Patna High Court
Sunder Mandal vs Dhanukhi Yadav And Ors. on 1 May, 1967
Equivalent citations: 1968 (16) BLJR 380, 1968 CriLJ 1440
Author: M Verma
Bench: M Verma
ORDER M.P. Verma, J.

1. This appeal has been preferred under the provision of Section 417 (3) of the Criminal Procedure Code. Sunder Man-dal, the present appellant, brought a case against Dhanukhi Yadav, his brother Khanro Yadav and Dhanukhi's son Sakal Yadav. It is said that on 6-9-63 at 5.30 p.m. Sakal was seen grazing his 12 heads of cattle in the rahar field of Sundar, situate in village Loncha Patnam, Police station Moffasil Monghyr district Monghyr, Sundar came there and drove away the cattle towards the pound. Sakal then called his father upon which Dhanukhi and his brother Khanro came there. They rescued the cattle though Sundar protested and said that she was taking the cattle to the pound and they should not rescue the same. Then on the order of Dhanukhi, Sakal gave lathi blows to Sundar and Khanro gave slaps to him. On the hulla raised by Sunder, the other prosecution witnesses came there and saw the assault and the rescue of the cattle by Sakal, Dhanukhi and Khanro. Injured Sakal was taken to Monghyr sadar hospital where his fardbeyan was recorded by Assistant Sub-Inspector Sarjug Prasad Verma of town police station. Dr. Ramji Singh (P. W. 5) of Monghyr hospital examined Sakal on 7-9-63 at 10.25 a.m. and found two injuries on his person, namely, a diffused swelling bruised covering lower one third of left leg, ankle and foot. X'ray showed fracture of left leg fibula in the vital lower parts and one bruise 1" x 1/2" on front right leg. According to this doctor, injury No. 1 was grievous and injury No. 2 was simple caused by a lathi within 24 hours, Dr Jitendra Mohan Gupta (P. W. 7), a private medical practitioner had X rayed the leg of Sundar on 11-9-63 and found that there was a fracture of lower end of left fibula. His report is Ext. 2. When this medical report was received by the police, a first information report was drawn up on 22-9-63 at 6 p.m. and the police started investigation and ultimately submitted charge sheet on 7-11-63.

2. Meanwhile, Sundar filed a complaint petition on 17-9-63 before the Subdivisional Officer, Sadar, Monghyr who took cognizance on 19-9-63 under Section 323 of the Penal Code and Section 24 of the Cattle Trespass Act Both the complaint case and the police case were transferred to file of the Honorary Magistrate first class, Monghyr. They were amalgamated and tried together. In that court charges were framed under sections 325/34 and 426 of the Penal Code and Section 24 of the Cattle Trespass Act. The learned Honorary, Judicial Magistrate acquitted all these three respondents. Hence this appeal by the complainant. Sundar Mandal, to this Court.

3. Learned counsel appearing for the respondents raised a preliminary objection. His contention is that this appeal is not maintainable under Section 417 (3) Cr. PC. because the case had proceeded on the charge sheet submitted by the police and the procedure laid down under Section 251-A of the Criminal Procedure Code was adopted. He further pointed out that the order sheet of the court of the learned Honorary Judicial Magistrate clearly indicated that the Assis-

tant Public Prosecutor was in charge of this case and he was taking steps to produce the witnesses etc. The last order in this order sheet is dated 19-5-65 and the learned Honorary Judicial Magistrate has written that all accused are acq uitted under Section 251 (11) Cr P. C. It was further contended that the appellant also filed a revision petition before the Sessions Judge, though the same was summarily dismissed on 23-6-65. He. having availed that opportunity, now cannot back out from that position.

