

Kader Sundar and ors. Vs. Emperor

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Court : Kolkata

Decided On : Jul-11-1911

Reported in : 13Ind.Cas.279

Judge : Caspersz and ;Sharfuddin, JJ.

Appellant : Kader Sundar and ors.

Respondent : Emperor

Judgement :

1. The Sessions Judge concurring with the four assessors, has convicted the 29 appellants for belonging to a gang of persons associated for the purpose of habitually committing dacoity and he has sentenced appellants Nos. 2 and 27 to transportation for life and the other appellants to rigorous imprisonment for seven or five years. The trial of the case occupied two months in the Court of Session, but the substantial question for determination is a simple one, namely, whether the approver, Bayan Sandar, has been adequately corroborated in respect of each of the appellants. Six appellants Nos. 8, 10, 14, 15, 17, 26 may be excluded at the outset, because the learned Deputy Legal Remembrancer intimated during the hearing, that he was unable to support their convictions. There remain 23 appellants including two (Nos. 2 and 18) who made confessions in the Magistrate's Court.

2. The case for the Crown is that the Sandars are a semi-criminal tribe, dwelling in boats, wandering and predatory by habit and instinct, that the appellants belonged to a gang of Sandars operating during the years 1891--1909, in the Districts of Bogra, Pubna, Rungpur, Mymensingh and Rajshahye, and that the numerous dacoities that took place were the work of this gang which, however, did not invariably consist of the same persons but committed dacoities in detachments.

3. Bayan Sandar, the approver, was convicted in the Gadakhali Dacoity case in February 1909. Subsequently, on the 11th April 1909, he made a detailed confession to a Magistrate of the crimes he had been guilty of, as a member of the gang, and this was 'verified' by another Magistrate. On this basis, the 29 appellants were sent up for trial with the result we have mentioned.

3. The Sessions Judge, after reciting the history of the initiation of the case and stating the general effect of the evidence of Bayan, proceeds to give, in tabular form a list of the dacoities and thefts in which Bayan implicated himself and the appellants who are his relations.

4. The tabular form gives a list of eighteen criminal occurrences, the date of each such occurrence, the names of the persons implicated by the confession of Bayan and by his evidence in Court, and the documents (first informations, etc.) and the witnesses proving the occurrence. But the numerous witnesses mentioning the appellants merely say that they are Sandars that they live in boats, and that the boats congregate in bahars that is in flotillas, at various places in the net work of rivers which constitute a peculiar feature of that part of the country. The witnesses identify the appellants in one sense, but they do not connect them or any of them with the tabulated occurrences Identification of this kind does not carry the case for the Crown very far in a prosecution under Section 400, Indian Penal Code, though no doubt such evidence and the other evidence in this case might be valuable if the proceedings had been for bad livelihood or with reference to the Criminal Tribes Act (now Act III of 1911). The general criminality of a tribe or caste cannot be imputed to individual members operating in gangs where the prosecution is under Section 400, Indian Penal Code. See *The Public Prosecutor v. Bonigiri Pottigadu* 32 M. 179 : 5 M.L.T. 100 : 9 Cr. L.J. 567 : 5 Ind. Cas. 307.

Similarly, the documents specified do not prove that particular persons were named as having been concerned in any occurrence to which they relate. In seven occurrences only, Sandars were suspected as having committed the offence reported. None were convicted. The utmost that can be said is that Sandars were seen within a distance of three miles from the scenes of the occurrences at or about the time in question. We offer these observations in this place because they have an important bearing in the matter of corroboration of the testimony of the approver, and it is as well to state, at once, the difficulty we feel in dealing with the case.

5. The Sessions Judge, after discussing some discrepancies in the evidence of Bayan, next proceeds to consider each occurrence from the year 1892 to 1908 when the Gadakhali dacoity in which Bayan was caught red-handed, was perpetrated. The Sessions Judge explains the nature of the corroboration, which, in his opinion, was sufficient, but we do not find anywhere that he directed his attention to what is legally adequate corroboration, that is, evidence connecting each of the appellants with each or some of the occurrences. We may mention that the Magistrate who verified Bayan's confession was not examined as a witness, but the inferior evidence of the verification witnesses was recorded and relied on. Even so, the verification does not touch the appellants.

6. The Sessions Judge then mentions certain other dacoities and thefts of which the Fulchari dacoity may be taken as a specimen. A Railway Booking Clerk (P.W. No. 65) says that some persons took 7 or 8 tickets, possibly, bearing consecutive numbers, at the Bogra Station for Fulchari on the day in question. We are unable to hold that this fact proves that twelve of the appellants were the dacoits--in fact, railway tickets must be issued in a consecutive series, and the clerk cannot know who the passengers are--whether dacoits or others. Moreover, Bayan said, in his confession that only eight persons committed the Fulchari dacoity. The finding of the Sessions Judge is in general terms that,--There appears reason to think Sandars committed those dacoities and thefts. He also says that a large number of Sandars were seen staying with their boats at the different centres of their association; that thefts and dacoities increased in the quarter where they used to stay; that the Sandars were kept under Police surveillance, and their boats used to

be regularly searched. It is a fact of importance that no stolen property was ever recovered in any of these searches.

7. The Sessions Judge concludes his judgment with a consideration of the case of each of the appellants, but his analysis is not conclusive and does not go beyond his previous estimate of the evidence.

