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Court : Allahabad

Decided On : Aug-10-1964

Reported in : 1966CriLJ315

Judge : M.H. Beg, J.

Appellant : Babu Lal

Respondent : State

Judgement :

M.H. Beg, J.

1. There are three appeals before me one by Babu Lal who has been convicted underSub-section 399 and 402. Penal Code and sentenced to four years rigorous imprisonment concurrently under each of the two sections and another by Hardas and Bansi, and a third by Brij Lal who have been convicted similarly and sentenced to four years' rigorous imprisonment underSub-section 399 and 402, Penal Code and also to 18 months' rigorous imprisonment concurrently under Section 19(f), Arms Act by an Additional Sessions Judge of Jhansi.

2. It is alleged that the appellants were among the persons who had assembled at a Nala near village Mahroni Khurd having prepared themselves to commit a dacoity at the house of Pandit Gajadhar in village Gangasagar which lay at a distance of about two miles from the place of assemblage. Dhira (P. W. 1) was

also invited to join this assembly, but he went to the police station and passed on the in formation to Bhagwati Singh (P. W. 8), Sub-Inspector of Police who organised a raid by a number of persons who surprised the assemblage of alleged dacoits at about 11 P.M. on the night between 28th and 29th March 1962. The four appellants were among the five accused persons who were captured on the spot. It is alleged that two members of the assembly escaped. The three appellants, Brij Lal and Bansi and Har Das, were also found in possession of the alleged unlicensed fire arms and ammunition.

3. The accused persons denied their participation in any such assembly and also their alleged arrest at the place in question. Babu Lal pleaded that he was arrested in front of police station Kot wali at Lalitpur at 10 P.M. on 28-3-1962 while he was returning home after attending the Court of a Magistrate at Jhansi. He produced his wife Srimati Kamla (P. W. 1) to substantiate his defence. This woman proved that she made some application on 30-3-1962, by registered post alleging her husband's arrest on 28-3-1962. The learned Sessions Judge rejected this defence as he thought that the application was sent by registered post on 30-3-1962 with a back date shown untruthfully. The tact that no application was sent before 30-3-62 and also the fact that the alleged presence of this accused in the court of a Magistrate on 28-3-1962 could have been proved by some documentary evidence from the court itself and not by the mere statement of his wife, who has given no reason why she went to court of a Magistrate with her husband, show that the learned Sessions Judge was right in rejecting the defence of the appellant Babu Lal. The appellant Brij Lal alleged that he had been arrested on 29-3-62 from village Bansi where be had gone after attending the court of a Magistrate. He too produced no evidence from any court and he examined no defence witness at all. The appellants Bansi and Har Das alleged that they had been arrested from their houses. But they also offered no evidence to substantiate their allegations. The learned Sessions' Judge was there fore, right in rejecting the various defences set up by the appellants.

4. The prosecution has. however, to prove Its case by credible and satisfactory prosecution evidence and cannot rely upon mere absence of sufficient proof given by the accused persons to substantiate their allegations. It has been argued that

the evidence of Dhira (P. W. 1) is unreliable and unnatural inasmuch as it disclosed that Dhira had stated in the Committing Magistrate's court that he did not know any of the accused from before. Dhira (P. W. 1) went back on that statement in the course of trial. The trial court surmised that he was perhaps trying to help the accused deliberately. The evidence of Dhira (P W. 1) is certainly not so reliable that a conviction could be based upon his uncorroborated testimony. Nevertheless, when the evidence given by Dhira (P. W. 1) about the intended dacoity by a set of per sons, including the appellants, is borne out by the actual assembly which was found to have taken place at the time and place given out by Dhira and recoveries of unlicensed firearms, the allegations made by Dhira (P. W. 1) about the object of assembly could be accepted. The real question in this case, therefore, is : Did the assembly take place on the night and at the time in question at the alleged place and were the accused arrested in the circumstances disclosed by the statements of the prosecution witnesses of the arrest and recoveries made from their possession

