

Lalua Dom and ors. Vs. the State

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Court : Kolkata

Decided On : May-05-1955

Reported in : AIR1955Cal461,1955CriLJ1174

Judge : Mitter and ;Renupada Mukherjee, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Section 297; ;[Evidence Act, 1872](#) - Section 114

Appeal No. : Criminal Appeal No. 144 of 1954

Appellant : Lalua Dom and ors.

Respondent : The State

Advocate for Def. : Nirmal Chandra Sen, Adv.

Advocate for Pet/Ap. : Sambhu Nath Banerjee, Adv.

Disposition : Appeal dismissed

Judgement :

Renupada Mukherjee, J.

1. The three appellants before us were tried by the Sessions Judge of Midnapore sitting with a jury on charges under Section 396, Penal Code, and also alternatively under Section 395 read with Section 397, Penal Code. The jury found

the accused persons unanimously guilty under Section 395, Penal Code, but they unanimously found them not guilty of the remaining charges. The learned Judge accepted the verdict of the jury and convicted the accused persons under Section 395, I. P. C., and sentenced each of them to undergo rigorous imprisonment for a period of five years. The present appeal is directed against the above conviction and sentence,

2. The prosecution case, briefly stated, is as follows: One Bejoy Pal of village Ellaboni within district Midnapore is a person of some affluence. The village is 13 miles sway from Midnapore Kotwali P. S. On the night of the 16th Bhadra 1360. B. S. corresponding to the small hours of the morning of 3-9-1953 there was a dacoity at the house of Bejoy Pal between 1 A. M. and 1-30 A. M.

According to the case of the prosecution Bejoy Pal and his wife Provabati were sleeping with their daughter Sandhyarani in their bed room on the first floor of the three storeyed mud-built house. At about 1 A. M. Bejoy Pal went out of his house through the western khirkee door for answering a call of nature and then he heard sounds of knocking at the sadar door on the opposite side. Bejoy Pal then challenged the persons who were knocking at the sadar door of the house and he was asked peremptorily to open the door. Bejoy Pal then realised that his house had been attacked by dacoits and he went away westwards into the village and raised a hue and cry for assembling the villagers. A number of villagers gradually assembled from all directions and they took their stand on various sides of the house for the purpose of apprehending the dacoits. Sasanka Pal, P. W. 5 who is an agnatic paternal uncle of Bejoy Pal and Sasanka's elder brother deceased Sankar Pal tried to approach the Sadar door of the house but they were threatened by the dacoits who pelted stones at them.

While the villagers were assembling in the house of Bejoy Pal the dacoits had forced their entrance into the house and had looted some properties including cash and ornaments. Bejoy Pal's wife Provabati (P. W. 2) went up to the second floor of the house for taking shelter but she was followed there by some of the dacoits. She was forced by two dacoits to give away her car tops and four gold plated 'churis' and a ring. Similarly Sandhyarani, daughter of Bejoy Pal and

Prohabati who was left alone in the bed room was forced to part with her necklace.

After having looted the properties the dacoits came out and they were confronted by the villagers who numbered 15 or 16 including prosecution witnesses Sasanka Sekhar Pal (P. W. 5), Hemanta Kumar Pal, (P. W. 14), Atul Krishna Maity (P. W. 15), and Khudiram Chowdhury (P. W. 16). The dacoits attempted to effect their escape and they were chased by the villagers and a free fight took place between the two parties Sankar Pal who was one of the villagers who chased the dacoits hit a dacoit with a lathi and felled him to the ground. Thereupon several dacoits turned round and flashed torches on the pursuers and one of them also shot an arrow at Sankar which pierced him in the abdomen. After this the villagers lost heart and they gave up the chase. Sankar was brought to the village in a seriously injured condition.

Before the dacoits could make good their escape a half shirt fell off from the head of a dacoit while he was passing under the branches of a bamboo clump. This was picked up by Sasanka Pal (P. W. 5) and carried to the village and subsequently made over to the police. At about 3 A. M. on the same night a party of villagers set out for Midnapore town with the wounded Sankar in a bullock cart. Information was lodged at the thana in due course and Sankar Pal was admitted in a hospital at Midnapore. Unfortunately Sankar died in the hospital soon after his admission.

