Nazir vs Rex on 18 September, 1950

Equivalent citations: AIR1951ALL3, AIR 1951 ALLAHABAD 3

JUDGMENT

Bind Basni Prasad, J.

1. In view of the divergence of opinion between this Court on the one hand and the High Courts of Calcutta, Lahore and Patna and the Chief Court of Sind on the other in regard to the interpretation of Sections 59 and 46, Criminal P. C., the following question has been referred by a Division Bench for decision :

> "Whether in view of the facts found by us above, Lallu Singh, Bahadur Singh, Thakuri, Sireshtey, Chhotey Lal and Behari had the right to attempt to arrest the appellants and their companions and whether the appellants and their companions had the right to shoot them in their self-defence?"

2. The facts found by the Division Bench are that on the night between the 29th and 30th of March 1949, an armed dacoity took place in the house of one Debi Prasad in village Basta in the District of Farrukhabad. There were about 15 or 20 dacoits and some of them were armed with guns and pistols. Kanhaiya Lal, one of the neighbours of Debi Prasad, saw the commission of this dacoity and recognised the faces of some of the dacoits at that time. After the dacoits decamped with the booty, Kanhaiya Lal alone pursued them, but he came back shortly afterwards. A short while later he again started in pursuit of the dacoits taking with him this time four other persons, Shri Krishen, Ghaus Ali, Buddha and Akhtar Ali. They followed the dacoits according to the footprints left by them on the ground and after they had covered about six miles from the place of the dacoity they noticed twelve men going towards Saraimiran railway station. Kanhaiya Lal recognised among these eight or nine persons those who had come out of the house of Debi Prasad at the time of the dacoity. A little later two persons out of the twelve took another way and Kanhaiya Lal sent Sri Krishen, Ghaus Ali and Buddha to follow them while he and Akhtar Ali continued to follow the remaining ten. The pursuit continued for some distance and when they were about a mile and a half from Saraimiran, Kanhaiya Lal saw a bus coming from Tirwa and going towards Saraimiran. He sent Akhtar by the bus to inform the police suggesting that the police should try to arrest the dacoits at Saraimiran railway station to which place he thought the dacoits were going. Kanhaiya Lal was thus left alone and he continued to follow the ten dacoits. After a short distance four more of the dacoits left the company of the other six and proceeded in a different direction. Kanhaiya Lal continued to follow the other six dacoits. Proceeding further the dacoits passed by the field of one Basant Singh in which he was working. Basant Singh challenged the dacoits. Presumably his curiosity was aroused because he found them armed with guns and pistols. Nazir retorted, "I am your father." Basant Singh felt suspicious about them and shouted to his village people to come with lathis. Upon this, Nazir appellant fired his pistol at Basant Singh, but the latter sat down and the shot missed. Meanwhile a

number of the residents of the village of Basant Singh arrived and they all chased the dacoits. A little further Lallu Singh, nephew of Basant Singh, tried to arrest the dacoits. Then Nanhu appellant fired his shot at Lallu Singh and injured him. The third man who attempted to arrest the dacoits was Bahadur Singh, another nephew of Basant Singh. Nazir fired at him and he was also injured. The fourth man who made this attempt was Kanhiya Lal. He too was fired at by Nazir and was injured. With three persons injured among the pursuers they allowed a little more distance to intervene between themselves and the dacoits, but they continued the chase. The pursuers were joined by others also as they proceeded and their number swelled to about 40 or 50. Two such persons who joined the party were Thakuri and Sireshtey who were working in a field which was close to the route by which the dacoits were proceeding. They too attempted to arrest the dacoits but they too were fired at and were injured. The seventh man who attempted to arrest the dacoits was one Chhotey Lal. Nazir appellant fired at him and injured him. The eighth man attempting to arrest the dacoits was Behari, brother of Chhotey Lal. Nanhu fired at him and injured him. The ninth attempt to arrest the dacoits was made by Basant Singh and this time, instead of firing at Basant Singh, Nazir picked up a clod of earth and threw it at Basant Singh. This led the pursuers to infer that the dacoits had, exhausted their ammunition and thereupon they fell upon the dacoits and captured them. Country made pistols were recovered from the possession of both the appellants. Thakuri died within an hour of his receiving the injuries. The casualties among the pursuers were thus one killed (Thakuri) and six fired at and injured.