5. The witnesses of the arrest and recovery, apart from Dhira (P. W. 1) were : Bhagaun (P. W. 2) and Bijai Singh (P. W. 4), residents of village Mahroni Khurd, who had been taken by the police and Prem Shanker (P. W. 5), Head Constable, and Bhagwati Singh (P. W. 8), the Sub-Inspector who organised the raid. The learned Sessions Judge has relied upon the evidence of these four witnesses and has observed that he saw no reason for disbelieving their evidence. The most important alleged defect pointed out in the statement of Bhagaun (P. W. 2) is that he stated that he was in the party which came from north whereas, according to the statement of other prosecution witnesses, he should have been in the party which came from the south. In my opinion, such a lapse could be due to defective recollection rather than due to untruthfulness. There is also nothing improbable in the time of two hours given by the prosecution witnesses said to have been taken in the completion of the proceeding of arrest and recovery which has also been assailed as incredible. The statement of Bijai Singh (P. W. 4), who is a Sabhapati of village Mahrauni, has been attacked on the ground that he had been arrested once by the police on one occasion and locked up for three days and then released according to his own statement.

It is also pointed out that he stated that only one paper was written out at the lime and place of arrest on which he put his thumb impression. In fact, there were several papers which were prepared on the spot, one relating to each accused person front whom recovery was made. The evidence of these witnesses was taken on 22nd January 1963 which was nearly a year alter the occurrence. Lapses of memory are sure to be found in the evidence of even truthful witnesses in such cases. I cannot disbelieve Bijai Singh, who is a Sabhapati, merely because he forgot something and because he was arrested on some occasion by the police and then released. He was not questioned about the reason for the arrest and he deposed that no case was started against him. In addition to the two respectable members of the public, there are two police witnesses. One of them is a Head Constable and another is a Sub-Inspector. I have been taken through the statements of all the eye-witnesses and I do not find any such select in their testimony which would justify the rejection of the evidence of the witnesses who were members of the raiding party, and I agree with the appraisal of evidence by the learned Sessions Judge.

6. One of the questions which arose in course of arguments in this case relates to the extent to which the appraisal of oral evidence by a trial court, which has had the additional advantage of seeing the witnesses depose as compared with the appellate court, should weigh with the appellate court. It has been argued by S. S. Tiwari that the burden of proving that the prosecution case is fully established lies upon the prosecution even at the appellate stage because an appeal is a continuation of the trial. It is contended that there is no burden in a criminal case upon an appellant to satisfy the appellate court that the judgment of the trial court is erroneous apart from convincing the appellate court that the prosecution case itself is not established. Even if an appeal is a continuation of the trial, I am unable to adopt the view that the judgment of the trial court, which is there, could be ignored. Criminal appeals can be summarily rejected, under Section 421 (3), Cr. P. C., even without sending for the record. This means that there is a presumption that the judgment of the trial Court is correct. The appellate Court can ask the appellant to discharge the burden of showing that the judgment of the trial court is erroneous even be-fore sending for the record although it is the practice of this Court to require the appellant to discharge this burden only after sending for the

record. The burden of displacing the presumption that the Judgment of the trial court is correct can be discharged by convincing the appellate court, from the evidence on record, that the judgment is erroneous, but the burden is there all the same.

7. It has also been contended that the judgment of the trial court can be taken into account in assessing the worth of eye-witnesses only if the assessment is based upon the observations made about the demeanor of witnesses It was argued that in all such cases there ought to be a note by the trial court about the demeanour of each witness after his evidence, Reliance was placed upon Zafar Husain v. State of U.P. 1956 All L. J. 751 at p. 758 where a Division Bench of this Court observed:

We must, however, express that any such demeanour of a witness which goes to affect the court in appreciating his evidence must be noted down at the proper stage during or at the close of the examination of the witness.

My attention has been invited in particular to another passage horn this case:

To note about the demeanour of a witness in the course of the judgment is not fair. Any such note about the demeanour of a witness should be made known to the Learned Counsel of the parties who may have suggestions to make about the observations and the inferences to be drawn therefrom.

