

The State Vs. Gayadin

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Court : Madhya Pradesh

Decided On : Dec-05-1959

Reported in : AIR1960MP188; 1960CriLJ917

Judge : A.H. Khan and ;Shiv Dayal, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 417, 417(1), 423, 427 and 428; Madhya Bharat Public Security Act - Sections 12, 19 and 21

Appeal No. : Criminal Appeal No. 76 of 1958

Appellant : The State

Respondent : Gayadin

Advocate for Def. : K.P. Dey, Adv.

Advocate for Pet/Ap. : Rama Shankar Bajpai, Dy. Govt. Adv.

Disposition : Appeal dismissed

Judgement :

A.H. Khan, J.

1. Gayadin son of Binde Gadariya was tried by the Special Judge Bhind, constituted under Section 12 of the M.B Public Security Act for an offence under Section 396 I.P.C. and was acquitted. The Government have now filed an appeal

against an order of acquittal under Section 417 of the Criminal Procedure Code.

2. Mr. Dey, learned counsel for Gayadin respondent has raised a preliminary objection that as there is no provision for an appeal against acquittal in the Public Security Act under which the accused was tried, this appeal is incompetent.

3. The learned counsel has argued that the Public Security Act is a Special Act and Section 19 of the Act makes provision for appeal and revision. But although it is provided that a convicted person can file an appeal to the High Court, yet there is nothing in the Act to entitle the Government to file an appeal against acquittal. In support of his contention he relies upon *Supdt. and Remembrancer of Legal Affairs Bengal v. Luchmi Narayan*, AIR 1933 Cal 776(1).

4. It is true that there is no express provision in Section 19 for an appeal against acquittal but Clause 2 of Section 19 of the Act runs thus:

'The High Court may call for the record of the proceedings of any case tried by a Special Judge under this Act and may in respect of such case exercise any of the powers conferred on a court of Appeal by Sections 423, 426, 427 and 428 of the Code...' A reference in the above Clause to Sections 423, 427 and 428 of the Cr. P. Code is significant. Section 423 contains powers of the Appellate Court in disposing of appeal both against conviction and acquittal. Section 427 confers powers on the High Court to order arrest of an accused person when an appeal is presented under Section 411 A, Sub-section (2) of Section 417 (against acquittal) of the Criminal Procedure Code. Section 428 invests the appellate court to take further evidence in any appeal, should it think if necessary.

To me, it seems that these three sections impliedly indicate that an appeal under Section 417 of the Code was in fact intended though not expressed in so many words. Because if it was not intended to provide for an appeal against acquittal, there was no sense in stating in Clause 2 of Section 19 of the M. B. Public Security Act that the High Court can exercise any of the powers conferred on a Court of appeal under Sections 423, 427 and 428 of the Cr. P. Code.

5. I feel further fortified in my opinion by Section 21 of the Act which runs thus:

'The provisions of the Code and of any other law for the time being in force in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this Act shall apply to all matters connected with arising from or consequent upon, a trial held by a Special Judge, appointed under this Act.'

A perusal of this would show that the provisions of the Cr. P. Code apply to this trial and that the only prohibition against the applicability of the Cr. P. Code is when any provision of it may be inconsistent with the provisions of the M. B. Public Security Act. Furthermore Section 21 says that the provisions of the Criminal Procedure Code 'apply to all matters connected with, arising from or consequent upon a trial held by a Special Judge. Now an appeal either by the accused or by the Government is a matter which arises from or is consequent upon a trial. In this view of the matter I am of the opinion that an appeal against acquittal in a case by a Special Judge does lie to High Court under Section 417 of the Cr. P. Code.

6. Mr. Dey, learned counsel for the respondent relies upon AIR 1933 Cal 776 (1), No doubt in the Calcutta case it is laid down that 'an appeal to the High Court by the Local Government from an order of acquittal passed by a Special Magistrate appointed under Bengal Act 12 of 1932 is not competent under Section 5 of the Act No. 24 of 1932.' But this view is based on the interpretation of Sec, 5 of the Bengal Suppression of Terrorist Outrages (Supplementary) Act, 1932 (Central Act No. 24 of 1932) which runs thus;

'Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law, there shall, save as provided in the local Act as supplemented by this Act, be no appeal from any order or sentence passed by a Special Magistrate under the Local Act and save as aforesaid no Court shall have authority to revise such order or sentence, or to transfer any case from any such Magistrate, or to make any order under Section 491 of the Code, or have any jurisdiction of any kind in respect of any proceedings of any such Magistrate, or of any direction made under Chapter II of the local Act.' A perusal of this would show that its language is quite different from that of Section 19 of the M. B. Public Security Act of 1953. Secondly, it makes no mention of Section 423, 427 and 428 of the Cr. P. Code which are specially referred to in the M. B. Public

Security Act. Last but not the least, the learned Judge of the Calcutta High Court did not consider the provisions of Section 34 of the Bengal Act No. XII of 1932, which is analogous to Section 21 of the M. B. Public Security Act which directs that the provisions of the Criminal Procedure Code so far as they are not inconsistent with the Act shall apply to proceedings under the Act. I am, therefore, of the opinion that the Calcutta case does not help the respondent.

7. After disposing of the preliminary objection, I now turn to the record to examine the merits of the case. On doing so, I find that there are no sufficient grounds for interfering with the order of acquittal passed by the learned Special Judge.

8. The prosecution case shortly stated is that on 5-11-59, a gang of dacoits about 15 or 16 number, armed with guns visited village Bhatiyavali-Badi and made straight for the house of Patel Jagmohan Singh. But Jagmohan Singh having come to know that the Badmashes were in search for him, managed to slip away from the village and went to a Police Post in village Gurera in order to fetch help. Before leaving the Village, Patel Jagmohansingh told Arjun Singh P.W. 1 and his son Matadin P. VV. 4 that he was going to fetch the Police and that in his absence they should protect his wife and children. At the direction of Jagmohansingh, Arjumsingh and Matadin both went to the house of Jagmohansingh, and, then they found that the dacoits had reached there earlier.

The dacoits tied down a number of villagers with a rope and after setting up a guard of 4 or 5 Badmashes to watch the persons whom they had tied down, the dacoits looted the house of Jagmohansingh and also the house of other villagers and took with them cash, clothes and ornaments as the booty. After looting the village for about half an hour, they returned to the house of Patel Jagmohansingh and they enquired from one Jagannath (D. W. 1) who was one of the persons who had been tied down by the dacoits as to who were the persons who had helped Police in the arrest of Ochchelal (an alleged dacoit). Jagannath informed them that Patel Jagmohansingh and Gambhira Singh were responsible for the arrest of Ochchelal,

On receiving this information, it is alleged that the dacoits asked Gayadin the present accused respondent (who is the brother of the alleged dacoit Ochchelal

and who is said to have been arrested at the instance of Patel Jagmohan Singh and Gambhira Singh) to shoot one Dhanlal, who was a servant of Patel Jagmohan Singh. On this, Gayadin fired a gun at Dhanlal and killed him then and there. After this all the dacoits ran away. On their departure, other villagers arrived on the scene, and freed these who had been tied down by the dacoits. The Police help arrived at the spot after the dacoits had left. Jagmohan Singh P. W. 8, the Patel of the village lodged a report on 6-11-57.

From what has been stated above, Jagmohan Singh Patel had run away from the village before the approach of the dacoits, and what he stated in the report was merely that which he heard from other villagers. No doubt it is said in the report that Gayadin respondent was with the dacoits and that he had shot Dhanlal dead.

9. I shall now examine the prosecution evidence to see how far the charge can be sustained against the respondent. In all there were 9 eye-witnesses in this case, out of which three have been declared hostile. Their names are Kammedasingh P. W. 5, Devilal P. W. 11 and Kaptan Singh P. W. 12 and they have stated before the Special Court that they were unable to identify the man who shot Dhanlal. It is evident that a conviction cannot be based on the evidence of these three hostile witnesses and the learned Government Advocate has not also referred to their evidence. Let us, therefore, now see how far the evidence of other six eye-witnesses brings home the guilt to the respondent.

10-19. (After reviewing the evidence of these witnesses his Lordship proceeded). It is true that Dhanlal has been shot dead but it is doubtful whether he was shot in the manner described by the prosecution witnesses, whose statements, I have given above. For one thing all the witnesses say that Gayadin, fired only one shot, and, as such there, should have been only one gun-shot injury. But the post-mortem report and the statement of the Doctor belie this. There are three gun-shot injuries on the body of the deceased. Of these, one is the wound of entry and the other is the wound of exit. This connotes the firing of one shot. But there is also a third gun shot wound unrelated to the wound of entry and exit. This could have been caused by a second shot only, but no one says that two shots were fired.