3. Learned Sessions Judge convicted Nazir under Sections 302 and 307, Penal Code and Section 19(f), Arms Act and sentenced him to death under ' the first offence and to seven years and two years' rigorous imprisonment respectively under the last two offences. The sentences of imprisonment were to run concurrently, Nanhu was convicted under Section 307, Penal Code, and Section 19 (f), Arms Act and sentenced to seven years and two years' rigorous imprisonment respectively, the sentences to run concurrently.

4. The Division Bench has held that Kanhaiya Lal had the power under Section 59, Criminal P. C. to arrest the accused, because the non-bailable and cognizable offence of dacoity was committed "in his view," and the appellants had no right of private defence as against him and no justification to fire at him. The same view was taken as regards Basant Singh also because the dacoits committed the non-bailable and cognizable offence of attempt to murder Kanhaiya Lal "in his view;" but as regards the remaining six persons, namely, Lallu Singh, Bahadur Singh, Thakuri, Sireshtey, Chhotey Lal and Behari the Division Bench was doubtful "of their right of private defence" in view of the divergence of opinion. It observed;

> "On this question of law, we have been referred, on behalf of the prosecution, to a Division Bench decision of this Court in Emperor v. Sheo Balak, A. I. R. (35) 1948 All. 103 : (49 Cr. L. J. 62). This case completely supports the arguments advanced on behalf of the prosecution. On the other hand, against this view taken by a Division Bench of this Court, we have been referred to a number of cases of other High Courts who have taken a view entirely different from the view taken by this Court. We may refer to the cases of Bolai De v. Emperor, 35 Cal. 361: (7 Cr. L. J. 188), Alawal v. Emperor, A. I. R. (9) 1922 Lah. 73 : (23 Cr. L. J. 3) and Abdul Aziz v. Emperor, A. I.

R. (20) 1933 Pat. 508 : (35 Cr. L. J. 725). In addition to these cases our attention has also been drawn to a case of the Sind Chief Court in Fakiro v. Emperor, A.I.R. (34) 1947 Sind 107 : (48 Cr. L. J. 823). In this case the view taken by the Sind Chief Court is directly opposed to that taken by the Allahabad High Court on the interpretation of Section 46, Criminal P. C. and full reasons have been given for taking the contrary view. It is true that the Sind Court decided that case earlier than the case of Emperor v. Sheo Balak Dusadh, I.L.R. (1948) All. 3 : (A. I. R. (35) 1948 All. 103 : 49 Cr. L. J. 62), decided by this Court in 1948, but it appears that that Sind case was not brought to the notice of the Bench of this Court which decided the case of Emperor v. Sheo Balak Dusadh, I. L. R. (1948) All. 3 : (A.I.R. (35) 1948 All. 103 : 49 Cr. L. J. 62) in 1948. It would, therefore, appear that on this question of law there is considerable divergence of opinion between our High Court and several other High Courts. The question, of law is, in our opinion, of great importance and we consider that it should be settled by a more authoritative pronouncement in this Court."

5. The facts of Sheo Balak Dusadh v. Emperor, A.I.R. (35) 1948 ALL. 103 : (49 Cr.L.J. 62) were that the accused were noticed committing the non-bailable and cognizable offence of house-breaking. The inmates along with some neighbours who arrived on hearing the hue and cry, but who had not actually seen the commission of the offence chased the accused and in the course of the scuffle in arresting the accused, one of the neighbours who was pursuing them was killed. It was held that the persons who had actually seen the thieves at the back of their house were clearly authorised under Section 59 of the Code to arrest them and when the thieves started running away from the house, they would in accordance with the provisions of Sub-section (2) of Section 46, Criminal P. C. be authorised to use all means necessary to effect the arrest, and this would include the seeking of help from their neighbours in arresting them. Raising of an alarm means a call to the neighbours to come to assistance and no evidence that they actually called the neighbours for assistance is necessary. When, therefore, a neighbour chases the thieves on seeing them running away, the thieves have no right of private defence against any attempt made by him to arrest them. Further it was held that when a man is found committing a non-bailable and cognizable offence and then tries to escape, the whole is to be treated as one single transaction and any person who sees him either committing the offence or finds him running away immediately after the commission of the offence would be entitled to arrest him and the offender has no right of private defence against any attempt made by any such person to arrest him.

6. On the other hand the view taken by the Calcutta, Patna and Lahore High Courts and the Chief Court of Sind is quite contrary.

