

(1998) 11 GAU CK 0047

In the Gauhati High Court

Case No : Criminal Appeal (J) No's. 8 and 15 of 1995

Lal Beharidas and Others

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 20-11-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 123, 232, 233, 233(1), 234
Penal Code, 1860 (IPC) — Section 148, 149, 302, 324, 326

Citation : (1998) 4 GLT 220

Hon'ble Judges : P.G. Agarwal, J;P.C. Phukan, J

Bench : Division Bench

**Advocate : B.B. Deb, D.K. Deb, D. Sarkar and S. Chakraborty, for the Appellant;
A. Ghosh, Public Prosecutor, for the Respondent**

Final Decision : Allowed

Judgement

P.C. Phukan, J.—By the judgment and order dated 25.4.95 in Sessions Case No. S.T. 107 (W.T/A)/93, the learned Sessions Judge, West Tripura at Agartala acquitted 6 (six) of 9 (nine) accused persons of offence under Sections 148/149/354/ 326/302 IPC, but convicted the accused Gunqpada under Sections 324 IPC and sentenced him thereunder to one years" Rigorous Imprisonment, convicted die accused Lal Behari u/s 326 IPC and sentenced him thereunder to five years Rigorous Imprisonment and also to pay a fine of Rs. 2,000/- in default, to six months" R.I. and convicted the accused Ranga Mohan u/s 302 IPC and sentenced him thereunder to imprisonment for life.

2. The appeal has been presented by the State against the order of acquittal of the aforesaid six accused persons. Accused Ourupada also preferred no appeal against his conviction and sentence. However, accused Lal Behari filed Criminal Appeal (J) No. 8 of 1995 and accused Ranga Mohan Das field Criminal Appeal (J) No. 15 of 1995 against their respective conviction and sentences.

3. This Court by an order dated 26.07.96 in Criminal Appeal No. 8/1995 directed as follows:

Mr. B.B. Deb, learned Counsel for the Appellant submits that this appeal and Criminal Appeal No. 15/95 arose out of same judgment. In Criminal Appeal No. 15/95, Appellant challenged his sentence of life imprisonment u/s 302 IPC and hence that appeal can be heard only by a Division Bench. Appellant of the instant appeal was sentenced to R.I. for 3 (5?) years u/s 324 (326?) IPC. However, he submits that both cases would be heard by the same Bench, namely, a Division Bench of this Court. Mr. S. Das, learned Public Prosecutor also submits that the prayer is reasonable.

Accordingly, I direct that this appeal should be heard analogously along with Criminal Appeal No. 15/95 by a Division Bench of this Court. Therefore, list this appeal along with Criminal Appeal No. 15/95 before a Division Bench.

4. Pursuant to the above order, Criminal Appeal Nos. 8 and 15 of 1995 have been heard analogously and we propose to dispose of both these Appeals by this common judgment.

5. We have heard Mr. B.B. Deb, learned Counsel for the accused Appellant Lal Behari Das in Criminal Appeal No. 8 of 1995 and Mr. b. Sarkar, learned Counsel for the accused Appellant Ranga Mohan Das in Criminal Appeal No. 15 of 1995 as well as Mr. A. Ghosh, learned Public Prosecutor appearing for the State-Respondent.

6. The prosecution case may be stated briefly as follows. On 4.8.89 at about 4 P.M. P.W. 1, Amrita Bhowmick along with other members of his family and two tribal girls was engaged in planting paddy in his field at Durganagar under Jirania Police Station. The accused Gurupada appeared there and tried to forcibly take one of the two tribal girls, named Smti. Rani Deb Barma P.W. 11 and removed her pasra. P.W. 2 Ranjit Bhowmick freed her from him and reported the incident to his father (since deceased) who, in turn, went to the house of the accused Gurupada to complain against him before his father.

