IN THE HIGH COURT OF ORISSA AT CUTTACK

AFR

CRLA No. 525 of 2007

Dara Singh @ Rabindra Ku. Pal and Others .... ***Appellants***

-versus-

State of Odisha .... ***Respondent***

Advocates appeared in the cases:

For Appellants : Mr. Devashis Panda, Advocate
Mr. C.R. Sahoo, Advocate

For Respondent : Mr. Janmejaya Katikia
Additional Government Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE CHITTARANJAN DASH

JUDGMENT
07.09.2022

Dr. S. Muralidhar, CJ.

1. This appeal is directed against the judgment dated 22nd September, 2007 passed by the learned Sessions Judge, Mayurbhanj in Sessions Trial No.188 of 2000 arising out of G.R. Case No.290 of 1999 corresponding to Mahuldiha P.S. Case No.34 of 1999.

2. By the impugned judgment the Appellants have been convicted for the offences punishable under Sections 323, 302, 436, 452 read with Section 149 IPC and under Sections 147 and 148 IPC. For the offences punishable under Section 302/149 IPC, they have been each sentenced to rigorous imprisonment (RI) for life and to

pay a fine of Rs.10,000/- and in default to undergo RI for one year; for the offence under Section 436 IPC to RI for seven years and to pay fine of Rs.5000/- and in default RI for six months; for the offence under Section 452 IPC RI for five years and fine of Rs;.5000/- and in default RI for six months; for the offence under Section 323 IPC, RI for one year for the offence punishable under Section 147 IPC, RI for two years and for the offence punishable under Section 148 IPC, RI for three years. All sentences were directed to run concurrently.

3. The case of the prosecution is that on 1st/2nd September, 1999 at around 2 am in the night when some persons belonging to the Christian community were performing a dance in front of the Jambani Church, the present Appellants along with some others armed with lathis formed an unlawful assembly, trespassed into the church and asked for Father Arul Doss who was sleeping in a room in the church. Hearing their noise Kete Singh Khuntiar (Informant, PW 3) came out of the mosquito net in which he was sleeping. Somebody assaulted PW 3 on the rear of his head by a lathi and he became senseless. When after some time he regained his senses, PW 3 heard Father Arul Doss shouting loudly. Out of fear, PW 3 went into the jungle and informed the Sarat P.S. This information was ultimately forwarded to the jurisdictional P.S. at Mahuldiha the following morning i.e. 2nd September, 1999. The FIR was registered as Mahuldiha P.S. Case No.34 of 1999. The FIR was against four unknown persons.

4. Trinath Sahoo (PW 22), who was the OIC of Mahuldiha P.S. visited the spot and held an inquest on the dead body of Father Arul Doss. PW 22 prepared an inquest report, collected the sample earth and blood-stained earth from the house of PW 12 where the deceased was first found lying. He also seized four arrows lying in the house of PW 4 and certain other articles. On gathering information, the Appellants were arrested by PW 22. At the end of the investigation, a charge sheet was submitted against the present four Appellants and others. Finally, 17 persons, including the present Appellants were sent up for trial after charges were framed against them under Sections 120B/149, 323/149, 147, 148, 302/149 and 436/149, 452/149 and 212/149 IPC. Whereas the present four Appellants were convicted for the offences aforementioned, the remaining 13 accused were acquitted of all the offences.

5. For the prosecution, 23 witnesses were examined. None was examined for the defence. On an analysis of the evidence, the trial Court concluded in the impugned judgment that the prosecution had been able to prove the guilt of the four Appellants beyond all reasonable doubt. The findings of the trial court were as under:

(i) The evidence of PWs 2 and 5 was natural and their presence at the place of occurrence could not be doubted. Except certain bald suggestions to them in the cross-examination, there was nothing elicited that could impeach the credibility of their evidence.

