

Poresh Nath Sircar Vs. Emperor

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Court : Kolkata

Decided On : Aug-30-1905

Reported in : (1906)ILR33Cal295

Judge : Rampini, ;Woodroffe and ;Mookerjee, JJ.

Appellant : Poresh Nath Sircar

Respondent : Emperor

Judgement :

Rampini, J.

1. This is a Rule to show cause why the conviction and sentence passed on the accused should not be get aside.
2. The petitioners are three out of seven accused persons tried for and convicted of the offence of rioting, under Section 147 of the Indian Penal Code, by the Subdivisional Magistrate of Magura.
3. The facts are that some time ago there was a Section 145 case about the possession of chur Attock between Asutosh Goswami on the one side and some of the accused on the other. The complainant Arshad supported his landlord. The Magistrate found chur Attock to be in the possession of the accused, but directed that Arshad should continue in possession of his homestead, which he was found

to have occupied for more than two months before the date of the institution of the Section 145 case. Arshad, according to the Subdivisional Magistrate of Magura, began to encroach upon the land adjoining his homestead. He filled up a ditch between his bari and that of his brother Abed, and began to occupy Abed's huts. This enraged the accused who, on the 8th February last, came to the place of occurrence with a large body of armed men, beat Arshad and his neighbours Jan Mahomed and Mehar, and pulled down the huts. Mehar was speared in the abdomen. His body was removed by the rioters. He has never been seen or heard of since. A head was subsequently found, but it could not be identified to be his.

4. On these facts the Magistrate convicted the seven accused before him under Section 147, and sentenced them to a year's rigorous imprisonment. On appeal to the Sessions Judge he acquitted four of the accused, because their names had not been mentioned in the First Information report. He affirmed the conviction of the remaining three persons, who were the inciters of the riot, who were present at it and who gave orders for the attack on Arshad and his neighbours. He reduced the sentences on Benimadhab Hore to three months' simple imprisonment, and on the other two accused to one month's simple and two months' rigorous imprisonment.

5. This Rule has been obtained on the ground that the Sessions Judge has found the common object of the unlawful assembly to be different from that mentioned in the charge, and that the accused have thereby been prejudiced.

6. The charge is to the effect that the accused committed a riot " with the common object of taking possession of some property by means of criminal force, or to enforce a right or supposed right on it.'

7. Now the learned pleader for the appellants relies on the findings of both the Courts below, which are to the same effect, viz., Arshad had encroached upon the land of the chur declared by the Magistrate in the Section 145 case to be in the possession of the accused, and had added Abed's homestead to his own. Hence it is said, the accused, when they committed rioting, did not do so with the object of taking possession of some property by means of force or to enforce a right or supposed right on it, but were exercising the right of private defence against the

encroachment of Arshad. This reasoning is to my mind entirely fallacious. What Arshad did was entirely improper and illegal, but it did not give the accused persons a right to come with a large body of armed men, and to attack Arshad and his companions, to beat two of them and apparently to kill a third, and to eject him forcibly from Abed's homestead. What Arshad had done was done stealthily and some time before the day of the occurrence. On the day of the occurrence he was not engaged in taking possession of Abed's homestead. The accused, therefore, had no lawful right to act as they did,

8. As the Magistrate observes, 'there cannot arise any question of the right of private defence. The accused were not exercising any such right. They were on the offensive and not on the defensive. If Arshad had trespassed into Abed's house, the proper course was to prosecute him before the proper tribunal instead of resorting to the present high-handed proceedings.'

9. The Present case in my opinion comes well within the rule laid down by this Court in the well-known leading case of *Ganouri Lal Das v. Queen-Empress*. Then, I can see no difference between the findings of (he Courts below as to the common object of the riot and the common object as specified in the charge. The accused were certainly on the day of the occurrence endeavouring to take possession of some property by means of criminal force or to enforce a right or supposed right on it.

10. In this view of the case the accused cannot have been in any way prejudiced. But in any view of the case I see no reason to suppose that they have been prejudiced. They knew very well they were tried for the riot they committed for the purpose of taking forcible possession of Abed's homestead. They had every opportunity given them of proving that they were not guilty of such an offence, and I am unable to see (hat they have been prejudiced in any way. The provisions of Section 537, Clause (d), are accordingly applicable.

11. I am, therefore, of opinion that this Rule should be discharged. As my learned brother does not agree with me, this case must be laid before the Hon'ble the Chief Justice for reference to a third Judge.

