

(1986) 08 GAU CK 0018

In the Gauhati High Court

Case No : Criminal Original No.98/78 and Crl. Appeal No. 5(K)/78

YA Ngshine Lotha & 9 Ors.

APPELLANT

Vs

State of Nagaland

RESPONDENT

Date of Decision : 22-08-1986

Acts Referred:

Criminal Procedure Code, 1973 — Chapter 18, 334(1)
Criminal Procedure Code, 1973 (CrPC) — Chapter 18, 334(1)
Penal Code, 1860 — Section 120B(1)
Penal Code, 1860 (IPC) — Section 120B(1)

Citation : (1987) 1 GLR 31

Hon'ble Judges : S.Haque, J

Bench : Single Bench

Advocate : H.K.Sema, D.K.Mishra, Advocates appearing for Parties

Judgement

Offences under 436 read with Sec. 120B (1) of the Indian Penal Code are exclusively triable by Court of Sessions. It is to be presumed that procedure under Chapter XVIII of the Code or the spirit thereof, as permissible in Nagaland, had been followed in trying the instant case. In following the procedure in spirit, some discretion is vested with the trial Judge. It is certainly not unfettered. The discretion must be shown to have been applied judiciously and with reasons understandable to a man of prudence. The instant case deserves scrutiny in this sphere.

The village Chairman of YIKHUM submitted the First Information Report to the effect that on 20478 about 100 HUMTSO villagers armed with deadly weapons rushed into the cultivable field of YIKHUM VILLAGE and set fire to many Kheti huts of YIKHUM villagers causing heavy damage to the huts and properties. The informant, his wife and daughter although were present in the field, could not recognise any of the offenders. They reported the incident to the villagers of YIKHUM. Thereupon, Case No. 3 (4) of 1978 under Sec. 147/148/149/and 436 IPC was registered at WORKHA P. S. and investigated into. It was numbered as GR Case No. 15/1978 on submission of the chargesheet against 22 accused

persons including the present 10 appellants who faced the trial.

The trial Judge (Deputy Commissioner, WOKHA) was required to consider framing of charges on the basis of the materials in the casediary, and the documents, the copies of which were supplied to the accused and on which the prosecution relied. In absence of materials for proceeding against the accused by framing charges against them, the Judge should discharge the accused by recording reasons. Such was the situation in the instant trial. Instead of discharging the accused, as required under Sec. 227 of the Cr. P. C., the Judge preferred to examine the 22 accused persons under Sections 239 and 240 of the Criminal Procedure Code on 27th and 30th September, 1979 with a view to collect materials for the purpose of framing charges. Here the Judge applied his discretion under Chapter XIX of the Cr. P. C. treating as if the case was one not of Sessions triable.

These 10 appellants were selected from such examinations to face the trial. The procedure adopted by the Judge was not in conformity with the provisions of the Code nor under the shed of spirit thereof for a case exclusively Sessions triable. Serious infirmity in law had been committed.

Charges under Sec. 120B (1) and 436 of the Indian Penal Code had been framed against the 10 accused appellants selected on 27978 and 30978 in 2 batches. The Judge recorded the plea of each of the accused on the body of the charge. The plea of all the accused was that the villagers of YIKHUM fired gun on them and thereupon being angry, they set fire into the kheti huts. The plea of each accused was almost in verbatim with his statement recorded during examination under Sec. 239/240 of the Cr. P. C. referred to above. Thus, there is open scope for suspicion, as submitted by learned counsel Mr. D. K. Mishra for the appellant, as to the manner in which the charges had been framed and pleas recorded in verbatim with their previous statement. Reasonable suspicion was apparent on the face of record as to the anomaly in the framing of the charges.

Furthermore, the learned Judge accepted the pleas of the accused as their plea of guilt. Error has been committed by such acceptance, because the same was not a clean and unambiguous plea of guilt. It added some sort of provocation. The plea was that they set fire out of carver as they were fired upon with guns. The learned Judge did not at all consider the aspect of provocation, if any, in his judgment, hence, error had been committed by accepting the pleas as a clean pleas of guilt to act upon for conviction.

5 witnesses for the prosecution had been examined after framing the charges. This clearly indicated that the learned Judge decided not to accept the pleas of the accused forthwith to convict them; but applied his discretion to record evidence in the case in support of the charges. All the 5 witnesses had deposed that they could not recognise any of the culprits who set fire into the Kheti huts. The evidence filially negated the charges. But the learned Judge went back to accept the so called plea of guilt of the accused recorded in the charge to convict

them. Was it a fair procedure in the eye of law ? The learned trial court has got discretion to accept the plea of guilt if it is clean and unambiguous, and convict the accused, or not to accept it. If the latter course is selected and proceeds to record evidence of the witnesses, the learned Judge must satisfy himself that the evidence which he hears justifies conviction or else he should record an order of acquittal. If the learned Judge hears evidence, and it does not prove the allegations of the charge, it is not open to him to go back and accept the plea of guilt, and convict the accused. This view was held by the Full Bench of the Bombay High Court (AIR 1931 Bombay 195 Emperor vs. Janardan Abhyankar). In the instant case, finding no evidence against the accused on examining the prosecution witnesses, the learned Judge returned back to act upon the so called plea of guilt of the accused recorded on the body of the charges to convict them. The learned Judge committed grave error and illegality. Such procedure is discouraged.

