

Nayan Ullah and ors. Vs. Emperor

Nayan Ullah and ors. Vs. Emperor

SooperKanoon Citation : sooperkanoon.com/882990

Court : Kolkata

Decided On : Jul-17-1924

Reported in : AIR1925Cal903,85Ind.Cas.818

Appellant : Nayan Ullah and ors.

Respondent : Emperor

Judgement :

1. The eleven appellants before us and two others were tried before the learned Additional Sessions Judge of Sylhet and a Jury on various charges arising out of a riot in the course of which one Kabir Ulla was killed. The first appellant Nayan Ulla was charged with offences of rioting, rioting armed with a deadly weapon and with culpable homicide not amounting to murder by causing the death of Kabir Ulla. The 11th appellant Kedar Nath Chowdhury was charged with the offence of commuting riot and for being liable for culpable homicide committed by Nayan Ullah under the provisions of Section 149, Indian Penal Code, and also for being liable for the same culpable homicide by reason of the provisions of Section 150 of the Code. The other accused were charged with rioting and also for being liable for the culpable homicide committed by a member of that unlawful 'assembly by reason of Section 149, Indian Penal Code. Two of the accused were acquitted. Nayan Ullah was convicted on the unanimous verdict of the Jury of rioting punishable under Section 147, Indian Penal Code, and (also of being constructively liable for culpable homicide under the provisions of Section 149, Indian Penal Code; this being an offence with which he had not been charged.

Kedar Nath was found guilty by the Jury under Section 304, Indian Penal Code, read with Section 150, Indian Penal Code, and not guilty under Section 147, Indian Penal Code and Section 304 read with Section 149, Indian Penal Code. The remaining nine appellants were found guilty under Section 147, Indian Penal Code, and Section 304 read with Section 149, Indian Penal Code. The two accused who were acquitted were given the benefit of doubt by the Jury.

2. The first point taken in this appeal is that the conviction of Nayan Ulla under Section 304 read with Section 149, Indian Penal Code, when he was not charged with such an offence is bad in law. We think this objection must be maintained. Ordinarily a person cannot be convicted at a Sessions trial of an offence with which he has not been charged. There are some exceptions to this rule which are to be found in Sections 237 and 288, Cr. P.C. Section 238 can have no application in this case. Constructive culpable homicide cannot be said to be a minor offence compared with actual culpable homicide with which Nayan Ullah was charged. It has been argued that Section 237, Cr. P.C., might justify this conviction. Section 237, Cr. P.C., provides for conviction of a person of an offence not charged but which might have been charged under the provisions of Section 236, Cr. P.C. That section provides that 'if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences.' It is a settled law that the doubt referred to in this section must be a doubt as to application of the law to the proved facts and the section has no application where there may be a doubt as to the facts which constitute one of the elements of the offence. Here the case for the prosecution on the evidence was that Nayan Ullah had actually caused the death of Kabir Ullah by stabbing him in the neck with a spear. The Jury though they actually returned no verdict on that charge must be held to have found that it was not proved that Nayan Ulla actually inflicted the fatal wound. In fact by acquitting him of the offence charged under Section 148, Indian Penal Code. It would seem that they did not believe the evidence that he was armed with a spear. On the case as made by the prosecution there cannot be any doubt as to what offence would have been committed if the witnesses had been believed. It was clearly a case in which the accused would have been liable under the provisions of Section 304, Indian Penal Code. Taking this view we must hold

that the conviction under Section 304 read with Section 149, Indian Penal Code, was illegal and must be set aside.

3. The next point taken is as regards the conviction of Kedar Nath under Section 304, Indian Penal Code, by reason of the provisions of Section 150. The charge framed against Kedar Nath under these sections is in the following terms. 'That you on or about the 1st day of May 1923 at the band Baban Khamar engaged or employed your co-accused Nayan Ullah to join as, or become, a member of an unlawful assembly and that the said Nayan Ullah as a member of such unlawful assembly in pursuance of such engagement or employment committed culpable homicide not amounting to murder by causing the death of one Sheikh Kabir and thereby committed an offence punishable under Ss .304-150 of the Indian Penal Code, and within the cognizance of the Court of Sessions.' The charge, therefore, against this accused is a definite one of having engaged or employed one person, the co-accused Nayan Ullah and further Kedar Nath's liability under this charge is by reason of this Nayan Ullah having committed culpable homicide not amounting to murder, The Jury having found that Nayan Ulla did not commit the murder we hold that 'Kedar Nath could not on this charge be convicted of constructive culpable homicide under the provisions of Section 150. The Jury should have been directed that on this charge as framed they could not convict Kedar Nath unless they found that the culpable homicide had been committed by Nayan Ullah. Further we find that in explaining this charge to the Jury the learned Sessions Judge seriously misdirected them. He tells them that some of the necessary points of proof are not only that the accused hired or engaged the person in question but also in the alternative that he prompted or connived at such hiring, etc. This he should not have done as there is no reference to prompting or connivance in the charge as framed. But nevertheless he went on to explain at length what would constitute connivance. He further went on to say 'you must find that there had been an unlawful assembly composed of persons said to have been hired by the accused, and in the course of which some offence had been committed for which the accused would have been responsible equally with those who were members of that unlawful assembly before you can convict the accused.' The serious misdirection here is that he speaks 'persons' in the plural whereas the charge against this accused was limited to hiring or engaging Nayan Ullah. Further we

