

**Jagdish and ors. Vs. Emperor**

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**Court :** Allahabad

**Decided On :** Mar-21-1945

**Reported in :** AIR1946All249

**Appellant :** Jagdish and ors.

**Respondent :** Emperor

**Judgement :**

**Braund, J.**

1. This is an appeal from the sentences and convictions of seven appellants by the Additional Sessions Judge of Etawah. The appellants were charged under Section 436, Penal Code, and under Rule 35, Sub-rule (4), Defence of India Rules, read with Section 149, Penal Code. They were all, with the exception of appellant Munshi Singh, sentenced to seven years' rigorous imprisonment under Section 436, Penal Code, one year's rigorous imprisonment under Section 147, Penal Code, and seven years' rigorous imprisonment under Rule 35, Sub-rule (4), Defence of India Rules, and in conjunction with the last sentence the learned Additional Sessions Judge imposed a fine of Ra. 100. In the case of the appellant Munshi Singh the sentences under Section 436, Penal Code, and under Rule 35, Sub-rule (4), Defence of India Rules, are two years less. In the cases of Jagdish and Puttu Singh there are also sentences of whipping. The case is known as the Basrehar Canal Kothi Burning Case. The facts may be shortly set out. It happened

during the night of 12th September 1942, at the tail end of the August disturbances, at or shortly after midnight. There is a small canal inspection house at or near Basrehar village, which is occupied for the purpose of administering and guarding the canal and its appurtenances in that neighbourhood. Basrehar village is itself four miles from the nearest police-station at Chaubia. On this particular night, we know that there were in the canal bungalow some five persons : the bungalow mali, whose name was Ganesh, the mail runner called Basanta, a Beldar or labourer called Parmu and two members of the patrol, Akbar Ali and Sami Ullah. They were asleep; Parmu and Basanta, on the eastern verandah of the bungalow, Ganesh on the western verandah and Sami Ullah and Akbar Ali in the stables, which apparently served not only as stables but also as the quarters of the men of the patrol. These stables were at a short distance to the southeast of the bungalow and between the bungalow and the stables there was a small mango grove and a road.

2. At or shortly after midnight a party of men, variously described as between 10 and 25 in number, attacked the place by breaking open the doors and eventually burnt a good deal of the contents and did damage which has been assessed at something like Rs. 1,800. In addition to this, a length of telegraph wire was dragged down from the telegraph poles near the bungalow and thrown down a well. Whoever may have done it, there is no doubt that this was a deliberately planned and executed raid in this particular piece of Government property. It is in respect of this affair that the seven appellants have been tried and sentenced. I should like to say at once that the learned Additional Sessions Judge, as appears from the record, to have conducted the trial with fairness and with great care and it is right to say that, notwithstanding that my own view does not wholly agree with his. The evidence against the appellants really goes by stages and corresponds with the events as they are set out in the prosecution story. It is said that the assault on the canal bungalow had been planned at the instigation of the Congress agitators some days earlier. If the prosecution story of what happened is right, then on 10th September there was a meeting between the appellants Jagdish and Puttu Singh, together with another man who has avoided trial by absconding called Arjun Singh, at the house of the appellant Jagdish at Basrehar. This is said to have taken place at about 4 o'clock in the afternoon. It is suggested

that Arjun Singh then came and upbraided Jagdish and Puttu Singh for having done very little towards helping the disturbances and in the sabotage of Government property then going on. The prosecution has endeavoured to establish this meeting by the evidence of the two witnesses, namely, Chiddu, P.W. 27 and Mahadeo, P.W. 26.