(ii) PW 2 remembered the features of the four Appellants as the persons who had come to the Church earlier in search of buffalos in the house of Birsingh Ho and was therefore able to identify them. PW 5 could only identify Appellant No.1 (Dara Singh) among the accused that came to the Church.

(iii) It was proved that the present four Appellants were among the 10 to 15 or more persons who formed an unlawful assembly and attacked father Arul Doss apart from trespassing into and damaging the church.

(iv) For the purposes of the offence punishable under Section 149 IPC, as long as it was shown that a large crowd of persons armed with the weapons, assaulted the intended victims, it was not necessary that each of the members of the unlawful assembly should have taken part in the actual assault. The common object of the unlawful assembly could be gathered from the nature of the assembly, the arms with them and the behavior of the assembly at or before the occurrence.

(v) From the evidence adduced by the prosecution, it was proved that more than five persons, armed with the weapons like bows, arrows and lathis came to the Church at the odd hour of the fateful night, chased Father Arul Doss and killed him by shooting an arrow.

(vi) The medical evidence proved that it was a homicidal death caused by injuries to the vital organs resulting from the arrows. The Church was also burnt after the deceased was killed. The evidence therefore, clearly proved that an unlawful assembly was formed with an objective of causing the death of the deceased and burning the Church. This being an act by the members of an unlawful assembly, it was not necessary to prove an overt specific act for each member of the assembly.

(vii) The presence of the four Appellants in the unlawful assembly and their role in causing the death of Father Arul Doss and in trespassing into and burning the Church was proved beyond doubt.

(viii) However, there was no evidence that any of the accused persons conspired to commit any offence. Therefore, they were acquitted of the offence under Section 120-B IPC.

6. This Court has heard the submissions of Mr. C.R. Sahoo, learned counsel appearing for the Appellant No.1 and Mr. Devashis Panda, learned counsel appearing for the Appellant Nos.2, 3 and 4. Mr. J. Katikia, learned Additional Government Advocate appearing for the State-Respondent has also been heard.

7. On behalf of Appellant No.1, it is submitted as under:

(i) The deceased belonged to the Christian Community and was the father of the Jambani Church. PWs 1 to 4, PW 8, PW 10 and

PW 13 were also Christians and members of the dancing party who were assaulted by the present Appellants on the intervening night of 1st/2nd September, 1999 at 2 am. While the evidence of PWs 3, 4, 6 and 10 was disbelieved, the conviction of the Appellants was sustained on the basis of the depositions of PWs 2 and 5. In the cross-examination of PW 2, he admitted that in the darkness, he could not identify who assaulted whom during the occurrence. The OIC PW 22 also admitted in his cross examination that PW 2 had stated before him during investigation that on the date of the occurrence, four persons came near a Church in search of buffaloes and on being asked, PW 2 pointed to the house of Birsingh Ho. It is submitted that from the answers given during the cross examination of PWs 2 and 5 as well as PW 22, the IO, it was clear that the alleged eyewitnesses ran from the spot under fear when the assault began and therefore, there was no occasion for PWs 2 to 5 to see who attacked the deceased by shooting an arrow.

(ii) An essential ingredient to attract the offence punishable under Section 149 IPC is that the minimum number of persons in the unlawful assembly has to be five whereas in the present case, the FIR was initially lodged against four to five persons. Although seventeen persons were sent up for trial, there was no unidentified or absconding accused.

(iii) Therefore, once seventeen persons were acquitted the rest four could not be convicted without any specific overt act for the

offence punishable under Section 149 IPC. Once seventeen out of 21 accused got acquitted, the logical conclusion is that the assembly should be held to have comprised only four persons, and not five.

(iv) Relying on the decisions in ***Ramanlal v. State of Haryana (2015) 11 SCC 1; K. Nagamalleswara Rao v. State of Andhra Pradesh AIR 1991 SC 1075; Sukra Sahu v. State of Odisha 2001 (20) OCR 36; Amar Singh v. State of Punjab AIR 1987 SC 826 and Mahendra v. State of M.P. (CRLA No.30 of 2022),*** it is submitted that unless there were some unidentified or absconding persons apart from the present four Appellants, who are yet to be brought to trial, the offence punishable under Section 149 IPC does not stand attracted.

