

Gunadhar Das and ors. Vs. State

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Court : Kolkata

Decided On : Apr-10-1952

Reported in : AIR1952Cal618

Judge : Harries, C.J. and ; S.R. Das Gupta, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 154, 288, 297, 423 and 423(2); ;[Evidence Act, 1872](#) - Sections 30 and 145

Appeal No. : Criminal Admitted Appeal No. 203 of 1951

Appellant : Gunadhar Das and ors.

Respondent : State

Advocate for Def. : N.C. Sen, Adv.

Advocate for Pet/Ap. : Arun Prokas Chatterji, Adv.

Disposition : Appeal allowed

Judgement :

Harries, C.J.

1. This is an appeal by eleven persons who were convicted of dacoity and each sentenced to five years' rigorous imprisonment. They were tried along with twelve others by a learned Assistant Sessions Judge sitting with a jury. The jury had

found the twelve persons not guilty, and they were acquitted but the jury unanimously found the eleven appellants guilty and they were dealt with accordingly.

2. The case for the prosecution was that these twenty-three persons together with others committed a dacoity in the house of one Janakram Shaw, P. W. 2, on the evening of 10-9-1949. On that evening between 7 and 8 p. m. some 50 or 60 persons, it is said, were seen coming along the road towards this house armed with lathis, spears, swords and other weapons. They were shouting slogans such as 'Lal Jhanta Ki Jay', 'Mahajan Dhangsa Hauk' and were obviously making for the house of Janakram Shaw.

Apprehending that his house might be the subject of attack, Janakram it is said bolted the main door from inside and he together with his womenfolk and children escaped through another door and took shelter in the house of one Chandrika Shaw which was a little way away. The dacoits, it is said, came to the house, assaulted some of the inmates and tied two of them to posts in an outhouse. The main door was broken open and the dacoits entered the house. They set fire to a tiled roof shed and also to a thatched hut and then began looting paddy and rice from the granary. Further, it is said, they entered the dwelling house of Janakram and took away a large amount in cash and ornaments. It is said that the dacoits were observed by a number of people and a certain number were recognised.

3. After the dacoits had left villagers collected and there was a discussion as to who had been recognised. On the following morning at about 6 A. M. Janakram went to the house of the President of the Union Board, Hossain Ali Molla, P. W. 8, and there reported the incident. From there, it is said, he left for Canning Police Station which is at a distance of 14 miles, walking on foot. He arrived at the than at 4-30 P. M. and there made a first information report. The police investigated and in due course these 23 persons were arrested* and committed to stand their trial in the court of Sessions.

4. The defence was that the charge was wholly false, and that they had been implicated out of enmity. It was suggested that a number of the accused had been members of a 'tebhaga' movement and had incurred the displeasure and enmity of

the landlords of the district and in particular of the President of the Union Board. The suggestion was that this case was a concoction and that these persons had been falsely implicated, No evidence was given on behalf of the defence and the defence has to be inferred from the cross-examination.

5. At the close of the evidence, the learned Assistant Sessions Judge summed up at considerable length and the jury returned the verdicts which I have indicated.

6. In the first place, I am rather surprised to find that a case of this sort was allotted to an Assistant Sessions Judge. In my view, it is not fair to an Assistant Sessions Judge who cannot have had any great experience of criminal trials to be called upon to try a case of this kind. Obviously, this was a case for a senior Sessions Judge or an Additional Sessions Judge and I draw the attention of the Sessions Judge of Alipore to the fact that a comparatively inexperienced Judge was called upon to try this very difficult case. There are misdirections which I shall point out in a moment and evidence was admitted which should not have been admitted. I do not find any great blame with the Assistant Sessions Judge: He should never have been asked to try a case of this kind.

7. Mr. Chatterji, on behalf of the appellants, has contended that the learned Assistant Sessions Judge did not place the defence fairly before the jury but I do not think that any complaint can be made on that score. He mentioned that it was suggested that some of the accused were members of the 'tebhaga' movement and that they had incurred the enmity of the landlords and of the President of the Union Board. He put it quite pointedly to the Jury that the suggestion was that this was a concoction of the main prosecution witnesses and the President of the Union Board and he asked the jury to consider whether the delay in making the first information report did not to some extent bear out that suggestion. I think the learned Assistant Sessions judge placed the defence quite fairly before the jury.

8. As is usual in cases of this kind, the depositions of witnesses in the court of the Committing Magistrate were put in under Section 288, Criminal P. C., without any regard whatsoever for the provisions of that section. Such depositions are only admissible at the discretion of the presiding Judge. He must be satisfied that there is a good reason why they should be admitted, and this Court has laid down a

number of times that that discretion ought to be exercised very sparingly. For example, if a Judge is satisfied that a witness has deliberately resiled from his earlier evidence then that might be a case in which the deposition in, the court below could be put in under Section 288.

