MAHADEVA SHARMA & OTHERS A

v.

STATE OF BIHAR

April 21, 1965 B

[A. K. SARKAR, K. SUBBA RAO, M. HIDAYATULLAH AND J. R. MUDHOLKAR, JJ.]

Criminal Law—Alternative charges under s. 302 *read with s.* 34 *and s.* 302 *read with* 149 *of the Indian Penal Code—No charge under s.* 147 *or s.* 148*—Conviction under s.* 302 *read with s.* 149*—Legality.* C

The appellants were charged alternatively under s. 302 read with s. 149 and s. 302 read with s. 34 of the Indian Penal Code, 1860. They were convicted under s. 302 read with s. 149. On the question whether the conviction was legal, when they were not charged and convicted under s. 147 or s. 148.

D

HELD : It was not obligatory to charge the accused under s. 147 or s. 148 before s. 149 could be utilized against them. [22D; 23]

For the application of s. 149 there must be an unlawful assembly. If an offence is committed in prosecution of the common object of that assembly or is such as the members of the unlawful assembly know to be likely to be committed then whoever is a member of that assembly at the time the offence is committed, is guilty. A charge under sections 143 or 147 is not a condition precedent before section 149 is utilized, because, these are implied in circumstances in which s. 149 is used, and must always be present when the charge is laid for an offence like murder with the aid of s. 149. There can be proof under s. 149, of the existence of an unlawful assembly of the common object and of the part played by that unlawful assembly or any of its members, same as under s. 143 or s. 147 or s. 148. There may be additional charges under these sections to guard against failure of the charge for an offence read, with s. 149, but the other charges cannot be regarded as condition precedent. [22 B-C; 23 C-D, H; 24A] E F

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 209 of 1962 and 3 of 1963.

G

Appeals by special leave from the judgment and order dated August 30, 1962, of the Patna High Court in Government Appeal No. 33 of 1959 and Cr. Appeal No. 392 of 1959 respectively.

S. P. Varma, for the appellants (in Cr. A. No. 209 of 62).

K. K. Sinha, for the appellants (in Cr. A. No. 3 of 1963). H

U. P. Singh, for the respondent (in both the appeals).

A The Judgment of the Court was delivered by

Hidayatullah J. In these two appeals by nine persons, who have been convicted under s. 302/149, Indian Penal Code, special leave is limited to one question of law, namely, whether the accused could be legally convicted under the above sections when they B were not charged and convicted under s. 147 or s. 148 of the Indian Penal Code? It appears from the judgment under appeal that there was a difference of opinion on this point in the High Court at Patna and the appeals in the High Court were disposed of by a Full Bench which held that charges under ss. 147 and 148 were not necessary before conviction under s. 302, Indian C Penal Code could be made with the aid of s. 149, Indian Penal Code.

In view of the limited nature of the appeals only the essential facts may be stated. The person who lost his life was one Misari who was related to some of the accused persons. In the past there were other incidents. In 1955 one Ajablal was murdered D and some of the present accused were prosecuted but were acquitted. Subsequently, one Baldeo Sharma was murdered and some of the prosecution witnesses in this case were charged with that offence. At the time of the judgment under appeal (August 30, 1962) an appeal was pending in the Patna High Court against E the conviction of the accused in that case.

The present occurrence took place on April 24, 1958. The prosecution case is that Misari was going in the morning to call labourers when he was attacked by the appellants with diverse weapons. He died as a result of his injuries and a case was registered under s. 302, Indian Penal Code. The appellants F were charged at the trial alternatively under s. 302/149 and 302/34, Indian Penal Code. The Additional Sessions Judge, Monghyr convicted three of the appellants on both the charges, sentencing them to imprisonment for life on the first charge only. The remaining accused were acquitted. Appeals by those who were convicted and by the State Government against the acquit- G tal of the others were heard together and were disposed of by the common judgment now under appeal. The appeal of the State Government was allowed and that of the three convicted accused was dismissed. As a result all the original accused were convicted under s. 302/149, Indian Penal Code and were sentenced to imprisonment for life. During the hearing of the appeals a point H was raised by the State counsel in the appeal by the State that the trial was bad inasmuch as no charge under s. 147 or s. 148 had been framed. The Divisional Bench thinking that the point might

benefit the convicted accused allowed it to be raised but referred the appeals to a Full Bench in view of an earlier decision on this point with which they did not agree. The Full Bench overruled the earlier decisions and came to the conclusion that it was not obligatory for the validity of the conviction under s. 302/149, Indian Penal Code that a charge under s. 147 or s. 148 should have been framed and a conviction under those sections recorded.