3. Thereafter the next event is said to have been a meeting on the same day - which was a Thursday - on a chabutra under a banyan tree in the village. At this meeting - assuming it took place - there are said to have been present all the appellants as well as one or two others, including Arjun Singh mentioned above and also two men - Bijai Singh and Brahmadin - who so frequently became approvers in the case. This meeting was again adjourned and they agreed to meet later that same evening in the house of the appellant, Nawab Singh. Two days later on Sunday night, no doubt as a result of what had been decided upon on Thursday, a party, including the appellants and the approvers, is said again to have assembled in Nawab Singh's house armed with the instruments of dacoity and it is from there that they are alleged to have set out for the assault on the canal bungalow. There were, however, two incidents on the way. They first reached a village, Bankati, and there, if the evidence is to be believed, the appellant, Nawab Singh, was recognised and accosted by an inhabitant of the place called Bala Ram who happened to be at the door of his cow-shed. This Bala Ram has given evidence of seeing, and speaking to, the appellant Nawab Singh and also of the fact that there were a number of other people with Nawab Singh in the background, although owing to the darkness of the night he does not claim to have actually seen them or to have recognised them. He merely heard them. That evidence is intended to prove the sequence of events, which took place as the expedition proceeded.

4. The next incident took place when they reached a maize field belonging to the appellant Jagdish. There they are said to have fallen in with a certain Chiddu, who had gone there from the village to have a quiet smoke. It may perhaps be added that Chiddu was himself subsequently arrested as having taken part in the affair, but he was ultimately released after some four months' detention. Chiddu's story is that the party or rather the number of small parties into which they had split up -

arrived at this field at about 10 P.M. at night and he (Chiddu) was told to go and scout round the canal bungalow to see if the chaukidar was awake. This he apparently did, and, after, reporting on the first occasion that the chaukidar was still awake, he subsequently brought the information, that after the manner of chowkidars, he had gone to sleep. Chiddu was then sent to fetch an axe which he duly did and then the story goes that the party proceeded and assuming always that Chiddu has spoken the truth - he was pressed to accompany them but he got out of it on the ground that he had sprained his leg.

5. That having happened at the maize field, the party proceeded for the final assault on the canal bungalow, but before they reached it they climbed at least one telegraph pole, tore down the telegraph wire and by some primitive means of using an axe seem to have succeeded in cutting it and throwing it down an adjacent well. They then went on to the canal bungalow itself. So far as what actually happened is concerned, it need not be set out at any length. They burst into the kothi and did a good deal of damage and in the end set fire to the contents. What, however, is important is that it was at this point that the next, and the main, group of evidence comes on the scene in the form of the five men, whose names I have given above, who were asleep either on the verandahs of the bungalow or in the stables. The evidence, therefore, upto this point falls into three groups, first of what happened on 10th of September; next of what happened on the way to the canal bungalow; and thirdly the evidence of the occupants of the bungalow itself. But the matter goes beyond that, because the prosecution has produced two approvers, Bijai Singh and the other a man named Brahmadin. Practically the whole of the defence was concentrated at the trial, in both cases - examination and argument, on destroying the evidence of these two approvers; and conversely, I think I am doing the learned additional Sessions Judge no injustice if I say that in the long run he accepted the evidence of the approvers and that it governed his judgment. In this appeal moreover the attack - or at least the main attack - has again been concentrated on these two approvers, since, if their evidence is not discarded, these convictions would obviously have to stand, I must, therefore, deal with the evidence of the two approvers with some little care. If the evidence of the two approvers, Bijai Singh and Brahmadin, is to be judged by the volume of suggestion and innuendo directed against them by the cross-

examination of the defence, then it can be of very little value. But there are, to my mind, more substantial reasons in this case why the evidence of these two approvers has to be considered with the greatest care and I must first set out certain further facts and dates relating to the course of the investigation itself.

