Bishambher Bhagat and Others

Vs

State of Bihar

Criminal Appeal No. 119 of 1968

(J.M. Shelat, I.D. Dua, S.C. Roy JJ)

01.09.1971

JUDGMENT

DUA, J. -

1. This appeal by special leave is directed against the judgment of the Patna High Court, dated February 16, 1968, in Criminal Appeal No. 384 of 1966. Fourteen persons were tried in the court of the Second Additional Sessions Judge, Chapra, under Sections 307, 148 and 147, I.P.C. Out of them two were convicted under Sections 307 and 148, I.P.C. and four under Section 147, I.P.C. The rest were acquitted. The six convicted persons appealed to the High Court but except for the reduction of the sentence imposed under Section 307, I.P.C., their appeal was otherwise dismissed. All the six convicted persons applied for special leave to this Court. On May 21, 1968, however, an application was presented in this Court on behalf of the petitioners seeking permission to amend the special leave application by raising the following two additional grounds :

> "(1) that the Trial Court disbelieved the prosecution case that any lathi blows were given by the petitioners 3 to 6 erred in convicting them under Section 147 of the Penal Code in the absence of any finding of any overt act on the part of those persons;
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> (2) that Ex. AA could only be admitted in evidence as a previous statement of Ganesh Bhagat, P.W. 2 and used for the purpose of corroboration or for contradiction but not as a substantive piece of evidence. Both the courts below have erred in convicting petitioners 3 to 6 under Section 147 of the Penal Code merely because their names were in Ex. AA."

2. On May 22, 1968, this Court declined special leave to petitioners 1 and 2 and granted it only to petitioners 3 to 6, but in their case also leave was limited only to the two additional grounds mentioned above. This appeal is accordingly confined to only those two grounds. The names of the four appellants with whose case we are now concerned are :

#(1)Bishambher Bhagat, (2) Raghunath Bhagat, (3)Ghuguli Bhagat, and (4)Jamuna Bhagat.##

3. According to the prosecution case there was long-standing enmity between Ganesh Bhagat (P.W. 2) on the one side and the accused in the Trial Court on the other. This enmity had given rise to several criminal cases between the parties, including proceedings under Section 107, Cr. P.C. Some of those cases were pending on the date of the occurrence in question in this appeal. On November 22, 1965, between 10 and 11 a.m. Ganesh (P.W. 2) was surrounded by about 18 persons including

the 14 persons accused in the Trial Court when he was proceeding to his house by a village path towards the north of his residence after leaving a bundle of paddy at the house of one Palta. Before he reached his house, on a direction by Bishambher Bhagat (one of the appellants in this Court) and Nandkumar Bhagat (acquitted by the Trial Court), their companions assaulted Ganesh. Ram Briksh Bhagat and Ramkishan Bhagat (to whom special leave was declined by this Court) were armed with bhalas with which Ganesh was assaulted by them. The others were armed with lathis.

4. This Trial Court, while dealing with the case under Section 147, I.P.C., upheld the prosecution version only to the extent it was supported by the earliest statement of Ganesh recorded on November 22, 1965, as his dying declaration, by P. N. Roy, Circle Officer, who was examined as court witness No. 1. Point No. 4 which was formulated by the Trial Court on this part of the case reads :

> "Whether it has been established that the rest of the accused persons were members of the unlawful assembly on that date, armed with lathis the common object of which was to assault Ganesh ?"

The Court recorded its finding on this point in these words :

> "15. Point No. 4 : According to the prosecution case all these accused persons were members of an unlawful assembly and except Rambriksh and Rambishun, all were charged under Section 147, I.P.C., for being armed with lathi. But the perusal of the earliest statement made by the informant himself and duly recorded by the C.O.C.W. 1 goes to show that only he following names had been mentioned therein (1) Rambishun (2) Rambriksh (3) Bishambher (4) Jamuna (5) Ghughali (6) Ramnath Son of Ramlakhan. Obviously therefore the presence of the rest of the eight accused persons namely Jhakar, Chandrika, Chanderma, Mukhlal, Serjug, Sital, Mahendra and Nandkumar becomes very much doubtful.
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> 16. It was strongly contended on behalf of the defence that the names of Raghunath does not find mention in Ext. AA whereas it was contended on behalf of the prosecution that the name of Ramnath has been wrongly written instead of Raghunath in Ex. AA and it was submitted that Ganesh naturally would be making feeble statements and instead of Raghunath the C.O. had noted down Ramnath. I would have given benefit of doubt to Raghunath as well but I find the parentage of all the six accused persons mentioned in Ext. AA including those of Ramnath, and he has been described as son of Ramlakhan. It is not disputed that Raghunath is the son of Ramlakhan and it also appears from his statement under Section 342, Cr. P.C.
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> 17. After due consideration of the respective arguments, I am satisfied that the Circle Officer had by mistake noted Ramnath instead of Raghunath. Furthermore it should be mentioned that even P.W. 4 Narsingh had not named accused Mahendra, Chanderika and Chanderma before P.W. 7 and as such there is no doubt that the presence of the accused persons besides those mentioned in the earliest statement of Ganesh becomes very much doubtful. There is no doubt that all the eye-witnesses examined in this case have consistently deposed about the presence of these accused persons as members of the unlawful assembly except P.W. 4, who has omitted to mention the three names mentioned the above but keeping in view the absence of the names of the eight accused persons, from the earliest statement of Ganesh their

