1963 SCC OnLine Gau 3 : (1963) 2 Cri LJ 255

Gauhati High Court
(BEFORE C.S. NAYUDU AND S.K. DUTTA, JJ.)

The State ... Appellant;
Versus
Md. Misir Ali and others ... Respondents.

Government Criminal Appeal No. 11 of 1962, against order of Sub-divisional Magistrate, Nowgong
Decided on December 28, 1961 and February 1, 1963

The Judgment of the Court was delivered by

C.S. NAYUDU, J.:— This appeal by the State is directed against an order of acquittal by the Sub-divisional Magistrate, Nowgong acquitting the respondents who were charged before him, under Sections 326, 148 and 326/149, Penal Code, 1860.

2. The case for the prosecution is that when one Fazar Ali examined as P.W. 1, Abdul Subhan examined as P.W. 2 and Basir Seikh examined as P.W. 3 were on the road in the village of Chenimari at about 8 P.M. on 10th August 1959, all the eight accused persons who figure as respondents in this appeal and some others attacked them with sticks, daos and spears and caused them serious injuries. The three prosecution witnesses fell down, and hearing their cries and the noise on account of the incident, P.W. 4 Moslem Munchi who was living close by, came to the scene and saw the three prosecution witnesses 1 to 3 lying with bleeding injuries and also saw accused respondents Nos. 1, 2, 3, 4, 6 and 7 going away from the place of occurrence, carrying with them lathis, daos and spears. Thereafter Moslem Munchi P.W. 4, with the help of others carried the injured persons to the Jagiroad hospital, where they were treated for the injuries. P.W. 1 proceeded to the police station at Morigaon some thirteen miles away and lodged a first information report to the police on the following day, that is 11-8-59 at 8-30 A.M. In the first information report P.W. 1 showed all the respondents as the accused persons and in addition one Tafiuddin and others whose names he did not note in the first information report. Thereupon the police took up investigation and sent the three prosecution witnesses for medical examination by the medical office examined in the case as P.W. 5. On the person of Faza Ali P.W. 1 the medical officer noticed two lacerated wounds which in his opinion were caused by blunt weapons. On the person of Md. Abdul Subhan P.W. 2 he noticed three punctured wounds and one linear lacerated wound. In the opinion of the medical officer two of the three punctured wounds on the person of P.W. 2 Abdul Subhan were grievous in nature. The medical officer also gave his opinion that the punctured wounds must have been caused by a sharp pointed instrument, whereas the lacerated wound could have been caused by a blunt weapon. On the person of Basir Seikh P.W. 3 the medical officer P.W. 5 noticed one punctured wound caused by a sharp pointed weapon and two lacerated wounds caused by blunt weapons. After completing the investigation in the case the police filed a charge-sheet which led to the present prosecution before the Court below. The learned Magistrate framed changes against Md. Misir Ali,

Moniruddin, Yad Ali Sarkar and Jabbar Ali for having voluntarily caused grievous hurt to Abdul Subban by means of spear which is a deadly pointed weapon thereby committing an offence under Section 326, Penal Code, 1860. The second charge in the case was framed

against all the eight accused respondents, for rioting armed with deadly weapons, an offence punishable under Section 148, Penal Code, 1860. The third charge was framed against accused respondents Salimuddin, Abbas Ali, Amjad and Amchar for having been members of an unlawful assembly and thereby committing an offence punishable under Section 149 read with section S. 326, Penal Code, 1860.

3. On trial the learned Magistrate in a brief and most casual judgment found the accused not guilty of the charges framed against them and acquitted them of the charges. Hence the present appeal by the State.

4. A perusal of the judgment of the learned Magistrate shows that, it cannot be called a judgment at all in the eye of law and is certainly not in conformity with either the letter or the spirit of Section 367, Criminal Procedure Code. We find practically no discussion of the prosecution evidence in the judgment. Although a point for determination was framed, it is not followed by any intelligent discussion of the pros and cons of the case and consideration of the evidence in regard to the charges and in respect of each of the accused. It does not appear from the judgment that the learned Magistrate took the trouble of going through the evidence or judicially considering the same before he recorded a decision to reject it. To say the least, the judgment is vague, perfunctory and a carelessly prepared document. In our opinion the learned Magistrate had failed in the disposal of the case to judicially weigh the evidence adduced in the case and to apply his mind to that evidence and consider it with reference to the charges, in order to determine whether that evidence has or has not established the charges framed against the accused persons. We also notice that the learned Magistrate apparently proceeded on the assumption that in this case as in other cases of sudden rioting and ‘marpit’, as he calls it, recognition of the accused persons could not be established beyond any reasonable doubt.

