

(1965) 02 CAL CK 0016
In the Calcutta High Court
Case No : Criminal Appeal No. 555 of 1962

Nemai Mondal and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 18-02-1965

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 429
Evidence Act, 1872 — Section 134

Citation : AIR 1966 Cal 194 : (1966) CriLJ 522

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : Krishna Binode Roy, for the Appellant; Sudhindra Kumar Palit, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Mukharji, J.—This criminal appeal comes up before me for decision u/s 429 of the Criminal Procedure Code because two learned Judges of the Division Bench were equally divided in opinion Niyogi, J. was of the opinion that the appellants were guilty and should be convicted u/s 323/34 of the Indian Penal Code and u/s 148 of the Indian Penal Code. Das, J., on the other hand, was of the opinion that the conviction should be set aside.

2. Originally there were ten appellants. Both the learned Judges of the Division Bench, however, were unanimous that the conviction of the first appellant, Nemai Mondal alias Nemai Chandra Mondal u/s 326 of the Indian Penal Code and u/s 147 of the Indian Penal Code should be set aside as also the conviction of appellants Nos. 9 and 10, namely, Probodh Mondal and Kanai Mondal, u/s 147 of the Indian Penal Code. Therefore, appellants Nos. 1, 9 and 10 have been set at liberty and there is no difference of opinion about them. The difference of opinion that comes up before me for decision is with respect to appellants Nos. 2 to 8; namely, Jogen, Dulal, Haren, Anukul, Ramen, Kartik and Ganesh.

3. Before dealing with the merits and facts of this appeal it is necessary to

dispose of a preliminary point. Mr. Roy appearing for the appellants submits that u/s 429 of the Criminal Procedure Code all that need be done by the third Judge is to accept one view or the other already expressed by the two differing Judges of the Division Bench. He has further submitted that where one Judge has expressed himself in favour of acquittal then very little remains for the third Judge to do because normally when one of the two learned Judges has reasonable doubt about the guilt of the accused, the third Judge should also give the benefit of that doubt to the accused. Mr. Palit for the prosecution has disputed both these propositions.

4. On a close scrutiny of the language and interpretation of Section 429 of the Criminal Procedure Code I do not think it is possible to accept any of the two submissions made on behalf of the appellants on Section 429 of the Criminal Procedure Code. I shall record my reasons briefly. Section 429 of the Criminal Procedure Code reads as follows:

"When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion."

5. As I read the language of that section, what is laid before the third Judge is "the case" itself and not merely the points of difference or the views of difference. The case with the differing opinions is placed before the third Judge. In other words, it is the duty of the third Judge to decide "the case" and not merely the points on which the Judges have differed. No doubt in doing so, the two differing opinions have to be considered by the third Judge. But the decision is the decision of the third Judge on the case. The concluding words of Section 429 of the Criminal Procedure Code to the effect that the judgment shall follow the opinion of the third Judge seems to indicate that the final and ultimate decision is of the third Judge on the case. At the same time the word "case" normally would mean in the case of a number of appellants, the case of each appellant considered separately. In other words, if out of three appellants, the two Judges of the Division Bench agree on one and disagree in respect of the other two appellants, then the "case" that is referred to u/s 429 of the Criminal Procedure Code is the case not of the appellant on which they agree but the appellants on whom they had disagreed. The case in such a context means the case in respect of the appellants on which the two Judges are equally divided. The words "equally divided" in Section 429 of the Criminal Procedure Code seem to support that construction. In this case, for instance, before me all that I have to decide is the case of the seven appellants from 2 to 8 on which the two Judges were equally divided and not in respect of the appellants Nemai, Probodh and Kanai about whom they were not divided but unanimous. On this point a reference may be made to the decision in *Grande Venkatta Vs. Corporation of Calcutta*, where Woodroffe, J. observed as follows:

"Without deciding that the word "case" does not include the whole case it is plain

that a third Judge would not differ upon a point on which both the referring Judges were agreed unless there were strong grounds for doing so. I am not going to do so here."

6. It is not necessary for me in this case to decide what Woodroffe, J. meant by "strong grounds".

7. The view that I am taking is supported by such decisions as *Sarat Chandra Mitra v. Emperor* ILR 38 Cal 202, *Ahmad Sher v. Emperor* 32 Cr. LJ 868 : (AIR 1931 Lab 513) and *Subedar Singh Vs. Emperor*, .

8. In *Md Illias Mistri v. The King* ILR 1949(1) Cal 43, Biswas, J. as a reference Judge u/s 429 of the Criminal Procedure Code observed on Section 429 of the Criminal Procedure Code at page 44 of that report as follows:

"There can be no doubt upon the wording of the section that the whole case is now before me, which means not only that I am at liberty, but, that is also my duty to examine the whole of the evidence for myself and come to a final judgment. It is not a case of merely weighing the opinion of one learned Judge against that of the other and deciding which of these opinions I should accept."

