HIGH COURT OF MADHYA PRADESH : JABALPUR

Criminal Appeal No.1350/2002

Shiv Narayan and others

-Versus-

State of Madhya Pradesh

CORAM :
Hon'ble Shri Justice Hemant Gupta, Chief Justice.
Hon'ble Shri Justice Vijay Kumar Shukla, Judge.

Shri Vijay Nayak, Advocate, for the appellants.

Smt. Namrata Agrawal, Government Advocate, for the State

Whether approved for reporting?	
Law laid down	*(i) Even after acquittal of the charge under section 302 read with section 149 IPC, the remaining accused can be convicted under section 302 IPC without there being separate charge u/s 302 IPC. The same is a curable irregularity.* *(ii) To claim the right of self defence, there must be real danger to life or grievous hurt.*
Significant paragraph Nos.	

JUDGMENT
(Jabalpur dt.: 09.01.2018)

Per : V.K. Shukla, J.-

In the instant appeal, challenge has been made to the order of conviction and sentence passed

by the Additional Sessions Judge, Maihar, District Satna in S.T.No.135/1994, whereby appellant no.1 Shiv Narayan has been convicted under section 302 of IPC and sentenced to undergo imprisonment for life and fine of Rs.10,000/-, in default to suffer further R.I. for 1 year. He has also been convicted under Section 323 of IPC and sentenced to fine of Rs.1000/-, in default to suffer further R.I. for one month. Appellant no.2 Ramsujan and appellant no.3 Lal Bihari have been convicted under Section 323 of IPC and sentenced to fine of Rs. 1000/-, in default to suffer further R.I. for one month each.

2. The incident is alleged to have taken place on 28-02-1994, when deceased Budh Ganesh went to the field and in the night time, appellant no.1 Shiv Narayan and appellant no.3 Lal Bihari alongwith other co-accused Katahur abused the deceased and complained regarding theft. On the next day i.e.01-03-1994, it is alleged that in the morning in front of the house of Kutwar, the deceased and PW-11, Ramnaresh were telling about the last night incident and at time the appellants and other accused persons who have been convicted came armed. It is alleged

that appellant no.1 Shiv Narayan had given lathi blow to the head of the deceased and thereafter assaulted PW-11 Ramnaresh and also PW-7 Ram Prasad. On their raising alarm, the other witnesses came and intervened.

3. FIR was lodged by PW-7 Ram Prasad Patel on the same day i.e. 9.30 A.M. vide Ex.P-7. Deceased Budh Ganesh was initially examined by Dr.M.L. Soen (PW-18). He found head injury on him and advised for further investigation. He was hospitalized and after 6 days, he died. His dead body was sent for postmortem and the postmortem was carried out by Dr. M.A.Lazir (PW-1) and the postmortem report is Ex.P-1.After his death, the offence under section 302 read with section 149 of IPC was added. Initially the police has registered offence under sections 147, 148, 149, 323 and 507 of IPC at Crime No.82/94.

4. The charges were denied and submitted that the complainant side was aggressor as they had come to the house of the appellant and the incident took place in front of the house of one of the accused person. It is further submitted in defence that PW-7

Ram Prasad Patel and PW-11 Ram Naresh Patel were armed and they assaulted appellant no.1 Shiv Narayan and appellant no.2 Ramsujan. Thus, they had acted in their right of self defence and therefore, the offence under section 302 of IPC is not made out.

5. Prosecution witnesses PW-2 Mathura Prasad, PW-3 Jameshwar, PW-4 Kallu, PW-5 Loknath, PW-6 Rajeev Mishra, and PW-12 Durghatiya have not supported the prosecution case whereas PW-7 Ram Prasad Patel and PW-11 Ram Naresh Patel have supported the prosecution case.

6. 6 accused persons were prosecuted for the charges under sections 147, 302 read with section 149 and 323 of IPC. 3 accused persons namely Katahur, Badri Prasad and Ayodhya Singh were acquitted of the charges under sections 147, 302 read with section 149 and 323 of IPC. Accused Shiv Narayan was acquitted under sections 147 and 323 of IPC for causing injury to Ram Naresh and Ramdas. Other accused persons Ramsujan and Lal Bihari were also acquitted under sections 147, 302 read with section 149 and 323 of IPC for causing injury to

Ram Naresh and Ram Prasad. The trial court convicted appellant no.1 Shiv Narayan under section 302 of IPC for causing death of deceased Budh Ganesh and also for causing simple injury to Ram Prasad and was convicted and sentenced as mentioned in preceding paragraph. Other appellants Ramsujan and Lal Bihari have been acquitted for all other charges but they have been convicted under section 323 of IPC for causing simple injury to Ram Prasad and sentenced to only fine amount of Rs.1000/-.Thus, in the present appeal, the conviction of appellant no.1 Shiv Narayan under section 302 IPC and sentence R.I. for life and under section 323 of IPC sentence of Rs.1000/- has been challenged. By other appellant Ramsujan and Lal Bihari conviction under section 323 of IPC and sentence of fine of Rs.1000/- has been impugned.