If in a case some of the accused plead guilty cleanly, but others plead not guilty, then it is open for the court to record evidence as against those pleading not guilty, by deferring to convict those who plead guilty. But if in such a situation, the evidence so recorded discloses circumstances or facts that commission of offence becomes doubtful also by those who pleaded guilty then also returning back to act upon the plea of guilt would not be a fair trial.

After recording evidence of the prosecution, the learned Judge immediately proceeded to record the evidence of the 10 accused persons as defence witnesses. They were not examined under Sec. 313 of the Criminal Procedure Code. There was no scope for such examination as no evidence was in record against them to explain any circumstance. Position being such, the learned Judge should not have suomuto called upon the accused persons to give defence evidence by examining themselves. This procreated, was in complete violation of Sec. 315 (1) Proviso (a) of the Code. Such practice is also discouraged. When the prosecution apparently failed to prove the charge by evidence, then there is no scope to ask the accused to adduce defence evidence.

While returning back to accept the so called plea of guilt, the learned Judge considered the defence evidence to strengthen the so called plea of guilt for convicting accused. This was very unfair. The defence evidence should be read along with the prosecution evidence to appreciate the truthfulness of the prosecution case. In the instant case, the prosecution evidence was nil to implicate the accused. The defence evidence, although recorded on the unwillingness of the accused, cannot be utilised for strengthening the so called plea of guilt, the acceptance of which was unfair on going back to it after the prosecution fails to prove the charges by evidence.

120B(1) IPC was not attracted on the facts and allegation of the case. The ingredients of this offence are completely missing in this case.

The accused are poor illiterate tribal. They faced trial of offence, exclusively

triable by Court of Sessions. It was the duty of the trial court to assign lawyers, for their defence at State expenses. Mandatory provision of Sec. 304 Cr.P.C. was violated. High sounding deliberations on the subjects of Legal Aid, defence at State costs for those unable to engage lawyers, thickly spread over the atmosphere, but in practical field, in the backward needy Tribal States, it is yet to be advertised, not to speak of implementation. Presiding Officers trying Sessions cases should strictly comply the provision in Sec. 304 (1) and the State Government of Nagaland should implement it by notification under subsection (3), if not yet done.

Learned Asstt. Advocate General Mr. H. K. Sema, submits that the trial Judge acted on his discretion fairly in the trial under the spirit of the Criminal Procedure Code. He referred the case State of Nagaland vs. Ratal Singh (AIR 1967 SC 212) in support of his contention. It was held there that in the area of Nagaland discretion to the authority is considered necessary for greater utility than technical Rules and the provisions that the spirit of the Code should apply is a law conceived in the best interest of the people. The discretion of the Presiding officer is not subject to rigid control because of the unsatisfactory state of defences which would be offered and which might fail if did not comply with some technical Rules. The removal of the technicalities, leads to the advancement of the cause of justice in backward tracts of Nagaland.

On the other hand the imposition of the Code of Criminal Procedure would retard justice as indeed the GovernorGeneral, the Governor and the other heads of local Government have always thought. With due respect to which the Hon''ble Supreme Court held, it should be kept in mind that the discretion vested on the authorities specially to those who are entrusted to dispense with justice should act in a manner to utilize the same judiciously which may be justified with reasons. Unfettered discretion to bend the spirit of the Code as they like was never vested upon. A procedure for trial unheardof and not supported by any reason, as in the instant case, cannot be called as done with judicious discretion in the spirit of the Code. The discretion vested shall mean a judicious discretion which can be interpreted with reasons as fair. In Criminal trial, discretion should never be implemented by the authority vested to dispense with justice, with the aim to end somehow a trial into a conviction where the accused should get clear benefit of acquittal. The instant case is one in which the accused ought to have got the benefit of clear acquittal, but for the infirmities committed as referred to above, the learned trial judge bend his discretion unjustly to end the trial into conviction.

This appeal is allowed. The impugned judgment and order of conviction dated 16.10.78 of Deputy Commissioner, OKHA DISTRICT is hereby set aside. The 10 accused/appellants are acquitted of the charges and set at liberty. They are discharged from their bail bonds. Inform all concerned.