

Hasnu and ors. Vs. Rex

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Court : Allahabad

Decided On : Jul-05-1948

Reported in : 1949CriLJ150

Judge : Raghubar Dayal and; Agarwala, JJ.

Appellant : Hasnu and ors.

Respondent : Rex

Judgement :

Agarwala, J.

1. Haanu, Earn Autar and Bhullar, Ahirs, all residents of village Marhun and Ramlal resident of Malakharhar and Pudai resident of village Mohammadpur along with six other Ahirs were prosecuted for offences under Sections 302, 147, 485/149 and 201/149, Penal Code. Haanu, Earn Autar, Bhullar, Eamlal and Pudai have been convicted by the learned Additional Sessions Judge of Allahabad under all those sections and sentenced each to transportation for life under Section 302, Penal Code and to one year's rigorous imprisonment under Section 147, two years' rigorous imprisonment under Section 435 and three years' rigorous imprisonment under Section 201, Penal Code. The trial for the offence under Section 201, Penal Code was with the aid of a jury. The other six accused have been acquitted. The above named five accused have come up in appeal to this Court.

2. The prosecution case was as follows: On 17th June 1946, in village Marhun there was a riot between three Mussalmans, Suleman, Kallu and Mahboob on the one hand and the Ahirs including the accused on the other. This incident is a subject-matter of a separate case under S3. 147/807, Penal Code. As a measure of retaliation, the accused formed members of an unlawful assembly on 18th June 1946 at about noon in the sandy tract of land (Kachhar) on the bank of the river Ganges in village Marhun where the water-melons of one Mustafa were growing. Mustafa and his servant Bandhu Chamar were loading water-melons in a cart which was lent by one Mijajuddin, brother of Mustafa, and which was driven by the said Bandhu Chamar, when all of a sudden fifty or sixty Ahira armed with lathis came shouting from Mohammadpur side crying 'kill the Mahomedans.' When these Ahirs were at a distance of 1 or 1 bighas from the place where the cart was standing, Mustafa and Bandhu on seeing the Ahirs and hearing their cries ran towards the river Ganges and the Ahirs chased them up to the edge of the river. Mustafa and Bandhu jumped into the river and swimming across one of the streams of the river landed on a sandy island in the river. The Ahirs then burnt the cart with the water-melons and then they set fire to a hut of one Mahboob, and thereafter they pulled one Naimuddin, a resident of mauza Eudarpur from out of another hut of one Bafi and beat Naimuddin to death by striking him with lathig and disposed of his dead body by throwing it into the Ganges near the burning ghat. Mustafa and Bandhu swam across another stream of the river and when they were mid-stream they were picked up in a boat and left on the ghat near village Mahdowri from where they went on foot to village Eudarpur. At village Eudarpur they learnt that the Sub-Inspector was already in the kachhar of village Marhun in connection with the investigation of the occurrence of 17th June 1946. They then went to him in the kachhar and Bandhu lodged the first information report, This whole incident was seen by Khairuddin aged twelve, Mushtaq aged twelve, Zahoor aged fourteen, Eajjan aged fourteen, and one man named Abdul Eauf.

3. The first information report in this case was made by Bandhu at 5 P. M. on 18th June 1946, at the place of occurrence to the Sub-Inspector who had reached the place soon after the incident had taken place. The incident having taken place at about 12 noon, there was considerable delay in making the report. This delay is

sought to be explained by the story of Bandhu and Mustafa having gone to the other side of the river and then coming to village Eudarpur by passing through village. Mahdowri and then coming to village Marhun. Although Mustafa admits that he was present before the Sub-Inspector at the time of the making of the report, we find that the report is lodged in the name of the servant Bandhu Chamar. Why the master Mustafa should not have made the report himself when he was there at the spot and why it was lodged in the name of an illiterate servant, have not been explained. Zahoor (p. W. a) admitted in his statement made before the committing Magistrate that at Budarpur when Mustafa and Bandhu had arrived, the village people collected together and had consultations as to what should and what should not be dictated in the first information report:

Ghar pahunchne he thori arise bad Mustafa aur Bandhu aye, Oaon walon ko ekalha hiya aur phir salah huyi hi rapat men kya Uhhawan aur kya na Ukhawan.

