

(1933) 05 CAL CK 0026

Calcutta High Court

Case No: Apps. Nos. 821, 819 and 820 of 1932

Madhu Sudan Sen Gupta

APPELLANT

Vs

Emperor

RESPONDENT

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Date of Decision: May 26, 1933

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### Judgement

Lort-Williams, J.

The Appellants Madhu Sudan Sen Gupta. Shiba Das Daw and Nikhil Chandra Guha Roy were tried with one Ramphal in the Court of the Special Judge of Murshidabad under secs. 4(a) and 5 of the Explosive Substances Act (VI of 1908) and sec. 440 read with sec. 120B of the Indian Penal Code. The trial was under Ordinance II of 1932. Ramphal was acquitted and the other three were convicted and sentenced to various terms of imprisonment. It is unnecessary to deal in detail with the evidence, because the case turns almost entirely upon the evidence of the approver Kalu. This evidence was very full and if it is believed, there can be no question about the guilt of all the three Appellants. The real question, therefore, for us to decide is whether it is safe to allow the conviction to stand upon the evidence of the approver or, in other words, whether there is sufficient and proper corroboration in law of this evidence. The prosecution story begins with the association of some of the Appellants in an atheletic club. The leading spirit there was Madhu and it appears that there was some theatrical talk among some of the Appellants about making oneself physically fit in order to enable one to fight for independence. The Magistrate has rightly disregarded that part of the story which is associated with this club. The Sub-Divisional Officer thought apparently that the club was not altogether desirable and it was closed by his orders and there is evidence to show that Madhu, Shib Das and Kalu talked about frightening the Sub-Divisional Officer for what he had done. The evidence shows that sometimes they spoke of punishing him by throwing a bomb, at other times merely of frightening him. It is clear that they were in touch with the accused Nikhil who was a detenu living at Bharatpur and who had been sentenced to imprisonment for life. There is ample corroborative evidence of association between Madhu, Nikhil, Shib Das and Kalu. It is suggested

that Nikhil advised or taught them how to make bombs or bomb "patkas" which is said to be another name for "crackers": but there is no corroboration of the approver's story on this point except the evidence of P. W. 7, Samed, who said that he was present behind a purdah or partition when Nikhil was talking to the others and that he heard them say that they would frighten the Sub-Divisional Officer. Kalu said that he purchased the materials necessary for making bombs upon the instructions of Madhu who gave him the money and though there is corroboration of the fact that Kalu purchased the articles, there is none of the fact that Madhu had told him to do so. Similar criticism may be made of Kalu's evidence that he was told by Madhu to get pieces of iron and waste paper for the purpose of preparing bombs. According to Kalu, bombs were made and Madhu produced them, on March 11th. There were four bomb-patkas and a bundle containing iron pieces and other things. Madhu took two light bomb-patkas, Kalu a heavy bomb-patka and a man who has not been identified took the bundle and another bomb-patka. They went to the house of the Sub-Divisional Officer and stood at various places round the house. Then they threw their missiles and there were three explosions, the bundle did not explode, and they ran away. Upto this point Kalu's evidence, so far as it implicates Madhu, is not corroborated. But P. W. 27, Bholanath, gave evidence that he was on the road near to this house and that he heard the explosions and saw some men running away and by the light of the hurricane lantern which he held, he recognised Madhu and Kalu. There is no doubt that some of the bombs or bomb-patkas were dangerous both to property and life. The evidence of the expert witnesses is sufficient to show that if some of these articles had exploded within about 15 feet of a human being, it would have been sufficient to kill him. On the other hand, they were not powerful bombs as is shown by the fact that where one of them had struck the wall of the house, only the plaster was damaged. The real danger doubtless lies in the fact that some at least of them contained pieces of iron and glass. Kalu was tendered a pardon at the commencement of the trial. Some preliminary points were raised by the defence, one being that sanction is required for a prosecution under the Explosive Substances Act and that no explicit sanction had been obtained for prosecution under sec. 5: Further, that no consent had been given to prosecutions under the sections of the Indian Penal Code and consequently, the Special Judge had no jurisdiction to try them. It is true that in the order, dated the 27th May, 1932, only sec. 4 of the Explosives Act read with sec. 120B of the Indian Penal Code and sec. 436 read with sec. 120B of the Indian Penal Code are explicitly mentioned. But the letter from the Deputy Secretary to the Government of Bengal to the District Magistrate of Murshidabad of the same, date shows clearly that the Government consented to a prosecution under sec. 4 of the Explosives Act read with sec. 120B of the Indian Penal Code and sec. 436 read with sec. 120B of the Indian Penal Code and for "such other offence or offences as may be disclosed in the evidence." In our opinion, therefore, the learned Magistrate had jurisdiction to try all the offences for which the Appellants were convicted.

2. Another point raised is that in the conspiracy charge Kalu's name was not included. This undoubtedly was erroneous. But it is quite obvious from the course which the trial took and from the evidence which was given that the Appellants were not misled by this omission and they have not been prejudiced or embarrassed in their defence by the fact that Kalu's name was not mentioned. Sec. 114 (b) of the Indian Evidence Act provides that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. This has been explained in many previous cases both in this Court and in the English Courts as meaning that the material particulars must implicate the accused in order that the corroboration may be such as is intended by the section. Sec. 133 of the Evidence Act provides that an accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The position in law is somewhat difficult to state clearly: but it amounts to this. In a jury trial it is the duty of the Judge to point out to the jury the position in law affecting the evidence of an accomplice and to tell them that they may convict, if they choose, on his evidence alone; but that owing to the circumstances in which the evidence is given, it is, generally speaking, very dangerous to act upon it, unless they find corroborative evidence which implicates the accused person. If such a warning has been given and nevertheless the jury choose to convict the accused in the absence of such corroborative evidence, the conviction will not generally be quashed. In a case such as this, where a Judge is sitting without a jury, he must apply the same rule by treating himself as a jury. If, therefore, these factors were not present to his mind and if there was not sufficient corroborative evidence implicating the accused, then the conviction ought to be set aside: just as in a jury case the same result ought to follow where the necessary warning has not been given by the Judge to the jury. As was stated by Lord Reading, C. J., in *Rex v. Baskerville* L. R. [1916] 2 K. B. 658, 663, this rule of practice has become virtually equivalent to a rule of law. Now in the present case, there is undoubtedly some corroboration implicating the accused against all the Appellants. With regard to Nikhil and Shib Das, however, leaving out for the moment the evidence of P. W. 7, Samed, the corroborative evidence is only as to association between Kalu, Madhu, Nikhil and Shib Das. P. W. 7, Samed, stated that he heard them discussing the question of frightening the Sub-Divisional Officer. In our opinion, this evidence is not sufficient to eliminate the danger of a conviction upon the evidence of an approver. Such being the position, we think that the conviction of Nikhil and Shib Das must be set aside. These two Appellants are, therefore, acquitted.

3. Madhu stands in a different position. In addition to the evidence of association and Samed's evidence about the conversation in which the question of frightening the Sub-Divisional Officer was discussed, there is the evidence of P. W. 7, Bholanath, who saw Madhu running away from the scene of the explosions immediately afterwards. In our opinion, Kalu's evidence as against Madhu is sufficiently

corroborated and his conviction must stand: but in view of all the circumstances we think that it will be sufficient if he serves a sentence of two years" rigorous imprisonment instead of the four years to which he has been sentenced by the Special Judge.

McNair, J.

I agree.