5. In view of the unfortunate state of the judgment it has become necessary for us to examine the evidence and give our careful consideration to it. Accordingly both the learned Government Advocate and Mr. Talukdar the learned counsel for, the respondents took us through the evidence carefully and invited our attention to the material portions thereof. (The judgment then discusses the prosecution evidence in Para 7 and proceeds).

6. It may be seen from the above that all the eight accused persons were identified as having been present at the scene of occurrence at the time when the occurrence took place, that they had approached the place more or less together from the same direction armed with various dangerous weapons and that they attacked the three prosecution witnesses Nos. 1 to 3 inflicting severe injuries on them.

7. The accused in their examination made no statement except uniformly asserting that each was not guilty. No specific reply was given to the questions put by the learnad Magistrate, the only answer being ‘not guilty’ in each case. It does not appear, therefore, from their statements why they claimed to be not guilty — whether it is because they were not present at the incident and had not participated in it or whether they were not guilty because they had acted in the exercise of the right of self -defence. It is clear that no specific defence as such has been put forward by the

accused in this case. Their statement was no more than the plea to the charges that was earlier made in the case. It is true, as pointed out by the learned counsel for the accused that one or two suggestions had been made to the prosecution witnesses vaguely indicating what at that stage may have been in the mind of the accused. For example, P.W. 1 was questioned in cross-examination and the following answers were elicited:

> "Moniruddin filed a false case of assault on that day against us (myself, Subhan and Bosir, Moslem and Idris). It is not a fact that we assaulted Moniruddin first and thereafter somebody else assaulted us elsewhere."

8. To P.W. 3 questions were put eliciting the following answers:

> "It is not a fact that there was no occurrence in the evening. I cannot say that accused Moniruddin got injuries on that date."

9. Mere suggestions not supported by any specific statements made by the accused persons and not supported by any defence evidence would have no evidentiary value. No importance could be attached to the above suggestions made during the cross-examination of P.Ws. 1 and 3 in this case. In any case as the burden of establishing the guilt of an accused person is always on the prosecution, the question whether the charges had been made out against the accused persons will have to be determined with reference to the prosecution evidence adduced in the case.

10. On a careful consideration of the prosecution evidence we are satisfied that all the eight accused persons were present at the occurrence and participated in the assault of the P.Ws. 1 to 3 at the time. We are also satisfied that they were armed with dangerous weapons like lathis, daos or spears, each one of which was capable of causing serious injuries if employed as a weapon of offence.

11. We are also satisfied that accused 1, accused 2, accused 3 and accused 7 inflicted the serious injuries on the person of Subhan P.W. 2 and the remaining accused along with the above-Mentioned four persons formed themselves into a riotous assembly with the common purpose and object of inflicting severe injuries on the prosecution witnesses, particularly P.W. 2, against whom they had reason to bear severe grudge.

12. On the question whether the accused persons Nos. 1, 2, 3 and 7 who inflicted injuries on Subhan P.W. 2 can be held to be guilty of the charge under Section 326, Penal Code, 1860, we feel that the evidence adduced in the case did not establish beyond reasonable doubt that the injuries inflicted on P.W. 2 by one or other of these persons can be regarded as grievous within the meaning of Section 320, Penal Code, 1860. It is true that the medical officer describes two of the punctured wounds on the person of P.W. 2 as grievous, but as correctly contended by Mr. Talukdar the learned counsel for the accused, the decision has to rest with us although we can take into consideration the opinion of the medical officer in the case. The prosecution apparently seek to bring the case within the eighth category described in Section 326, Penal Code, 1860, namely any hurt which endangers life. Although a spear thrust in the chest is likely to have fatal results, if the spear penetrate sufficiently deep, we consider that having regard to the nature of the injury, namely that the thrust caused a punctured wound which only extended upto the pleural cavity and did not cause injury to the pleura or to the lungs or to any other vital organ of the

body, it would be a doubtful case whether the hurt in question could be said to be of that category which has the effect of endangering life. Hence, we feel that the proper section that would apply would be Section 324, Penal Code, 1860, namely voluntarily

causing hurt with dangerous weapons. We would accordingly find accused 1 Misir Ali, accused 2 Moniruddin, accused 3 Yad Ali Sarkar and accused 7 Abdul Jabbar alias Jabbar Ali guilty on the first charge, of the offence under Section 324, Penal Code, 1860 and sentence them each to rigorous imprisonment for a term of three years.

