Moolchand and ors. Vs. the State

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Court : Madhya Pradesh

Decided On : Dec-09-1954

Reported in : 1955CriLJ1033

Judge : Sathaye, J.C.

Appellant : Moolchand and ors.

Respondent : The State

Judgement :

Sathaye, J.C.

1. Moolchand (67 years), his son Chainsingh (18 years), his wife Mst. Ram Piyari (aged 62 years), and his two graziers, Sk. Majeed (18 years) and Sk. Jameel (42 years), all of Sehore, are convicted by the Sessions Judge, Bhopal of three offences viz., Section 147 (rioting), Section 325 (voluntarily causing grievous hurt) and Section 307 (attempt to commit murder) the latter two read with Section 149, IPC Each of them is sentenced to suffer rigorous imprisonment for a period of one year Under Section 147, two years Under Section 325/149 and 5 years Under Section 307/149, the imprisonment as against the male accused being rigorous and as against Mt. Ram Piyari being simple. For the offence of Section 325/149 each of them is in addition fined Rs. 50/- or two months rigorous imprisonment in default, that as against Rampiyari being simple. All the sentences are to run concurrently.

2. The case for the prosecution was that Mool-chand and others had assaulted some Bhois a few days before the day of occurrence and the complainant Jamna Prasad (P.W. 1) had witnessed the assault and during the investigation of that offence the police had called Jamna Prasad to meet them at the Octroi Post in the noon of Sunday, 1-7-1951. Accordingly Jamna Prasad accompanied by his lessee Mohd. Ali alias Ayya Mian (P.W. 6) was proceeding towards the Octroi Post at about 12 noon and had gone as far as a, garden named 'Gitti Wali Bagia' at a distance of about 150 paces from Jamna Prasad's house when he found all the five accused near the road all armed with 'lohangis' (iron shod lathis) except Mt. Rampiyari who had a bamboo 'danda',

3. According to the prosecution with the common object of causing the death of Jamna Prasad, so as to prevent him from giving his statement to the police, all the accused pounced upon Jamna Prasad and belaboured him with 'lohangis' and 'lathis' and continued to do so even after he fell down unconscious and Ayya Mian threw himself on Jamna Prasad in order to protect him. Some people, however, were seen running down to the place and the accused left. Jamna Prasad was taken to the police station, Sehore where Mohd. Ali alias Ayya Mian lodged a report at about 1 p. m. the same day and when Jamna Prasad was examined at the hospital by Dr. Samad (P.W. 2) the Assistant Medical Officer, as many as 30 injuries including two contusions on the head and a fracture of rib and ankle-bone were found on his body and he had to be detained in the hospital for treatment for about a month.

4. In both the Courts Moolchand and Sk. Jameel put up pleas of 'alibi', the former saying that he had gone to Shujalpur in Madliya Bharat and the latter, to village Moharia at about 10 miles from Sehore on that day and returned only in the evening. The other three accused stated that at the hour of the occurrence on the day, Chainsingh and Sk. Majeed were grazing their cattle near the road when Mt. Ram Piyari brought them their food. They wenF to a nearby 'nala' to eat it when, in their absence, Jamna Prasad and Ayya Mian came there and the former assaulted Ram Piyari and as she began to weep and cry these two accused ran down to her help and there was a scuffle between them on one side and Jamna Prasad and Ayya Mian on the other side. Jamna Prasad shouted to his servants in the garden

nearby to fetch his gun and Chain Singh, Sk. Majeed and Ram Piyari left the place pushing away Jamna Prasad who fell down and rolled over stones in a ditch possibly receiving injuries.

5. The direct evidence for the prosecution consists of the testimony of Jamna Prasad (P.W. 1) and Ayya Mian (P.W. 6). Laxman (P.W. 3), Dulli (P.W. 7) and Nanda (P.W. 8) reached the scene just after Jamna Prasad fell down by the beating. Dr. Samad (P.W. 2), Assistant Medical Officer examined the condition of Jamna Prasad as soon as he was taken to the hospital and the injuries found on his person. Dr. R. N. Shrivastava (P.W. 4), the Medical Officer verified the injuries and both were observing the condition of Jamna Prasad and his injuries.