The charges against the appellants were as follows :

"First :—That, you on or about the 24-4-58 at 7 a.m. at village Jhanjhra P. S. Parbatta, district Monghyr were members of unlawful assembly, armed with gun, bhala and chhura (dagger) and in prosecution of the common object to murder Misari Sharma you all caused such bodily injury to Misari Sharma, which caused his death, the offence punishable under section 302 I.P.C. and thereby committed an offence punishable under section 149/302 of the Indian Penal Code and within the cognizance of Court of Sessions."

. . . . .

"That you, on or about the 24-4-58 at 7 a.m. at village Jhanjhra P. S. Parbatta, district Monghyr in furtherance of the common intention of you all caused the death of Misari Sharma, intentionally and knowingly, and thereby committed an offence punishable under section 302/34 of the Indian Penal Code, and within my cognizance and I hereby direct that you be tried by the said court on the said charge".

. . . . . .

No charge under s. 147 or s. 148 was framed and the question is whether the conviction under s. 302/149, Indian Penal Code could legally be recorded in the absence of such a charge or charges. Mr. S. P. Verma has brought to our notice the earlier unreported decisions of the Patna High Court which were considered and overruled by the Full Bench and has contended that they were correct and the judgment under appeal is erroneous.

Section 149 occurs in Chapter VIII of the Indian Penal Code which deals with offences against the public tranquility. That Chapter consists of twenty-one sections and most of them are concerned with assemblies which are a danger to public peace. Such assemblies are designated unlawful assemblies and the punishment for membership varies in severity according as the assembly

A only menaces the public peace or actually disturbs it. The scheme of the Chapter may now be examined.

Section 141 defines an unlawful assembly as an assembly of five or more persons the common object of which is *inter alia* to commit an offence. There are five clauses which describe the B many kinds of common objects which render an assembly unlawful. These clauses need not be reproduced here for nothing turns on them in the present case. Here we are concerned with the offence of murder and according to the charge the common object of the accused who had formed themselves into an assembly was to commit the murder of Misari. This common object has been C held proved and there can thus be no question that this was an unlawful assembly. Continuing again with the scheme of the Chapter, we next see that s. 142 says that a person is considered to be a member of an unlawful assembly, if, being aware of facts which render any assembly an unlawful assembly he intentionally joins that assembly or continues in it. A mere membership of an D unlawful assembly is punishable under s. 143. Under the next section heavier punishment is awardable to a person who joins an unlawful assembly armed with a deadly weapon or with anything which used as a weapon of offence is likely to cause death. Section 145 next provides for a similar higher punishment for a person who joins or continues in an unlawful assembly knowing E that it has been ordered to disperse. These sections make membership as such of an unlawful assembly punishable, though in varying degrees.

Section 146 then defines the offence of rioting. This offence is said to be committed when the unlawful assembly or any member F thereof in prosecution of the common object of such assembly uses force or violence. It may be noticed here that every member of the unlawful assembly is guilty of the offence of rioting even though he may not have himself used force or violence. There is thus vicarious responsibility when force or violence is used in prosecution of the common object of the unlawful assembly. The G next two sections prescribe punishment for the offence of rioting. Section 147 punishes simple rioting. Section 148 punishes more severely a person who commits the offence of rioting armed with a deadly weapon but the section makes only a person who is so armed liable to higher punishment. Section 149 then creates vicarious responsibility for other offences besides rioting. H The section provides as follows :

> "149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.