(v) There was an absence of clear and cogent motive for the crime. The non-conducting of the Test Identification Parade (TI Parade) was also fatal to the prosecution case. Accordingly, Appellant No.1 ought to be given the benefit of the doubt.

8. On behalf of Appellant Nos.2 to 4, the above points are urged and in addition, it is submitted as under:

(i) For the charges framed against the Appellants, the date of occurrence is shown as 1st/2nd September, 1999 and the time is at 2 am. Neither any specific weapon is stated to have been wielded

by any of the named accused nor any specific act of assault on the deceased is attributed to them.

(ii) None has been charged under Sections 302/323/436 and 452 IPC with the aid of Section 34 of IPC. In the circumstances, where 17 of the accused have been acquitted, the present Appellants cannot be convicted for the offences punishable under Section 147, 148, 302, 323, 436 read with Section 149 IPC nor even for those offences with the aid of Section 34 IPC.

(iii) There is clear distinction between Section 34 IPC which is declaratory of criminal liability and does not create a distinct offence like Section 149 IPC does. Unlike Section 34 of IPC, for an indictment under Section 149 of IPC, it was necessary for every individual member of the unlawful assembly to have participated in the commission of the criminal act.

(iv) When the charges were framed, the Appellants were alleged to have been part of an unlawful assembly and their individual roles were not specified. However, Section 34 IPC, if it is to be attracted, requires the accused to be informed at the stage of charge that he is being tried for his individual role in the joint act. If that is not done, prejudice would certainly be caused to an accused. With acquittal of seventeen persons not having been challenged by the State, the convictions of the present Appellants cannot be sustained under Section 149 IPC.

(v) For attracting Section 34 IPC, the charge has to advert to participation of the individual offender in some form or the other. Reliance is placed on the decisions in ***Nanak Chand v. State of Punjab AIR 1955 SC 274; Bhudeo Mandal v. State of Bihar (1981) 2 SCC 755*** and the recent Judgment dated 5th January, 2022 of the Supreme Court of India in Criminal Appeal No.30 of 2022 (***Mahendra v. State of M.P.***).

(vi) The mere presence of a witness, who identifies an accused for the first time during the trial, could not be accepted unless it is confirmed by other corroborative evidence. Referring to the decisions in ***Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1*** and ***Rabindra Kumar Pal alias Dara Singh v. Republic of India (2011) 2 SCC 490***, it is submitted that identification of the accused by a witness for the first time in Court though permissible cannot be given preference. In the present case, there was no corroborative evidence and therefore, the trial Court has erred in placing reliance on the testimony of PWs 2 and 5.

9. Mr. J. Katikia, learned Additional Government Advocate appearing for the State, in reply to the above submissions, submitted that the decision in ***Nanak Chand v. State of Punjab*** (*supra*) is distinguishable on facts. Reliance was placed on the decisions in ***Kallu Alias Masih v. State of M.P. (2006) 10 SCC 313*** and ***Nethala Pothuraju v. State of Andhra Pradesh (1992) 1 SCC 49***. The said two decisions have been discussed in a recent

judgment dated 23rd August 2022 passed by this Court in CRLA No.19 of 2004 ***(Raj Kishor Behera v. State of Orissa***). It is accordingly submitted that the impugned judgment of the trial Court should not be interfered with.

10. The above submissions have been considered. The common thread in the submissions made on behalf of Appellant No.1 on the one hand and the Appellant Nos.2 to 4 on the other, is that the Appellants cannot be held guilty of the offence punishable under Section 149 IPC. To attract that offence, which is a distinct offence and not a provision like Section 34 IPC which only fixes liability, the participation of five or more persons as part of an unlawful assembly in a crime, has to be established.

