

Dal Chand Vs. the State

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Court : Rajasthan

Decided On : Aug-27-1964

Reported in : 1966CriLJ236

Judge : L.N. Chhangani, J.

Appellant : Dal Chand

Respondent : The State

Advocate for Pet/Ap. : Mr. Kasliwal

Judgement :

ORDER

L.N. Chhangani, J.

1. This is a revision by Dalchand against the appellate judgment and order of the Additional Sessions Judge, Jhalawar, dated 21st of June, 1963, maintaining his convictions under Sections 452 and 323, Indian Penal Code. The petitioner was convicted by the Munsif Magistrate, Jhalawar, by his order dated 31st January, 1963 for these offences The Munsif Magistrate awarded 6 months' rigorous imprisonment and a fine of Rs, 300/-, in default, further rigorous imprisonment for 3 months under Section 452 and one month's rigorous imprisonment under Section 323, Indian Penal Code. The Additional Sessions Judge while maintaining the convictions modified the sentences awarded by the Munsif Magistrate. He set

aside the sentence of fine awarded under Section 452. He also set aside the substantive sentence under Section 323 but awarded a sentence of fine amounting to Rs, 100/-and in default directed that the accused will undergo one month's rigorous imprisonment.

2. The facts giving rise to the prosecution of the petitioner and four other persons, namely Gorilal, Daulatram, Parmanand and Tulsiram, are briefly these:

The petitioner Dalchand and the co-accused Gorilal and Diulatram are real brothers. The other two accused Tulsiram and Parmanand are the sons of accused Gorilal. Thus all the five accused are members of one family. The complainant Ridhkaran obtained a lease of a shop belonging to the accused in village Pakanl. The complainant installed one floor-mill and a machine for extracting oil in the shop. The complainant also is alleged to have purchased some open land towards the north of the shop and constructed a tin shed on the open place. Two doors of the shop in lease were opened in the tin shed by the complainant. The complainant's case was that the accused wanted the complainant to vacate the shop but he declined to do so. Therefore, the accused adopted wrong methods to secure the vacant possession of the shop. According to him, on 10th May, 1961 the accused collected stones for purposes of construction and thereby obstructed the way to the shop occupied by the complainant. The complainant objected to the collection of the stones by the accused, whereupon the accused entered the tin shed and attacked him.

According to the complainant, Dalchand the petitioner took a 'salia' of the cart and inflicted injuries upon him. The matter was reported to the Police Station, Bakani and the police registered a case under Sections 147, 341 and 452, Indian Penal Code and started investigation. After investigation the police challaned five persons including the petitioner in the Court of Munsif Magistrate, Jhalawar. The Munsiff Magistrate acquitted Parmanand. He convicted the petitioner Dalchand under Sections 452 and 323, Indian Penal Code. Gorilal and Daultram were convicted under Section 448, Indian Penal Code and were awarded two months' rigorous imprisonment. Tulsiram was also convicted under Section 448 but was released in accordance with Section 6 of the Probation of Offenders Act.

Dalchand, Gorilal and Daulatram Sled a joint appeal in the Court of Additional Sessions Judge, Jhalawar. The Additional Sessions Judge, Jhalawar, acquitted Gorilal and Daulatram but maintained the convictions of the petitioner with modification of sentences as indicated above.

3. Mr. Kasliwal, appearing for the petitioner. in the first instance, challenged the concurrent findings of facts arrived at by the Courts below with regard to the petitioner. After considering the relevant portions of the record and examining the judgments of the two Courts below, I have no hesitation In coming to the conclusion that there is sufficient evidence to justify the findings of facts arrived at by Courts below. No case for reappraisalment of the evidence is revision has been made out. The Courts below were right in accepting substantially the prosecution case.

4. The main submission on behalf of the petitioner Is that even on the facts of the case as held proved, his conviction under Section 452, Indian Penal Code is not sustainable. The argument of the learned Counsel in this behalf is two fold. In the first in-stance, it is submitted that to constitute an offence under Section 452, Indian Penal Code, there must be in the first instance, a house trespass and there must be further evidence of preparation for causing hurt to any person. It is urged that there is no evidence of preparation is the present case. Secondly, it was argued that to constitute a house-trespass, the prosecution ought to have proved that the building upon which the offence of trespass was committed is a building used as a human dwelling or used as a place of worship or as a place for the custody of the pro-party. The submission of the learned Counsel is that there are no materials to justify a conclusion that the building was used as a human dwelling or for the custody of the property. The question of the property being used as a place of worship does not arise.

5. Taking up the first branch of the argument, I must observe that there is a considerable force in It and it must be accepted. It is well settled that there must be clear evidence of preparation for causing hurt to sustain a conviction under Section 452, Indian Penal Code. The fact that a person entered another man's house and committed an assault does not necessarily presuppose such

preparation! for it may be a case of post hoc ergo propter hoc. The materials on the record of this case show that the fight between the parties developed on account of the complainant having protested against the collection of stones by the accused. The fight was sudden and during the course of the fight the accused took a 'salia' of the cart and inflicted blow upon the complainant. In the circumstances of the case, it is difficult to infer that the accused had made preparation for causing hurt to the complainant. Mr. Singhi appearing for the State made no attempt to counter argument on this aspect of the case.

