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Court : Allahabad

Decided On : May-26-1949

Reported in : AIR1949All620

Appellant : Babu

Respondent : Rex

Judgement :

Mushtaq Ahmad, J.

1. Babu appeals against his conviction under Section 436, Penal Code read with Sections 6 and 18, U.P. Act, XXIV [24] of 1947 and sentence of seven years' rigorous imprisonment together with a fine of Rs. 500 and six stripes passed by a first class Magistrate of Mathura.

2. The occurrence, which was the subject of the charge, had taken place at 9-45, on the morning of 27th October 1947, in Qasba Baldeo, one furlong from police station Baldeo. That was that the appellant had set fire to a fallen thatch belonging to himself which was resting on a wall over chabutra, five paces from his own residential house.

3. Lala Ram, P.W. 1, is said to have sent a written slip to Pandit Mani Bhushan, the President of the local Congress Committee, who was also an Emergency Magistrate regarding this occurrence, and the latter then sent an information about

it to the Sub-Inspector, Ch. Rudra Datt Tyagi, who, in his turn, lodged a report at the police station.

4. The primary question before the learned Magistrate was whether the appellant had applied a match to his thatch and thereby burnt it. The prosecution relied on the evidence of three-eye-witnesses, Lala Ram, P.W. 1, Bankey Lal, P.W. 2 and Har Prasad, P.W. 3, and the learned Magistrate having believed that evidence, came to the conclusion that the appellant had set fire to his thatch. I have gone through the statements of these witnesses and I find no ground for disagreeing with the view taken by the learned Magistrate and I think that he was perfectly right in coming to the conclusion that the appellant had burnt his thatch. This undoubtedly made him answerable to a charge under Section 436, Penal Code.

5. It was argued by the learned Counsel for the appellant that the thatch burnt by the latter not being a 'dwelling house', within the meaning of the said section, but being used only as a place for keeping the appellant's horse, as deposed to by Lala Ram P.W. 1, no offence under that section could be said to have been committed. Lala Ram had also stated that the appellant kept no property at the time under the thatch. But this circumstance alone could not, in my opinion, take the case out of the purview of Section 436, Penal Code. The words 'any building' in that section may not necessarily refer to the building primarily destroyed by the accused. They may cover any other building, close by in regard to which there might have been an intention in the mind of the accused to destroy the same. In the present case the learned Magistrate has pointed out that there were several Hindu houses round about the appellant's thatch, there being also, no doubt, his own residential house, only five paces away from it. It is true that if he had any intention, by burning his own thatch, to destory the houses of the Hindu neighbours, he must be credited with an intention to destroy his own house also which prima facie would not be likely. But apart from any question of intention, it the accused knew that he was likely, by his act, to destroy any neighbouring houses, an offence under Section 436, Penal Code would be complete. In the present case, as I have said, there being other houses close by, the accused must be held to have known that his act of burning his own thatch was likely to destroy those other houses also, although, fortunately, such a contingency in the present

case never came. I, therefore, hold that the accused was guilty under Section 436, Penal Code.

6. The appellant's conviction, however, under Sections 6 and 18, U.P. Act No. XXIV [24] of 1947 was not, in my opinion, legally warranted. The learned Magistrate applied those sections on the solitary ground that the city of Mathura had 'been declared on 9th September 1947, to be a communally disturbed area for a period of three months, the occurrence itself taking place during the currency of that period. In the Full Bench case of Shubrat Shah v. Rex A.I.R. (36) 1949 ALL. 75, however, the following observation was made:.it does not follow that because an area has been declared to be a communally disturbed area (that) any offence which is subsequently committed in that area is necessarily committed 'in the course of or arising out of or due to any communal disturbance for there may at the time be none; It is further clear that the apprehension of a future disturbance is not sufficient to attract the provisions of Section 6 of the Ordinance. It was faintly suggested in argument that the act of the appellant itself constituted 'communal activity,' and as such was sufficient to attract the provisions of Section 6. We think that there is no substance in this suggestion, for, in our opinion, the act of an isolated individual cannot in any circumstances be the activity of a 'community or class of persons' within the definition of 'communal' activity in Section 2 (3) of the ordinance.

7. Apart from a stray remark in the judgment of the learned Magistrate that 'the intention of the accused for this wilful commission of arson before his leaving his house can be nothing but in the course of a communal activity,' there was no material on the record throwing out the least suggestion that there had been or was at the time any communal activity or excitement in the town to which the appellant's action could be made to relate. The only circumstance, which the prosecution had sought to bring on the record, was that the appellant, a few days before the occurrence, had sold his property in order to leave for Pakistan. The learned Magistrate on this point remarked that the accused had sold off lot of property 'seven or eight days before his committing this offence.' The only reference to the selling of any property by the appellant is in the statements of Bankey Lal, P.W. 2, and Yad Ram, P.W. 6, who, no doubt, said that the appellant

had sold his property. I have not been told how the learned Magistrate, only on this evidence, was justified in using the expression 'lot of property,' unless it was figment of his own imagination.

8. Another circumstance which has been suggested as lending support to the subsistence of communal activity at the time at Mathura was that some Mohammadans used to come to the appellant. I, for my part, could not make out this argument. I cannot conceive how the mere fact of some people going to a member of their own Community can be taken to have any relevant bearing on the question of such activity in a particular locality and at a particular time.

9. There being thus no materials before the (Magistrate leading to a conclusion of the existence of a communal activity in the town on the date of the occurrence, he, in my opinion, entirely misled himself by applying the provisions of the U.P. Act XXIV [24] of 1947 in the present case. It is, no doubt, that he applied those provisions on the solitary ground that the area had already been declared as a communally disturbed area, a basis which has now been held by the Full Bench decision, referred to above, as legally insufficient. The appellant, therefore, could not, in my opinion, be convicted under Sections 6 and 18 of the Act.

10. The question now is what course I should adopt. The Magistrate himself had the right to convict the appellant within the provisions of Act XXIV [24] of 1947 and, after the amendment of Section 18, also impose on him the maximum sentence provided by Section 436, Penal Code. The appellant has already been in jail since the date of the occurrence, when he was arrested, up to the present day, his conviction by the Magistrate being dated 17th February 1948. He has thus been in jail for about 19 months now. In the circumstances, I do not consider it desirable to order the commitment of the appellant to the Court of session. A question similar to this arose before a Full Bench in the case of Rex v. Itwari : AIR1948 All369 and their Lordships, in view of the sentence already suffered by the accused, refused to order his retrial.

11. I, therefore, allow this appeal in so far as the appellant's conviction under Sections 6 and 18, U.P. Act XXIV [24] of 1947 is concerned, and maintain his conviction only under Section 436, Penal Code reducing the term of imprisonment

to the period already undergone, and, at the same time, setting aside the sentence of fine and of stripes imposed by the learned Magistrate. The fine, if paid, shall be refunded.

12. The appellant shall be released forthwith, unless required in any other connection.

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