presence becomes doubtful.

18. After the due consideration of the evidence discussed above and the facts and circumstances of the present case I hold that the prosecution has been able to establish the charge under Section 147, I.P.C., against Bishambher, Ghughali, Jamuna and Raghunath and they are convicted thereunder and sentenced to undergo R.I. for one year each."

5. The High Court, while dealing with the appeal by the six convicted persons, disposed of the argument on behalf of the present appellants which is relevant for our purpose in these words :

"According to Mr. Misra, the Trial Court, after having disbelieved the prosecution case in part as to the participation of the accused persons other than the appellants in the occurrence and assault with lathi by appellants Bishambher, Raghunath, Ghughali and Jamuna as well as the order for assault by Bishambher, should not have convicted the appellants on the residue. It is now well established that even in criminal cases the courts have to find out the truth by separating the chaff from the grain and should not discard the prosecution case merely respect relying on the doctrine of falsus in uno falsus in omnibus. Further, the court below has not disbelieved the prosecution witnesses altogether, but it has merely given benefit of doubt to the accused persons on account of the omission of the names of some of the accused persons in Ext. AA. In the circumstances there is no substance in this contention."

6. In this Court the same argument, as was urged in the High Court, was repeated by Shri P. K. Chatterjee. According to the counsel when those appellants were acquitted of the charge under Section 323, I.P.C., they could not be convicted under Section 147, I.P.C., because no over act has been proved against them. The counsel argued that there was not finding that the present appellants shared the common object of the unlawful assembly with those convicted. He cited Baladin v. State of U.P., (AIR 1956 SC 181.) in support of his contention. In that decision the principle of law was stated thus :

"..... It is well settled that mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under Section 142, Indian Penal Code."

Support for his contention was, however, sought by the appellants' counsel from the way in which this principle was applied to the facts of that case. We consider it unnecessary to deal with this aspect at length for the simple reason that in the case before us the appellants, along with those convicted, had assembled together armed with lathis and they were parties to the assault on Ganesh Bhagat, even though it may not be possible to find actual overt acts on their part. They were certainly not innocent persons who happened to be present at the place of occurrence for the purposes other than as associates of those convicted. We agree with the appellants' counsel that mere presence of a person at the place where members of an unlawful assembly have gathered for carrying out their illegal common object, does not incriminate him. But the question is one of fact in each case as to whether a person happens to be innocently present at the place of the occurrence or was actually a member of the unlawful assembly. In the present case the Trial Court has believed that part of prosecution version which shows the present appellants to be members of the unlawful

assembly and the High Court had affirmed that conclusion and rejected the appellants' contention to the contrary. In our opinion, on the facts found there can be no reasonable doubt about the appellants being members of the assembly which had illegally gathered near Ganesh's house and assaulted him.

7. The actual decision in Baladin's case (supra), as already observed proceed on its own facts. With the proposition of law laid down in that case, which has already been reproduced earlier, there can be no dispute and the conclusions of the two courts below in he present case do not violate that principle. The observations made in that case from which the appellant seeks support must be read in the context of its special facts. That those observations cannot be read as laying down an unqualified proposition of law was also held by this Court in Masalti v. State of U.P. ((1964) 8 SCR 133 at 149).

8. Exhibit AA undoubtedly can only be used as an earlier statement of Ganesh. But it is wrong to say that this statement has been used by the High Court as substantive evidence. It has only been used for the purpose of corroborating the prosecution evidence and to the extent there is such a corroboration available the evidence has been accepted. No serious argument to the contrary was addressed in this Court on behalf of the appellant.

9. We do not find any merit in this appeal which is hereby dismissed.

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