

Mohanlal and ors. Vs. the State

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Court : Rajasthan

Decided On : Apr-19-1960

Reported in : AIR1961Raj24

Judge : L.N. Chhangani, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 154, 233, 237 and 423; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 141 and 308

Appeal No. : Criminal Appeal No. 525 of 1959

Appellant : Mohanlal and ors.

Respondent : The State

Advocate for Def. : R.A. Gupta, Adv. for;Dy. Govt. Adv.

Advocate for Pet/Ap. : R.K. Rastogi, Adv.

Disposition : Appeal dismissed

Judgement :

L.N. Chhangani, J.

1. This is an appeal by four appellants, two of whom Mohanlal and Parbhati have been convicted under Section 308 Indian Penal Code and sentenced to three years' rigorous imprisonment and the remaining two Mangoo and Bissa have been

convicted under Section 323 I. P. C. and sentenced to six months' rigorous imprisonment.

2. The prosecution case, as disclosed in the First Information Report lodged by one Bhagwat-singh, cousin brother of the injured Gulley with the-Police Station, Dig at about 3-30 p. m. on 4-10-1957 within six hours of the incident, is as follows;

3. On 4th October, 1957,

'when the first informant Bhagwatsingh was in the jungle, six persons Mohanlal, Mangoo, Parb-hati, Bissa, Handoo and one unnamed son of Ram-chand, Gujars of Pasopa within the police Station, Dig having concerted, assaulted his cousin Gulley when he was returning after taking his bath in the Pokhar near the Poll of Ramhet. He was beaten by lathis very mercilessly and ultimately was given up for dead. When the informant returned to the village at 11 a.m. he saw his cousin Gulley, who was in a very serious condition. There were hundreds of injuries on his person and his skull had been broken and that he was in a dying condition'

4. It will be convenient to mention at this stage how the injured was medically examined. It appears that before the police reached the spot for investigation, the relations of the injured Gulley called for two doctors, one Nathmal from Kamanand another Dr. Nigam from Dig. Dr. Nathmal reached earlier, but before he could examine the injured, Dr. Nigam reached there at about 4 p. m. and thereafter, Dr. Nathmal left the job and the examination of the injured was completed by Dr. Nigam. Dr. Nigam noticed a number of injuries on the person of Gulley. There were 17 ecchymosis measuring 3' to 6' x 1' on his right thigh and knee, 2 contused wounds on the skull bone, one contused wound on the head and 13 other contused wounds on various other parts of his body, as detailed in the Injury Report, Ex. P. 2, which of course was issued after a requisition by the police.

The police after usual investigation, submitted charge-sheets against five persons and did not find any case against the person who could not be named in the First Information Report, but who was suggested to be Farsa. The learned Sub-divisional Magistrate, Dig after enquiry under Chapter XVIII of the Code of Criminal Procedure committed all the accused to the court of the Sessions Judge,

Bharatpur for trial under Sections 147 and 308 I. P. C.

5. The prosecution examined in all six witnesses including the three eye-witnesses, P. W. 2 Girraj, P. W. 3 Gulley, the injured, and P. W. 4 Roopsingh; and Dr. Nigam P. W. 5, Bhagwatsingh P. W. 1, the first informant, and Shri Jagdev Singh, P. W. 6, the Station House Officer, who conducted the investigation. The accused made a complete denial and pleaded alibi. The learned Sessions Judge found the prosecution story substantially correct, but he found the case against Handoo doubtful and acquitted him. According to him, the accused could be held responsible only for their individual acts and approaching the case on that basis, he convicted Mohanlal and Parbhati under Section 308 I. P. C. and the two remaining appellants Mangoo and Bissa under Section 323 I. P. C.

6. In this appeal by the accused, Mr. Rastogi, in the first instance, invited my attention to some infirmities in the prosecution case. It may be said in all fairness to him that these infirmities were pointed out with no request for an outright rejection of the prosecution case. They were pointed out mainly with a request that the case should be approached cautiously and due allowance should be made for the probable exaggerations by the prosecution in this case.

