

(1958) 06 CAL CK 0019
In the Calcutta High Court
Case No : Criminal Revision No. 864 of 1957

Muhammad Zephyr

APPELLANT

Vs

Shibraj Singh and Others

RESPONDENT

Date of Decision : 11-06-1958

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 297
Penal Code, 1860 (IPC) — Section 302, 304, 337, 338

Citation : AIR 1960 Cal 142 : (1960) CriLJ 329

Hon'ble Judges : N.K. Sen, J

Bench : Single Bench

Advocate : J.M. Banerjee and Krishna Binod Roy, Maitra, for the Appellant; A.K. Dutt and Dilip Kumar Dutt, for the Respondent

Judgement

N.K. Sen, J.—This Rule is directed against an order of acquittal passed by Shri P. N. Lahiri, Additional Sessions Judge, 24 Parganas, in a Sessions trial where the jury unanimously found the three opposite parties not guilty of the respective charges upon which they were tried. The learned Judge held that the verdict which he accepted was not against the weight of evidence. He did not, however, express himself as to whether he agreed with the verdict.

2. Opposite party No. 1 Shibraj Singh was tried on charges under Sections 302 and 326 of the Indian Penal Code. The charge u/s 302 was for shooting Sk. Monjur to death and the other charge u/s 326 of the Indian Penal Code was for causing grievous hurt to a boy named Ranjit Pal, who is prosecution witness No. 24 in the case. The two other opposite parties were charged for abetment of the aforesaid offences.

3. The prosecution case which may be shortly narrated was as follows: There is a manufacturing concern on the Bagmari Road known as Oriental Rubber Works. For sometime past there was a discontent amongst the factory workers as a result of which the workers went on strike which lasted from the 13th to the 21st August, 1956 when there was a tripartite agreement amongst the Secretary and

the President of the Labour Union Mr. Kaijar All (opposite party No. 3), the Manager of the concern and the Assistant Labour Commissioner. On the 24th August, 1956 the management suspended 17 workers. This, the employees alleged, was in violation of the terms of the tripartite agreement and amounted to victimization. The company tried to run the factory by recruiting new hands. The strikers used to assemble at the gate of the factory and maintain a check on all vehicles coming in or going out with the object of preventing induction of new recruits and export of manufactured goods. The management sought police help and had two constables posted on continuous duty to prevent any breach of the peace.

4. On the 7th September, 1956 which was the date of occurrence at about 11 A.M. a factory truck went out and proceeded along Bagmari Road. The occupants of the truck were opposite party No. 1 Shibraj Singh, an up-country darwan who was armed with a D.B.B.L. gun, opposite party No. 2, Santosh De, the Chemist, the opposite party No. 3, Md. Kaizar Ali, the workshop manager, two Nepali darwans and a driver. The truck had not proceeded far from the gate when Sk. Manjur, the deceased, and Tarapada Biswas, (P.W. 35), two of the strikers brought the truck to a standstill by show of hands. As soon as the vehicle was halted, the Nepali darwan. who was seated on the front portion of the truck started brandishing his Bhojali, On the protest of the deceased Monzur, the manager, opposite party No. 3 Kaizar Ali retorted saying that he would take to gun firing if it became necessary and thereafter opposite party No. 2 Santosh and opposite party No. 3 Kaizar Ali ordered opposite party Shibraj Singh to open fire. Shibraj Singh thereupon fired two shots from his D.B.B.L. Gun in quick succession, the first shot hitting Sk, Monzur on his left thigh, bringing him down. The second shot however, travelled further and hit the boy Ranjit Pal (P. W. 24) who was out on an errand for his uncle. The truck, however, did not stop there but moved off quickly to Manicktolla Police Station where Kaizar All opposite party No. 3 lodged a first information report charging the workers with assault, rioting and wrongful restraint. In the meantime on receipt of a telephonic message, an ambulance arrived and carried away the deceased Monzur Sk. and the injured boy Ranjit Pal, to the R.G. Kar Hospital. The police too arrived at the scene but by then the ambulance had already removed the two persons, Monjur however expired at the hospital at 3-40 P.M. on the same day. Ranjit who was detained in the hospital was operated on and ultimately was discharged from the hospital on the 11th October, 1956.