7. In Bolai De v. Emperor, 35 Cal. 361 : (7 Cr. L. J. 188) one Jadu Bagdi, on seeing one Radhanath Dey cutting and removing some plantain trees from his garden and placing them on a cart waiting outside, cried out that his plantain trees were being stolen away. The duffadar on hearing the cry ran to the spot and saw a cart loaded with five or six freshly cut plantain trees being driven away by Radhanath along the road next to the garden, and being followed by Jadu who told him that the trees had been cut from his garden by Radhanath. The duffadar seized the latter and proceeded with him and the cart-load of plantain trees a short distance towards the thana, when the petitioners

came up and rescued Radhanath with the cart and the plantain trees from his hands. The petitioner, Bolai, ordered the duffadar to be beaten, and the petitioner, Gokul raised his lathi to strike him, but the blow was averted by one Sital who happened to be then present. Bolai De was put on his trial and was convicted under Sections 225 and 353 read with Section 114, Penal Code. Learned Judges held that the arrest by a duffadar of a person for theft on a complaint made to him but not committed in his presence was illegal and neither the rescue of such a person from his custody nor the threat to beat him amounted to any offence under Section 225 or 353, Penal Code.

8. This view was dissented from in Gouri Prosad Dey v. Chartered Bank of India, Australia and China, 52 Cal. 615 : (A. I. R. (12) 1925 cal. 884). Page J. observed :

> "In my opinion, it is not essential that a private individual, in whose presence a non-bailable and cognizable offence is committed, should himself physically arrest the offender. He may cause such offender to be arrested by another person. In so far as the ratio decidendi of the case of Bolai De v. Emperor, 35 Cal. 361 : (7 Cr. L. J. 188) is not in accordance with the view which I have expressed, with all due respect to the learned Judges who decided it, I am unable to acquiesce in it."

9. The Chief Court of Sind in Fakiro's case, A. I. R. (34) 1947 Sind 107 : (48 Cr. L. J. 823) quoting the above observations remarked that they were obiter dicta. One of the questions involved in that case-was whether the plaintiff was legally arrested. In considering this point the remarks quoted above were apposite.

10. In Alawal v. Emperor, A. I. R. (9) 1922 Lah. 73 : (23 Cr. L. J. 3) it was held that "Section 59, Criminal P. C., gives the powers to a private person to arrest any person, who, in his view, commits a non-bailable and cognizable offence. Arrest of the offender by a person in whose presence the offence is not committed is not justified, unless it is proved by the evidence on record that the intention of the accused was to prevent the arrest, or that the pursuers were lawfully empowered to arrest him ; persons stopping them from doing so are not liable under Section 225, Penal Code."

11. The facts of Abdul Aziz v. Emperor, A. I. R. (20) 1933 Pat. 508 : (35 Cr. L. J. 725) were that ,one Ganpat was murdered. He cried out and this brought his son, Ram Kishan, on the scene. Ram Kishan chased the accused and when Ram Kishan was on the point of seizing the accused, the accused turned round and stabbed Ram Kishan also with a knife. Both the father and son died. It was argued that in stabbing Ram Kishan the accused committed no offence because he had a right of private defence against him as the accused had not murdered Ganpat in the sight of Ram Kishan. Rowland J. observed :

> "It seemed at first sight paradoxical that Zalim could claim a right of private defence against Ram Kishan. Ram Kishan had heard his father crying out and saw Zalim in flight and pursued by Ganpat who was pressing his hands to the mortal wound. Ram Kishan gave chase and for this Zalim stabbed him to death. But examination of the statutes and the authorities has convinced us that there is no escape from the position that the law is as my learned brother has stated it, and we have to apply the

> law as we find it. It is popularly believed that a private person is entitled to arrest not only a criminal whom he sees in the act of doing the crime, but one whom he sees in the act of flight immediately after. This is not the law : See Kalai v. Kalu, 27 Cal. 366 : (4 C. W. N. 252) and Bolai, v. Emperor, 35 Cal. 861 : (7 Cr. L. J. 188). If it is felt that the law is not in conformity with public feeling and the public conscience the only remedy is by way of amendment."

12. Lastly there is the case of Fakiro v. Emperor, A. I. R. (34) 1947 Sind 107: (48 Cr. L. J. 823) in which it was held that "Sections 42 and 43 are exhaustive and therefore Section 59 which states that any private person may arrest any person who in his view commits a non-bailable or cognizable offence gives authority to that person only to arrest and doss not enable him to give authority to any third person to effect the arrest on his behalf."

In this case, the shop of one Bilawal was being broken open by the accused. Bilawal raised a hue and cry which brought one Phatan who joined in the pursuit of the accused. Phatan arrested the accused. The latter gave Phatan a blow killing him. It was held that the accused was entitled to the benefit of Excep. 2 of Section 300, Penal Code, as Phatan had not seen the attempt at house-breaking. Learned Judges referred to the case of the Calcutta and Patna High Courts mentioned above.

