Babulal And Anr. vs State on 21 May, 1951

Equivalent citations: AIR1952ALL146, AIR 1952 ALLAHABAD 146

ORDER

P.L. Bhargava, J.

1. This application in revision has been filed by Babu Lal and Madhusudan, who were charged and tried for an offence punishable under Section 435, Penal Code, by a Magistrate of the first class of Mohamdi, in Kheri district. The learned Magistrate found them guilty, convicted them of the offence with which they were charged and sentenced each of them to rigorous imprisonment for one year and to a fine of Rs. 100.

2. The case for the prosecution was as follows: On the night between 17th and 18th March 1950, at about 10 p.m., the applicant Madbusudan went to Dal Chand alias Dalla a tongawala, and asked him to get ready his tonga as he had to go somewhere. Dalla refused saying that his horse was tired and he himself was unwell. This is said to have annoyed Madhusudan, who threatened Dalla to see him and break his limbs. Dalla and his wife, Shanti, went to sleep in their house. Dalla's horse was, as usual, tethered in a double-thatched shed (bangla) near his house. About a couple of hours later Dalchand and his wife heard the noise of their horse jumping in the head. As they came out of their house they noticed the applicants near the shed. Madhusudan was sprinkling kerosene oil over the shed and Babu Lal lighted a match and set fire to the shed, which was burnt and the horse was badly burnt. Dalla raised an alarm and the people arrived on the scene, whereupon the applicants fled away.

3. The applicants denied all the allegations-made on behalf of the prosecution and alleged that they had been falsely implicated due to enmity. It was suggested that Shanti, the wife of Dalla, was a woman of loose character and Babu Lal often cut jokes with her; that Dalla suspected illicit intimacy between his wife and Babu Lal, and that on account of that suspicion he had been falsely implicated in this affair. Madhusudan alleged that he had allowed Dalla's wife to use the latrine in his house and since the time when he prevented her from using the latrine, there arose some dispute, on that account and that on account of that dispute he had been falsely implicated.

4. On a careful review of the entire evidence on the record the Courts below accepted the prosecution story and rejected the defence version. Learned counsel for the applicants has argued that even on the facts found by the Courts below the conviction of the applicants, under Section 435, Penal Code, was not warranted by law. Section 435 is in these terms :

> "Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards or (where the property is agricultural

produce) ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine."

5. In the first place, it has been argued on behalf of the applicants that the prosecution has failed to prove that the damage to the property affected by fire amounted to Rs. 100 or upwards. The learned Sessions Judge has found that the damage to the property, viz., the shed and the horse, to the amount of over Rs. 100 has been proved. He worked out the amount, on the basis of the evidence produced in this manner :

"Damage to thatched shed ... ... Rs. 25.

Damage to the horse--the amount spent on its treatment..... Rs. 50.

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Loss of income suffered by the owner of pro
 perty during the period the horse was inca
 pacitated at Rs. 8 per day (or 15 days....  ....  ....    Rs. 120."
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6. On behalf of the applicants, it has been argued that only the actual damage to property and not the consequential loss or damage suffered by the owner of the property is contemplated by the expression "damage to any property" used in Section 435, Penal Code. Section 425, Penal Code, defines "mischief" and clearly indicates what the expression 'damage to any property' means. It means "the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously." In other words, if the property is destroyed, diminished in value or utility or is otherwise injuriously affected the damage is done to the property. Such a damage may be occasioned by fire or by any other means. Therefore, the damage to any property contemplated by Section 435 must be of the nature aforesaid. So far there is no difficulty.

7. The difficulty arises when we have to determine the extent of damage in terms of money. The relevant phrase used in Section 485 is "damage to any property to the amount of" and in this case it is necessary to find out the extent of damage in money caused by fire to the thatched-shed and the horse. As already stated, the thatched shed was destroyed & the horse was badly burnt with the result that it was incapacitated & unfit for work for about 15 days. Learned counsel for the applicants urged that only the costs of the replacement of the shed and the expenses incurred over the treatment of the horse should be taken into account in assessing the amount of damage to the property. The costs of replacement of the shed as well as the expenses of treatment of the horse are to be borne by the owner of the property, and the extent of loss in money suffered by the owner would afford the real basis for the assessment of damage. The damage to the property and the consequential loss to the owner are, therefore, co-related and one cannot be treated as independent of or