7. The first infirmity relied upon by Mr. Rastogi is that in the First Information Report, Paltu has been mentioned as a person who took the injured to his house. No other person has been named. During the trial, Paltu has not been examined; whereas other persons have been examined as eye-witnesses. It was also pointed out that in the First Information Report, it was not mentione'd that the injured Gulley had been driving the cattle belonging to Mohanlal and Ramhet, father of Man-goo accused, at the time of the incident.

Incidentally, my attention was invited to a portion of the statement of P. W. 2 Girraj, where he stated that the injured Gulley had gone to forcibly cultivate some land in possession of the accused. On these premises, an argument was developed that the incident really arose in consequence of the injured having gone to obtain forcible possession of the land and that the part of the prosecution story relating to the driving of the cattle is false and an after-thought.

8. I have given my careful consideration to these facts and do not find any substance in the argument built upon these infirmities. It will be pertinent to observe here that the principal object: of the First Information Report is only to make a complaint to the police to set the criminal law into motion. Its secondary though equally important object is to obtain early information of an alleged criminal activity to record the circumstances before there is time for such circumstances to be forgotten or embellished.

It should not be treated as the last word of the prosecution in the matter. The Magistrates and the Judges while considering omissions in the First Information Report should not derive inference from them like mathematical formulas, but should try to appraise them and find out their true effect In the light of all the circumstances of the case and the materials on record.

In the present case, the First Information Report was lodged by Bhagwatsingh, who was not an eye witness. When he came to Gulley, the injured, the latter was seriously injured and was unconscious and was not in a position to narrate the complete incident to him. He could hardly be expected to collect all materials including particulars about persons, who took the injured to his house and the manner in which the trouble started and, therefore, the omissions in the First Information Report cannot be considered sufficient to discredit the prosecution case.

9. Secondly, Mr. Rastogi read before me the evidence of the eye-witnesses with a view to show that according to the eye-witnesses, no blows were dealt to the injured while he was standing. Girraj has clearly stated that no blows were given to the injured after he fell down. He also referred to the statement of Gulley, the injured, but that statement does not support Mr. Rastogi. He stated that he received some injuries, then he fell down and when he was getting up, he was again beaten.

This statement cannot be taken to positively imply that no blows were received by him while he was standing. The third eye-witness, Roopsingh (P. W. 4), however, very clearly deposes that some blows were given to the injured after he fell down. The learned counsel relying upon the statements of Girraj P. W. 2 and Gulley P.

W. 3 urged that Roop-singh's presence at the time of incident is doubtful and that the ambiguous statement of Gulley should not be accepted in the face of a clear statement of Girraj P. W. 2.

Relying upon a premise that the prosecution case is that the injuries were received by the injured while standing, he contended that it is contradicted by the medical evidence. A number of injuries on thigh and other parts of the body could not have been caused to the injured in a standing position and it must be held that some injuries were certainly inflicted upon the injured after he fell down. The discrepancy between medical evidence and the eye-testimony has been very seriously stressed. Unfortunately, there is always a tendency to over-emphasize such discrepancies.

These discrepancies should be treated and appraised just like other discrepancies in the statements of the witnesses. It cannot be forgotten that the eye-witnesses may not give a very correct and accurate account of the version and may at places make exaggerations or may fail to give correct facts either on account of lapse of memory or on account of inability to observe minutely or to recount and recite correctly.

It should also be borne in mind that some times, the Medical Officers also do not bestow sufficient care while performing examinations and their opinions may not be properly formed on account of inadequate or defective examinations or lack of complete knowledge. It is, therefore, hardly fair to expect a complete and perfect correspondence between the medical evidence and the eye-testimony.

Naturally, therefore, the court must carefully examine the discrepancies and if it is reasonably open to arrive at a substantial and true version of the prosecution case, the courts should not adopt the easy course of throwing away the prosecution case on the alleged discrepancies between the medical evidence and the eye-testimony. Applying the above test to the present case, it can safely be assumed that the statement of Girraj to the effect that no injury was caused after the injured had fallen down cannot be deemed to be correct and is only the result of imperfect memory on his part and the prosecution case on that basis cannot at all be held unreliable.

