

Lalu and ors. Vs. the State

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Court : Kolkata

Decided On : Sep-17-1958

Reported in : AIR1960Cal776,1960CriLJ1579,64CWN671

Judge : N.K. Sen and ;Bhattacharya, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 297 and 539B; ;
[Evidence Act, 1872](#) - Section 154

Appeal No. : Criminal Appeal No. 492 of 1957

Appellant : Lalu and ors.

Respondent : The State

Advocate for Def. : Tarini Prosad Bagchi and ;Sasthi Charan Roy, Advs.

Advocate for Pet/Ap. : S.S. Mukherjee and ;Samar Ray Choudhary, Advs.

Disposition : Appeal allowed

Judgement :

Bhattacharya, J.

1. Five appellants were tried by the learned Sessions Judge, Howrah, with the help of a Jury and sentenced to various terms of imprisonment on a finding of guilty under Section 304(II) and Section 148 I.P.C. so far as the appellant Lalu

alias Baliram, alias Sewji Kurmi alias Khatik is concerned, under Section 304(II)/149 and Section 148 I.P.C. as regards appellants Dinantb Goala and Sankar Kurmi alias Nata, and under Section 304(11) read with Section 149 as also under Section 147 I.P.C. in regard to appellants Ramabatar Singh and Shyamlal Singh.

2. Without a Jury the learned Sessions Judge further tried the five appellants of whom Ramabatar Singh and Shyamlal Singh were acquitted and appellants Lalu and Sankar Kurmi alias Nata were convicted under Sections 3 and 5 of the Explosive Substances Act and were sentenced to rigorous imprisonment for three years on each count, the sentences running concurrently, and appellant Dinanath alias Dina was convicted under Sections 4(a) and 5 of the Explosive Substances Act and was sentenced to rigorous imprisonment for three years on each count, the sentences running concurrently.

3. The prosecution case, briefly stated, is as follows: appellant Dinanath and his two brothers had a quarrel with Giridhari and his brother Suren and his mother Tentri over residence, because the former. had driven out the latter party, from the house and the Jadavas gave shelter to Giridhari and his family about 15 days before the occurrence in question. On the 13th October, 1956, which was Navami day of Durga Puja, at about 2-15 P. M., Sriksen Jadav (complainant), his brother Jahuri Jadav, and uncle Sundarlal Jadav, Sankar Show, Bhutan alias Bodha, Jhaku Prosad, Giridhari, Lakhi, Hingulal and others were seated by the side of a tank known as Kalibala tank in Nandibagan bye lane, Salkia, (P.S. Golabari), and were discussing Puja affairs. The five appellants and another person came from the south. Appellant Lalu threw a bomb which struck Jahuri Jadav, who fell down wounded. Appellant Sankar threw a bomb which exploded and injured several others. Appellant Dinanath threw a bomb which fell into a nearby drain and remained unexploded. Attracted by shouts and sounds of bombs people came and the appellants began to run away with some others in pursuit of them. Ramabatar and Shyamlal fled in one direction while the other three appellants (and Kalu Kahar who was not an accused and not an appellant) fled in another direction. During the chase the appellant Ramabatar and Shamlal threw more bombs at the chasing party. The bombs exploded but nobody was wounded. Ramabatar and

Shyamlal were arrested by some members of the public and Sankar was arrested by others in another place. On receiving information from some members of the public over the telephone a police party came from Malipanchghara P. S. and took the arrested persons to the thana. Appellant Dinanath and appellant Lalu were arrested on the 13th October, 1956 and 24th November 1956 respectively by some constables. Jahuri Jadav and other injured persons were removed at first to the house of a local doctor named Parmalal Das, but later they were removed to Howrah General Hospital at about 3 P. M. In the hospital Sri Kissen Jadav made a statement to the Officer-in-charge Golabari P.S. at 4-15 P.M. It was at first treated as F. I. R: but later it was expunged from the record. Jahuri, Giridhari, Sankar and Lakhi were admitted into the hospital as indoor patients and the other injured persons including the complainant Sri Kissen Jadav were discharged after first aid. Jahuri's condition was very serious and he died in the hospital at about midnight as a result of the injuries.

4. The defence was that the appellants were innocent and had been falsely implicated in the case. It was suggested that the complainant party itself had in their possession bombs which exploded and injured them.

5. Mr. Mukherjee has pointed out several lacunae. He has also urged that there was no trial at all because the learned Sessions Judge held local inspection without notice to the accused persons and without keeping any memorandum. The learned Judge did not also caution the jury as to what use the local inspection may be put to. The defects, amounting to misdirection and non-direction, will be referred to hereafter.

