

Hashmatulla Rahatulla Vs. Emperor

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Court : Mumbai

Decided On : Dec-20-1945

Reported in : AIR1946Bom465; (1946)48BOMLR382

Judge : Macklin,; Lokur and ;Rajadhayaksha, JJ.

Appeal No. : Criminal Appeal No. 14 of 1945

Appellant : Hashmatulla Rahatulla

Respondent : Emperor

Judgement :

Macklin, J.

1. This is an appeal under the amended Section 411 A of the Criminal Procedure Code, 1898, against the verdict given by a majority of seven to two in a trial held before Mr. Justice Bhagwati on a charge of murder. The majority of the jury convicted the accused of murder, and Mr. Justice Bhagwati accepted the verdict and sentenced him to transportation for life, but at the same time gave a certificate that this was a fit case for appeal under the amended law.

2. The powers of this Court in dealing with appeals from verdicts of a High Court jury have been laid down in Government of Bombay v. Fernandez (1944) 47 Bom. L.R. 363. The effect of that decision is that, although the power of interference

given by Section 411 A is very wide, it does not necessarily follow that the High Court is bound to follow it indiscriminately in every case, and in practice the High Court will not exceed the powers which it ordinarily exercises in dealing with cases referred to it under Section 307 of the Code, although both in appeals under Section 411 A and in references under Section 307 the powers which it is entitled to use if it thinks fit are very much wider. In practice references under Section 307 are treated as if the test for interference were either a material error in the charge to the jury or a verdict which on the facts of the case is manifestly erroneous or unreasonable. Here there is no question of any error in the charge to the jury; and the principal question which we have to decide is whether it can be said that the verdict of the jury in this case is the verdict of unreasonable men, having regard to the facts of the case. A subsidiary question arises as to whether we ought in this case to exercise our power to direct a new trial in view of the fact that certain questions which might properly have been put to the accused under Section 342 of the Code and which ordinarily would have been put to the accused under that section were not put to him. [His Lordship then dealt with the facts of the case and continued:]

3. When called upon to make a statement the accused said that at about 7 o'clock he returned from his hair cutting saloon and saw the three Pathans in his room, two of them inside and one outside. As he arrived, the two Pathans inside were coming out, and one of them aimed a blow at the accused. The accused then caught hold of the knife with his hand and was cut across the fingers. He again caught hold of the knife, and was again cut across the fingers when the Pathan pulled the knife out of his grasp. He then says that the Pathans started running away and that he chased them shouting 'thieves, thieves.' When he came out on the road he saw the deceased lying on the road, and a victoria was fetched and the deceased taken to hospital. It is to be noted that the apparent meaning of this statement is that the accused did not see the woman injured until he saw her lying on the road. The statement covers the use of the accused's knife, and it also covers his presence on the spot either at the time of the murder or almost immediately afterwards. But it does not cover certain other points upon which the prosecution relies, namely the dying declaration, the motive, the request to Abdul Rahim to tell a false story to the police about Pathans, and the fact of the knife

having been bought in a false name; nor does it cover the story of the knife having been thrown behind the gharry. Speaking for myself, I am not quite clear as to the meaning of the evidence on this last point; I am not altogether satisfied that the intention of the witness was to suggest that the accused had made a concealment of bringing the knife from the house.

4. It is argued before us that the omission to ask questions on these points so as to enable the accused to explain them is either an illegality which vitiates the whole trial or an irregularity which is material in the sense that the jury must have been influenced by this part of the evidence and were probably also influenced by the omission of the accused to explain these incidents, though the omission of the accused to explain them was due to no fault of his own, he having been asked no questions about them. We are satisfied that the omission to ask specific questions on points like these is not an illegality. The accused was questioned generally on the case and made a general statement; and that we think is all that the law requires, namely a formal compliance with the provisions of Section 342 of the Code. But there can be no doubt that it is the duty of the Judge to examine an accused person on points which are of great importance to the case against him. This is made clear from the judgment of the Privy Council in *Dwarkanath Varma v. Emperor* : (1933)35BOMLR507 .. But it does not follow that the omission to question an accused person on specific points, even though it may be the duty of the Judge to do so, will necessarily vitiate the trial. If the omission to question an accused person on such points is not an illegality, then the omission to do so will not vitiate the trial unless it has in fact caused a failure of justice (see Section 537 of the Code); and whether it has or has not occasioned a failure of justice in any particular case is a question depending on that case alone.