5. The defence taken up by the opposite party appears to be that the troubles started in the Rubber Factory in July 1956. The management started lodging various diaries against the workers and on the 6th September, 1956 the manager issued a notice to the effect that if the strikers did not report for duty on the next day, that is, on the 7th September, 1956, their services would terminate. The strikers became more agitated on the 7th September, 1956. The track carrying the officials of the company was stopped at the gate at 11 A.M. when it wanted to go inside. Even the two constables on duty could not be of any help. A police

van arrived which was obstructed by the strikers who tried to force open the gate, the manager and the chemist then started for the thana in the truck accompanied by the darwans. The vehicle was again stopped at the gate by a larger crowd that surrounded it. Some of the men got into the truck and others began to pelt stones and brickbats. Those that got into the truck tried to pull down the manager and the chemist while others made an attempt to snatch away the gun from the darwan Shibrai Singh. It was then stated that in the course of the scuffle that followed the trigger was touched and the gun went off with two successive shots. In short, the opposite parties pleaded that in the circumstances detailed above they were not guilty of any offence. Opposite parties Nos. 2 and 3 have specifically denied having given any orders for firing.

6. Mr. T. M. Banerjee, appearing on behalf of the petitioner has taken me through the entire summing up of the learned Judge. He has argued that this summing up suffers not so much from actual commissions but from serious omissions resulting in serious misdirection's and ultimately leading up to a grave miscarriage of justice. He has pointed out that in the first place the defence having tried to set up a case of accident within the meaning of general exception contained in Section 80 of the Indian Penal Code it was, the clear duty of the learned Judge to have explained the import of that section more fully to the jury drawing particular attention to the facts and circumstances which either brought the case within the exception or took it out of it.

7. Mr. Banerjee contended that by merely saying that Section 80 of the Indian Penal Code had been read and explained to the jury the learned Judge did not discharge his duties in full. He should have at the same time pointed out to the Jury the relevant facts and circumstances that had a relevant bearing on the section. In this connection Mr. Banerjee further argued that the learned Judge not only omitted to place those facts but also failed to explain Section 105 of the Indian Evidence Act. Exception was also taken by Mr. Banerjee to the learned Judge's telling the jury that the defence discharged its burden it it could show that the plea might be reasonably true though the jury might not be convinced of its truth. Mr. Banerjee argues that this would apply only to cases where a presumption arose from certain facts which, it unrebutted would entitle a Court to draw a presumption adverse to the accused and not to those cases where general exception was pleaded.

8. It was next argued that while discussing Section 80 of the Indian Penal Code the learned Judge should have explained the true import of the words "proper care and caution" which really constituted one of the essential elements of an "accident". In this connection it was contended that if rashness and negligence were not explained, the explanation of Section 80 of the Indian Penal Code became useless. It was, therefore, all the more necessary for the learned Judge to have explained section 1304A, of the Indian Penal Code for the purpose of pointing out to the jury that the facts alleged might yet constitute an offence of causing death by doing a rash or negligent act. The facts of the case showed that

opposite parties Nos. 2 and 3 were taking with them two Nepali darwans at least one of whom was armed with a Bhojali and the opposite party No. 1, a newly appointed darwan, was armed with a gun. It was argued that the fact that the strikers outside were then smarting under a discontent and were checking up each and every vehicle going to and coming out of the factory made it incumbent upon the person or persons to observe the greatest restraint to avoid any rash or negligent act, In the circumstances the very fact of going out with a fire arm fully loaded would exclude a case of taking proper care and caution. The case of the opposite party being that the occurrence was the result of a pure accident, the learned Judge should have clearly directed the jury that the very fact that two successive shots were discharged from the gun would completely negative the theory of accident and taking the most generous view of the defence case it would clearly make out a case of rashness and negligence. Mr. Banerjee has pointed out that the evidence in the case showed unmistakably that two shots were discharged, one felled down Sk. Monjur on the spot and the other travelled a long distance and hit the boy Ranjit Pal. From this evidence a case u/s 338 or 337 of the Indian Penal Code clearly arose for consideration. According to Mr. Banerjee, the learned Judge's omission to refer to these two sections was also serious non-direction amounting to a misdirection. Mr. Banerjee then submitted that in connection with the charge of murder the learned Judge explained only Section 302 and Section 304 of the Indian Penal Code whereas he should not have omitted to explain Section 326 of the Indian Penal Code. Next it was argued that since evidence showed that the mob was unarmed the learned Judge should not have confused the jury by trying to explain the law as to the right of private defence specially when he held that such a plea did not in fact arise. Lastly it was argued that in the general diary entry Ext. 11 lodged by opposite party Md. Kaizar Ali there was no mention of the gun having gone off accidentally or otherwise and accordingly the learned Judge should have drawn the attention of the jury to this very significant omission from which it was apparent that the story of accidental firing was a myth.

