Nathwa And Ors. vs State on 12 July, 1950

Equivalent citations: AIR1951ALL452, AIR 1951 ALLAHABAD 452

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Bench: V. Bhargava

JUDGMENT

V. Bhargava, J.

1. This is an appeal by ten persons, Nathwa, Niadar, Dharma, Lal Singh, Banwari, Pirbhu, Kirpal, Mohammad Taqi, Achchhan and Laltu, who have all been convicted under Sections 399 and 402, Penal Code, and sentenced to undergo rigorous imprisonment for four years and three years respectively under these two sections. In addition all these appellants have been convicted for the offence under Section 307 read with Section 149, Penal Code. Two of them, Kirpal and Mohammad Taqi alias Kalian have been sentenced to four years' rigorous imprisonment for this offence whereas the remaining eight persons, have been sentenced to three years' rigorous imprisonment. Mohammad Taqi and Kirpal nave further been convicted and sentenced to one year's rigorous imprisonment for the offence under Section 19 (f), Arms Act and Nathwa and Laltu have been convicted and sentenced to six months' rigorous imprisonment under Section 19 (f), Arms Act. All the sentences of imprisonment of all these appellants have been directed to run concurrently.

2. The incident in respect of which these appellants have been convicted is said to have taken place on 5-11-1948. It is alleged that all these appellants together with three other persons, Chokhey, Mangal and AH Husain, had collected in the garden house of one Vijay Vir Singh close to the village Chak Goverdhanpur on the night of 5-11-1948, for the purpose of committing a dacoity. Information of this assemblage was carried to the Station Officer Mehtoreby an informer. Station Officer informed the Superintendent of Police, Bijnor, who proceeded to village Chak Goverdhanpur with a large party of policemen, some of whom had fire arms with them. The party also included the Deputy Superintendent of Police. They met Station Officer of Police, Station Mehtore, with members of his staff close to that village. They also took two private citizens residing in Chak Goverdhanpur with them and the whole party then came towards the grove of Vijay Vir Singh. They surrounded the grove. The Superintendent of Police himself led the party which launched the attack on this assemblage of dacoits from the front side of the garden house which was towards the east. As these men approached firing started. A few shots were fired on both sides but no one happened to be injured. Thereafter, the Superintendent of Police happened to come close to the gathering of these men which was in the verandah of the garden house. Mohammad Taqi alias Kalian was the principal man who was firing towards the Superintendent of Police. The Deputy Superintendent of Police grappled with him and he was captured. One of the persons assembled there for the purpose of

dacoity who was carrying a gun, ran away and it is alleged that this person was Kirpal, appellant. The remaining persons went inside the room where they were followed by the police officers. The Superintendent of Police threatened to shoot any one who refused to surrender at once and thereupon all these men surrendered themselves. Mohammad Taqi alias Kalian was found in possession of an English-made revolver. Chhokhey, who was also convicted in this case but who has not filed any appeal, was found in possession of a country-made single barrel 12 bore gun. Kirpal, the man who ran away, is alleged to have had a double barrel gun, Nathwa appellant had a sword and Laltu had a spear. A number of lathis were also found in the room when the appellants had surrendered themselves to the police. The case was then investigated. But no case could be worked out against the 13th man who had run away. Twelve persons were, therefore, sent up for trial. These twelve were the nine appellants (besides Kirpal) and Chokhey, Mangal and Ali Husain. During enquiry in the committing Magistrate's Court Ali Husain made a confession. He was then granted a pardon and was then examined as an approver. Ali Husain in his statement named Kirpal appellant and thereupon attempts were made to arrest Kirpal. It is alleged that Kirpal had absconded and proceedings had to be taken under Sections 87 and 88, Criminal P. C. Attachment of his property took place on 10-3-1949 and thereupon Kirpal surrendered himself in Court on 12-3-1949. He was sent to jail and then was put up for identification. Pour constables identified Kirpal as the 13th person assembled for the purpose of dacoity who had escaped with a double barrel gun. On this evidence all these appellants as well as Chokhey and Mangal were sent up for trial. The learned Sessions Judge held that the case against all of them was established and convicted them as mentioned above. Chokhey and Mangal did not appeal against their conviction so that the appeal before me is by ten appellants only.