7. Accordingly to the prosecution, the above incident was prelude to the actual occurrence. On the same day at about 8.30 PM. when P.W. 1 was discussing the above incident with the members of his family, they heard hue and cry in front of the house of one Bidhu Bhowmick (not examined) raised by P.W. 4, Indrajit Bhowmick. Then P.W. 1 his brother P.W. 2, mother P.W. 3, Smti. Saraswati Bhowmick, uncle P.W. 8, Agni Bhowmick and father (deceased) rushed to the scene and saw there all the accused persons along with 7/8 others armed with lathi, dao, spear etc. They attacked them causing injuries in their persons. The deceased succumbed to his injuries. Accused Lal Behari hit him on the head with a chopper and accused Ranga Mohan inflicted the fatal dao blow in his abdomen. Accused Gurupada injured P.W. 2 Ranjit with a spear.

8. On the day of occurrence itself at about 11.45 P.M. P.W. 1 lodged the FIR, Ext. P-1 at Jirania Police Station. In the meantime the dead body of the deceased was taken to Ranirbazar Out Post under Jirania Police Station. A Sub-Inspector of Police, P.W. 13 held the inquest, P.W. 6 the Doctor performed the post mortem

examination, P.W. 16, Investigating Police Officer visited the place of occurrence, collected blood-stained earth and then went to the G.G. Hospital where accused Ranga Mohan was undergoing treatment. The I.O. P.W. 16 examined the witnesses and on completion of investigation charge-sheeted all the accused persons under Sections 148/149/326/354/302 IPC. The learned Judicial Magistrate committed the case to the Court of Session under the aforesaid Sections of law.

9. In the Court of Session, charges were framed against all the accused persons under Sections 148/149/302/326 IPC, against Gurupada u/s 354 IPC and against accused Lal Behari and Ranga Mohan u/s 302 IPC. The charges were framed, read over and explained to accused persons to which they pleaded not guilty and claimed to be tried.

10. In the trial, the evidence of 18 witnesses for prosecution was taken and the accused persons were examined u/s 313 Code of Criminal Procedure Regarding such examination the Sessions Court's order dated 9.4.95 reads as under:

9.4.95. All the 9 (nine) accd. persons, on bail, are present.

Ld. Addl. PP is present.

All the accd. persons are examined u/s 313 Code of Criminal Procedure

Ld. Addl. PP verbally prays for time for argument.

Considered, prayer for time is allowed.

Fix 6.4.95 for argument.

11. Accordingly, arguments were heard in part on 6.4.95, 10.4.95 and 13.4.95 and concluded on 20.4.95. The learned Sessions Judge fixed 25.5.95 for judgment and on that date delivered the impugned judgment acquitting the six accused persons and convicting and sentencing the remaining three including the two accused Appellants as stated above.

12. It transpires from the Sessions Court's order dated 9.4.95 quoted above and the subsequent orders that the learned Sessions Judge after taking the evidence for prosecution and examining the accused persons proceeded to hear argument (under Section 234 Code of Criminal Procedure) and to deliver the judgment (under Section 235 Code of Criminal Procedure) by-passing the two stages as envisaged under Sections 232 and 233 Code of Criminal Procedure.

These two Sections read as under:

232. Acquittal - If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.

233. Entering upon defence - (1) Where the accused is not acquitted u/s 232, he

shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

13. In the instant case, there is nothing on record to show that after taking evidence for prosecution and examining the accused persons, learned Sessions Judge heard the prosecution and the defence on the point whether there is no evidence that the accused committed the offence as required u/s 232 Code of Criminal Procedure.

14. In this regard, it was held in Sivamani's case 1993 Criminal Law Journal 23 as follows:

11. Under the first Section (Section 232) after examining the accused, the Judge has to hear both sides "on the point". The point is whether the Judge can consider that there is no evidence in the case that the accused committed the offence. The manner of examination of the accused is provided in Section 313 of the Code. The commencing words in Section 233 of the Code i.e. "Where the accused is not acquitted u/s 232..." would make it clear that an accused has to be directed to enter upon his defence if he cannot be acquitted u/s 232. An accused can be acquitted u/s 232 only when "there is no evidence that he committed the offence."

