Kishan and Others

Vs

State of Maharashtra

Criminal Appeal No. 95 of 1968

(Dua JJ)

18.03.1970.

JUDGMENT

DUA, J. -

1. This appeal by special leave is directed against the order of the Bombay High Court (Nagpur Bench), dismissing the revision of the present appellants against the order of the Sessions Judge, Yeotmal, allowing in part their appeal by acquitting Laxman of the Charge under Section 147, I.P.C., but otherwise maintaining the conviction of all the appellants but reducing their sentences.

2. According to the broad features of prosecution story the prosecution witnesses and the accused persons belong to two opposite factions in village Gaul. Taluk Pusad, District Yeotmal. Indeed, there had been criminal proceedings between them even on earlier occasions. The relations between the two parties were, therefore, admittedly strained for some time prior to the present occurrence which took place on July 12, 1965. On that day three prosecution witnesses, Narayan, Baburao and Rangrao and one Ganpat, are alleged to have accidentally met at the dispensary of one Bajirao at Shembal Pimpri. That was a Bazar day and about 3 p.m. they left Shembal Pimpri for going to their village Gaul. While they were about one mile away from their village they met the present appellants and some others. Kisan, appellant, challenged the party of the witnesses, inquiring as to why they had given evidence in the tenancy case and, so saying, instigated his companions to assault them. This led to a scuffle in which Narayan and Rangrao sustained some injuries. Baburao lost a tooth. Ganpat is alleged to have shouted for help. In response, some people arrived there and seeing them, the accused persons ran away, Rangrao, whose injuries were some what serious, was taken first to Shembal Pimpri and from there to the hospital at Pusad. The police sent up 11 persons for trial. The Trial Court on a consideration of the evidence came to the conclusion that the prosecution had succeeded in proving the case only so far as accused Nos. 1, 2, 5, 6 and 7 were concerned. They are the present appellants in this Court, Kisan, Ramrao, son of Jagdeorao, Marotirao, Bhimrao and Laxman. The Five appellants were all found guilty of an offence under Section 147, I.P.C. and also of an offence under Section 323 read with Section 149, I.P.C. They were all sentenced to various terms of imprisonment which it is not necessary to state for our present purpose. On appeal the learned Sessions Judge sentenced them as follows :

3. Kisan, Ramrao and Marotirao were to undergo rigorous imprisonment for four months on each count for offences under Section 147 and Section 323, read with Section 148, I.P.C. : sentence of fine was set aside. Bhimrao, son of Shankarrao was sentenced for each of the two offences under the aforesaid sections to pay a fine of Rs. 100/- and in default to undergo rigorous imprisonment for three months for the offence under Section 147 and to undergo rigorous imprisonment for one month for the offence under Section 323, read with Section 149, I.P.C. The sentence of

imprisonment imposed on him by the Trial Court was set aside. Laxman, appellant was acquitted of other charge under Section 147, I.P.C., but for offence under Section 148 and Section 323, read with Section 149, I.P.C., was sentenced to rigorous imprisonment for six months under Section 148 and to rigorous imprisonment for four months under Section 323, read with Section 149, I.P.C. The sentence of fine against him was set aside.

4. The High Court on revision, as observed earlier, confirmed both the convictions and sentences.

5. Before us Mr. M. N. Phadke, the learned advocate for the appellants raised two main points in support of the appeal, by submitting that the manner of trial in the case his resulted in failure of justice. According to the first grievance the Trial Court was wrong in disallowing the prayer on behalf of the accused persons, for the production of the police diary relating to a report alleged to have been made by Rangrao Dajiba on June 30, 1965, relating to a theft in his house. In the application, dated November 26, 1966, it was recited that two cases arising out of the occurrence, dated July 12, 1965 were pending in the Trial Court and the accused were desirous of filing a certified copy of the report relating to theft in Rangrao Dajiba's house which had to be proved by the investigating officer whom the accused wanted to examine as a witness. It was prayed : (1) that the S.D.O.P., Pusad or the D.S.P., Yeotmal be directed to produce the above case diary and (2) that certified copies of the report, dated June 30, 1965 and of Panchnamas of the searches conducted in the investigation be supplied. This application was disallowed by the Trial Court on the same day on the Ground that these documents were now shown to be relevant and that the Trial Court could not supply certified which were not relied upon by the prosecution. Later another application was presented by the accused, when they were going to enter on their defence, for summoning the police officer concerned with the aforesaid documents but the Trial Court held that the matter had already been decided by it. According to the appellant's counsel they were entitled to prove the report made by Rangrao to show that the complainants' party had motive to be the aggressors which would support their plea of the complainants aggression. In the Trial Court the point of the complainants being the aggressors was raised and the defence evidence led to that effect. So far as relevant for our purpose this is what that court said in his connection :