One 'lohangi' (Article A) and a bamboo 'lathi' (Article B) were produced as seized from the house of the accused and were said to have been identified in the presence of Shri H. NT. Shrivastava, the Deputy Collector Magistrate First Class (P.W. 5). On the other side evidence was offered to support the pleas of 'alibi' and also in support of the case of the other three accused. The learned Sessions Judge relying on the evidence of Jamna Prasad and Ayya Mian and the other three witnesses and the medical evidence of the large number of injuries on Jamna Prasad and discarding the evidence in defence convicted all the accused of three offences viz., Section 147, Section 325 and Section 307 both read with Section 149, IPC and sentenced them as above,

6. The contentions in this Court are manifold viz.

1. That the Sessions Judge's approach to the case in considering the evidence for defence first was palpably wrong and indicates his prejudice from the beginning,

2. That there was no evidence of the alleged assault by the accused on Bhois... and Jamna Prasad's having witnessed it and thus the alleged motive for the assault on him is not proved.

3. The the motive was too far-fetched, insufficient and highly improbable.

4. That it was impossible that the accused, particularly the woman and the graziers, should have the object of killing Jamna Prasad and the absence of any

serious injury on his head contra-indicates it. (5) That unless the act of each individual is proved his object cannot be held to be' proved.

6. That there being no evidence of the alleged injuries on Ayya Mian (P.W. 6) the finding that Jamna Prasad was assaulted even after his fall h unwarranted.

7. That on the evidence of Jamna Prssad (P.W. 1) himself that he was beaten with only 'lohangies', Mt. Ram Piyari, who is said to have possessed only a 'danda', could not be convicted of any offence.

8. That the finding of entertaining the object of attempt to murder cannot be sustained and further mere causing grievous hurt without its being voluntary, being not punishable as stated in the charge, the latter is so defective as to prejudice the accused.

9. That separate sentences for the three offences consisting of the acts in the same transaction of assault are illegal.

10. That the sentences awarded are too heavy.

7. Taking up the first contention a close perusal of the judgment of the learned Sessions Judge no doubt apparently indicates that he did not follow the instructions and rules issued from this Court and that his approach to the case was wrong in that instead of examining the evidence on the case for the prosecution first, he examined the case of the defence in the pleas of 'alibi' taken by two of the accused. What seems to have been done by the Judge is to find out if Moolchand and Sk. Jameel were not present on the scene of occurrence as if their presence alone would have been enough to prove the prosecution case against them.

The first part of his judgment suggests that he lost sight of the fundamental principles of Criminal Jurisprudence that the onus to prove every essential of the offence against the accused lies on the prosecution and that it is only if these are proved that the Court is entitled to examine the defence. It is pointed out that the prosecution must stand on its own strength and cannot seek support from the possible weakness of the defence. The evidence in defence is to be examined only with a view to see if it rebuts the case of the prosecution only if proved. The

approach of the Sessions Judge to the case therefore was highly defective.

8. This finding alone, however, is not sufficient in law to set aside the findings and the convictions. It is necessary to show that the wrong approach of the Judge has caused prejudice to the accused. No such prejudice has however been shown to have occurred to the accused on account of this wrong and defective approach. In a later part of the judgment the Judge has examined and considered the evidence for the prosecution and it is only on the findings reached by him on such evidence, offset by the evidence on defence, that he has found the accused guilty of the offences with which they were charged. In the circumstances the mere wrong method of approach of the Judge in preparing his judgment cannot be sufficient to reach the conclusion that his findings and incorrect.

9. The next two contentions attack the existence of -motive for the alleged grievous assault on the victim Jamna Prasad. In so far as the evidence of the motive is concerned there is only a bald and solitary statement of Jamna Prasad (P, W. 1) where he states that five accused had beaten the Bhoies in his presence and he was called by the Head Constable during the investigation of that case. According to Mohd. Ali alias Ayya Mian (P.W. 6) when he questioned the accused why they were beating Jamna Prasad they merely asked him to keep quiet and said that they were determined to eat him. To my mind there is no definite reliable evidence as to the motive for the assault and considering the little harm that Jamna Prasad's statement to the police in the investigation would have caused to the accused, it seems highly improbable that simply for the purpose of escaping that harm the accused would seek to thrash Jamna Prasad to the extent they were alleged to have done.

