PATNA HIGH COURT

Awadh Singh

Vs

State (Patna)

Criminal Appeal No. 186 of 1952

(Choudhary, J.)

17.05.1952. 09.11.1953

JUDGMENT

Choudhary, J.

1. The appellants Nos. 1 to 5 and 8 have been convicted under Sections 148 and 326/149, Penal Code and sentenced to undergo rigorous imprisonment for one year each under the former section and for seven years each under the other sections. The appellants Nos. 1 to 3 have also been convicted under Section 324, Penal Code, and sentenced to undergo rigorous imprisonment for two years each under that section. The sentences are to run concurrently. The appellants Nos. 6 and 7 have been convicted under Sections 148 and 326/149, Penal Code and sentenced to rigorous imprisonment for two years each under Sections 326/149, Penal Code, but no separate sentence has been passed under Section 148, Penal Code. The appellant No. 9 has been convicted under Sections 147 and 326/149, Penal Code and sentenced to undergo rigorous imprisonment for two years under Sections 326/149, Penal Code, but no separate sentence has been passed under Section 147, Penal Code.

2. The prosecution case is as follows. Dhanga wan 'pyne alias' Darbasain 'pyne' starts about 8 or 9 chains south of the trijunction of three villages, namely, Marsua, Morasa and Asiawan, and after passing through several villages towards the north terminates in village Dhargawan. The surplus water of adjacent fields known as Nigar is discharged into the mouth of this 'pyne'. The residents of Dhangawan and neighbouring villages are alone entitled to the water discharged in this 'pyne', and admittedly the residents of Asiawan. Morasa and Marsua have no right to irrigate their fields from it. On 23.9.1951, at 8 a.m. about 50 persons, residents of village Dhangawan and the neighbouring villages started desilting the pyne just from the northern side of the road-pyne. After they had desilted at places where it was found necessary to desilt and had proceeded about 175 places north of the crossing they heard people shouting towards the south and they saw a mob numbering 50 or 60 armed with various weapons approaching towards them. At this Jamuna Singh (P. W. 1) who was super vising the work told his men to leave digging, whereupon they left the work and shifted to an adjacent 'marua' field towards the east of the 'pyne'. The armed mob reached near the place where these persons were and the appellant Awadh Singh asked Jamuna Singh to stop digging. The latter asserted his right, and there upon the appellant

ordered assault. The mob thereafter began to assault. The appellants Awadh Singh, Rajdeo Singh and Keshwar Mahton struck Kamjit with garassas and the appellants Awadh Singh, Rajdeo Singh and Deonandan Mahton struck Jamuna Singh (P. W. 1) with garassas. The appellants Sheoratan Singh also gave a garassa blow to Baldeo Singh (P. W. 6). Keshwar Mahton (P. W. 4), Ramkishun (P. W. 10). Chandraman (P. W. 11) and Kara Singh (P. W. 15.) also received injuries in the scuffle. Several other persons who, being frightened, took to their heels, were also chased and assaulted by the members of the mob. After the mob left the place, the prosecution party arranged for cots and bearers and took the injured persons to the nearest police station at Jehanabad which is at a distance of six miles from the place of occurrence and first information was lodged by Bhagwat Singh (P. W. 24) at 2 P. M. on the same day. After recording the first information and preparing the injury reports, the investigating officer sent the injured persons to the hospital where Ramjit died. On receipt of this information the investigating officer reached the hospital at about 3 P. M. and having prepared an inquest report forwarded the dead body of Ramjit for 'post mortem' examination. After investigation the police submitted charge-sheet against the appellants along with three other persons, namely Ruplal alias Saroop, Bhausagar and Mahabir. On preliminary enquiry having been held they were committed to the Court of session for trial.

3. The defense of the accused persons was that they were innocent and that they had not gone to the place of occurrence at all. They also asserted that none of the prosecution witnesses knew them either by name or by face. Their case is that the prosecution party wanted to dig a parti plot bearing No. 431 which starts from the trijunction of the three villages and proceeds to the Morasa 'pyne' and that there was some scuffle between the men of the prosecution party and some people of villages Morasa and Anandibigha and they suggested that the injuries might have been caused in that scuffle.