8. In this case, their Lordships held that although Section 363 of the Cr. P.C. makes it incumbent on the trial court to record its remarks separately about the demeanour of witnesses, it does not affect the legality of remarks about the demeanour of a witness which may have been made in the course of a judgment itself. Their Lordships went on to rely upon another, reported case, State v. Ram Autar Chaudhry : AIR1955 All138 , as well as upon an unreported decision in Criminal Appeal No. 375 of 1952 by a Bench of this Court (Lucknow Bench) where it was held:

Accordingly we are bound to give great respect to the observation of the learned Sessions Judge that the prosecution witnesses did not impress him as witnesses of the truth though, in our opinion, he would have been better advised to make his

note regarding the demeanour of a witness immediately after recording his statement so as to enable the counsel for the parties to let him have the benefit of their own views in the matter, and it seems to us rather unfair for remarks being made behind the back of the parties and witnesses concerned.

9. The observations quoted above do not sup port the contention, that the appraisal of the evidence of the witnesses by the trial court should not be given any weight at all unless the trial court makes some remarks about the demeanour of the witnesses.

10. Of course, it is better if the trial court has complied with the provisions of Section 363 of the Cr. P.C. and made some remarks about the demeanors of each witness also. But even in those cases in which such remarks are made only in the judgment, an appellate court is bound to attach some weight to the appraisal of oral evidence by the trial court, This weight is attached due to the undeniable fact that the trial court is in a better position to judge the veracity of witnesses who have actually deposed before it than the appellate court and does not depend upon whether the trial court has complied with the provisions of Section 363 of the Cr. P.C. or not.

11. In the case before me, the trial court did not make any observation about the demeanour of the witnesses, but its appraisal of evidence indicated clearly that it was impressed by the two witnesses of the public and the two police officers who deposed about the arrests of the accused persons and the recovery of unlicensed fire-arms and ammunitions in the circumstances disclosed above. It believed their testimony about these facts and the fact that the persons who bad assembled at the spot tried to run away. And, far from giving any explanation of their presence at the spot and explaining the recoveries, the accused persons denied having been either arrested at the spot or having been found in possession of unlicensed fire-arms. They even alleged that their thumb impressions were taken at the police station upon some papers. These papers were the recovery memos of which copies were given to the accused persons. The implication of their allegations under Section 342 Cr. P. C., was that they never received the copies of the recovery memos. The trial court, which saw the accused also make their

statements, disbelieved their explanations of the thumb impressions on the recovery memos.

12. The trial court) after examining all the facts and circumstances carefully came to the conclusion that the prosecution case against the appellants was fully established. I have examined the whole of the prosecution evidence quite independently of the judgment of the trial court also and have come to the same conclusion. I would, however, like to make it clear that, in weighing the evidence afresh, the appellate court can and should, in my opinion, give due weight to the view which the trial court formed about the credibility of witnesses who appeared before it. The inferences from evidence which are the result of the reasoning or logic adopted by the trial court stand upon a different footing. In respect of such inferences the appellate court is in no worse position than the trial court. But, where the judgment of the trial court contains opinions about the veracity of witnesses, those opinions are also entitled to be given due weight and importance keeping in view the added advantage of seeing witnesses which the trial court has had. The opinions formed by the trial court cannot relieve the appellate court of the duty of forming its own opinions, but, in forming its own opinions on questions of credibility of witnesses, one of the reasons which should weigh with the appellate court is the fact that the trial court which had an added advantage, took a particular view.

13. It is certainly desirable that trial courts should use their powers under Section 363 Cr. P.C. and comply with its provisions so that appellate courts are able to distinguish clearly between inferences which are based upon the impressions made by the demeanour and bearing of witnesses and inferences which are the result of the logic adopted by the trial court. And, remarks about demeanour ought to be such as to disclose or constitute reasons for inferences from them.