10. The real motive for the assault is found in the First Information Report (Ex. P. 1) which Ayya Mian (P.W. 6) lodged with the police within an hour of the incident. A F. I. R. is the most immediate and first version of the incident and has great value in ascertaining the truth and in the case coming as it does from a person who was not only present on the scene but actually took part in the incident, this report has the greatest value and must be held to militate against any contrary or varied subsequent version. In the F, I. R. (Ex. P. 1) Ayya Mian (P.W. 6) has stated

that when he questioned the accused the reason for the assault they replied that he (Jamna Prasad) had impounded their cattle helping Kashiram and other Bhoies.

This clearly shows the motive for the assualt and considering the usual occurrences of such incidents in villages where cultivation is the main occupation, this motive is the most probable. To my mind therefore the motive for the assault was not as was suggested by the prosecution. This change, however, does not discount the actual occurrence, the evidence on which will be examined later.

11. The next contentions (4) (5) (6) and (7) raise the question of the common object of the assembly of the 5 accused, viz., whether they had the object of committing the murder of Jamna Prasad. This question arises in this case because the offence in the charge (the wording of which is not happy as will be shown later) and for which the accused are convicted is of attempt to commit murder read with Section 149 because of which all the accused are held to be constructively liable. It may be pointed out that it is not the case for the prosecution that a particular member of the assembly committed the act of the attempt to murder but that all members jointly committed the said act of the attempt with the common object of murdering the complainant Jamna Prasad. It is thus obvious that every one of the accused can be made liable only if the above was the common object of the unlawful assembly.

I have carefully examined the evidence on record and cannot persuade myself to accept that the common object of the assembly was to cause the death of Jamna Prasad. An object is entertained in the human mind and being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Examining the evidence on record it is found that two witnesses Jamna Prasad (P.W. 1) and Mohd. Ali alias Ayya Mian (P.W. 6) have stated of the assault and the manner in which it was committed from its beginning till its end. Laxman (P.W. 3), Duli (P.W. 7) and Nanda (P.W. 8) came on the scene after Jamna Prasad had fallen down unconscious, and saw the later part of the assault only. I am satisfied that there is voluminous evidence to show that all the accused including

Moolchand, Mt. Ram Piyari and Sk. Jameel took part in the severe beating given to Jamna Prasad.

It is also proved that these five accused were at the scene of the occurrence and pounced upon Jamna Prasad in order to belabour him and did so by causing not less than 30 injuries by means of 'lohangis' and 'lathi'. It is also saHsfactorily proved from the evidence of the above four witnesses (excluding Jamna Prasad (P.W. 1)) that the beating was continued even after Jamna Prasad fell down unconscious.

12. In this connection two contentions of the appellants may be disposed of. It was said that there was no evidence of any injury on Ayya Mian (P.W. 6) and therefore it cannot be confidently said that Jamna Prasad was beaten even after he fell down. There is however evidence of Ayya Mian (P.W. 6) himself in this connection that he also received two blows of 'lathi' on his hands when he was lying on the person of Jamna Prasad to save him from further beating. This evidence finds corroboration from the testimony of Laxman (P, W. 3) and Dulli (P.W. 7).

Therefore, what is absent is not substantive evidence on this fact but merely medical evidence which would have been only an addtional piece of corroboration and its absence does not militate against the proof of that fact. The record of the committing Court accompanying the record of the Sessions Court is perused. It is found that an injury-report dated 1-7-1951 by Dr. Samad, on the injuries of Mohd. Ali alias Ayya Mian is filed on that record but the prosecuting machinery, both in the committing Court and in the Sessions Court, did not care to prove it on record in the evidence oi Dr. Samad (P.W. 2). Without reference to it however there is voluminous evidence that Jamna Prasad was beaten even after he fell down unconscious.

13. Another point which was urged may also be examined at this stage. It was said that the evidence of Mt. Ram Piyari's taking part in the assault or beating is discounted by the statement of Jamna Prasad (P.W. 1) himself that he was beaten by 'lohangis'. The Sessions Judge has not paragraphed the depositions of witnesses despite the directions and rules in that behalf, otherwise it would have been possible to pointedly refer to this part of the evidence. Attention is drawn to

Jamna Prasad's statement in the early part of his deposition that 'All the accused began to beat me with lohangis; four men were armed with lohangis and Rampiyari was armed with a bamboo danda.' There is however a voluminous evidence that Ram Piyari was also beating Jamna Prasad with a 'danda' or 'lathi' and the above statement alone is not, in my opinion, sufficient to absolve her.

