Khuda Bux And Ors. vs State on 14 March, 1951

Equivalent citations: AIR1951ALL637, AIR 1951 ALLAHABAD 637

JUDGMENT

Desai, J.

1. This is an appln, in revn. against the appcts'. convictions Under Sections 332, 147, 379 & 225B, I. P. C, by the Addl. Ses. J. of Bareilly. In all 28 men were convicted by the trial Ct. & the learned Addl. Ses. Judge acquitted 12 & maintained the conviations & sentences of the remaining 16 men, all of whom have filed this appln. Only Amir Bakhsh appct. has been convicted Under section 379, I. P. C. & only Nanhey appct. has been convicted Under section 342, I. P. C.; the other offences have been found proved against all the appcts.

2. The facts against the appcts. are as follows: One Midhai is the father of Noor Jahan, married to Bashir appct. in village Harnampur. Dalel appct. is the father of Bashir. Midhai got a warrant issued by the Addl. Dist. Mag. for the arrest of Noor Jahan from the house of Dalel & Bashir where, presumably, she was alleged to have been wrongfully confined by them. A clerk of the Ct was issued Under section 100, Criminal P. C. There is an order of the Addl. Dist. Mag. showing that the warrant was issued Under section 100. The warrant was handed over to Midhai for being delivered to the station officer. Midhai at once took it to S. I. Ram Singh, station officer of P. S. Bhamora, on 29-9-1946, at about 3 p m. The S. I. accompanied by Midhai, two police constables Ahmed Nabi & Bishan Lal, & a number of villagers went to villagers went to village Harnampur to the house of Dalel. They arrived there at 5 or 6 p. m. Midhai called out Noor Jahan & she came out with Dalel. The S. I. showed the warrant to Dalel & arrested Noor Jahan & took her towards the chaupal of the mukhia which is about 40 paces from Dalel's house. There the S. I. & men of his party were attacked by a crowd of 30-35 men with lathis. They pulled down the S. I. from the horse & Amir Bakhsh snatched away his revolver. The S. I. fired two shots from his revolver in the air. The rioters rescued Noor Jahan from the custody of the police. Then five of the appcts. carried away the S. I. to the house of Nanhey appct, & looked him inside it. Right men of the police party, including Midhai, were injured by the rioters. All the appcts were among the rioters. Information of the occurrence reached the police station & a force of police went there at about 3 a.m. & got the S. I. released from confinement. His torn bushshirt was taken in possession. Noor Jahan was again arrested from the house of Khuda Bakhsh appct. Amir Bakhsh pointed out the place where he had thrown away the S. I.'s revolver which was found there. The appcts. were then arrested & put up for identification before the prosecution witnesses. After the investigation 28 men were sent up for trial with the result already stated.

3. The defence of the appct. was denial of the ocqurrence as alleged by the prosecution. It was admitted that some occurrence took place but not in the manner deposed by the prosecution witnesses. The defence was that the S. I. accompanied by a number of men raided Dalel's house at

midnight, that Dalel shouted for help saying that a dacoity was being committed & that his neighbours collected & attaaked the police party taking it to be a gang of dacoits. The allegations about the snatching away of the S. I.'s revolver & of the arrest of Noor Jahan & her rescue were denied.

4. It has been found by the Cts. below that the prosecution case as set out above is true. The case is supported by a large number of witnesses & circumstances. There is no reason to think that the findings of the Cts. below are wrong or improper. As a matter of fact Mr. B. C. Saxena did not address me at all on the facts. He challenged the propriety of the convictions on the following grounds of law.

5. The first ground is that the warrant of arrest of Noor Jahan was illegal. The warrant was snatched away & torn by the rioters & could not be produced in evidence. One does not know, therefore, under what section it purported to have been issued. The clear evidence of the clerk of the Ct. that issued it supported by a copy of the order is that it was issued Under section 100, Criminal P. C. If the warrant was really issued Under section 100, there was nothing illegal or invalid in it. Mr. Saxena's argument was based on the statement of the S. I. that the warrant was issued Under section 552. I do not know how the S. I. could say that the warrant was issued Under section 552. He did not say that a note was endorsed upon it to this effect He did not give evidence of the contents of the warrant which would show that it was issued Under section 552 & not section 100. It seema to me that it was only an impression created in his mind that it was issued Under section 552. In any case whether it was issued under one section or the other was a question of fact & the Cts. below were fully justified in relying upon the evidence of the Ct. clerk & the documentary evidence & holding that it was issued Under section 100.

6. Under section 652 a Disk Mag. upon a complaint made on oath of the unlawful detention of a woman or a female child under the age of 16 years may make an order for the immediate restoration of the woman to her liberty or the female child to her husband, or parent having the lawful charge of her & may compel compliance with the order using such force as may be necessary. Noor Jahan is a woman & Under section 552 she could have been only restored to her liberty & could not have been arrested. The very fact that there was a warrant of arrest shows that it was really issued under section 100 & not section 552.

