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JAMUNA SINGH

v.

STATE OF BIHAR

September 22, 1966.

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[V. RAMASWAMI, V. BHARGAVA AND
RAGHUBAR DAYAL, JJ.]

*Indian Penal Code, 1860 (Act 45 of 1860), ss. 436, 109, 115—
Acquittal of main offender under s. 436—Conviction of abettor when
and how justified.*

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The appellant was convicted by the trial court, *inter alia*, of an offence under s. 436 read with s. 109 of the Indian Penal Code for having instigated one of his co-accused to burn a hut. The High Court acquitted the said co-accused of the offence under s. 436 but maintained the conviction of the appellant for that offence read with s. 109. In appeal by special leave before this Court it was urged that after the acquittal of the main offender the appellant's conviction for abetting the offence under s. 436 was illegal.

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HELD: (i) It cannot be held in law that a person cannot be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The question of the abettor's guilt depends on the nature of the act abetted and the manner in which the abetment was made. Under s. 107 I.P.C. a person abets the doing of an act in either of three ways which can be instigating any person to do an act; or engaging with one or more person in any conspiracy for the doing of that act; or intentionally aiding the doing of that act. If a person instigates another or engages with another in a conspiracy for the doing of an act which is an offence, he abets such an offence and would be guilty of abetment under s. 115 or s. 116 I.P.C., even if the offence abetted is not committed in consequence of the abetment. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence. [472 A-C; 473 A]

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Barendra Kumar Ghosh v. The King Emperor, L.R. 52 I.A. 40 and *Faguna Kanta Nath v. The State of Assam*, [1959] Supp. 2 S.C.R. 1, relied on.

Gallu Sah v. The State of Bihar, [1959] S.C.R. 861, held inapplicable.

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(ii) In the present case the person charged with the main offence under s. 436 had been acquitted and there was no finding of the courts below that the fire was set by any person who was participating in the incident along with the appellant and at his instigation. The appellant could not therefore be held guilty under s. 436 read with s. 109. [474 B]

It had been held by the High Court that the appellant had instigated his co-accused to commit the offence under s. 436 I.P.C. He must therefore be held guilty under s. 436 read with s. 115 I.P.C. [474 E]

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Conviction and sentence altered accordingly.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 238
of 1964.

Appeal by special leave from the judgment and order dated July 27, 1964 of the Patna High Court in Criminal Appeal No. 481 of 1963. A

D. P. Singh, for the appellant.

The respondent did not appear.

The Judgment of the Court was delivered by B

Raghubar Dayal, J. Jamuna Singh, appeals, by special leave, against the order of the Patna High Court dismissing his appeal and confirming his conviction and sentence under ss. 323 and 436 read with s. 109, I. P. C.

Along with the appellant, four other persons were prosecuted for committing riot and the offence under s. 323 I.P.C. Jodha Singh, one of them, was also prosecuted for committing the offence under 436. I.P.C. The Assistant Sessions Judge acquitted one of the five persons and convicted the other four of the offence under s. 323 I.P.C. He also convicted Jodha Singh of the offence under s. 436 I.P.C. C

These four convicted persons appealed to the High Court. The High Court acquitted two of the appellants before it. It acquitted Jodha Singh of the offence under s. 436 I.P.C. but maintained his conviction under s. 323 I.P.C. Jamuna Singh's appeal was dismissed. He has come up on appeal to this court. D

Learned counsel for the appellant did not question the conviction of the appellant under s. 323 I.P.C. He has contended that the conviction of the appellant for the offence under s. 436 read with s. 109 I.P.C. is bad in law, when Jodha Singh, who is said to have set fire to the hut of Baishaki at the instigation of the appellant, has been held to be not guilty of setting fire to the hut. E

Before dealing with the contention, we may refer to the relevant provisions of the Indian Penal Code. F

“107. A person abets the doing of a thing, who—
First—Instigates many person to do that thing; or,
Secondly—Engages with one or more other person or persons in any conspiracy for the doing of that thing,
if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or G

Thirdly—Intentionally aids, by an act or illegal omission, the doing of that thing.

Explanation 1—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, H

A or attempts to cause or procure a thing to be done, is said to instigate the doing of that thing.

B *Explanation 2*—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

108. A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

C *Explanation 2*—To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

D *Illustrations*

(a) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

E 109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

F *Explanation*—an Act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy or with the aid which constitutes the abetment.

G 115. Whoever abets the commission of an offence punishable with death or imprisonment for life, shall if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

H and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

It cannot be held in law that a person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The question of the abettor's guilt depends on the nature of the act abetted and the manner in which the abetment was made. Under s. 107 I.P.C. a person abets the doing of an act in either of three ways which can be: instigating any person to do an act; or engaging with one or more person in any conspiracy for the doing of that act; or intentionally aiding the doing of that act. If a person instigates another or engages with another in a conspiracy for the doing of an act which is an offence, he abets such an offence and would be guilty of abetment under s. 115 or s. 166 I.P.C., even if the offence abetted is not committed in consequence of the abetment. The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed. This is clear from Explanation 2 and illustration (a) thereto, to s. 108 I.P.C.