14. Before proceeding further in examination of the common object of the assembly it would not be out of place to consider the defence of the accused. Moolchand's case was that he had gone out of Sehore and on the day and hour of the alleged assault he was at Shujalpur in Madhya Bharat. In support of this he examined two witnesses viz. Nanoo Mai alias Sonaji (D. W. 3) and Bhagwati (D. W. 4). The former stated that he met Moolchand at Shuja-pur in the afternoon on the day of his arrest and both returned to Sehore at about 3-30 P.M. It Is difficult to believe that the witness remembers such common incident after nearly three years after its taking place and it appears that he has merely obliged his neighbour by giving this evidence. Bhagwati (D. W. 4) evidence is of the same type and both have been rightly disbelieved.

As regards Sk. Jameel's plea of 'alibi' support is sought from the evidence of Sajansingh (D. W. 1) and Roop Singh (D. W. 2) who merely state that Sk. Jameel had been to their village Moharia about 8 miles from Sehore on Sunday which was the first of The English Calendar month in the month of 'Asad'. The date no doubt fits with the day of occurrence but it is difficult to credit both these villagers with such strong memory in respect of an ordinary incident in which a person till then not even seen by them was concerned. Monawar Ah' (D. W. 5) and Faiz Mohd. (D. W. 6) seek to support the case of the other accused that Jamna Prasad kicked Ram Piyari near the road on the date and hour of the occurrence and on her cries the accused Chain Singh and Sk. Majeed ran down and struggled with him.

A perusal of their depositions establishes that they were nothing but tutored. The very exactitude of the evidence is so clinching that no other conclusion can be reached in this behalf. Considering the whole evidence for the defence I am clear that it does not inspire any confidence and is thus liable to be discarded and it does not rebut the case for the prosecution.

15. It is now proved that the five accused together jointly belaboured Jamna Prasad with 'lohangis' and 'lathi' and. caused a number of injuries on his person. The manner of the sudden assault by all with the above weapons clearly indicates that each had the same common object in his mind. There is evidence that 'lohangies' and 'lathis' are generally carried by the cultivators in villages.

The learned Sessions Judge has discussed the question of the object of attempt to murder in para (31) of his judgment and has stated not less than 12 grounds in support of his conclusion. In my opinion none of the first six and the last five grounds are incompatible with the object of voluntarily causing grievous hurt being entertained.

The Sessions Judge finds that because according to Jamna Prasad (P.W. 1) the accused when questioned by Ayya Mian as to the reason for beating said 'We will take his life.' They had this object in their minds but as pointed out by the Judge himself the evidence of Mohd. Ali alias Ayya Mian itself contradicted this when he deposed that the accused replied 'We are determined to beat him'. It is obvious that Jamna Prasad's evidence in this behalf is not true but exaggerated. Mere words or utterances in excitement in such circumstances are not enough to indicate the real mental attitude and it is the act committed and result therefrom that are the main features from which the same may generally be gathered and determined, though in every case the result alone does not necessarily indicate the attitude of the mind of the doer of the act.

16. Examining the result of the acts of the accused, therefore it is clear that the nature of the injuries actually caused also contra-indicates the existence of the object in every mind of causing Jamna Prasad's death. Out of 30 injuries only two were on the head viz. Nos. 29 and 30 which again were simple hurts. If really the object was to cause his death there was nothing to prevent the accused from dealing a few severe blows on the head.

Then it must be remembered that with all the beating given and the injuries caused only two resulted in fractures at Nos. 7 and 15 both of which were not on vital parts of the body & the rest were also simple hurts. The simple nature of the injuries caused, indicates that they were not caused with very great force or violence. The

motive as found for the assault also does not, on probability of human conduct, support the presence of an object of causing death. It is true that there is medical opinion, that had Jamna Prasad been a man of normal built and strength it was possible that his death might have been caused but we cannot rely on mere hypothesis but must deal with tangible facts proved on records.

