Rabari Ghela Jadav

Vs

The State of Bombay

Criminal Appeal No. 14 of 1959

(CJI B. P. Sinha, Syed Jafar Imam, J. C. Shah JJ)

26.02.1960

JUDGMENT

IMAM, J. -

This appeal is by special leave. The appellant was convicted under s. 304, Part I of the Indian Penal Code and sentenced to imprisonment for life. He appealed to the Bombay High Court. According to the judgment of the High Court the appeal was admitted only on the point of sentence. The High Court reduced the sentence from imprisonment for life to 10 years' rigorous imprisonment.

It was submitted on behalf of the appellant that the High Court could not, in law, admit an appeal only on the point of sentence and the appellant was entitled to have his appeal heard on the merits of his conviction as well. The evidence upon which the appellant was convicted was unsatisfactory and he was entitled to be acquitted.

Shortly stated, the case of the prosecution was that the appellant had caused the death of Zina Hira on April 6, 1957, when the deceased was returning from an adjoining village to the village of his residence. The appellant met him on the way and accused him of having committed theft in the appellant's house which the deceased denied. Upon this the appellant attacked him with a stick which had iron rings round it. A number of blows were given by the appellant with this stick in consequence of which Zina Hira fell down. Although a doctor was called for from Keshod, 8 miles away, ultimately the deceased was taken to Junagadh for better medical treatment but died on the way in the early hours of the morning of April 7.

According to the case of the appellant he was not present at the scene of the crime and pleaded not guilty to the charge.

According to the judgment of the High Court the appeal of the appellant before it was admitted only on the point of sentence. It was urged that this procedure adopted by the High Court was not in conformity with the provisions of ss. 421 and 422 of the Code of Criminal Procedure. Reliance was placed upon the decisions of the Calcutta High Court and Patna High Court in the cases of Nafar Sheikh v. Emperor ((1914) I.L.R. 41 Cal. 606), Gaya Singh v. King Emperor ((1925) I.L.R. 4 Pat. 254), Sudhir Kumar Neogi and Another v. Emperor (A.I.R. (1942) Pat. 46) and Sheikh Rijhu and Others v. Emperor (A.I.R. (1931) Pat. 351) and of the Privy Council in the case of The King-Emperor v. Dahu Raut ((1935) L.R. 62 I.A. 129). Reference was also made to the decision of the Patna High Court in the case of Kuldip Das v. King Emperor ((1932) I.L.R. 11 Pat. 697) and the decision of the Bombay High Court in the case of Bai Dhankor v. Emperor ((1937) I.L.R. Bom. 365).

In order to appreciate the submission made on behalf of the appellant reference to certain provisions of the Code of Criminal Procedure in Chapter XXXI concerning Appeals will be necessary. Under s. 418(1) an appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only. It is unnecessary to refer to sub-s. (2) of this section for the purposes of this appeal. Under s. 419 every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367. As to what should follow on the presentation of such a petition it will be necessary to quote the provisions of ss. 421 and 422 of the Code. Section 421 reads :

> "421(1) On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily :
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> Provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.
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> (2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so."

Section 422 reads :

> "422. If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the State Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;
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> and, in cases of appeal under section 411A, sub-section (2), or section 417, the Appellate Court shall cause a like notice to be given to the accused."

It is clear from these provisions that on receiving the petition and a copy under s. 419, the Appellate Court shall peruse the same and if it considers that there is no sufficient ground for interfering it will dismiss the appeal summarily, and that if the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the State Government may appoint in this behalf, of the time and place at which such appeal will be heard. The recording of an order that the appeal is admitted, when it is not summarily dismissed, is not a happily chosen expression as was pointed out by the Privy Council in the case of The King-Emperor v. Dahu Raut ((1935) L.R. 62 I.A. 129). Section 421 gives ample power to the Appellate Court to dismiss an appeal summarily if it considers that there is no sufficient ground for interfering. On the other hand, if it does not dismiss the appeal summarily then it is obligatory upon it to cause notice of the appeal to be given to the appellant and to such officer as the State Government may appoint in this behalf of the time and place at which such appeal will be heard. These provisions do not contemplate a partial summary dismissal of an appeal as was pointed out by the Privy Council in the above-mentioned case where it was stated by Lord Thankerton :

> "The terms of the section equally exclude the possibility of partial summary

> dismissal, e.g., in so far as the conviction is appealed against. Failing summary dismissal, the provisions of ss. 422 and 423 apply and, in their Lordships' opinion, the provisions as to notices in s. 422 and the provisions as to sending for the record in s. 423 are clearly peremptory and there can be no room for revision at that stage."

It was, however, submitted on behalf of the State of Bombay that the facts in the case before the Privy Council can be distinguished from the facts of the present case because in the case before the Privy Council no notices were issued under s. 422 and the record was not sent for in accordance with s. 423. In the present case notices were issued under s. 422 and the record was sent for in accordance with s. 423 of the Code. Particular reliance was placed upon the concluding portion of the Privy Council judgment to the following effect :-

> "Accordingly, their Lordships will humbly advise His Majesty that the appeals should be allowed, and that it should be declared that, upon the true construction of the Criminal Procedure Code, the Appellate Court is entitled to dismiss an appeal summarily in terms of s. 421 unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal, and that where the appeal is not dismissed summarily, the court is bound, in order to the disposal of the appeal, to comply with the provisions of s. 422 as to notice, and with the provisions of s. 423 as to the sending of the record, if such record is not already in Court.....".