4. The trial was held with the aid of four assessors, according to whose opinion the appellants Awadh Singh and Sheoratan were guilty under Sections 326 and 148, Penal Code and the appellants Rajdeo, Deonandan, Sagar and Brahamdeo were guilty under Section 148, Penal Code, but all the above appellants were not guilty under any other charge. According to their opinion, however, the other accused persons were not guilty under any charge. The learned Additional Sessions Judge partly agreeing and partly disagreeing with their opinion acquitted the accused Ruplal alias Sarup, Bhausagar and Mahabir, but convicted and sentenced the appellants as stated above.

5. In this case it is not disputed that only the residents of Dhangawan and neighbouring villages are entitled to the water flowing in the pyne in question and the residents of Morasa, Marsua, and Anandibigha have no claim to the water of this pyne. It is also admitted that at the material time a large number of residents of village Dhan gawan and neighbouring villages came to desilt the pyne and they were assaulted by a mob with lathis and various sharp cutting weapons resulting in the death of Ramjit, who was also called Jhapas, and causing injuries to Jamuna Singh (P. W. 1), Keshwar Mahto (P. W. 4), Baldeo Singh (P. W. 6) Ramkishun Ahir (P. W. 10), Chandraman Mahto (P. W. 11) and Karu Singh (P. W. 15).
The question to be determined, however, is whether the appellants were in the mob which caused the injuries. In considering the evidence adduced by the prosecution to establish the guilt of the appellants certain facts and circumstances have to be kept in mind. Admittedly, the appellants have no manner of rights in the 'pyne' in question, and according to the prosecution case itself,

they before the date of occurrence, never interfered with the exercise of the right of the prosecution party in getting the pyne desilted. It is on this occasion only when the appellants and their men are said to have taken into their heads to put obstruction to the desilting of the pyne for the first time. On behalf of the accused persons several petitions were filed before the Magistrate for holding a test identification parade but for reasons best known to the authorities concerned, no test iden tification parade was held. It may be remembered that the definite case of the defense was that none of the prosecution witnesses knew them either by name or by face and, therefore, it was all the more necessary to have a test identification parade held, especially when applications were made to the Magistrate on behalf of the defense for that purpose. It appears that an order was passed by the Subdivisional Magistrate asking the investigating officer to arrange to hold a test identification parade. Even the senior Sub Inspector of police gave such a direction to the investigating officer, but the investigating officer submitted a note that as he had already submitted the charge-sheet, the test identification parade might be held in Court. The learned Additional Sessions Judge has characterized the excuse of the investigating officer for not holding the test identification parade as untenable and in his opinion, the investigating officer could have held it if he was serious enough to do so. He has also held that in such cases it was necessary to hold a test identification parade, but, in his opinion, the non-holding of the test identification parade could not, in law, be said to have prejudiced the accused persons. The following passage from his judgment may be quoted in this connection.

> "However negligent the conduct of the investigating officer in not carrying out the orders of the Magistrate might have been, it must be held that the accused had no legal 'right' to claim that test identification parade he held at the investigation stage or even at the stage of inquiry and, therefore, it cannot be held that the non-compliance of the Magisterial order in this regard has caused any prejudice to the accused persons."

The accused persons may or may not have legal right to claim for test identification and the holding of test identification may or may not be a rule of law, but it is a rule of prudence, no doubt, that in such cases test identification parade should be held, especially when the accused per sons definitely assert that they were unknown to the prosecution witnesses either by name or by face and they requested the authorities concerned to have the test identification parade held. In '*Provash Kumar Bose v. The King*[1]', the holding of a test identification parade was considered to be necessary as the accused was not known to the witnesses (who had identified him in Court) from before the occurrence. The non-holding of a test identification parade, therefore, in my opinion, though may not be a ground to vitiate the trial, is undoubtedly a very important feature in considering the credibility of the witnesses on the point of identification. It may also be remembered that the learned Additional Sessions Judge has himself discarded the evidence of the most of the prosecution witnesses on the point of identification and assault and, in that view of the matter, it will all the more be necessary for me to consider very cautiously and carefully the evidence of the remaining witnesses on whom reliance has been placed by the Court below. Moreover, it has also to be remembered in this case that for no apparent reason the applicants suddenly appeared and forcibly attempted to prevent the prosecution party from desilting the pyne when they do not claim to have any right over the water of that pyne. In order to believe a story of an apparently unjustified attack, as the present one, it must be supported by unambiguous and unimpeachable evidence, vide '*Narsingh Singh v. Emperor*[2]',