In *Barendra Kumar Ghosh v. The King Emperor*(¹) it was said

“Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart.”

This Court reiterated it and said in *Faguna Kanta Nath v. The State of Assam*(²) :

“Under the Indian law for an offence of abetment it is not necessary that the offence should have been committed. A man may be guilty as an abettor whether the offence is committed or not.”

In the present case, the appellant is said to have instigated Jodha Singh to commit the offence of mischief under s. 436. I.P.C. Jodha Singh has been acquitted of the offence under s. 436. It can therefore be said that he did not set fire to the hut of Baishaki. The appellant's instigating Jodha to commit the offence under s. 436 I.P.C. did amount to his abetting the offence under s. 436 and he would therefore be guilty of the offence of abetment under s. 115 I.P.C. since Jodha did not commit the offence. It may be mentioned that Baishaki's hut was actually set on fire by someone, but another's setting fire not on the instigation of the appellant will not make the appellant guilty of abetment under s. 109 I.P.C. as the setting on fire by another was not in consequence of the abetment. The appellant will therefore not be guilty of the offence of abetment under s. 436 I.P.C. read with s. 109, but will be guilty of the offence of s. 436 read with s. 115 I.P.C. as the offence under s. 436 I.P.C. is punishable with imprisonment for life.

(1) L.R. 52 I.A. 40, 53.

(2) [1959] Supp. 2 S.C.R. 1, 5.

A It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence. The case of *Faguna Kanta Nath*⁽¹⁾ lays this down. The observations of this Court in that case, at p. 7, bring out clearly the distinction

B in the case of persons instigating another or engaging in conspiracy with another on the one hand and that of a person aiding the person in committing a certain offence. The observations are:

C “It is not the prosecution case that the appellant abetted the offence by instigating Khalilur Rahman to demand the illegal gratification; nor has the prosecution set up or proved a case of conspiracy between the appellant and Khalilur Rahman for the commission of an offence under s. 161. On the findings of the Court the appellant received the money for and on behalf of Khalilur Rahman and the evidence of the complainant is that Khalilur Rahman had asked him to hand over the money to the appellant. If

D Khalilur Rahman is acquitted and therefore the offence under s. 161 is held not to have been committed, then in this case no question of intentionally aiding by an act or omission the commission of the offence arises.”

E The case reported as *Gallu Sah v. The State of Bihar*⁽²⁾ referred to by the Court below, is not applicable to the facts of the present case. There, one Budi was said to have set fire to a hut at the instigation of Gallu Sah. Budi had been acquitted by the High Court. Gallu Sah’s conviction for the offence under s. 436 read with s. 109 I.P.C. was affirmed by the High Court. This Court repelled the contention that Gallu Sah’s conviction was bad in law. It held it to be correct as the hut had been set on fire by one of the persons of

F the unlawful assembly of which Gallu Sah was a member. The Court observed at p. 866:

G “It seems to us, on the findings given in the case, that the person who set fire to the hut of Mst. Rasmani must be one of the persons who were members of the unlawful assembly and he must have done so in consequence of the order of the present appellant. It is, we think, too unreal to hold that the person who set fire to the hut of Mst. Rasmani did so irrespective, or independently, of the order given by the present appellant. Such a finding,

H in our opinion, would be unreal and completely divorced from the facts of the case and it is necessary to add that no such finding was given either by the learned Assistant Sessions Judge who tried the appellant or the learned

(1) [1959] Supp. 2 S.C.R. 1.

(2) [1959] S.C.R. 861.

Judge of the High Court. As we read the findings of the learned Judge, it seems clear to us that he found that the person who set fire to the hut of Mst. Rasmani did so in consequence of the abetment, namely, the instigation of the appellant.”

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In the present case, there is no finding of the Court below and it cannot be said that the fire was set by any person who was participating in the incident along with Jamuna Singh and at his instigation. Three alleged co-accused have been acquitted and therefore cannot be said to have taken part in the incident. Jodha Singh and Jamuna Singh took part in the incident according to the findings of the Court below and Jodha Singh did not set fire to the hut. It follows that it cannot be held that Baishaki's hut was set fire to by any one at the instigation of Jamuna Singh.

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The result is that Jamuna Singh's conviction under s. 436 read with s. 109 I.P.C. is not correct in law.

Jamuna Singh's instigating Jodha Singh to set fire to Baishaki's hut is held established by the High Court and makes it an offence under s. 436 read with s. 115 I.P.C. The conviction of Jamuna Singh under s. 436 read with s. 109 I.P.C. can be legally altered to one under s. 436 read with s. 115 I.P.C. the latter being a minor offence.

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The appellant was sentenced to eight years' rigorous imprisonment under s. 436 read with s. 109 I.P.C. and the offence under s. 436 read with s. 115 I.P.C. is punishable with imprisonment up to seven years and with fine. Reduction in sentence is necessary.

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In the result, we dismiss the appeal against the appellant's conviction under s. 323 I.P.C. and allow it with respect to his conviction under s. 436 read with s. 109 I.P.C. which we modify by altering it to one under s. 436 read with s. 115 I.P.C. and reducing the sentence to four years' rigorous imprisonment.

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G. C.

Appeal allowed in part.