Raghunath Singh And Ors. vs State on 2 March, 1950

Equivalent citations: AIR1950ALL471, AIR 1950 ALLAHABAD 471

JUDGMENT

P.L. Bhargava, J.

1. Babban Lal was formerly the patwari of village Bijaura, P. S. Mardah in the district of Ghazipur. In October 1946 he was appointed to officiate as supervisor kanungo of Zahurabad with head-quarters at Qasimabad, to which place he shifted from Bijaura. He has sixteen or seventeen bighas of occupancy land in village Bijaura. It is recorded either in the name of Lallan Prasad, his brother, or in the name of Bhagwan Prasad, a cousin of his. It is said that while he was away, on the morning of 15th Jane 1947, Babban Lal's house in village Bijaura was looted and razed to the ground.

2. On 19th June 1917, Babban Lal made a report at P. S. Mardah alleging that the appellants and twenty-nine other persons had, on 15th June 1947, in the morning raided his house and, having broken the lock on the outer door of the house, removed the goods lying therein, dismantled the roofs and the walls of the house and removed the door leaves, etc., and threw the clay of the walls into a ditch. The police re. gistered a case Under Section 454, Penal Code, against the persons named in the report, and after investigation sent them up for trial.

8. The case for the prosecution was that the father and the grand father of Babban Lal were also patwaris of village Bijaura. The grand-father of Babban Lal had constructed a house in the village. It fell down and its site became parti. The father of Babban Lal constructed another house in the village to the east of the house of Sheopujan Singh, who is one of the appellants. There was a narrow lane between the new house of Sheopujan Singh, In March 1947 Sheopujan Singh demolished the western wall of the house of Babban Lal which had been constructed by his father and started making constructions so as to include that wall and the lane in his house. Babban Lal thereupon instituted a suit against Sheopujan Singh in the Court of Munsif of Saidpur for injunction and damages. This suit offended Sheopujan Singh who, with the help of Raghunath Singh and other appellants, on the morning of 16th June 1917, proceeded to the house of Babban Lal and looted the same and razed it to the ground as stated above.

4. The civil suit instituted by Babban Lal was decreed on 4th March 1948; and the decree was upheld in appeal, which was decided on 15th November 1948.

5. The appellants were charged with having committed dacoity, an offence punishable Under Section 395, Penal Code and committed to the Court of Session. At the trial the appellants denied having committed any offence; they even denied the existence of the house said to have been looted and razed to the ground.

6. The learned Sessions Judge found that the house in question did exist to the east of the house of Sheopujan Singh, one of the accused persons and it was worth about Rs. 200/-; that the said house was dismantled and its materials were removed and thrown away; and that the appellants were responsible for the same. The learned Judge summed up his conclusions thus :

> "..... Babban Lal had a small house to the east of the house of Sheopujan Singh accused and in view of the civil litigation Sheopujan Singh accused took the help of Baghunath Singh accused and both broke open the look of the house and then got it dismantled and its materials thrown away by some of the accused among whom the presence of Kelawan, Naubat, Jhillu, Hardeo, Pattu, Sukhnandan, Chhotu, Sahdeo, Dukhanti and Kalapnath accused is certain. This is what is established and borne out by the evidence. There can be no doubt that Babban Lal has exaggerated the matter to a considerable extent, but to say that nothing happened as the defence would have us believe, is also absurd."

7. The learned Judge further found that an offence Under Section 395, Penal Code, was not made out and the appellants had, with the intention of causing wrongful loss or damage to Babban Lal, caused the destruction of his house and had thereby committed mischief, an offence punishable Under Section 427, Penal Code. Accordingly, he convicted the appellants Under Section 427, Penal Code and sentenced Sheopujan Singh and Baghunath Singh to rigorous imprisonment for six months and a fine of Rs. 200/- or in default of payment to undergo further rigorous imprisonment for one month each and the remaining appellants to rigorous imprisonment for three mouths each.

8. An appeal has been filed on behalf of the convicted persons challenging their conviction and sentence Under Section 127, Penal Code. Babban Lal has filed a revision praying that the conviction of the appellants be altered from one Under Section 427, Penal Code to one Under Section 395, Penal Code, and the sentences imposed upon them be enhanced.