7. Learned counsel for the appellant submitted that the appellants were charge-sheeted for commission of offence under Section 302 read with section 149 of IPC and once the trial court has acquitted of the charges under sections 147 and 149 of IPC then without their being separate charge under

Section 302 of IPC, appellant Shiv Narayan could not have been convicted under Section 302 of IPC. Hence, the conviction is liable to be set aside on this ground alone. The offence under section 149 IPC is a substantive offence. He relied on the judgments passed by the Apex Court in the cases of **Nanak Chand Vs. State of Punjab AIR 1955 SC 274 and Lakhan Mahto and others Vs. State of Bihar, AIR 1966 SC 1742.**

8. The other point right of self defence has been argued that the incident had taken place in front of the house of one of the accused and the complainant side was aggressor and therefore, the appellants have exercised the reasonable force in their right to private defence. For the said purpose, learned counsel for the appellants relied on the following judgments :

(2002) 9 SCC 494 (Moti Singh Vs. State of Maharashtra)

(1997) 11 SCC 579 (Rukma (Smt) and others Vs. Jala and others.

(2009) 11 SCC 414 (State of Uttar Pradesh Vs.

Gajey Singh and another)

9. It is also submitted that on over all evaluation of the evidence, the conviction of the appellants suffers from illegality and the non-framing of separate a charge under section 302 of IPC has rendered the conviction and sentence illegal. The conviction under section 302 of IPC in absence of separate charge has caused prejudice to appellant no.1 Shiv Narayan.

10. Per contra, learned counsel for the State submitted that the prosecution has successfully proved its case beyond any doubt. It is further contended that once the appellants were charged under section 302 read with section 149 of IPC, then the acquittal under sections 147 and 149 would not vitiate the entire prosecution case and conviction and sentence. It is submitted that it is a mere irregularity, which is curable in the eyes of law .

11. We have heard the learned counsel for the parties and in order to appreciate the arguments, it is apposite to first consider the legal submissions

made on behalf of the parties.

12. The first contention of the appellants that since appellant Shiv Narayan has been acquitted under sections 147 and 302 read with section 149 of IPC, therefore, without separate charge, he could not have been convicted under section 302 of IPC has been supported by the judgment passed by the Apex Court in the case of **Nanak Chand Vs. State of Punjab and Lakhan Mahto and others Vs. State of Bihar (supra)** has to be considered in the light of the judgment passed by the Constitution Bench in the case of **Willie (William) Slaney vs The State Of Madhya Pradesh, AIR 1956 SC 116,**

13. The law in this regard is well established. In the case of **Willie (William) Slaney vs The State Of Madhya Pradesh, AIR 1956 SC 116,** a Constitution Bench of the Supreme Court while considering the effect and impact of defect in charges framed in a criminal case, has held as under:-

> "43. Now, as we have said, sections 225, 232, 535 and 537(a) between them, cover every conceivable type, of error and irregularity referable to a charge that can possibly arise, ranging from cases in which

there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that whatever the irregularity it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction. Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done, what we are concerned to see is whether the accused bad a fair trial, whether he knew what be was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend

himself. If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one.

44. to 55. xxx xxx xxx

56. Now what is an accused person entitled to know from the charge and in what way does the charge in this case fall short of that? All he is entitled to get from the charge is-

> (1) the offence with which he is charged, section 221(1),Criminal Procedure Code,
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> (2) the law and, section of the law against which the offence is said to have been committed, section 221(4),
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> (3) particulars of the time, section 222 (1) and
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> (4) of the place, section 222(1), and
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> (5) of the person against whom the offence is said to have been committed, section 222(1), and
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> (6) when the nature of the case is such that those particulars do not give him sufficient notice of the matter with which he is charged, such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose, section 223.

He is not entitled to any further information in the charge: see Illustration (e) to section 223 of the Code:

> "A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B".

57. It is clear from this that when the case is one of murder, the accused is not entitled to be told in the charge how it was committed, whether with a pistol or a lathi or a sword. He is not entitled to know from the charge simpliciter any further circumstance. How then is he expected to defend himself? He has the police challan, he has the evidence recorded in the Committal Court, he hears the prosecution witnesses and he is examined under section 342 of the Code. It is these roceedings that furnish him with all the necessary, and indeed vital, information, and it is his duty to look into them and defend himself. It will be seen that if the logic of the appellant's contention is carried to its fullest extent the accused could complain of prejudice because be was not told in the charge whether a pistol was used for the crime or a sword and if a pistol, its calibre and bore and the type of cartridge.