He relied in this connection on a Bench decision of this Court in the case of Har-bans Singh v. Daroga Singh, AIR 1962 Pat 27. But, the facts of that case are some what different. In that case Harbans Singh had lodged a first information report on 12th January, 1956, at Phulwari police station concerning an occurrence that had taken place on the 11th January, 1956. A copy of the first information report was forwarded to the Subdivisional Officer and he started G. R case No. 98 of 1956. On 10th February, 1956, while the police investigation was going on, Harbans Singh filed a protest petition before the Subdivisional Officer who treated it as a complaint and examined him on solemn affirmation on the same date. Case No. 43/C/56 was started on its basis. The sub-divisional magistrate ordered the matter to be put up with connected case record on the 14th February, 1956. As the record was not available readily, the learned magistrate ordered on 6th June, 1956, that the case be transferred to a magistrate. The magistrate proceeded to hold the commitment enquiry in accordance with the provisions of Section 207-A of Chapter XVIII Cr. P. C, and committed the accused persons. A trial was held by the first Additional Sessions Judge of Patna who acquitted the accused persons. In the meantime, Case No. 43/C/56 went on being postponed from date to date until the 6th June, 1956, on which date the Sub-divisional Magistrate transferred the police case to the magistrate. He gave the order as follows:

"Complainant is absent. Charge sheet Under Section 148/149/302, I. P. C. submitted in the police case.

Amalgamated with G, R. No. 98/56 Pulwari P. S-case No. 4 (1) 56."

In such circumstances, this Court held that the case could not be said to have been instituted upon a complaint within the meaning of Sub-section (3) of Section 417 Cr. P. C. The effect of the order of amalgamation therefore, was that the complaint case was merged with the police case. In other words, the complaint case lost its identity and separate existence as it merged with the police case which alone retained its identity.

4. On behalf of the appellant a reference was made to the case of Jamuna Singh v. Bhadai Shah, AIR 1964 S. C. 1541. In this case a complaint was filed before the magistrate and he passed the following order:

"Examined the complainant on s.a. (solemn affirmation). The offence is cognizable one. To S. I. Baikunthpur for instituting a cast and report by 12-12-56."

In such circumstances it was held that if the magistrate had used the words "for investigation" instead of the words "for instituting a case" the order would clearly be under Section 202 of the

Code. The fact that he used the words "for instituting a case'' did not make any difference The magistrate was not bound to take cognizance of the offences on receipt of tht complaint and he could have, without taking cognizance, directed an investigation of the case by the police under Section 156 (3). But. when he took cognizance, it was open to him to order investigation by the police only under Section 202 and not under Section 156 (3) Cr. P. C. The Sub-Inspector of police treated the copy of the petition of complaint as a first information report and submitted charge sheet against accused persons, this would not make any difference and the report made by the polict officer, though purporting to be a report under Section 173, should be treated in law to be a report under Section 202 only. In other words, the cognizance having already been taken by the magistrate before he made the order, there was no scope of cognizance being taken afresh of the samt offence after the police officer's report was received. Thus, there was no escape from the conclusion that the case was instituted on private person's complaint and not on the police report. The contention that tht appeal did not lie under Section 417 (3) Cr. P. C, was, therefore, rejected.

5. Both the aforesaid cases were considered and discussed in the case of Adityt Narain Rai v. Ramasis Rai, AIR 1964 Pat 538. The facts of this case are quite similar to the facts of the case before me. In that case a complaint petition was filed before the Subdivisional Magistrate who after examining the complainant on solemn affirmation, passed an order directing tht police to investigate and institute a case. A first information report was drawn by the police on the basis of the complaint petition and a charge sheet was submitted. Cognizance was then taken on the chargt sheet and later the complaint case was amalgamated with the police case. The magistrate proceeded under Section 251-A and acquitted the accused under Sub-section (11) of that section. It was held that an appeal under Section 417 (3) Cr. P. C. against the order of acquittal lay as tht case should be deemed to have been insti-tuted on a complaint and not on a police report. The case reported in AIR 1962 Pat 27, was distinguished and the case reported in AIR 1964 S. C. 1541 was followed. It was further observed that the procedure followed under Section 251-A was irregular and could not be said to have occasioned any failure of justice. In the instant case, it is to be noticed that the complaint petition was filed on 17-9-63 and cognizance was taken on 19-9-63. The fardbeyan was no doubt recorded earlier, i. e., on 7-9-63, but the first information report was drawn up on 22-9-63 and before that the magistrate had already ordered that the accused should be summoned under Section 323 of the Penal Code and Section 24 of the Cattle Trespass Act and this order was passed on 19-9-63. So, in mv opinion, be held that the amalgamation of the police case with the complaint case would not make the com-plaint case lose its identity and that being the position, an appeal under Section 417 (3) Cr. P. C. was maintainable.

