Sanyasi Gain and Others Vs Emperor

Court: Calcutta High Court

Date of Decision: Jan. 14, 1937

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 374
Penal Code, 1860 (IPC) â€" Section 120B, 395

Citation: 171 Ind. Cas. 183

Hon'ble Judges: Patterson, J; Jack, J

Bench: Division Bench

Judgement

1. This is a reference u/s 374, Criminal Procedure Code, for confirmation of the sentence of death passed on Sanyasi Gain in consequence of his

convictions on two charges u/s 302. In the same trial he was charged and tried with assessors along with ten others u/s 120-B read with Section

395, Indian Penal Code, and he and nine others were convicted on that charge. Objection has been taken to the trial on the ground of misjoinder

of charges inasmuch as occurrences extending over a period of 16 months are included in the charges and these occurrences cannot be said to

have formed part of the same transaction so as to come under the provisions of Section 235, Criminal Procedure Code. It is urged further that

even if the two murders can be said to have taken place in the course of the same transaction, the learned Judge did not rightly exercise his

discretion in including them in the same trial as the jury were likely to be prejudiced by the joint trial. As regards the first point, the prosecution case

is, that all those criminal occurrences referred to in the evidence were part of one transaction inasmuch as they all took place in furtherance of a

conspiracy to commit dacoities. They consisted of dacoities, the theft of boats and the rescue of members of the gang by an attack on the Police

and the commission of murder in two of the dacoities. It is suggested that the theory of conspiracy has been invented by the prosecution merely in

order to connect these occurences together. It is true that the only direct evidence of a conspiracy is the statement of the approver Aswini in cross-

examination as follows:

We conspired only once in Behari"s house about the aims and the work of the gang. After that we committed the dacoities from time to time

without further consultations.

2. Thus the evidence of deliberate conspiracy is very thin, but if the evidence that the same gang of men systematically committed a series of

dacoities by similar methods on each occasion is believed, there can be no doubt that there must have been some understanding or agreement

between them that when summoned by the organisers they would unite together to commit these dacoities. Thus every series of gang robberies

committed by the same gang might be said to be the outcome of a criminal conspiracy. Moreover, on behalf of the prosecution, cases have been

referred to in which it was held that in order to legalize such a trial it is only necessary to show that there was a bona fide accusation of conspiracy

embracing all the criminal acts; it is not necessary for the prosecution to establish that in fact there was such a conspiracy. The latest of these is the

case in Rash Behari Shaw (Handa) and Others Vs. Emperor, . In this case it was held that where there is a charge of conspiracy having one or

more objects in view, the offence of conspiracy and acts committed in pursuance of it come under one transaction, and that in judging of the

validity of a trial, the test to be applied in the accusation made and not the result of the trial. The matter must be looked at as it appeared to the

Magistrate when framing charges. It was also held that, where the irregularity, if any in the joint trial of several persons at one and the same trial is

not one which in the actual facts of the case caused any prejudice to the accused or by itself entailed any failure of justice, it is no ground for

quashing the proceedings, the more so, when no protest or complaint is made by or on behalf of the accused against the course adopted by the

Magistrate.

3. In the present case there was apparently no protest or complaint against the joint trial. The same views were expressed in Abdul Salim and

Others Vs. Emperor, ; Satya Narain Mohata Vs. Emperor, and Abdullah and Others Vs. Emperor, . In In Re: Gam Mallu Dora alias Malayya and