58. Now when several persons join in the commission of a crime and share a common intention, it means that each has the requisite intention in himself; the fact that others share it does not absolve any one of them individually, and when the crime is actually committed in pursuance of the common intention and the

accused is present at its commission, the crime becomes the offence actually committed because of section 114 of the Indian Penal Code. Section 114 does not create the offence nor does section 34. These sections enunciate a principle of criminal liability. Therefore, in such cases all that the charge need set out is the offence of murder punishable under section 302 of the Indian Penal Code committed by the accused with another and the accused is left to gather the details of the occurrence as alleged by the prosecution from other sources. The fact that be is told that he is charged with murder committed by himself with another imports that every legal condition required by law to constitute the offence of murder committed in this way was fulfilled: section 221(5) of the Criminal Procedure Code."

14. The aforesaid law laid down by the Supreme Court has been held to be good, valid and applicable, even after amendment to the Criminal Procedure Code in 1973 by the Supreme Court in the case of **Annareddy Sambasiva Reddy Vs. State of A.P.(2009) 12 SCC 546** and **Vutukuru Lakshmaiah Vs. State of Andhra Pradesh, 2015 (11) SCC 102:-**

15. In the case of **Mohan Singh Vs. State of Bihar, 2011 (9) SCC 272**, while considering a similar question in respect of the appellants therein, who had

been convicted for an offence punishable under Section 120-B of the Indian Penal Code, for criminal conspiracy for murder in the absence of the charge under Section 302 of the IPC, the Supreme Court after taking into consideration the provisions of Sections 214, 211, 215,464 of the IPC, relying upon the Constitution Bench decision in the case of **Willie Slaney (supra), Rawalpenta Venkalu and another Vs. The State of Hyderabad AIR 1956 SC 171, K. Prema S. Rao Vs. Yadla Srinivasa Rao, 2003 (1) SCC 217, Dalbir Singh Vs. State of U.P. 2004 (5) SCC 334, State of U.P. Vs. Paras Nath Singh 2009 (6) SCC 372 and Annareddy Sambasiva Reddy Vs. State of A.P. 2009 (12) SCC 546,** held as under:-

> "27. In view of such consistent opinion of this Court, we are of the view that no prejudice has been caused to the appellant for non-mentioning of Section 302 I.P.C. in the charge since all the ingredients of the offence were disclosed. The appellant had full notice and had ample opportunity to defend himself against the same and at no earlier stage of the proceedings, the appellant had raised any grievance. Apart from that, on overall consideration of the facts and circumstances of this case we do not find that the appellant suffered any

prejudice nor has there been any failure of justice."

16 . The law laid down in the case of **Willie Slaney** (supra) has again been affirmed and relied upon by the Supreme Court in the case **Anant Prakash Sinha Vs. State of Haryana and another 2016 (6) SCC 105**.

17. In the case of **Gurpreet Singh Vs. State of Punjab 2005 (12) SCC 615** the question raised was in similar terms as the one raised in the present case, wherein the accused were convicted of an offence punishable under Section 302 of the IPC, without any specific charge under Section 34 of the IPC, and without there being any evidence to indicate that as to which of the appellants had inflicted the fatal injury. The Supreme Court while rejecting the contention of the appellants regarding fatal defect in the prosecution case in this regard again relied upon the constitution bench decision in the case of **Willie Slaney** (supra) and has held the same to be a irregularity.

18. In the case of **Jai Singh alias Bandu and another Vs. State of Maharashtra, 1996 SCC(Cri.)**

672, the Apex Court has again referred the judgment passed by the Constitution Bench in the case of **Willie Slaney** (supra) held that in a case where the charge was under section 302/34 but one co-accused has been acquitted , the conviction of the left out accused could be under section 302 of IPC without there being separate charge. The omission to frame a charge or departure from the charge can not invalidate conviction until prejudice has been caused. The same view has been taken by a Coordinate Bench in the case of **Ramvishwas Pael @ Balua and another (Cri. Appeal No.1535/2006)** decided on 15-11-2017.

19. In view of the aforesaid conspectus, we do not find any legal infirmity in absence of specific charge under section 302 of IPC.

20. Now, we advert to the second submission of the learned counsel for the appellants that the appellant has exercised reasonable force in exercise of his right to self defence as the other side was aggressor and the incident had taken place in front of the house of one co-accused.

21. To appreciate both the submissions, the evidence of the present case has to be seen. The prosecution case has been supported by witneses PW-7 Ram Prasad Patel and PW-11 Ram Naresh Patel. As per the testimony of PW-7 Ram Prasad Patel, because of the allegations made by the accused persons against the father regarding the theft, he had gone to talk to accused persons alongwith his brother. When his brother and deceased Budh Ganesh were talking to the accused persons, the accused persons armed with lathi had first beaten Ramnaresh and thereafter his father Budh Ganesh. He made categorical statement that appellant Shiv Narayan had given lathi blow on the head of his father and on account of which he had fallen on the ground that thereafter also the accused persons had continued to beat him and when he tried to save his father, appellant Shiv Narayan had also given lathi blow on the shoulder and to his brother Ram Naresh also.

