

Bogatola and anr. Vs. the State

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Court : Guwahati

Decided On : Nov-27-1972

Judge : M.C. Pathak and Baharul Islam, JJ.

Appellant : Bogatola and anr.

Respondent : The State

Advocate for Pet/Ap. : Shri. B. C. Barua

Judgement :

Baharul Islam, J.

1. In this case appellant Bogatola alias Mena Ruti and appellant Tayam Giba were convicted under Sections 302/149 and 324/149 and each of them was sentenced to imprisonment for life under Section 302/149 and to rigorous imprisonment for one year under Section 324/149, by the Sessions Judge, Lakhimpur, at Dibrugarh in Sessions Case No. 56 (L-D) of 1969. Appellant Bogatola was further convicted under Section 148 of the Penal Code and sentenced to rigorous imprisonment for two-years and appellant Tayam Giba was further convicted under Section 147 of the Penal Code and sentenced to R. I. for one year. They have filed the present appeal against the aforesaid order of conviction and sentences.

2. The prosecution case, in brief, is that on 20th December, 1964, a cow belonging to appellant Bogatola damaged the crops of Ramakanta (P.W. 3) and as such the

cow was confined by his son, Deva-kanta, deceased, in his house. In the afternoon appellant Bogatola came to the house of Ramakanta to take back the cow, but Devakanta agreed to release the cow only on payment of compensation for the damage done to his crops, whereupon appellant Bogatola left the place. At about 9 P.M. when the members of the family of Ramakanta were sitting by the fire-side after their meals, five Abors, namely, appellant Tayam Giba, Tasok, Basoni Takum, Talar and Salikota Tadar came to the house of Ramakanta. They were invited inside the house and received with customary courtesy and were offered betel nuts. On enquiry they said that they came there to negotiate on the release of the cow. After some talk they left the place and then some one shouted from outside to the inmates of the house saying that their gram-cultivation was being damaged by cattle. Hearing shouts deceased Devakanta came out of the house when he was surrounded by 20/25 persons including the appellants and appellant Bogatola and others assaulted him with daos and caused his death. Hearing sounds of assault, and screams of Devakanta, his father Ramakanta (P.W. 3), mother Champa (P.W. 5), brothers Jogeswar (P.W. 2) and Sadananda (P.W. 9) came out from their house. They were also assaulted by the persons who were outside the house. Devakanta died at the spot. Ramakanta, Jogeswar and Champa were seriously injured. Hearing their cries several neighbours came and Ramakanta sent Ramnath Saikia (P.W. 5) to lodge the first information report at the Dhemaji Police Station, where the F. I. R. was lodged at 1 A.M.

3. Police registered a case and after investigation submitted charge-sheet against 22 persons showing 12 as absconders. During the committal proceedings two of the said 10 persons also absconded. The learned Magistrate examined five witnesses and found a prima facie case against 8 persons under Sections 148, 302/149 and 324/149 of the Penal Code and committed them to the Court of Sessions to stand their trial. He split up the case of these 8 persons from the absconding accused.

4. In the Sessions Court also charges were framed under Sections 148, 302/149 and 324/149 of the Penal Code. Charges were read over and explained to the accused persons who pleaded not guilty. The defence of the appellant Bogatola is that he was the original settler in the Aborgaon whereto some new settlers

migrated and were trying to grab his land, and, he, being the leader of the Abors, objected to the settlers for which the latter instituted some cases against him and having failed to do anything, he has been falsely implicated in the present case. In the relevant night he was sleeping in his house. Next morning he learnt that some Abors had committed some offence in the house of Ramakanta and apprehending trouble he left his home with the members of his family, and went to inform the Political Officer at Lakhapani. Later on, he came to know that his name was implicated in the case and he came to Dibrugarh and appeared in the Court whereupon he was remanded to jail custody.

5. In the case the prosecution has examined altogether 17 witnesses including the Doctor (P.W. 1), who held the postmortem examination, and the Police Officers. Of them P.Ws. 2, 3, 5, 6, 7, 8 and 9 are eye-witnesses. Except P.W. 7 others are members of the family of P.W. Ramakanta. P.Ws. 4 and 7 are neighbours who came to the place after the occurrence.

