Rajpal Singh and Others

Vs

Jai Singh and Another

Criminal Appeal No. 224 of 1966

(I.D.Dua, J.M.Shelat JJ)

16.04.1970

JUDGMENT

SHELAT, J. -

1. This appeal, by certificate granted by the High Court of Allahabad, is against its order dismissing the criminal revision filed by the appellants and refusing to interfere with the order passed by the Sessions Judge setting aside the order of discharge passed by the committing Magistrate.

2. The facts leading to the appeal may briefly be stated. One Naubat Singh of Village Nagla Shekhoo, who owned certain lands, died in August 1963. Some three years prior thereof he had sold part of his land to complainant Jai Singh who was married to Raj Kali, who, according to the prosecution, was the only heir and legal representative of the said Naubat Singh. On the death of Naubat Singh, Raj Kali entered into possession of the rest of the land as his sole heir. The appellants (the original accused), however, put up a claim that Kasturi, the wife of the appellant Sardar Singh, was also the daughter of Naubat Singh, and therefore, entitled to a half share in the property left by Naubat Singh. Legal proceedings ensued as a result of these rival claims and February 13, 1964 was the date of the hearing.

3. According to the complainant Jai Singh, at about 11.30 p.m. on that date he heard some sound in consequence of which he woke up and saw with the aid or his torch the four appellants setting fire to the thatch of his Bangi. On his raising an alarm, his wife, his brother, Atar Singh, and several neighbours came to the scene of the offence and the appellants on seeing them ran away. This was the gist of his case as incorporated in his complaint. The appellants' defence was two-fold; that the place which was said to have been burnt down was a cattle-shed and not a residential house, and that they had been falsely implicated on account of the previous hostility between them and the complainant and the members of his party.

4. During the committal proceedings both the sides examined a number of witnesses. At the instance of the appellants the Magistrate also made a local inspection and placed his report thereof on record. The complaint against the appellant being under Section 436 of the Penal Code, the case was triable by Sessions Court, if the Magistrate were to commit the case on being satisfied that there were sufficient grounds to do so.

5. The Magistrate considered the evidence led before him in great details and in an elaborate judgment observed : (1) that of the six witnesses examined by the complainant, three, namely, the complainant, his wife and his brother, belonged to the same family, (2) that the remaining three eyewitnesses were chance witnesses, (3) that the complainant had failed to examine any witness

from his immediate neighbourhood, (4) that his inspection revealed that the Ghar, which was set fire to, was a cattle-shed and that the complainant actually resided in a house at a distance of about 50 paces from that place, (5) that the house of two of the prosecution witnesses, Badri Prasad and Gokul Singh, were at a distance of 304 and 179 paces away, while that of the third witness Mantri, was situated at a distance of one and half furlong from the scene of the offence, (6) that Badri Prasad and Gokul had given evidence against the appellants in an earlier litigation and were, therefore, interested witnesses, (7) that the name of Mantri did not figure either in the F.I.R. or in the complaint filed by the complainant, nor in the list of witnesses filed in the inquiry under Section 202 of the Code of Criminal Procedure, and that therefore, he was made witness as an after-thought, (8) that the defence witnesses, on the other hand, had their houses near the place of the alleged offence, (9) that the defence witnesses were independent witnesses, (10) that though complainant's Ghar had admittedly caught fire, none of his witnesses claimed that he saw the appellants actually setting fire to it, that their version that they saw them near the place or running way therefore was unnatural, particularly the version of Badri Prasad that he saw the appellants not only near the place but actually talking to the complainant, (11) that the version of Badri Prasad was not only unnatural but his denial that he had previously figured as a witness on the side of the complainant was false, (12) that the evidence of Mantri that he saw the appellants jumping over a wall was improbable as the wall was about 5 to 5 1/2 feet in height, and lastly, that the version of the prosecution witnesses that they had flashed their torches in the light of which they saw the appellants running away was also unnatural. On the analysis of the evidence the Magistrate came to the conclusion that none of the prosecution witnesses had been the appellants or any of them either setting fire to the Ghar or being near it, that the statements of the defence witnesses, who were the near neighbours and therefore could have arrived at the scene of the offence earlier than the others, that none of the prosecution witnesses was present when they came there, were true, that the case was first investigated by the police and was found to be false and it was then only that a complaint had been filed, and lastly, that looking to all the facts and circumstances of the case, the complaint was baseless, and therefore no order of commitment could be made.

6. Aggrieved by the said order of discharge, the complainant filed a criminal revision before the Sessions Court. The Sessions Judge observed that the Magistrate had assessed the evidence led by the parties, made an on the spot inspection of the scene of the offence, disbelieved the prosecution witnesses and had thus virtually tried the case instead of leaving it to be tried by the Sessions Court. Relying on Bipat Gope v. State of Bihar, (1962 Supp (2) SCR 948) he held that the Magistrate had gone beyond his jurisdiction, that there was evidence which established a prime facie case, and therefore, remitted the case to the Magistrate directing him to commit the appellants for trial to the Sessions Court. In a further revision by the appellants to the High Court, the High Court noted that though there may not be eye witnesses, there may in some cases be circumstantial evidence cogent enough to establish the case against an accused person, that though the prosecution witnesses did not claim that they had seen the appellants setting fire to the house, they had claimed to have seen the appellants near about when they came there in response to the complainant's alarm and had also seen them running away. The High Court observed that this evidence constituted circumstantial evidence to make out a prima facie case. It also observed that the reasoning of the Magistrate that the appellants could not have jumped over a 5 feet wall was misconceived and, relying on the observations in Bipat Gope's case (supra) dismissed the revision holding that on the evidence recorded by the Magistrate it was his duty to commit the appellants to the Sessions Court and the Magistrate could not himself decide the case as he in fact had done.

