
(1950) 02 CAL CK 0031

In the Calcutta High Court

Case No : Criminal Appeal No's. 213 and 220 of 1949

Kailash Nath Shaw and Others

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 22-02-1950

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 297, 423(1), 428

Citation : AIR 1950 Cal 310

Hon'ble Judges : Harries, C.J.; Bachawat, J

Bench : Division Bench

Advocate : Sudhansu Sekhar Mukerji and Chintaharan Roy, for the Appellant;
J.M. Banerjee, for the Respondent

Final Decision : Allowed

Judgement

Harries, C.J.—These are two appeals from convictions u/s 395, Penal Code. The appellant Kailash Nath Shaw, who is the sole appellant in Appeal No. 213 of 1949 was sentenced to three years" rigorous imprisonment. The seven persons who are the appellants in Appeal No. 220 of 1949 were each sentenced to two years" rigorous imprisonment.

2. The offence with which these eight persons were charged, was a most serious one of dacoity and if they were guilty of the offence the sentences imposed, namely, three years" and two years" rigorous imprisonment, were far too lenient. As the learned Judge accepted the jury"s verdict he was in my view bound to impose very much more severe sentences than those which he did.

3. The eight appellants were tried by a learned Sessions Judge and a jury upon this charge of dacoity. The jury by a majority of 3 to 2 found all the eight appellants guilty. The learned Judge apparently agreed with the verdict and sentenced the appellants in the manner I have indicated.

4. Mr. Sudhansu Mukherji who has appeared on behalf of the appellants in both the appeals, has contended that the charge to the jury in this case was grossly

inadequate and that it contained such misdirections that the verdict of the jury must be held to be vitiated. What Mr. Mukherji suggests is non-direction rather than misdirection. It is clear however that where a learned Judge fails to direct the jury on material matters such failure to direct amounts in law to a misdirection.

5. The case for the prosecution is a somewhat astounding one. The occurrence is said to have taken place on 11th May 1948 at about 3 A. M. at or near a railway yard known as Halisahar Railway Yard which seems to be some distance from Halisahar Railway Station.

6. According to the prosecution two constables, one of whom certainly was armed, if not both, saw a lorry approaching the railway yard from a distance of about a quarter of a mile. The lorry had its headlights on and apparently was approaching towards the constables. According to Constable Biswanath, P. W. 6 who was the principal witness in the case, he walked forward about half a mile when he found the lorry stationary alongside the siding but with its headlights full on. He noticed, so he says, a number of people loading railway wagon springs into the lorry and he advanced with a view to preventing what in his view was obviously theft. It may be observed that there were a number of condemned railway wagon springs lying at the siding which had been sold to a private firm. According to Biswanath, as he approached somebody came from the lorry and threatened him with the result that he retreated. He withdrew, so it is said, a matter of 20 or 25 cubits and remained under a tree. After a short lapse of time Biswanath says that somebody tried to start the lorry which was still standing with its head, lights full on. Fearing that the lorry might escape Biswanath fired one shot and then, according to him, remained at the spot under the tree for about eight to ten minutes. Others then came up and the party advanced towards the lorry and found the driver sitting in his seat apparently dead. Alongside him was the appellant Kailash Nath Shaw and in the lorry itself were the seven other appellants.

7. According to the prosecution, after the shot some people apparently ran away. It is said by some witnesses that 20 or 30 people ran away, but the appellants, for reasons best known to themselves, are said to have remained quietly in the lorry for a period of eight to ten minutes to await arrest and they were in due course arrested. According to the prosecution there were at that time a large number of springs in the lorry.

8. A first information report was not made until 12 noon and in that report it is stated that when Biswanath and the constable who accompanied him, Chittaranjan Dutta, saw the lorry there were about 30 or 40 men loading the lorry. Biswanath is said to have shouted to them to stop whereupon one man threatened him at the point of a revolver to remain silent. Biswanath finding himself in danger fired a round which killed the driver who was attempting to start the lorry. On hearing the firing it is said that other constables came up and managed. to arrest the eight appellants, but the other culprits made good their

escape.

9. The investigating officer appeared and according to the prosecution there were 45 wagon springs in the lorry. A search list was prepared of what was found in the lorry and on the persons of the appellants who were found in it. That search list was witnessed by two persons. But that list contains no reference whatsoever to springs in the lorry but to one spring lying near where the lorry was standing. However a second search list is said to have been drawn up and this is also said to be witnessed by two persons, one of whom is said to have witnessed the first search list. Why the same persons did not witness the second list was not explained by the prosecution and indeed none of the search witnesses were called at all. The learned Judge in his charge to the jury dealt at very great length with the law and with the evidence given by each of the witnesses and the defence must concede that the learned Judge pointed out to the jury very serious discrepancies in the evidence for the prosecution. No point can be made by the appellants on that aspect of the case. The learned Judge, for example, pointed out quite fairly the conflict between Biswanath's evidence and the evidence of other witnesses, and the conflict between Biswanath's evidence in the Sessions Court and the first information report. In the Sessions Court Biswanath did not state that somebody came forward and threatened him with a revolver. All he said was that they threatened him with something that looked like a revolver. Quite obviously at the Sessions trial the story of threat by pointing a revolver had to be abandoned as no revolver was found on any of the appellants. In fact no weapon of any kind was found on any of the appellants and what is stranger still Kailash Nath Shaw, who according to the prosecution had come to commit a dacoity, had come with a sum of Rs. 500 in his pocket.