6. Learned counsel appearing for the appellant has urged that the learned Honorary magistrate came to a wrong conclusion about the facts of this case because he committed errors of record and so the decision was vitiated. In paragraph 4 of his judgment, the learned Honorary Magistrate has observed that neither the complainant nor any witness has given the area and boundary of the disputed land and that, only the Investigating Officer has given the boundary of which he had no personal knowledge. This appears to be an error of record, because towards the end of the complaint petition it has been clearly mentioned that 8 kathas of land, which contained raher crop, was grazed and all the four boundaries of that portion of the land was given. The learned magistrate doubted the ownership and possession of the complainant concerned this field. But, from the trend of

evidence it does not appear that it was even suggested to any witness that this field belonged to somebody else. In his own evidence the complainant (P. W. 4) has stated that the rahar field, which was grazed, stood in the name of Janki and he was a step-son of the said Janki, because his mother remarried Janki after the death of her first husband, Bhi-khari. The learned magistrate was further of opinion that the complainant had no right to catch the cattle so as to impound them, and, therefore, though the accused persons rescued the cattle from him, they did not commit any offence. This is also not a correct view of legal position In the case of Ramratan v. State of Bihar. AIR 1965 S.C. 926 it was pointed out that when a person seizes cattle on the ground that they were trespassing on his land and causing damage to his crop and produce and had given out that he was taking them to the pound, he commits no offence of theft however mistaken he may be about his right to that land and the crop. The remedy of the owner of the cattle so seized is to take action under Section 20 of the Cattle Trespass Act. He has no right to use force to rescue the cattle so seized. In the present case, the evidence is that the cattle were damaging the rahar crop of the complainant and so he had seized them and had clearly given out that he was taking those cattle l,o the pound. This damage of crop was also found by Nand Keshvar Prasad (P. W. 8), the Assistant Sub-Inspector of Police, who visited the place of occurrence in connection with the investigation of the case. The learned Honorary Judicial Magistrate has further observed in paragraph 5 of his judgment that no witness stated that the complainant protested while the cattle were being rescued. This is a wrong statement of fact because both P. Ws.

1 and 2 have stated that the complainant had protested by saying as to why the accused persons were snatching away the cattle from his custody.

The learned magistrate further expressed his opinion that the nature of injuries found by the doctor did not appear to be grievous. This is wrong. Dr. Jitendra Mohan Gupta (P. W. 7), who took the X' ray plate of the leg of the complainant, found that there was fracture in the lower end of the left fibula. On the basis of this report Dr. Ramji Singh (P. W. 5) clearly stated that injury No. 1 was grievous. The learned Magistrate has also observed that it was just possible that the complainant might have sustained such injury with the chouki. There is nothing on the record in support of drawing such an inference and presuming a thing like that. Had this been the case, the attention of the Investigating Officer must have been drawn to that portion of the field where chouki was being given. In paragraph 8 of his judgment, the learned Magistrate has further observed that no witness saw the crop being grazed. This also is wrong. P. W. 1 clearly stated that he say Sakal Yadav grazing his 12 cows and bullocks in the rahar field of Sundar. P. W.

2 also stated that Sakal was grazing his cattle in the rahar field of Sundar. According to P. W, 4, when he went to his own field, he saw Sakal grazing 12 heads of cattle.

7. It may further be mentioned that the complainant examined 8 witnesses before the learned Honorary Magistrate. Out of them, P. Ws. 1 to 4 are the eye witnesses to the occurrence. P. W. 3 was of course tendered. The remaining three witnesses have given a consistent story about the seizure of cattle by Sundar and the illegal rescue of those cattle by the accused persons.

8. As regards the assault, the evidence is consistent that Sakal gave lathi blows to Sundar. There is no indication of any injury caused by slaps and fists by Khanro Yadav. It also appears to be an exaggeration to say that Dhanukhi Yadav was the order giver.