11. In ***Mahendra v. State of M.P.*** (*supra*), the Supreme Court while acquitting the Appellants there of the offence under Section 149 IPC held as under:

> "xx xx xx
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> "It was not the case of the prosecution that there are other unnamed or unidentified persons other than the one who are charge-sheeted and faced trial. When the other co-accused persons faced trial and have been given benefit of doubt and have been acquitted, it would not be permissible to take the view that there must have been some other persons along with the appellant in causing injuries to the victim. In the facts and circumstances, it was as such not permissible to invoke Section 149 IPC."

12. In ***Kallu Alias Masih v. State of M.P.*** (*supra*), it was shown that one of the five got the benefit of doubt "though his presence as a member of the group was accepted". It was in those circumstances that the conviction under Section 149 IPC was sustained. In the present case, however, none among the thirteen accused persons who have been acquitted have been found to be members of an unlawful assembly.

13. Therefore, it is not possible in the present case to sustain the conviction against the four Appellants for the offence punishable under Section 149 IPC. However, that does not bring the matter to an end. In ***Hamlet @ Sasi v. State of Kerala (2003) 10 SCC 108,*** the Supreme Court explained the circumstances in which Section 34 would be brought into play to convict the accused. It referred to the decision in ***Nethala Pothuraju*** (*supra*) and held as under:

> "17. This Court in *Nethala Pothuraju v. State of A.P. (1992) 1 SCC 49* has held that the non-applicability of Section 149 IPC is no bar in convicting the accused under Section 302 read with Section 34 IPC if the evidence discloses commission of an offence in furtherance of the common intention of such accused. This is because both Sections 149 and 34 IPC deal with a combination of persons who become liable to be punished as sharers in the commission of offences. Therefore, in cases where the prosecution is unable to prove the number of members of the unlawful assembly to be five or more, courts can convict the guilty persons with the aid of Section 34 IPC provided that there is evidence on record to show that such accused shared the common intention to commit the crime. While doing so the courts will have to bear in mind the requirement of Section 34. It is well known that to establish the

> common intention of several persons to attract Section 34 IPC, the following two fundamental facts have to be established: (*i*) common intention, and (*ii*) participation of the accused in commission of the offences. If the above two ingredients are satisfied, even overt act on the part of some of the persons sharing the common intention is not necessary. (See Jai Bhagwan v. State of Haryana (1999) 3 SCC 102."

14. Therefore, one has to see whether in the present case, even if it is held that Section 149 IPC is not attracted, whether the Appellants could be still convicted with the aid of Section 34 IPC.

15. At this stage, it must be noted that while it is true that the charges framed do not mention Section 34 IPC, the decision in ***Hamlet @ Sasi v. State of Kerala*** (*supra*), says that even in such cases, Section 34 IPC can be invoked subject to two requirements:

(i) It has to be established that there was common intention to commit the crime; and

(ii) The participation of the accused in the commission of the crime has to be established.

Once the above two elements are established, as pointed out in ***Hamlet @ Sasi*** (*supra*) "even an overt act on part of some of the persons in sharing the common intention is not necessary".

16. The Court does not propose to dwell on the distinction between 'common object' (Section 149 IPC) and 'common intention' (Section 34 IPC), as it has been explained in several decisions of the Supreme Court including ***Virendra Singh v. State of Madhya Pradesh (2010) 8 SCC 407***. In the present case, what requires to be examined is whether the present Appellants did share the common intention to kill Father Arul Doss and burn the church in question.

17. A careful perusal of the evidence of PW-2 shows that he could identify each of the present Appellants. His evidence was cogent, clear and convincing. He clearly knew the aggressors as they had come earlier to the same place. The mere fact that a TI Parade was not conducted would not discredit the testimony of the said eye-witness.