14. A very erudite and wise American judge with a vast experience of conduct of trials, Mr. Jerome frank (see: Law and the Modern Mind, 1949 Ed.), has dealt with the process reproduction based upon the recollections of witnesses possessing average powers of observation and of imagination which is often used to supplement detects of observation or memory without witnesses being conscious

of it. He pointed out how honest versions of the same occurrence can vary widely without deliberate attempts by witnesses to distort, and he then observed at p. 109):

The Courts have been alive to these grave possibilities of error, and have, therefore, repeatedly declared that it is one of the most important functions of the trial judge, in determining the value and weight of the evidence, to consider the demeanour of the witness.

They have called attention, as of the gravest importance, to such facts as the tone of voice in which a witness's statement is made the hesitation or readiness with which his answers are given the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glance, or his shrugs, the pitch of his voice his self-possession or embarrassment, his air of candor or of seeming levity. It is because these circumstances can be manifest only to one who actually hears and sees the witnesses that upper Courts have frequently stated that they are hesitant to overturn the decision of the trial Judge in a case where the evidence has been based upon oral testimony, for the upper Courts have recognized that they have before them only a stenographic or printed report of the testimony, and that such a black and white report cannot reproduce anything but the cold words of the witness.' The tongue of the witness,' it has been said, is not the only organ for conveying testimony. Yet it is only the words that can be transmitted to the reviewing court, while the story that is told by the manner, by the tone, by the eyes, must be lost to all but but who observes the witness on the stand.

It is, then, a legal commonplace that a witness cannot mechanically reproduce the facts, but is reporting his judgment of the facts and may err in the making of this judgment.

Strangely enough, it has been little observed that while the witness is in this sense a judge, the judge in a like sense, is a witness. He is a witness of what is occurring in his court-room. He must determine what are the facts of the case from what he sees and bears; that is from the words and gestures and other conduct of the witnesses. And like those who are testifying before him, the judge's determination

of the facts is no mechanical act. If the witnesses are subject to lapses of memory or imaginative reconstruction of events, in the same manner the judge is subject to defects in his apprehension of the testimony; so that long before he has come to the point in the case where he must decide what is right or wrong, just or unjust, with reference to the facts of the case as a whole, the trial judge has been engaged in making numerous judgments or inferences as the testimony dribbles in. His beliefs as to what was said by the witnesses and with what truthfulness the witnesses said it, will determine what ha believes to be the 'facts of the case,' If his final decision is based upon a hunch and that hunch is a function of the 'facts', then or course what, as a fallible witness of what went on in his court-room, he believes to be the 'facts' will of ten be of controlling importance. So that the Judge's innumerable unique traits, dispositions and habits often get in their work in shaping his decisions not only in his determination of what he thinks fair or just with reference to a given set of facts, but in the very processes by which he becomes convinced what those facts are.

15. It is for the abovementioned reasons, stated so well by Judge Jerome Frank, that it is very necessary for trial Courts not only to observe the demeanour of witnesses but also to record their observations in such a way that the appellate Court is in a position to assess the worth of the appraisal of evidence by a trial Court. Although the assessment of the worth or oral evidence based upon impressions of the trial Court, which has had an added advantage over the appellate Court, cannot be ignored even if it has not complied with S, 363, Criminal P. C., yet, I am of opinion, the weight and effect of the assessment is certainly greater where Section 363, Criminal P.C. has been duly complied with and when reasons are given for that part of appraisal of oral evidence which I depends upon impressions made in the witness box.

16. In the result, I concur with the view taken by the trial Court and uphold the convictions and sentences of the appellants under the various sections under which they have been convicted. I, however, reduce their sentences from four years' rigorous imprisonment under Section 399, I. P.C. and four years' rigorous imprisonment under Section 402, I. P.C. to three years rigorous imprisonment under each of these two sections, as no previous conviction has been proved

against any of the appellants. I uphold and confirm the convictions and sentences under Section 19(f), Arms Act. All the sentences are directed to run concurrently. With these modifications, the appeals are dismissed. The appellants Babu Lal, Har Das and Bansi, are in jail, and they will serve out the remaining periods of their sentences. The appellant Brij Lal is on bail. He will surrender forthwith and will serve out the remaining period of his sentence.