3. In this case, so far as the nine appellants besides Kirpal, who were arrested on the spot, are concerned, the case against them is perfectly clear and is supported by very reliable evidence. The evidence of the Superintendent of Police himself proves the case against all of them. It is completely supported by the evidence of the station officer of police station Mehtore, by the statements of Shahbir Ahmad and Mohammad Hashim, the two private citizens residing in Chak Goverdhanpur who had accompanied the police party and by the evidence of a number of police constables, who did take part in this raid. There is absolutely no reason to disbelieve the evidence of any of these witnesses. The fact that these persons were assembled for the purpose of commission of a dacoity is also clear from the circumstance that Chokhey was found in possession of an unlicensed 12 bore gun, Mohammad Taqi alias Kalian of an unlicensed English-made revolver and Nathwa and Laltu of unlicensed sword and spear respectively. The evidence further discloses that the 13th man, who was also a member of the party, had been carrying a 12 bore double barrel gun. The conduct of this party also indicates that their object was not to gather for any peaceful purpose. These men knew that the police had come to capture them. The police were actually led by the Superintendent of Police himself. Had these persons been there for any innocent purpose, there was no reason at all for them to start firing at the police. They should have actually surrendered themselves and thereafter they should have convinced the Superintendent of Police that they were not the persons assembled for the purpose of commission of a dacoity and thus got away. In addition to all this evidence there is the evidence of Ali Husain approver who also says that all these men had assembled for the purpose of committing a dacoity.

4. In the light of this finding of fact, it is quite clear that every one of these nine appellants except Kirpal is guilty of having assembled for the purpose of commission of a dacoity so that they are all liable to be punished under Section 402, Penal Code. It is also clear that some members of this party fired at the police party with guns and a revolver. It is true that no one was hit but it is also clear that in firing at the police party with such dangerous weapons, as guns and revolver, they attempted to cause the death of the members of the police party. The conviction of all the appellants for the offence under Section 307, Penal Code, read with Section 149, Penal Code, is also therefore justified. The recovery of the English-made revolver from Mohammad Taqi alias Kallan, of the sword from the possession of Nathwa and of the spear from the possession of Laltu is also fully established from the same evidence. Their conviction for the offence under Section 19 (f), Arms Act is also correct. On behalf of the appellants, it has been argued that the conviction of these appellants for the offence under Section 399, Penal Code is, however, not justified. To me it appears that this argument would be applicable to the case of all other, applicants except those who were armed with dangerous weapons. Mohammad Taqi alias Kalian, Nathwa and Laltu came armed with a revolver, sword and spear. In arming themselves with these weapons while assembling for the purpose of committing a dacoity, it is obvious that these persons had made preparation for the commission of a dacoity and they are, therefore, clearly guilty under Section 399, Penal Code. The case of the remaining six appellants, Niadar, Dharma, Lal Singh, Banwari, Prabhu and Achchhan, however, is different. They were not armed with any dangerous or unlicensed weapons. If at all, they had only lathis in their possession. There is no evidence at all on the record to show that they committed any other overt act which may amount to making preparations for the commission of a dacoity except that of assembling in this garden house of Vijay Vir Singh. Even the evidence of Ali Husain, approver, does not show that any of them took any active part in preparing for the dacoity. All that these men did was to join others who were armed with more deadly weapons. Mere assemblage for the purpose of commission of the dacoity is already a distinct offence punishable under Section 402, Penal Code. If mere assemblage were considered as preparation for the commission of a dacoity, there would have been no need for a separate section like Section 402 apart from Section 399, Penal Code. Obviously the fact that the legislature considered it necessary to make a separate provision for punishing persons assembling for the purpose of committing a dacoity indicates that the act of assembling is not to be deemed to be a preparation for the commission of a dacoity punishable under Section 399, Penal Code. These six appellants, Niadar, Dharma, Lal Singh, Banwari, Prabhu and Achchhan, cannot, therefore, be held to be guilty of the offence under Section 399, Penal Code. They had merely come to this assembly on the direction of other persons. According to Ali Husain's evidence, the residents of village Sadaranpur came under the direction of Kirpal, appellant. How the others came is not known. There is, however, no evidence at all that there was any previous consultation or agreement between these persons for assemblage in this garden house for the purpose of commission of a dacoity. Whatever evidence there is indicates that these persons came there because of directions given by their leaders and not in pursuance of any previous agreement between themselves. The case of Emperor v. Khusi Ram, A. I. R. (5) 1918 ALL. 361 : (19 Cr. L. J. 43), is, therefore, not applicable to the facts of the present case. This is a case in which no other extraneous circumstance is available against these persons except the mere fact of assemblage for the commission of a dacoity and, in my opinion, it would not be justified to uphold the conviction under Section 399, Penal Code. These appellants are, therefore entitled to acquittal for this charge only.

