

APPELLATE CRIMINAL

Before Khosla and Harnam Singh, JJ.

ATMA SINGH AND ANOTHER,—*Convicts-Appellants.*

versus

THE STATE,—*Respondent.*

Criminal Appeal No. 237 of 1953

1953

Oct. 26th.

Indian Penal Code (Act XLV of 1860)—Sections 34 and 149—Respective applicability of.

Held, that section 34 of the Indian Penal Code refers to cases in which several persons both intend to do and do a criminal act; it does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act. In the latter class of cases section 149 of the Code may be applicable but section 34 is not.

Held, that in applying section 149 of the Code the Court must find with certainty that there were at least five persons sharing the common object. The finding that four out of the six accused may have been named simply to add to the number of the assailants betrays uncertainty about the participation of at least five persons in the crime.

Held also, that in order to bring the case within section 149 of the Code, it is necessary to show among other things, that the offence has been committed by a member of an unlawful assembly as defined in section 141 of the Code. In such a case the essential question is whether the number of persons who took part in the crime was five or more than five.

Kapildeo Singh v. The King (1) and Dalip Singh and others v. The State of Punjab (2), relied on.

Appeal from the order of Shri Chhaju Ram, Additional Sessions Judge, Amritsar, dated the 19th May 1953, convicting the appellants.

M. L. SETHI AND B. S. CHAWLA, for Appellants.

HAR PARSHAD, ASSISTANT ADVOCATE-GENERAL, for Respondent.

(1) I.L.R. 29 Pat. 391

(2) A.I.R. 1953 S.C. 364

JUDGMENT

Harnam Singh, J. HARNAM SINGH, J. In Criminal Trial No. 8 of 1953, Atma Singh, Udham Singh, Bachan Singh, Niranjana Singh, Sohan Singh and Dalip Singh were prosecuted for having committed the murder of Tara Singh on the 11th of November 1951, at Village Butt, District Amritsar. In that trial the learned Additional Sessions Judge has given benefit of the doubt to Bachan Singh, Sohan Singh, Niranjana Singh and Dalip Singh and acquitted them. Atma Singh and Udham Singh have been convicted under section 302 read with section 149 and section 148 of the Indian Penal Code, hereinafter referred to as the Code, and sentenced to transportation for life under section 302 and to one year's rigorous imprisonment under section 148 of the Code, sentences to run concurrently. Atma Singh and Udham Singh appeal.

Briefly summarised the facts of the case are these: On the night between the 10th and 11th of November, 1951, Harnam Singh, P.W. 2, and Tara Singh worked Sundersinghwala well. Mohan Singh, P.W. 3, came to that well on the morning of the 11th of November, 1951, and asked Tara Singh to lend a plough as his own had broken. Tara Singh told him that the plough was lying at his house and would give the plough to him when he went to take his tea. After some time Tara Singh accompanied by Mohan Singh proceeded towards his house. Harnam Singh, father of Tara Singh, followed Tara Singh and Mohan Singh. In the way Tara Singh and Mohan Singh saw the six accused emerging from the *charri* field of Amar Singh. Tara Singh had *prani* in his hand while Mohan Singh and Harnam Singh were empty-handed. Atma Singh, accused, was armed with *kulhari* while Udham Singh carried *kirpan*. Niranjana Singh, Sohan Singh, Dalip Singh and Bachan Singh carried spears. Seeing the accused Tara Singh ran towards the village and entered the house of Bahadur Singh. The accused entered that house and surrounded Tara Singh. Atma Singh accused caused injuries to Tara Singh with

kulhari while Udham Singh caused injuries with *kirpan*. No injury was caused to Tara Singh by Niranjan Singh, Sohan Singh, Dalip Singh and Bachan Singh. Tara Singh died at the spot.

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Harnam Singh, P.W. 2, reported the incident to Assistant Sub-Inspector Indar Singh at Tarn Taran Jandiala Octroi Post at 10 a.m. on the 11th of November 1951.