The prosecution witness Bandhu also admitted in the Court of the committing Magistrate, though he denied it in the Court of Session, that the village people had gathered together and had had consultations before the first information, report was made. It, therefore, appears that the report was not the spontaneous expression of what Bandhu had seen but was the outcome of a consultation amongst all the interested people in the village. We cannot, therefore, attach that amount of importance to a report like this as we would otherwise have done.

4. The defence theory is that no such incident as has been alleged by the prosecution ever took place; that it is doubtful whether there was ever a person by the name of Naimuddin of village Eudarpur, and that if ever he was there it is doubtful if he was beaten to death; and that though a cart and a hut may have been burnt, they were never burnt by the accused or by any Ahirs as alleged by the prosecution. The first point, therefore, which has to be decided is whether the incident at all took place as alleged by the prosecution; and the second thing to be decided is whether the appellants took part in the incident and were guilty of any offence.

5. The prosecution does not suggest any motive for the commission of the offences. The incident in which the Ahira including the present accused beat three

Mohamraadans, Sule-man, Kallu and Mahboob, could afford no motive for the Ahirs to take it into their heads to murder Naimuddin and to burn Mustafa's cart of water-melons or the hut of Mahboob. The Ahirs were alleged to have been the aggressors on 17th June. If there was any motive for revenge, it would be with the Mohammadana and not with the Ahirs. It is not alleged that there was any enmity with Mustafa or Naimud-din. The only motive suggested is 'communal'- the Ahirs wanted to kill the Mohammadana and to burn their properties simply because they were Mohammadans. As we proceed further, we shall find that this could not have been the motive for the alleged crimes.

6. In support of the prosecution case, seven witnesses, Mustafa, Zahoor, Mushtaq, Khairud-din, Bandhu, Abdul Rauf and Bajjan, have been examined. Of these Mustafa and Bandhu are alleged to have run away and saved their lives by throwing themselves into the river and swimming, five witnesses who are all Mohammadana are alleged to have remained standing there near about the place of occurrence, and although they (the Muslims) were frightened they did not run away and yet no harm was done to them by the Ahira who were there ostensibly to kill all Mohammadans, except a few slaps to Zahoor and Mushtaq. It is alleged that Naimuddin was in the hut of one Bafj and that Mushtaq (also called Eamma) and one Gazi Teli were also in the hut of Naimuddin, and that Naimuddin was selected out of these three persons and killed while nothing was done to Gazi Teli, and only a few slaps were given to Mushtaq and Zahoor. It is difficult to believe . that the Ahirs whose ostensible object was to kill the Mohammadans would leave these Mohammadan witnesses unharmed or that these witnesses would not have run away and would have stayed there all the time seeing the incidents.

7. We have great doubts whether the alleged story of the killing of Naimuddin is true. (After giving reasons for this finding his Lordship continued). For all these reasons the very factum of the murder of Naimuddin becomes very doubtful.

8. Undoubtedly, the Sub-Inspector who investigated the case found the cart burning and he said that only a part of it remained unburnt. Strangely enough, he did not find any water, melons burning or any pieces of burnt watermelons there; while Mustafa says that there were pieces of burnt water-melon lying about at the

place where the cart had been burnt. This fact throws doubt on the story of the loading of water-melons given out by Mustafa.

9. The next question is whether the appellants took part in the incidents assuming that they did happen. (His Lordship reviewed the evidence of identification, etc., and continued.)

10. The statements of the prosecution witnesses are so inconsistent - they say something before the committing Magistrate, and they go back upon it in the Sessions Court where they find it to be injurious to the interests of the prosecution - and they are so full of improbabilities that it is difficult to place any reliance upon them. We are, therefore, of opinion that the factum of the murder of Naimuddin has not been established beyond all reasonable doubt and that it has not been satisfactorily established that any of the accused took part in any of the offences with which they were charged.

11. The offence under Section 201, Penal Code was tried with the aid of a jury. Having come to the conclusion that the offence of murder of Naimuddin has not been established, the accused should not logically be held guilty of any offence of causing the evidence of the commission of the said offence of murder of Naimuddin to disappear under Section 201, Penal Code. But law is not always logic and this is one of the anomalies of law.

