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Court : Allahabad

Decided On : May-02-1933

Reported in : AIR1933All565; 145Ind.Cas.849

Appellant : Raghunath and ors.

Respondent : Emperor

Judgement :

King, J.

1. This is an appeal by Raghunath and six other persons who have been convicted under Section 304, Penal Code. Two of the appellants, Kishan Sarup and Bishan Sarup, have been sentenced to 8 years' rigorous imprisonment and the rest to six years.. The case for the prosecution, briefly, was that on 7th May 1932 Kishan Sarup and Bishan Sarup (who are zamindars and residents of Kanth) came with a number of men about 13 or 14 in all, to the village of Qasimpur, which is about 1 mile from Kanth, for the purpose of collecting subscriptions. They intended to collect subscriptions for the defence of one Raghunath, who was under trial before a Magistrate. The party came armed with spears and lathis. On arrival at Qasimpur they called for the Padhan named Girdhari, but he was not in the village. His brother Kanhaiya was then sent for and Kishan Sarup and Bishan Sarup demanded Rs. 15 from him as subscription towards Raghunath's defence fund. Kanhaiya Lal raised objections to paying the subscription and tried to go back into

his house but he was followed up with abuse and Kishan Sarup struck him with a lathi. He fell down and shouted for help whereupon Bishan Sarup ran him through with a spear. This gave rise to a general fight between the villagers and the visiting party. Blows were given and received by both sides and after some fighting the visiting party left the village. Kanhaiya 'was taken to the Kanth hospital where he died the same day. The chaukidar made a report at the police station that evening upon information given to him by Ballu the nephew of Kanhaiya. In that report all the appellants are mentioned as being among the rioters who killed Kanhaiya and injured certain other persons. (Here the judgment considered, the first information report, evidence and the findings of the Sessions Judge, and concluded). We have carefully considered the evidence and the arguments which have been advanced on behalf of these two appellants, viz., Kishan Sarup and Bishan Sarup, by Mr. Kumuda Prasad, but we have no hesitation in agreeing with the trial Court that the two appellants were among the rioters and were the leaders. The other five appellants have not been shown to be connected with Kishan Sarup and Bishan Sarup; so it is not clear why they should have gone to Qasimpur along with those two persons for the purpose of extorting subscriptions. On the other hand, no enmity is alleged between the prosecution witnesses and any of these five appellants such as might induce the witnesses to name or identify these persons falsely. We are satisfied that these five appellants also did take part in the fight.

2. A question of law has been raised on the basis of the fact that the appellants have been convicted under Section 304, Penal Code, only, and have not been convicted under Section 147, Penal Code. The argument is that as the appellants were expressly charged with an offence under Section 147, Penal Code, and have not been convicted of that offence, it must be assumed that they have been acquitted of the offence of rioting. As they have been acquitted of the offence of rioting, Section 149, Penal Code, cannot be invoked for the purpose of establishing the joint responsibility of all the appellants for having caused the death of Kanhaiya. The appellants moreover cannot be held jointly responsible under Section 34, Penal Code, as the finding is that they had no common intention of killing Kanhaiya. As none of the appellants have been found individually responsible for causing Kanhaiya's death, their learned advocate claims that they are all entitled to an acquittal. It appears to us that the learned Sessions Judge's

finding is perfectly clear to the effect that the accused did become members of an unlawful assembly and that certain members of that assembly did use force and violence in prosecution of their common object, which was to extort subscriptions by force, and therefore they were all guilty of rioting. The learned Sessions Judge sums up his findings briefly as follows:

I have no doubt what happened, Kishan Sarup Bishan Sarup, and a large body of retainers, the whole party armed with lathis and spears, appeared in Qasimpur and demanded' subscriptions for Raghunath. They were refused and there was a fight. Kanhaiya was killed in the course of the fight, probably by Bishan Sarup, and that probably finished the fight.

3. He further observes:

Of course these people did not come to the village intending to murder Kanhaiya Lal or anybody else. But they did come in considerable force and heavily armed, intending thereby to extract subscriptions from people who might not be moved by mere persuasion. I cannot assume 'that they failed to realise that resistance might be met with, and I cannot assume that they intended their armament for mere display, not for use if occasion called. Exactly how the fighting started I cannot say. But when a gang of armed men came to a village to levy money and a fight starts, it is absurd for them to suggest that they are using these arms in self-defence. And people armed with lathis who go to support others armed with spears must be supposed to realise that in the confusion of a fight their companions' spears may inflict mortal injury, even though there be no positive desire of any single' person to cause death.

4. This language is only consistent with the view that the accused were guilty of rioting and that the killing of Kanhaiya and the injuring of certain other villagers were incidents in the course of the riot and that the accused were jointly responsible, because the offences were committed by certain members of the riotous assembly, and were likely to be committed in the prosecution of their common object.

5. In such circumstances it is doubtful whether it could be held 'that the accused had by necessary implication been acquitted of the charge of rioting. For the appellants great reliance is placed upon the observations of their Lordships of the Privy Council in the case of *Kishan Singh v. Emperor* AIR 1928 PC 254. In that case an accused person was charged under Section 302 and was convicted under Section 304, Penal Code. The Local Government applied to the High Court in revision and the High Court accepted the application and directed that the conviction of the accused should be altered to a conviction under Section 302, Penal Code, and sentenced the accused to death. Their Lordships of the Privy Council held that the accused must be deemed to have been acquitted in the Sessions Court of the charge of murder, and that the order of the High Court resulted in altering the finding of acquittal to one of conviction, and that therefore the order was contrary to law. In our opinion, the present case can be distinguished upon the facts. In the case of *Kishan Singh* the accused had been charged with murder, and the trial Court, in convicting him under Section 304, Penal Code, must be held to have acquitted him of the charge of murder by necessary implication even if it did not expressly record an acquittal under Section 302, Penal Code. The learned Sessions Judge must have applied his mind to the question whether the accused was guilty of an offence under Section 302, Penal Code, and must have come to the conclusion that he was not guilty of such an offence. In such a case, no doubt, it must be assumed that the trial Court had acquitted the accused of the offence under Section 302, Penal Code.