In view of all these facts and circumstances I am of the opinion that the common object of the unlawful assembly of the five accused was to give a severe thrashing to Jamna Prasad that is only to voluntarily cause grievous hurt to him. The result is that it is found that all the five accused formed an unlawful assembly with the common object of voluntarily causing grievous hurt to Jamna Prasad and in prosecution of the said object they caused such hurt to him. The conviction Under Section 307/149 IPC is therefore not warranted by law and is liable to be set aside.

17. The charge reads thus;

That you on the 1st day of July, 1951 at 12 O'clock in the noon, were members of an unlawful assembly and in the prosecution of the common object of which, namely attempting to murder Jamna Prasad S/O Chunnilal, in that assembly, all of you did . an act of beating and causing grievous hurt to the said Jamna Prasad with such intention and under such circumstances that if by that act you had caused the death of Jamna Prasad you would have been guilty of murder, and that you caused grievous hurt to the said Jamna Prasad by the said act and thereby committed offences punishable Under Sections 37, 325 and Section 147 read with Section 149, I. P. G. and within the cognizance of the Court of Sessions.

In this connection the contention is that the charge framed was seriously defective as it is not possible to entertain the object of making only an attempt on a human life and the conviction on such a charge is not proper. It is further said that merely causing grievous hurt is not an offence unless it is voluntary. The charge is no doubt defective in both these matters. An attempt is the third of the stages of an act which is completed, viz., intention, preparation, attempt and commission. An attempt is an act which necessarily leads to the commission of an offence and stops short of the commission by frustration because of something which the doer of the act neither foresaw nor intended. Therefore, it cannot be said that the object

of the assembly was that they should be frustrated in the commission by some unforeseen event just before the completion of the offence. The charge of entertaining an object of attempt under the law is, therefore, incorrect.

Then mere causing grievous hurt is not an offence unless it is voluntarily caused and the charge is defective in that part also. The charge in the first part should have mentioned the common object of 'causing the death of Jamna Prasad' and in the second part should have been of 'voluntarily causing grievous hurt' to him. There is however nothing on record to show that any prejudice was caused to the accused or that they were misled 4n their defence or there has been a failure of justice because of these defects and as such the irregularity is curable in view of Section 225 and Section 537 Cr.PC In the instant case now the offence Under Section 307/149 IPC is already hold to be not proved.

18. The offences proved against the accused-appellants therefore are of rioting, and of volun- tarily causing grievous hurt by the unlawful assembly with such common object i. e., Under Section 147 and Section 325/149, IPC The question is whether they can be convicted of both these offences and also punished for them both. Section 235 (3), Criminal P. C, refers to trial for one or more acts constituting one offence but when combined of a different offence. Section 35, Criminal P. C, and Section 71, IPC deal with the question of punishment for such offences. Section 141, IPC states the definition of an unlawful assembly. Section 143, IPC lays down that being a member of an unlawful assembly is punishable and the punishment therefor. Section 146 lays down the definition of 'rioting' and it must be remembered that so long as no force or violence is used by an unlawful assembly no rioting can be said to have been committed but at that stage the conviction, if any, must stop short at Section 143, IPC Section 147 lays down the punishment for the said offence and Section 149 lays down the final stage of the commission of an offence or offences by an unlawful assembly with a common object.

19. In the case on hand it must be remembered that the five appellants formed an unlawful assembly with the common object of voluntarily causing grievous hurt to Jamna Prasad and actually did so, therefore the offence of rioting can be said to have been committed only because violence or force was used against Jamna

Prasad with the common object of doing so. If the said final act of voluntarily causing grievous hurt had not been committed then neither could an offence of rioting Under Section 147 nor of Section 325/149, be said to have been committed. To be brief the act of using force or violence essential to convert the offence Under Section 143 into an offence Under Section 147 itself converted the offence Under Section 143 into that Under Section 325/149. The several acts constituted when combined, two different offences as required Under Section 235 (3) Criminal P. C, by the strict application of the section. The maximum that may be said is that the two offences one Under Section 147 and another Under Section 325/149, IPC were committed. To my mind, therefore, all the five accused could be convicted of two offences Under Section 147 or Section 325/149, IPC

20. As the two offences Under Section 147 and Section 325/149, IPC were held to have been committed by the same acts and the accused convicted therefor the offenders are not Under Section 71, IPC liable to be punished with the punishment for more than one of such offences. There is, however, divergence of opinion in different decisions of different High Courts, One view is that separate sentences in such cases are not legal while the other is that they are. The following decisions take the former view that separate sentences are not legal viz., in - 'Empress v. Ram Partab', 6 All 121 (A). The accused were members of an unlawful assembly the common object of which was to voluntarily cause grievous hurt and such hurt was caused, separate sentences for Section 147 and Section 325/149 were held to be not legal.