It seems to us, however, having regard to the provisions of the Code, that while an Appellate Court has power to dismiss an appeal summarily, if it considers that there is no sufficient ground for interfering, it has no power to direct, as in the case before us, that the appeal shall be heard only on the point of sentence. Such an order is not an order of summary dismissal under s. 421 and neither is it an order in terms of s. 422 of the Code. When an appeal is filed it is an appeal against conviction and sentence and it is not permissible for an Appellate Court to direct that it shall be heard only on the question of sentence. Our interpretation of ss. 421 and 422 is in keeping with the interpretation of these sections by the Privy Council in Dahu Raut's case. The decisions of the Calcutta High Court and the Patna High Court in (1914) I.L.R. 41 Cal. 606, A.I.R. 1942 Pat. 46, (1925) I.L.R. 4 Pat. 254 referred to above appear to us to be correct. In these circumstances reference need not be made to the view expressed by the Patna High Court in (1932) I.L.R. 11 Pat. 697 which was a judgment before the decision of the Privy Council in Dahu Raut's case. The decision of the Bombay High Court in I.L.R. 1937 Bom. 365 endeavoured to find a way in which the difficulty could be resolved where the Appellate Court was of the opinion that only the question of sentence was involved. For the purposes of this appeal it is unnecessary for us to say anything about this decision because what was stated there does not arise for consideration, as, in the present case, according to the judgment of the High Court, the appeal was admitted only on the point of sentence. It was also urged by Mr. Umrigar that under s. 423 an Appellate Court had the power to reduce the sentence. That is so, but that power can only be exercised after the requirements of s. 422 have been complied with. The Appellate Court after hearing the appeal, certainly has the power in finally disposing of the appeal to reduce the sentence but that does not entitle it to direct that an appeal is admitted only on the question of sentence. We make it clear, however, that in dealing with Mr. Umrigar's submission on this point we are concerned with the powers of an Appellate Court and not with the power of a High Court in the exercise of its revisional jurisdiction which does not arise for consideration in this appeal. In our opinion, the form of the order admitting the appeal in the present case was invalid and the appellant could have insisted that since the appeal had not been summarily dismissed, the High Court should have heard his appeal on the merits as well.

As the appeal was not heard on the merits, we consider whether the appeal should be sent back to the High Court for rehearing on the merits. We have, however, though it fit to hear the appeal on the merits for ourselves.

We, accordingly, heard the learned Advocate for the appellant on the evidence. It is clear to us from a perusal of the evidence that the case has been amply proved against the appellant. There was an eye-witness who saw the appellant assaulting the deceased with a stick. He was in some way related to the deceased, which he attempted to deny, otherwise there is nothing in his evidence to induce a court to distrust his testimony. This eye-witness, Bava Tapu, immediately after the assault, went to the Police Patel of Simroli, one Keshav, and told him that the deceased had been assaulted by the appellant. Keshav corroborated Bava Tapu in this respect. Keshav's evidence in this respect is also corroborated by Natha Jiwa who stated that Bava Tapu came and informed Keshav that Zina Hira had been severely assaulted and injured by the appellant. Bogha Jiwa also corroborated Keshav in this respect. None of these witnesses have any real motive to depose against the appellant. In addition to this evidence there was the dying declaration of the deceased as to who his assailant was. Furthermore, there was the recovery of a stick buried underground at the instance of the appellant which was found to be stained with human blood according to the report of the Serologist. The other circumstantial evidence need not be referred to.

It was urged on behalf of the appellant that the reason for the appellant assaulting the deceased could not be true as no reference was made to it in the First Information lodged by Keshav. Reference also was made to the evidence of the Police Officer Priyakant that no information of the theft had been lodged by the appellant at the thana. The appellant in his statement denied that the deceased had committed any theft in his house and the witness Karsan brother of the appellant had stated in cross examination that there had been no theft in their house. This witness was examined by the prosecution but was declared hostile and permission was granted by the Court to cross-examine him. It seems to us, however, that even if the story about the accusation of theft against the deceased made by the appellant was not stated in the First Information the omission is of little consequence because even Keshav stated in the First Information that he had enquired from Bava Tapu as to how the quarrel had started. Merely because there was no information lodged about the theft at the police station, it does not necessarily follow that the appellant could not have been suspecting the deceased. The denial of the appellant and of his brother cannot assume much importance as it would be natural for them to deny any such thing. Apart from this even if the real cause for the assault may be obscure, if the evidence is clear that the appellant assaulted the deceased, it matters very little if the Court has not before it a very clear motive for the assault. As we have already said, apart from Bava Tapu hesitating to admit that he was somewhat related to the deceased, there was no apparent motive for him to depose against the appellant in such a serious case as this. His conduct would show that he had, in fact, witnessed the assault because immediately after the assault he went to the Police Patel Keshav and informed him that the appellant had assaulted the deceased with a stick. There is no reason to doubt the genuineness of the dying declaration. There is no good reason for supposing that the deceased would have accused the appellant falsely as there was no previous enemity established. It is also unlikely that he would let go his real assailant and accuse the appellant falsely. The dying declaration is corroborated by the evidence of the eye-witness Bava Tapu. It further receives corroboration from the recovery of the stick stained with human blood at the instance of the appellant which had been identified by Bava Tapu as belonging to the appellant.

It is clear, therefore, that the evidence in the case, which we have carefully examined and see no good reason to distrust, established beyond doubt that the appellant had struck the deceased several

blows with a stick and thus caused his death. He was, therefore, guilty at least under s. 304 of the Indian Penal Code as found by the trial court. The reduced sentence imposed by the High Court does not appear to be unduly severe.

The appeal is, accordingly, dismissed.

Appeal dismissed.

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