6. P.W. 2, who is the brother of the deceased, gives a resume of the facts of the case. His evidence is that he knows appellant Bogatola, Galong Pegu and Tayam Pegu by name and sight from before. Other accused persons were known to him but he did not know their names. Accused Bogatola and Galong were his neighbours. A cow of Bogatola damaged their paddy on December 20, 1964, and so Devakanta caught hold of the cow and confined it in his house. In the evening at about 4 O'clock Bogatola came to his house to take back the cow. But his elder brother, Devakanta, agreed to release the cow only on payment of compensation for the damage. Bogatola then went back. At night when the members of his family were by the fire-side after their dinner, accused Tayam Giba, Tasak, Tavam, Basani Tazum and Chalikata came to their house. They were received with customary courtesy. On enquiry, they said that they came in search of the cow. After a little while they went out. Immediately after they left, they heard a shout from outside that their cow was eating up their pulse crops. He says that the cry appeared to be that of Bogatola. On hearing the cry Devakanta went out. After a while they heard screams of Devakanta that he was being killed. On hearing the screams he went out. He found many persons surrounding Devakanta and saw Bogatola giving dao blows to Devakanta. He says altogether there were about 20

persons. He further says that appellant Tayam Giba attacked him and gave him dao blows on his leg whereupon he fell down. Appellant Bogatola also attacked him and gave dao blows on his head. The Doctor examined him. He identified in the witness box accused Sundar, Kesharam, Sagal Naru and Muchi before the committing Magistrate. He says that these persons along with appellant Bogatola were the members of the assembly.

The other members of the family,, namely P.Ws. 3, 5, 6, 8 and 9 also support the prosecution case. P.W. 3, inter alia, says in his evidence that after coming out of his house he saw 20/25 persons surrounding and assaulting Devakanta at a little distance from his house. Accused Bogatola, Tabu, Takum and Takar Tadar gave him dao blows. P.W. 7, Makhan Chandra Bora, who is a neighbour deposes that at the relevant night hearing cries and screams from the house of Devakanta, he went to their house and saw 'Bogatola cutting Devakanta' who was surrounded by some other persons. These persons had daos and lathis in their hands. These persons chased him and therefore he fled and went to the military camp. Amongst the members of the assembly he recognised Bogatola. P.W. 13, Paubar Koch, who is also a neighbour, inter alia, deposes that on the night of occurrence after hearing cries he went to the house of Ramakanta and learnt from him about the occurrence. P.W. 1, Dr. D. N. Bharali, S.D.M. & H.O., Dibrugarh, who held the post-mortem examination found the following injuries on the dead body:

- (1) One incised wound on the back of the neck at the level of the 7th cervical vertebra 4 1/2' x 1' x bone deep.
- (2) One incised wound on the back of the neck 21' below No. 1 injury 8' x 2 1/2" x bone deep.
- (3) One incised wound on the left shoulder region 4' x 3', joint exposed, ac-romion cut.
- (4) One incised wound on the posterior aspect of the left forearm 4' x 2' whole bone cut and divided.

(5) One incised wound on the left lumbar region abdominal cut intestine seen outside the cavity 5'x 3' x-abdominal wall.

(6) One incised wound in the epigastric region of the abdomen 2' x 1' x stomach deep.

The other organs were healthy. According to the Doctor the injuries were ante-mortem and death was due to shock and haemorrhage as a result of the injuries. He further found that the injuries were sufficient in the ordinary course of nature to cause the death and that the injuries were homicidal in nature.

7. Let us first examine the case against appellant Tayam Giba. The evidence against him is the evidence of P.Ws. 2, 8, 9 and 6. P. W. 2 deposes before the Sessions Judge that in the assembly of the attackers he saw Tayam Giba who gave him a dao blow on his legs. But he did not mention his name to the investigating Officer.