6. There are 27 prosecution witnesses, one of whom is the investigating officer (P. W. 27). Out of the remaining 26 witnesses, 11 witnesses have been tendered only for cross-examination. Six witnesses are the injured persons and eight witnesses are the other eye-witnesses who did not receive any injury. The injured witnesses are P.Ws. 1, 4, 6, 10, 11 and 15 and the other eye witnesses are P.Ws. 2, 3, 5, 7, 12, 16, 22, 23 and 24. P.Ws. 2, 3, 7, 12, 16 and 22 did not see the assault. The witnesses who deposed to have seen the assault are the aforesaid six injured persons and Mathura Singh (P.W. 5). Though, after the occurrence, this Mathura Singh was all along present in the village, he was examined by the in vestigating officer, for the first time, five days after the occurrence. No explanation has been given as to why he was produced before the investigating officer so late. Then remains the evidence of the injured per sons. They are no doubt competent to speak about the assault. The learned Additional Sessions Judge has not, however, accepted the evidence even of identification by Baldeo Singh (P.W. 6), Ramkishan (P.W. 10) and Chandraman Mahton (P.W.11). Karu Singh (P.W. 15) did not identify any one. Thus, I am left with the evidence of only two witnesses, namely, P.Ws. 1 and 4, amongst the injured persons. P.W. 1, Jamuna Singh, received as many as 13 injuries. According to him, the appellant Awadh Singh struck him in his right dorsum and palm with a garasa, the appellant Rajdeo Singh struck him at his neck with a garasa and the appellant Deonandan struck him in his left arm with a garasa. He could not, however, identify his other assailants. Injury No. 9 on the person of this witness is an incised cut on the left palm between the middle and ring fingers separating the two fingers for a depth of 1¼ inches. This cannot be the injury caused by the appellant Awadh as the injury given by him was on the right palm. Injury No. 5 is a lacerated wound on the dorsum of the right hand about 1 inch below the wrist joint ½" x ¼" skin deep. The appellant Awadh is said to have caused an injury in the right dorsum of this witness, but it was caused with a garasa which could not produce a lacerated wound and, therefore, this injury also could not have been caused by the assault of the appellant Awadh. The prosecution has not been able to show any other injury on the person of this witness which could be caused by the garasa used by the appellant Awadh. Deonandan Singh is said to have struck him with a garasa in his left arm. Injuries Nos. 6 and 7 are no doubt on the left arm, but they are lacerated wounds and could not have been caused by garasa blows. The appellant Rajdeo Singh is alleged to have struck this witness at his neck with a garasa. Injuries Nos. 12 and 13 are on the neck which could have been caused by the blow said to have been given by the appellant Rajdeo. P.W. 1, however, did not state before the investigating officer that the appellant Awadh Singh hit him in
his palm. His attention was drawn to this fact, but he said that he did not tell the Sub Inspector about it. The investigating officer (P.W. 27), however, has denied that this witness made any such statement. If really the appellant Awadh gave him a garasa blow, this witness would not have forgotten to mention this fact to the investigating officer soon after the occurrence. The only other witness is Keshwar Mahton (P.W. 4). At one place he has stated that when the assault commenced on Jamuna Singh he started fleeing, that Jamuna Singh was, first, to be assaulted and after the assault on Jamuna was over, assault on Jhapas began. Therefore, according to this evidence he started fleeing before the assault on Jhapas began. But at another place, on the court question, he has stated that he started fleeing after Jhapas had fallen on the ground on receiving the assault. Before the Committing Court he identified one Jodha as being Keshwar. At the trial, however he has denied to have done so. His evidence before the Committing Court has been tendered on behalf of the accused persons under Section 288, Criminal Procedure Code, and it appears from it that he did, in fact, identify Jodha as Keshwar. He did not state before the police that Keshwar struck Ram jit. His attention was drawn to this fact, but he asserted that he did so before the police. The investigating officer, however, has denied that he made any such

statement. Even the learned Additional Sessions Judge does not seem to be inclined to place much reliance on his evidence which will appear from the following passage of his judgment :

> "Later on, however, he discovered that his pre vious answer would go to show the improbability of his having witnessed the assault on Ramjit and, therefore, he modified his statement by saying that he started fleeing after assault on Ramjit was over."