9. Learned Counsel appearing for the respondents has raised a few points which will be disposed of here. He has said that there is a difference in the version of the prosecution witnesses concerning the nature of assaults. P. W. 1 said that the first blow was on the right leg and the second blow was on the left leg and then Sundar fell down. P. W. 2 has said that Sundar fell down after he received the first blow and the fists and slaps. The second blow was given thereafter. P. W. 4, the injured himself, has said that the first blow was given on the left ankle and the second blow was given below the ankle. He does not sav right or left. In my opinion these are not material contradictions. When there were many persons to see the occurrence, there may be some difference in the recital of events and the sequence thereof. He has also urged that there was some difference in the evidence concerning the place of the occurrence itself. Some witnesses said that it was to the north of the well whereas some said that it was to the south west of the field of the complainant. The exact topography or the configuration of plot has not been brought on the record and so it is difficult to say whether the witnesses have given wrong description by saying North or South West or North East. This objection cannot be accepted. The evidence of the Investigating Officer concerning the location of the place of occurrence is not strictly speaking admissible because he must have been guided by others while visiting the place of occurrence. There is also some discrepancy concerning as to who came first on the hulla and who came subsequently. Such meticulous details cannot be expected from rustic witnesses. On a hulla being raised by the injured, several persons v. ere collected and when a particular witness was asked as to who were those persons, he gave out all the names. It is rather very difficult for him to remember as to the exact sequence in which these prosecution witnesses arrived there.

Some such discrepancies are bound to occur in any case and the main consideration should be whether the witnesses were purposely suppressing the truth and bolstering up a false case or they had not seen the occurrence themselves but were trying to pose as eye witnesses. I do not find any thing of this nature in this case. It is further said that P. W. 2 in the fardbeyan said that Musharu was the son of Dukhit Mandal and it was also so said in the petition of complaint. In the court, Musahar said that he was the son of Jogi Mandal and this point was made clear in the cross examination when he said that he was the son of Dukhit. So, there must have been some confusion some where. He was not examined before the police, as it is said, but I do not think his non-examination before the police would make his evidence untrustworthy. Even if it is left out of consideration, there were consistent statements of other witnesses to support the occurrence in question. So. I do not think there is any merit in the contentions raised regarding the place of occurrence or the arrival of the prosecution witnesses at that place iust at the time of the assault as well as immediately afterwards

10. On behalf of the respondents, a point of limitation was also raised The judgment of the Magistrate is dated 19-5-65 and the order of the Sessions Judge sum-

marily rejecting the criminal revision is dated 23-6-65. If a period of 60 days is computed, it will be noticed that 12 days in May, 30 days in June and 18 days in July were available to the appellant. There was a delay of two days in the preparation of the copy of the order and so this appeal ought to have been filed on the 20th July, 1965. Learned counsel has urged that though the copy of order was ready on the 10th July, 1965, the copy could not be taken for two days as 11th was a Sunday and 12th was closed for Fateha-dawazdhum. So, there was no delay in filing the appeal. However, to remove any defect, the appellant has filed an application under Section 5 of the Limitation Act and in the circumstances of the case the delay, if any, is condoned, because the appellant has a good case to agitate in this Court, Therefore, this objection is overruled.

11. It is correct to say that an appellate court should not readily reverse the judgment of acquittal but in the instant case it is to be found that the learned Honorary Magistrate came to a wrong conclusion because he committed errors of record and drew inferences which were not justified. In the circumstances of the case, therefore, respondents Dhanukhi Yadav and Khanro Yadav must be given the benefit of doubt so far as the order of assault and the assault by fists and slaps on Sundar is concerned. But, Sakal Yadav must be found guilty of an offence under Section 325 of the Penal Code and he is accordingly convicted under that section and is sentenced to undergo rigorous imprisonment for a period of six months. All the three respondents are convicted under Section 24 of the Cattle Trespass Act and each of them shall pay a fine of Rs. 25/~ or in default undergo rigorous imprisonment for one month. Out of the fine, if realised, a sum of Rs. 50/- shall be paid to Sundar Mandal by way of compensation.

12. In the result, this appeal is allowed and the order of acquittal passed by the learned Honorary Magistrate is set aside and the respondents are convicted and sentenced as mentioned above.