

Gokul Vs. the State

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Court : Allahabad

Decided On : Dec-13-1957

Reported in : AIR1958All616

Judge : R.N. Gurtu, ;D.N. Roy and ;A.N. Mulla, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 367, 419, 420 and 561A; [Evidence Act, 1872](#) - Sections 9

Appeal No. : Criminal Appeal No. 441 of 1955

Appellant : Gokul

Respondent : The State

Advocate for Def. : Adv.-General, ;D.P. Uniyal, Dy. Govt. Adv. and ;H.W. Seth, Asst. Govt. Adv.

Advocate for Pet/Ap. : Yashoda Nandan, Adv.

Disposition : Appeal allowed

Judgement :

R.N. Gurtu, J.

1. This appeal has come to me upon a difference of opinion between my brother Roy J. and my brother Mulla J. under Section 429 of the Code of Criminal

Procedure.

2. Appellant Gokul was convicted on the 14th January, 1955 by the Additional Sessions Judge of Pilibhit under Section 395 of the Indian Penal Code and was sentenced to five years rigorous imprisonment. He submitted an appeal from jail under Section 420 of the Code of Criminal Procedure. The appeal was numbered as 435 of 1955 and was submitted to my brother Nasirullah Beg under Part III, Chapter XVIII, Rule 13 (2) of Rules of Court. That rule runs as follows :

'(2) On receipt of such petition of appeal or application for revision the office shall examine it and endorse thereon a report containing as nearly as may be the particulars required under Rule 7 and the Registrar shall thereafter submit it to a Judge for orders. If the case is one which cannot be dealt with by the Judge sitting alone, the orders passed by the Judge shall be laid before another Judge for concurrence before they are issued. If the Judge does not dismiss the appeal or revision summarily and orders notice to be issued, the procedure prescribed for appeals and revisions presented in Court shall, as nearly as may be, be followed.'

On the 16th March, 1955 an appeal from the same conviction was presented to this Court by the appellant through counsel under Section 419 of the Code of Criminal Procedure.

3. On this appeal the office made the following endorsement:

'Jail appeal on behalf of Gokul has been received in this very case and has been submitted to the Hon'ble Judge for admission which has not been received back yet. This is an appeal for the second time on behalf of Gokul through counsel. In time up to 19-3-1955.

Sd. R. N. Singh

17-3-1955.

Then the Registrar made an endorsement to the following effect :

'Presented today. Lay before Court for orders on 22-3-1955.

Sd. Illegible

13-3-1955.

There is a further office report dated 22-3-1955 which is as follows :

'N. B. Jail appeal on behalf of Gokul has been dismissed by Hon'ble Beg J., placed below.

Sd. R. N. Singh

22-3-1955.

Then on 29th March, 1955 the appeal was laid for orders before my brother James who passed the following order :

'Appellant's learned counsel states that the appellant's appeal from Jail was previously dismissed summarily. A regular appeal has now been filed. It is hereby admitted and will be heard on merits in due course. There is also a prayer for bail, but, in view of the evidence of identification against the appellant, bail cannot be allowed for the pendency of the appeal.

Sd. B. R. James.'

The Judgment of my brother Beg on the jail appeal was sealed on 30th March, 1955. The date of my brother's judgment is not given at the foot of the judgment but it appears that that judgment was given on some date prior to 22nd March, 1955 and after 17th March, 1955. The represented appeal came up for final hearing before my brother Mulla J. who referred it on 23rd October, 1956 to a Division Bench because in his view the following important questions of law arose for determination :

'1. Is the proviso to Section 421, Criminal Procedure Code, which makes a distinction between appeals filed under Section 419, Cr. P. C. and Section 420, Cr. P. C. justifiable or whether it violates Article 14 of the Constitution of India as it lays a basis for discrimination which is neither reasonable nor compatible with the principles of natural justice?