13. With due deference I find myself unable to agree with the Calcutta, Lahore, Patna and Sind cases just mentioned, and respectfully agree with the view of this Court expressed by Harish Chandra J. in Sheo Balak Dusadh v. Emperor, A. I. R. (35) 1948 ALL. 103 : (49 Cr. L. J. 62). The Calcutta view in Bolai De's case, (35 Cal. 361 : 7 Cr. L. J. 188) has been dissented from in Gauri Prosad's case, (52 Cal. 615 : A. I. R. (12) 1925 Cal. 884). In the aforesaid cases of the Calcutta, Lahore and Patna High Courts the effect of Section 46 upon Section 59 of the Code was not considered. In the Sind case, however, not only these two sections, but also Sections 42 and 43 have been considered. For finding out the power of a person to arrest an offender of non-bailable and cognizable offence the conjoint effect of Sections 46 and 49 as also the provisions of Sections 42 and 43 should be considered.

14. Section 59 provides as to when a private person may arrest an offender in the following words :

> "Any private person may arrest any person who, am his view, commits a non-bailable and cognizable offence, or any proclaimed offender ....."

The words "in his view" must be given a liberal interpretation. They mean not only "in his sight" but also "in his presence". A narrow interpretation of these words would greatly defeat the object of this section. Suppose in a winter a person is sleeping inside his room and there is no light in it. A thief makes a hole and tries to enter it. He cannot see the thief; but on hearing the sound he becomes aware of the fact that a thief is breaking the wall. Although he has not actually seen the thief he can arrest him. It would be absurd to hold otherwise. Again suppose a blind woman is sleeping and a thief wants to forcibly remove an ornament from her person. Although she cannot see the thief, there can be no doubt that she can arrest him. In Gokul Tatwa v. Emperor, A. I. R. (13) 1926 Pat. 53 : (26 Cr. L. J. 1462) and Abdul Aziz v. Emperor, A. I. R. (20) 1933 Pat. 508 : (35 Cr. L. J. 725). It was held that the words "in his view" in Section 59 mean "in his presence" or "within sight of him"

15. While Section 59 provides for the circumstances in which a private person may arrest an offender, Section 46 lays down how a private person may arrest an offender in the following words:

> "46. (1) In making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
>
> (2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police- officer or other person may use all means necessary to effect the arrest.
>
> (3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life."

The law authorises a private person to "use all means necessary to effect the arrest." The words "all means" are very wide and include the taking of assistance from others in effecting the arrest. Any other interpretation would defeat the object of this section. Suppose a thief enters a house at night. The inmates wake up and give a call to the chowkidar. The thief runs away. The inmates and the chowkidar chase him. There can be no doubt that the chowkidar, although he did not see the commission of the offence of theft or the entry of the thief into the house, can arrest him. Similarly, when a dacoity is committed in a village not only the persons who have actually seen the commission of the dacoity but also others whose assistance is summoned can arrest the dacoits.

16. Section 42 casts a duty upon every person to assist a Magistrate or a police-officer reasonably demanding his aid in the taking or preventing the escape of any other person whom such Magistrate or police-officer is authorised to arrest and in the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property. Failure to render such assistance would make him liable for an offence under Section 187, Penal Code. The section is confined to the assistance to Magistrates and police-officers. Section 43, however, deals with the aid to be rendered to a person other than a police-officer who has to execute a warrant of arrest in accordance with Section 77. It provides that "when a warrant is directed to a person other than a police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant."

This section is confined to a private person who for the time being is discharging the functions of a police-officer. There is no express provision anywhere in the Code of Criminal Procedure in regard to the aid to a private person in arresting an offender under Section 59. It does not follow from this that such a person is not entitled to any assistance to arrest an offender. Sections 42 and 43 cannot be regarded as exhaustive on the subject of aid for the arrest of offenders. They deal only with such aid to Magistrates, police-officers and persons who for the time being discharge the functions of a police officer. An examination of the contents of chap. IV of the Code convinces me that this is the only meaning which can be assigned to the heading of that chapter, a heading upon which the Chief Court of Sind have emphasised. There is no prohibition in this chapter against rendering aid to a

person making an arrest under Section 59 of the Code. On the other hand, S. 46 which deals with the subject of "arrest generally" and lays down how the arrest may be made, empowers the person making the arrest "to use all means necessary to effect the arrest" of the accused evading the arrest. These words are wide enough to include the taking of assistance from others in making the arrest. I may say that these considerations do not arise if the person to be arrested has not committed the offence. They arise only in the case of actual offenders.