Others, it was held that to make the joint trial legal, the accusation must be a real one and not a mere excuse for a joinder of charges which cannot

otherwise be joined. With, these views we would respectfully concur. There is a danger, too, that a conspiracy charge may be introduced in order

to make the case triable with the aid of assessors and we are inclined to suspect that this may have had something to do with the framing of the

conspiracy charge in the present case In this case, however, the circumstantial evidence appears to support the approver"s statement as to the

existence of a conspiracy, and there is evidence that a number of the same persons took part in these occurrences and were probably parties to a

conspiracy to carry them out. This evidence is sufficient to show that the inclusion in the one trial of the 18 occurrences extending over 16 months

referred to in the judgment of the learned Judge was not illegal. In such cases evidence can be given of all criminal acts done in pursuance of the

conspiracy. An attack on the Police in order to rescue members of the gang was probably made in order to prevent the gang from being broken

up, and though there is a suggestion that the murder at Durbadanga was the outcome of enmity on the part of Sanyasi against Praneswar (the man

who was shot), there can be little doubt that this murder was committed in order to facilitate the dacoity, and the murder of Durga Sen in the

Chhotomullakhali River dacoity was with the same object. Ã¯Â¿Â½We hold, therefore, that the joint trial was not illegal. The vital question is, therefore,

whether prejudice has been caused to Sanyasi or any of the other accused by the joint trial. After careful consideration of this point we are

definitely of opinion that Sanyasi has been prejudiced by the trial of the two murder charges against him along with the charge of conspiracy, but

we do not think any of the accused have been prejudiced by their joint trial on the conspiracy charge. It is urged by the learned Advocate for the

Grown that the verdict of the jury should not be set aside unless it is shown that in fact the jury were prejudiced. In the nature of things it is not

possible to say whether in fact they were actually prejudiced but we think it is quite sufficient that there is every probability that they were

influenced in each case against him by the evidence not strictly relevant to the murder charge introduced by the trial under Sections 120 B, 395,

Indian Penal Code, and this, inspite of the rather naive warning by the learned Judge that in considering the guilt of Sanyasi on the murder charges,

they should confine themselves to the evidence of murder and not allow themselves to assume that if he is proved to be a dacoit, he must also be a

murderer, and that if he is guilty of one murder he must be guilty of all the murders with which he is charged.

4. But apart from this defect in the trial the charge to the jury in Sanyasi"s trial on the murder charges seems to have been defective and misleading.

There were two charges of murder. The first referred to a murder alleged to have been committed by Sanyasi on February 2, 1935, in the course

of a. dacoity at Durbadanga in P, Section Kaliganj in shooting Praneswar Mondal with a gun; the second referred to a murder alleged to have been

committed by him in the course of the Chhotomullakhali River dacoity in P.S. Sunderkhali in shooting Durga Sen with a gun. At Durbadanga it is

alleged that during the dacoity Sanyasi fired several shots through a window and wounded Praneswar in the abdomen. Then, when the dacoits

were retreating, he came back into the room and deliberately shot Praneswar at close range with the gun. The alleged motive was because

Praneswar was on bad terms with a friend of Sanyasi''s and had objected to the friend putting up Sanyasi and others in his house.

5. While directing the jury that it was not essential for the prosecution to establish a motive, the learned Judge might well have asked them to

consider whether this was a sufficient move for so deliberate a murder of a man whom he had already shot in the abdomen in course of the

dacoity. Again, the identification of Sanyasi depends on the evidence of four members of Praneswar''s family. They gave their evidence five months

after the occurrence, and though they were brought to the jail to identify other suspects in the interval, they were, for some unexplained reason,

never tested as to whether they could identify Sanyasi. As regards this the learned Judge merely remarks Ã¯Â¿Â½it would have been undoubtedly

better if Sanyasi had been in the parade.Ã¯Â¿Â½ Sanyai alleges in his appeal petition that the prosecution witnesses saw the prisoners outside the Court

at the time of the trial and that he was probably pointed out to them. This may very well be true. The learned Judge also did not point out to the

jury that there was no mention in the first information of the Durbadanga dacoity of the deliberate return of Sanyasi in order to finish off Praneswar.

There it was simply stated that he was shot in the course of the dacoity. With regard to his identification by two ex-convict boatmen who had

denied all knowledge of the dacoity and of Sanyasi before a Magistrate, but identified him in Court as the man who carried a gun, the learned

Judge merely told the jury they should not convict on their evidence alone, lie might more appropriately have told them that no weight whatever

could be placed on their identification.

