlawful assembly did not depend upon the presence therein of Harihar Gope. Failure to establish that Harihar Gope was a member of the unlawful assembly did not, in our judgment, affect the liability of the persons proved to be members of the unlawful assembly for the acts done in prosecution of its common object, or which they knew to be likely to be committed in prosecution of the object thereof. When a concerted attack is made on the victim by a large number of persons it is often difficult to determine the actual part played by each offender. But on that account for an offence committed by a member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to be committed in prosecution of the common object, persons proved to be members cannot escape the consequences arising from the doing of that act which amounts to an offence.

H There is clear evidence on the record to show that Budhia was one of those persons upon whom an attack was made by the unlawful assembly of which the appellants and others were members.

In the assault made by the members of the assembly Budhia as well as other persons were injured. On the findings of the High Court, the offender who actually caused injuries to Budhia cannot be ascertained : it follows that the injuries were caused to Budhia by some member of the unlawful assembly, and that Budhia succumbed to those injuries. In our judgment, the order of conviction of the appellants, other than Harihar Gope, for the offence under s. 302 read with s. 149 I.P. Code is not rendered illegal, because Harihar Gope is held not to have been a member of the unlawful assembly. A

The appeal fails and is dismissed. B

R.K.P.S.

Appeal dismissed. C