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Doctor Sham Singh who performed post-mortem examination on the body of Tara Singh found nine incised wounds, two contused wounds and several abrasions on different parts of the body. In the opinion of Doctor Sham Singh incised wounds inflicted on the head of Tara Singh were individually fatal.

In giving reasons for the acquittal of Bachan Singh, Sohan Singh, Niranjan Singh and Dalip Singh the Additional Sessions Judge said:—

“The eye-witnesses depose that Atma Singh accused was armed with a *kulhari*, Udham Singh with a *kirpan* and the other four accused with spears, that Atma Singh and Udham Singh, accused, inflicted blows to Tara Singh deceased with their respective weapons and that Niranjan Singh, Sohan Singh, Dalip Singh and Bachan Singh, accused, surrounded him. Spear is a more deadly weapon than either a *kulhari* or a *kirpan* and it has a very long handle and it can be used from a distance. If the six accused had come fully armed with the object of murdering Tara Singh, as alleged by the prosecution, it is difficult for me to believe that the four accused, who were armed with spears, did not make use of their weapons. The only part assigned to them is that they surrounded the deceased and asked Atma Singh and Udham Singh to do away

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with Tara Singh. It is beyond my comprehension that persons armed with deadly weapons like spears who had come with full determination of murdering Tara Singh would content themselves with mere playing of a minor part mentioned above. In fact they would have taken a leading part in making a free use of their dangerous spears to inflict mortal blows to Tara Singh and finish him as quickly as possible. It is possible that the said part may have been assigned to these four accused *simply to add to the number of assailants. There is a general tendency amongst the village people to include as many relations and friends of the real culprits as possible.* Moreover, there is another important factor in this connection which raises a doubt in my mind, namely, that there was absolutely no motive for Dalip Singh accused to participate in this crime."

From the judgment under appeal it is plain that the Additional Sessions Judge thought that Niranjn Singh, Sohan Singh, Dalip Singh and Bachan Singh had been implicated in the murder of Tara Singh to involve as many relations and friends of the real culprits as possible. That finding is not challenged in these proceedings and on a perusal of the record I concur in that finding.

In applying section 149 of the Code the Court must find *with certainty* that there were at least five persons sharing the common object. The finding that four out of the six accused may have been named simply to add to the number of the assailants betrays uncertainty about the participation of at least five persons in the crime. In no part of the judgment does the Additional Sessions Judge come to the conclusion that at least five persons participated in the crime though the identity of one or more was in doubt. That being so, the case does not come within section 149 of the Code.

In order to bring the case within section 149 of the Code, it is necessary to show among other things, that the offence has been committed by a member of an unlawful assembly as defined in section 141 of the Code. In such a case the essential question is whether the number of persons who took part in the crime was five or more than five.

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In Kapildeo Singh v. The King (1), Mahajan, J., delivering the judgment of their Lordships of the Federal Court said :—

“The essential question in a case under section 149 is whether there was an unlawful assembly as defined in section 141, I.P.C. of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and, even when it is possible to convict less than five persons only, section 149 still applies if upon the evidence in the case the Court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified.”

In regard to the application of section 149 of the Code *Dalip Singh and others v. The State of Punjab* (2) may be seen.

In Dalip Singh and others v. The State of Punjab (2), the facts were these. In Sessions Trial No. 5 of 1951 the Sessions Judge convicted seven persons under sections 302 and 452 read with section 149 and section 148 of the Code. On appeal the conviction of four accused under sections 302 and 452 read with section 149 and section 148 of

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Atma Singh the Code was upheld. As regards the three
and another accused who were acquitted the learned Judges
v. said :—
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“The other three accused may or may not
have taken part in the affair.”