The portion of Girraj's statement that no in-jury was received after Gulley fell down is not acceptable, but from this, it does not follow that his entire statement should be discarded on that ground with the help of medical evidence. The lower court was quite competent to accept the substantial part of his testimony. Gulley's statement, ambiguous though it may be does not necessarily imply that he received no injuries after he fell down.

The medical evidence cannot be, therefore, invoked to discredit his testimony. Further, I find no justification to doubt the presence of Roopsingh at the time of the incident. The lower court has explained the statements of Girraj and Gulley about the arrival of Roopsingh and for the reasons mentioned by it with which I am in agreement, I hold that Roopsingh is a reliable eye-witness. His evidence is quite consistent with medical evidence. In my opinion, the trial Judge has rightly accepted the prosecution case and I do not see any good reasons to differ from the appraisal of the evidence by the lower court.

10. Mr. Rastogi, however, very seriously contended that on the findings recorded by the trial Judge, the conviction of Mohanlal and Parbhati under Section 308 I. P. C. cannot be maintained. The learned Judge held that there was no unlawful assembly and, therefore, the application of Section 149 I. P. C. was out of question. He also did not apply Section 34 I. P. C., but thought it proper to convict the accused on the basis of their individual acts. It was pointed out by Mr. Rastogi that Gulley has stated that Parbhati first of all gave a blow on his head and Mohanlal also gave one blow on his head. Gulley further stated that the other accused gave blows on the head, eye and other parts of the body of the injured. There are three injuries on the head -- 2 grievous and one simple.

The reasonable possibility of one of the three injuries on the head having been caused by some accused other than Mohanlal and Parbhati, cannot be altogether eliminated. Further, it cannot also be positively stated that only a slight injury should be imputed to that accused. Mr. Gupta, Dy. Government Advocate invited my attention to the following portion of Gulley's statement:

fcLlk eqyktae us esjh vka[k dsHkh ykBh dk Bqlk ekjk Fkk] ysfdu ykBh eksVh Fkh blfy;s vka[k ds pkjks vkSj toZnkbZ A

and suggested that although this blow given by Bissa primarily relates to injury No. 8 in the Injury Report, Ex. V. 2, but it may very probably also cover injury No. 7, which is one of the three head injuries. The injury No. 7 is over the right parietal prominence of the head and it will be hardly fair to the accused on arguments based upon probabilities to positively hold that the third head injury was the result of the blow given by Bissa and to consequently conclude that Mohanlal and Parbhati must be authors of one each of the two grievous head injuries.

Therefore, the infliction of only one of the two serious head injuries can be positively imputed to these two accused and further one cannot be certain which one should be held positively liable for any one serious head injury and which one. In these circumstances, on the manner of approach adopted by the Sessions Judge in determining liability of the accused on their individual actions, the learned Sessions Judge could not have held any of the accused liable for the fatal head injury.

It may also be noticed that while determining the liability under Section 308 I. P. C., the Sessions Judge has considered the cumulative effect of these injuries. He did not consider whether each of the two grievous injuries on the head was by itself likely to cause death without taking into account the other injuries including head injuries. There is a good deal of force in this contention of Mr. Rastogi.

While holding the accused responsible for their individual acts, it was not open to the Sessions Judge to have considered the cumulative effect of the head injuries and to have held these two accused responsible for offence under Section 308 I. P. C. In my opinion, on a consideration of the matter on the basis of the approach of the learned Sessions Judge, the conviction of the two appellants Mohanlal and Parbhati under Section 308 I. P. C. cannot be safe. This, however, does not conclude the matter. It becomes necessary to examine whether the conviction of these two persons can be maintained with the help of Section 149 or Section 34 I. P. C.

11. At the outset, I must point out that the reasoning adopted by the Sessions Judge in acquitting Handoo has not at all impressed me. Handoo was named in the F. I. R. as one of the assailants. All the eye-witnesses have named Handoo as