6. In referring to the statement made by the deceased in the second murder case that he had been shot by a Ã¯Â¿Â½darkish middle-aged manÃ¯Â¿Â½ the

learned Judge ought to have pointed out that the description of the man who shot him given in the first information was Ã¯Â¿Â½a man of medium

complextion aged about 30 or 32,Ã¯Â¿Â½ and there does not appear to be any other description in the evidence. In speaking of the identification in this

case by the alleged eye-witness at a parade in the jail, the learned Judge may easily have given the impression that they identified Sanyasi there as

the man who shot Durga, whereas they were merely identifying, him or one of those who took part in the dacoity. The Judge put it as follows:

The alleged eye-witnesses, Sasbi Hazari and Bidhu were present at an identification parade held in Basirhat Jail by Moulvi S.A. Matin (P. W. No.

150) and they all picked Sanyasi out of the numerous outsiders with whom he was placed in the parade. The approver also says that it was

Sanyasi who shot Durga and in this connection you must remember what I have already told you about the evidence of an accomplice.

7. Again, in the midst of his statement as to the evidence regarding the finding in the house of Anukul of the gun said to have been used by the

dacoit, the learned Judge says the prosecution case is that the gun used to be handled exclusively by Sanyasi and that it was Sanyasi who took the

gun to Anukul"s house, but omits to say that there is no evidence of this, the only foundation for it appears to be that Sanyasi was arrested when

going away from Anukul"s house at the time this gun and another gun were found there and Anukul was arrested. The learned Judge says Ã¯Â¿Â½it is

alleged that, Sanyasi purchased the ammunition,Ã¯Â¿Â½ but omits to mention that there is no evidence of this. The evidence is that it was sold to Uttam

on his license by his stepbrother Kishto who. was an assistant of the gun-maker from whom it was purchased. The 12 cartridges were given to

Uttam by Bihari, and not by Sanyasi as stated in the charge. According to the approver Aswini, Durga was shot because one of the dacoits

(Aswini) had been recognized by Bidhu and the Judge might have suggested that this would have been a motive for shooting Bidhu rather than

Durga. Aswini"s evidence on this point is as follows:

I was lighting a cigarette and Bidhu recognized me, and calling me Anukul said "that man has recognized you, he must be killed." Durga was then

seated with a kantha round his person and on hearing our conversation Sanyasi fired at Durga and hit him on his right hand.

8. In stating that the prosecution sought to prove that Sanyasi used to go about with the gun which was used to commit the two murders, the

learned Judge did not add that there was no evidence that this identical gun was used in shooting either Praneswar or Durga and that the evidence

is that Sanyasi want about with a gun along with the accused Kishto and witness Kalipada for the purpose of shooting birds, In referring to the fact

that the approver did not identify Sanyasi when confronted with him at Satkhira the learned Judge merely says ""we have the admission of the

approver that he intentionally refrained from identifying him,Ã¯Â¿Â½ apparently assuming that this statement of the approver was true whereas it was for

the jury to decide what : construction they should put on the apparent failure of the approver to identify Sanyasi in the first instance. The admission

was in these words:

I did not identify Sanyasi and Anukul at Satkhira. I identified them in the Oourt. I did not identify Sanyasi in the Satkhira Jail as he joined his hands

and I took pity on him.

9. The is rued Judge concludes his charge by the somewhat bold statement:

Several witnesses claiming to be eye-witnesses have been examined in each case, not to mention the evidence of the approver and that of several

witnesses who prove association. The defence case is that Sanyasi knows nothing of all these incidents. It will be your duty to examine all the

evidence as reasonable men of the world and come to such findings as may appear to you to be just.