6. The incident took place on the night of 12th September 1912. A very short report was made at the Chaubia police-station at 3-45 A.M. on the same morning, that is to say, in the early hours of 13th September. It was a purely formal report lodged by the Chaukidar of the village, and contained little or no detail. On the same day the investigation was begun by the second officer of the Chaubia police-station, who, naturally enough, began by examining the occupants of the canal bungalow. On 14th September the investigating officer apparently got something about the appellants Puttu Singh and Jagdish; but it was not till the 18th of December - three months later that anyone was arrested. The first person to be arrested was the approver, Bijai Singh. He was taken into custody at a village called Nagla Chhati in the same police circle as Chaubia. Now the fact is that from 18th December 1942, until 4th January 1943, a period of sixteen or seventeen days - the approver Bijai Singh was kept in custody at the police-station and was not sent to jail. I shall explain how that came about in a moment. On 4th January 1943 he was sent to prison and on 8th January - four days later - he offered a confession which was duly recorded before a Magistrate. The circumstances in which this protracted detention of Bijai Singh in the police-station came about were these. He was arrested, as I have said, on 18th December 1942; and there can be no possible doubt that his arrest was in respect of an offence under the Penal Code. It is the that there was added to it a charge under Rule 35, Defence of India Rules, that is to say, the rule dealing with sabotage, but the fact remains that the substantial matter for which Bijai Singh was arrested was the charge under Section 436, Penal Code, of committing mischief by fire in relation to the attack on the canal bungalow. It is very important for the purpose of getting a clear view of this matter to appreciate the fact that he was taken into custody - was in fact held in custody - from 18th December on-wards on a charge (at that time not fully investigated) under the Penal Code. This view is, I think, fully confirmed from Ex. P-83 at page 27 of the record before me which is the report of the policeman, who arrested Bijai Singh 'in the case, criminal No. 66, under Section 436, Penal Code,

and Rule 35, Defence of India Rules...' It goes on to relate how that arrest was effected. For the next four days he was held in the police-station, and, as far as I know, nothing happened. None of the usual steps under Section 167, Criminal P.C., appear to have been taken; but instead what seems to have been done was that Bijai Singh's arrest on the several charges on which he was apprehended was quietly converted into detention in police custody under Rule 129, Defence of India Rules. In short, the police, having taken the man into custody under the Criminal Procedure Code, then proceeded automatically to hold him in custody under Rule 129, Defence of India Rules. That was the position up till 22nd December. The police then appear to have applied for, and obtained, an order from the District Magistrate under proviso (1) to Sub-rule (2) of Rule 129 extending the period of 'detention' from fifteen days 'until further orders.' It would be interesting to know what reasons were given to the District Magistrate for this. In the result therefore, Bijai Singh, having been arrested for an offence under Section 436, Penal Code, and having been brought into custody, as it seems to me, under the provisions of the Code of Criminal Procedure, then automatically (and probably unknown to himself) had the character of his confinement changed, first' by the police and then by the District Magistrate, from detention under the Code of Criminal Procedure to detention under Rule 129, Defence of India Rules, and this over the period of the most active investigation of this crime, and almost immediately preceding the presentation to the authorities of his confession on 8th January. So much for Bijai Singh.

7. The facts as regards Brahmadin are somewhat different. He was arrested on 17th January in the forenoon and was again, as I understand, kept in custody in the police-station until 19th January, when an order was also made for his detention under Rule 129, Defence of India Rules. However, he was actually sent to prison on the following day (20th January) and his confession was forthcoming on 22nd January. It is difficult to see why in his case the formality of detaining him at all under Rule 129, Defence of India Rules, was resorted to, seeing that he was already in custody and was in fact sent to prison on the following day. The not unnatural suggestion of the defence is that, in his case, it took a shorter time in police custody to get him to make up his mind to confess, and that, therefore, it turned out to be unnecessary for the police to hold him in detention under the

Defence of India Rules for so long a period as in the case of Bijai Singh.