7. I am not prepared to hold that the warrant directed Noor Jahan's restoration to her liberty & that the S. I., wrongly arrested her. Whether the section under which the warrant was issued was endorsed upon it or not. I have not the least doubt that it directed Noor Jahan's arrest. If no section was endorsed upon it or section 100 was endorsed upon it there was nothing illegal in the issue of the warrant. If section 552 was endorsed upon it, then it would be an illegal warrant because, as I said earlier, no arrest could be ordered under that section. But so long as there was an order of a competent Mag. to arrest, it could not be said that the S. I., acted absolutely without jurisdiction in arresting her. It would then be a case only of his exceeding the jurisdiction & not of acting absolutely without jurisdiction. He could very well think that section 552 was writien by mistake for section 100. He had no concern with the section, if any was mentioned; he was not required by law to satisfy himself that the warrant could be issued under that section. His sole duty was to execute the warrant

by arresting Noor Jahan. If he acted in good faith colore offici, there could be no right of private defence against his act; see section 99, I. P. C. So long as his act of arresting could not be said to be absolutely without jurisdiction, it was one which at the worst could be said to be not strictly justifiable by law. Those who attacked him & his party could not escape the consequences by relying upon the right of private defence. The only effect of the illegality of the warrant would be that the S. I. could not be said to have been acting in the discharge of his duty within the meaning of section 332, I. P. C. & the apprehension of Noor Jahan could not be said to be lawful & consequently that no offence Under section 332 or 225B, I. P. C. would have been committed. But, all other offences such as those under sections 323, 147, 379 & 342, I. P. C. could certainly have been committed. If the arrest of a person is unlawful & he resists it or escapes from custody, he & others, who help him, commit no offence simply by resisting or escaping or abetting these acts. It should be noted that they are innocent, not because of any right of self defence, but because the acts do not amount to an offence at all. But if in addition they do other acts which are criminal, they would certainly be responsible *Now 18 years-See section 5 of Act 42 of 1949 Ed.

for them unless they can show that they had a right to commit them. For instance, if they beat the S. I. arresting the person in order to liberate him, they will be liable for the offence of beating him unless they can establish the right of private defence. If on account of the S. I's. acting in good faith they are divested of the right of private defence Under section 99, they will be guilty Under section 328, I. P. C. This law has been clearly laid down in Badri Gope v. Emperor, 5 Pat. 216: (A. I. R. (13) 1926 Pat. 237 : 27 Cr. L. J, 418), Supdt. and Legal 'Remembrancer of Legal Affairs, Bengal v. Sona Mia, A. I. R. (35) 1948 cal. 95 : (48 Cr. L. J. 464) & Ahmad Subhan v. Emperor, A. I. R. (36) 1949 Cal. 407 : (48 Cr, L. J. 616). The distinction between total absence of authority for the act & exceeding the authority has been emphasised in Cook v. Leonard, (1827)6 B. & C. 351: (5 L. J. M. C. 99), Painter v. The Liverpool Oil Gas Light Com. Ltd., (1836) 3 Ad. & El. 433-: (111 E. R. 478) and Corbett v. The King, (47 C. L. R. 317). In the first case Bayley, J. observed at p. 354:

> "If an officer does any act, part of which is, and part of which is '"not, authorised by the statute; or if a Mag. acts in a case which his general character authorizes him to do, the mere excess of authority in either case does not deprive the officer or Mag. of that protection which is conferred upon those who act in execution of it; but where there is a total absence of authority to do any part of that which has been done, the party doing the act is not entitled to that protection."

In the second case Lord Denman, Ch. J., observed at page 444:

> "A warrant is a justification to officers, because they are not to canvass the legality of the process they have to execute. Acts of Parliament have been passed for their protection, founded on that principle; and it is a just one; for it would be absurd that an officer charged with the execution of a warrant should have to pause & consider whether it was regularly issued or not."

And Lord Williams, J. observed at p. 449:

> "It would be wild work if the officer were entitled to scan the warrant delivered to him, for the purpose of ascertaining whether it was regular or not under the circumstances of the case."

In the third case (of Corbett 47 C. L. R. 317) it was laid down that it is not every defect or irregularity in warrant & every non-compliance with statutory provisions that destroys the efficacy of the process & that unless the warrant is a nullity, it would operate to confer upon the officer an authority, resistance to which would constitute an offence. Starke, J. who dissented, said at p. 339 :

> "A police officer is called upon to show his warrant only. But he cannot justify under his warrant if on its face it is such as no law authorizes, & is therefore a nullity & of no more effect than a piece of waste paper (Moravia v. Slopper, (1737) Willes, 30 : 125 E. R. 1039 ; Andrews v. Marris, (1841) 1 Q. B. 3: 113 E. R 1030 ; Carratt v. Morley, (1841) 1 Q. B. 18 : 113 E. R. 1036; Mayor Etc. of London v. Cox, ((1867) 2 H. L. 239, at p. 263). Nor could he justify if he acted in excess of the authority of the warrant Ash v. Dawnay, ((1852) 8 Ex. 237 : 155 E. R. 1334) Mere irregularities in procedure would not affect the justification, for it is no part of the duty of an officer to examine into the regularity of the proceedings upon which the warrant issues. It is his duty to execute the warrant according to its exigency."

