
(1972) 10 RAJ CK 0012
In the Rajasthan High Court

Bishan Singh and Others

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 07-10-1972

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 304, 307

Citation : (1973) CriLJ 1079 : (1972) WLN 818

Hon'ble Judges : L.S. Mehta, J

Bench : Single Bench

Judgement

L.S. Mehta, J.—This is an appeal taken by accused Bishan Singh, Kishan Singh and Pakhar Singh, residents of Kal-puria, police station Talera, District Bundi, against the judgment dated August 31, 1970, of Mr. Bhanu Kumar Jain, Additional Sessions Judge, Bundi, convicting and sentencing the accused-appellants as under:

1. Bishan Singh has been convicted u/s 304 (Part II), IPC and sentenced to seven years' rigorous imprisonment. He has also been found guilty u/s 447, I.P.C. and sentenced to two months' rigorous imprisonment.

2. Kishan Singh and Pakhar Singh have been convicted u/s 324, I.P.C. and sentenced to one year's rigorous imprisonment each. They have also been held guilty u/s 447, I.P.C. and sentenced to two months' rigorous imprisonment each.

The substantive sentences have been directed to run concurrently.

2. The prosecution story, in brief, is that there was a land (Khasra Nos. 141/1, 142/1, 171/7 and 173/1), situate in village Kalpuria. That land belonged to Kalu and Dhanna. On September 22, 1968, at about 2 P.M. Kalu, Dhanna, Gangolia, Sanwalia, Kanha and Nanhi were weeding out useless plants and grass in the paddy field. At that time Mahendra Singh, Teja Singh, Pakhar Singh, Bishan Singh, Chanchal Singh, Karan Singh and Kishan Singh, armed with various weapons, entered the land and assaulted Kalu and Dhanna. As a result of the injuries sustained by Kalu, he instantaneously died on the spot. Gangolia, P.W. 3,

Mangi Lai, Nanhi and Dhanna also received certain injuries. Anandi Lai, P.W. 1, after having received information regarding the incident, got first information report (Ex. P-I) written by Kalyan, P.W. 5 and sent it with one Birdhi Lai, P.W. 2, to the police station, Talera. On receipt of the report, the police registered a case under Sections 302 and 307, I.P.C, and took over investigation. After necessary investigation a challan was presented by the police to the Court of Additional Munsiff Magistrate No. 1, Bundi, against the above named seven accused persons under Sections 302 and 307, I.P.C. Learned Magistrate conducted preliminary inquiry and committed all the accused to the Court of Additional Sessions Judge, Bundi. The Additional Sessions Judge framed charges against the accused under Sections 148, 447, 302/149 and 324/149, I.P.C, to which they pleaded not guilty. In support of its case the prosecution examined 21 witnesses. In their statements, recorded u/s 342, Cr. P, C, the accused denied the prosecution allegations. In their defence they produced one witness Trilok Singh. Eventually the trial Court acquitted Teja Singh, Mahendra Singh, Chanchal Singh and Karan Singh but convicted and sentenced the accused-appellants, Bishan Singh, Kishan Singh and Pakhar Singh, as stated above.

3. Aggrieved by the above verdict, accused Bishan Singh, Kishan Singh and" Pakhar Singh have taken this appeal. The contention of learned Counsel for the appellants is that when the accused were in fact charged under Sections 302/149, 324/ 149, 447/149 and 148, I.P.C, they could not have been convicted under Sections 304 (Part II), 447 and 324, I.P.C, simpliciter. Learned Deputy Government Advocate submitted that if the charge-sheet of the accused is read carefully, it would appear that they have been charged u/s 302,. I.P.C, simpliciter. Counsel for the State¹ further argued that even if there is some error in framing the charges, it is curable under Sections 535 and 537, Cr. P O

4. The form of charge u/s 149, I.P.C, as given in Ratan Lai's Law of Crimes, 22nd Edn., P. 370, is:

I (name and office of Magistrate, etc.) hereby charge you (name of accused) as follows:-

That you, on or about the...day of ... at ... were a member of an unlawful assembly, (in prosecution of the common object of which, viz... one of the members ... caused (specify the offence) to ...) or (when one of the members of the said assembly caused ... (specify the offence) to ...) or (when one of the members of the said assembly caused ... (specify the offence) to ..., which offence you knew to be likely to be committed in prosecution of the common object of the said assembly and you are thereby, u/s 149, of the Indian Penal Code, guilty of causing the said (offence), an offence punishable u/s ... of the Indian Penal Code, and within my cognizance (or within the cognizance of the Court of Sessions).