12. Mookrjee J. This is a Rule calling upon the District Magistrate of Jessore to show cause why the conviction of, and the sentence passed upon, the petitioners should not be set aside. It appears that the three petitioners along with four others were tried by the Deputy Magistrate of Magura for having taken part in a riot. All the accused were convicted under Section 147 of the Indian Penal Code and sentenced to imprisonment. Upon appeal to the Sessions Judge four of the accused were acquitted, but the conviction of the petitioners was affirmed. The learned Sessions Judge, however, reduced the sentences passed upon them and affirmed the order made under Section 106 of the Criminal Procedure Code for security for keeping the peace on conviction. The applicants then moved this Court and obtained this Rule. No one has appeared on behalf of the Magistrate to show cause, but he has submitted an explanation, which has been placed before us. It is sufficient to say with reference to this explanation that it does not throw any additional light on the case. It has been argued by the learned vakil, who appears in support of the Rule, that the facts found by the learned Sessions Judge are not sufficient to support a conviction under Section 147 of the Indian Penal Code, inasmuch as all the elements which must be established to support a conviction under that section have not been found; he lays particular stress upon the circumstance that there is no finding that the persons, who are alleged to have composed the unlawful assembly, had a common object, and if so, what that common object was. He has further contended that the facts found by the learned Sessions Judge negative the common object set out in the charge, which he contends was in itself vague and indefinite. In my opinion these contentions are well founded and ought to prevail.

13. It is essential to sustain a conviction under Section 147 of the Penal Code that the persons forming the unlawful assembly should be animated by a common object. I have carefully read the judgment of the learned Sessions Judge, and I fail to discover in it any statement which even by implication may be supposed to contain a finding that the assembly, of which the present petitioners are alleged to have been members, had a common object; the judgment certainly contains no finding what the common object, if any, was. If we turn to the judgment of the Deputy Magistrate, it is equally defective. Upon this ground alone the conviction, in my opinion, ought to be set aside. But, as I shall show presently, the facts found

by the learned Sessions Judge completely negative the common object, which was not very precisely set out in the charge. This involves an examination of the facts and the evidence in the case. It is unquestionable that, although this Court will not as a rule, in the exercise of its revisional jurisdiction, go into the evidence and examine the validity of the conclusions of the Court below, it may in exceptional cases enter into matters of fact, if it thinks fit: *Keshab Chunder Roy v. Akhil Metey* (1805) I.L.R. 22 Calc. 998 and *Emperor v. Bankatram Lachiram* (1901) I.L.R. 28 Bom. 533. But I am not aware that it is the practice of (his Court, in cases in which the judgment of the Court below, as in the present instance, is manifestly defective and the findings contained therein are insufficient to support a conviction, for itself to examine the evidence in order to see whether the conviction may not be sustained. In the present case, however, an examination of the evidence and the circumstances of the case-have satisfied me that the conviction of the present petitioners ought not to be sustained.

14. The story for the prosecution is that some time before February last there had been a dispute between one Asutosh Groswami and the present petitioners regarding the possession of a property known as chur Attock. Proceedings were instituted under Section 145 of the Criminal Procedure Code between the petitioners on the one hand and Asutosh and his tenants including two brothers, Arshad and Abed, on the other. Those proceedings terminated in favour of the petitioners, and they were maintained in possession of the chur, excepting the portion covered by the homestead of Arshad, of which he was found to have been in possession for more than two months preceding the institution of the proceedings. The homestead of Abed, however, fell into that portion of the chur, of which possession was given to the petitioners. It is not disputed that after the termination of the Section 145 case-Abed left his homestead and it was unoccupied. It is alleged on the side of the prosecution that on the 8th February last the petitioners, along with a hundred or a hundred and fifty men, who are all said to have been armed, attacked Arshad's house, demolished it and wounded him; and the charge which was framed against them was in these terms: 'That you on or about the 8th February 1905, at chur Attock, committed a riot with the common object of taking possession of some property by means of criminal force, or to enforce a right or supposed right on it.' It will be noticed that the charge does

not specify the property, the taking possession of which is supposed to be the common object of the unlawful assembly. That this vagueness in the charge was not accidental is amply shown by the later developments of the case. As I have already stated, it was alleged in the First Information that the attack was upon Arshad's homestead; but when Arshad himself was examined in the case he was forced to admit that the alleged attack was upon the western hut of Abed Mollah, and this variation has a very important bearing upon the case. The learned Sessions Judge finds that since the disposal of the Section 145 case, Arshad had been trying to encroach upon the land decreed to the present petitioners, and that the occurrence was the result of the complication that Arshad was trying to introduce by stealthy wrongful acts. A perusal of the evidence leaves no doubt in my mind that on the morning of the occurrence, whatever its precise nature might have been, the present petitioners were in possession of Abed's hut, and that the disturbance was the result of an attempt on the part of Arshad to take possession of that hut by unlawful means. I entirely disbelieve the story as set out in the First Information, upon which the whole case for the prosecution rests, namely, that the occurrence took place on Arshad's homestead as the result of a dispute as to its possession. The view I take is obviously supported by the evidence of Arshad himself, and the evidence of the other witnesses is hopelessly contradictory. I entirely agree with the learned Sessions Judge that there has been a considerable manipulation of the evidence; but while he restricts this criticism only to the number and names of the accused persons, in my opinion there are grave reasons for thinking that the observation applies with equal force to the whole of the evidence. To take one illustration, the prosecution sought to make out that during the occurrence the party of the accused speared and killed a man named Meher, and that the rioters managed to disappear with his body. The learned Sessions Judge observes that this part of the story has not emerged above the region of suspicion, but he appears to me to put the matter too mildly. No trace of such a story is to be found in the First Information, and it was not developed till a very late stage of the case, and as the learned Sessions Judge says, only casually referred to by some of the witnesses. To my mind this part of the story is an after-thought, and the evidence has been manipulated accordingly. It further appears that the witnesses examined on the side of the prosecution are partisans of Asutosh