2. Has the High Court any powers to admit and hear a second appeal filed through a counsel after the first appeal filed by the prisoner from jail has been summarily rejected under the proviso quoted above?

3. Can it be said that the judgment of the High Court is not delivered until the seal of the High Court is affixed to such a judgment? and

4. Can the High Court review its own judgment under Section 561-A, Cr. P. C.?'

When the appeal went before the Division Bench there was a difference between the learned Judges. My brother Mulla's answer to the first question was that the inclusion of the words 'presented under Section 419, Cr. P. C.' has made the proviso unjustifiable and ultra vires of the Constitution of India, but these words could be severed from the proviso, which after this deletion becomes a salutary rule of law. My brother Roy did not consider that any part of the proviso to Section 419 was ultra vires of the Constitution of India.

In regard to questions 2 and 3 my learned brethren were agreed that the High Court had no power to hear a second appeal filed through a counsel after the first appeal filed by the prisoner from jail had been summarily rejected. There was also an agreement in holding that the fixing of the seal of the High Court was not necessary to give validity to the judgment of the High Court. On the fourth question my brother Mulla was of the view that under certain circumstances the High Court could review its own judgment under Section 561-A, Cr. P. C. My brother Roy was of the contrary view.

4. After having expressed their views on the legal questions my brethren considered the represented appeal on merits and Mr. Justice Mulla expressed the view that the appellant's appeal should be allowed, that he was entitled to the benefit of doubt and that he should be acquitted. My brother Roy expressed the view that the appeal was without force and should be dismissed.

5. In view of the difference of opinion between the two learned Judges as indicated above they passed the following order :

'In view of a difference of opinion between us in the case, we direct that it be laid before the Hon'ble the Chief Justice so that under the provisions of Section 429 of the Code of Criminal Procedure it may be laid before any learned Judge of this Court for opinion.'

6. When the appeal was opened before me there was some discussion at the bar and the order passed by my brother Beg J. was examined. That order is on a printed form and for purposes of convenience a copy thereof also on a printed form is included by me in this judgment as an annexure. Upon a perusal of this judgment of Mr. Justice Beg it was agreed by Sri Yashoda Nandan, learned counsel for the appellant, and the learned Advocate General for the State that the learned Judge's order consisted not merely of the word 'dismissed' but that the learned Judge's order was as follows :

'Dismissed. Delay seal pending expiry of period of limitation.'

The question then arose as to what exactly was meant by the learned Judge using the words 'delay seal pending expiry of period of limitation.' The learned Advocate General conceded that the judgment in the jail appeal by my brother Beg J. not merely dismissed the appeal but made the dismissal provisional by expressly saying that the seal of the Court should not be put on the judgment till the expiry of the period of limitation. He conceded that it was quite clear from this judgment that if a regular appeal was filed within the period of limitation that regular appeal would be heard in the regular way on the merits and the order of dismissal would then have no effect.

He also conceded that inasmuch as a regular appeal had been presented to the Court on 19th March, 1955 within limitation as reported by the office, on the correct interpretation of the order of Mr. Justice Beg his order of dismissal ceased to have any effect after the 19th March, 1955 and was not a bar to the hearing of the represented appeal on merits. The learned Advocate General further conceded that in fact there is a direction, that such an appeal should be heard, in the order of my brother Beg and that the signing of the judgment by my brother Beg was not an impediment in the way of the regular appeal being heard. The sealing on the 30th March, 1955 of the Judgment must be considered according to

the learned Advocate General to be in violation, of the judgment when correctly interpreted and, therefore, the mere sealing of the judgment cannot operate as a bar to the hearing of the represented appeal.

7. I have reproduced the admission of the learned Advocate General in his own words. The learned counsel for the appellant was of the same view as the Advocate General.

8. In view of these concessions by the counsel for the State and for the appellant, it is not necessary for me to examine this matter at any great length but I might briefly give my reasons why I think that the hearing of the represented appeal by me on the merits is not barred.

