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Gunda and anr. Vs. State

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Court : Allahabad

Decided On : Jul-31-1953

Reported in : AIR1954All127

Judge : Beg, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections - 162, 297, 298 and 537; Evidence Act, 1872 - Sections 25

Appeal No. : Criminal Appeal No. 299 of 1951 and Criminal Appeal No. 984 of 1952

Appellant : Gunda and anr.

Respondent : State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Man Singh, Adv. for ;Moti Lal and ;Raja Ram, Advs.;Mohd. Baqar Usmani, Adv.

Judgement :

Beg, J.

1. These are two appeals by three appellants. Criminal Appeal No. 299 of 1951 has been need on behalf of Gunda alias Basudeo and Buddha through counsel.

Criminal Appeal No. 984 of 1952 has been preferred by Ram Autar from jail. All the three appellants mentioned above have been convicted under Section 395, Penal Code, & sentenced to four years' rigorous imprisonment each. Along with them four other persons were sent up for trial by the Committing Magistrate. Their names are Jagjit, Ram Rup, Manni and. Srimati Mahrania. Jagjit, Ram Rup and Manni were charged with the abovementioned appellants under Section 393. Srimati Mahrania was charged under Section 412, Penal Code. The trial court acquitted Ram. Rup, Manni and Srimati Mahrania. The remaining lour accused, namely, Gunda alias Basudeo, Buddha, Ram Autar and Jagjit were convicted by the trial court and sentenced to four years' rigorous imprisonment under Section 395, Jagjit does not appear to have filed any appeal and I am not concerned with his case. The case was tried with the aid of a jury. The unanimous verdict of the jury with regard to Ram Rup, Manni and Sm. Mahrania was that they were not guilty. The trial court, agreeing with the said verdict acquired them. The majority of the members of the jury, however, gave their verdict in favour of the guilt of the aforementioned three appellants and they were accordingly convicted by the trial court.

2. The abovenamed appellants were charged with having committed dacoity on 30-1-1949, in the evening at about dusk, on the road near village Shahzadpur, police station Kohkiraj, district Allahabad. A first, information report of this incident was made by Raja Ram, son of Moti Lal, on 31-1-1949, at about 6-35 A. M. This first information report gives a brief narration of the incident. In this report Raja Ram stated that his father Moti Lal a resident of village Shahzadpur had gone to Ajhwa bazar to lay his 'sarrafa' shop. He was returning from the said bazar. On the way Raja Ram met him at Ghulamipur. From Ghulamipur Raja Ram started for his house in village Shahzadpur along with his father Moti and one Bullah Faqir. Raja Ram took the 'sarrafa' box from his father and tied it on to his cycle.

When they had reached about four or five fur-longs near Shahzadpur and it was getting dark, five men armed with lathis intercepted them, surrounded the party and began beating them with lathis. Another batch of five or six persons remained standing at some distance armed with lathis. Raja Ram and Bullah raised an alarm. The dacoits snatched the 'sarrafa' box, which contained ornaments, and ran

away. Raja Ram recognized Rajjan Brahmin of his village. The other dacoits were not recognized, Niwar Tamboli, Dhola Kalwar, Shiva Ghulam, Ram Nath and Sri Nath Vaish of his village also happened to be returning from the bazar & witnessed the incident. Raja Ham and his father had received injuries. Raja Ram and Moti Lal reached then house in the night. Owing to fear they did not goto lodge the report till the morning.

3. Against all the aforementioned appellants the prosecution evidence is of two kinds. There is, firstly the evidence of identification by witness; and, secondly the evidence of the recovery of some property alleged to be stolen. Against Gunda there is the identification evidence of two identification witnesses, namely, Raja Ram (P. W. 1) and Moti Lal (P. W. 4). In addition, some stolen property is also said to have been recovered from him. Against Buddha and Ram Autar there is the identification evidence of three witnesses, namely, RajaRam (P. W. 1), Habibullah (P. W. 3) and Moti Lal P. W. 4. Further, there is the evidence ofrecovery of articles alleged to be stolen against these two appellants also. So far as the evidence of recovery of stolen property is concerned, it may be mentioned that the learned trial court severely criticised this evidence on various grounds in its charge to the jury.

It would appear from his charge to the jury that the learned Judge considered this part of the prosecution evidence to be quite unreliable. He invited the attention of the jury to the fact the no listof stolen property was given in the first information report in spite of the fact that the said report was made after a good deal of delay and deliberation. He also went on to consider the list of stolen property which was produced on behalf of the prosecution. In this connection he drew the attention of the jury to the serious contradiction that existed between the statement of the investigating officer and that of Raja Ram on the point. According to the statement of the investigating officer, the list was ready when he reached the spot. On the other hand, Raja Ram's statement would show that the list was dictated by Moti Lal after the investigation had started while Moti Lal was giving his statement to the investigating officer. The trial court, considered the statement of the investigating officer unreliable on the point and held the list of stolen property to be inadmissible under Section 162, Cr. P. C.

