

Emperor Vs. Hari Bijal

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Court : Mumbai

Decided On : Sep-09-1915

Reported in : (1915)17BOMLR906

Judge : Batchelor and ;Hayward, JJ.

Appeal No. : Criminal Reference No. 79 of 1915

Appellant : Emperor

Respondent : Hari Bijal

Judgement :

Batchelor, J.

1. This is a reference made by the learned Additional Sessions Judge of Ahmedabad in a case in which the two accused, Hari Bijal and Ganda Hari, were charged inter alia with the murder of a village Pagi named Jiva Becher. The learned Sessions Judge was for convicting the accused on the evidence but the Jury were unanimously of opinion that the accused were 'not guilty'. The learned Judge, thinking it necessary in the interests of justice to do so, has submitted the case for this Court's orders.

2. Very briefly stated, the story for the prosecution is that on the night of the 8th April a gang of persons, making preparations to commit dacoity, was discovered in

the village limits and was pursued by a body of villagers. But while the dacoits-so to call them-were yielding before the advance of the villagers, these two accused were seized and arrested by two of the villagers, and that at or about this critical moment one of the dacoits at large fired his gun and killed the deceased Pagi. The evidence is not consistent as to the precise time at which the Pagi was killed, and it seems to us that we are bound to adopt that version of the prosecution story which bears least heavily upon the accused. That is the version, to which several prosecution witnesses deposed, that the two accused were arrested before the unseized dacoit shot at and killed the deceased. On that state of facts it appears to us that the two accused cannot be visited with liability for the murder committed by a member of that gang to which they no longer belonged. In so far as the common object of the unlawful assembly had been originally to commit a dacoity, that object at the critical time must, in our view, be taken to have been abandoned. And the two accused being by force of circumstances separated from the gang, the subsequent murder committed by one, who still remained a member of the gang, ought, we think, to be regarded, in fact, as an independent and isolated act for which the two accused cannot be held liable. The case would seem clearer if an interval of half an hour, say, had elapsed between the arrest of the two accused by the villagers and the shooting of the Pagi by the dacoit. Yet in substantia there seems to us to be no difference between that case and the case which we have here where some unknown interval, less than half an hour, but appreciable, separated the two events. The important point is that the separation of the two accused from the gang was prior to the murder on the evidence for the prosecution, and in that view of the case we hold that neither Sections 149 nor Section 34 of the Indian Penal Code can render the accused liable for the murder as if the murder had been within the common intention or the common object of the accused and other persons. We find as a fact that it was not within such common intention or object.

3. We think, therefore, that on this reference the accused are entitled to be acquitted and discharged on the charge of murder.

4. We have now to deal with the appeals from the convictions recorded under Sections 148 and 399 of the Indian Penal Code, the former section dealing with

the offence of rioting when armed with a deadly weapon and the latter dealing with the offence of preparation made for dacoity. Here the Assessors were of opinion that the accused should be acquitted. In our opinion the evidence does not suffice to establish the guilt of either of these appellants under either of these charges.

5. It seems to us that much significance is due to the prosecution evidence as to the occurrences on the 7th April, that is, the day preceding this alleged crime. On that day it is clear that, according to the case for the prosecution, the Pagis of Pachham and the Pagis of Fedra had an interview concerning their reciprocal tendencies to theft, which ended in angry words and angry feelings. The accused No. 1 is Pagi of Pachham, and, according to the case for the prosecution, was the leader of the gang of the dacoits as the prosecution described them. The evidence, however, as to the events of the 7th April suggests that the mere assembly of the accused's party in the field of Devising to the south of Fedra is insufficient to show that the common object of that assembly was the offence of dacoity, or that the person assembled were preparing to commit a dacoity. The more probable view, it seems to us, upon the prosecution's own evidence is that the accused party were assembled there in order to intimidate the villagers of Fedra, but without any specific intent to commit dacoity. The burden of proving that there was an intent to commit dacoity lies, of course, upon the prosecution and that burden has not been discharged by the evidence which has been produced. Indeed, there is practically no evidence at all on the subject, if we except the doubtful statement of the witness Budhia that the accused's party were 'sitting secretly as if lying in ambush to commit a dacoity.' But the party made no movement towards the commission of a dacoity. On the contrary they stayed where they were until challenged by the villagers of Fedra. This view of the case seems to us to receive support from the two great difficulties which confronted the prosecution before the Sessions Court. We mean, first, the grave divergence between the account given in the Mukhi's report and the account given in the eye-witnesses' depositions, and, secondly, the inability of these eye-witnesses to supply an intelligible explanation of how it happened, on the theory of a dacoity, that two of the intending dacoits were arrested, although the intending dacoits and the pursuing villagers do not seem to have come into any actual conflict, and of the pursuing villagers, not one received any blow or injury except, of course, the

unfortunate man who was killed on the spot.

6. We think that if due weight is allowed to these circumstances and to the evidence concerning the meeting at Ratanpur on the 7th April, the only conclusion possible is that the prosecution have failed to show that the accused's party were assembled with the object of committing a dacoity. The charge, therefore, under Section 399 must fail.

7. The charge under Section 148 is also unsustainable, because by the definition in Section 146 the offence of rioting is constituted where force or violence is used by an unlawful assembly in prosecution of their common object. Now, here, as we have said, there is no proof that the common object was dacoity, and moreover, there is no evidence that any force or violence whatever was used by the accused's party up till the time when two accused were unwillingly removed from membership of that party. Therefore the charge under Section 148 also fails.

8. It seems to us, however, that the accused's assembly of about twenty persons in the field of Devising at dead of night, many of those persons being armed with deadly weapons, was undoubtedly an unlawful assembly within the meaning of Section 141, the common object of those persons being, as is proved by the evidence, to commit mischief or criminal trespass. That being so, the two accused are properly liable as members of an unlawful assembly. The evidence shows that the first accused was armed with a gun and the second accused with a somewhat formidable knife. The consequence, therefore, is that both are liable to punishment under Section 144. We convict the appellants under that section and sentence each of them to two years' rigorous imprisonment.