A police investigation followed and the three appellants before us were arrested on different dates and after the completion of investigation a chargesheet was submitted against them. There was a preliminary enquiry in the Court of a Magistrate and as a prima facie case was said to have been established against the accused persons they were committed to the Court of Sessions and tried and convicted and sentenced as stated above.

3. It has already been stated that although the dacoity was committed by a large number of persons only three persons were sent up for taking their trial. The case of these three accused persons has been dealt with separately by the learned Sessions Judge in his charge to the jury. Mr. Banerjee appearing on behalf of the appellants also placed the case of each accused separately before us. Before

doing that, however, he made one or two general comments on the charge delivered by the learned Sessions Judge.

He contended in the first place that two witnesses deposed rather in favour of the defence before the committing Magistrate and the evidence of these witnesses were withheld from the jury by the learned Public Prosecutor who conducted the prosecution. These two persons who were examined at the commitment stage, but were not examined during the sessions trial were Kalipada Mahato & Dilbodh Mahato. Mr. Banerjee contended that if these witnesses had been examined in the Sessions Court the jurors might have given their verdict in a different manner because the evidence of these persons would have been favourable to the accused. Mr. Banerjee, therefore, contended that the learned Sessions Judge should have asked the jurors to make a presumption against the prosecution and in favour of the accused on account of the non-examination of these two persons, and the omission to have done so amounts to a misdirection.

This argument of Mr. Banerjee would have found favour with us if the prosecution had intentionally withheld the evidence of these two witnesses from the Sessions Court. But the order-sheet of the Sessions Court dated 10-3-54 would show that as a matter of fact these two witnesses were produced in the Sessions Court. But the Public Prosecutor who conducted the prosecution did not examine them apparently because he was not satisfied that the witnesses were witnesses of truth. As the witnesses were produced in the Sessions Court the defence could easily have put questions to these witnesses. As that was not done and the opportunity given to the defence was not availed of by the accused it cannot be said that the prosecution intentionally withheld the evidence of Kalipada and Dilbodh. That being the case the learned Sessions Judge did not certainly commit any misdirection by omitting to tell the jurors that an adverse inference should have been drawn against the prosecution for not bringing Kalipada and Dilbodh in in the witness box. The first objection taken by Mr. Banerjee to the charge delivered by the learned Sessions Judge, therefore, fails.

4. It was next contended on behalf of the accused appellants by Mr. Banerjee that besides the witnesses examined on behalf of the prosecution in the Sessions

Court the names of some other persons figured in the charge-sheet and as those witnesses were not examined by the prosecution or tendered for cross-examination by the accused, the learned Judge should have told the jurors that an adverse inference should be made against the prosecution under Section 114(g), Evidence Act.

That clause says that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. In the present case, however, no question of withholding any evidence arises. The law does not say anywhere that all the witnesses named in a charge-sheet should be actually examined or tendered in Court for examination. Certainly the prosecution is bound to examine all witnesses whose testimony is considered to be material for the case and any intentional withholding of any person whose evidence is material to the case may certainly be fatal to the prosecution in particular cases. In the present case the prosecution examined all the witnesses whose evidence is considered material for this case. That being the case Section 114(g), Evidence Act, has no application and the learned Sessions Judge was not guilty of any misdirection if he omitted to tell the jurors that an adverse inference should be drawn against the prosecution for not examining all the witnesses named in the charge-sheet submitted by the police.

5. I shall now proceed to discuss the case of each accused individually. Before doing that I may incidentally mention that the factum of dacoity was in no way challenged by Mr. Banerjee on behalf of the appellants. Indeed the evidence recorded in the Sessions Court would show that a dacoity of a very serious nature took place in the house of Bejoy Pal, P. W. 1, on the night of 16 Bhadra 1360 B. S. corresponding to the small hours of the morning of 3-9-1953.