9. I have already reproduced the judgment of my brother Beg J. No doubt the word dismissed is there but the words 'delay seal pending expiry of period of limitation' are also a part of this judgment. Now these words cannot be treated as surplusage. They must be given some meaning. If these words were interpreted merely as a matter of language then, of course, the words only mean what they say, namely, that pending expiry of the period of limitation the seal of the Court should not be affixed. The question now arises why it was necessary to add these words after the word 'dismissed.' The reason is I think to be found in *Bhawani Dehal v. King Emperor*. 3 All LJ 618 (reprint): opposite page 693 (A).

That was a case in which a convict had filed an appeal from jail to the Court of Session and had also presented a petition of appeal within limitation through a legal practitioner. It was held by this Court that the Sessions Judge was not competent to dismiss the appeal from jail summarily but should have heard the convict's appeal. It was probably because this Court wanted to keep its hands free to dispose of a represented appeal presented within limitation to it even if a previous appeal presented from jail had been summarily dismissed, that an order was always made at the time of the summary dismissal that the judgment should not be sealed pending expiry of the period of limitation.

In *Lachhman Chamar v. Emperor* : AIR1934 All988 , it was held that a summary dismissal of a jail appeal filed under Section 420, Cr. P. C. does not debar the

hearing of an appeal filed through, counsel. The view of the learned Judge of this Court in that case was that the dismissal of the jail appeal must be deemed to be a provisional dismissal in no way affecting the right of the appellant to have his counsel heard under the proviso to Section 421, Cr. P. C. It has been the practice of this Court to hear a represented appeal presented within limitation on the merits even when there has been a summary order of dismissal passed upon a jail appeal and the words 'delay seal pending expiry of period of limitation,' have thus acquired a technical meaning.

These words in this Court are taken to mean that if a represented appeal is filed within the period of limitation then that appeal will be heard and the summary dismissal of the jail appeal will cease to have any effect. That these words have been used as such and interpreted in this way is apparent from the order which my brother James passed when this represented appeal was put up before him.

10. I am not concerned here to judge whether the view taken by this Court that by incorporating these words a summary judgment of dismissal would cease to have effect if a represented appeal was presented within the period of limitation is correct. I am only concerned here with interpreting the order of my brother Beg and giving effect to it. I am not sitting in appeal over it. I cannot treat the words 'delay seal pending expiry of period of limitation' as mere surplusage and treat the appeal as having been summarily dismissed unconditionally.

In the light of the practice of this Court there cannot be the slightest doubt that the words 'delay seal pending expiry of period of limitation' have meant and mean that if a represented appeal is presented within the period of limitation it will be heard on the merits. I would not be justified in disregarding the practice of this Court in interpreting the judgment of my brother Beg in the jail appeal, nor would I be justified in treating any words contained in that judgment as surplusage. That would not be fair to the accused person.

11. In my view the thorny question on which there was a difference of opinion between my brothers, Roy and Mulla as to whether under certain circumstances this Court can review a criminal judgment or order passed by it does not arise. I am not called upon in this case to review any judgment or order. All that I am

called upon is to give effect to it. Inasmuch as the apparent meaning of the words 'delay seal pending expiry of period of limitation' in the setting and in the background cannot be the real meaning of these words: I had to interpret those words in order to give effect to the judgment. In my view Section 561-A, Cr. P. C. certainly entitles a Court to interpret its own Judgment. Section 561-A, Cr. P. C. runs as follows :

'Nothing in this Code shall be deemed to limit or affect the, inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.'

An interpretation of my brother Beg's order is necessary for the purpose of giving effect to it and for securing the ends of justice. I can interpret the words which my brother Beg J. used as well as he himself can do. The words are not specifically his own words. They are words which appear in the printed form and they are the words which stand incorporated in the order of every Judge who dismisses an appeal from jail summarily, using the printed form.

