
(1915) 09 CAL CK 0004
In the Calcutta High Court

Deputy Legal Remembrancer

APPELLANT

Vs

Matukdhari Singh and Others

RESPONDENT

Date of Decision : 02-09-1915

Acts Referred:

Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 324

Citation : 32 Ind. Cas. 137

Hon'ble Judges : Richardson, J; Chitty, J

Bench : Division Bench

Judgement

Chitty, J.—Matukdhari Singh and nine other persons were convicted by Babu Har Sahai Lal, Deputy Magistrate, 1st Class, of Gaya, under various sections of the Indian Penal Code and sentenced to various terms of imprisonment. They appealed to the Sessions Judge of Gaya who allowed the appeals of all the ten persons. From that order of acquittal, the present appeal has been filed by the Local Government.

2. It is urged on behalf of the Local Government that the matter is one of considerable public importance, inasmuch as the accused in this case claimed to use force in asserting their rights of irrigation. It is argued that there would be considerable danger to the public peace if such action on behalf of private individuals was allowed to go unpunished. For the defence it is argued that an appeal from an acquittal stands on a different footing with regard to the consideration of evidence to an appeal from a conviction. Reference was made to the cases of *Empress of India v. Gayadin* 4 A. 148 and *Emperor v. Madan Mondal* 22 Ind. Cas. 731; 18 C.W.N. 668; 15 Cr. L.J. 155; 41 C. 662. These decisions were considered in Government Appeal No. 8 of 1914 by a Bench of which I was a member. It is sufficient for me here to say that no distinction is drawn in the Code of Criminal Procedure between an appeal from an acquittal and an appeal from a conviction. It is expressly provided that an appeal from an acquittal may lie on a question of fact. Only one broad rule can be laid down with regard to the consideration of evidence in all criminal cases, and that is that the innocence of

the accused person must be presumed; and the burden lies upon the prosecution of completely rebutting that presumption. If after the consideration of the whole evidence any doubt is felt by the Court as to the guilt of any accused person, he is entitled to the benefit of that doubt, and the verdict must be in his favour. There are, however, no special rules for dealing with the evidence in an appeal from an acquittal. Of course due weight must be given to the decision of the Court below and the reasons advanced for that decision. Apart from this, however, an appeal from an acquittal must be considered in precisely the same manner as all other cases are considered and it must be determined whether the evidence is such as to warrant a conviction of the accused.

3. This is an appeal from an Appellate order. There is a salutary rule which says that an Appellate Court should give weight to the opinion of the trying Court which had the witnesses before it and was, therefore, able to judge from their demeanour whether or not they were telling the truth. In an appeal like this from an acquittal passed upon appeal, this Court is obviously in as good a position as the lower Appellate Court to form an opinion with regard to the credibility of the witnesses. We must have, as the Appellate Court ought to have had, due regard to the opinion on this question formed by the trying Magistrate. The facts of this case are not seriously in dispute. There was undoubtedly an occurrence of the nature described by the witnesses in the early morning of Sunday, 4th October 1914. It arose in consequence of the reluctance on the part of the people of Mauza Nimsar to allow the mauzas above them to take water from what is called the Nimsar Pyne. The Sessions Judge himself, who has acquitted the accused, says "The Nimsar people, as is admitted and proved beyond a shadow of doubt, demolished the dam at Sikaria claiming that their turn had come for the use of the water."

4. Only two questions arise in this case, first, whether the action of the Nimsar people amounted to an offence u/s 147, Indian Penal Code, and the kindred sections, that is to say, whether there was in fact a riot; and, secondly, whether the accused, or any and which of them, participated in that riot?

5. The learned Sessions Judge has, in my opinion, fallen into an error with regard to the parabandi system which is in vogue in this locality and also with regard to the legal rights of the parties. These errors have undoubtedly vitiated his whole judgment and, in my opinion, driven him to an entirely wrong conclusion.

