Lakhan Mahto & Ors.

Vs

State of Bihar

Criminal Appeal No. 214 of 1963

(K. Subha Rao, V. Ramaswami-I JJ)

24.02.1966

JUDGMENT

RAMASWAMI, J.-

This appeal is brought, by special leave, from the judgment of the High Court of Patna dated September, 1963 in Criminal Appeal No. 368 of 1961.

The appellant, alongwith 13 others, was tried by the Additional Sessions Judge of Patna who by his judgment dated April 22, 1961 convicted all the accused under ss. 302/149, Indian Penal Code and sentenced them to undergo rigorous imprisonment for life. Lakhan and Indo were convicted under s. 148, Indian Penal Code and sentenced to undergo rigorous imprisonment for two years and Gopi was convicted under s. 147, Indian Penal Code and sentenced to rigorous imprisonment for one year. Indo was also convicted under s. 326, Indian Penal Code and Gopi was convicted under s. 326/109, Indian Penal Code and were sentenced to undergo rigorous imprisonment for eight years. Appellant Lakhan was convicted under ss. 326/149, Indian Penal Code but no separate sentence was awarded on this charge. Lakhan and Indo were convicted under s. 19(f) of the Arms Act and sentenced to undergo rigorous imprisonment for two years each. Five of the accused persons were acquitted and 8 of them were convicted on charges under ss. 302/149, 326/149, 148 and 147, Indian Penal Code.

The appellants alongwith 8 others who were so convicted, appealed to the High Court of Patna which allowed the appeal of the 8 persons but dismissed the appeal of the appellants with the following modifications : The conviction of the appellants under ss. 302/149, Indian Penal Code, s. 148, s. 147 and ss. 326/149, Indian Penal Code was set aside and the appellants were acquitted of those charges. The conviction of Lakhan under s. 302/149, Indian Penal Code was altered into a minor offence under s. 326, Indian Penal Code, but the sentence of life imprisonment imposed upon him was maintained. The conviction and sentence of Indo under s. 326, Indian Penal Code and of Gopi under ss. 326/109, Indian Penal Code were upheld. The conviction and sentence of Lakhan and Indo under s. 19(f) of the Arms Act were also upheld.

The case of the prosecution is that on October, 7, 1959 at about 10 a.m. deceased Sheosahay Mahto went to look after his paddy field in Belwa Khandha. On arriving at the spot, he found appellant Lakhan and one Ishwar putting up a net for catching fish in his field after cutting one of its ridges. Sheosahay protested and there was an altercation between the parties. Sheosahay threw aside the net and Ishwar and appellant Lakhan went away towards the village. Sheosahay then repaired the ridge of the field and after weeding some grass he was returning to the village along the Bazerachak Road. While he was passing by the side of a brick-kiln, appellant Lakhan suddenly emerged from

behind it with a pistol in his hand and fired at Sheosahay hitting him on his chest. Sheosahay staggered for a few steps and fell down at the house of one Baiju. There were 15 or 20 other persons variously armed in the company of Lakhan. Mst. Akhji P.W. 3 wife of Jitu P.W. 7 heard the report of a gunfire while she was in her house situated near the house of Baiju. She came out of her house and saw Sheosahay lying fallen in the village lane. She pretested to Gopi who became furious and ordered that she should be assaulted. Upon his order, Rajendra who was carrying a gun fired at Akhji, P.W. 3 on her left arm. After committing the assault all the members of the mob fled away. On the same evening, at about 5 p.m. a first information report was drawn up by the Assistant Sub-Inspector of Police, P.W. 14 on the statement of Sheosahay and both the injured persons were forwarded to Nawadah hospital where Sheosahay died early next morning.

The appellants pleaded not guilty to the charges and alleged that they were falsely implicated on account of previous enmity. The trial court held that it was unsafe to convict appellant Lakhan on the specific charge under s. 302, Indian Penal Code for causing the death of Sheosahay as it appeared from the dying declaration of the deceased (Ex. 8) that accused Ishwar had also shot at him and as such appellant Lakhan was entitled to benefit of doubt. The trial court accordingly acquitted Lakhan on the charge under s. 302, Indian Penal Code but convicted him and 2 other appellants under s. 148, Indian Penal Code and ss. 302/149, Indian penal Code. The State Government did not prefer an appeal to the High Court against the acquittal of Lakhan on the charge under s. 302, Indian penal Code but on appeal preferred by the appellant against the judgment of the Sessions Judge, the High Court altered the conviction of Lakhan from s. 302/149, Indian Penal Code to a minor offence under s. 326, Indian Penal Code and maintained the sentence of life imprisonment imposed upon him. The view taken by the High Court was that the evidence of P.Ws. 1, 6, 7 and 8 should be accepted as true and it must he held that it was Lakhan who fired the pistol at the deceased and it was Lakhan alone who fired the pistol shot and not Ishwar. The High Court held that it was competent to it in the appeal preferred by the appellant to alter the conviction of Lakhan from the constructive offence under s. 302/149, Indian Penal Code to the substantive offence under s. 302, Indian Penal Code, but "in order to obviate any technical objection" the High Court altered the conviction under s. 302 read with s. 149 to a minor offence under s. 326, Indian Penal Code and regard being had to the gravity of the offence, the High Court maintained the sentence imposed upon Lakhan.

