

Babulal Bajpai Vs. the State

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Court : Kolkata

Decided On : Jul-10-1959

Reported in : AIR1959Cal693,1959CriLJ1313

Judge : Debabrata Mookerjee and ;Niyogi, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 297 and 411A(1); ;
[Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 307; ;[Evidence Act, 1872](#) -
Section 54

Appeal No. : Criminal Appeal No. 9 of 1958

Appellant : Babulal Bajpai

Respondent : The State

Advocate for Def. : P.C. Borooah, Adv.

Advocate for Pet/Ap. : Chintaharan Roy and ;Arun Kishore Dasgupta, Adv.

Judgement :

Debabrata Mookerjee, J.

1. Appellant Babulal Bajpai was tried with three others by Sen. J., in the Sessions Division of this Court, In accordance with the unanimous verdict of the Jury, Babulal was convicted under Section 307/34 of the Indian Penal Code and

sentenced to suffer rigorous imprisonment for five years.

2. Babulal was placed on trial along with Lachmi Narayan Singh alias, Batarua, Ram Cnandra Singh alias, Ramaiya and Kaloo Khati alias Kaloo Mali. Batarua and Ramaiya were charged along with Babulal under Section 307/34 of the Code while Kaloo Khati was charged under Section 307/109 of the Indian Penal Code. The three co-accused of the appellant having unanimously been found not guilty of the respective charges framed against them, they were acquitted by the learned Judge. Babulal, the appellant was alone convicted and sentenced as indicated above.

3. The case for the prosecution briefly, was that on the night of 7-5-1957 at about 9-45 p. m., one Kishorilal Mali (P. W. 3) was suddenly attacked near the junction of Prasanna Kumar Tagore Street and Upper Chitapore Road by the appellant and two of his co-accused at the instigation of Kaloo Khati and another person who has since been discharged. The appellant Babulal struck Kishorilal (P. W. 3) on the right fore-arm with a Bhojali. Thereafter, Kishorilal was struck by Ramaiya also with a Bhojali on the right wrist and Batarua struck him on the neck with a sword. Just at the time of assault, Biswanath Mali (P. W. 5), a cousin of the injured, was proceeding homewards after day's work. Biswanath Mali heard a row and came upto the place and saw a part of the occurrence. The injured was then put in a rickshaw and taken to the Jorabagan Police Station where an information was lodged. Thereafter, Kishorilal was removed to the Mayo Hospital where he was detained for about 18 or 19 days for treatment. An investigation followed on the information lodged at the police station and a charge-sheet was submitted against the appellant, his co-accused and another named Kalidas. Kalidas was discharged from the proceeding by the committing Magistrate and the appellant and the aforesaid Batarua, Ramaiya and Kaloo Khati were committed to this court for trial.

4. Appellant Babulal, Batarua and Ramaiya were charged under Section 307/34. whereas Kaloo Khati was charged under Section 307/109.

5. At the trial the appellant pleaded not guilty and his defence was that he had been falsely implicated. He suggested that the occurrence took place elsewhere, possibly at Sethbagan Lane and he had nothing to do with it. In his examination

under Section 342 of the Code of Criminal Procedure he stated that he was not even in Calcutta on the date of the occurrence.

6. As indicated above, the Jury unanimously found in favour of the appellant's co-accused in respect of the charges framed against them, but found the appellant alone guilty under Section 307/34 of the Code. In agreement with that verdict the learned Judge convicted and sentenced the appellant as stated above.

7. This appeal was admitted under Section 411A (1) (a) of the Code of Criminal Procedure. Leave to appeal under Clauses (b) and (c) of Sub-section (1) was refused. We have accordingly to remind ourselves that the appeal can succeed only on a ground which involves a matter of law.

8. Mr. Roy appearing on behalf of the appellant has argued that the verdict of the Jury and the resultant order of conviction and sentence based upon it, cannot be sustained, inasmuch as the appellant alone has been found guilty under Section 307/34 of the Indian Penal Code. His argument is that the case for the prosecution was definite that only the appellant and two others, Batarua and Ramaiya acted in concert in causing the injuries under circumstances which made the act an offence under Section 307. The fourth accused Kaloo Khati was charged for abetment under Section 307/109. The charge that was actually adopted in the case named only three persons, viz., the appellant, Batarua and Ramaiya and it did not even suggest that any other unknown person or persons were involved in the commission of the crime of attempted murder. The verdict of the Jury accepted by the Judge clearly indicates that Batarua and Ramaiya were proved not to have participated in the act of attempt at murder. Section 34 would mean and imply that persons charged with a particular crime were acting in concert and in furtherance of an intention common to all. That being so, the appellant could not possibly be convicted of a charge of offence under Section 307/34, the other two co-accused having been acquitted of it. We think, there is substance in this contention. In the case of *Prabhu Babaji Navle v. State of Bombay*, : 1956 CriLJ147 , it was held by the Supreme Court that where a person is charged under Section 302 read with Section 34 for having shared a common intention of four named persons and for having participated in the crime, and the four persons are all acquitted the element

of sharing a common intention with them disappears; and unless it can be proved that he shared a common intention with the actual murderer or murderers, he cannot be convicted with the aid of Section 34. It is indeed difficult to see how after the acquittal of Batarua and Ramaiya the appellant could alone be convicted under Section 307/34. Section 34 speaks of joint liability. The only participants in the crime were the appellant, Batarua and Ramaiya; but the latter two persons having been acquitted, it seems to us impossible to hold that the appellant could still be convicted under Section 307/34 of the Indian Penal Code.