6. From the Mortar river flows what is known as the Nimsar Pyne, a channel constructed many years ago for purposes of irrigation. It flows southwards past several villages. Those villages originally all belonged to the Tikari Raj. Now some of the villages in question have passed to other owners. The several villages with which we are concerned in the present case are Noni, Maksudpur, Kalyanpur, Sekaria and Nimsar-Hasanpur. Nimsar-Hasanpur still form part of the 9-anna Tikari Raj. Maksudpur, Kalyanpur and Sekaria which lie below Noni to the north, have passed to the ownership of Babu Ishwari Persad Singh, whose people are the complainants in this case and who himself resides at Gaya. The only

document relating to the system of irrigation is the Lal Bahi, an old book of the Tikari Raj, of which an extract has been put upon the record as Exhibit 6. The system, as we find it proved in this case, is that the villages lying in proximity to the Nimsar Pyne are permitted in, rotation each to erect a bundh across the Pyne when the water is flowing low, so as to collect it and permit of its flowing into the bhoklas or distributories which thus pass the water from the Pyne into their fields. The rotation commences from the northern-most village which lies highest and descends in turn to the villages lying lower and to the south. Thus, in this case, the first village which has a right to construct a dam is Noni. Below Noni are some other villages with which we are not concerned. Then comes the group of three villages, Maksudpur, Kalyanpur and Sekaria. They lie, Maksudpur and Kalyanpur to the West of the Pyne and Sekaria to the east. Maksudpur and Kalyanpur have one bhokla on the western bank and Sekaria one bhokla on the eastern bank. Into these two bhoklas the water is compelled to flow by the construction of a single dam. Below these three villages, to which we may for the purposes of this case refer as Maksudpur, lie the villages of Nimsar-Hassanpur. The water is drawn off by the several villages in the paras or turns which are specified in the Lal Bahi. Thus Noni is allowed to take the water for two days, Maksudpur, Kalyanpur and Sekaria together for two days and Nimsar-Hassanpur for three days. Those paras, in my opinion, clearly mean the actual time during which water is flowing into the bhoklas. When the water is running low, some time must necessarily be allowed both for the construction of the bundh and the period required for the filling of the handar, or space behind the bundh, so as to permit the water to rise high enough to flow into the bhoklas. It was suggested on behalf of the defence, but not in any way proved, that no time could be allowed for the erection of the bundh and the filling of the handar. This is clearly not the case. In September 1914 there had been a dearth of water, but some 10 days or so before the occurrence there appears to have been a very heavy storm and a consequent rush of water which carried away the bundhs which had been erected by Noni, Maksudpur and Nimsar. Noni, whether by reason of the heavy rainfall or for some other reason, did not require to re-erect its bundh or to draw water from the Pyne for its irrigation. Maksudpur and Nimsar, on the other hand, seem to have required water and to have taken steps to erect their bundhs. It may be that the Nimsar bundh was commenced before the Maksudpur bundh. As to this there is no Certain evidence. It is, however, in evidence and proved beyond doubt that the Maksudpur people began constructing or reconstructing their bundh on Wednesday, 30th September 1914. The Nimsar people, who wanted to draw the water for themselves at that time, objected. Some of their men came to the Maksudpur people who were constructing the bundh and asked them to desist. They declined to do so. Remonstrance was again made by the Nimsar people on Thursday, 1st October. The Police were also informed with the result that the Sub-Inspector paid more than one visit to the bundh and ultimately 3 constables and 4 chowkidars were put to watch the Maksudpur bundh with a view to preventing any breach of the peace. On Thursday, 1st October, a notice was given by the Sub-Inspector to Matukdhari Singh the first