> If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence".

For the application of the section there must be an unlawful assembly. Then if an offence is committed in prosecution of the common object of that assembly or is such as the members of the unlawful assembly know to be likely to be committed then whoever is member of that assembly at the time the offence is committed is guilty. The remaining sections do not help in the present discussion.

This being the scheme, is it obligatory to charge a person under s. 147 or s. 148 before s. 149 can be utilized ? Section 149 does not state this to be a condition precedent for its own application. No other section prescribes this procedure. Sections 146 and 149 represent conditions under which vicarious liability arises for the acts of others. If force or violence is used by a member in the prosecution of the common object of the unlawful assembly every member of the assembly is rendered guilty of the offence of rioting and is punishable for that offence under s. 147. The offence of rioting must, of course, occur when members are charged with murder as the common object of the unlawful assembly. Section 148 creates liability on persons armed with deadly weapons and it is a distinct offence. It need not detain us. If a person is not charged under s. 147 it does not mean that s. 149 cannot be used. When an offence (such as murder) is committed in prosecution of the common object of the unlawful assembly or the offence is one which the members of the assembly knew to be likely to be committed in prosecution of the common object, individual responsibility is replaced by vicarious responsibility and every person who is a member of the unlawful assembly at the time of the committing of the offence becomes guilty. It is not obligatory to charge a person under s. 143, or s. 144 when charging him with s. 147 or s. 148. Similarly, it is not obligatory to charge a person under s. 143 or s. 147 when charging him for an offence with the aid of s. 149. These sections are implied. It may be useful to add a charge under s. 147 and 148 with charges under other offences of the Penal Code read with s. 149, but it is not obligatory to do so. A person may join an unlawful assembly and be guilty under s. 143 or 147 or 148 but he may

A cease to be its member at the time when the offence under s. 302 or some other offence is committed. He would not in that event be liable for the other offence for s. 149 would not apply to him. The present case is not of that kind.

B The fallacy in the cases which hold that a charge under s. 147 is compulsory arises because they overlook that the ingredients of s. 143 are implied in s. 147 and the ingredients of s. 147 are implied when a charge under s. 149 is included. An examination of s. 141 shows that the common object which renders an assembly unlawful may involve the use of criminal force or show of criminal force, the commission of mischief or criminal trespass C or other offence, or resistance to the execution of any law or of any legal process. Offences under ss. 143 and 147 must always be present when the charge is laid for an offence like murder with the aid of s. 149, but the other two charges need not be framed separately unless it is sought to secure a conviction under them. D It is thus that s. 143 is not used when the charge is under s. 147 or s. 148, and s. 147 is not used when the charge is under s. 148. Section 147 may be dispensed with when the charge is under s. 149 read with an offence under the Indian Penal Code.

The charges that are framed against the appellants and which E we have reproduced earlier, contain all the necessary ingredients to bring home to each member of the unlawful assembly the offence of murder with the aid of s. 149. The prosecution has proved the existence of an unlawful assembly, its common object which was murder of Misari and the membership of each of the appellants. Nothing more was necessary. Of course, if a charge F had been framed under s. 147 or 148 and that charge had failed against any of the accused then s. 149 could not have been used against him. The area which is common to ss. 147 and 149 is the substratum on which different degrees of liability are built and there cannot be a conviction with the aid of s. 149 when there is no evidence of such substratum. It is quite a different thing to G say that to lay down this substratum one must frame first a charge under s. 143, then a charge under s. 147 and then a charge under s. 149. The last named section is not dependent on the others because the others are implied in circumstances in which s. 149 is used. There can be proof under s. 149 of the existence of an unlawful assembly, of the common object and of the part played H by the unlawful assembly or any of its members, same as under s. 143 or s. 147 or s. 148. There may be additional charges under these sections to guard against failure of the charge for an offence

read with s. 149 but the other charges cannot be regarded as condition precedent. A

We agree with the conclusion of the Full Bench and therefore confirm the judgment under appeal. The appeals will be dismissed.

Appeals dismissed. B