9. Mrs. Maitra appearing on behalf of the State has submitted that the learned Judge was in grave error in not explaining Sections 304A and 338 of the Indian Penal Code. Mrs. Maitra also argued that the learned Judge did not explain "accident" nor has he explained "negligence" and this failure on the part of the learned Judge has resulted in the return of a perverse verdict. She has, therefore supported Mr. Banerjee so far as the case of Shibraj Singh was concerned. She has, however, said that so far as the two other opposite parties were concerned, they could not be said to have abetted the commission of any offence of which rashness and negligence were component parts.

10. Mr. Ajit Kumar Dutt appearing on behalf of the opposite parties has reminded me of the several decisions of the Supreme Court and also of the Privy Council wherein the principles to be followed in cases for setting aside orders of acquittal in revision on the application of private persons have been enunciated and has further drawn my attention to the limited scope of the revisional jurisdiction of

this Court.

11. Mr. Dutt has then argued on the points raised by Mr. Banerjee and submitted that no objection was taken by Mr. Banerjee to the manner in which the evidence had been summed up by the learned Judge. Mr. Banerjee commented on this point that since the entire summing up was placed before me it was done with the sole object of showing how colourless it was and that a mere reproduction of the evidence without suitable, comments was hardly of any use to the jury. I agree that if the object of summing up of the evidence was to help the jury to arrive at a proper decision, this object could hardly be attained unless the Judge made useful observations in his summing up to the jury.

12. Mr. Dutt, then argues that it was not necessary for the Judge to have explained the sections of the Indian Penal Code as mentioned by Mr. Banerjee as the prosecution case was either a case u/s 302 or Section 304 of the Indian Penal Code or nothing else. Therefore Mr. Dutt argued that if the Judge had explained the other sections he would have simply misled the jury. I cannot share this view. The specific case of the defence was one of accident. Therefore in explaining Section 80 of the Indian Penal Code the learned Judge, in my view, had definitely misdirected the jury in not explaining these sections. Mr. Dutt then says that assuming there was a just possibility of a case u/s 304A or 338 of the Indian Penal Code, being made out there was nothing to prevent the learned Judge to have framed charges under those sections. Since no such charge was framed it was unnecessary for the learned Judge to embark on dissertation on those sections. I cannot persuade myself to accept this view either. On the other hand, this argument only emphasises the necessity of explaining these sections.

13. As from the above it appeared to me that there were serious misdirections in the summing up. I have examined the important and relevant evidence of most of the witnesses in the case. It seems to me clear that the evidence in the case was quite ample to negative the theory of accident altogether. It cannot be said that the erroneous directions have not resulted in a perverse verdict and has occasioned in consequence a failure of justice. As in this case there is evidence that there was firing with a gun which has resulted in the death of an individual and grievous hurt to an innocent person, justice demands that there should be a fresh and fair trial.

14. I have seriously considered the argument of Mrs. Maitra appearing on behalf of the State as to whether or not the cases of opposite parties Nos. 2 and 3 also should be sent back for retrial. Mr. Banerjee argues that whatever may be the charge on which opposite party No. 1 should be retried, the other opposite parties by giving orders to fire whether at a particular individual or aimlessly at the air, they should also be retried for the abetment of the offence with which the principal offender might be charged. On a careful consideration of all the facts and circumstances of the case I have come to the conclusion that this Rule must be made absolute and the order of the learned Additional Sessions Judge and the verdict of the jury must be set aside.

15. I therefore, direct a retrial of the opposite parties by the Sessions Judge of 24-Parganas and a jury on charges properly framed. The question on which charges the opposite parties should be tried must be left to the learned Sessions Judge.

16. (D/- 17-6-1958) After I had dictated the above in Court and before it was put up for my signature Mr. Dutt later in the day mentioned that he should be given an opportunity for making further submissions upon evidence for the purpose of showing that in any case a charge u/s 302 of the Indian Penal Code was not made out and as such in directing a retrial, I should direct that no charge u/s 302 of the Indian Penal Code should be framed.