Further the trial court expressed its view to theeffect that the identification proceedings in the case could not be relied upon as genuine. It was admitted by witnesses on behalf of the prosecution that all the stolen ornaments were new and it was also admitted by the said witnesses that all the ornaments mixed with them were old. Under these circumstances the trial Court did not consider the identification proceedings relating to property as worthy of any credence. The trial court further pointed out the fact that the items of stolen property produced in the case were not properly exhibited. The exhibit marks on the said items did not tally with the list of material exhibits in the calendar. As a result all the material exhibits were in a total mess and it was impossible to say which article was picked out by which witness before the identification Magistrate and before the Committing Court.

In view of this confusion, it was also not possible to say whether the witnesses had identified the same articles in the Court of Session as they had in the other two courts. After criticising the evidence of identification of the property in the above manner, the learned trial Judge summed up his conclusions as follows:

'Thus the identification proceedings in respect of the property is extremely doubtful and it cannot fix any crime against any accused without any doubt. The fact that old ornaments were mixed with these ornaments shows that a proper test was not applied and the witnesses were not put to sufficient test in order to assess their ability to point, out the looted ornaments. Under the circumstances it cannot be said that these ornaments were looted in the dacoity and that they were properly identified by the witnesses subsequently. It would, therefore, be dangerous to hold this point in favour of the prosecution on the fact as it stands before you.'

4. On this aspect of the case the learned counsel for the appellants argued before me that the charge of the learned Judge to the jury was vitiated by virtue of the fact that he had omittedto direct the jury to the effect that in assessingthe guilt of the appellants under Section 395, Penal Code, the jury should in view of the weakness of the evidence relating to the recovery of the property, ignore that evidence altogether. There is no doubt that the learned Judge did not, in so many words, tell the jury to eliminate this part of the evidence, but, in my opinion, the

charge of the learned Judge on this point is as fair as it can be. He has given a criticism of the said evidence. He has duly cautioned the jury and clearly opined that it would be dangerous to rely on it for the purpose of convicting the accused. I am accordingly, unable to agree with the contention of the learned counsel on this particular point.

5. The second argument of the learned counsel for the appellants was that the appellants in this case were seriously prejudiced as a result of the fact that the entire contents of the recovery lists, which contained the admission of guilt by or on behalf of the aforesaid appellants, were brought on record by the trial Court. To appreciate this part of the arguments, it is necessary to refer briefly to the recovery lists of property alleged to have been recovered from the appellants. Exhibit P-2 is the recovery list of the property alleged to have been recovered from Gunda alias Basudeo appellant 1. In this recovery list the investigating officer stated that Basudeo alias Gunda, after confessing his guilt, handed over his share of ornaments after digging them out from under the 'mendh' of a sweet-potato field. Similarly, Ex. P-3 is the recovery list of the property recovered at the instance of Srimati Mahrania, wife of appellant Buddha the brother of the appellant Gunda. In this recovery list also the investigating officer stated that Srimati Mahrania, after confessing her guilt, stated that the ornaments in question were given to her by her husband. After saying this she dug out the ornaments from a sweet-potato field.

Exhibit P-4 is the recovery list of property alleged to have been recovered from the house of Ram Autar appellant. In this recovery list also there is a similar statement to the effect that Ram Autar, after having confessed his participation in the dacoity at Shahzadpur, admitted his possession of the ornaments which he dug out from the kitchen wall of his house.

There is no doubt that the statement relating to confession of guilt in all the three aforementioned exhibits is clearly inadmissible. There is further no doubt that if the attention of the jury was drawn to the said statements and these documents were read out, in extenso before the jury, a serous and irreparable prejudice would be caused to the case of the appellants. There is nothing on the record to indicate

that any precaution was taken by the trial court to see that the objectionable portions of these documents were eliminated during the course of the trial, or any step was taken to see that they were not brought on record. On the other hand, it appears to me that the statements of the prosecution witnesses indicate that the entire documents were proved in the case and exhibited as P-2, P-3, and P-4.

6. Krishna Pal Singh is a common witness of all the three recovery lists P-2. P-3 and P-4. He stated in his examination-in-chief that all the three recovery memos. P-2. P-3 and P-4 were prepared in his presence and bore his signature. Raghuraj Singh (P. W. 13) was produced to prove exhibits P-3 and P-4. He also proved the entire exhibits and seated that the said recovery memos, were prepared by the Darogha and bore his signature. Similarly, Jagat Singh P. W. 7 S. O. Kohkiraj, who was the investigating officer in the case and effected the recoveries mentioned above, proved all theaforementioned exhibits P-2, P-3 and P-4 andstated that the exhibits in question bore his signature as well as the signatures of the witnesses and were correct. In view of the above evidence, there is no doubt that the entire Exs. P-2, P-3 and P-4 were brought on record in this case and, I take it,were open for the consideration of the jury. If the jury were intelligently following the proceedings of the case, their attention must have been drawn to the fact that the aforementioned appellants or their family members had confessed their guilt before the investigating officer.