9. In the present case, the defence put in the deposition of Janakram Shaw in the court of the Committing Magistrate and the prosecution put in the depositions of Ghuran Sardar. P.W. 5, and Beharj Sardar P.W. 6. It is clear from the order-sheet and the notes appearing in the depositions of these witnesses in the Sessions Court that the depositions were admitted in evidence merely because the learned Judge was asked to admit them by Counsel for the State and the defence respectively.

There is nothing to indicate that the learned Judge addressed his mind to the question whether these documents could be admitted and whether circumstances had been established to justify their admission. The presiding Judges of courts must realise that these depositions should not be admitted merely at the request of Counsel for either of the parties. The law places upon the learned Judge the duty of deciding whether these depositions should or should not be admitted and that duty must be exercised and the learned Judge must come to a conclusion before he admits these depositions.

10. Further, the depositions of these witnesses in the Court of Session make it quite clear that these depositions were not put to these witnesses in the manner required by Section 145, Evidence Act. Obviously, they were put in for the sake of a few contradictions. If the whole deposition is being put in with a view to establishing contradictions then the whole of the depositions must be put to the witness as! required by Section 145, Evidence Act. Section 288, Criminal P. C. makes the depositions admissible but subject to all the provisions of the Evidence Act. In a recent case in the Supreme Court, 'TARA SINGH v. STATE', 1951 S. C. R. 729. their Lordships laid down that a deposition is not admissible in evidence at all unless it has been put to the witness and the provisions of Section 145, Evidence Act, are strictly complied with.

11. It is clear therefore that these depositions which were put in under Section 288 were clearly evidence which was inadmissible and what their effect was on the minds of the jury it is impossible to say. Persons connected with these criminal cases must remember that these depositions may have an effect very different from the effect intended. A deposition may be put in because it contains some small contradiction but the jury may regard it as most valuable corroboration of the evidence of a witness because they find that in the main the deposition in the court of the Committing Magistrate follows and supports the evidence in the Court of Session. These depositions cannot be put in for that purpose and that is the effect that they very well might have. The admission of this inadmissible evidence might in itself be sufficient to vitiate the verdict in this case.

12. However, the matter does not rest there because a deposition of another witness was put in in circumstances which I find it impossible to understand. This was pointed out to us by Counsel for the State and we are greatly obliged to him for doing so. Ganesh Shaw, P. W. 11, was tendered by the prosecution as a witness but not examined-in-chief. His deposition in the court of the Committing Magistrate was also tendered by the prosecution and read and explained but under what provision of the Jaw I am unable to appreciate. It was not tendered apparently under Section 288, Criminal P. C, but, nevertheless, it was put in evidence. This witness was cross-examined and I can see no justification whatsoever for admission of his deposition in the court of the Committing Magistrate. The deposition of a person who is dead or who cannot be found or who cannot give evidence is admissible in certain circumstances under Section 33, Evidence Act, but obviously this witness was very much alive and could be produced in court and could give evidence. Fortunately, his evidence does not matter very much but for what it was worth, it was wholly inadmissible.

13. There is also in my view a very serious misdirection regarding the first information report. The first information report was made by P. W. 2, and of course it could be used to contradict P. W. 2 or to corroborate him. It cannot be used for any other purpose. The learned Judge does point out that a first information report is not a piece of substantive evidence, but he says that it can be used merely by way of corroboration or contradiction, but not for any other purpose. As I have

said, it can be used for corroboration or contradiction of the maker, but it cannot be used for corroboration of any other witness or for the case of the prosecution in general. Further, the learned Judge points out that the document is of great importance because it is the earliest recorded version of a cognizable offence. That is true, but no more use can be made of the first information report than I have stated, namely, to contradict or to corroborate its maker.

14. Having said that the first information report is not substantive evidence, it is quite clear that when he summed up the evidence against each accused he put the first information report as a most valuable piece of evidence. The learned Judge made these observations:

'Before I conclude, I shall sum up the evidence against each accused separately, in order to enable you to hold whether or not the charge against him has been established.'

He then dealt with each accused and the opening sentence in each case is that his name was or was not mentioned in the first information report as the case may be. He puts the naming of accused in the first information report in the forefront of the evidence against that accused and of course it is no evidence at all against any accused except in so far as it was corroboration of the evidence of P.W. 2 who made the report. It is quite clear that this treatment of the first information report may have had very serious results because out of the 11 appellants, 9 of them were mentioned in the first information report, and it will be seen later that the other two who were not mentioned in the first information report were mentioned in another document in respect of which I think there is a misdirection.