5. It is argued that here the jury must have been influenced by this part of the evidence which was not specifically put to the accused for explanation. But it is very doubtful if that is so, because the learned Judge dealt with the point of the dying declaration and with the point of the alleged corruption of the witness Abdul Rahim at great length in his charge to the jury and gave the jury the strongest possible hint that they ought not to rely on that part of the evidence. He did not refer to the fact of the knife having been bought in a false name; but that, as I have

said, does not seem to take the case very much further, since the accused had a friend with him and any attempt to give a false name seems pointless. In practice, therefore, it is difficult to see how the omission of the learned Judge to put specific questions to the accused on these points and the consequent failure of the accused to give an explanation of them-can have had any practical effect upon the verdict of the jury. I may mention that it is difficult to imagine what explanation the accused could have given beyond saying that the evidence was false; and that in effect is what the learned Judge himself said to the jury, namely that the evidence must be accepted only with the utmost caution. I may also mention that the evidence as to the knife having been purchased in a false name has never been disputed and no questions in cross-examination were put to the witness on that point.

6. There is, however, ample evidence in our opinion to justify the jury in reaching the verdict which they did reach, quite apart from the evidence about which the accused -was asked no specific questions. It is true that immediately after this occurrence the conduct of the accused, so far as the general public could see, was that of a man who was genuinely distressed at what had happened and was doing what he could to alleviate the sufferings of the woman; and his behaviour generally was that of a person who was sincerely fond of her and had no possible reason for killing her. The learned Judge in his summing up dwelt on this point at great length and asked the jury if they thought that it was, possible for the accused before them to behave in this way if he had killed the woman only a few minutes before. But I take it that the jury were prepared to think that he really was as much of an actor as all that; and it cannot be denied that for a murderer to be successful he must always be something of an actor.

7. The real question however is whether the rest of the evidence led by the prosecution is enough to justify us in finding that the verdict of the jury was a reasonable verdict. The rest of the evidence seems to me to come to this. The accused was undoubtedly on the spot, either at the murder or immediately afterwards; from that there is no possible escape, and it is not disputed. The knife used in the murder was the accused's own knife, and that knife was not taken away by the assailant, whoever he was; it was left in the room. As soon as the

accused left the room, he told the witness Tatyā that the woman had been killed, though in his own statement he suggests that he had no cause to know that she had been killed until he found her on the road. He told the same thing to the witness Allibux before he had seen the woman lying on the road. The witness Abdul Rahim says that he saw first the woman and then the accused come out of the house but no Pathans, though on the story of the accused it was essential for the Pathans to come out between the woman and the accused; and he made contradictory statements as to where these Pathans had gone to the police constable and to the witness Mahomedali Akbar. Of course the fact of an accused person having told a false story in his statement to the Court is immaterial, because what the Court has to see is whether the evidence for the prosecution is enough to justify a conviction, and it is only when a case has been made out by the prosecution that it is necessary to examine the accused at all. But here it is admitted that the woman was killed with the accused's own knife and that the accused was present either at the murder or immediately afterwards, and therefore it would have been perfectly reasonable for the jury to come to the conclusion that the accused was the murderer, even if there had been no other evidence in the case and even if the accused had refused to make a statement at all. The accused having made a statement, they would be bound to examine his statement and see how far they thought it could be true; and when there is evidence which they are entitled to believe and which contradicts the statement of the accused in material particulars, they would be justified in rejecting the story of the accused altogether. They would not be justified, even in this simple choice between the story of the accused and the story of the prosecution, in believing the accused to be guilty because he told a false story; but they would be perfectly justified in rejecting his story and relying entirely on such evidence as was covered by the story of the .-accused and accepting the version which the witnesses for the prosecution gave of those incidents. As to the truth of the evidence which is not accepted by the defence as true, it is enough to describe it as such that the jury would have been justified in accepting it if in fact they did so. Even if we ignore the dying declaration, the statement of Abdul Rahim, the false name under which the knife was bought, and any allegations or suggestions of motive that may have been made by the prosecution, the jury would still be perfectly entitled to convict

upon the simple evidence which the accused has attempted to explain. We cannot therefore say that the jury was wrongly influenced by the omission of the learned Judge to examine the accused in full on specific questions; nor can we say that, even ignoring those items of the prosecution evidence, their verdict was an unreasonable verdict. We are satisfied that justice has been done in this case, and we must dismiss the appeal.