9. It has next been argued that the learned Judge erred in allowing evidence which suggested bad character of the appellant. We have been taken through those passages in the evidence upon which reliance was placed to show the suggested bad character of the appellant. Section 54 of the Evidence Act provides that in criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character in which case it becomes relevant. Thus evidence suggestive of the appellant's bad character was not admissible; but mere admission of inadmissible evidence would not vitiate the Jury's verdict. A more important objection has been taken by Mr. Roy on behalf of the appellant; that objection is that the learned Judge pointedly drew the Jury's attention at more than one place in the summing up that the accused persons were rough and Goondas. It is true that the learned Judge characterised both sides, viz., the witnesses for the prosecution as also the accused as rough and Goondas; but it does not matter that some of the witnesses or even the injured persons were referred to as roughs or Goondas; what the law prohibits is that the accused men should be given a bad character. Surely, to call an accused a rough or Goonda is to prejudice the Jury seriously against the accused. The learned Judge repeated this observation and we think, in the circumstances., the Jury's verdict was vitiated by this misdirection.

10. We accordingly, hold that on the case made and in view of the verdict of the Jury, the appellant could not properly be convicted under Section 307/34 and that by reason of the misdirection to which we have referred, the verdict of the Jury was vitiated. We have therefore to consider the evidence ourselves in order that we may be able to decide whether as a result of the misdirection there has been

an erroneous verdict resulting in failure of justice.

11. Kishorilal (P. W. 3) is the injured person. He deposed that on the night of the occurrence while he was near about the crossing of Chitpore Road and Prasanna Kumar Tagore Street, he was assaulted by the appellant and others at the instigation of one Kalidas. The appellant hit him on his right arm. Then the accused Ramaiya struck him. Both of them struck him with Bhojalis. He fell down and Batarua struck him with a big sword on the neck. He attempted to run away but the appellant and his co-accused gave a chase and about that time witness Biswanath (P. W. 5) came up. He is a cousin of the injured. Other persons also appeared and he told them what had happened. He was taken by Biswanath to the police station from where he was sent to the Mayo hospital for treatment. He was detained in the hospital for about 19 days.

12. Hiramon Khatic (P. W. 4) is another person who witnessed the assault. He stated that Babulal Bajpai had a Bhojali in hand with which he assaulted Kishorilal. Ramaiya and Batarua also struck him (Kishorilal). After the assault, Kishorilal ran a distance and eventually was taken to the police station.

13. Biswanath Mali (P. W. 5) gave evidence to the effect that the accused Babulal struck Kishorilal with a Bhojali. Thereafter, the appellant's co-accused continued the assault on Kishorilal. Biswanath is a cousin of the injured Kishorilal Mali. In fact, it was he who called in a rikshaw, put the injured into it and took him to the Jorabagan police station.

14. In this appeal we are not concerned with the part played by the appellant's co-accused. We have, of set purpose, left out the details of assault perpetrated on Kishorilal by the appellant's co-accused. The co-accused of the appellant having been acquitted by the learned Judge on the verdict of the Jury, we have only to consider what part the appellant actually took in the assault on the injured person. With the assistance of Counsel on both the sides, we have examined the evidence and are clearly of the opinion that the appellant inflicted only one injury with a Bhojali on the right fore-arm of Kishorilal. He is answerable only for that injury and for nothing else. It must be recalled that the charge of attempt to murder in which the appellant was said to have been jointly responsible with others, failed. That

being so the specific act of assault which the appellant was proved to have perpetrated on the injured, can alone be taken into account. It is clear from the evidence that the appellant was responsible for inflicting only one injury with a Bhojali. That injury was on the right fore-arm. The evidence of the doctor is that it was an incised wound over the posterior aspect of the right fore-arm at the middle. The wound measured 4 1/2' X 3/4' muscle deep. It was a 1/2' gaping wound.

15. The evidence of the eye-witnesses was somewhat faintly assailed by Mr. Roy as being not entirely dependable. We have considered his criticisms and are constrained to say that nothing has transpired in cross-examinations which would justify us in rejecting their testimony. We hold accordingly that the appellant has been proved, on the evidence, to have caused an injury on the right fore-arm of Kishorilal with a sharp cutting weapon.

16. We have taken into account the statement of the accused and the suggestions made in cross-examinations. We are not prepared to believe that the accused was not at the place of occurrence on the date in question; nor are we prepared to hold that the evidence of the eye-witnesses is unreliable and consequently, cannot be acted upon.

17. We hold that the verdict of the Jury was , vitiated by misdirection and that the evidence establishes an offence different from the one of which the appellant has been convicted. The evidence proves that the appellant is guilty only o an offence under Section 324 of the Indian Penal Code We accordingly alter his conviction from one under Section 307/34 of the Code to one under Section 324 and reduce the sentence of five years passed upon him by the learned Judge, to the period already undergone. He should be released at once. The appeal is disposed of accordingly.

Niyogi, J.

18. I agree.