There is nothing in the charge itself to indicate that any precaution was taken by the Judge to warn the jury that they should disabuse their mind in this regard and blot out any damaging impression that they might have got from the contents of the said recovery lists. The procedure of exhibiting entire documents containing objectionable and inadmissible matter of this nature is, in my opinion, irregular. I have noticed this procedure being indiscriminately followed in a number of cases, and I cannot help observing that the repetition of it must in the end have serious repercussions on the fate of the case and must cause incalculable damage to the interests of the accused. It is regrettable that investigating officers make it a practice to invariably append such confessions and to incorporate them in recovery lists apparently for the purpose of introducing inadmissible and damaging evidence against the accused by the backdoor. It is more regrettable that courts

should indiscriminately allow such statements to be brought on record in a wholesale fashion without taking the care to dissect them and to sift the admissible portions from the inadmissible ones. In such cases, in my opinion, the trial court should exhibit only the admissible portion and exclude the inadmissible portion. The danger of the admission of the entire documents containing objectionable material of this nature might not be so great incases tried by assessors. In cases, however, triable by jury, the danger of a wholesale importation ofevidence of this nature cannot be over-estimated.

7. The learned counsel for the State argued in reply that no objection having been raised on behalf of the appellants, the charge cannot be said to be vitiated on that ground. In a matter like this the defect, to my mind, lies in the procedure followed by the courts and it is for the courts themselves to see that such irregularities do not occur in the proceedings. Even though no objection was taken on behalf of the accused on that score, the appellate court cannot shut its eyes to the obvious prejudice that has accrued to the accused by following a wrong procedure of this nature.

8. The nest argument of the learned counsel for the State was that there was nothing to indicate that any prejudice was actually caused to the appellants as a result of the erroneous procedureadopted by the trial Court. In my opinion, prejudice in such cases should be presumed. An objective demonstration of the prejudice caused insuch cases is impossible. If the result of the case can be a test of prejudice in such cases, then certainly it does indicate that prejudice was caused to the appellants. As observed above, in the opinion of the trial court, the evidence of recovery of property in this case was quite worthless. If this part of the evidence is eliminated, there remains only two identification witnesses, namely, Raja Ram and Moti Lal against Guuda, and three identification witnesses namely, Raja Ram, Moti Lal and Habibullah against Buddha and Ram Autar. As mentioned above, the jury acquittedRam Rup and Manni accused by a unanimousverdict, yet the only evidence against both Ram Rup and Manni consisted only of the same witnesses that identified both Buddha as well as Ram Autar.

Thus the case of Buddha and Ram Autar, the convicted accused, stood on exactly the same footing as that of Ram Rup and Manni the acquitted accused all or them having been identified by the same three witnesses. On the other hand, the case of Gunda stood on a better footing than the case of Ram Rup and Manni, as Gunda was identified by only two out of the same three witnesses that identified the acquitted accused. In spite of the above position, the jury gave a unanimous verdict of acquittal in favour of Ram Rup and Manni, and convicted Gunda, Buddha & Ram Autar by a majority verdict. Thus, there is an apparent indication of prejudice to the convicted accused in this case. The members of the jury are laymen. They are after all human beings and must necessarily be influenced by damaging evidence of this character. It is up to the courts to see that such evidence is rigorously excluded and not allowed to come before the jury. Where, however, such irregularity has been committed, it is not possible, in my opinion, to condone it on the ground that no actual proof of prejudice exists on record. In my opinion, the aforesaid irregularity of procedure has in the present case resulted in vitiating the charge and destroying the sanctity to be attached to the verdict of the jury. The conviction based on such a charge cannot, therefore, be sustained.

9. In the circumstances of this case, I do not think it necessary to order a retrial. The evidence of recovery, as rightly observed by the trial court and as mentioned by me above, is absolutely unreliable. The evidence of identification, so far as the appellants are concerned, is the same as that against the two acquitted accused. So far as the third appellant, namely, Gunda is concerned, the evidence of identification against him is weaker than the evidence against the accused that were unanimously acquitted by the jury itself. Under the circumstances, it would not be in the interests of justice to order a retrial.

10. In view of the conclusions arrived at byme, this appeal must be allowed. I, accordingly,allow the appeals of the aforementioned appellants, set aside their convictions and sentences andacquit them of the offence with which they werecharged. Guuda alias Basudeo and Buddha are onbail. They need not surrender. Ram Autar is injail. He shall be released forthwith unless requiredin connection with some other offence.

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