13. We are satisfied on the evidence adduced in the case that sill the accused were armed with deadly weapons at the time of the rioting and are accordingly guilty of the second charge, namely of rioting armed with deadly weapons, under Section 148, Penal Code, 1860, and we would accordingly convict each of them of the charge and sentence each of them to rigorous imprisonment for two years.

14. On the third charge against accused 4 Abbas Ali, accused 5, Amjad Ali, accused 6 Amchar Ali and accused 8 Salimuddin, we find them guilty under Section 324 read with Section 149, Penal Code, 1860 and would accordingly sentence each of them to rigorous imprisonment for two years. The sentences in each case shall run concurrently.

15. Before we conclude this judgment it is necessary to point out that an unfortunate practice still continues in the subordinate Courts, of placing much importance on mere omissions from the statements made by prosecution witnesses to the police during investigation. Strictly according to law an omission cannot be regarded or proved as a contradiction, firstly because there is no diction in the case of an omission, because an omission implies absence, of diction, and secondly because Section 162, Criminal Procedure Code permits the limited use of a statement made to the police, and what is permitted to be used is a portion of that statement which is found to be contradictory to the evidence given in the Court. Section 162, Criminal Procedure Code thus only permits the statement made to the police officers to be used for that limited purpose, and not the statements not made during the police investigation. Again, an omission cannot be proved as a contradiction, because Section 145 of the Evidence Act which is the section dealing with the procedure to prove a contradiction, deals with statements in Writing, and requires the portion of the writing which is sought to be used for contradiction to be brought to the notice of the witness and the witness being questioned about it. For that reason again, an omission, in a previous statement cannot be used for the purpose of contradiction under Section 145 of the Indian Evidence Act. Hence, what is not found in a police statement under Section 162, Criminal Procedure Code, cannot be used under that section, nor can the same be proved under Section 145 of the Evidenced Act.

16. We should not, however, be understood as stating that in no case could a serious and glaring omission from a police statement be relied on. It may not be relied on as a contradiction as such, but it may be relied on as a relevant circumstance. To give an example, if a witness stated on oath, before the Court trying a murder charge, that A, B and, C attacked and caused the death of the deceased, and before the police he only stated that A and B did the murderous assault, that, circumstance may be brought out not as a contradiction under Section, 145 of the Evidence Act but as something having an effect somewhat similar to a contradiction, in that a different case, as it were, is put forward by the witness for the prosecution, disclosing perhaps an attempt to improve or develop the prosecution case, which thus, may have the effect of casting a doubt on the prosecution case as put forward before the Court, and also on the veracity of the witness, at least to the extent of his implicating ‘C’.

17. We also regret to note that the procedure to be followed in the case of proving the contradictions appearing in the statements made by prosecution witnesses to the police during investigation, is not being followed by subordinate Courts, as well as by the counsel appearing in criminal cases.

18. We had occasion to point out the correct procedure more than once and it would be worth while restating it. If it is intended by an accused to contradict the

evidence given by a prosecution witness at the trial, with a statement made by him before the police during the investigation, the correct thing to do is to draw the attention of the witness to that part of the contradictory statement, which he made before the police, and question him whether he did in fact make that statement. If the witness admits having made the particular statement to the police, that admission will go into evidence and will be recorded as part of the evidence of the witness and can be relied on by the accused as establishing the contradiction. If, on the other hand, the witness denies having made such a statement before the police, the particular portion of the statement recorded under Section 162, Criminal Procedure Code should be provisionally marked for identification, and when the investigating officer who had actually recorded the statement in question, comes into the witness box, he should be questioned as to whether that particular statement had been made to him during the investigation, by the particular witness, and obviously after refreshing his memory from the Police Case Diary the investigating officer would make his answer in the affirmative. The answer of the investigating officer would prove the statement which is then exhibited in the case and will go into evidence, and may, thereafter, be relied on by the accused as a contradiction. This is the only correct procedure to be followed, which would be in conformity wisth Section 145 of the Evidence Act.

19. In the result, this appeal is allowed as indicated above.

EG/S/D.V.C.

20. *Appeal allowed*.