12. In the view that I take of my brother Beg's order the dismissal of the summary appeal now ceases to have any effect. Therefore, there is nothing to prevent my disposing of the represented appeal,

13. I do not think that there is any bar to a convict person presenting a jail appeal first and then presenting a represented appeal also within limitation. As soon as a represented appeal is presented it can be connected with the jail appeal and both can be listed together. The appellant would then be entitled to withdraw his jail appeal and to proceed with the represented appeal. This position is different to the position which exists where a jail appeal is summarily, finally and unconditionally dismissed and then an appellant is inviting a second decision on a represented appeal preferred within limitation.

14. In my view the order of my brother Beg itself permitted the hearing of a represented appeal if it was filed within the period of limitation and itself indicated that in the eventuality of the represented appeal being so filed the order of

summary dismissal would stand vacated and the represented appeal would be disposed of on merits. In the view that I take of this case none of the legal points raised by my brother Mulla and on which opinion was expressed by my brothers Mulla and Roy arise for decision, nor is my decision invited by either of the counsel for the State or the appellant on those points.

15. I now proceed to deal with the represented appeal of the appellant on the merits. I have heard his counsel and I have also heard the learned Advocate General and the State counsel. The facts of the appeal may now be given.

16. The factum of dacoity is not disputed in this appeal. The prosecution story was that an armed dacoity was committed at the house of Salik Ram a resident of village Ladpur, police station Bishalpur, district Pilibhit. About 18 or 20 dacoits some of whom had fire arms whereas others who had spears and lathis came and entered the house of Salik Ram. Salik Ram lived in the house along with his brother, wife and other relations. At that time Salik Ram was sleeping in a sidari where it is said that a lantern was burning. The sound of foot steps awakened Salik Ram who woke up his wife also and shouted to his brother Balak Ram sleeping in a different part of the house. Salik Ram took his torch, went to the outer door where by torch light he saw the assembled dacoits.

One of the dacoits began to assault Salik Ram. Salik Ram raised an alarm and Salik Ram's wife rushed to save Salik Ram. The dacoits then beat his wife Radhika Devi also. She was made to deliver up the keys. The dacoits collected booty from the house. Neighbours gathered round the house. When the dacoits went out they fired their guns and ran in a group. According to the prosecution three dacoits were recognized on the spot namely Debi Murao and Chinta Kurmi, who were known by name, and the third dacoit recognised was a Kahar who was identified by the locality in which he lived but his name was not known.

17. The first information report was lodged the next day at 10 A.M. The known dacoits were named as indicated therein. The suspects were arrested on various dates and were put up for identification. The present appellant was put up for identification on the 13th of March, 1954.

18. Out of the eight persons put up for trial before the Magistrate three were discharged and five were committed to the Court of Session. That Court acquitted three and convicted only the appellant and Ram Prasad. Ram Prasad did not appeal and the present appellant appealed first from jail and then filed this regular appeal.

19. The defence of the appellant was first indicated at the identification parade held on the 13th of March, 1954. The Magistrate who carried out the identification made the following note on the identification chart: 'Gokul states that Re was shown to the witnesses at thana. The witnesses saw him at Bisalpur police station, in the train when he was being brought from Shah-jahanpur.' Before the Magistrate the defence of the appellant was that he was on inimical terms with Salik Ram and had been implicated for that reason and that the witnesses were under the influence of the police. He then stated as follows :

'The police detained me in the Katra thana for 2-3 days after arresting me, where I was shown to the witnesses. They sent me and the witnesses to Shahjahanpur by one and the same train. I was shown to the witnesses at Bisalpur station as well.'

Before the Court of Session the appellant did not add anything of importance.

20. At the identification parade held in jail on the 13th of March, 1954 the appellant was identified By five witnesses namely P.W. 2 Baldeo, P.W. 3 Hori, P.W. 4 Umrao, P.W. 19 Salik Ram and P.W. 21 Radhika Devi. The trial Court rejected the evidence of Umrao and Hori but accepted the identification of the three other witnesses and convicted the appellant upon their testimony. The witnesses rejected by the trial Court were rightly rejected.