accused who was the Circle Officer of the Tikari Raj. In that he was asked to assist in preventing, any breach of the peace which was apprehended at Maksudpur between the Nimsar raiyats and Tikari amlas on the one side and the raiyats of Maksudpur on the other. The Maksudpur people continued to erect their bundh. There is some slight discrepancy in the evidence as to at what precise hour it was completed; but, putting it as much against the prosecution and as favourably for the accused as possible, there can be no doubt whatever that it was not completed until Thursday, 1st October, and that the water did not commence to flow into the bhoklas until the morning of Friday the 2nd. The general body of the prosecution witnesses puts the time when the water began to flow into the bhoklas at noon on Friday; but, assuming that it was 4 or 5 hours before that, it would not, in my opinion, make any difference to the position of the parties in the present case. If it began to flow on the morning of Friday the 2nd, the para of two days would expire on the morning of Sunday the 4th. It would, in any case, not expire until, say, 7 A.M.; in all probability, it did not expire until noon on Sunday. On the Friday and Saturday, no objections were taken by the Nimsar people. On the night of Saturday and Sunday, there were 12 men of the three villages appointed to watch the completed bundh. The evidence shows that there were seven on one side and five on the other. We are unable to accept the evidence of the Police constable and chowkidar which would put the number at anything from 25 to 100. It is extremely improbable that so many men would be left there simply for the purpose of, watching the bundh. Besides these watchers were the three constables and four chowkidars. At about 2 or 3 A.M. on Sunday morning a large crowd of Nimsar people--the number has been variously estimated at 100 to 200 or even more--came from the south on the western bank of the river headed by a man on an elephant. The evidence shows that one of them at least carried a sword, another a garasa, while many were armed with lathis. They came up to the bundh; and the man on the elephant--who was evidently in authority called upon the watchers to demolish the bundh. They replied that their para had not terminated and that it should not be demolished till the para was over, when, they said, the Nimsar people might demolish it themselves. It should be stated that according to the parabandi, it is the right of the village below to demolish the bundh of the village above directly the para of that village has terminated. It would, therefore, be within the rights of the Nimsar people to demolish the bundh at Maksudpur when the Maksudpur para was over. As the Maksudpur people declined to accede to their request, the elephant was directed to the bundh which it proceeded to demolish under the orders of its mahuts. It trampled down or removed with its tusks the bundles of sugarcane and the earth forming the bundh and made a breach through which the water began to flow. The flow of water rapidly increased the breach and the bundh was soon demolished, the water flowing southwards. In consequence of the action of the Nimsar people, the Maksudpur people made a small show of resistance. Some of them were pursued by the elephant and frightened away. That was before it had actually demolished the bundh. Others were attacked by the persons who carried the sword, the garasa and lathis. The evidence is clear--

and, indeed, the fact cannot be disputed--that Kunja Singh and Enayet Khan of the Maksudpur people were very seriously injured by the sword, garasa and lathi blows. After the bundh had been demolished and the Maksudpur people had been put to flight the Nimsar people dispersed. One of the constables Ram Dahim Singh, who was pronounced a hostile witness in the trying Court, instructed one of the chowkidars Gopal Dusadh, who also appears to have been a hostile witness and not being called by either side was examined by the Court, to lodge a first information. This he did at the Tikari Police Station--three miles from Bhaismara, the place of occurrence. In that information, he did not identify any of the rioters except Beni Singh who, he then said, was seated on the elephant with another man whom he could not identify. He was, in my opinion, clearly in error in putting Beni Singh on the elephant, and the trying Magistrate has given good reasons for holding that he did this deliberately with the object of shielding Matukdhari Singh. That information was lodged at about 4 a.m. Soon after that Matukdhari Singh was undoubtedly arrested at his residence, which is not very far from the thana, by the Police officials of their own motion. His arrest must have taken place at about 6 or 6-30 A.M. Thakur Singh--the gomasta of Maksudpur and Kalyanpur--distrusted the Tikari Police who, he thought, might be unduly favourable to the Raj and so to the Nimsar people who were tenants of the Raj. He accordingly took steps to bring the occurrence to the notice of the authorities without the intervention of the Tikari Police. He sent Kunja Singh and Enayet Khan to the hospital and at about 8 a.m. caused to be written out the telegram Exhibit 9 to the District Magistrate of Gaya. In that telegram he accused all the eight persons who are now before the Court other than the two palwans. An information also was laid by Kunja Singh said to be of Mauza Sekaria on 4th October 1914 in which he, too, named the eight accused other than the two palwans. The consequence was that all the 10 accused persons were put upon their trial with the results as above stated.