P. W. 9, Sadananda Bora deposes before the Sessions Judge that Tayam Giba assaulted Devakanta with a lathi, but he did not mention before the Investigating Officer his name as assaulting Devakanta with a lathi. That apart, his evidence is belied by the medical evidence. No injury caused by a lathi was found on the body of Devakanta by P. W. 1, P. W. 8, Kirti Nath Bota, deposes before the Sessions Judge that he saw Tayam amongst the attackers. But before the investigating officer he did not mention his name. P. W. 6, Mali Bora, deposes before the Sessions Judge that she saw appellant Tayam Giba amongst the attackers. But she also did not mention his name before the Investigating Officer.

Although these are mere omissions to implicate name of appellant Tayam Giba by P.Ws. 2, 8, 9 and 6, in our opinion the omissions are material. If he had given serious blows to Devakanta and others, his name could not have been omitted. In our opinion, therefore, the prosecution has failed to prove his presence in the assembly beyond reasonable doubt and he is entitled to acquittal.

8. Let us now examine the case against Bogatola. P.Ws. 2, 3, 5, 6, 7. 8 and 9 have stated the name of Bogatola and alleged that he was one of those who gave

dao blows to deceased Devakanta. The evidence of P. W. 7 Makhan Chandra Bora, needs separate scrutiny. His evidence is that on the night of occurrence after hearing the cries he came out from his house to the house of Davakanta and saw Bogatola cutting Devakanta. In cross-examination he stated that he could not remember whether before the investigating Officer he said that he was sitting in Ramakanta's house from 1 O'clock in the afternoon with Ramakanta, Devakanta and other members of the family; but he did not recollect whether the five Abors visited the house of Ramakanta or not. But to the investigating officer he had stated that he had gone to Ramakanta's house, was talking with Ramakanta and the other members of his family including Devakanta and that while he was sitting with them by the fire side at about 9 P. M. five Abors came and sat there with them. In cross-examination he has admitted that when he first came to Subahipatha in 1952, he was staying in the house of Ramakanta. In view of the contradictions and his indebtedness to Ramakanta it is difficult to place reliance on his evidence.

Although the other witnesses, namely, P.Ws. 2, 3, 5, 6, 8 and 9 are members of the same family and related to deceased Devakanta, they were most natural witnesses and we do not find any reason to disbelieve them. It is true that the relation between the appellant and the family of the deceased was strained. But that does not lead us to disbelieve the witnesses. If somebody else would have killed Ramakanta, there was no reason as to why that persons's name would not be implicated and Bogatola's name would be substituted. It is also not the defence suggestion that any disinterested witnesses have been withheld.

Another important factor in the case is that no time was lost in lodging the first information report. The occurrence having taken place at 9 A. M., the information was lodged at 1 A. M. although it was a cold December, month and name of Bogatola was mentioned in the first information report. It does not appear, therefore, that the name of Bogatola was falsely implicated. There is, therefore, no doubt that the appellant Bogatola was a member of the assembly and that he gave dao blows to deceased Devakanta.

9. The learned Sessions Judge also has found:

All the witnesses are at one to say that it was accused Bogatola along with a few others, who inflicted the injuries on the deceased. Whether or not accused Bogatola inflicted the fatal injury it is clear that he also joined in the assault and inflicted injuries with dao.

19. We are now to see what offence if any, is committed by Bogatola.

Shri B. C. Barua, learned Counsel for the appellants, submits that the six out of the eight accused persons who were charged for forming an unlawful assembly having been acquitted, the two appellants cannot be convicted under Section 148 or under the other two sections read with Section 149. He submits that in the charge the Sessions Judge has mentioned only eight definite names and has not mentioned that there were unknown and unnamed persons in the unlawful assembly. That being the position when six of them are acquitted, the number of members of the assembly falls below five and the assembly ceases to be an unlawful assembly.