18. As explained in ***Daya Singh v. State of Haryana (2001) 3 SCC 468***:

> "13. The question, therefore, is - whether the evidence of injured eyewitnesses PW37 and PW38 is sufficient to connect the appellant with the crime beyond reasonable doubt. For this purpose, it is to be borne in mind that purpose of test identification is to have corroboration to the evidence of the eyewitnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the Court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. Further, where reasons for gaining an enduring impression of the identity on the mind and memory of the witnesses are brought on record, it is no use to magnify the theoretical

possibilities and arrive at a conclusion which in the present day social environment infested by terrorism is really unimportant. In such cases, not holding of identification parade is not fatal to the prosecution. The purpose of identification parade is succinctly stated by this Court in *State of Maharashtra v. Suresh [(2000) 1 SCC 471*as under: (SCC p. 478, para 22)

> "We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."

19. Again in ***Malkhansingh v. State of M.P., (2003) 5 SCC 746***, it was observed as under:

> "7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused

who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad vs. Delhi Administration : AIR 1958 SC 350; Vaikuntam Chandrappa and others vs. State of Andhra Pradesh: AIR 1960 SC 1340 ; Budhsen and another vs. State of U.P. : AIR 1970 SC 1321 and Rameshwar Singh vs. State of Jammu and Kashmir : (1971) 2 SCC 715*)"

20. Again in ***Raja v. State (2020) 15 SCC 562***, it was observed as under:

"19. It is, thus, clear that if the material on record sufficiently indicates that reasons for "gaining an enduring impression of the identity on the mind and memory of the witnesses" are available on record, the matter stands in a completely different perspective. This Court also stated that in such cases even non-holding of identification parade would not be fatal to the case of the prosecution. Applying the tests so laid down to the present case, in view of the fact that each of the eyewitnesses had suffered number of injuries in the transaction, it can safely be inferred that every one of

> them had sufficient opportunity to observe the accused to have an enduring impression of the identity of the assailants. It is not as if the witnesses had seen the assailants, in a mob and from some distance. Going by the injuries, the contact with the accused must have been from a close distance."

21. Keeping in view the above decisions of the Supreme Court, this Court is of the view that in the present case, since the identity of the four Appellants has been established beyond reasonable doubt through the testimony of PW-2, the non-holding of TI Parade to have them identified by PW-2, is not fatal to the case of the prosecution.

22. The submissions made on behalf of the Appellants that in the absence of specific charge invoking Section 34 IPC and attributing to each of the Appellants an overt act, severe prejudice has been caused to the Appellants by not giving them an opportunity of defending themselves against the charge, cannot be accepted.

23. The charge as framed clearly indicates the manner of commission of the crime. As explained in ***Hamlet@ Sasi*** (*supra*) the common intention of four persons who came armed with lathis and committed the crime of killing father Arul Doss and burning the church has been clearly established. The two ingredients to attract the finding of the guilt for the substantive offences with which they have been charged, with the aid of Section 34 IPC, stands fully established. As explained in ***Hamlet@ Sasi*** (*supra*), it

is not necessary in the circumstances, for the prosecution to attribute an overt act to each of the Appellants who have participated in the crime.

24. Consequently, this Court sustains the conviction of the Appellants for the substantive offence punishable under Sections 302/323/436/452 of IPC with the aid of Section 34 IPC. The sentences awarded to each of them for the aforementioned substantive offences are hereby affirmed. They are acquitted of the offences punishable under Sections 147, 148 and 149 IPC. The net result is that the appeal is disposed of in the above terms, but in the circumstances, no order as to costs.

25. The bail bonds of the Appellants who have been enlarged on bail during the pendency of the appeal are hereby cancelled. They are directed to surrender forthwith and, in any event, not later than 23rd September, 2022, failing which, the IIC of the concerned PS will take steps to take them into custody forthwith for serving out the remainder of the sentences.

(S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge

S.K. Jena/Secy.