one of the assailants. Only one witness Roopsingh stated that Handoo himself did not inflict any injury. The same witness of course stated that Handoo told the other accused to see whether the injured was alive or dead. For a variety of reasons, I am quite unable to concur in the conclusion reached by the Sessions Judge. In the first instance, it was hardly desirable for the Sessions Judge to have brushed aside the evidence of other eye-witnesses and to record a conclusion on the basis of a portion of the statement of P. W. Roopsingh that Handoo did not inflict any injury. Secondly, he went completely wrong in concluding that because Handoo did not inflict any injury, he could not be a member of the unlawful assembly. It is a settled law that active participation in actual violence is not necessary. Persons who by words or by signs or otherwise encourage violence are equally members of the unlawful assembly. In my opinion, the acquittal of Handoo by the Sessions Judge is wholly unjustified and is based on fanciful grounds. The case of Handoo is, however, not before me. There is no appeal by the State against the acquittal of Handoo. The question, therefore, that calls for determination is whether it is open to this Court to treat the acquittal of Handoo as wrong and to come to a conclusion that the four appellants could be convicted under Section 147 I. P. C. and other offences read with Section 149 on a premise that Handoo was the fifth member to form the unlawful assembly.

12. Such a question came up for examination by the Supreme Court in *B. M. Dana v. State of Bombay*, AIR 1960 SC 289, where it was argued on behalf of the accused that the acquittal of some accused should have full effect for all purposes and cannot be ignored as wrong while convicting other accused under Section 147 or other sections of the I. P. C. read with Section 149 I. P. C. The question was, however, left open. The Supreme Court decided this case on an assumption that the conviction was good for all purposes.

13. However, there is an earlier Supreme Court decision in *Dalipsingh v. State of Punjab*, AIR 1953 SC 364 laying down a rule applicable to the present case. In the Supreme Court case, 7 persons were stated to have formed an unlawful assembly and to have committed a double murder in prosecution of the common object of the assembly. The Sessions Judge who tried the case convicted each one of the seven accused under Section 302 read with Section 149 I. P. C. relying upon the

testimony of two eye-witnesses. On appeal, the Punjab High Court did not believe the eye-witnesses all the way and required corroboration. Finding corroboration in the case of four accused in the recovery of blood-stained clothes, their conviction was maintained and the remaining three were acquitted.

14. In an appeal by the four convicted accused, a question arose whether their conviction was legally sustainable. The Supreme Court found it difficult to maintain conviction under Section 302 I. P. C. simpliciter as it was impossible to ascribe any particular injury to any particular person. The Supreme Court also felt unable to have recourse to section 34 I. P. C. However, the Supreme Court weighed the evidence and accepting the evidence of the two eyewitnesses observed that the High Court was unnecessarily cautious in acquitting the other three accused and sustained the conviction of the four persons under Section 302 read with Section 149 I. P. C. with the following observations:

'Despite that, we agree with the learned Sessions Judge that Musammat Punnan and Musammat Charni are to be believed regarding the main facts and that they correctly named all the seven accused as the assailants. On that finding, the conviction under Section 302 read with Section 149 can be sustained. We accordingly uphold these convictions. The acquittals in the other three cases will of course stand but the mere fact that these persons have, in our opinion, been wrongly acquitted, cannot affect the conviction in the other cases'.

15. Indeed, there can be no objection to the adoption of such a course on general principles. The finding of the court below must be arrived at on a consideration of the entire evidence in the case in respect of persons before it and a finding with regard to a person who is not before the court should not stand in the way in arriving at a definite finding with regard to the persons before the Court. The same conclusion is reached on yet another approach.

Two persons may be concerned jointly for one offence. One becomes available for trial earlier and is tried and acquitted. Can this acquittal bar the trial of the second accused at a later stage on the same facts and is it not open to the trial court or the appellate court to reach a different conclusion on the same facts and evidence with regard to the other accused? In my opinion, there is no legal bar. Obviously,

Section 403 Cr. P. C. cannot be invoked in such cases.

On the same principle, equating the hearing of an appeal as a continuation of trial of some persons and some being not available, I cannot see any legal bar for an appellate court to record a finding different from the trial court in determining the case of persons before it. The appellate court should and will of course give due weight to the findings of the trial court with respect to an acquitted accused, while deciding the case of accused before it, but it is hardly correct to say as a matter of law that the finding of the trial court must be accepted for all purposes including that of determining the case of persons before it. An argument was raised that the person who is not before the court is likely to be adversely affected. The argument though plausible has no real substance obviously, as that finding is not binding upon him.