21. So far as P.W. 2 Baldeo is concerned, his evidence has not been acted upon by either my brother Roy or my brother Mulla J. Baldeo is the Chaukidar, in his deposition he stated that he was sleeping in his house and went to the house of Salik Ram when he heard the firing. He says he was at a place about 30-35 paces from his house when he heard a fire and returned back and stood by the side of a chapper in his sahan. He says that he saw the dacoits coming out of the house and running through--and it was then that he identified the dacoits. He picked up

Ram Prasad and Gokul. It is to be noted that in the first information report made by Salik Ram his name is not mentioned as an eyewitness.

The chaukidar of another village has been named as a witness. It is evident therefore that the maker of the first information report was also mentioning officials like chaukidars and the failure to mention Baldeo's name is significant. Upon his own saying Baldeo seems to have kept well away from the scene and I am disinclined to believe that he was as near the scene of occurrence as he pretends to be. Being the village chaukidar I suppose he had to show that he did take some effective part in the incident. Having considered his evidence I am not prepared to place any reliance upon him either. I also adopt the reasoning of my brothers Roy and Mulla JJ. in discarding his evidence. This leaves the evidence of only two witnesses, namely Salik Ram and Radhika Devi.

The position in regard to their identification is this. Salik Ram and Radhika Devi identified suspects at two identification parades, namely, on the 13th of March, 1954 and on 3rd of April, 1954. These two identification parades were held within a month of each other. There was an earlier identification parade of 24th November, 1953 but the distance in point of time between this identification and the two previous ones is sufficiently long for that parade to be left out of consideration. At the first parade Salik Ram rightly identified two persons correctly and wrongly identified one person. In the second identification parade he rightly identified one person correctly and three persons incorrectly. The total position in regard to these two parades, therefore, is that three persons have been correctly identified and four have been wrongly identified.

So far as Radhika Devi is concerned, the position is that at the first identification parade she correctly identified three persons and wrongly identified one person. At the second parade the correct identification was one and the incorrect identifications were three. The total position therefore is that there were four correct identifications and four incorrect identifications. From all this it will be apparent that Salik Ram and Radhika Devi are not very careful observers and were not observing carefully.

22. The learned Sessions Judge has only considered the effect of the one parade which concerned the present appellant. In my view inasmuch as this identification had taken place almost eight months after the occurrence it is specially necessary in this case to carefully check the capacity of witnesses on whom reliance is placed to retain impressions of suspects. We find in this case that the difference of a month's time has resulted in a considerable blurring of the impression. The results of the second parade are less favourable than the first parade. I am generally anxious not to lay down any rigid general rules in regard to the weighing of testimony, but in this case the incident took place in the night and therefore it is necessary carefully to test the capacity of witnesses to retain such impression as they may have carried at the time of the incident.

23. I now come to a consideration of the evidence of these two witnesses. My brothers Mulla and Roy, both accepted the prosecution case in regard to the presence of light and of a lantern although the lantern has not been produced in evidence and the story that a lantern was burning in a village home even when the inmates were asleep does not appeal to me, nonetheless it is now usual for dacoits to carry torches and for inmates to have these, and to use them and therefore, it may be presumed that there was light available.

This is, however, not a case when there was moon light and though I am prepared to concede that there was intermittent lighting up of the scene by torches I do not think that at any point of time there was that continuity of flow of light which one would get from an electric light which was burning, or from a well lit kerosene oil lamp. In such a condition of light according to the evidence two sleeping persons woke up and one of them namely Salik Ram flashed his light and was assaulted and then his wife followed up and was also assaulted. According to the prosecution itself many dacoits took a hand in the assault. Radhika Devi intervened when her husband was being beaten. The injury report shows that the following injuries were caused to Salik Ram :

1. Contused wound $1\frac{3}{4}$ ' x $\frac{1}{4}$ ' scalp deep, 4' above the right ear.
2. Contused wound $1\frac{1}{4}$ " scalp deep $2\frac{1}{2}$ ' above the left ear.