The evidence of Bejoy, his wife Provabati, his daughter Sandhyarani and also one Sambhu Ari, P. W. 17, who slept in a verandah of Bejoy's house would go to show that a large number of dacoits numbering 35 to 40 attacked the house of Bejoy on the night in question. Bejoy went out of the house and raised a hue and cry for the purpose of assembling villagers. Several villagers were roused from their sleep by hearing his shouts and 15 or 16 of them came to the house of Bejoy headed by

deceased Sankar Pal. Prosecution witnesses Sasanka Sekhar Pal, Hemanta Kumar Pal, Atul Krishna Maity & Khudiram Chowdhury were also among the persons who assembled at the spot.

These villagers gave the dacoits a hot chase when they were attempting to get away after having committed the dacoity. Sasanka (P. W. 5) threw a lathi at one dacoit from a distance which hit him slightly. Thereupon deceased Sankar advised the villagers to close up and deal direct blows on the dacoits and after giving this advice he rushed forward and hit one of the dacoits with a lathi and felled him to the ground. It is alleged that after this dacoit was hit with a lathi some of the dacoits turned round and a free fight ensued between the two parties at close quarters during which torches were flashed by both parties.

The evidence clearly and conclusively shows that a dacoity was committed in the house of Bejoy Pal, but then the most important question is whether the present appellants or any of them participated in the dacoity.

6. The first appellant before us is Lalu Dom (Lalua Dom). The evidence against this accused consists of his identification by Sasanka Sekhar Pal (P. W. 5), Sambhunath Pal, (P. W. 6), Atul Krishna Maity (P. W. 15) and Hemanta Kumar Pal (P. W. 14). Regarding this question of identification Mr. Banerjee on behalf of the appellants made one submission which applies commonly to all the appellants. This contention was that none of the witnesses who purported to have identified the appellants in the T. I. parade mentioned to the investigating officer that they had torches in their hands and the torches were flashed in the course of the fight. Mr. Banerjee submitted that in his charge to the jury the learned Sessions Judge said that only some of the villagers omitted to mention to the investigating officer that they did not flash any torches.

Mr. Banerjee contended that instead of saying that some of villagers omitted to say anything about flashing of torches, the learned Judge should have said that all the witnesses examined by the investigating officer omitted to say that there was flashing of torches. On a reference to the evidence of the Investigating Officer K.P. Chowdhury, P. W. 29, I, however, find that this contention of Mr. Banerjee does not gain support because no suggestion was put to the investigating officer from

the side of the defence that this omission in the statement of the witnesses examined by the police was an omission common to all the witnesses examined by the investigating officer. That being the case the learned Judge certainly did not commit any misdirection when he said that only some of the witnesses omitted to state before the investigating officer about the flashing of torches.

7. Coming back to the question of identification of accused Lalua Dom, I may say that the learned Sessions Judge has said all that can be said in favour of the defence regarding the character of the identification. He has given sufficient warning that the evidence of identification given by the four witnesses in question should not be accepted unless the jurors thought that the identification was honest and could be accepted without any hesitation.

Regarding accused Lalua Dom there is also another piece of evidence which is very damaging to this appellant. It is the case of the prosecution that at the time of effecting their retreat a half shirt fell off from the head of one of the accused.

This half shirt was made a material Exhibit in the Sessions Court, namely Ex. IV. This half shirt had been mended by a tailor who was examined on behalf of the prosecution. The tailor is P. W. 7 Bhupendra Nath Das. He deposed that he had mended this shirt at the instance of accused Lalua Dom.

So the inference becomes irresistible that Lalua Dom was the owner of the shirt and that this shirt dropped off from the head of one of the dacoits when they were retreating after having committed a dacoity in the house of Bejoy Pal. That being the case there was sufficient evidence for returning a verdict of guilty so far as accused Lalua Dom was concerned and we are not prepared to say that the learned Judge committed any misdirection in placing the case of this accused before the jurors. The conviction of this appellant must, therefore, stand.