10. Learned advocate for the appellants however has stressed the fact that the learned Judge in his charge to the jury makes no reference whatsoever to the suspicious circumstances surrounding the bringing into existence of two search lists to which I have made reference.

11. The essential fact which the prosecution had to prove in this case was the presence of these railway springs in the lorry. Unless there was evidence that the persons in the lorry had moved or attempted to move property into the lorry then no case of dacoity could possibly be made out. It must be remembered that the case for the defence was that this lorry was travelling along a kutcha road where it was eventually found stationary and was brought to a standstill by shots being fired by somebody nearby. According to the defence this lorry which belonged to Kailash Nath Shaw, had been delivering materials to purchaser earlier in the evening and was returning with Kailash Nath Shaw in it when it was stopped by this firing. Whether the defence version was true or not would depend largely on whether or not railway springs were found in this lorry when Biswanath and the persons who had joined him rushed up.

12. That there were railway springs in the lorry at a later stage there can be little doubt. But it seems clear that whereas there were 45 springs in the lorry when

the investigating officer is said to have counted them, there were only 35 when another Sub-Inspector counted them a little earlier. That Sub-Inspector in the Court of the committing Magistrate stated that there were 35 when he counted them, but in the Court of Sessions he tried to resile from that position as obviously the evidence did not fit in with the evidence of the investigating officer who had counted 45. If the number of springs had increased that would suggest that somebody was putting railway springs into that lorry in order to create evidence. The learned Judge pointed out this aspect of the case to the jury and no complaint can be made against the summing up on that ground. What however is said against the summing up is that it makes no reference whatsoever to the two search lists beyond the fact that they were produced as evidence in Court.

13. Why two search lists were prepared it is impossible to say and why 45 springs should not have been included as the first item in the first search list only the police can explain. The 45 springs were the essential piece of evidence in this case. Yet we find that a search list was laboriously drawn up and the only mention of wagon springs in that search list is the mention of one spring found near the lorry.

14. That search list appears to have been attested by two search witnesses who must be respectable persons of the locality. The learned Judge did not point out to the jury that neither of these search witnesses were called. The prosecution stated that they could not be found. But there is no evidence at all that any attempt was made to find them and it is difficult to believe that two respectable persons of the locality can disappear completely without the possibility of being traced. The jury should have been told that if they were not satisfied with the explanation that these witnesses could not be found they might infer that the witnesses would not have supported the prosecution if they had been called. The learned Judge, as I have said, makes no reference at all to the fact that neither of these search witnesses were called, and to the further fact that in that search list there is no reference at all to springs in the lorry, but there is reference only to a spring lying on the ground near the lorry.

15. The second search list is a most suspicious document and a most cursory glance at it must inevitably raise suspicion. Whether the learned Judge or the jury ever looked at this document it is impossible to say, and it appears to me that learned advocate for the defence could not have looked at it either, because certain features would have inevitably impressed themselves on him if he had done so.

16. The second list merely contains one item, namely, 45 wagon springs found in the lorry. Two search witnesses are named, one only of them being a witness to the first search list. Why the second witness to the first list did not attest the second list no explanation is given and it would appear as if these lists were made and drawn up at a different time. But why that should be so it is impossible to say if the springs were in the lorry at the time the first search list was drawn

up. If the wagon springs were in the lorry when the first search list was drawn up, why were they not included in the first list and why was it necessary to obtain a different witness, and in any event why was not this other witness, the new witness in the second list, called? He should have been a respectable person of the locality, but apparently he also disappeared from this locality leaving no trace. It is indeed astounding to find that three search witnesses should disappear in this most amazing fashion leaving no trace whatsoever behind them. The rather astounding nature of this disappearance I think should have been mentioned to the jury as the latter might have drawn a quite different inference from the failure of the prosecution to call these witnesses.

17. A glance at this second search list also shows that the signatures of the two witnesses appear to be in the same hand. Whether the two signatures were written by the same person would of course be a matter for the jury, but I think the jury should have been warned about it and asked to consider whether these signatures were genuine at all, particularly having regard to the fact that neither of the persons who are supposed to have signed is called as a witness. Further, the names of these search witnesses which have to be inserted at the head of search list appear to have been inserted by the same hand as that which wrote the signatures in the search list. Of course, it would be for the jury to say whether the writing was in the same hand, but the similarity is such that that point should have been made to the jury in the summing up and they should have been asked to consider whether the names of the witnesses at the head of this document and their signatures at the foot were or were not all written by the same person.