> "The accused have led defence evidence to show that the witnesses in the present case were the aggressors and it was Rangrao who initiated the attack, D.W. 1 states that at the relevant time, he was in his field where sowing operations were going on, and that he saw Marpit while standing in his field. He states that Rangrao and others started throwing stones in which one stone hit accused Kisanrao, witness Narayan gave a cane blow to accused Kisanrao, Baburao caught hold of accused Marotirao and that thereafter a free fight took place. He then states that accused Laxman and one Ranuji came there and they all separated the accused.
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> In his examination-in-chief he stated that his field is adjacent to the field of Marya Mahar and he was at a distance of about 50 to 60 paces. However in cross-examination, he admitted that field of one Vithya Mahar intervenes in between and that there are one or two more fields in between. It is, therefore, clear that this witness could not have witnessed the Marpit because by on stretch of imagination it can be said that he was so near as to hear the talk and also see the Marpit when according to his own admission, his field is certainly not adjacent to the field of Marya Mahar. On the contrary, as per his own evidence, he was certainly far away and it appears to be correct as we find that he was himself admitted that after hearing the shouts, he reached the spot after about 10 minutes. One cannot believe when he

> says that he could see everything from his own field. I, therefore, find his evidence as untrustworthy and reject the same. D.W. 2 Rangrao, son of Dajiba is examined to show that a theft was committed at his house and that he had named the witnesses as the suspected criminals involved in the commission of the crime and that upon this information, the house of the witnesses were searched by the police. This witness is admittedly a very close relative of accused Kisanrao and, therefore, it is likely that he may state anything to support the cause of his relation. He admits in cross-examination that he had not mentioned the names of the witnesses as suspects in his report submitted to police. Moreover, it does not appeal to reason that he would name the witnesses as suspected criminal in a housebreaking case when we find that the witnesses are all agriculturists and persons of standing. It all the more appears surprising that the police so easily played in his hand and without any reason or any enquiry they immediately conducted house-searched so extensively and that too without any result. One still fails to understand as to why Rangrao and others would have got annoyed with the accused Kishanrao when their names were mentioned to police not by accused Kisanrao but by the complainant Rangrao, son of Dajiba D.W. 2. To me the evidence of this witness appears something which by itself is not only improbable about absurd also. I therefore, reject his evidence."

After considering the defence evidence that Trial Court held it to be of no avail to the accused. This pint was re-agitated on appeal by the appellants in the Court of the Sessions Judge and this is how that court disposed it of.

> "The learned counsel for the appellant wanted to suggest a different motive in support of his contention that the prosecution witnesses were themselves the aggressors and it was to the effect that a few days earlier, there was a theft at the house of D.W. Rangrao, for which, he gave a report to the police and also conveyed his suspicion against P.Ws. Rangrao and Narayan whose houses were accordingly searched. For the same reason, D.W. Uttam was saying in his evidence about the incident that when Rangrao and others met the appellants in the fields, Rangrao questioned them as to why they had reported against them in a theft case. Unfortunately, this motive was not disclosed by the appellants themselves in their statement before the Lower Court, except that at the defence stage, they made an application on 26-11-66 (Ex. 48) for securing the case papers pertaining to the report of theft made by D.W. Rangrao. That application was however rejected by the learned Magistrate and it is now argued before me on behalf of the appellant that they were not allowed an opportunity to lead and prove their real defence. A perusal of the application will however show that the defence counsel wanted the court to secure the case diary itself along with all investigation papers, and also the report given by D.W. Rangrao. The report was no doubt material, but the case diary and other investigation papers of that theft case were wholly irrelevant to this case, and the learned Magistrate was right in refusing to call them and also to summon the police witnesses on that point, which was another grievance raised before me.
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> Yet, I find that the defence was in no way prejudiced, even if their application was rejected by the Lower Court and the learned Magistrate refused to summon police witnesses who had investigated the theft case, because the appellants had examined D.W. Rangrao himself at whose house the theft was committed and whose evidence was material for the defence aside as they were alleging. Evidence of D.W. Rangrao

> would, however, show that although he was suspecting P.ws. Rangrao, Narayan and other persons for committing theft at his house, he had not disclosed their names in his own report. In such a case the mere fact that houses of some persons were searched by the police including those of P.Ws. Rangrao and Narayan cannot lead us to infer that they were responsible for theft, particularly when there is nothing to show of they were prosecuted in that respect Rangrao was however deposing that after were prosecuted in that respect Rangrao was however deposing that after he made his report to the police, the persons suspected by him had started giving him threats, and were protesting to him as to why he disclosed their names at the instance of appellant Kisan himself. Yet, he admits that for the alleged threats also, he gave no report to the police. In any case, if P.Ws. Narayan and Rangrao were suspected by D.W. Rangrao for committing theft at his house there was obviously no reason why they should have assaulted appellant Kishan in this case, instead of punishing D.W. Rangrao himself. The witness was closely related to the appellants and, therefore, he appeared in the witness-box to support their farfetched defence on the question of alleged motive but he was wholly unreliable and was rightly rejected by the Lower Court."