8. I next deal with accused Ramapada Dom. He was identified at a Test Identification Parade by two witnesses namely, P. W. 5 Sasanka and P. W. 6 Sambhunath Pal. The learned Judge placed the evidence of identification before the jurors with the usual warnings that they should not act upon the evidence of identification unless they were satisfied that the identification was correct and

honest. There was a piece of further evidence against this accused namely, the recovery of a thala (Ex. VII) on the occasion of the search of his house on 22-9-1953. There appears to be sufficient evidence to show that this thala was pawned with Bejoy by one Preyashi Dasi (P. W. 9), mother-in-law of Rabi Maity (P. W. 8).

Both Rabi Maity and his mother-in-law Preyashi Dasi as also Rabi's father Rajendra Maity (P. W. 11) identified this thala as belonging to Rabi and his lather Rajendra, and the evidence was that this thala was actually pawned on behalf of Rabi with Bejoy by Preyashi Dasi. This evidence was placed before the jury by the learned Sessions Judge at great length and with extreme fairness and I do not find that appellant Ramapada Dom has really got any reason for finding fault with the charge of the learned Sessions Judge so far as he is concerned. In my judgment, therefore, the verdict of the jury against this accused is not open to criticism and the appeal on behalf of this appellant must fail.

9. The third and last appellant before us is accused Lulka Mahato. The only evidence against this accused is the identification in the T. I. Parade by two witnesses namely, P. W. 5 Sasanka and P. W. 16 Khudiram Chowdhury, Mr. Banerjee on behalf of the appellants contended before us that the learned Sessions Judge committed a serious misdirection in placing the evidence of Khudiram before the jury.

This contention was made in the following way: In one part of his evidence Khudiram stated in the Sessions Court that during the fight with the dacoits he was able to see the lace of one dacoit clearly with his own torch light. After having made this statement he identified Lulka Mahato in the Sessions Court.

From the evidence of the investigating officer P. W. 19 it would appear that P. W. 15 Atul Krishna Maity had described one of the dacoits as a person who was tall and fair complexioned and had a long beard. The investigating officer did not record the evidence of Khudiram separately because his statement was similar to that of Atul Krishna Maity. Mr. Banerjee, therefore, contended that Atul Krishna Maity also must have stated before the investigating officer that the dacoit whom he had clearly seen was tall and fair complexioned with a long beard. The learned Sessions Judge himself observed in his charge that this description of the dacoit

as given by Khudiram did not apply to accused Lulka Mahato who was of a dark complexion. Mr. Banerjee, therefore, contended that the learned Sessions Judge should have straightway told the jurors that the identification of Lulka Mahato by Khudiram was not acceptable in any way and the failure of the learned Sessions Judge to have said so amounts to a serious misdirection.

Mr. Banerjee further contended that the statement in the charge that the prosecution witnesses did not admit that they saw only one dacoit each, also amounts to a misdirection so far as the testimony of Khudiram is concerned because Khudiram himself said that he clearly saw only one dacoit. After having carefully examined the evidence of Khudiram I am not prepared to say that this contention of Mr. Banerjee is correct, Khudiram no doubt says that he saw only one accused clearly with the light of his own torch but he stated at the same time that when Sankar Pal had struck one of them with a lathi the dacoits turned round.

It is certainly not the case of the prosecution that only one torch was flashed during the fight. The evidence rather shows that both the parties flashed torches upon each other. That being the case the learned Sessions Judge is not wrong in stating in his charge to the jury that the prosecution witnesses did not say that they saw the face of one dacoit each. It may be that the evidence against accused Lulka Mahato is not as strong or as satisfactory as the evidence against the remaining two accused but the jury chose to accept the evidence of identification given by P. W. 5 Sasanka and we are not prepared to say that the verdict of the jury in respect of this accused is in any way unreasonable or perverse. There being no misdirection in the charge so far as this accused is concerned we are not prepared to interfere with the unanimous verdict of the jury.

10. In the result the appeal on behalf of all the appellants fails. Mr. Banerjee submitted in the last resort that the sentence passed by the learned Sessions Judge against the appellants is rather heavy and may be reduced. But regard being had to the serious nature of dacoity committed by the appellants and their associates we are not prepared to hold that the sentence is in any way unduly severe.

11. The appeal is dismissed.

12. The appellants must now surrender to their bail and serve out the remaining period of their sentence.

J.P. Mitter, J.

13. I agree.

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