17. I allowed Mr. Dutt to make his further submissions in full since he was of the view that as I had myself looked into the evidence I may have missed some points arising in the appeal. Mr. Dutt has now made his further submissions in full. I also gave an opportunity to Mrs. Maitra who had appeared for the State and Mr. J. M. Banerjee who appeared for the petitioner to make their submissions on the point raised by Mr. Dutt.

18. Mr. Dutt took me once more through the evidence of the material witnesses namely, P. Ws. 3 to 8, 7 to 9; 13 to 15, 21, 27, 29, 35, 37 and 38 and also the evidence of P. Ws. 10 and 11. His principal comments were that the opposite parties specially opposite parties Nos. 2 and 3 had not been properly identified. It was said that most of the witnesses mentioned that so far as giving orders which was ascribed to opposite parties Nos. 2 and 3, the evidence mainly was that the witnesses heard voices in the truck from which they understood that it was the opposite parties Nos. 2 and 3 who had given orders to open fire. Mr. Dutt argued that although there was direct evidence on the point coming from some witnesses, the evidence of those who spoke about the identification by voice should not be lost sight of. Mr. Dutt next emphasised upon the evidence relating to certain wads being found on the person of the deceased which, according to the evidence in the case, came from blank cartridges. The presence of wads and the absence of any shot, he submitted, would conclusively prove that the person who hired the shot did not have the intention to kill. Lastly Mr. Dutt submits that if the Court found it expedient in the interest of justice to send the case for retrial the cases of opposite parties Nos. 2 and 3 should be separately considered.

19. The prosecution case is that the opposite parties Nos. 2 and 3 had given orders to open fire. No other part had been ascribed to them. If the Court was to frame a charge against them only a charge for abetment u/s 114 of the Indian Penal Code could be framed. Since no case of murder had been made out Mr. Dutt submits that the opposite parties Nos. 2 and 3 could not be, upon the evidence, charged for abetment of rashness and negligence. For all practical purposes it was submitted that it was impossible to conceive a case of rashness and negligence.

20. Mrs. Moitra has repeated her argument made previously and had again

submitted that the cases of opposite parties Nos. 2 and 3 should not be sent back for retrial and so far as the case of opposite party No. 1, there was, according to her, a case against him u/s 304A or 337 or 338 of the Indian Penal Code.

21. Mr. Banerjee for the petitioner however has argued that upon the question whether there should be a retrial or not, the evidence having been placed before the Court and the Court having gone through the evidence of all the material witnesses it was abundantly clear that an offence had been made out and in the interest of justice there should be a retrial.

22. I had myself gone through the evidence first unaided by any comments from the Advocates appearing for the parties and then having had the advantage of hearing the comments of the learned Advocates thereon and I have no doubt in my mind that justice demands that there should be a retrial in the case.

23. The next point for consideration is on what charges should the opposite parties be tried. The first question raised by Mr. Dutt as to identification is a question of fact. If I were to give effect to the argument of Mr. Dutt namely that recognition by voices being a very feeble piece of evidence should not be accepted, I should not send the cases of these two opposite parties back for retrial and should acquit them on the charges. The evidence against them on the question of recognition was in many instances direct and I should not be justified in taking the matter from the hands of the jury who would be the proper persons to accept or reject the evidence of identification.

24. On the other question as to on what charges the opposite parties should be retried I have again carefully considered the matter in the light of the argument advanced by the learned Advocates for the parties, whether I should direct the Court below to frame certain charges or I should leave the matter to its discretion. The arguments addressed to me that only a case u/s 304A, or 337 or 338 if the Indian Penal Code had been made out and nothing else do not seem to me to be very convincing. Mr. Dutt's argument that there could be no abetment of rashness or negligence does not also impress me. I do not want to discuss facts of the case in any details as it might have some effect on the mind of the Court that was to frame a charge. Now that evidence was gone into before the Court of Session in framing such charges the learned Judge will be at an advantage. Mrs. Moitra on behalf of the State has to some extent supported Mr. Dutt. It may be the view of the State, and there is no reason to think that this is not a considered view, the State may support such charges to be framed against the opposite parties at the retrial which the State expected to prove. Therefore, the apprehensions of Mr. Dutt do not seem to me to be reasonable. I do not think I shall at all be justified in placing the learned Judge at a disadvantage. In my judgment his final discretion must be left unlettered. I have no doubt he will see that proper charges are framed against the opposite parties at the retrial. I do not, therefore, find any reason to change my mind in leaving the question of the framing of charges to the learned Judge.