20. The doctor has said that the entry wound at the back was one inch in diameter and that the exit wound corresponding to it was in the abdomen which was only 1/2 inch in diameter. This apparently supports the prosecution story that the gun was fired, from the back. But I am afraid the Doctor has not looked up his book on Medical Jurisprudence properly. It is common knowledge that an entry wound is always smaller in diameter than an exit wound which is always larger. From the size of the wounds recorded by the Doctor in the post-mortem, report, it would appear that the gun was shot in the abdomen, where the wound was 1/2 inch in diameter and that it came out of the back where the wound was of one inch in diameter. Thus Dhanlal was shot from the front and not from the back and this fact alone knocks out the entire bottom of the prosecution case.

21. After carefully reviewing the entire evidence, I am of the opinion that the charge of shooting Dhanlal cannot be sustained against the respondent Gayadin. No looted property has been recovered either from his possession nor at his instance. There are no compelling reasons to set aside the order of acquittal.

22. For reasons stated above, I would dismiss the Government appeal.

Shiv Dayal, J.

23. I have had the advantage of reading the judgment prepared by my learned brother. I feel some justification in saying a few words of my own, (24) The preliminary objection raised by Shri Dey must be rejected because Section 417 of the Code of Criminal Procedure is wide enough to include an appeal against an order of acquittal passed by the Special Judge constituted under the Madhya Bharat Public Security Act. Clause (1) of Section 417 reads thus:

'Subject to the provisions of Sub-section (5) the State Government may, in any case, direct the public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.' The expression 'an original or appellate order of acquittal passed by any Court other than a High Court' does not leave out of its purview an order of acquittal passed by a Special Judge. The argument of Shri Dey is that "any Court" does not include a Special Court. He reads Section 6 of the Criminal Procedure

Code as to exclude High Courts and the Courts constituted under any law other than the Criminal Procedure Code. In my opinion, such an interpretation is not warranted by the language of Section 417 read with Section 6 of the Criminal Procedure Code. The expression 'any Court' in Section 417 necessarily means any Court of Criminal jurisdiction. Section 6 enumerates the classes of criminal Courts in these words:

'Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of criminal Courts in India namely, Courts of Sessions etc.

If it was intended that the criminal Courts constituted under the Criminal Procedure Code were to be only the five classes enumerated therein, it was unnecessary to use the words 'besides the High Courts and the Courts constituted under any other law'. This expression only connotes that criminal Courts for the purposes of the Criminal Procedure Code shall be (1) High Courts as defined in Section 4(1) (i)(2) of Criminal Procedure Code; (2) Courts constituted under any law other than the Criminal Procedure Code, (3) Courts of Session, (4) Presidency Magistrates, (5) Magistrates of the First Class, (6) Magistrates of the Second Class, and (7) Magistrates of the third Class. While enumerating the five classes of criminal Courts, that is, Nos. 3 to 7 above, the legislature has been cautious enough to remove all doubts that the High Courts and other Courts are constituted under special laws shall also be criminal Courts for the purposes of the Criminal Procedure Code.

25. As regards the merits of the case, it is to be remembered that this is an appeal against acquittal. It is not permissible to interfere with an order of acquittal just because this Court could have reached a different conclusion as a trial Judge. Their Lordships have observed on a number of occasions that there must be compelling reasons for such interference, and the presumption of innocence or an accused becomes further strengthened by his acquittal at the hands of the trial Judge. It is true that the sheet anchor of the judgment of the Sessions Judge is that three prosecution witnesses turned hostile and on that basis others have also been disbelieved. This in my opinion is an erroneous approach.

He should have weighed the evidence of the other witnesses independently and then arrived at a conclusion. I am not satisfied with the manner in which the order of acquittal was reached by the learned trial Judge. However, since the learned counsel for the respondent, has succeeded in creating a doubt and the learned Deputy Government Advocate has not been able to point out reasons to compel me to take a different view of the oral evidence. I agree with my learned brother, in the result, that this appeal must be dismissed.

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