On behalf of appellant Lakhan learned Counsel submitted that he had been acquitted by the trial court on the specific charge under s. 302, Indian Penal Code for the overt act of shooting at the deceased Sheosahay and he was convicted under ss. 302/149, Indian Penal Code for being a member of an unlawful assembly, the common object of which was to kill deceased Sheosahay. It was pointed out that the State Government has not preferred an appeal against the acquittal of Lakhan on the charge under s. 302, Indian Penal Code. It was submitted that the High Court cannot, in the absence of an appeal preferred in this behalf, convict Lakhan again under s. 302, Indian Penal Code or under s. 326, Indian Penal Code for the overt act of shooting. It was also pointed out for the appellant that there was the finding of the High Court that there was no unlawful assembly and consequently Lakhan was acquitted of the charge under s. 302, I.P.C. read with s. 149, I.P.C. The argument, therefore, presented on behalf of appellant Lakhan is that the conviction and sentence of Lakhan for a substantive offence under s. 326, I.P.C. was illegal and must be quashed.

The powers of the appellate court in disposing of an appeal are prescribed by s. 423 of the Criminal Procedure Code which states :

> "423. (1) The Appellate Court shall then send for the record of the case, if such

record is not already in Court. After perusing such record, and hearing the appellant or his pleader if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 411-A, sub-section (2) or section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may -

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from conviction, (1) reverse the finding and sentence, and acquit or discharge the accuse, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding maintaining the sentence or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same;"

Section 423(1)(a) expressly deals with an appeal from an order of acquittal and it empowers the Appellate Court to reverse the order of acquittal and direct that further inquiry be made or that the accused may be tried or committeed for trial, as the case may be, or it may find him guilty and pass sentence on him according to law. Section 423(1)(b) in terms deals with an appeal from a conviction, and it empowers the Appellate Court to reverse the finding and sentence and acquit or discharge the accused or order a retrial by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial. It has been held by this Court in The State of Andhra Pradesh v. Thadi Narayana (A.I.R. 1962 S.C. 240) that s. 423(1)(b), Criminal Procedure Code is clearly confined to cases of appeals preferred against orders of conviction and sentence, and that the powers conferred by this clause cannot be exercised for the purpose of reversing an order of acquittal passed in favour of a party in respect of an offence charged while dealing with an appeal preferred by him against the order of conviction in respect of another offence charged and found proved. It was also pointed out in that case that where several offences are charged against an accused person the trial is no doubt one; but where the accused person is acquitted of some offences and convicted of others the character of the appellate proceedings and their scope and extent is necessarily determined by the nature of the appeal preferred before the Appellate Court. If an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the Appellate Court and not the order of acquittal. In exercising the powers conferred by s. 423(1)(b) the High Court cannot therefore convert the order of acquittal into one of conviction and that result can be achieved only be adopting procedure prescribed under s. 439 of the Criminal Procedure Code. In our opinion, the principle of this decision applied to the present case and it must accordingly be held that the High Court acted without jurisdiction in altering the finding of acquittal of Lakhan on the charge under s. 302, Indian Penal code and convicting him on the charge under s. 326, Indian Penal Code and imposing a sentence of imprisonment on that charge.

In this connection the High Court has taken the view that s. 149, I.P.C. does not constitute a substantive offence and it as only an enabling section for imposition of vicarious liability and the conviction on vicarious liability can, therefore, be altered by the appellate court to conviction for direct liability, though there was an acquittal by the trial court of the direct liability of the offence. In our opinion, the view taken by the High Court is not correct. There is a legal distinction between

a charge under s. 302, I.P.C. and a charge of constructive liability under ss. 302/149, I.P.C., i.e., being a member of an unlawful assembly, the common object of which was to kill the deceased Sheosahay. In Barendra Kumar Ghosh v. Emperor (I.L.R. 52 Cal. 197) Lord Sumner dealt with the argument that if s. 34 of the Indian Penal Code bore the meaning adopted by the Calcutta High Court, then ss. 114 and 149 of that Code would be otiose. In the opinion of Lord Summer, however, s. 149 was certainly not otiose, for in any case it created a specific and distinct offence. It postulated an assembly of five of more persons having a common object, as named in s. 141 of the Indian Penal Code and then the commission of an offence by one member of it in prosecution of that object. Lord Sumner referred, in this connection, to the decision of the Calcutta High Court in Queen v. Sabid Ali and Others ((1873) 20 W.R. (Cr.) 5). The observation of Lord Sumner was quoted with approval by this Court in Nanak Chand v. The State of Punjab ((1955) 1 S.C.R. 1201) in which it was pointed out that by framing a charge under s. 302, read with s. 149, Indian Penal Code against the appellant it was not charging the appellant with the offence of murder and to convict him for murder and sentence him under s. 302 of the Indian Penal Code was to convict him of an offence with which he had not been charged. It was accordingly held that the conviction of the appellant under s. 302, I.P.C. was illegal. The same view has been reiterated by this Court in a later case in Suraj Pal v. The State of Uttar Pradesh ((1955) 1 S.C.R. 1332).

For these reasons we hold that the conviction and sentence imposed by the High Court on Lakhan under s. 326, Indian Penal Code is illegal and must be set aside.

On behalf of the appellants it was also contended that the prosecution had not been able to establish the other charges of which they have been convicted, but having heard learned Counsel we are not satisfied that the convictions on the other charges are vitiated by any illegality and we see no reason for interfering with the judgment of the High Court.

As already pointed out, we set aside the conviction and sentence imposed on Lakhan on the charge under s. 326, Indian Penal Code; otherwise we a firm the decision of the High Court as regards Lakhan and also as regards the other two appellants and dismiss this appeal.

Appeal dismissed.

Conviction and sentence modified.

</html