3. Contusion 2'x 1' on the right temple.
4. Contusion 4' x 3' over the right shoulder joint.
5. Contusion 2' x 2" over the right sterno clavicular joint.
6. Contusion 2' x 2' over the middle of left scapula.
7. Contusion 3' x 3/4' below the right axilla.
8. Bruised swelling 1' x 1' over the back of the left wrist.
9. Abrasion size small pen, on the middle of right second toe.

The following injuries were caused to Radhika Devi :

1. Punctured wound 2' x 1/3' scalp deep 3' above the middle of right eye brow.
2. Contusion 4' x 2' over the right shoulder.
3. Contusion 2 1/2' x 1/2' over the outer side and middle of right arm.
4. Contusion 3' x 3/4' over the lower part and outer side of right forearm.
5. Penetrated wound 3/4' x 1/2' bone deep an inch above the right wrist (ulner side).
6. Bruised swelling 2' x 1" over the middle and back left palm.
7. Contusion 6' x 1' across the left scapula.

24. It is to be noted that Radhika Devi has received a punctured wound about the middle of the right eye brow. This must have considerably shaken her up. She states in her evidence that immediately she intervened the dacoits speared her which means that the injury above the eye was caused at the very beginning. There is no doubt that Salik Ram was also shaken up because he asserts that he became unconscious. Now when the assailants and the person assaulted came close together it is no doubt possible that the assailants may be recognised, but in an assault of this nature at the dead of night in intermittent light with such a large

number of persons being amongst those who were assaulting and with the natural fear and confusion that the presence of dacoits creates in the hearts of men and women, I doubt whether persons so situate as Salik Ram and Radhika Devi were would be in a position to so carefully notice the features of those who were assaulting them as to enable reliance to be placed Upon their identification after a period of eight months, particularly when upon a total view of their picking out at two identifications it is seen that they picked out an equal number of suspects and non-suspects.

25. I agree with the view expressed by my brother Roy that in this case the appellant has failed to prove that he was shown to the witnesses or that these witnesses were inimical to him.

26. At an identification parade however there is always a possibility of mistaken identifications. Then total view of the identification of Salik Ram and Radhika clearly suggests that they were taking a risk at the identification and that they were prepared to pick out persons who had no connection with the crime at all. It may be pointed out here that out of the five persons picked out by Radhika Devi two were discharged, two have been convicted and one has been acquitted. So far as the persons picked out by Salik Ram are concerned, two have been convicted and two acquitted.

27. There is a further consideration. At this identification parade although twenty five men were mixed, amongst those who were mixed there were only ten persons who had their ears bored. The appellant Gokul and two other persons, who were put up for identification on that day had their ears bored. No steps were taken to cover up the bored ears so that the witnesses had really to pick out three men, out of thirteen. In view of this small number of undertrials with bored ears who were mixed at the parade the assurance which flows from the mixing of a larger number is not available in this case.

28. Upon a total view of the position I have come to the conclusion that the element of mistaken identity in identification of Gokul cannot be eliminated in this case having regard to the nature of the light, the circumstances existing at the time of the crime, the period which had elapsed between the identification of Gokul and

the date of the crime. For these reasons I think that Gokul is entitled to the benefit of doubt. I accordingly accept the appeal, set aside his conviction and sentence and direct his acquittal.

29. I understand that the case is now to go back to the Division Bench. Let this be done.

D.N. Roy and A.N. Mulla, JJ.

30. A difference of opinion having had arisen between us, the case was referred to a learned third Judge for his opinion. His opinion has been received. In view of that opinion we allow this appeal, set aside the conviction and sentence of the appellant and acquit him of the charge. He is on bail. He need not surrender.

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