State vs Ram Lakhan And Ors. on 13 January, 1954

Equivalent citations: AIR1954ALL680

JUDGMENT

Agarwala, J.

1. This is a reference by the learned Assistant Sessions Judge of Faizabad under Section 307, Criminal P. C.

2. On 20-4-1948 polling was held at Iltifatganj School building in connection with the District Board Elections. The two main parties in the field were the Congress Party and the Socialist party. It appears that at first there was some quarrel between the two parties and then a riot broke out. Several persons received injuries. One Udaibhan Singh, Head Constable, was hit in the eye and lost it.

Two cross cases were challaned by the police. We are concerned with only one of the cross cases in which the accused seemed to belong to the Socialist party and in this case 18 accused were committed to stand their trial for offences under Sections 147, I. P. C., 323 read with 149 I. P. C., 333 read with 149, I. P. C., and 426 read with 149, I. P. C. They were tried with the aid of five jurors who acted as assessors also. "Under Section 323 read with 149, I. P. C., and 333 read with 149, I. P. C., the trial was a jury trial. For these offences, the jury by a majority of four to one gave their verdict that only the four accused, viz., Ram Lakhan Singh, Ayodhya, Hardwar Singh and Jabbar Khan were guilty.

Under Section 426 read with Section 149, I. P. C., their opinion as jurors was unanimous that none of them was guilty. The trial for the offence under Section 147, I. P. C., was by the court with the aid ..... of the same persons as assessors. As assessors, the very same jurors gave their opinion that none of the accused was guilty. The learned Assistant Sessions Judge agreed with the opinion given by the aforesaid persons as assessors and acquitted the accused of the offence under Section 147, I. P. C. He also agreed with the opinion of the jury so far as it related to the offence under Section 426 read with Section 149, I. P. C., and acquitted the accused of that offence.

So far as the trial under Sections 323 read with 149, I. P. C., and 333 read with 149, I. P. C., was concerned, he partly accepted the verdict of the jury, and acquitted all the accused except Ram Lakhan Singh, Ayodhya, Hardwar, Singh and Jabbar Khan. But he did not agree with their verdict so far as these four accused were concerned. In his opinion these four persons should also have been acquitted. Consequently, he made the reference under Section 307, Cr. P. C., which is before us.

3. The reason, according to the learned Asstt. Sessions Judge, why the accused Ram Lakhan Singh, Ayodhya, Hardwar Singh and Jabbar Khan should not be held guilty under Sections 323/149 I. P. C.,

and Section 333/149, I. P. C., was that the very same jurors had already expressed their unanimous opinion as assessors that the four accused were not guilty for the offence under Section 147, I. P. C. He further held that the opinion of the jury being against the weight of the evidence was perverse.

He opined that out of the eighteen prosecution witnesses only four witnesses could be believed and the others could not be believed, and if reliance were placed on these four P. W's the jury had no material before them to discriminate between the different accused and to hold the four accused as being guilty and the rest not being guilty. For all these reasons the learned Assistant Sessions Judge considered that the verdict of the jury was perverse.

4. It was urged that the trial of the accused under Section 323 read with 149, I. P. C., and 333 read with 149, I. P. C., should not have been with the aid of a jury. We think that the contention is sound.

5. Under Section 269:

> "the State Government may ..... by order in the official gazette, direct that the trial of all offences, or of any particular class of offences, before any court of session, shall be by jury in any district."

The U. P. Government has by notification No. 2038/VII-B-1583-50 dated 7th March 1951, prescribed that all offences except the following offences are to be tried by jury:

> (a) .....
>
> (b) .....
>
> (c) Offences punishable under Chapters V-A, VI, VII, VIII, IX, XXI of the Indian Penal Code.

The offences under Sections 147 and 149 fall under Ch. VIII, and assuming that Section 149 defines a substantive offence and makes it punishable, it will not be an offence triable by a jury. The question is whether Section 149 creates a substantive offences. and makes it punishable also. On this point it has been held by this Court that Section 149 does create a substantive offence and that a trial under that section, read with any other section which may be triable by a jury is nob to be so tried, vide -- 'Dakhani v. Emperor', AIR 1933 All 128 (A).