6. The facts of this case are quite different. It is true that the learned Sessions Judge convicted the accused under Section 304, Penal Code, only. He made no mention in his judgment, from beginning to end, of the other charges upon which the accused were being tried. But the whole trend of his judgment, as we have already shown, was that the accused were guilty of rioting. We think it would be wrong to hold that the accused had by necessary implication been acquitted of the offence under Section 147, Penal Code. The real fact seems to be that the learned Sessions Judge directed his attention exclusively to the principal charge under Section 304, Penal Code, and failed to pay any attention to the charges of minor offences under Sections 147 and 326, Penal Code. His findings amounted to a conviction under Section 147, Penal Code, as well as under Section 304, Penal

Code. He merely omitted, probably by an oversight, to record a conviction under Section 147, Penal Code, also. On this ground alone we think that this case can be distinguished from Kishan Singh's case AIR 1 928 PC 254.

7. Another reason why the ruling in Kishan Singh's case cannot be applied is that in that case the High Court were acting in exercise of their re-visional powers under Section 439, Criminal P.C. Their Lordships held that in exercise of revisional powers the High Court could not convert a finding of acquittal into a finding of conviction. There is no question in the present case of convicting the accused of the offence under Section 302, Penal Code, after they have been acquitted of that offence. Nor are we sitting as a Court of revision. We are sitting as a Court of appeal. The accused having appealed against their conviction under Section 304, Penal Code, and the powers exercise-able by us are powers under Section 423, Criminal P.C. Under that section the High Court is entitled to alter the finding while maintaining the sentence. The question is whether the conviction under Section 304, Penal Code, can be altered into a conviction under Section 304 read with Section 149, Penal Code, although the learned Sessions Judge has not recorded any conviction under Section 147, Penal Code, and therefore might possibly be deemed to have acquitted the accused of that charge. On the merits we find it clearly proved that the appellants were guilty of rioting, and that, as mortal injuries were likely to be caused in the prosecution of their common object, they were also guilty of an offence under Section 304, read with Section 149, Penal Code.

8. Numerous authorities have been cited which show that the trend of judicial opinion is in favour of the view for which the learned Government Pleader contends. He maintains that under Section 423, Criminal P.C., it is open to the High Court to convict under Section 147, although the trial Court may have expressly acquitted the accused under that section, or may have merely failed to record an order either of conviction or of acquittal under that section. In support of this contention the following authorities have been cited: *Queen-Empress v. Jabanulla* (1986) 23 Cal 975. In that case it was held that the appellate Court can under the provisions of Section 423, Criminal P.C., in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of an offence of which he was acquitted by that Court. That was a case of converting an express

acquittal into a conviction and their Lordships of the Calcutta High Court held that such course was open to the High Court under Section 423, Criminal P.C.

9. The ruling goes further than is necessary for the purpose of the present case where there is no express acquittal under Section 147 but merely an omission to record a conviction under that section. This ruling was followed by a Single Judge of this Court in *Emperor v. Sardar* (1912) 34 All 115 Here it was held that an appellate Court can under Section 423, Criminal P.C., in an appeal from a conviction alter the finding of the lower Court and find the appellant guilty of an offence of which the lower Court has declined to convict him. The same view was taken by the Madras High Court in *Golla Hanumappa v. Emperor* (1912) 35 Mad 243 and again by a Single Judge of this Court in *Janki Prasad v. Emperor* : AIR1926 All700 The whole trend of authorities is in one direction and not a single case has been cited before us in which a dissentient view has been expressed. In our opinion, the Privy Council ruling in *Kishan Singh's case* AIR 1928 PC 254 does not shake the authority of the rulings cited as. it does not interpret the powers of an. appellate Court under Section 423, Criminal. P.C., but interprets the revisional powers of the High Court under Section 439' of the same Code. Following these authorities therefore we hold that we are' entitled to alter the conviction under Section 304, to a conviction under Section 304 read with Section 149, Penal Code. We accordingly do so. We think it unnecessary to record a formal conviction and to pass a concurrent sentence under. Section 147, Penal Code.

10. As regards the sentences, we think that the sentences passed upon *Kishan Sarup* and *Bishan Sarup* of 8 years.' rigorous imprisonment, are not excessive. These two were clearly the ringleaders. They were influential men and they were trying to extort subscriptions by force from certain villagers. They must have known that such objectionable and forcible methods would, be likely to result in fighting and serious bodily injuries. We therefore dismiss their appeals. As regards the other five appellants we think that the; sentences are somewhat unnecessarily-severe because they had no personal, interest in collecting these subscriptions and they must have come as mere retainers of the two principal accused, and were no doubt acting under their influence and orders. Moreover, the prosecution evidence does not show that they personally committed any specific acts of

violence. We therefore maintain the convictions of these five appellants but reduce the sentences from six: years' to three years' rigorous imprisonment. If any of the appellants have been released on bail they must surrender and serve out their sentences.

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