6. The question of local inspection may be dealt with first.

7. As the order-sheet of the Sessions Court will show, on the 2nd September, 1957, when the Court was rising for the day, the Public Prosecutor filed an application for local inspection by the Court and the jurors in order to appreciate the evidence. The order of the learned Judge was: 'Heard. Local inspection will be held tomorrow at 11 A.M. Accused as before.' The relevant portion of Order No. 8 dated the 3rd September, 1957 is to the following effect:

'Statement of each of the accused persons is recorded in this Court under Section 342 Cr. P. C. and each of them declines to adduce any defence witness. The Judge then started from Court with the Jurors in Motor Vehicles at 12 noon and after inspecting the alleged place of occurrence came back to Court at 12-25 P.M."

There is no indication that any notice was given to the accused persons or to their lawyers. The order of the 2nd September 1957 or that of the 3rd September, 1957 is silent on this point. This aspect of the case becomes important when it is remembered that the Public prosecutor filed the application towards the close of the day, when the Court was rising. It is not certain therefore whether the lawyer for the defence was present at the time, nor is it noted anywhere in the order of the 3rd September, 1957 that the defence lawyer was intimated about this proposed local inspection. In his order No. 8 dated the 3rd September, 1957, as at p. 5 of the paper book, there is no mention whether the Public Prosecutor or the defence lawyer accompanied the Judge and the jurors. It is not realised how the learned Judge could reach the place of occurrence without the help of the Investigating Officer or any other person connected with the investigation. Mr. Bagchi appearing for the State has stated that the Judge and the Jurors could not have remained in the place for more than 2 to 5 minutes because the whole trip lasted only 25 minutes. Mr. Mukherjee has next drawn our attention to the absence of any memorandum in regard to this local inspection. The procedure for local inspection or view by jury is laid down in Sections 293 and 539B Cr. P. C. Section 293 is to the following effect:

'View by Jury: (1) Whenever the Court thinks that the Jury should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred the Court shall make an order to that effect, and the Jury shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

2. Such Officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the Jury and, unless the Court otherwise directs, they shall, when the view is finished, be immediately

conducted back into Court'.

(9)_Section 539B runs as follows:

'Local Inspection: (1) Any Judge or Magistrate may at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion, necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case. If the public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost: Provided that, in the case of a trial by jury the Judge shall not act under this section unless such Jury are also allowed a view under Section 293'.

8. It is clear that the proviso to Section 539B regulated this procedure. The proviso cautions that 'the Judge shall not act under this section unless such, jury are also allowed a view under Section 293'. Now Section 539B(i) speaks of recording 'a memorandum of any relevant facts observed at such inspection'. Even if no relevant facts are observed, this will not be known to anyone unless a memorandum of this negative aspect is kept. If any relevant facts have been observed, details will be essential. We looked in vain to see whether the learned Judge had really kept any memorandum. Such a memorandum is necessary, not merely because human memory is short and without written record no one, not even the learned Sessions Judge, will remember the details thereafter. The memorandum may suitably indicate also what Exactly the Jurors viewed, so that an appellate Court may find out whether the view was merely for the purpose of enabling the Jurors to appreciate the evidence instead of supplementing it, and also to see whether the learned Sessions Judge in his summing up has cautioned the jury in this respect. That this inspection is merely to enable one to appreciate the evidence is a proposition about which there cannot be any reasonable dispute. If any authority is necessary, it would be found in *Kunjilal Chakravarti v. The King*, 54 Cal WN 186. It was a case of trial by a Magistrate but the principles apply

with equal force to a Sessions trial. In the instant case the learned Judge never cautioned the jury that the purpose of the inspection was only for appreciating the evidence and not for forming any idea apart from that evidence. He should have told the jury that if they are to satisfy themselves as to the possibility of identification, various factors would have to be taken into consideration, for example, whether the witnesses had good eye sight and strongly developed powers of observation which vary from man to man. Further, in this case no notice appears to have been given to the defence, as mentioned before. Such a notice was indispensable, as has been laid down in the case of Oudh Behari Narain Singh, In re. 1 Cal LR 143. A Division Bench decision of this Court in Hriday Gobinda Sur v. Emperor : AIR1924 Cal1035 made it clear that the omission to place on record the memorandum of a local inspection was an illegality vitiating the conviction and not an irregularity curable by the absence of any prejudice resulting from the defaults. Mr. Bagchi has drawn our attention to a decision of the Oudh Chief Court in Mt. Shakura v. Mt. Nasira AIR 1938 Oudh 182, wherein it was held that non-compliance with the direction in Section 539B to make a memorandum of local inspection does not vitiate the trial; and that such an omission is an irregularity, unless it was proved that, the accused were prejudiced. In view of the facts of this case the decision of this Court referred to above, we are of opinion that in this case absence of a memorandum of local inspection is an illegality that goes to the very root of the case in the circumstances.

9. Mr. Mukherjee has pointed out that the learned Judge did not properly caution the jury in regard to appraisal of dying declaration and the need of corroboration. In the present case several witnesses have referred to the statement made by the deceased, and generally no written note has been kept of this alleged statement. In Ex. A, the injury report recorded by the Doctor, P. W. 15, the following note appears:

'Said to have been injured as a result of explosion of bomb thrown by Laloo about 2-30 P.M.'