7. As I have said, the learned Sessions Judge has fallen into an error both with regard to the parabandi and the legal rights of the parties. What his precise finding is as to the parabandi it is difficult to say; but he apparently holds that the para of Maksudpur had in fact commenced at the time of the occurrence because he says that they had no right to erect the bundh and dam up the water for irrigation at all at that time. His reason for this appears to be that Noni had not exercised its right of taking the water and, therefore, the right had in some manner been lost to Maksudpur and passed to Nimsar who had commenced he says, to erect their bundh shortly before the Maksudpur people commenced to erect theirs. I fail to see how the waiver by Noni, if there was such waiver, of its right to erect a bundh and take the water for its para could possibly affect the right of Maksudpur as between Maksudpur and Nimsar. The Maksudpur people were undoubtedly entitled to take the water before the Nimsar people. They had, therefore, the right to erect their bundh and have their para completed before the Nimsar people could insist on having the channel opened for the irrigation of their fields.

8. The learned Sessions Judge has also fallen into an error with regard to the legal rights of the parties, which the Counsel for the accused did not attempt to support. The learned Judge says that in his opinion, the riparian owners were entitled to the free flow of the water and that anything which stopped that flow amounted to a nuisance which they were entitled to abate. Therefore, he says, the Nimsar people were entirely within their rights in demolishing the dam erected by the Maksudpur people because it constituted a nuisance so far as Nimsar was concerned. It need hardly be pointed out that this is not a question of nuisance or abatement of nuisance at all. The view also of the learned Sessions Judge entirely overlooks the rights of the Maksudpur people which, after all, are co-ordinate with the rights of the Nimsar people and are governed by the same system.

9. I am clearly of opinion that the Maksudpur people were within their rights in erecting their bundh as they did. I also find that their para would last until at least 7 a.m. on Sunday, 4th October and that the Nimsar people had no right whatever to demolish it before that hour.

10. I, then, pass to the consideration of the question whether there was, in fact, a riot within the definition of Section 141, Indian Penal Code. As to this there cannot be the shadow of a doubt. The common object of the mob in this case was by means of criminal force or show of criminal force to deprive the cultivators of Maksudpur and Sekaria of the use of water of the Nimsar Pyne of which they were in enjoyment, or thereby to enforce their right or supposed right to the said water. That the Nimsar people--the mob which came from the south that night--formed an unlawful assembly, there can be no doubt. They came with that object and they insisted on demolishing the bundh in spite of the remonstrances of the Maksudpur people. Even if the Maksudpur para had, in fact, terminated, it would still be a riot within the meaning of Section 141, Indian Penal Code. But in this case there can be no doubt whatever that the Maksudpur para had not terminated when the occurrence took place. At the very least it had three or four hours more to run. Even the learned Sessions Judge does not hold, as I read his judgment, that there could be any right of private defence in those circumstances. I, therefore, hold without any hesitation that this band formed an unlawful assembly and were guilty u/s 147, Indian Penal Code.

11. It is also clearly proved that violence was used and Kunja Singh and Enayet Khan were both seriously wounded by the rioters. This was in furtherance of the common object and that would render them liable to punishment under Sections 324 or 326 read with Sections 149, and whoever of them was armed with a deadly weapon or with anything which used as a weapon of offence was likely to cause death was also punishable u/s 148. They were farther charged u/s 430, Indian Penal Code, that is to say, with mischief by injury to works of irrigation or by wrongly diverting water. The learned Counsel for the Crown said that he did not press for a conviction on this charge, as the question of public importance was the charge of rioting. The learned Counsel for the accused claimed to be

convicted u/s 430. By that I take it that he meant that, if the charge u/s 430 was not established, there would be no unlawful assembly and that they would be entitled to an acquittal on the other charges. That, however, by no means follows. There may be an unlawful assembly and a riot in respect of a right which the rioters desire to enforce. There cannot be a conviction u/s 430 where there is a right or a bona fide claim of right. We do not think that we need consider the question of a conviction u/s 430 in view of the attitude taken up by the Crown in this case with regard to it.