It appears to me that in dealing with the individual accused the learned Assistant Sessions Judge treated the first information report as a piece of substantive evidence against each accused who was named therein and indeed puts it in the forefront of his summary of the evidence against each person. That appears to me to be a very serious misdirection which might have had very disastrous results. It is common knowledge that the ordinary man in the street attaches undue importance to a document and I can well imagine a jury would attach enormous importance to the fact that the name of a particular accused appeared in a

document such as the first information report. The use that can be made of that report requires the most careful charge to the jury.

15. In this case two of the accused had confessed and had subsequently retracted their confession. One of the confessing accused did not implicate anyone but himself, but the other confessing accused Putiram alias Putia Karma-kar named a number of persons, namely, the accused Basanta Panda, Ananta Das, Dhiren alias Dhiru Karmakar, Satrughna Das, Nara-yan Das, Bhujanga Karmakar and Bilas Karmakar.

16. The learned Judge in his charge to the jury dealt with the value of a retracted confession of a co-accused as evidence against the others and it appears to me that his charge with respect to this is not sound. He stated that confessions of a co-accused can be taken into consideration against the other accused persons and that is strictly accurate, as such is the law as laid down in the Evidence Act. He also said that such confessions could not themselves form the basis of a conviction of other co-accused and there he was also right.

He then added:

'Unsupported by other evidence corroborating it in material particulars, the confession of a co-accused is a very weak kind of evidence and is on an even lower footing than the evidence of an accomplice for the simple reason that the evidence of an accomplice is given on oath and capable of being tested by cross-examination, while the confession of a co-accused is not made on oath and it cannot be so tested.'

He then added:

'It necessarily follows that a conviction cannot be based on such a confession alone, which is not supported by independent and reliable evidence corroborating it in material particulars.'

17. The view of the learned Judge appears to be that a conviction can be based upon the confession of a co-accused provided that the confession is corroborated in material particulars by other evidence. That appears to me to be an inaccurate

statement of the law. The value of a confession of a co-accused was comparatively recently considered by their Lordships of the Privy Council in the case of 'BHUBONI SAHU v. KING', 53 Cal W N 609 (PC). Their Lordships laid down that it cannot be made the basis of a conviction.

At page 613, Sir John Beaumont who delivered the judgment of the Board observed:

'Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case: it can be put into the scale and weighed with the other evidence. Their Lordships think that the view which has prevailed in most of the High Courts in India, namely, that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct.'

18. It seems clear that the view of their Lordships was that a confession of a co-accused can be used to support other evidence. In other words, it can be used to corroborate other evidence. It might assist the court in coming to the conclusion that the other evidence is true and therefore that an accused is guilty. It is one thing to say that a confession of a co-accused can be used to corroborate other evidence, but it is entirely a different thing to say that that other evidence can be used to corroborate the confession of the accused. The learned Assistant Sessions Judge directed the jury that the other evidence could be used to corroborate the confession, but the correct direction appears to me to be that the confession may be used to corroborate the other evidence. In short, the conviction must be based on the other evidence. The Confession can only be used to help to satisfy a court that the other evidence is true. What the learned Judge has suggested is that if the other evidence suggests to the court that the confession of the co-accused is true, then a conviction can be based on the confession. That appears to me to be an incorrect statement of the law.

19. As I have stated, two persons named in the confession, Bhujanga Karmakar and Narayan Das, were, not named in the First Information Report yet they were' convicted. That also suggests the undue importance which the jury placed upon documents because everybody who was convicted was either named in the First Information Report or in this confession.

20. It has been suggested that there are other misdirections but it appears to me that these points which I have indicated make it impossible for this Court to uphold the verdict of the jury. The jury may well have been influenced by these misdirections and by the admission of inadmissible evidence to the prejudice of these appellants and a miscarriage of justice might well have been occasioned. That being so, we are bound to set aside the verdict.

21. The question then arises what course should this Court follow. This does not, seem to us to be a case where we can possibly hold that even in spite of the misdirections and in spite of the admission of inadmissible evidence, the verdict of the jury is clearly right. It appears to us that this is a case which a jury should be called upon again to decide and that being so, we must order a re-trial.

22. In the result, therefore, this appeal must be allowed. The convictions and sentences are set aside and the eleven appellants are ordered to be re-tried by a Judge exercising the powers of a Sessions Judge sitting with a jury. The appellants must be released on bail pending the re-hearing-such bail to be to the satisfaction of the Sessions Judge of 24-Parganas.

S.R. Das Gupta, J.

23. I agree.