It is not shown that in the present case the warrant on the face of it was illegal or invalid & that the S. I. had absolutely no justification for arresting Noor Jahan. He was directed to arrest her & even if some illegality was committed by the Addl. Dist. Mag. in issuing the warrant, the S. I not having any reason to know that it was committed was bound to execute the warrant according to its contents & was protected by law from being attacked by others. Therefore even if the warrant purported to have been issued Under section 552, the appcts. would have been guilty Under sections 147 & 828, I. P. C., though not Under section 225B. Mr. Saxena referred to Jagannath v. Emperor, A.I.R. (19) 1932 ALL 227 : (33 Cr L. J. 887) : Bisu Halder v. Emperor, 6 Cr L. J. 38 : (6 C. L. J. 127) & Qiwen-Empress v. Dalip, 18 ALL. 246 : (1896 A. w. N. 48). In Dalip's case, 18 ALL. 246 : (1896 A. W. N. 48), section 99, I. P. C. was applied & the accused were convicted Under section 823, I P. C & 147, I. P. C. but not Under sections 332 & 225B, I. P. C In the other two cases, the warrants were held to be illegal & the police officers who executed them were held to have acted with complete absence of jurisdiction. The facts of those cases are different.

8. Another point taken by Mr. Saxena is that the prosecution witnesses did not point out the accused named by them. If a witness stated such & such accused took part in the crime that would be sufficient evidence against him, If the defence case was that the witness really did not know the accused, it should be for the defence counsel to cross-examine the witness & ask him to point out the accused named by him. This was not done in the present case & the statements of the witnesses that such & such accused took part in the riot were not challenged on the ground that they really did not know the witnesses & could not identify them.

9. Among the appots. is Sulaiman. He was not known to the prosecution witnesses from before. He was arrested during the investigation & then was put up for identification. He was identified by two

witnesses, both of whom made large number of mistakes. No reliance can be placed upon the evidence of these witnesses; they might have picked out the appct. by chance. The case against him was doubtful & the benefit of the doubt ought to have been given to him.

10. The S. I. was wrongfully confined in the house of Nanhey appct. but there is no evidence that he had anything to do with the matter except that he owned the house. No responsibility or the wrongful confinement attached to him merely on account of his ownership of the house. There ought to have been some evidence to the effect that he took part in the wrongful confinement or abetted it, when it does not appear that it was committed in furtherance of the common object of the unlawful assembly. There is no evidence that Nanbey was even in the unlawful assembly.

11. I find that there was no illegality in the warrant & that all the appcts. except Sulaiman & Nanhey have been rightly convicted Under sections 147-332, 225B & 379, I.P.C. It was a serious offence committed by the appcts. & I regret that the learned Mag. failed to realize the seriousness & inflict deterrent punishment. For this serious crime the sentences inflicted Under section 147 are three months' R. I. on some & a fine of Rs. 40 on others, Under section 332 are six months' R. I. on some & a fine of Rs. 50 on others & Under section 225B are three months' R. I. on some & a fine of Rs. 20 on others. The distinction between some appcts. & the others was not quite sound. For the offences of sections 147 & 332, I. P. C. the minimum sentence that should have been inflicted on any appot. was of one year's imprisonment. It was no use sentencing some appcts to only a fine & the others to only three months' or six months' imprisonment. Then the learned Mag. has made the sentences concurrent without giving any reason & apparently without even applying his mind to the question. I find that Mags, invariably make the several sentences concurrent without exercising any discretion in the matter. It is laid down in section 35 of the Code that one sentence of imprisonment will commence after the expiration of the other sentence of imprisonment unless the Ct. directs that such sentences shall run concurrently. Obviously the normal rule is that the sentences should be consecutive & they may be made to run concurrently only if there is some reason. Whether the sentences should run consecutively or concurrently is left to the discretion of the Ct. but the Ct. must exercise its discretion judicially. It must not exercise it arbitrarily & must not on every occasion blindly order the sentences to run concurrently as if there were no alternative; but this is done by nearly every Mag. I scarcely remember even one instance in which a Mag. ordered two sentences to run consecutively. In the present case there was no justification for ordering the sentences, which themselves were inadequate, to run concurrently; the appcts. should have been punished cumulatively for the different offences committed by them. I would have very much liked to make the sentences consecutive, but I am not sure if I can do so without a notice of enhancement having been given to the appcts. I am inclined to the view that making the sentences run consecutively instead of concurrently does not amount to enhancement. But this question was not argued at the Bar & as I am not quite certain that it does not amount to enhancement, I would refrain from making the alteration.

12. I maintain the convictions & sentences of all the appcts. except Sulaiman & Nanhey, & dismiss their appln.; if any of them is on bail, he must surrender himself to undergo the sentence. I allow the appln. of Sulaiman & Nanhey, set aside their convictions & sentences & acquit them. The fine, if realised from them, shall be refunded. If they are on bail, their bail bonds are discharged.