may remark that it was not necessary that they should find the accused responsible for any offence committed in the course of the riot. If it was found that the accused 'did hire Nayan Ullah to take part in the riot the provisions of the section would throw the responsibility on him without any finding of the Jury as to his responsibility being necessary. We hold, therefore, that the conviction of Kedar Nath on this charge cannot be upheld.

4. In connection 'with this charge a question has also been urged that the whole trial was bad for misjoinder. The offence of hiring a person to take part in riot is certainly a separate and distinct offence from riot itself: and ordinarily the hiring and the riot would be separate transactions. It is hard to understand on what evidence the prosecution sought to establish the charge which had been framed against Kedar Nath under Section 150, Indian Penal Code, read with Section 304, Indian Penal Code. But it would seem that they were such that in the special circumstances of the case we are justified in holding that the alleged hiring or employing and the riot were the same transaction. In the charge the time and place of the hiring are given as the 1st of May 1923 and band Baban Khamar respectively, which are the time and place at which the rioting is alleged to have taken place. It does not appear that there is any suggestion of any meeting between Kedar Nath and Nayan Ullah at Baban Khamar before the time of riot. Further the offence of culpable homicide for which Kedar Nath is sought to be made liable by the operation of Section 150 was committed in the riot and, therefore, it might be said that the offence charged under Section 304/150 was not complete until the riot had taken place. Taking this view we hold that the plea of misjoinder fails.

5. As regards the remaining accused it is objected that one of the two common objects stated in the charge was not an offence so far as the majority of the appellants are concerned. The common objects so stated are, firstly assaulting the deceased Kabir Ullah and others and secondly disobeying an injunction under Section 144, Cr. P.C. It has been pointed out that only two of the appellants were persons against whom the order of injunction was directed and served. It is, therefore, argued that though they might be guilty of the offence under Section 188 their companions could not be guilty of the same offence. It is argued that

committing an offence and abetment of it cannot be the same common object. We are unable to accept this contention. It appears to us that if certain persons jointly enter on certain land in defiance of an order that has been passed under Section 144, Cr. P.C., though some may be guilty of the offence under Section 188, Indian Penal Code, and others of abetment of that offence nevertheless the common object of them all was one and the same object.

6. It is further urged that the charge under Section 304 read with Section 149, Indian Penal Code against these appellants must fail on account of the acquittal of Nayan Ullah of the substantive offence. But in the charge as framed against these appellants they were made liable for the offence of culpable homicide In consequence of it having been committed by one of the members of the unlawful assembly without the name of Nayan Ullah in the charge. That being so we can see no illegality in the conviction on that charge.

7. Our attention has been drawn to the omission to draw the attention of the Jury to the fact that one man was killed and one injured on the side of the accused as well as on the side of the complainant. We cannot believe that these facts were not in the mind of the Jury and we regard it as a piece of non-direction of no great importance. On the view we hold we think that the sentences passed on the appellants other than Nayan Ullah, should not) be greater than that which we pass on Nayan Ullah himself.

8. For the above reasons we allow this appeal in the case of Kedar Nath. We reverse the conviction and sentence passed on him and direct that he be acquitted. The bail-bond of Kedar Nath will be discharged. We set aside the conviction of Nayan Ullah under Section 304 read with Section 149, Indian Penal Code. But we uphold the conviction of Nayan Ullah under Section 147, Indian Penal Code, and under that section we sentence him to two years' rigorous imprisonment. In the case of the remaining nine appellants we uphold their convictions under Section 304 read with Section 149, Indian Penal Code, and Section 147, Indian Penal Code, but we reduce the sentence passed on them to two years' rigorous Imprisonment each.

