

(1925) 12 AHC CK 0030
In the Allahabad High Court

Rafi-uz-zaman Khan and Others

APPELLANT

Vs

Chhotey Lal

RESPONDENT

Date of Decision : 14-12-1925

Acts Referred:

Penal Code, 1860 (IPC) — Section 193

Penal Code, 1860 (IPC) — Section 193

Penal Code, 1860 (IPC) — Section 193

Citation : AIR 1926 All 334

Judgement

1. Criminal Appeals Nos-747, 748 and 749 of 1925 arise out of a communal raiyat which occurred in 1924 and as a result of the case arising out of the raiyat the prosecution of the present three appellants for giving false evidence was ordered. It is admitted by counsel for the appellants that the false statements, which each of these three appellants is alleged to have made, were all directed to giving the same, or at any rate, a very similar account of the manner in which a certain Muhammadan met his death at the hands of Hindus.

2. The committing Magistrate decided to enquire into the case of all three separately and he eventually committed them for trial to the Sessions Court by three separate orders as in three distinct cases. We think that in this, he was only conforming to what has been the usual practice, a practice which is to some extent well founded, so far as subordinate Courts within the jurisdiction of this Court are concerned, on at any rate, one decision of this Court, *Empress of India v. Anant Ram* (1882) 4 All 293. That was a decision of a single Judge and was arrived at clearly with some hesitation. Counsel for the appellants has not been able to refer us to any later case of this Court. He referred us to *Empress of India v. Niaz Ali* (1882) 5 All 917 in which however the facts were somewhat different.

3. When the case came up before the learned Sessions Judge for disposal, he also expressed his opinion that there should be strictly in law three separate trials. As the point is of importance we will quote in extenso the account he gives of his procedure which is to be found in the heads of charge to the jury. Early in that charge his note shows that he addressed the jury as follows:

At this stage the Jury were again reminded that strictly speaking they were sitting to decide, not one trial of three persons, but three separate trials. The law required this, but the law did not require that in such circumstances each accused person should necessarily be tried by a separate Jury. In my opinion, it would have been improper to have tried each of these persons with a separate jury. Apart altogether from the great expenditure of public time and of private convenience involved, it would "constitute a public scandal if one or more, of these persons was convicted and the other or the others acquitted. For whatever arguments might be put forward to the effect that all three were guilty or to the effect that all three were not guilty, it would be impossible for anybody to put forward the argument that one or two were not guilty. The story told by all three was to all intents and purposes the same story and that was a story either false beyond reasonable doubt or true beyond reasonable doubt, or a story the truth or falsity of which a reasonable man could not vouch for. That one or two persons should be punished and that one or two should go free for coming into Court and telling precisely the same story under exactly the same circumstances, would not be edifying. Therefore it was my opinion that all the three persons should be triad by one jury. The result was to make the trial in practice hardly distinguishable from a joint trial, but under the circumstances no prejudice could arise to any of the accused from this. The jury were reminded that the accused were given the option of having all the evidence recorded over again and had they chosen to exercise that option the evidence would have had to have been recorded over "again. But they did not exercise that option considering and quite rightly, that nothing could be gained thereby. They ware however, each of them, allowed the option of recalling all or some of the prosecution witnesses for further cross-examination and this option they, in fact, exercised:

On this aspect of the case it was only necessary to give the Jury one warning and that was that the cases being technically distinct cases the statement made by one of these three accused could not in any way whatever be used against other of the accused.

4. We have had the order sheets in the three cases Nos, 20, 21 and 22 (Criminal Appeals Nos. 747, 748 and 749) of 1925 respectively laid before us. These order sheets show that in Case No. 20 of 1925 the evidence-in-chief of the prosecution witnesses was first taken, but there was no cross-examination of any witness excepting the doctor. This was due, we are informed and we have no reason to doubt is to the fact that a counsel for the accused in Case No. 20 of 1925 was not present. He was in, fact, also the leading counsel for the accused. Case No. 20 of 1925 was then adjourned in the ordinary way. During the hearing of this evidence all the three accused had been in the dock. The next day Case No. 21 of 1925 was called on and on behalf of Asad Ullah, the accused in that case, it was agreed that the evidence-in-chief of the prosecution, witnesses which had been taken in his presence need not be re-heard but might be read in his case. Witnesses for the prosecution were however recalled for cross-examination. The next stage in the case was that the evidence given in chief by the prosecution

witnesses in the first Case No. 20 of 1925 was also read with the consent of the counsel on behalf of the accused in Case No. 22 of 1925 and the cross-examination of these witnesses which had preceded in Case No. 21 of 1925 was also by consent read in Case No. 22 of 1925 and two of the witnesses for the prosecution were recalled on behalf of the accused for further cross-examination. Subsequently each accused was examined and one or two witnesses for the defence were called in the first case (No. 20 of 1925.) No witnesses were called in Case No. 21 of 1925 or in Case No. 22 of 1925. There then followed single addresses on behalf of the accused and the Crown. In which order these addresses were delivered is not material to the decision of this case. Finally the learned Judge addresses a single charge covering all three cases to the jury and the jury returned their verdicts in regard to each accused convicting each of them u/s 193 of the Indian Penal Code.

5. Against the verdicts of the jury no appeals on the facts lie, but all the three accused have appealed on the ground that they were, in fact, tried jointly at one trial and by the same jury and that such joint trial, being, as alleged, illegal, the whole trial was vitiated. Other grounds of appeal dealing with mis-directions to the jury were not argued.