9. Learned counsel for the appellants has, in the first place, contended that the finding recorded by the learned Sessions Judge that there existed a house of Babban Lal to the east of the house of Sheopujan Singh and that it was broken open or razed to the ground is not borne out by the evidence on the record. After going through the entire evidence and considering the circumstances of the case we, however, see no force in this contention. (After discussing the evidence, their Lordships proceeded:) In our opinion, the evidence on the record fully establishes that Seopujan Singh appellant, with the help of Baghunath Singh and other appellants, had broken open the look of the house, on plot No. 68, to the east of his house, which was at the time of the occurrence in the possession of Babban Lal, the complainant, and which was being looked after on his (Babban Lal'a) behalf by Dukhau Bhar, razed it to the ground and removed or threw its materials. The learned Sessions Judge has, as will appear from the portion of his judgment quoted above, found that Sheopujan Singh and Raghunath Singh appellants "broke open the look of the house, got it demolished and its materials thrown away" by other appellants. The finding is perfectly correct. The materials, such as door frames etc., were not there at the site. It follows, therefore, that they had been removed from the site of the dismantled house.

10. On behalf of the appellants, other than Sheopujan Singh and Raghunath Singh, it has been contended that they merely carried out the orders of the other two appellants as labourers and that in their case mens rea was entirely absent. It is in evidence that all the appellants had gone together; and when they helped Sheopujan Singh in dismantling the house and removing its materials, in spite of the protests by Dukhan Bhar, it is impossible to hold that in their case mens rea was absent. Moreover, it is not open to a person charged with a criminal offence to say that he committed the crime at the instance of another person.

11. Lastly, it has been contended by learned counsel for the appellants that, in any case, the appellants, who were charged Under Section 395, Penal Code, with having committed dacoity, could not have been convicted for mischief, Under Section 427, Penal Code, as they were not (?) charged with that offence and it was not a minor offence within the meaning of Section 238, Criminal P. C.

12. In the present case the charge framed against the accused was in these words :

> "That you on the 15th day of June 1947 in the morning at village Bijaura P. S. Mardah committed dacoity and thereby committed an offence punishable Under Section 395, Penal Code, and within the cognizance of the Court of Session."

The offence Under Section 427, Penal Code was not mentioned in the charge, nor were any facts, which could possibly bring the case under that section, mentioned therein. It is true that the Magistrate, while questioning the accused, put the question :

> "Did you along with the other accused go on 15th Jane 1947, at day time, to loot the house of Babban Lal in mauza Bijaura P. S. Mardha, after threatening and intimidating his servant Dukkhan Bhar and raze the house to ground (or demolish the same)?"

But, apparently the demolition of the house was taken as part of the offence of dacoity.

13. Now, the law lays down that for every distinct offence, there should be a separate charge; and a person charged with one offence can be convicted of another offence only in the cases mentioned in Sections 237 and 238, Criminal P. C.

14. Section 237, Criminal P. C., refers to cases mentioned in S. 236 of the same Code. The latter section deals with cases where it is doubtful what offence has been committed. No such doubt existed in the present case. Therefore, this case is not covered by Section 237 of the Code.

16. The case also does not fall within the purview of Section 238, Criminal P. C., which is in these terms:

> "238. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, bat the remaining particulars are not proved, he may be

> convicted of the minor offence, though he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it...."

16. In order to determine what constitutes a minor offence, within the meaning of Section 238, Criminal P. C., we have to examine the wordings of that section, as the said expression has not been denned anywhere else in the Code. The section speaks of "an offence consisting of several particulars." If all the particulars are proved to exist, they will constitute the main offence, referred to in the section; while a combination of only some of those particulars may also constitute an offence, that will be a minor offence, minor as compared to the main offence. Naturally, a combination of all the particulars will constitute a more serious offence than the one arising out of the combination of only some of them. The former will be a major offence having regard to the serious nature thereof and the latter a minor offence being less serious.

17. An offence will be treated as "minor" within the meaning of the said section with reference to the main or major offence referred to therein and not independently of it. Consequently, the minor and the major offences must be cognate offences which have the main ingredients common.

18. In Makkhan v. Emperor, A. I. R. (32) 1945 ALL. 81 : (46 Cr. L. J. 750), it was pointed out:

> "...the gravity of the offence must depend upon the severity of the punishment that can be inflicted, but the major and the minor offences must be cognate offences which have the main ingredients in commons and a man charged with one offence which is entirely of a different type from the offence which he is proved to have committed, cannot in the absence of a proper charge be convicted of that offence, merely on the ground that the facts proved constitute a minor-offence."

19. In that case the accused person was charged Under Sections 395, Penal Code, but was convicted Under Section 458 and 323, Penal Code. His conviction was set aside on appeal by this Court on the ground that he "had no notice of the offence of which he was going to be convicted and he was not asked to explain the points on which his conviction was based."