8. Those are the facts and I should desire, before proceeding any further, to refer to two recent cases, one from Lahore, and the other from Nagpur, which bear upon the improper use of Rule 129, Defence of India Rules, in relation to criminal proceedings. In *Dilbagh Singh v. Emperor* ('44) 31 A.I.R. 1944 Lah. 373 the learned Chief Justice and another Judge of the High Court of the Punjab in dealing with Rule 129, Defence of India Rules, and the powers of the police to arrest, and hold in arrest, under it without a warrant, expressed the view that Rule 129 was framed for the purpose of enabling persons who were reasonably suspected of being dangerous to be detained without the necessity of the formal procedure under the Criminal Procedure Code. But these learned Judges did not think that the rule was ever intended to cover the case of a person who, even if he might have committed some past prejudicial act, could be no longer regarded as a potential danger either to the State or to the prosecution of the war. The learned Chief Justice observed that, in his view, Rule 129, Defence of India Rules, had to be read in the light of Section 2, Sub-sections (1) and (2), Defence of India Act, and that, on doing that, it became clear that detention under Rule 129 could only be justified when a person's continuance at liberty became dangerous. Reverting for a moment to the present circumstances, it is very difficult to see what justification there could be for invoking Rule 129, in the case of a person who, whatever he may have done, was no longer even at liberty but had already been taken into custody under the provisions of the Criminal Procedure Code. One can appreciate that there are cases in which, for special reasons in war time, it is proper to equip the authorities with arbitrary powers overriding the ordinary provisions of the Criminal Procedure Code. But it is, to my mind, impossible to construe Rule 129, Defence of India Rules, as justifying the police, in effect, in taking a person, who is already in their custody under the Criminal Procedure Code, out of that custody and placing him in detention under the Defence of India Rules pending and for the purpose of the investigation of the very crime for which he was originally apprehended. In the case referred to above, the learned Judges came to the conclusion that resort to Rule 129, Defence of India Rules, for the purpose of facilitating the investigation of a crime under the Criminal Procedure Code was an abuse of them. In Nagpur in the still more recent case in *Vimlabai*

Deshpande v. Emperor ('45) 32 A.I.R. 1945 Nag. 8 two learned Judges of that Court came to substantially the same conclusion. They agreed with the learned Chief Justice of the Punjab High Court and said:

If a police officer, for facility of carrying on an investigation unhampered and unrestricted, detains an accused person, or a witness supposed to be acquainted with the facts and circumstances of the case, under Rule 129, Defence of India Rules, that would be an abuse of the power conferred under Rule 129....

9. And the learned Judges described it as a fraud upon the Act. With respect, I agree. In the present case, so far as Bijai Singh is concerned, as I have said more than once, he was taken into custody under the Criminal Procedure Code. Even assuming that the attack on the canal bungalow was a prejudicial act, as no doubt it was, once Bijai Singh was in arrest under the Criminal Procedure Code, it seems to me that there could by no stretch of imagination be any longer any bona fide probable reason for setting in motion the machinery of Rule 129, Defence of India Rules. Nevertheless, by quietly resorting to that rule, the police and the District Magistrate were enabled to keep him in custody in the police-station for a period of seventeen days. He was then sent to the prison, and almost immediately afterwards produced a confession. Apart altogether from the bitter attack that has been made on the confession on its merit, this to my mind, is enough to discount the confession of Bijai Singh altogether. If there is one thing more than another that the Criminal Procedure Code seeks to safeguard, it is the immunity of potential witnesses and, in particular, potential approvers, from police influence. I venture to express some slight surprise that the Magistrate of the first class, before whom the confession of this man was recorded four days later, did not, in view of Section 164, Criminal P.C., direct some special examination to the circumstances in which this confession was to be made. That observation would, of course, be unjust if the Magistrate in question was not aware of what had happened. It is right to say that it is nowhere shown that he was aware of it, and I should not wish to do him any injustice. For these reasons alone, in my judgment, the confession and evidence of Bijai Singh fails. Taking the whole of the circumstances together, I am not prepared to place the confession and evidence of Brahmadin on any different footing. It is true that the detention of Brahmadin in police custody under Rule 129,

Defence of India Rules, was much shorter. My mind, nevertheless, is so unfavourably affected by what happened in the case of Bijai Singh, that I should be reluctant to place the least reliance on the confession of Brahmadin either. (The rest of the judgment is not material for this Report.)

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