7. The scope of the inquiry under Chapter XVIII of the Code, as also the powers of the committing Magistrate under Section 209 therein have by now been well-settled. As a result of the amendment

of the original Section 207 and substitution of that section by the new Sections 207 and 207-A by the Code of Criminal procedure (Amendment) Act, XXVI of 1955, a distinction has now been made between proceedings instituted on a police report and these otherwise than on a police report. In the case of the former, the provisions of the new Section 207-A apply, while the latter are covered by the provisions of Section 208 and onwards. It is fairly clear that the procedure which applies to the proceedings instituted instituted otherwise that on a police report is more elaborate than that under Section 207-A. Further, whereas Section 207-A(6) lays down that the committing Magistrate shall discharge an accused person if he is of opinion that the evidence and documents before him disclose "no grounds for committing him for trial," Section 209 uses the words "not sufficient grounds for committing an accused person for trial." The difference in the language in these two sections has already been the subject-matter of consideration by this Court, and therefore, we do not consider it necessary once again to go into any detailed examination of them. In Baugopal Ganpatrai Ruia v. The State of Bombay (1958 SCR 618) this court examined in detail the previous case-law and held that the law in India, as incorporated in Section 209, is the same as in England, and cited with approval the statement in that connection in "Halsbury's Laws of England," (3rd ed.), Vol. X, p. 365, namely :

> "When all the evidence has been heard, the examining justices then present who have heard all the evidence must decide whether the accused is or is not to be committed for trial. Before determining this matter they must take into consideration the evidence and any statement of the accused. If the justice are of opinion that there is sufficient evidence to put the accused upon trial by jury for any indictable offence they must commit him for trial in custody or on bail."

8. This Court added that in each case the Magistrate holding the preliminary enquiry has to be satisfied that a prima facie case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit and if he is not so satisfied, he is not to commit. Where, however, much can be said on both the sides, it would be for the Sessions Court and not for the Magistrate to decide which of the two conflicting versions will find acceptance at its bands. In Dattatraya v. Shaikh Mahboob Shaikh Ali ((1969) 2 SCR 520 at p. 525) commenting on Section 209 of the Code, this Court observed that though a Magistrate holding an inquiry under Chapter XVIII is not intended to act merely as a recording machine and is entitled to sift and weigh the materials on record, he is to do so only for the purpose of seeing whether there is sufficient evidence for commitment and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit it is his duty to discharge the accused. But, if there is some evidence on which a conviction may reasonably be based he must commit the case. But the Magistrate at that stage has no power to evaluate the evidence for satisfying himself of the guilt of the accused. The question before him at that stage would be whether there is some credible evidence which would sustain a conviction. In Bipat Gope's case (supra) the Magistrate had examined witnesses, and as in the present case, held an on the spot inspection. It was found that the Magistrate did not stop to find out if there was evidence which, if believed, would establish at least a prima facie case, but had gone on further to disbelieve that evidence by an elaborate and painstaking process of examination, in aid of which he brought to bear his own appraisal of inconsistencies, improbabilities, etc. The Court held that in doing so the Magistrate in fact tried the whole case thereby for entailing the decision of the Court of Session which alone had the jurisdiction to try such a case. The Court, therefore, set aside the Magistrate's order of discharge as being one in excess of jurisdiction. Though the proceedings there were under Section 207-A, the Court took into consideration the language used both in that section and Section 209 and stated that though the words used in the two sections differed to a certain extent, under neither of them can the Magistrate

decide the case as if the trial was before him.

9. In the present case, the Magistrate has done precisely what was held in Bipat Gope's case (supra) to be contrary to the principle governing Section 209. The Sessions Judge, was right in setting aside the order of discharge passed by the Magistrate and the High Court also rightly refused in the revision before it to interfere with that order. Though, the language of Section 209 differs from that in Section 207-A, it is well-settled that under neither of them has the Magistrate the jurisdiction to assess and evaluate the evidence before him for the purpose of seeing whether there is sufficient evidence for conviction. The reason obviously is that if he were to do that he would be trying the case himself instead of leaving it to be tried by the Sessions Court, which alone has under the Code the jurisdiction to try it. As stated earlier, both the parties led evidence. Instead of finding out whether there was sufficient evidence to make out a prima facie case, what the Magistrate did was to evaluate the evidence by an elaborate assessment of it and held, as if he was trying the case, that between the two versions the evidence of witnesses examined by the appellants was preferable to that led by the complainant, that the defence evidence was more probable and that there were inconsistencies and improbabilities in the prosecution evidence, and finally that evidence was interested and liable, therefore, to be discarded. There may perhaps be some force in what the Magistrate has said about the evidence but it is clear that there was something which could be said on both the sides. The Magistrate, therefore, ought to have left the case for the Sessions Court to decide and come to its conclusion which of the two rival versions was acceptable on the facts and circumstances of the case. In our view the Magistrate transgressed the bounds permissible to him under Section 209, and, therefore, his order of discharge was liable to be set aside by the Sessions Court and the High Court, therefore, rightly refused to interfere with it.

10. The appeal fails and is dismissed.

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