On the other hand, a Division Bench of the Patna High Court has expressed a contrary opinion. It has held that an offence which is triable with the aid of a jury does not cease to be so triable when it is an offence only because it is to be read with Section 149, Indian Penal Code, vide -- 'Ramsunder Isser v. Emperor', AIR 1926 Patna 253 (B). The view taken in -- 'Dakhani's case (A)', however, appears to us to be the correct view.

6. Chapter VIII of the Indian Penal Code deals with offences against public tranquillity. Section 141 defines an unlawful assembly. Section 143 prescribes punishment for the offence of being a member

of an unlawful assembly. Section 144 prescribes punishment for being a member of an unlawful assembly when the person concerned is armed with a deadly weapon. Section 145 prescribes punishment for an offence of being a member of an unlawful assembly after the unlawful assembly has been commanded to disperse. Then section 146 defines roiting and Section 147 prescribes punishment for rioting. Section 148 prescribes punishment for rioting with deadly wea-pona. We are then led to Section 149 which reads as follows:

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that common-object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence,"

Now this section presupposes that there is an unlawful assembly, and further that some member of the assembly has committed some offence, and it prescribes that if that offence is, committed by some member either in prosecution of the common object of that assembly or in such circumstances as the members of that assembly knew that it is likely to be committed in prosecution of that object, every other member of the assembly shall be guilty of the very same offence which has been committed by that particular member. It is no doubt true that the section embodies a rule of vicarious liability. Nevertheless, it is also true that it is by virtue of this section that members of the assembly who have not themselves committed any offence beyond the offence of being members of that assembly are made liable for an offence committed by others .

This section, therefore, defines an offence committed by a member of an unlawful assembly in the circumstances mentioned in the section. Im-pliedly, though not expressly, it also lays down that the other members of the assembly shall be punished as if they have committed the very same offence committed by another member of the assembly. Section 149 is not to be confused with Section 34, Penal Code. Section 34 speaks of a common intention, whereas Section 149 speaks of a common object. The distinction between the two has been very clearly brought out by their Lordships of the Privy Council in -- 'Barendra Kumar v. Emperor', AIR 1925 P. C. 1 (C). Their Lordships observed:

> "There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action which is the leading feature of Section 34, is replaced in Section 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but Section 149 cannot at any rate relegate Section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all."

Their Lordships further observed :

> "Section 149 creates a specific offence and deals with the punishment of that offence alone."

It is, therefore, abundantly clear that Section 149 creates a specific offence and impliedly provides for punishment of that offence. Since offences under Chapter VIII are not to be tried by a jury, an offence under Section 149 is not to be tried by a jury. The argument that Section 149 refers to some other offence is immaterial. When a person is a member of an unlawful assembly, and is convicted of a particular offence by virtue of Section 149, he is being convicted under Section 149, though the punishment which will be awarded to him is to be awarded having regard to that other offence for which he is made liable.

7. After referring to -- 'Barendra Kumar Ghosh's case, (C),' their Lordships of the Patna High Court in -- 'Ramsunder's case, (B)', observed :

> "It is true Section 149 is an offence in respect of which there has been participation. It pre-cribes new set of conditions to which the section shall become applicable, but in the end the guilt of the person shall be the guilt attaching to the principal's crime. Now when the notification of the 11th September 1921, declares that the trial oi an offence under Section 436 must be by jury and not by assessors, the assessors are incompetent to determine whether a certain set of facts constitute the offence. It follows that the disability continues where the enquiry is whether upon the additional set of facts widening the field of liability prescribed in Section 149 the accused has rendered himself punishable for the same offence. The trial remains a trial under Section 438; the court must always first determine whether that offence has been committed by an individual and next whether Section 149 makes the participators responsible."

There is an assumption in the observation quoted above that because the trial under Section 436, I. P. C., could not have been with the aid of assessors but could only be by a jury, the assessors were incompetent to try an offence under Section 149 when it was to be read with Section 436. The two offences are quite different. An offence under Section 436 will be committed by an individual person, or read with Section 34 may be committed by some persons jointly. But in order to determine that an offence under Section 149 read with Section 436 has been committed certain other facts will have to be determined, namely, whether they were members of an unlawful assembly, and further whether the commission of the offence was in prosecution of the common object of the assembly, or the offence was committed in such circumstances as the members of the assembly knew to be likely to be committed in the prosecution of the common object of the assembly.