6. As regards the second argument submitted on behalf of the petitioner, the counsel for the State has joined a serious controversy and the question requires to be examined in a little detail. Evidently, house, trespass as described in Section 442, Indian Penal Code, and made punishable as such in Section 448 is an aggravated form of trespass and the prosecution besides proving all the ingredients of criminal trespass must further prove that the trespass was committed upon in the "building, tent or vessel" used as a human dwelling or as a place of worship or for the custody of property. In the present case, no question of trespass in a tent or vessel arises. The prosecution also has not come forward with a case that the building was used as a place of worship. The only question requiring determination is whether the tin-shed can be considered a building used as a human dwelling or as a place for the custody of the property?

7. Mr. Kasliwal relied upon the observation) made by Lord Esher in a English case *Moir v Williams*, (1892) 1 Q B 264. In that case Lord Esher said that the ordinary meaning of the word "building" is 'an enclosure of brick or stone-work covered in by a roof. 'Mr. Kasliwal further submitted that this dictum of Lord Esher has been referred to with approval in several Indian cases. As I look at the matter, the description of a building given by Lord Esher only indicates a rough and a broad test in relation to the conditions then prevailing in England. The word "building" in my opinion, cannot have a fixed connotation and it must vary from country to country and from place to place according to the climatic conditions, availability of materials for building purposes and the habits and notions of the people with regard to their residence. The difficulties in adopting Lord Esher's dictum as a test of universal application was very prominently met out by Malik J. in *Makkhan v.*

Emperor AIR 1945 All 81. The learned Judge in that case observed as follows:

In Indian houses generally there is a court-yard which is not covered. It may be a matter of some difficulty in such cases to say that when a man commits criminal trespass and enters the court-yard of the house, he is not guilty of 'house trespass.' Moreover, there may be cases where a man may be living in a house the roof of which has fallen down, but he has put up some sort of a shelter inside within the boundaries. In such cases too it may be difficult to say that the man has not been guilty of 'house trespass' simply because the roof of the house has fallen down. As I have already said, it would depend on the facts of each case whether the trespass has been committed of a building used for human dwelling as to come within the definition of the word 'house trespass'.

I entirely agree with the observations extracted above. I further express my concurrence with the views expressed by Srinivasa Aivangar J., in *Lakshmana Koundan v. Emperor* AIR 1927 Mad 343. Said the learned Judge;

The expression 'building' more especially having regard to the expressions 'Tent' and 'Vessel' that follow must be regarded as indicating some structure intended for affording some sort of protection to the persons dwelling inside it or for the property placed there for custody. Any structure which does not afford any such protection by itself but merely serves as a fencing or other means of merely preventing ingress or egress, cannot make the place a building or a house within the meaning of either of those two sections.

The question what constitutes a building must depend upon what is ordinarily understood by that term. Thus, a question whether a particular structure is a building must in an ultimate analysis be a question of fact to be decided on the evidence and materials of the case.

Then, the further requirement of Section 442 is that the building should be used as a human dwelling or as a place for worship. The expression 'human dwelling' denotes a building demarcated for use as a residence by an individual or the members of a family enjoying shelter and protection not only from the winds and the Sun but also from the unauthorised entries and interference by strangers. No

doubt, the primary determining factor is the nature of the actual user but it must be added that the meaning of the expression should not be over stretched by unduly emphasising the actual user. A distinction must be drawn between what may be considered an ordinary and normal use than between a casual and an abnormal use and regard must be had not only to the actual user but also to the normal adaptability of the building to the purpose for which it was put to use as also to the general notions and habits of the people in relation to residence.

Further, as pointed out by Bhargava J. in *Babulal v. State* AIR 1952 All 146 is considering the expression 'building for custody of property' a distinction ought to be drawn between the word 'custody' and the word 'keeping'. The word 'custody', it was observed, is undoubtedly different from the word 'keeping' and it implies a sense of security which would be wanting in the case of a shed, which is only meant to provide shelter from Sun and rain 'and which has no doors etc. Thus the question {whether a particular building is used as a human dwelling or as a place for the custody of the property cannot be determined on rigid and inflexible formula but must be considered and determined after due consideration of the nature of the actual user of .the structure as also the normal adaptability of the property to a particular use as also the general notions of the people in relation to residence and custody of property. It follows that each case must be decided on its own facts and circumstances.