5. Lastly I come to the case of Kirpal, appellant. This man was not arrested on the spot. He actually surrendered himself in Court on 10-8-1948 and his conviction is based on only two pieces of evidence. The principal evidence relied upon by the learned Sessions Judge is the evidence of identification by four prosecution witnesses; Kaman Singh, Jagan Singh, Shamshad Ahmad and Jokhi Ram. He held the view that all these identifying witnesses are reliable and satisfactory. Before me the learned counsel for the appellant has brought out a number of important circumstances which indicate that in this case it would not be very safe to rely on the identification. The first circumstance to be considered is that Kirpal, appellant has been identified by four constables only and not by any senior police officer or by the two private citizens who had accompanied the police party in this raid. It is significant that the four witnesses, who identified Kirpal, admit that, at the time of the raid, they were in the party of the Superintendent of Police himself. The Station officer of Police station Mehtore was also in the same party and so was the Deputy Superintendent of Police. Yet none of these senior police officers has identified this appellant. In fact, it appears that none of them was able to mark the face of the man who escaped with the gun under the circumstances which existed at the time of the raid. It appears to be very surprising that, while these senior officers were unable to mark the face of this man, the constables who accompanied them and were with them should have succeeded in marking his face. Some of the witnesses have alleged that they marked the face of the man who was running away during the pursuit when he looked back and fired at them. Firstly, it appears to be highly improbable that at that stage the witnesses should have at all got any opportunity of seeing the face. Secondly, it is again significant that the second (Station?) officer of police station, Mehtore who also pursued this man who was running failed to mark his face and to identify him. It seems to be very surprising that while the senior police officer, who saw the man who escaped under the same circumstances as the constables, was unwilling to identify him and give evidence against him while the constables were ready to do so. This circumstance does raise a strong suspicion that in all likelihood the face of the man who ran away could not be carefully marked by any one at all and the constables were the only persons who were willing parties to a fictitious identification. In this connection, it is also important to note that during the investigation none of these witnesses gave any description at all of the man who had escaped at the time of the raid. In fact, I have to remark at this stage that in this case the investigation by the circle inspector of police appears to have been highly unsatisfactory. All that the investigating officer seems to have done was to record the statements of members of the raiding party and to take the statements of the persons who were captured on the spot. He seems to have taken no trouble to do anything further in this case and he did not even take the elementary precaution of asking for the description of the escaped man from the witnesses who told him that they had seen his face and would be able to identify him later. Kirpal, appellant is an old man of about sixty years of age and he has grey moustaches. It is quite possible that the witnesses may have been unable to give a detailed description of the person who had escaped. But it should certainly have been possible for them at least to tell the investigating officer that the man was old and that he had grey moustaches. They could also have given other rough description about his height, general build and complexion, etc. The absence of any such description at the early stages of the investigation shows that the investigating officer wanted that the case against the 13th person should remain as vague as possible till the police had decided as to the person whom they would implicate in that place. In addition to all these circumstances, we come to the next serious lapse in the investigation of the case by the circle inspector. It appears from the charge-sheet submitted on 26-11-1948, against twelve persons, nine of whom are the appellants