I respectfully agree with the observations of Biswas, J. on the interpretation of Section 429 of the Criminal Procedure Code.

9. The other submission of Mr. Hoy on the construction of Section 429 of the Criminal Procedure Code that when two Judges differed the third Judge should give the benefit of doubt automatically to the accused is also, in my view, not sound. The first obvious answer is that if that were so then that view will repeal Section 429 of the Criminal Procedure Code which itself says that when the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge who shall deliver his opinion and the judgment shall follow such opinion. If whenever two Judges differ the third Judge was only to give the benefit of doubt then such a view will make Section 429 of the Criminal Procedure Code entirely nugatory. I am, therefore, unable to accept that submission of Mr. Roy. An argument on this point was also advanced to the effect that even if such a submission in its unqualified form was not acceptable there still remains the submission that where one Judge is of the view that the accused is guilty and the other is of the view that the accused is not guilty then in such a case the third Judge should exercise the benefit of doubt to the accused simply on the ground that two Judges of this Court have differed on their guilt This argument in my opinion does not really arise in this case because Das, J. only gave the benefit of doubt to the appellants. Something like this submission was made in the case of ILR (1949) 1 Cal 43 mentioned above, where Biswas, J. again at pp. 44-45 of that report said as follows:

"Mr. C. Noad had in his opening suggested that the very fact that one learned Judge was for giving the accused the benefit of the doubt was sufficient to entitle

his client to an acquittal from me. I would not go so far as that. If one learned Judge was definitely of opinion that the appellant was not guilty as against the contrary view expressed by the other learned Judge, there might have been some force in the contention put forward by Mr. C. Noad."

I am satisfied that on the language of Section 429 of the Criminal Procedure Code when ever the Judges of the Court of Appeal are equally divided in their opinions that section is attracted and there is no qualification or limitation in that section that if the division of opinions was based on the question of guilt or no guilt then the third Judge will have no other option but to record that fact and give on that ground alone the benefit of doubt to the accused. I cannot read any such qualification or limitation in the unqualified language of Section 429 of the Criminal Procedure Code so far as the division of opinions among the two learned Judges is concerned. It is not possible on that language to say that in some difference of opinion the third Judge must act in a particular manner and in other difference of opinion he has greater freedom. No doubt if, the third Judge on a reading of the whole record and evidence and the differing opinions has himself any reasonable doubt then that benefit must go in favour of the accused. But this does not mean that because two of the Judges of this Court have differed in their opinions that difference alone must in every case create a reasonable doubt in the mind of the third Judge.

10. Mr. Roy has tried to attract me with a decision of the Orissa High Court in Khetri Bewa Vs. State of Orissa, , where it has been said that the use of the words "if any" shows that the third Judge is not bound to have a full hearing and then to arrive at an independence opinion and that the third Judge can, unless on scrutinising the materials on record, the judgment of the Judge pronouncing in favour of the innocence of the accused is considered far from reasonable or perverse, give the benefit of reasonable doubt to the accused and acquit him. Although the third Judge in that case followed the decision in Md. Illias Mistri doubts were expressed about the correctness of the dictum in that case, that decision, however, does not help Mr. Boy in his submission on the point.

[After discussing the merits of the case it was held:]

11-35. It is needless for me to emphasise that it is not the number of witnesses who matter but the quality of evidence. It is well known law that u/s 134 of the Evidence Act no particular number of witness would be in any case required to prove any fact. The testimony of a single witness, if believed, is sufficient to establish any fact. Apart from the two witnesses P.W, 4, Bejov Mondal, and P.W 19, Meghnath Safui, who are eye-witnesses to the occurrence and who I have no reason to disbelieve, there are also other witnesses whose evidence I shall presently discuss In that view of the matter, absence of witness from the Hat or the shops does not. in any view, create any doubt in my mind.

36-50. For the reasons stated above I hold all the appellants before me guilty u/s 148 of the Indian Penal Code and convict them under that section. I also hold

them guilty u/s 323/34 of the Indian Penal Code and convict them under those sections.

51. What remains now to consider is the sentence. Mr. Roy for the appellants has submitted that they were in imprisonment from the 30th July 1962 when the Additional Sessions Judge convicted them until the 28th July 1964 when the appellants were released on bail after the difference of opinion in the Court of criminal appeal. He, therefore, asked me to consider the fact that they had already been in imprisonment for two years. I have taken that into consideration As against this submission Mr. Palit for the prosecution has urged that there are no extenuating circumstances when these appellants came in a gang armed with lathis, iron rods and ballams. Taking all these factors into consideration I am satisfied that the appropriate sentence in the context of the facts and circumstances of this appeal will be a sentence for three years u/s 148 of the Indian Penal Code. I accordingly sentence the appellants to three years" rigorous imprisonment. I do not pass any separate sentence on the appellants u/s 323/34 of the Indian Penal Code.

52. The appellants must surrender to their bail bonds forthwith to serve out the remainder of their sentence.

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