12. Section 423 (2), Criminal P. C. lays down that nothing contained therein shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him. Section 537 of the Code provides that no finding, sentence or order of a Court of competent jurisdiction shall be reversed or altered on appeal on account of any misdirection in any charge to a jury, unless the misdirection has, in fact, occasioned a failure of justice.

13. It is, therefore, obvious that this Court has no jurisdiction to alter or reverse the verdict of the jury given in this case in the trial of the offence under Section 201, Penal Code, unless it is vitiated owing to a misdirection by the Judge, and unless

the misdirection has, in fact, occasioned a failure of justice (there being no question of misunderstanding of law by the jury). We have, therefore, to examine the charge made by the Judge to the jury, and find out if it is vitiated by any misdirection and whether the misdirection has occasioned a failure of justice.

14. Section 297, Criminal P. C. lays down: 'In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury. Summing up the evidence for the prosecution and defence, and laying down the law by which jury are to be guided.' Section 298 (2) provides:

The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion on any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

If the summing up of the evidence for the prosecution and the defence is defective, either because there is positive misdirection to the jury on any question of fact or law or because there is an omission to place before the jury matters which should have been placed before them with the result that the jury by reason of such an omission were put on the wrong track, the verdict is vitiated: *Bajit Mian v. King-Emperor* (1927) 6 Pat. 817 : A.I.R. (15) 1928 Pat. 120: 29 cr. L. j. 81), *Dwarka Dass Bairagi v. Emperor* : AIR1929 Cal170 . What is a summing up The summing up is not the placing before the jury of a mere summary of the evidence produced on behalf of the prosecution and defence. 'A Judge who merely states to the jury certain propositions of law and then reads over his notes does not discharge his duty': *History of the Criminal Law of England* by Sir James Fitz-James Stephen, Vol. I p. 465. Juries in India are more dependent upon the Judge than they are in England for sound and proper advice and assistance as regards the degree of weight which may be fairly and safely attached to the testimony of particular witnesses. (See the observations of Sir Barnes Peacock O. J. in *Elahee Buksh*, (1866) 5 W. B. (f.b.) p. 80 - (87) : Beng. L. R. Sup. Vol. 459), Further it has to be remembered that the jury are untrained, and have usually no record of the evidence on which they have to pronounce the verdict.

15. It is, therefore, necessary for the Judge to sift, weigh and value the evidence. Though the final weighing is for the jury, the Judge ought to see that all essential facts go into the scales of justice and on the proper side of the balance; further, facts must be marshalled by the Judge under separate heads and in distinct compartments as they affect each separate incident in the story, and the law should be stated in short and simple form. *Nagendra Nath v. Emperor* : AIR1929 Cal742 . In other words, the Judge has to marshal the evidence so as to bring out the lights and shades and the probabilities and improbabilities, so as to give proper assistance to the jury who are required to decide which view of the facts is true. *Ilu v Emperor* : AIR1934 Cal847 . Further, where there are more than one accused, the Judge has to deal with the case of each individual prisoner and he must take the evidence against each one, summarize it and point out clearly to the jury how each prisoner is affected by the evidence which has been given. He must point out the kind of weight which ought to be given to this, that or the other facts, in order to show the jury some light and shade in the submission of the facts to them, that some matters are particularly important, some less and some of little importance. A mere resume of the evidence is not sufficient, *Akbar v. Emperor* : AIR1932 Cal395 . To take the witness one by one in the order of their examination and to place their disconnected statements before the jury is not in general very helpful; more assistance will be derived by the jury from a careful collection of the evidence as it bears upon the several allegations of the respective parties. *Abdul Rahim v. King-Emperor* (192-1) 25 O. W. N. 623 : A.I.R. (8) 1921 Cal. 697 ; 22 cr. L. J. 606). In analysing, sifting and collecting the evidence, the Judge may have at times, to express his own opinion on the facts or at any rate to do so impliedly. If he has to express his own opinion he is allowed to do so under the Indian Law under Section 298 (2) and very often it may be necessary and advisable to do so but it must always be remembered that when-ever the Judge expresses his own opinion he must always warn the jury that they are not to be bound by his own expression of opinion, that they should ignore it and they must form their own opinion as they are the judges of facts and not he.