12. I, then, pass to the second question as to the, participation on the several accused in this riot. The principal offender is no doubt Matukdhari. He is a Circle Officer of the Tikari Raj and a man in authority. We are told that he draws a salary of Rs. 200 per mensem and has other emoluments which bring his monthly income to more than double than sum. It is complained that he has been falsely accused in this case, that he was not present and that the identification of him as being present is wholly insufficient. We have been taken through the whole of the evidence by one side or the other and we think that it is proved beyond all doubt that Matukdhari Singh was the man on the elephant, who was directing the proceedings on that night. He is identified as, having been there by eight eye-witnesses and we see no reason to take a different view of the evidence of these men to that which was taken by the trying Magistrate. It was suggested by the learned Counsel for the accused that they had no proper means of identifying Matukdhari at that time, because it was said that the face of the man on the elephant was concealed in a galaband or muffler and that the elephant was at a very great distance from the Maksudpur people who purported to recognise Matukdhari Singh. There is really no force whatever in this contention for it is clearly proved that the elephant pursued and chased away from the Pyne a number of these eye-witnesses. They were, therefore, at very close quarters to the elephant and not, as the Counsel suggested, at a distance of 75 yards, i.e., on the other side of the Pyne. Further, it is clear from the evidence of Thakur Singh the gomasta--that he had conversations with the man on the elephant and that the muffler which he is said to have had on was a galaband or comforter wrapped round his throat. It may possibly have concealed a portion of his face: but on that night the moon was full. There was, therefore, ample light and ample opportunity for these persons to recognise Matukdhari Singh, whom they well knew as the Circle Officer of the Tikari Raj. He was named both by Thakur Singh and Kunja Singh as having taken the lead in the attack on the Maksudpur people. It was argued for him that when Thakur Singh sent the telegram (Exhibit 9) at 10-30 a.m., he must have known of the arrest of Matukdhari and took his cue from that and included him among the persons implicated. We were taken through the evidence bearing on this point by the learned Counsel for the accused and I may say that it is not at all proved that Thakur Singh knew of the arrest when he sent his telegram. On the contrary, it would appear from the fact that he was working behind the back of the Tikari Police and had no communication whatever with them, that he could not have

learnt of the arrest but spoke to Matukdhari being present from his own knowledge. It is true that the evidence with regard to the detection of Matukdhari when passing the thana is not such as the Court can rely on. There was a story put forward by the Sub-Inspector and several of the Police witnesses that Matukdhari Singh, when hurrying away from the scene of the occurrence, passed the thana on his elephant at an early hour. He Was seen by one of the men at the thana who communicated it to a constable, with the result that he was followed up at once and arrested at his, residence when alighting or just as he had alighted from the elephant. These witnesses have undoubtedly told their story in such a way that it cannot be accepted without some corroboration of the fact. The learned trying Magistrate very properly rejected their evidence in detail, but he accepted it as to the cardinal point that Matukdhari Singh was arrested by the Police on their own responsibility at about 6 or 6-30 A.M as having taken a part in this riot. That fact is proved to demonstration and there can be no doubt whatever about it. When we asked the learned Counsel for the accused what Matukdhari's explanation was as to his whereabouts on that night, he replied that he was in bed and asleep until he was roused in the morning and was arrested by the Police. Now, that is not only not supported by any evidence but is directly contrary to other evidence in the case. Not only have we the evidence of the eye-witnesses that he was seen at the place of the occurrence and directed the operation, but it is proved conclusively by the evidence of Bikoo Misser, a Head Constable, of Tikari, that Matukdhari Singh was a spectator of a play at Bahelia Bigha on the night of 3rd-4th, and that he was present at that play up till about 1 a.m. on Sunday when he left it almost at the same time as the witness. In this connection we may point out that the accused declined to make any statement in the trying Court. All the accused denied their guilt and said that they would file written statements. This Court has recently animadverted on this practice of filing written statements, which is not provided for by the Code of Criminal Procedure and enables statements to be put before the Court as statements of the accused when such statements are hot, in fact, drawn up by the accused themselves but by their legal advisers or friends and are entirely irresponsible. In his written statement, Matukdhari does not profess to explain what he was doing on that night. He merely says that he was not there, and that the charge against him was due to his being on bad terms with the Tikari Police. With regard to this last statement, it appears to be incorrect so far as the evidence of the Police in this case is concerned. The constable Ram Dahim Singh has undoubtedly proved hostile to the prosecution and given evidence to some extent in favour of the accused. Gopi Dusadh, the chowkidar, is in much the same position. Taking the evidence against Matukdhari as a whole and giving it our most careful consideration we have no doubt whatever that he was the man on the elephant who directed the proceedings and was, as the person in authority, directly responsible for the riot.