In his evidence the Doctor says that this statement was made by the deceased. The injury report in regard to the deceased, however, speaks of 'said to have been

injured'. Consequently it is not clear whether the doctor is recording the statement of the deceased. The learned Judge moreover does not seem to have told the jury what weight was to be attached to a dying declaration. As was pointed out in the case of *Emperor v. Premananda Dutt* : AIR1925 Cal876 the weight to be attached to a dying declaration depends in India, not upon the expectation of death which is a guarantee of its truth but inter alia upon the circumstances and surroundings under which it was made. The law on the subject has been clarified by two recent decisions of the Supreme Court viz., the case of *Ramnath Madhoprasad v. State of Madhya Pradesh*, : AIR 1953 SC420 and the case of *Khushal Rao v. State of Bombay*, : 1958 CriLJ106 . The failure in the instant case to give directions that the jury should not forget that a dying declaration was not made on oath and was not subject to cross-examination amounted to a misdirection as was held in the case of *Rased Molla v. Emperor* : AIR1948 Cal102 . Further, the learned Judge did not tell the jury that it was ordinarily unsafe to base a conviction on the statement of a dead person. That this omission to caution the jury amounts to misdirection, will appear from *Hussain Sk. v State*, : AIR1953 Cal383 .

10. According to Mr. Mukherjee P. W. 11 Baijunath Singh was declared hostile by the learned Judge on insufficient grounds, for a witness is not necessarily hostile, if in speaking truth as he knows and sees it, his testimony happens to go against the party calling him and that a mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. Order No. 3 dated 28-8-1957 shows, in respect of P.W. 11, that 'the Public Prosecutor prays for Court's permission to cross-examine the said witness on the ground that he has made some false statement to the detriment of the prosecution case". This witness was brought to the Court of Session for the first time, for he had not deposed before the trying Magistrate. It would have been usual for a Judge to look into the statement made before the Investigating Officer to see whether the witness was actually resiling from the position taken during investigation. There is no indication anywhere showing that this was done by the learned Judge. The first question in cross-examination asked by the Public Prosecutor elicited this reply:

'I do not remember if I stated to the Daroga that Ramabatar and Shyamlal were chased by people and were arrested after they had thrown bombs'.

The Investigating Officer had not been examined at that time and when he was subsequently examined, the prosecution did not put it to him whether the witness had made that statement. There is, therefore, some force in Mr. Mukherjee's contention that both before and after he was declared hostile, prosecution had not cared to lay a foundation for cross-examining its own witness. Be that as it may, the learned Judge does not appear to have given any caution to the jury as to how to evaluate the evidence given by a hostile witness. He should have given them proper directions in the light of several well known decisions of this Court including the Full Bench case of Profulla Kumar Sarkar v. Emperor : AIR1931 Cal401 . This non-direction, in our opinion, was a matter which cannot be overlooked. Then again, in regard to P. W. 14, Sudamalal, aged 10 years, the learned Judge did not tell the jury how to assess this evidence. Children, as is well known, are highly imaginative and given to imagining things and telling stories. Moreover they can be easily tutored and be asked to give from memory a story about which they have been told. In the circumstances the jurors cannot be said to have received proper assistance from the summing up by the learned Judge.

11. Mr. Mukherjee has referred to two other infirmities in this case. According to him the charge is defective inasmuch as in enumerating the common object to the assembly, the words 'hurt to others' have been omitted, although in another charge these words appear.

12. Mr. Mukherjee has said that having expunged the F.I.R., marked Ext. 1 and 1(a), by an order dated 3-9-1957, the learned Judge should not have referred to these in his summing up, thus creating an anomalous impressions in the mind of the jury. It is not known under what circumstances and at whose instance the documents, formerly treated as F.I.R., were expunged. If it was because of receipt of previous telephonic messages by the Police, there is no indication whether the attention of the learned Judge was drawn to the case of Chandrama Prosad Chamar v. State, ILR (1951) 1 Cal 539 and Chiramel Varied Devassikutty v. State, 1953 Cri LJ 1301: (AIR 1953 Trav Co 275). In view of the order that we are going

to pass in this case no further comments need be made in regard to the charge and the F.I.R., because the learned Sessions Judge will have to decide in reference to facts which will be elicited, what the charge should be, and which document, if at all, will be treated as F. I. R.

13. In the circumstances of the case, it is but proper that the case should go back for retrial by the learned Sessions Judge sitting with a fresh Jury.

14. Mr. Mukherjee has drawn our attention to the want of formal proof of any sanction in this case in regard to the charge under the Explosives Substances Act. Mr. Bagchi has conceded that no such sanction was formally proved. Accordingly, we order that the learned Sessions Judge should also re-hear this portion of the case on the same charges on which they were convicted.

15. In the result, the appeal is allowed, and the convictions and the sentences are set aside. The appellants are to remain in custody, pending further hearing, as under trial prisoners.

16. Let the records be sent down forthwith so that the trial may take place as expeditiously as possible.

N.K. Sen, J.

17. I entirely agree.