10. Such a summary could be of little use to the jurors. Toe suggestion that evidence of association was evidence in support of the charges of

murder was positively mischievous. On the whole, we are not satisfied that the evidence in this case was properly put before the jurors. Various

weaknesses in the prosecution evidence were not pointed out, and points in favour of the accused were omitted. So that apart from the fact that

the accused was most probably prejudiced by the trial of murder charges along with the charge of conspiracy to commit dacoities, the conviction

and sentence of death passed on the accused in this trial could not be allowed to stand. The conviction of Sanyasi Gain on both the charges u/s

302 and the sentence of death passed on him is, therefore, set aside. We have anxiously considered whether we should send back the case for re-

trial of the murder charges separately, specially as regards the second charge of murder which might very well be established on the evidence of

the identifying witnesses. But considering that this occurrence took place nearly two years ago and that the witnesses would be liable to confuse

what they had heard since, with what they had actually seen at the time of the occurrence, and further considering that we are convicting him on the

charge of conspiracy to commit dacoities and passing a sentence of transportation for life on Sanyasi on that charge we do not think that we should

send back the case against him for sepira"e re-trial on either of the murder charges.

Criminal Appeal No. 867 of 1936.

11. We have now to consider whether the convictions and sentences of the appellants u/s 120B read with Section 395, Penal Code, should be

upheld. The prosecution case is that the accused were all members of a gang of dacoits responsible for a series of dacoities and thefts on the

borders of Khulna and 24-Parganas during the early part of 1935; and evidence has been given of 17 cases in 1935, and one case in 1934. The

Police failed to discover who were reasonsible for these cases until the arrest of Aswini Mondal who was recognized by the witness Bidhubhusan

Sen during the river dacoity at Chhotomullakhali. He knew Aswini before; his brother had worked in Bidhu"s bsat, and his father had lands close

to Bidhu"s land. Aswini made a confession indicating that he had taken part in a series of dacoities and thefts along with a number of others

including most of the appellants who he says were associated together for this purpose. There is corroboration of the approver both as regards the

occurrences and to some extent as regards the identity of those who took part in them. (The judgment then proceeded to consider the cases of the

individual accused and concluded). The result is that the conviction and sentences of Mahendra Mandal, Ramesh Bhasa, Kisto Mandal and

Ketabdi are set aside and they are acquitted. The appeals of Durga Gain, Bhola Mondal and Trailokhya Gain are dismissed. The conviction of

Bihari Baidya is upheld but in his case the sentence is reduced to 5 "five years" rigorous imprisonment as we think there is no reliable evidence that

he took part in the dacoities.

12. Inasmuch as the learned Judge sentenced Sanyasi to death on the conviction of murder on both the charges u/s 302, he refrained from passing

any sentence on him or even convicting him under Sections 120 B-395, Indian Penal Code. We, therefore, convict and sentence him to

transportation for life on the conspiracy charge as the evidence shows he took a leading part in the conspiracy throughout. The conspirators were

responsible for the death of two men aid the crippling of a small girl by gunshot wounds, and there is evidence that the fatal injuries were caused by

Sanyasi, at least in the Chhotomullakhali River dacoity. This dacoity should have been tried separately u/s 393, Penal Code. In conclusion, we

cannot but comment on the unsatisfactory manner in which the investigation into these cases was conducted. Sanyasi was arrested on April 8, but

there was no test identification with regard to him until July 11, though he was under arrest throughout. In other cases there was no test

identification at all. The explanation is that he was arrested in the Khulna jurisdiction while most of the witnesses were in the jurisdiction of the 24-

Parganas and investigations in the different cases were conducted separately and were embarrassed by the distances and difficulties of travel. This

only accounts for a small part of the delay in part of the investigation. With the exception of Bihari all the accused were arrested at different dates in

1935 but were not put on trial for several months, and were only committed to Sessions on July 7, 1936. Surely, had there been proper

coordination between the Police Officers concerned, there need not have been such a very prolonged and unsatisfactory investigation.