Groswami, who was unsuccessful in the Section 145 case; they are, as the learned Sessions Judge himself observes, tenants of Prosanna Biswas and Tarak Chakravarty, who are the enemies of the appellants and of whom one, namely, Prosanna, had been actively looking after the case for (he prosecution both before the Police and at the time of the trial before the Deputy Magistrate. The evidence of these witnesses is discrepant in material particulars; the story as set out by them is different from, and indicates considerable developments upon and variation from, the story as set out in the First Information. Their evidence has been disbelieved in certain respects by the learned Sessions Judge himself, and in my opinion it would not be safe to sustain the conviction of the present petitioners upon their testimony.

15. From what I have already stated it is clear that the common object alleged in the charge has not been made out. The learned Sessions Judge has found that Arshad was trying to encroach upon the land of which possession was given to the petitioners by the order in the Section 145 case, and that he had been trying to introduce complication by stealthy wrongful acts. If, therefore, the petitioners were in possession, their common object could not have been to take possession by criminal force. The case, therefore, is covered by the principle laid down by this Court in the case of *Rahimnddi v. Asgar Ali* (1900) I.L.R. 27 Calc. 990, where it was held that, if the common object fails and the substantive charge is disbelieved, the accused should be acquitted, and that it is not proper for an Appellate Court, while disbelieving the common object of an unlawful assembly, to find out a different common object regarding which the accused were never called upon to plead nor tried, and to affirm the conviction. I may further add that the charge in this case ought to have been more precise, and I have not the smallest doubt that the accused have been prejudiced by reason of the omission in the charge to specify the property in respect of which the occurrence is alleged to have taken place. I would be very slow indeed to have recourse to Section 537, Clause (a) of the Criminal Procedure Code in a case of this description, where the specification in the charge of the property in respect of which the riot is said to have taken place, would alter the whole complexion of the case. The view I take is supported, by the cases of *Behari Mahton v. Queen-Empress* (1884) I.L.R. 11 Calc. 106, *Sabir v. Queen-Empress* (1894) I.L.R. 22 Calc. 776, and *Chunder Coomar Sen v.*

Queen-Empress (1899) 3 C.W.N 605.

16. In this view of the matter, it is not necessary to consider the effect of the decision in *Ganouri Lal Das v. Queen-Empress* (1889) I.L.R. 16 Calc. 206, which in my opinion has no application to the facts of the present : case; but if it had, I should be prepared to examine the grounds upon which that decision is founded and to refer the matter, if necessary, to a Full Bench.

17. The present case appears to me to be rather within the rule that if persons are rightfully in possession of land and find it necessary to protect themselves from aggression, they are justified in taking precautions and using such force as is necessary to prevent the aggression: see *Pachkuuri v. Queen-Empress* (1897) I.L.R. 24 Calc. 686.

18. In my opinion the conviction of the petitioner cannot be supported either upon the facts established by the evidence or upon the findings contained in the judgment of the learned Sessions Judge. I would, therefore, make the Rule absolute and set aside the conviction and sentences; but as my learned brother takes a different view, the procedure laid down in Section 430, Clause (1) of the Criminal Procedure Code, read with Section 429 of the Criminal Procedure Code, will have to be followed.

Woodroffe, J.

19. I have read the record in this case and the judgments of my learned brothers upon whose difference in opinion the matter has been referred to me for decision.

20. I think it unnecessary to express any opinion upon the question raised in Mr. Justice Mookerjee's judgment whether the Court in Revision will examine the evidence in cases where a judgment is defective in order to see whether the conviction is just and should be maintained, nor as to whether the case of *Ganouri Lal Das v. Queen-Empress* (1889) I.L.R. 16 Calc. 206 was correctly decided. In other respects, I entirely agree with the judgment of Mr. Justice Mookerjee, and for the reasons stated by him, I make the Rule absolute and set aside the conviction of, and sentence passed upon, the petitioners.