6. It "was first argued by the learned Counsel for the appellants that his clients had been prejudiced in two ways.

7. Firstly that if the first accused had been convicted by the jury in a separate trial the second and third accused would have claimed a different jury; secondly, that the first accused would have been able to examine the second and third accused as witnesses in his case. The same argument *mutatis mutandis* would apply to the case of the second and third accused. We will deal with these objections before considering the main question. It was not strongly pressed that the accused would have been entitled to a fresh jury in the second or third cases. It is clear that there would have been nothing illegal in the Judge hearing the second and third cases with the same jury that had tried the first. Such a procedure is provided for in the proviso of Section 272 of the Criminal P.C. No doubt the accused in the second and third cases could have asked for a second jury and it would have been in the discretion of the Judge to grant or refuse that application. *Prima facie* there would seem to be no more reason why a jury should not try a second charge in such circumstances than there is reason why a Sessions Judge should not try two cross-cases of riot.

8. The second suggestion of prejudice namely, that one accused was not able to call another accused as his witness, is baseless if, in fact, a joint trial was legal; for exactly the same situation arises in every joint trial.

9. To come then to the main question, two answers have to be given. Did the learned Judge try these cases as separate cases or did he in effect try them jointly? And secondly, if we find that he in effect tried them jointly was such joint trial illegal?

10. We have set out in extenso above the procedure actually followed by the Judge, It was clearly adopted in an attempt to save public time and money, and counsel for the appellants has wholly failed to prove-has almost even failed to suggest that procedure was protested against in any way whatever or at any stage whatever. There are however, only two methods provided by law for conducting a trial or trials in such cases as these. Either the trials must be separate if the law requires them to be separate or they may be and ordinarily will be joint, if the law permits them to be joint unless for some particular reason the learned Judge considers that the trials should be held separately. It is very dangerous and not in accordance with law for a Judge, with the very best intentions to follow some procedure which is really neither one nor the other of the two procedures provided by law. In this case it is clear from the Judge's own observations that he was endeavouring to try the accused separately and at the same time modify the procedure provided by law so as to save public time and money. We need not advert in detail to the various stages of the procedure adopted by him as we have set them out above; but we think that the trial or trials were conducted in such a way that in effect the proceedings amounted to a joint trial of the three accused. It is not clear that if one of the accused had asked to call the other two men in the dock as his witnesses what the learned Judge's answer would have been; but whatever that answer would have been; we think that undoubtedly the impression may have existed in the minds of the three accused and their counsel that the accused could not give evidence each on the other's behalf. We hold that these particular proceedings amounted in effect to a joint trial. A decision in every case of this nature must of necessity depend upon its particular facts.

11. The next question for decision is whether a joint trial was permissible in this case and the answer to this question depends upon the application of the law to the particular facts. Section 239 of the Criminal P.C. says in the material clauses of that section:

The following persons may be charged and tried together namely:

- (a) Persons accused of the same offence committed in the course of the same transaction.
- (b) Persons accused of different offences committed in the course of the same transaction.

12. It is clear that the accused committed the same offence, namely an offence in each case u/s 193 of the I.P.C. This point has not even been argued by counsel for the appellants and it could not be argued. The only question then that remains is whether these offences were committed in the course of the same transaction. Here again the circumstances in different cases may vary to an infinite degree. In the present case we find three accused persons witnesses on the same side in a case of communal riot all giving evidence on the same point and to the same effect, to prove the same fact, viz. the manner in which a

certain man met his death. We have no hesitation in holding that this evidence in the case of the three witnesses was given in the course of the same transaction. When the facts are stated, as we have above stated them, there is to our minds hardly room for argument. There was the most obvious identity of purpose and that alone in the circumstances of this case is to our minds sufficient.

13. We prefer the phrase "identity of purpose" to the phrase "community of purpose." The latter phrase is ambiguous in that it may mean only "identity of purpose" or it may suggest that the purpose of each was not only the same, but was known to the others, or in other words, "conspiracy." We do not consider "conspiracy" in any way a necessary element, though, if it is present, its presence will be a further element supporting a finding that the offences were committed in the same transaction. It is clear that the framers of the Criminal P.C., could never have had in mind the necessity for any proof of conspiracy before the terms of Section 239 could be applied. There is nothing requiring any element of conspiracy indicated by Section 239. Further that section has been in the Code for a very large number of years, if not from its actual inception and certainly long before Sections 120-A and 120-B were added to the I.P.C. We have to look to Section 239 and to Section 239 only. If the several acts of the accused were committed in the same transaction there is an end of the matter; there can legally and properly be a joint trial.

14. We may add that much confusion appears to us to have arisen in regard to this type of case owing to a failure to distinguish between different acts of the accused and different transactions. The act of each accused may be wholly independent of the act of the other and in that sense there may be no community whatever, but there may still be community of purpose in the sense of identity of purpose and the acts committed in the same transaction. In this case there cannot be a shadow of doubt that there was identity of purpose, and further in the circumstances of this case no reasonable man could believe that there was not in fact also community of purpose in the sense of a conspiracy or prior consultation. In either view we are satisfied that the offences of the three accused were committed in the same transaction and that therefore u/s 239 of the Criminal P.C., a joint trial was legal. The appellants contend, and we have also held that in effect the trial was a joint trial.

15. The appeals therefore fail and are dismissed.