separate from the other. There can be little doubt that the owner apart from the expenses over the treatment of the horse, suffered loss of income, which he would have otherwise earned if the horse had not been incapacitated by burns. This loss is as much consequential to the damage to the property as the loss to be incurred in the replacement of the shed and in the treatment of the horse. In my opinion, the expression "damage to any property" is wide enough to include the entire incidental loss suffered by the owner; for example if the horse became lame or was incapacitated due to injury or burns its value would be diminished and its utility to the owner will also be impaired. The loss in both cases would be to the owner and the extent of damage to property will have to be calculated with reference to the loss to the owner. In a case where mischief is done by straying of cattle in a field in which the crops are standing, the damage will have to be calculated with reference to the extent of loss of crops suffered by the owner.

8. Consequently, the correct measure of damage to property is the extent of loss suffered by the owner of the property; and there appears to be no reason to exclude the loss to the owner occasioned by the horse having been incapacitated. The method adopted by the learned Sessions Judge for calculating the amount of damage to property is correct, and I uphold the finding of the learned Judge that the damage to the property in this case exceeded the amount of Rs. 100. The case was, therefore, fully covered by Section 435, Penal Code.

9. In the next place, it has been argued that the conviction under Section 435, Penal Code, is bad in law, inasmuch as on the facts proved the case fell within the purview of Section 436, an offence punishable whereunder is exclusively triable by a Court of Session and that the learned Magistrate had wrongly assumed jurisdiction which he did not possess. The learned Sessions Judge has observed that the case was not covered by Section 436, Penal Code, inasmuch as there was nothing on the record to show that the shed was always or even "ordinarily" used for keeping the horse. There is ample evidence on the record to show that the shed was ordinarily used for keeping the horse. The very first sentence of the first information report speaks about the shed having been constructed for keeping the horse and that the horse was tied under it. In the charge-sheet the same thing was clearly indicated by the use of the words: "The thatched shed of Dalla where he used to tie up his horse." Same thing was made clear in the question put to the applicants under Section 842, Criminal P. C. The prosecution, however, had to prove that the shed was a "building which is ordinarily used .... as a place for the custody of property." The learned Government Advocate has pointed out, firstly, that the thatched-shed could not be considered such a building. On behalf of the applicants, it has been urged that the term "building" does not necessarily mean a finished structure. He relied upon the following observation of the Law Commissioners:

"The grass or mat huts of the lowest classes are placed on a level with the substantial, secure, and valuable dwellings of the better classes ... It is obviously, proper that in

> the case of mischief by fire a distinction should be made between the huts ... and substantial houses, but there is sufficient room for such a distinction between the maximum of fourteen years and the minimum of one year, and between rigorous and simple imprisonment . . . and we think it best that the distinction should be left to the discretion of the Judge."

A structure made of straw and not of bricks and mortar may be considered a building, if it has got the necessary furnishings needed for a building, such as doors, bars, etc, An ordinary double-thatched-shed resting on bamboos or wooden or brick pillars having no doors etc. cannot be treated as a building within the meaning of that term used in Section 456, Penal Code. The building referred to in the section is a building which can be used as a place of worship or as a human dwelling or as a place for the custody of property The word "custody" is undoubtedly different from the word "keeping" and it implies a sense of security which would be wanting in the case of a shed, which is only meant to provide shelter from sun and rain and which has no doors etc. Consequently, the thatched-shed in the present case could not be considered a building which was used for the custody of property. The learned Sessions Judge was, therefore right in holding that the present case was not covered by Section 435, Penal Code. The learned Magistrate, therefore, had the jurisdiction to try the case against the applicants, and the conviction of the applicants under Section 435, Penal Code, is not vitiated for want of jurisdiction.

10. Lastly, it has been contended on behalf of the applicants that, in any case, the sentence Imposed upon the applicants is excessive; but having regard to the nature of the offencs committed and the circumstances in which it was committed, I am of opinion that the sentence imposed on the applicants is fully deserved.

11. Accordingly, there is no force in this revision and I reject it. The applicants, who are on bail, shall immediately surrender be serve out the remaining portion of their sentence.