8. In dealing with the judgment of the Sessions Judge we have inevitably expressed the views we are constrained to adopt on the essential aspects of the case. The learned Deputy Legal Remembrancer and the learned Vakil for the appellants have afforded us the greatest assistance in examining the bulky record in which, it is admitted, much irrelevant matter is contained. The arguments of the learned Deputy Legal Remembrancer may now be considered in their order, and we proceed to do so.

9. It is argued for the Crown (1) that evidence proving an offence under Section 400, Indian Penal Code, need not be of the same quality as in the case of ordinary offences; (2) that in seven dacoities, during the shorter period 1899--1909, Sandars were referred to as being concerned in the same, and that their presence near the scenes of the occurrences affords sufficient corroboration of the story of Bayan; (3) that four of the appellants (Nos. 7, 9, 21, 25) were sent up but acquitted in the Fulchari dacoity (P.W. Nos. 65, 75, 204); (4) that the previous convictions of some of the appellants may be taken into consideration; (5) that the confessions of appellants Nos. 2 and 18 are sufficient to complete the evidence against them.

(1) Association is the gist of the offence punishable under Section 400 of the Penal Code, that is, association for the habitual pursuit of dacoity. The subject is fully discussed by Dr. Gour in his second volume on the Penal Law of India, and he has collected all the cases under the Section (pp. 1587--1590). The Section is a highly penal one, and, as was said by Phear, J., in *The Queen v. Mooktaram Sirdar* 23 W.R. Cr. 18, the offence is 'one of a very special character and entirely the creature of statute.' The Section must, therefore, be strictly construed. Although the evidence need not show the same degree of particularity as to the commission of each dacoity as is required to support a substantive charge of that crime *Empress v. Kure* (1866) A.W.N. 65 at p. 66 it must be established, for the purpose

of conviction, that the accused belong to a gang whose business is the habitual commission of dacoity. The special conspiracy must be proved see *Ring Emperor v. Tirumal Reddi* 24 M. 523 at p. 546. A good illustration of the kind of evidence; to be adduced in such a case as this is to be gathered from the judgment of Munro, J., in *The Public Prosecutor v. Bonigiri Pottigadu* 32 M. 179 : 5 M.L.T. 100 : 9 Cr. L.J. 567 : 5 Ind. Cas. 307 and we think that, in the case before us, the evidence under the seven heads (at p. 181 of the report is almost entirely absent. For instance, it has not been shown that the appellants move about in batches, have been arrested in batches, and are absent from home in batches, or that the appellants have been concerned in a large number of dacoities.

(2) It follows from the principles we have just mentioned, that the implication of Bandars generally in the number of even seven dacoities spread over the shorter period often years, is not sufficient proof against the present appellants. The tribe or caste of Sandars contains thousands of human beings, and even one bahar or flotilla of fifty boats may include two hundred persons. The approver Bayan has been corroborated to some extent as to the facts of the dacoities, but that corroboration has no tendency to prove that the appellants were with him on each or some of the occasions. Corroboration of the testimony of an approver must connect the accused with the offence--here, the association of a gang of persons for the business of habitually committing dacoity. In this essential respect, the evidence does not sufficiently support the story of the approver, and we may add that Bayan's deposition, which has been placed before us, is not free from important contradictions which cast doubts on his veracity. We have already noticed the vital fact that no stolen property was found in the possession of any of the appellants; if stolen or suspicious property had been discovered, that would have been adequate corroboration.

(3) The third contention of the learned Deputy Legal Remembrancer may be dismissed with the observation that the acquittal of the accused in Pulchari dacoity can only mean that they had nothing to do with that crime. See the cases of *The Emperor v. Neni Oopal Gupta* 15 C.W.N. 593 : 38 C. 559 : 10 Ind. Cas. 582 : 12 Cr. L.J. 286; *Rex. v. Plummer* (1802) 2 K.B. 339 : 71 L.J.K.B. 805 : 68 L.T. 836 : 51 W.R. 137 : 66 J.P. 647 : 20 Cox. C.C. 269. No adverse inference can be drawn

against the accused after their acquittal.

(4) The next argument concerns the previous convictions of some of the appellants. Jadu (No. 23,) was twice punished for dacoity. Sabed (No. 4), Rahimuddin (No. 6), Jalla (No. 11), Jadu (No. 23) and Tomiz (No. 24) were bound down to be of good behaviour under Section 110, Criminal Procedure Code. Lal Chand (No. 19) was convicted for theft and sentenced to three months' rigorous imprisonment. These are the previous convictions relied on. They do not carry much weight, though, no doubt, if the association for the purpose of habitually committing dacoity had been made out, the past history of some of the appellants would have been significant, as was pointed out in the case of Bonai v. The King-Emperor 15 C.W.N. 461 : 38 C. 408 : 9 Ind. Cas. 555 : 12 Cr. L.J. 97.

(5) The last contention covers the case of the appellants who confessed in the first Court (Nos. 2 and 18). We have heard the confessions read out. The appellants did not admit the existence of a gang. No. 2 spoke of five thefts and five dacoities. No. 18 mentioned only one theft and one dacoity. The confessions were retracted before the Magistrate. In our opinion, such confessions cannot be deemed conclusive where the other evidence in the case is so wanting in precision.

10. The conclusion of the whole matter is, that all the appellants, including the six exempted by the learned Deputy Legal Remembrancer, are in the same category, and must be acquitted of the present charge under Section 400, Indian Penal Code. We regret the expenditure of public time in the trial of this case in the Court of Session.

11. The appeal is allowed. The convictions and sentences are reversed. The appellants will be set at liberty, so far as the present proceedings are concerned.