The law is well settled that if 5 or more persons commit (constitute) an unlawful assembly and if after acquittal of some of the accused, the number of persons convicted is reduced to less than 5, the conviction will not be illegal, if there be evidence to show that in the assembly there were 5 or more persons named or unnamed. The Supreme Court, in the case of *Bharwad Mepa Dana jv. The State of Bombay*, reported in AIR 11960 SC 289 : 1960 Cri LJ 424 approving the decision of the Federal Court in this regard reported in AIR 1950 FC 80 = 1(51 Cri LJ 1057), has held:

In *Kapildeo Sing v. The King* 1949 FCR 834 : AIR 1950 FC 80 : 51 Cri LJ 1057, the prosecution case was that 60 or 70 men constituted the unlawful assembly, but the appellant in that case was charged with thirteen others with having committed certain offences in furtherance of the common object of the unlawful assembly. The appellant was found guilty, but the thirteen others who were charged along with the appellant were acquitted as they were not properly identified. One of the contentions raised in the Federal Court was that in all fourteen persons having been charged with rioting and thirteen of them having been acquitted, it could not be held that there was any unlawful assembly of five or more persons whose

common object was to commit an offence. With regard to this contention, it was observed at pages 837-838 (of FCR) : (at p. 81 of AIR):

The essential question in a case under Section 147 is whether there was an unlawful assembly as defined in Section 141, Indian Penal Code of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only. Section 147 still applies, if upon the evidence of the case the Court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified.

11. This decision of the Supreme Court clinches the point. In the instant case P. W's. 2, 3, 5, 6, 8 and 9 have stated that appellant Bogatola along with 20/22 others armed with lathis and daos attacked Deva-kanta. There is, therefore, no doubt that an unlawful assembly was formed by about 20/22 persons and appellant Bogatola was a member of that unlawful assembly; and that the common object of the assembly was to assault Devakanta and the members of his family.

The learned Sessions Judge also has found, and in our opinion, correctly;

I find that more than five persons in number came in a body and was waiting outside the house when five persons came inside to see as to where the members of the household were and by a trick lured out Debakanta, who being the eldest son in the family came out on a false call, and assaulted him causing his death and when other members of the family came out were also assaulted by the assailants. The object of the assembly, therefore, is clear that they came armed with deadly weapons with the object of assaulting the members of the family for their keeping the cow belonging to accused Bogatola during the day for the damage caused to their crops. The object of the assembly was certainly to assault the members, which was unlawful and when there were more than five persons in that assembly every person who was present and shared the common object must be held guilty of the offence of rioting.

12. Another argument of Shri Barua is that the common object mentioned in the charge is "assaulting the members of the family of Ramakanta Bora", and as Debakanta is alleged to have been killed before the other members of the family were assault-ed, it cannot be said that the murder was committed in prosecution of the said common object. This argument has no substance. Deceased Debakanta himself is a member of the family of Ramakanta. In our opinion the implementation or execution of the common object starts the moment Debakanta is assaulted and continues till Ramakanta and Jogeswar were assaulted.

There is, therefore no doubt that the common object of the assembly was to assault the members of the family of Ramakanta, that the common object, and as such the assembly, was unlawful, and that in prosecution of that common object, Debakanta was killed. In our opinion therefore appellant Bogatola has been rightly convicted under Sections 148 and 302/149, Penal Code.

13. Let us now examine the conviction under Section 324/149 of the appellant Bogatola. The charge was for assaulting Ramakanta and Jogeswar. The evidence is that of the two injured only.

The evidence of P. W. Jogeswar is that accused Bogatola gave him dao blows on his head, and that of P. W. Ramakanta is that when he was approaching his son Debakanta, accused Tasak gave him dao blows. The learned Sessions Judge has believed these two witnesses. We have no reason to disbelieve them. The conviction under Section 324/149, Indian Penal Code, is justified.

14. In the result there is no substance in the appeal of Bogatola alias Mena Ruti and it is dismissed. He is to surrender forthwith to serve out the sentence. The appeal of appellant Tayam Giba is allowed. His convictions and sentences are set aside and he is acquitted of all the charges.

15. The appeal is partly allowed.

M.C. Pathak, J.

16. I agree.