And I hereby direct that you be tried by the said Court (in cases tried by Magistrate omit these words) on the said charge." The form of charge u/s 302,

I.P.C., as given in the above treatise, at P. 796, is reproduced below:

I (name and office of Magistrate etc.), hereby charge you (name of the accused) as follows:

That you, on or about the ... day of ... at ... did commit murder by intentionally (or knowingly) causing the death of (specify the name of the deceased) and thereby, committed an offence punishable u/s 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions.

And I hereby direct that you be tried by the said Court on the said charge.

5. The charge-sheet of accused Kishan Singh shows that he has been indicted under sections 302/149, 324/149 and 447/148, I.P.C. In the main body of the charge it is mentioned that the prisoner along with other accused formed an unlawful assembly and in the prosecution of the common object of that assembly committed such and such crime. Similar is the case with the charges framed against Pakhar Singh, though Section 149, I.P.C, has not been added with Section 302, Penal Code, Likewise Bishan Singh has been indicted under Sections 447/148, 302 and 324, I.P.C, but the language in the main body of the charge is that an unlawful assembly was formed and he was a member of that assembly and in prosecution of the common object of that assembly he along with others committed such and such offences. Thus, the charges framed against Bishan Singh, Kishan Singh and Pakhar Singh are in conformity with the form of charge meant for the offence u/s 149, I.P.C. The bodies of the charges indicated that all the three appellants were not arraigned under Sections 302, 324 and 447 Penal Code simpliciter.

6. A charge for substantive offences under Sections 302, 324 and 447, I.P.C, is for distinct and separate offences from those under Sections 302, 324 and 447, read with Section 149, T.P.C. In the present case there was no direct and individual charge against the accused-appellants for the specific offences under Sections 302, 324 and 447, I.P.C. The absence of specific charge is a serious illegality which has materially prejudiced the accused. Argument of learned Deputy Government Advocate that this is only an irregularity which is curable under Sections 537/535, Cr. P. C, is answered by the observations of their Lordships of the Supreme Court in Nanak Chand Vs. The State of Punjab, in the following language :

If there is a conviction for a charge not framed it is an illegality and not an irregularity curable by the provisions of Sections 535 and 537, Cr.PC

The irregularity is not curable as the appellants were misled in their defence by the absence of a charge under Sections 302, 324 and 447, I.P.C. By framing charges in accordance with the provisions of Section 149. Penal Code, the trial Court gave an indication that it was not charging the accused with the specific offences simpliciter and, therefore, in defending themselves the appellants were not called upon to meet such charges. In this connection a reference is made to

Lakhan Mahto and Others Vs. State of Bihar, . In that case their Lordships of the Supreme Court, after referring to a Privy Council decision in Barendra Kumar Ghosh v. Emperor AIR 1925 PC 1 : 26 Cri LI 431, observed that

the High Court has taken the view that Section 149, I.P.C, does not constitute a substantive offence and it was 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 u/s 302, I.P.C. and a charge of constructive liability under Sections 302/149, I.P.C.

That being the settled law, there is no escape from the conclusion that the three¹ appellants, namely, Bishan Singh, Kishan Singh and Pakhar Singh have wrongly been convicted of the offences simpliciter, mentioned in the judgment of the trial Court.

7. Now the question is whether the accused should be acquitted or the case should be remanded to the court below for its retrial in accordance with law. The offence is alleged to have been committed on September 22, 1966. The trial of the accused continued upto August 31, 1970, i.e.. for about 4 years. Bishan Singh is confined to jail for about two years after the judgment of the court below. The error here is not merely technical. The appellants had already faced agony of criminal proceedings pending against them for a considerable period. Simply because the trial Judge has omitted to do his duty in not framing correct charges in accordance with law, the appellants cannot be subjected to further harassment: vide Machander Vs. State of Hyderabad, justice is not one sided. It has many facets. While it is incumbent on the Court to see that the guilty persons do not escape punishment, but it is even more necessary to see that persons accused of crimes are not indefinitely harassed. The scales of justice have to be kept on an even balance whether for the accused or against him, whether in favour of the State or not. In these circumstances, I am not prepared to order a retrial in the case because of the facts that appear here.

8. In the result, the appeal is allowed, the conviction and the sentences of the three appellants are set aside and the appellants are acquitted. Bishan Singh shall be released forthwith, if not required in any other case. Accused Pakhar Singh and Ki-shan Singh are on bail. Their bonds stand cancelled.