

Fattan and ors. Vs. Emperor

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Court : Allahabad

Decided On : Feb-13-1945

Reported in : AIR1945All87

Appellant : Fattan and ors.

Respondent : Emperor

Advocate for Pet/Ap. : Dr. Katju

Judgement :

Malik, J.

1. This appeal has been filed by seven appellants who have been convicted under various sections of the Penal Code and sentenced to various terms of imprisonment. The case for the prosecution was that on the night between 7th and 8th August 1943 they committed dacoity in the house of Nathu Singh and others in village Nithari, police station Jansath, district Muzaffarnagar. The learned Sessions Judge, however, disbelieved the story of dacoity and acquitted them under S.395, Penal Code but convicted the various accused under Sections 452, 823, 324, 147 and 148, Penal Code. On behalf of the appellants it has been argued before me that the learned Sessions Judge having disbelieved the entire case for the prosecution as regards this dacoity should not have, merely on the ground that the complainants had received certain injuries which could not be self-inflicted and which, must have been caused to them by somebody and there was no reason

why if the injuries were caused to the complainants by others they should have absolutely falsely implicated the accused, convicted the accused under the various sections mentioned above. The other ground is a question of law whether the accused having been charged only under S.395 for dacoity could be convicted of house trespass or of causing simple or grievous hurt. The complainants and the appellants all belong to the same village, mauza Nithari. The appellants are Gujars by caste except Hargyan who is a Brahman and who is said to be the priest of the Gujars, the other accused. The complainants are Chamars: Nathu Singh complainant is the Mukhia of the village. Prior to his election the Mukhias were all Gujars. Nathu Singh, however, was unanimously elected. According to Nathu Singh the Gujars did not like his election and it was, therefore, that they along with several others committed this dacoity. According to the accused, on the other hand, one of the Gujars, Dalel, who has been acquitted, had in his keeping a Chamar woman and that led to bitterness of feeling and the accused-were falsely implicated.

2. The first information report was made by Bhikkan Singh, uncle of Nathu Singh, at the police station, which is at a distance of three miles, at 12 o'clock in the night at, a time when it was alleged the dacoity was still being committed. According to this report Bhikkan Singh was sleeping in his house when about midnight he heard the sound of gunfire. He woke up and came to the house of Nathu Singh and saw about thirty or thirty-five men committing dacoity at the house of Nathu Singh. He recognised in the light of electric torches and lanterns as many as seventeen dacoits, the names of all of whom he gave in this report. Besides these seventeen he claimed to have recognised others whom he could identify. In the report he went on to say that a marpit was going on between the dacoits and the village people and 'the persons concerned would themselves tell in the village what they have seen and what property has been lost by which of them.' The Sub-Inspector went to the spot soon after the receipt of this report, but he was told that the dacoits had already disappeared. He was, however, given a list of the valuables stolen by the dacoits and the total cash and ornaments came to Rs. 18,764-8-0. A search was immediately made in the house of the seventeen accused who had been named and in the house of their relations but nothing was found. The police made enquiries and came to the conclusion that the case was false and refused to

send up the case. The complainant, however, sent an application to the Superintendent of Police and it was under his Orders that the case was challaned. Eleven accused were committed to the Court of Session out of seventeen named in the first information report. Four of them have been acquitted by the learned Sessions Judge and seven have been convicted by him to various terms of imprisonment. Some of the accused when they were arrested had marks of injuries on their person, but from the medical report it was clear that the injuries were caused to them on 9th August 1943. They were medically examined on 10th August and the doctor's opinion was that the injuries were about twenty-four hours old. These accused had, after they were arrested, been handed over and kept in the house of Nathu Singh and their case was that they were beaten while in custody. The learned Sessions Judge has accepted that part of their case when the Sub-Inspector reached the spot Nathu Singh handed over to the Sub-Inspector certain cartridges and wads and a pair of shoes. It was admitted that these, when handed over to the Sub-Inspector, were dry, though it is in the evidence of the prosecution, which has been accepted by the learned Sessions Judge, that it rained the whole of that night. The learned Sessions Judge has further disbelieved the story of the witnesses for the prosecution that the dacoits removed the ornaments from the person of the women in the house on the ground that there were no marks on their forearms or necks, when these women were examined by the police to show that they had been wearing those ornaments and further on the ground that if ornaments from the neck and the wrist had been forcibly removed certain scratches or other injuries may have been found on the person of these women.

3. As a matter of fact, the learned Sessions Judge in a long judgment covering several pages wrote a judgment of acquittal till he came almost to the end. Having disbelieved the prosecution witnesses on all material particulars he suddenly focussed his attention on the fact that the complainants had received several simple and one grievous hurt. The case of Nathu Singh was that he alone was sleeping inside the zenana compound and there were various other people in the mardana compound. As the dacoits came in he woke up and he was beaten. Other people came to his rescue. Then guns were fired and property was looted. The learned Judge has practically disbelieved the whole of this story. Certain