16. The Judge must further warn the jury that in case of doubt, the accused must be given the benefit of doubt. In the present case what the Judge has done is simply this. First of all he states the prosecution case. As regards the defence he

merely says:

The accused have denied the charge and have urged that they have been falsely implicated on account of enmity.

This was a curious method of setting up the defence. He does not clearly bring out the main pleas of the defence, firstly, that the story of the murder of Naimuddin is a fiction and secondly that no corpse was thrown into the Ganges. The way in which the defence has been mentioned to the Jury, creates an impression on their mind that all they have to find is whether they (accused) did the act or not and that the factum of the murder of Naimuddin was not seriously in question. This omission on the part of the learned Judge had greatly prejudiced the accused and may have probably misled the Jury.

17. The learned Judge having given the definition of Ss. 201/149, Penal Code and having analysed Section 201, lays down the requirements to be proved. Then the learned Judge instead of sifting and analysing the evidence simply states a summary of what the prosecution witnesses have stated. The only comment made by the Judge on the evidence is on the evidence of Bhagwati Dayal Singh, Investigating Officer. His comment is with regard to the delay in putting nets into the river. He says:

The delay in putting nets into the river two days later rendered the proceedings of 20th June 1946, almost farcical.

Having stated this he leaves it there and suggests no inference for or against the prosecution case. This summary of the prosecution witnesses is more confusing than helpful to the Jury. No attempt was made by the learned Judge to analyse this evidence and to tell the Jury how it bears upon the various elements of the offence which is sought to be proved. No attempt was made to collect the evidence at one place on the question of the existence of Naimuddin or his murder. No attempt was made to show the probabilities or improbabilities of the story. The fact that it was improbable that the prosecution witnesses, who are merely boys, would remain standing, when they saw 60 or 60 Hindus crying 'kill the Mohammadans' and would not run away on seeing them, was not mentioned

by the Judge at all. The Judge failed to point out to the Jury the important circumstances that the Ahira who were alleged to have dragged out Naimuddin from the hut had no enmity with him and that they did not touch the other Mohammadans who were there even though their object was alleged to be to kill all Mohammadans. These circumstances made the prosecution case improbable.

18. Then the Judge deals with identification proceedings. In this connection he simply says which witness identified which accused. He mentions the admission made by the learned Government Pleader that by reason of mistake committed by Khairuddin and Abdul Rauf, not much reliance could be placed upon their statements, but does not make any mention of considerations by which the value of the identification by other witnesses be judged; such considerations being percentage of correct identification at the jail identification proceeding, the probability or otherwise of witness seeing and knowing the accused from before and statements of witnesses themselves that some accused were known to them by face from before and that they knew their village of residence.

19. The learned Judge then points out the criticism made by the defence and the reply made by the prosecution but does not help the jury by indicating how the criticism and the reply has to be dealt with. Then the Judge quotes a passage from Dr. Kenny Downing, Professor of the Laws of England in the Cambridge University at p. 386 of his book entitled 'Outlines of Criminal Law' which is as follows:

Children are a most untrustworthy class of witnesses, for when of tender age, as our common experience teaches us, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward, and by desire of notoriety.

But he does not try to say how these observations were applicable to the case in hand. The Judge winds up the charge by analysing Section 201, Penal Code by putting forth with the points that have to be determined Under Section 201, Penal Code, He entirely omits to sum up the case against each individual accused.

20. In our opinion, the omissions on the part of the learned Judge are of such a serious nature that they amount to non-direction and consequently to misdirection

of the Jury who could not have got much help from such a charge. In fact, they might have been misled by it. We are further of opinion that this misdirection has prejudiced the accused and caused failure of justice. In these circumstances we cannot uphold the conviction of the accused under Section 201/149, Penal Code.

21. In the result we allow the appeal, set aside the conviction and sentences of the appellants and order that all of them except Earn Autar may be set at liberty unless they are required in connection with any other case. Earn Autar appellant is on bail. He need not surrender to his bail.

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