22. PW-11 Ram Naresh has also supported the prosecution case and in para-3 of his deposition, he has stated that the house of the accused persons is

adjoining to their house and when his father was talking with the co-accused persons regarding the allegations levelled by them against him about the theft, accused persons Shiv Narayan alongwith other accused persons came out from their house and they started quarreling with them. He has said that the accused persons were armed with lathi and his father was beaten by them.

23. PW-18 Dr. M.L.Soen, who first examined the deceased had found head injury of 1/4'x1/2' incised injury with bleeding and the same was on the left parietal region. Lacerated wound 1/2'x1/4' was on the left occipital region. There were other two contusions. The deceased was unconscious and was advised for Xray and other further investigation. During the treatment after 6 days he died and his postmortem report is Ex.P-1, which was conducted by PW-1 Dr. M.A.Lazir. He found on the left temporal region 2' x 1/2' injury and blood clotting was there. He has further found one blood clot 4' x1/2'x3' size on left temporal region. The injuries were found antemortem**.** The cause of death is syncope due to brain injury. In para-5 of his deposition, he has

opined that injury no.7 was sufficient to cause death in the natural course.

24. On evaluation of evidence, we find that the incident had taken place not in the house of the appellant but in front of the house of one of the accused person. From the evidence of PW-11 Ram Naresh Patel, it has been made clear that their house and the house of the deceased are adjoining as per para-3 of his deposition. Thus, it cannot be held that the complainant side had gone to the house of the appellants.

25. The other argument of the learned counsel for the appellants that since the deceased was carrying lathi, therefore, there was a real danger to his life therefore, in exercise of right to private defence , the deceased has been assaulted cannot be appreciated in view of the evidence available on record. Even if assuming that the complainant and the deceased was carrying lathi/stick, the same cannot be held to be a weapon in the back ground of this case. The deceased was about 60 years and in villages carrying a lathi/stick is a normal

phenomenon therefore, it cannot be held that there was any real danger or threat to the life of the appellants. The testimony of eye witness PW-7 Ram Prasad Patel and PW-11 Ram Naresh Patel is corroborated with the testimony of PW-1 Dr. M.A.Lazir and PW-18 Dr. M.L. Soen. The statement of PW-7 that appellant Shiv Narayan had given a lathi blow on the head of the deceased has been corroborated with medical evidence. The ocular evidence is well corroborated in the present case so far the active role is played by appellant Shiv Narayan.

26. Taking into consideration the law laid down in the case of Willie (William) Slaney (supra) and the subsequent judgments and specific overt act attributed to appellant Shiv Narayan, he has been rightly convicted under Section 302 of IPC without there being a separate charge under section 302 while acquitting under section 302 read with section 149 of IPC. The absence of separate charge under section 302 of IPC is only a curable irregularity as held by the Apex Court . In the facts of the present case we do not find any illegality in the order of conviction under section 302 of IPC. Our view is further fortified

by the judgment of the Apex Court in the case of **Nallabothu Venkaiah Vs. State of Andhra Pradesh, AIR 2002 SC 2945** where the accused was charged under section 300 read with section 149 IPC but he was convicted only under section 300 simpliciter and the other 6 accused persons were acquitted . The Apex Court held that considering the specific overt act attributed to the said appellant as stated by the eye witnesses corroborated by medical evidence, the appellant was rightly convicted under section 300 simpliciter without aid of section 149 in absence of substantive charge under section 300 of IPC.

27. The judgment relied by the counsel for the appellant in the case of **Lakshmi Singh and others Vs. State of Bihar (1976) 4 SCC 394** would not extend any aid to him in view of the facts of the present case regarding contention of self defence. Further on assimilating the entire facts available on record, it cannot be held that the right of private defence was available to the appellants. They have been rightly convicted by the impugned order. The law laid down in the case of **Raj Singh Vs. State of Haryana and others (2015)6 SCC 268,** held that to

claim the right of private defence, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. . There is no right of private defence where there is no apprehension of danger. Necessity of adverting an impending danger must be present, real or apparent. The burden of establish plea of self defence is on the accused and not on the prosecution. From the facts it has not been established that the complainant was aggressor and there was real threat to the life of the appellant so as to exceed the force to take the life of the deceased.

28. In view of the aforesaid discussion and as a consequence thereof, we do not find any infirmity or illegality in the judgment of the trial court warranting interference and therefore, the appeal is dismissed.

(HEMANT GUPTA) **CHIEF JUSTICE**	**(VIJAY KUMAR SHUKLA)** **JUDGE**

hsp.