6. On revision, in the High Court, this point was again argued. While dealing with it that Court said :

> "Mr. Phadke argued that motive would be an important circumstance to find out in this case which would also suggest which party had greater reason to launch the attack. According to him, the prosecution of 1964 was an old affair. In the same way the evident given before the Tenancy Court was about six months prior to the incident. That would also not serve as the immediate cause for launching the attack. The real reason, according to him, was that a relation of Kisan, also named Rangrao, involves the prosecution witnesses Narayan and Rangrao in a charge of theft. The theft took place in the house of defence witness Rangrao on June 29, 1965. He lodged a complaint on June 20, 1965. It is, however, suggested that Rangrao involved the prosecution witnesses Narayan and Rangrao, and as a result of the mentioning of the names of these persons, the Sub-Inspector searched their houses. This took place within four or five days of the giving of the information to the police. If the searches have taken place by about the 6th or 7th of July, 1965, that would be the immediate cause for the prosecution witnesses to attack the accused on July 12, 1965.
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> From the dates given above, the argument seems to be plausible, but here also the situation of the evidence made by the two courts below shows that there is no basis in facts. Rangrao in whose house the theft took place, appears as a defence witness No. 1. He makes two important allegations. His first allegation is that he expressed suspicion against the prosecution witnesses Narayan and Rangrao (P.W. 4). The second important statement is that when these people came to know that their names were being mentioned to the police, they began holding out threats to the defence witness Rangrao. These two facts are the basis of the argument that they provided motive for the prosecution witness to take the initiative. When the evidence of the defence witness Rangrao is examined, it would show that there is nothing to support either of these allegations. Rangrao's first admission in the cross-examination is that is that in the report made by him on June 30, 1965 he did not mention the names of Narayan and Rangrao as possible suspects. At the initial stage, therefore, the names

of the prosecution witnesses were not mentioned to the police. Assuming threat subsequently the names were mentioned, there ought to be some demonstration that the names were so conveyed. There is nothing to show that the searches, in fact, took place in the houses. The argument of Mr. Phadke is the accused persons are prejudiced in their defence as the Trail Court refused to call for the record of the Criminal case. Apart from it, the cross-examination of Rangrao as a defence witness shows that even the second allegation has no foundation. If the houses were searched, the prosecution witnesses would obviously know that they are being suspected of the theft and, therefore, the searches have taken place. The defence witness Rangrao does not say that mere searches were taken but he further alleges that the prosecution witnesses expressed their reaction by giving threats to him. When he is asked whether he has conveyed these threats to the police, he admits that he did not convey these threats to the police at all. If the prosecution witnesses had given threats to Rangrao, I am sure he would not have failed to mention that to the police and he would not have failed to seek protection from the police in that behalf. The cross-examination of Rangrao, therefore, sufficiently proves that there is no basis to imagine that the prosecution witnesses were mentioned as suspects which fact led to the searched of their houses, nor is there any ground to hold that they reacted by giving threats. This aspect of facts has been discussed by the first appellants court and after close examination of the evidence, it has been concluded that there is no truth in the suggestion that Rangrao involved the prosecution witnesses Nos. 1 and 4 in the case of theft.

When the above conclusion is reached on the evidence as it is, it would be obvious that no special prejudice is being caused to the accused persons by not calling for the record of the criminal case filed by Rangrao. It is to be remembered that Rangrao is only a relation of Kisan and Rangrao was not present in the group of the accused persons when the incident of July 12, 1965 took place. I am, therefore, inclined to accept the conclusion drawn by the two cuts below that the prosecution witness are not shown to have been involved in the criminal proceedings starts by the defence witness Rangrao and since that case is no made out, the Court's order refusing to call for the record of that case cannot be said to have prejudiced the defence."

7. The counsel complained before us that none of the three courts below has considered the matter from a correct perspective and their approach to the question is erroneous. The accused, according to him, were entitled as of right to summon their witnesses and the police diary. This right was wrongly denied and this resulted in failure of justice. Reliance was placed on Section 257, Cr. P.C., support of this right. The counsel in this connection desired this court to interfere under Article 136.