15. Although in the instant case the accused persons were not acquitted u/s 232 Code of Criminal Procedure there is nothing on record to show that they were ever called upon to enter on their defence and to adduce any defence evidence. What is worse, the learned Sessions Judge while examining the accused persons u/s 313 Code of Criminal Procedure did not put to them the usual question "Do you want to adduce any defence evidence?" invariably put at the end of such examination with rare exceptions. Had the learned Sessions Judge put this question to the accused persons, it could have been construed as amounting to calling upon them to enter on their defence and adduce defence evidence in substantial compliance with the requirements of Section 233(1) Code of Criminal Procedure.

16. Learned Counsels appearing for the accused Appellants have submitted that on this score alone, the conviction and sentences awarded to the accused Appellants by the impugned judgment and order are liable to be set aside and in support thereof have referred to the decisions in Kumar Naik and Others Vs. The State of Karnataka, Sivamani alias Sivan and Another Vs. State of Kerala, and Parmeswara Kurup Janardhanan Pillai Vs. State of Kerala. We are, however, inclined to agree with the different view taken by the Bombay High Court in ILR (1987) Bom 962 that an irregularity in not recording a finding u/s 232 Code of Criminal Procedure that it is not a case of no evidence would not vitiate the trial but is curable u/s 465 Code of Criminal Procedure. We are also in agreement with the view taken by the Karnataka High Court in Majidkhan Vs. The State of Karnataka, wherein it has been held, inter alia-

Section 232/233 Code of Criminal Procedure lay down the procedure to be

followed by the Sessions Court in the process of trial of an accused person. It is one thing to say that the said procedure should be complied with. However, it is quite another thing to say that failure on the part of the Sessions Court to comply with the said procedure would ipso facto vitiate the conviction. The failure on the part of the Judge to call upon the accused person to enter on his defence in terms of Section 233, Code of Criminal Procedure would not in all cases vitiate the conviction, if there are materials to indicate that no prejudice whatsoever has been caused to the accused. In other words, if on the facts of a particular case, no prejudice can be said to have been caused on account of the failure to comply with the procedure as laid down u/s 233 Code of Criminal Procedure conviction cannot be said to be vitiated.

17. On the question of prejudice, Mr. D. Sarkar, learned Counsel for the accused Appellants, has led us minutely through the record of the case and has succeeded in convicting us that in the instant case failure to call upon the accused persons to enter on their evidence and to adduce defence evidence has caused prejudice to them in their defence. Learned Public Prosecutor could not submit that in this case learned Sessions Judge complied with the requirements of Section 232 and 233 Code of Criminal Procedure, nor could he show us that there were materials on record to indicate that no prejudice has been caused to the accused persons.

18. In view of what has been stated above, we set aside the conviction and sentence awarded to the two accused Appellants and send back the case to the trial Court for retrial from the stage of Section 232 Code of Criminal Procedure duly complying with the provisions of Sections 232 and 233 Code of Criminal Procedure. The impugned judgment and order stands set aside so far as it relates to two accused Appellants.

19. The learned trial Court shall dispose of this case within six weeks from the date of receipt of the case record.

20. The accused Lal Behari Das is on bail, he shall remain on bail pending disposal of this case by the learned Sessions Judge. Mr. D. Sarkar, learned Counsel for the other accused Ranga Mohan Das prays that he be released on bail pending disposal of this case by the learned trial Court. On this point we have heard Mr. A. Ghosh, learned Public Prosecutor and after careful consideration of the entire matter, it is ordered that the accused Ranga Mohan Das shall be released on bail of Rs. 10,000/- with a surety of the like amount to the satisfaction of the learned trial Court.

Both the appeals are allowed as indicated above.