The evidence of these two witnesses, who are no doubt competent witnesses to speak about the occurrence, is not, in my opinion, for reasons given above, worthy of acceptance to prove individual assault.

7. Then remains the question of these appellants being members of the mob so as to apply the principle of constructive liability on them. On the question of identification the learned Additional Sessions Judge has relied on the evidence of the prosecution witnesses Nos. 1, 2, 4, 7, 23 and 24. Prosecution witness No. 2, as already stated, was examined five days after the occurrence, and I have already observed that there is no explanation for his belated statement. P.W. 7 Sidheshwar Singh, was also examined by the investigating officer five days after the occurrence, and in his case also there is no explanation as to why he was examined so late, though, according to him, he was all along present in his village till at least for seven days after the occurrence. Before the Committing Magistrate he was only tendered for cross-examination. Hence these two witnesses appear to be got up witnesses. P.W. 23, Rajaram Singh, did not identify Sarup before the Committing Magistrate. Though he had gone to the police station along with Bhagwat Singh (P.W. 24) at the time of lodging the first information, his statement was recorded by the investigating officer on the next day, that is, on 24.9.1951. He also deposed about the appellants Awadh, Rajdeo and Deonandan giving blows to Jamuna with garasas, but before the investigating officer he did not say that he witnessed the occurrence at all. He claims to nave known the accused persons from before, but he did not state as before the investigating officer or the Committing Magistrate. Therefore, the evidence of this witness also is not such as to the truth of which there can be no doubt. P.W. 24, Bhagwat Singh, is the informant. He also deposed about the assault given by the appellants. He also claims to be an eye-witness of individual assaults, but his evidence on that point has not been accepted by the learned Additional Sessions Judge. His observation with regard to the evidence of this witness and the previous witness is as follows :

> "I am unable to accept the evidence of P.Ws. 23 and 24 that they stood at a distance of about 150 to 160 feet from the place where Jamuna Singh was being assaulted. If they would have been there, I am sure the accused party would not have spared them. Obviously, they must have fled at a sufficiently long distance."

He also claims to have known the accused per sons from before, but he did not state this fact before the Committing Magistrate. The testimony of this witness also, therefore, seems to be doubt ful. The evidence of the other two witnesses, namely, the injured witnesses, has now to be examined. As already stated, their evidence on the question of individual assaults has not been accepted, and Sir Sultan Ahmad appearing for the appellants has argued that where the evidence of a witness on a material point has been disbelieved, it is not safe to rely on the rest of his

evidence to convict the accused persons. Of course, it is true that where the prosecution story is disbelieved as to its essential details, it is still open to the court to rely on a part of the story for the purpose of convicting the accused persons, vide '*Leda Bhagat v. Emperor*[3]', But, at the same time, it is elementary that where the prosecution has a definite or positive case it must prove the whole of the case vide, '*Mohinder Singh v. The State*[4]', In my opinion though it cannot be laid down, as a law of general application, that, in no case, a judge can accept a part of the prosecution story when he has disbelieved its other part, as a rule of prudence it will not be safe to rely on the evidence of witnesses on one part of the prosecution story when it has been dis believed as to its material part. In this case, as already observed, the evidence of P.Ws. 1 and 4 is not worthy of credence so far as the question of individual assaults is concerned. It has also been shown that they have attempted without any reason to attribute the particular act of assaults to the different appellants. I am not, therefore, inclined to rely on their evidence even on the question of identification, especially when, as already observed, the appellants have never put forward any claim over the water of this pyne and their prayer for the test identification parade was ignored.

8. Considering the entire evidence on the record I am satisfied that the prosecution has not established its case beyond reasonable doubt. I will, therefore, allow the appeal and set aside the order of conviction and sentence passed on the appellants. The bail bonds stand cancelled.
Appeal allowed.

Cases Referred.

[1] AIR 1951 Cal 475
[2] AIR 1939 Pat 659
[3] AIR 1931 Pat 384
[4] AIR 1953 SC 415