13. With regard to Bern Singh, it is suggested that he was not there. Now, Gopi Dusadh in his first information says that there were four men on the elephant,

that is to say, the two palwans and two others of whom Beni Singh was one. As I have above stated, this appears to be a deliberate falsehood spoken by Gopi Dusadh for the express purpose of shielding Matukdhari Singh. There is, however, no doubt whatever on the evidence that Beni Singh, who is one of the gomastas of that side, was present on that occasion and that he was armed with a sword with which he struck Enayet Khan. His presence there is proved by a number of witnesses, the same who speak to the presence of Matukdhari Singh; and we see no reason whatever to disbelieve their statements. We think, therefore, that he was a member of the unlawful assembly and that he is guilty under Sections 148, 324/149 and 326/149, Indian Penal Code.

14. Bahadur Singh, the other gomasta, was admittedly at the scene of the occurrence. He was armed with a garasa with which he wounded Kunja Singh. His complicity is clearly proved and his guilt is the same as that of Beni Singh.

15. With regard to Punnit and Kamala they also were admittedly present on the occasion as members of the Nimsar bundh. They were armed with lathis and must, therefore, be taken to be guilty under Sections 147, 324/149 and 326/149, Indian Penal Code.

16. Chhedi, Harekku and Kuldip have been satisfactorily proved to have been present and to have been members of the unlawful assembly. Their complicity is proved by the same witnesses as speak to the other accused. They are, therefore, guilty under the same sections as Punnit and Kamala.

17. The only two remaining accused are Noor Khan and Mahammad Jan--the two palwans or mahuts. It may be noted that they were only sentenced each to one month's rigorous imprisonment. The learned Sessions Judge had, therefore, no jurisdiction to entertain appeals by them against their conviction. Their offence was undoubtedly of a lesser nature inasmuch as they were merely the drivers of the elephant and no doubt, acted under the orders of their master, Matukdhari Singh. At the same time they must, we think, be held to have been members of the unlawful assembly in the act in which they undoubtedly took part by directing the action of the elephant in destroying the bundh.

18. We accordingly set aside the order of acquittal in the case of all the 10 accused. Matukdhari Singh is convicted under Sections 147, 324/149 and 326/149, Indian Penal Code, and sentenced u/s 147 to a fine of Rs. 2,000 or in default six months rigorous imprisonment. Beni Singh and Bahadur Singh are convicted under Sections 148, 324/149 and 326/149, Indian Penal Code, and are each sentenced u/s 148 to nine months' rigorous imprisonment. Chhedi, Punnit, Harekku, Kamala and Kuldip are convicted under Sections 147, 324/149 and 326/149, Indian Penal Code, and sentenced each u/s 147 to six months' rigorous imprisonment. We pass no separate sentences under Sections 324/149 and 326/149. Noor Khan and Mahammad Jan are convicted u/s 147, Indian Penal Code and sentenced each to one month's rigorous imprisonment.

Richardson, J.

19. I concur in the conviction and sentences and think that the case is a clear one against all the accused.