For reasons best known to the Government, the Government did not include the trial of an offence under Section 149 as a trial by a jury and considered that such an offence should be tried by the Judge with the aid oi assessors. It is not for us to find out the reasons which led the State Government to exclude the trial of offences under Chapter VIII from the purview of jury trial. The fact remains that a trial for an offence under Section 149 read with Section 436 will be different from

a trial for the offence under Section 435 simpliciter.

Very often the trial for such an offence is stated as an offence "under Section 436 read with 8. 149". To be accurate, the offence should be mentioned as "under Section 149 read with section 436", because the substantive offence for which a person is being tried in those circumstances is not under Section 436, but under Section 149 read with the help of Section 436. In our opinion, therefore, the trial of the offences under Section 323 read with Section 149 and Section 333 read with Section 149, or to be more accurate of the offences under Section 149 read with Section 323 and Section 149 read with Section 333 should have been with the aid of assessors and not by jury.

8. This, however, does not conclude the matter. The question remains what is the effect of this irregularity. Upon this Section 536, Criminal P. C. is clear. It provides that if an offence triable with the aid of assessors is tried by a jury the trial shall not on that account only be invalid. In some cases, it has been held that a verdict given by a jury in a case which should have been tried by the aid of assessors can be recorded as the opinion of the assessors and the trial will not stand as a trial with the aid of a jury, but as a trial with the aid of assessors, vide -- 'Patti-kadan Ummaru v. Emperor', 26 Mad 248 (D) and -- 'Empress v. Mohim Chunder Rai', 3 Cal 765 (E).

A contrary view has been expressed by a Full Bench decision of the Bombay High Court in --'King Emperor v. Parbhu Shankar', 25 Bom 680 (F). We think that the view taken by the Bombay High Court should be followed. According to that court the trial should be taken as a trial by a jury, because it was in fact a trial by a jury and not a trial with the aid of assessors. We cannot on the wordings of Section 536 convert a trial by a jury into a trial with the aid of assessors. It remains a trial with the aid of jury, and Section 536 lays down that for that reason only it will not be considered to be illegal. The trial in the present case cannot, therefore, be invalidated on the ground that the offence should have been tried with the aid of assessors. (9) This leads us to the main point in the case. The learned Assistant Sessions Judge was of opinion that the verdict of the jury is perverse. We have considered the evidence in the case, and we find that against the four accused individually against whom a verdict of guilty was given by the jury under Sections 323/149 & Sections 333/149, I. P. C., it was proved that they had themselves inflicted injuries on other persons.

Ram Lakhan Singh was proved to have struck Udai Bhan Singh, Head Constable. This is borne out by the testimony of Nazir Khan, Abrar Husain, Sita Ram and Udai Bhan Singh. Sita Ram and Udai Bhan Singh were themselves hurt. There can thus be no doubt that Bam Lakhan Singh was responsible for causing the grievous hurt to Udai Bhan Singh, Head Constable who was a public servant, and who at the time when he was hit was discharging a duty as such. He was, therefore, guilty under Section 333, I. P. C. It was not necessary to convict him under Section 333 read with Section 149, I. P. C. So also it was proved on the record that Hardwar Singh, Ayodhya Singh and Jabbar Khan had caused simple hurts to other persons. They were all guilty under Section 323, I. P. C. and again we may say it was not necessary to hold them guilty under Section 323 read with Section 149, I. P. C. Thus, although the verdict of jury, in so far as it held these four persons guilty of offences under Section 149 read with Sections 323 and 333, I. P. C., was erroneous, these persons could rightly be held guilty under Section 323 or 333, I. P. C., as pointed out by us above.

10. In this view of the matter, there is no inconsistency in acquitting these persons and other accused who were tried along with them of the offences under Section 147 and yet holding these individual accused guilty of offences which they committed not as members of an unlawful assembly but as individual persons.

11. The result, therefore, is that we convict Ram Lakhan Singh under Section 333, I. P. C. and sentence him to three years' rigorous imprisonment. We convict Hardwar Singh, Ayodhya Singh and Jabbar Khan under Section 323, I. P. C. and sentence each of them to three months' rigorous imprisonment.

12. The reference is thus disposed of.