17. Learned Judges of the Chief Court of Sind observed:

> "Section 59 which states that any private person may arrest any person who in his view commits a non-bailable or cognizable offence, gives authority to that person only to arrest and does not enable him to give authority to any third person. It may also be noted that Act XVIII [18] of 1923 added words 'or cause him to be taken in custody,' but did not add words or cause to be arrested' in Section 59 (1), Criminal P. C. .... We have been referred to no authority for the proposition that a private person entitled under Section 59 to effect an arrest can authorise a third person, not so entitled, to act as his agent."

18. To take assistance from a person in arresting another is not to appoint an agent for the purpose. Nor can it be said that it is causing him to be arrested. If a person takes no part in doing a work, but gets it executed by another, then only it can be said that it was caused to be done by him through an agent. If he himself takes some part in arresting the offender he is only asking the other to partake in the act. The addition of the words "cause him to be taken in custody" in Section 59 of the Code by the amending Act of 1923 supports the conclusion at which I have reached. According to Section 46 a person making an arrest has already the power to take assistance from others in making the arrest. That section, however, did not authorise him to entrust to others the duty of taking the offender to the police station. Hence, these words were added to enable him to send the offender to the police station through someone else. Kanhaiya Lal himself was trying to arrest the dacoits, but as he alone could not do it, the dacoits being armed and larger in number, he sought the assistance of others. Sections 59 and 46 should be read together. One supplements the other. While Section 59 provides as to when a private person may arrest an offender, Section 46 lays down how he may make the arrest, what force he may use and what help he may take.

Harish Chandra, J.

19. in Sheo Balak Dusadh v. Emperor, A.I.R. (35) 1948 ALL. 103: (49 Cr. L. J. 62) referred to English law also in support of his opinion that a person may arrest an offender if he finds him running away immediately after the commission of the offence. On this aspect of the case the Chief Court of Sind observed:

> "There is, however, an argument, which, though not raised before us, might be raised, that what is understood to be the English law may apply, namely a person in not pursuit of a felon is entitled to arrest. Our opinion is that the Criminal Procedure Code has codified the law on the subject of arrest by a private person and has thus

displaced whatever may have been the law before such codification."

20. Section 46 of the Code gives the same power to a private person to render assistance to another in the arrest of an offender as the English law on the subject would give him.

21. I am in complete agreement with the view expressed by Harish Chandra and Akbar Husain JJ., in Sheo Balak Dusadh v. Emperor, A. I. R. (35) 1948 ALL. 103 : (49 Cr. L. J. 62) and respectfully differ from Bolai De v. Emperor, 35 Cal. 361 : (7 Cr. L. J. 188); Alawal v. Emperor, A. I. R. (9) 1922 Lah. 73 : (23 Cr. L. J. 3); Gokul Tatwa v. Emperor, A. I. R. (13) 1926 Pat. 53 : (26 Cr. L. J. 1462); Abdul Aziz v. Emperor, A. I. R. (20) 1933 Pat. 508 : (35 Cr. L. J. 725) and Fakiro v. Emperor, A.I.R. (34) 1947 Sind 107 : (48 Cr. L. J. 823).

22. In view of the above finding the appellants in the present case had no right of private defence as against the persons named in the question referred to this Bench. The appellants were rightly convicted by the learned Sessions Judge. My answer to the question referred to is as follows: Lallu Singh and Bahadur Singh had the right to arrest the appellants as "in their view" they (the appellants) committed the-offence of attempt to murder Basant Singh and also because they could aid Kanhaiya Lal in arresting them, Kanhaiya Lal having seen the commission of the dacoity. Thakuri, Sireshtey, Chhotey Lal and Bihari were justified in attempting to arrest them, as they could under the law render assistance to Basant Singh in the arrest of the appellants who had fired shots at him, Kanhaiya Lal, Lallu Singh and Bahadur Singh, and had thus committed the non-bailable and cognizable offence under Section 307, Penal Code.

Sankar Saran, J.

23. I agree.

Wanchoo, J.

24. I agree and have nothing, to add.

25. By the Court Our answer to the reference is that in view of the facts found by the Division Bench, Lallu Singh, Bahadur Singh, Thakuri, Sireshtey, Chhotey Lal and Behari had the right to attempt to arrest the appellants and their companions and the appellants and their companions had no right to shoot them in their self-defence.