20. In Thakur Singh v. Emperor, A. I. R. (26) 1939 ALL. 665 : (40 Cr. L. J. 948), the accused were charged Under Sections 304 and 201, Penal Code, but they were convicted Under Sections 385 and 201, Penal Code. On the evidence produced in the case, the conviction of the accused Under Section 201, Penal Code, could not be sustained, and their conviction Under Section 385, Penal Code was set aside as "they were never charged under this section. No questions were put to any of the accused persons either by the Magistrate or the learned Sessions Judge with reference to the evidence led to prove the offence under Section 385, Penal Code."

21. The offence of dacoity is made up of certain ingredients, some of which, taken together, constitute an offence of theft; while others taken together constitute an offence of robbery. If

robbery is committed by five or more persons acting conjointly it would constitute an offence of dacoity. If all the ingredients are proved, it would constitute the main offence of dacoity; and it would be the main or the major offence. If a person is charged with dacoity, but if only those ingredients which constitute the offence of theft or those which constitute the offence of robbery are proved, the person charged would be deemed to have committed a minor offence with in the meaning of Section 238, Criminal P. C. The offence of theft or robbery would be a minor offence as compared to the major offence of dacoity.

22. On the other hand, if a person is charged with dacoity, but some other offence which has no connexion whatsoever with the offence of dacoity and with which he was not charged is proved to have been committed, he cannot be convicted of the latter offence, although it may be comparatively less serious, and as such it may be described as a minor offence.

23. Applying the above test the offence of mischief, the main ingredients of which are not common with the ingredients which constitute the offence of dacoity, could not be considered as a minor offence, within the meaning of Section 238, Criminal P. C. The learned Sessions Judge was, therefore, wrong in convicting the appellants for an offence punishable Under Section 427, Penal Code, as they were not charged with that offence.

24. On behalf of the complainant it has been contended that the appellants should have been convicted Under Section 395, Penal Code, and the finding of acquittal recorded by the learned Sessions Judge, under that section, may be set aside and the sentence imposed upon them be enhanced. In an appeal from a conviction an appellate Court can alter the finding of acquittal into one of conviction; but it cannot enhance the sentence. No doubt, the complainant has filed a revision; but, in exercise of our revisional powers, we cannot alter the finding of acquittal into one of conviction, although we can enhance the sentence. We have had occasion to express our views on this point recently in Criminal Appeal No. 162 of 1949, Muhammad Sharif v. Rex, decided by us on 16th December 1949 : (A. I. R. (37) 1950 ALL. 380 : 51 Cr. L. J. 1040). In that case we have also held that the two powers of the High Court, namely, appellate and revisional, cannot be combined to the prejudice of the accused. In this case, therefore, the sentence imposed upon the appellant cannot be enhanced, even if we find that the appellant should have been convicted Under Section 395, Penal Code.

25. As we are inclined to think that the appellants could have been convicted Under Section 395, Penal Code, we have considered the question whether we should order a retrial; but we find that the occurrence in connexion with which the appellants were prosecuted took place nearly three years ago and now after a lapse of such a long time it would not be desirable to order a retrial. In arriving at this conclusion we have also taken into consideration the circumstances of the case and the nature of the offence committed by the appellants. It seems to us, that on account of the civil litigation, Shiva Pujan Singh took it into his head to demolish the house altogether. As Babban Lal was living away from the village, he would not have kept anything valuable in the house, the western wall of which had already been demolished. Both Shiva Pujan Singh and Babban Lal were evidently trying to assert their right and possession over the small house, which stood thereon. The offence committed by the appellants was, therefore, more in the nature of mischief; but, as we shall

presently show, the particulars which have been proved in law constitute the offence of dacoity.

26. The evidence on the record goes to show that the appellants chased and threatened to beat Dukhan, the servant of the complainant, when he stopped them from breaking open the house, which was in his charge and that the appellants dismantled the house and removed the door-leaves and other materials obviously without the consent of the complainant, who was in possession of the house. Thus they committed theft of the materials of the house and in doing so they used force against the person who was in charge of the house. The number of the appellants was more than five and they all acted conjointly. Consequently, all the ingredients of the offence of dacoity were made out in the case.

27. Accordingly, we alter the finding of acquittal Under Section 395, Penal Code, to one of conviction under that section and maintain the sentence, which we cannot enhance.

28. The appeal is, therefore, dismissed, with this modification that the conviction of the appellants is altered from one Under Section 427, Penal Code, to one Under Section 395, Penal Code. The appellants, who are on bail, shall surrender forth with to serve out the sentence imposed upon them.