16. I may also observe that even apart from the applicability of Section 149 I. P. C., the learned Judge should have applied Section 34 I. P. C. to the facts of the case and should have convicted these persons with the help of Section 34 I. P. C. Section 34 I. P. C. is specially intended to meet a case in which it may be difficult to distinguish between the acts of the individual members of party who act in the furtherance of the common intention of all or to prove exactly what part was taken by each of them.

The principle which the section embodies is participation in some action with the common intention of committing a crime. Once such participation is established, Section 34 I. P. C. is at once attracted, vide AIR 1960 SC 289. It is not necessary that the common intention must be to commit the very crime that was actually committed.

Further, to reach a finding about common intention, it is not necessary to establish a prior concert. Common intention may be formed just before or even during the course of the assault. In fact, the question of common intention is a question of inference to be drawn from the facts and circumstances of the case. In this connection, two important considerations should always be borne in mind:

(1) Whether the assault is sudden or appears to be deliberate.

(2) Whether it is a case of a few casual injuries or a case of a number of injuries inflicted by a number of persons.

17. In a case where the assault is not sudden, common intention should be generally presumed unless there is something to show that there was no opportunity for the accused to have a concert, vide *Ganpat v. The State*, 1951 Raj LW 313.

18. Secondly, when several persons inflict numberless injuries, the common intention should be safely presumed. In the present case there is no suggestion on behalf of the accused that there was a sudden assault. There is no further suggestion that the accused came from different directions with the same or similar intention to cause injury to the injured on account of their separate individual grievances. The prosecution case clearly shows that they all made a combined assault and inflicted a number of injuries, which can be safely estimated at not less than 40.

I cannot understand why the Sessions Judge, in these circumstances, did not apply Section 34 to the facts of the case. Charges under sections 147 and 308 I. P. C. having been framed against all the accused, it was quite open to the Sessions Judge to have convicted the accused under Section 308/34 I. P. C. as in this case, there could have been no possible prejudice to the accused in view of the complete denial of the incident. In these circumstances, the conviction of Mohanlal and Parbhati under Section 308 I. P. C. can be easily maintained either with the help of Section 149 or Section 34 I. P. C.

19. In fact, the other two persons convicted under Section 323 I. P. C. and Handoo should also have been convicted under Section 308 read with Section 149 I. P. C. or Section 34 I. P. C. There is no appeal by the State against the complete acquittal of Handoo and the partial acquittal of the other two persons and I have no alternative but to allow their cases to rest where they are, but their cases do not stand in my way for sustaining the conviction of accused Mohanlal and Parbhati under Section 308 read with Section 149 or Section 34 I. P. C.

20. There is no difficulty in coming to the conclusion that in view of a number of injuries including three serious head injuries with underlying fractures of the skull bone, it could be considered sufficient to bring the case of the appellants under Section 308 I. P. C., because had the injured died, they could have been easily convicted under Section 304 I. P. C. In these circumstances, I maintain the conviction of the two appellants Mohanlal and Parbhati under Section 308 read with Section 149 or Section 34 I. P. C. and also the conviction of the other two appellants, Mangoo and Bissa under Section 323 I. P. C .

21. Coming to the question of sentence, I cannot help mentioning that three years' sentence passed against Mohanlal and Parbhati does not appear to be excessive in view of the merciless beating given by the accused to the injured. There are, however, two considerations which though not strictly relevant have weighed with me in interfering with the sentence. The three other accused who were also implicated in the same incident have been allowed a good deal of leniency. One has been completely acquitted and the other two have been convicted under Section 323 I. P. C. and sentenced to six months' rigorous imprisonment only. The second consideration which also has weighed with me is the extreme fairness with which the case was placed before me by Mr. Rastogi appearing for the appellants. Although, I am not quite sure of the propriety of taking into account these considerations, yet I have felt inclined to reduce the sentence passed upon these two accused, i. e. Mohanlal and Parbhati from three years' to 2 years' rigorous imprisonment.

22. With this modification, the appeal of all the appellants is dismissed.

23. Accused Mangoo and Bissa are on bail and, therefore, the District Magistrate, Bharatpur shall take steps to secure the arrest of these two accused for sending them to jail to undergo their unexpired period of sentence.