18. Further, a comparison of these documents makes it quite clear that the person who wrote the names of the witnesses in the first search list could not possibly have written their names in the second search list because even to a person without the slightest knowledge of handwriting, the handwriting is entirely different. Why was it necessary to obtain the services of some other person to write the names of the witnesses in the second search list? Why could not the officer, who wrote the headings of the first search list, have written the headings of the second search list? The prosecution offered no explanation and the jury were never asked to consider these facts.

19. Mr. Banerjea has contended that the police were not bound in law to draw up a search list. But I need not enter into that question. Search lists are said to have been drawn up and were put in evidence and one of those documents appears on the face of it to be a highly suspicious document. Further, the persons who are supposed to have witnessed both these documents were never called. If those documents are genuine and were supported by the search witnesses the prosecution would have gone a long way to proving that there were springs in the lorry. But the jury should in my view have been carefully directed to consider whether the second search list was not an entirely bogus document. If the jury had come to the conclusion that it was, it might well then

have come to the conclusion that the case for the prosecution, that springs were found in this lorry, was false. Mr. Banerjea also contended that as learned advocate for the defence had not noticed the suspicious features in this second search list the Judge was under no duty to make any point about the search list to the jury.

20. It is an elementary principle of criminal administration that counsel can make no admission binding on his client. That being so, is his client bound by the fact that counsel is not astute enough to discover some obvious Saw in evidence? Further, if such a flaw in the evidence exists and has been overlooked by counsel, does that exonerate the learned Judge from putting the case fairly and properly before the Jury? If counsel for the defence does not notice that a document is highly suspicious it is the duty of the Court to point that fact out if the document is suspicious. The Court cannot shelter itself behind a plea that as the attention of the Court was not drawn to it the Court did not look at the document. It appears to me in the present case that the learned Judge should have most carefully warned the jury about these search lists and have warned them further that a serious inference could be drawn against the prosecution by their failure to call any of these search witnesses, if the explanation that the search witnesses had miraculously disappeared was not accepted by the jury. Nothing whatsoever was said upon this matter.

21. There is one other feature which is rather striking and which the learned Judge omitted to notice in his charge to the jury. Biswanath in his evidence stated that he fired only one shot. But a Sub-Inspector who came on to the scene fairly soon afterwards stated in the Court of the committing Magistrate that he found a number of cartridges near the lorry, though he tried in the Court of Session to resile from that statement. The first information report only mentions one shot and there is only one cartridge mentioned in the first search list. There were however three wounds on the deceased driver, a graze on the forehead, a serious wound on the neck which was obviously a gunshot wound and the gunshot had fractured the vertebrae and there was also what was obviously a gunshot wound on the left side of the chest. The doctor who was called as a witness stated in the Court of the committing Magistrate that all these three wounds could have been caused by one bullet, but how one bullet could cause a graze on the forehead, a serious deep wound on the neck, and a fractured vertebrae and a wound which appeared to have been bone deep in the chest, is wholly impossible to understand. I cannot believe that the doctor really meant that these three wounds could possibly have been caused by one bullet, but that is what he is recorded as having said, The wounds would suggest that there was a number of shots which would leave a number of cartridges lying near the lorry as spoken to by a witness in the Court of the committing Magistrate. The learned Judge says nothing about this very odd piece of medical evidence. He did mention that the Sub Inspector had stated in the Court of the committing Magistrate that he had found cartridges and had later resiled from that statement, but he never asked the jury to consider whether the wounds did not

show that there must have been more than one shot and that the evidence of Biswanath was obviously untrue.

22. If there is any truth in the defence version, a number of shots might well have been fired to stop this lorry. Biswanath might have suspected that this lorry was after no good although admittedly it was standing on a kutchra road which was a public road and it might well have been there for purposes which were entirely innocent. If a constable suspected that the occupants of the lorry had some criminal designs he might well have fired to stop the lorry and accidentally hit the driver and he might well have fired a number of shots. This aspect of the case was never brought to the attention of the jury although it is not of such importance. The failure however to draw the attention of the jury to the suspicious character of at least one of the search lists and the suspicious nature of the evidence accounting for the failure to call any of these search witnesses was to my mind a most material non-direction which might well have led to a gross miscarriage of justice in this case.

23. In my view, the summing up in this case was so defective that the verdict of the jury which was a majority verdict of guilty by 3 to 2, cannot possibly be sustained and must be set aside.

24. The question then arises what should the Court do? Mr. Banerjea on behalf of the prosecution has asked us to order a retrial. But it appears to me that the evidence in this case is so unsatisfactory that it would not be safe to order a retrial. [His Lordship considered the evidence and proceeded.

25. In my view the evidence in this case is not such that would warrant a Court ordering a retrial and that being so I would allow these appeals set aside the convictions and sentences and acquit the appellants of the offence of dacoity.

26. The two persons who are on bail need not surrender to their bail and their bail bonds are discharged. The remaining appellants must be released forthwith unless required by the authorities on any other charge.

Bachawat J.

I agree.