In Criminal Appeal No. 22 of 1953 Bose, J.,
delivering the judgment of their Lordships of the
Supreme Court said :—

“Before section 149 can be called in aid, the
Court must find with *certainty* that
there were at least five persons sharing
the common object. A finding that
three of them “may or may not have
been there” betrays uncertainty on this
vital point and it consequently becomes
impossible to allow the conviction to
rest on this uncertain foundation.”

In Sessions Trial No. 8 of 1953 the six accused
were tried on the following charges :—

“First : that you on or about the 11th day
of November, 1951, within the area of
village Butt were members of unlaw-
ful assembly and in prosecution of the
common object of such assembly *viz.*
to murder Tara Singh deceased com-
mitted the offence of rioting while
armed with deadly weapons like spears
kulhari and *kirpan*, and thereby com-
mitted an offence punishable under
section 148 of the Indian Penal Code
and within the cognizance of the Court
of Session.

Secondly : that you on or about
the 11th day of November, 1951 within
the area of village Butt were members
of an unlawful assembly and in prose-
cution of the common object of such
assembly committed the murder of
Tara Singh deceased with *kulhari* and

kirpan, etc. and thereby committed an offence punishable under section 302/149 of the Indian Penal Code and within the cognizance of the Court of Sessions.”

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Finding as I do, that section 149 of the Code has no application to the facts of the case the question that arises for decision is whether the accused can be punished under section 302 read with section 34 of the Code.

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Section 34 of the Code refers to cases in which several persons both intend to do and do a criminal act; it does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act. In the latter class of cases section 149 of the Code may be applicable but section 34 is not.

In *Dalip Singh and others v. The State of Punjab* (1), Bose, J., said :—

“Nor is it possible in this case to have recourse to section 34 because the appellants have not been charged with that even in the alternative, and the common intention required by section 34 and the common object required by section 149 are far from being the same thing.”

In my judgment, the case does not fall to be considered under sections 149 and 34 of the Code. That being so, no question of constructive liability arises in the case.

Now, it is said that the Court of Session having refused to act on the evidence given by Harnam Singh, P.W. 2, Mohan Singh, P.W. 3, and Tara Singh, P.W. 4 *qua* Bachan Singh, Sohan Singh, Niranjan Singh and Dalip Singh, it would be unsafe to maintain the conviction of Atma Singh and Udham Singh on the evidence given by them.

As stated hereinbefore, Doctor Sham Singh found nine incised wounds, two contused wounds and several abrasions on the body of Tara Singh.

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Clearly, the assailants of Tara Singh were two or more than two. Harnam Singh, Mohan Singh and Tara Singh gave evidence that Atma Singh gave blows with the sharp and blunt edge of the *kulhari*, while Udham Singh gave *kirpan* blows. In the opinion of Doctor Sham Singh injuries found on the body of Tara Singh were caused by *kulhari* and *kirpan*. If so, the evidence given by Harnam Singh, Mohan Singh and Tara Singh finds corroboration in the medical evidence.

Then it is said that the non-production of Bahadur Singh *mazbi* militates against the truth of the prosecution story.

In the Court of Session Shri Bindra Ban, Public Prosecutor, gave up Bahadur Singh as having been won over by the accused. Bahadur Singh was present in the Court of Sessions but was not examined by the appellants. In these circumstances the non-production of Bahadur Singh by the prosecution does not adversely affect the prosecution case.

Having given the evidence my anxious consideration I find that the participation of Atma Singh and Udham Singh in the incident in which death of Tara Singh was caused is not open to any doubt.

Doctor Sham Singh gave evidence that injuries Nos. 1, 2, 5 and 6 described at page 29 of the record were individually fatal. From the evidence examined at the trial it is impossible to ascribe any particular injury to Atma Singh or Udham Singh. If so neither the conviction of Atma Singh nor of Udham Singh under section 302 of the Code can be sustained.

In the result, I would set aside the conviction of Atma Singh and Udham Singh under sections 302 and 148, convict them under section 324 of the Code and sentence them to suffer rigorous imprisonment for three years each.

Khosla, J.

KHOSLA, J.—I agree.