8. The other grievance ventilated on behalf of the appellant in this Court was that the prosecution had failed to produce Ganpat Chinnagi as a wines at the trial though he was an important witness for unfolding the prosecution story. This witness it was contended, was admittedly present at the time of the occurrence out of which the two cross-cases arose. It was emphasised that Ganpat Chinnagi had actually been cited as an eye-witness in the beginning but was later given up. Ganpat argued the counsel, was the only interested witness and he alone could give an impartial account of how the trouble had originated. In this connection stress was laid on the fact that Kisan, appellant had received as many as 12 injuries which remained unexplained and this suggested aggression on the part of the party of the P.Ws. Ganpat was withheld from the court on account of oblique motive and this according to Mr. Phadke, has resulted in grave injustice. The accused applied to the Trial Court

on August 18, 1966 after the examination of two prosecution witness praying that Ganpat whom the prosecution had decided not to examine in this case was an important witness and should be examined as a court witness. The court declined this prayer observing that it did not consider it necessary to examine him as a witness because the other witnesses on the point had already been examined. The court also said that the prosecution could not be compelled to examine any particular witness. According to Mr. Phadke, Ganpat was required to be produced as a witness only to get from him the origin of the quarrel so as to find out as to who was the aggressor. This matter was considered at length by the Trial Court but it appears that no serious attempt was made to ask for an adverse inference against the prosecution on account of the non-production of Ganpat. On appeal in the Court of the Session Judge again we do not find that this argument was seriously pressed. That court also came to a positive conclusion that the accused were the aggressors who had purposely gone to Shambal Pimpri armed with sticks and one of them Laxman carrying an axe. In the High Court on revision Mr. Phadke learned counsel, of course, started with the argument that the prosecution had failed in its duty to conduct the trial in a fair manner by withholding Ganpat who was admittedly present when the trouble started. This being a case of riot, the initial aggression, according to the counsel was the determining factor, and, therefore, Ganpat should have been examined. The High Court, after carefully examining this argument, in the background of the established facts described it to be "an argument more of convenience then based upon facts". The High Court, as a special case, went through the major portion of the oral evidence (what is normally not done on revisions) and after a proper scrutiny felt that Ganpat could not be considered as an independent witness. It also observed that non-production of Ganpat was an act of honest selection and not of deliberately withholding from the court a material witness. The argument pressed before the High Court was repeated before us in this Court.

9. Quite a few decisions were cited at the bar in support of the principle that a material witness who is necessary for unfolding the prosecution story must not be withheld from the court and that defence witnesses must be allowed to be produced, the provisions contained Section 257, Cr. P.C. being mandatory. We do not consider it necessary to refer to hem because the principle join regard to these question is will-settled. We, however, consider it appropriate at this stage to re-state the position in regard to criminal appeals under Article 136 of the Constitution because not infrequently in practice questions which are normally considered to be concluded and not open to re-examination under this Article are sought to be re-opened and canvassed in this Court. Recently in Chidda Singh v. State of M. P. (Cr. A. 125 of 1967, decided on January 12, 1968) this Court, after referring to three of its earlier decisions said :

> ".......... Article 136 does not confer any right of appeal on a party from the decision of a court, but it confers a discretionary power on the Supreme Court to interfere in suitable cases. It is implicit in the discretionary power that it cannot be exhaustively defined. It cannot obviously be so construed as to confer a right on a party where he has non under the law. The practice of the Privy Counsel accepted and adopted by the federal Court and is Court is not to interfere on questions of fact except in exceptional cases such as when the finding is such that it shocks the conscience of the four or by disregard to forms of legal process or some evaluation of principles of natural justice or otherwise substantial and gave injustice has been done."

10. In the appeal before us there were two cross-cases arising out of the same occurrence which were tried by the same court. We did not have the advantage of knowing the fate of the cross-case as the counsel expressed ignorance about its final result. It was, in our opinion, open to the Trial Court to decline to summon a witness after recording its reasons for the refusal. And this was precisely

what the Trail Court did. We find nothing wrong with the procedure or the reasoning of the Trial Court in this case. We also agree with the High Court that Ganpat was not held back for any oblique motive. The only grievance pressed before us on behalf of the appellant is that they could have shown from his evidence that the complainants' party were the aggressors. For this purpose, in our view, they could have produced Ganpat as their own defence witness. No cogent ground is shown a to why that was not possible, This grievance is of no assassins to the appellant. The motive for the complainants aggression could also be proved by producing the person who had lodged the report in regard to the theft. And he was in fact produced. In the cross-case also all this evidence would, in all probability, have been led, if considered necessary. There is on legal infirmity made out and certainly no failure of justice, is shown from the record. It is a simple case of riot in which the appellants on appreciation of evidence by three courts below were found to be the aggressors and the finding was not shown to be legally erroneous. It may be pointed out that enmity between the parties being a common point the courts were aware of the existence of motive on both sides to harm the other party. There is no special feature in this case for departing from the normal practice of refusing to interfere under Article 136 in the absence of grave illegality. There is no violation of any mandatory provision of law which would vitiate the trial or render the trial unfair and prejudicial to the appellant. The appeal must fail and is accordingly dismissed.

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