On similar facts the decisions in - 'Nilmony Poddar v. Queen Empress', 16 Cal 442 (B); - 'Ramdarsan Mahton v. Emperor' AIR 1929 Pat 206 (C); - 'Bajo Singh v. Emperor' AIR 1929 Pat 263 (D); - 'Pesh Mohammad v. Emperor' AIR 1942 Pat 319 (E); - 'Baldeosingh v. Emperor', 1955 Ori. L. J. Pandtan Inbtjbanoe Co. Ltd. v. K. J. Khambatta (Chagla C. J.) AIR 1940 Nag 120 (F); - 'Kitabdi v. Emperor' AIR 1931 Cal 450 (G); - 'Ponniah Lopes v. Emperor' AIR 1934 Mad 388 (H), take the same view and the decision in '6 All 121 (A)', is followed. It may be pointed out that the Nagpur decision (ibid), examines the various decisions and lays down the same rule following the decisions in '6 All 121 (A)', and 16 Cal 442 (B)'.

21. On the other side the decision in - 'Queen Empress v. Dungar Singh', 7 All 29 (I), in which three offences were proved, viz., Section 147, Section 323 and Section 325/149, the latter two being on two different persons and were held to be distinct offences and therefore separate sentences were awarded Under Section 147 and Section 325. The decision however dissents from the view taken in '6 All 121 (A)', In the decision in - 'Queen Empress v. Ram Sarup', 7 All 757 (J), the offences Under Section 147 and Section 325/149 were distinct and separate sentences were held not illegal.

In 'Queen Empress v. Bisheshar', 9 All 645 (K), the rioting Under Section 147 could not be held to be a part of voluntarily causing grievous hurt Under Section 325 and the provisions of Section 71, IPC were held to be inapplicable. In - 'Queen Empress v. Bana Punja', 17 Bom 260 (L), which follows 7 All 757 (J)', it is held that separate sentences for Section 147 and Section 323/149, IPC are legal if the total punishment does not exceed the maximum for any of the offences. In - 'Raghubar v. Emperor' AIR 1939 Oudh 91 (M), convictions were Under Section 147 and Section 324/149 on an offence Under Section 324 by only one member of the assembly. Two sentences were held legal.

The decision in - 'Dulan Dayal Singh v. Emperor' AIR 1945 Oudh 102 (N), follows the above decision and dissents from the decision in AIR 1940 Nag 120 (F). It may be pointed that in the first three decisions on this view referred to above the offences were distinct and separate,

22. On the facts in the case on hand very similar to those in 6 All 121 (A), and '16 Cal 442 (B)', I'prefer to accept the former view taken in these and other such decisions as noted above. It must be remembered that the accused cannot be punished twice for the same acts. The conviction of the accused only for the offences Under Sections 147 and 325/149 is upheld and that for offence Under Section 307/149 together with the sentence for that offence is set aside.

23. Only one sentence is however liable to be awarded. As regards the sentence against Mool-chand, Chainsingh, Sk. Majeed and Sk. Jameel I consider that rigorous imprisonment for a period of two years to an old man of about 66 years like Moolchand, and to Chainsingh and Sk. Majeed still in their teens, is too severe

and there is no particular reason to distinguish the case of Sk. Jameel aged 42 years, except the factor of age. I therefore reduce the sentence of each of these four appellants to rigorous imprisonment for a period of only one year.

Mt. Ram Piyari is an old woman of about 62 years and the sentence of even simple imprisonment for a period of two years against her is, to my mind, too severe and it is therefore reduced to such imprisonment for a period oT one year only. The appellants appear to be mere cultivators and do not ap- pear to be men of much substance. The fines imposed against all are therefore set aside.

24. The appeal is thus partially allowed and the convictions and sentences are modified as above.