places in the house were shown as dug up with a phaora. The learned Judge disbelieved it on the ground that the phaora itself was not such which could be used for digging. He disbelieved the story that the cartridges or wads belonged to any of the accused. He disbelieved the story that guns were fired on the ground that there were no pellet marks anywhere at or near the place of occurrence and further that all the things handed over by Nathu to the police, were dry, when they should have been wet, if they were left in the open by the dacoits and further that nobody but Nathu had picked them up and had handed them over to the police. He disbelieved that Nathu Singh had all this cash and jewellery, as there had been a partition in the family of Nathu Singh previous to this dacoity and no cash had then been divided, as there was no cash to divide. The learned Judge pointed out, that independent villagers-had not come forward to depose against the accused, but the witnesses for the prosecution were Nathu Singh, members of his family and his relations. After having held all this in favour of the accused the learned Judge went on to hold that there was no doubt that Nathu and the members of his family were given a beating and this must have been done by some of the accused as the injuries could not be self-inflicted. He further went on to surmise that the fight must have taken place outside the mardana and zenana enclosures. According to him Ghissan and others were 'probably' first attacked and then Khizan and Nathu came outside to their rescue and then meeting with stiff opposition they ran back and were pursued into the house and were further beaten. The whole of this part of the judgment is a surmise of the learned Judge. If the prosecution chose to come to Court with a false story, it must take the consequence and the case must fail. It is not the duty of the Court to try to punish somebody, merely because the complainant's party had received injuries and the injuries may have been caused by some of the accused. On the facts, therefore, I am of the opinion that the accused were wrongly convicted and their conviction should be set aside and they should be acquitted. On the question of law, Dr. Katju appearing for the appellants has raised two points, firstly, that the charge against the accused was in these words:

That you on or about the night between 7th and 8th August 1943 at village Nithari P.S. Jansath, District Muzaffarnagar, along with others and armed with and using deadly weapons committed dacoity at the house of Nathu Singh and others, and

thereby committed an offence punishable under Section 395, Penal Code, read with Section 397, Penal Code, and within cognizance and jurisdiction of the Court of Session. And I hereby direct that you be tried by the said Court on the said charge.

The accused were examined by the learned Magistrate on 13th November 1943 and only two questions were put to them. The first was, 'Did you on the night between 7th/8th August 1943 in village Nithari, P.S. Jansath, along with others and being armed with lathis, spears, torches, lanterns and guns commit dacoity at the house of Nathu Singh, Khazan Tirkha and Durga?' The other question was, 'Why this complaint against you and why do the witnesses depose against you and how did you receive injuries?' The learned Sessions Judge on 16th February 1944 read out the reply given by each accused and asked him whether it was his statement and then he asked him whether he wanted to say anything more in his Court and whether he would produce evidence. Learned Counsel for the appellants has argued that the ingredients of the offences under Sections 452 and 323, Penal Code, are not the necessary ingredients of an offence under Sections 395 and 397, Penal Code, and therefore they were wrongly convicted under those sections; and as regards Section 147, Penal Code, his argument is that the accused were not charged under that section and they or any of them could not be convicted under Section 147, Penal Code. Lastly learned Counsel has argued that the assessors' opinions were not taken whether the accused were guilty under Sections 452, 323, 324 and 147, Penal Code, and that again vitiated their conviction.

4. On the first point I have in my judgment in criminal Appeal No. Makkhan v. Emperor reported in : AIR1945 All81 , Decided on 13th February 1945 held that an accused charged merely in general terms of 'having committed dacoity' should not be convicted under Sections 452 and 323, Penal Code, as the latter offences are not necessarily cognate offences and in committing dacoity one does not necessarily commit house trespass or simple hurt. I have further held that the provisions of Section 342, Criminal P.C. are very important and the Court, before it could convict the accused under Sections 452 and 323, Penal Code, was bound to put to the accused points brought out in the evidence of the prosecution witnesses

so that the accused might have an opportunity to give his explanation. Whether there was or was not prejudice caused to the accused would depend in each case on the facts of that case. The Court may have also to take into consideration the line of defence and the evidence that was given. If from the language of the charge and from other materials it is clear that the accused knew definitely the case that he had to meet and a surprise was not sprung on him Section 537, Criminal P.C., would enable the Court to uphold the conviction in spite of the charge being defective. From the several cases that have come before me and the nature of questions put to the accused under Section 342, Criminal P.C. I think it is necessary that stress should be laid by this Court on the importance of putting these questions a little more intelligently and not merely as a matter of form, so that the object of the Legislature, that the accused may have the opportunity of giving such explanations, as he may desire, may be fulfilled.

5. As regards the second point, I have already said that the accused were only charged under Section 395, Penal Code. It is true that both in the case of dacoity as well as in the case of an unlawful assembly there should be five or more persons, but when the accused were charged under Section 395, Penal Code, the common object, as suggested in this case, was robbery. The Court in this case has convicted the accused under Sections 147 and 148, Penal Code, not on the ground that the common object of the unlawful assembly was robbery but that it was something else. This common object was neither brought out in the charge, nor were any questions put, under Section 342, which would suggest that the common object for which the accused were going to be convicted was something different. As I am not satisfied that the prosecution has been able to prove the case against the accused, I do not propose to determine finally the question raised by the appellant's counsel and content myself with saying that, as at present advised, I do not consider that the accused could be convicted under Sections 147 and 148, Penal Code, when the charge against them was merely under Section 395, Penal Code, unless the case was one to which Sections 236 and 237, Criminal P.C. were applicable.

6. As regards the last point, I am satisfied that there is no substance in the contention raised on behalf of the appellants. It is no doubt true that the Court was

bound under Section 309, Criminal P.C. to ask the assessors to state their opinion on all the charges on which the accused had been tried. The Court asked (the assessors their opinion and recorded the same. Having done that it was open to the learned Judge to pronounce his judgment. It may have been better if the learned Judge, when he decided to convict the accused under charges other than those with which they had been charged, had put questions to them and (elicited their opinion, but his not having done so, put at its highest, is a mere irregularity and cannot vitiate the conviction. In the result I allow this appeal, set aside the convictions and the sentences and direct that the accused need not surrender to their bail.

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