except Kirpal, that at that time the circle inspector knew that Kirpal was most likely the 13th man of the gang who had run away with the gun. This is apparent from the entry made by him in one of the columns of the charge-sheet in which the names of accused persons, sent up for trial whether arrested or not arrested including absconders, is required to be entered. There is a note in this column which also lays down that if the person sent up happens to be an absconder his name should be entered in red ink. The name of Kirpal appellant was entered in blue-black ink and not red ink. It therefore shows that on 26-11-1948, when this case was sent up to Court by the investigating officer Kirpal was not absconding but was living actually at his house. In spite of the fact that Kirpal appellant's name was known to the investigating officer and he was in his house, the investigating officer took no steps to arrest him and to complete the investigation against him also as expeditiously as possible. He actually took no steps at all for about two months. It was on 20-1-1949, that Ali Husain's confession was recorded and thereafter on 22-1-1949, the circle inspector directed that Kirpal should be arrested. No explanation at all is forthcoming why Kirpal was left at liberty for about two months or so between 26-11-1948, and 22-1-1949. It appears to me that there is considerable force in the suggestion made on behalf of the appellant that the circle inspector deliberately left Kirpal at liberty allowing him to live peacefully in his village with the object that this interval of about two months might be utilised by his prosecution witnesses to see him in his village and mark him carefully so as to be able to recognise him at the time of the identification proceedings subsequently. Even if this inference does not necessarily follow, this circumstance creates a considerable doubt in my mind about the genuineness of the identification. Obviously, the prosecution witnesses had an opportunity to see Kirpal between the incident of 5-11-1948, and the identification proceedings which took place on 28-3-1949, and this opportunity, it appears, was deliberately made by the investigating officer. The counsel for the appellant appearing in the trial Court tried to question the circle inspector who investigated the case on this point. To avoid having to give an explanation for these circumstances, the circle inspector came out with a false statement. He in Court stated that he came to know the name of Kirpal only from the statement of Ali Husain approver and he clearly added that he did not know the name of Kirpal, appellant until this confession was made. The confession of Ali Husain was made on 20-1-1949, and yet we find that the investigating officer had himself written the name of Kirpal on the charge-sheet forwarded on 26-11-1949. Obviously, he could not have recorded the name of Kirpal, appellant unless he was aware of Kirpal's name and his statement that he knew the name of Kirpal only when the confession of Ali Husain was recorded is, therefore, entirely false. He seems to have come out with this wrong statement with the object of avoiding the necessity of explaining his default in making the arrests of Kirpal or in taking steps for his arrest at the earlier stages of the case. While Such circumstances exist, I consider that it would not be at all safe to rely on the evidence of identification of Kirpal by the four police constables who have come to give evidence against him. There is the further fact that the prosecution did not make any attempt to bring witnesses of village Sadaranpur to corroborate Ali Husain approver's statement that it was Kirpal who sent the men from Sadaranpur to join this gang of dacoits. So far as the evidence of Ali Husain approver is concerned, it cannot be given much weight. The learned Sessions Judge has himself remarked that the approver's evidence is not of great value and can only be used for the purposes of corroboration. Kirpal and his brother and several other persons had beaten Majid the father of Ali Husain approver, as well as some other Muslims and were actually convicted for the commission of that offence. A copy of the judgment of that case has been filed and in addition Ram Narain, brother of Kirpal appellant, has been produced

in evidence in support of this allegation. Ali Husain approver denied all knowledge saying that no such incident took place within his memory. It is possible that Ali Husain was too young at that time to have had personal knowledge of it and he could, therefore, safely plead ignorance. The fact, however, is that there was such a case, so that ill-feeling existed between Majid, the father of Ali Husain approver, and Kirpal the appellant. In these circumstances, the evidence of Ali Husain approver loses further value. Finally we have to note the circumstance that in this case the statement of Ali Husain approver was really of no use at all to the prosecution except for the purpose of implicating Kirpal appellant. As against all other persons who were sent up for trial, the evidence of the Superintendent of Police and all other prosecution witnesses was quite sufficient and there was practically no need at all for the evidence of an approver. Ali Husain was, therefore, most probably made an approver for the purposes of obtaining evidence against Kirpal appellant. These being the circumstances, it is not possible to attach any weight at all to the evidence of Ali Husain approver against Kirpal appellant. The case could have rested on the evidence of the witnesses of identification but as I have mentioned above the very unsatisfactory investigation of the circle inspector has had the effect of making the evidence of identification practically useless. The result is that in this case it has to be held that Kirpal is entitled to a benefit of doubt.

6. Consequently, the appeal of Nathwa, Laltu and Mohammad Taqi alias Kalian is dismissed in toto. The appeal of Niadar, Dharma, Lal Singh, Banwari, Prabhu and Achchhan is allowed against their conviction and sentence under Section 399, Penal Code, and they are acquitted of this charge. Their appeal in respect of their conviction for the remaining offence under Sections 402 and 307 read wit hs. 149, Penal. Code, is dismissed. The appeal of Kirpal appellant is fully allowed. His conviction and sentence are set aside and he is acquitted of all the charges under Sections 399, 402, 307 read with. Section 149 and Section 19 (f), Arms Act. Kirpal's bail bonds are discharged. All other appellants must immediately surrender to their bail in order to undergo the remaining part of their sentences