8. For reasons to be given) by Mr. Justice Lokur, we are of opinion that in cases such as this, where the Judge has accepted a verdict that was not unanimous, he should be slow to give a certificate. It should be left to the appellate Court to say whether there-should be an appeal or not.

Lokur, J.

9. I concur. I wish to add a few words regarding the certificate granted in this case under Section 411 A of the Criminal Procedure (Code. When in a case tried, before a High Court the jury are unanimous in their opinion, the Judge is bound by their verdict and he must give judgment in accordance with it. When the jury are not unanimous and at least six of them are of one opinion, the Judge may or may not accept the verdict of the majority. If he disagrees with their verdict, he must at once discharge the jury. If he does not think it necessary to express disagreement with that verdict, he must give judgment according to it. But if there are not as many as six jurors who agree in their opinion, the jury must be discharged. This is the gist of Sections 305 and 306 of the Criminal Procedure Code; and it follows that when the Judge has accepted the verdict which is not unanimous, he must be deemed not to have thought it necessary to express disagreement with it. In all cases where the judgment is in accordance with the verdict of the jury, whether unanimous or not, a Court: of appeal can interfere with it on a point of law. But an appeal on facts requires a certificate either of the Judge who tried the case or of the Court of appeal. It is now well settled by the ruling in *Government of Bombay v. Fernandez* (1944) 47 Bom. L.R. 363 that where there is no point of law and there is no misdirection or non-direction in the Judge's charge to the jury, a Court of appeal will not interfere with the verdict of the jury unless it appears to be manifestly wrong or unreasonable, and therefore a certificate to appeal on facts

should be granted only when, prima facie, the verdict is manifestly wrong or erroneous. When the trial Judge grants such a certificate, it obviously means that he does not agree with the verdict of the jury. If he discovers that there was some misdirection or non-direction in his charge to the jury or that there was some error of law, an appeal on such grounds does not require a certificate under Section 411 A of the Code. But if he thinks that the verdict of the jury is wrong, but has got to be accepted by law as it is unanimous, the Judge may give a certificate to enable an appeal on facts.. Even then the appeal Court will not interfere with the verdict unless it is manifestly wrong or unreasonable. But where the verdict is not unanimous and the Judge thinks that it is not acceptable to him, he is bound to discharge the jury under Section 305(3) of the Criminal Procedure Code.

10. In the present case the verdict was not unanimous. We are told that the learned Judge was inclined to discharge the jury as he did not agree with their verdict, but to avoid a retrial, he accepted it and granted a certificate to appeal on facts. There is nothing on record to show that the learned Judge disagreed with the verdict of the jury. In that case the only course open to him was to discharge the jury under Section 305(3), but as he passed judgment in accordance with the verdict of the jury, it must be taken that he did not think it necessary to disagree with it. Had he thought that the accused should not be subjected to another trial before a different jury, it was open to him to discharge the jury and then make an entry to that effect, which under Section 308 would have operated as an acquittal. It is only where the verdict is unanimous and the Judge is bound to accept it though he disagrees with it, that it would be reasonable to him to grant a certificate. But it would be meaningless to grant it when he is not only not bound to accept the verdict but is bound to discharge the jury if it is not acceptable to him. In my opinion where the verdict is not unanimous and the Judge does not agree with it, it is not open to him to accept the verdict and then grant a certificate under Section 411 A of the Criminal Procedure Code to appeal on facts.

11. On the merits of this appeal I have nothing to add to what my learned brother has said, and I agree that it should be dismissed.

Rajadhyaksha, J.

12. I agree and have nothing to add.

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