8. Let us now examine the present case in the light of the considerations indicated above, Mr. Singhi appearing for the State contended that the tin-shed into which the accused Dalchand enter-ed and inflicted a blow upon the complainant is in the nature of a verandah attached to the shop in lease with the complainant. In this connection, he emphasised that the doors of the shop open in the tin-shed and that the complainant has been using the tin-shed as his office and is keeping certain articles in the tin-shed. Before determining the question of fact, it will be necessary to consider the legal position. Now, verandah may be inner verandah or outer verandah. So far as the inner verandah in a building is concerned, no difficulty can arise and that can easily be considered as a part of the main building falling within the terms 'building used as human dwelling' or 'a place for the custody of the property.' With regard to outer verandah, the judicial opinion is not

uniform. Although the learned Counsel did not cite cases under Section 442 or Section 448, Indian Penal Code but three cases interpreting identical expressions in Section 380, Indian Penal Code are relevant and may have noticed,

9. The Madras High Court in a case reported in High Court Proceedings 17th March, 1883, 1 Weir 435 Cr.) observed as follows:

Now an ordinary verandah, is no doubt part of a building, but a theft from the verandah which is outside the house is not a theft in a building. It might so happen that the verandah was so enclosed as to be a substantive building used for the custody of the property, but that is a question of fact to be determined upon the evidence in each case.

10. The next case to be referred is *Jabar v. Empress* 1 Pun Re 1881 Cr. In that case, the decision of the Madras High Court referred to above, was referred. The learned Judge with reference to the Madras case observed as follows:

We have not been able to find this ruling re-ported, but we observe that it does not amount to a ruling that verandah cannot be a 'building used as a human dwelling or for the custody of property.

We consider that theft of property in a verandah may be theft in a building, within the meaning of Section 380 of the Penal Code. When a verandah forms part of a building which is itself used as a human dwelling or for the custody of property, theft committed there is theft committed in a building so used, and, therefore, theft punishable under Section 380.

11. In *Sit Hon v. Emperor* AIR 1917 Low But 78 (2), it was held:

The panatchut or outer verandah where shoes are taken off is part of a Burmese dwelling house, and a person who commits criminal trespass on a panatchut under the circumstances set forth in . 441, Indian Penal Code, commits house trespass.

12. I have given due consideration to the above, three decisions. In my opinion, it is difficult to accept an extreme view that every outer verandah is necessarily a

building house used as human dwelling or as a place for the custody of the property. Similarly, the other extreme view that an outer verandah can never be such a building, cannot also be accepted. The question whether a particular outer verandah answers the requirement of Section 442 should be determined on the general considerations indicated above with due regard to the actual user of the verandah as also its adaptability to use for residence or custody of property having due regard to the general notions of the people in relation to residence and custody of the property.

13. Considering the facts of the present case, it must be mentioned at the outset that the main building belongs to the accused and complainant has been occupying the shop as a tenant of the accused. The open space under the tin shed does not belong to the accused. The complainant is alleged to have purchased the open land under the tin shed. There is no evidence or material on record to show whether the accused had given consent to the amalgamation of the open space with his shop building so that it may be considered or treated an integral part of the shop. The mere fact that the doors of the shop in lease with the complainant open in the tin-shed cannot necessarily make the land under the tin-shed an integral part of the shop belonging to the accused. It is also obvious that the tin-shed is open from three sides and is bounded on the fourth side by the shop belonging to the accused. There is no adequate prevention against the entries of strangers in the tin-shed.

It has been stated that the complainant has kept a slab there and uses the tin-shed for his use as office by sitting on the slab. This, however, cannot, in my opinion be sufficient to treat the open space under the tin shed as a human dwelling house. The use, in my opinion, is casual and abnormal and having regard to the adaptability of the land, I am not prepared to treat the open land as a building used as human dwelling. Similarly, the complainant's suggestion that the place should be treated as a place for the safe custody of the property because he has kept a boiler in the tin-shed, cannot also reasonably be accepted. In my opinion, it will be safer to say that the boiler has been merely kept there but it is difficult to predicate that the tin-shed is a place for the safe custody of the boiler or any other property. In the circumstances, the contention on behalf of the State that

the tin-shed is in the nature of a verandah and integral part of the shop and is used as a human dwelling or as a place for the safe custody of the property, cannot be accepted and is rejected.

14. The learned Counsel also cited a few cases relating to court-yard and open compound, where varying views have been taken. In some cases an offence of house trespass has been held proved. In other cases an offence of house trespass has not been, held to be made out. The decision of these cases depend upon the facts and the circumstances of each case and no useful guidance can be derived from them for determining the controversy on the facts and the circumstances of the present case, I need only observe that considering the nature of THE tin shed and the fact that it is open from all three sides, I am not prepared to treat it as a building satisfying the requirements of Section 442, Indian Penal Code.

15. In the light of the above discussions, the second line of argument advanced on behalf of the petitioner also merits acceptance. It follows that the conviction of the petitioner under Section 452, Indian Penal Code, is not sustainable. However, the ingredients of a simple trespass are satisfied and the accused is certainly guilty under Section 447, Indian Penal Code. The petitioner's conviction, therefore, deserves to be altered from S, 452 to one under Section 447, Indian Penal Code.

16. In the result, the revision is partially accept-ed. The conviction of the petitioner under Section 323, Indian Penal Code, and a sentence of Rs. 100/- fine under that section are maintained. The petitioner's conviction under Section 452, Indian Penal Code is set aside. He is, however, convicted under Section 447, Indian Penal Code. A sentence of fine of Rs, 50/- is awarded to him under this section. The petitioner is given one month's time to pay the fine, failing which he will undergo one month's imprisonment in default.