

Emperor Vs. Tara and ors.

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SooperKanoon Citation : sooperkanoon.com/459627

Court : Allahabad

Decided On : May-15-1923

Reported in : (1923)ILR45All633

Judge : Walsh and ;Kanhaiya Lal, JJ.

Appellant : Emperor

Respondent : Tara and ors.

Judgement :

Walsh, J.

1. This is a very difficult case which has given us a great deal of trouble, and the results which probably involves a miscarriage of justice, but, speaking for myself, I have no doubt whatever as to the legal principles applicable to it, and as to the applicability of them to the peculiar circumstances of the various appellants before us. Now there are three cases, each of them involving a large number of alleged dacoits who were tried together for participation in three separate dacoities, committed at different times and at different places, but round about the same season and round about the same neighbourhood. Their connection arose more from the alleged co-operation of a large number of the accused in each of them, than from any other circumstance showing direct connection between the three dacoities. There were really four in all, and I desire to say at once, because I shall have something to say hereafter by way of criticism, that the police and the

Sessions Judge were alike confronted with a difficult task.

2. We are dealing today with one only of these dacoities,, namely, that committed at Sarai Chabila, on the night between the 23rd and 24th of July, at the house of one Rate Ram and others in the same compound. The other appeals relate to dacoities committed on the 9th of March of the same year, 1922, and on the 28th of June, 1922. The fourth dacoity, which the Judge says was thought by the investigating officer to be closely connected with this dacoity by reason of its being carried out by the same participants, occurred on the 20th of July.

3. We have not heard the other appeals, but we are told by the Assistant Government Advocate that in substance, and in respect of the characteristics which have evoked our criticisms of the judgment in this case, the other two appeals, which are still pending, do not greatly differ from this, and, therefore, although this decision does not govern the others, this case, on the other hand, must be considered to be a type of the others, and the result in the others when we reach them must be governed by the principles which we propose to lay down in this, and the criticisms which we propose to pass upon the procedure unfortunately adopted in this case must be read with reference to the other cases *mutatis mutandis*.

4. It cannot be denied that the general characteristics in this case, at any rate,-- and we are told both by the counsel for the defence and by the Assistant Government Advocate that the same characteristics apply to the other appeals,-- resemble more a gang case, in which the evidence obtained by the police, mainly through approvers, of association and active participation in planning and preparation and so forth, is applicable to a class of persons varying in number who have set out to commit a series of joint crimes.. The learned Judge himself, as shown by his judgment, experienced insuperable difficulty in avoiding reference to the other cases from time to time, and he also, from time to time utilized to a quite considerable extent material which he had got, either from the police evidence, or from what seems not at all improbable also police diaries, tending to throw suspicion and afford clues which were entertained by the police generally against particular individuals before they got any definite information with regard to the

commission of this or the other of the dacoities which I have mentioned. Another characteristic is that there is a total absence, very unusual in a case where so many convictions have been secured in the commission of a particular dacoity in a particular village, of any attempt to obtain identification by villagers or the complainants or their households, and none of them have been called to give evidence.

5. Another exceptional characteristic is that, with the exception of an absconding accused to whom we shall have to refer again, no loot has been traced, and as against the 17 appellants who have been convicted, there is no evidence of any loot found in their possession.

6. We now come to the peculiar and embarrassing features of this case. One of the appellants is a man named Kishan. Somehow, it does not matter how, the police got his name and came into touch with him. He immediately informed them that he was ready to give information. He admitted (this of course is in the nature of a confession which is rendered inadmissible by law and it really ought not to have appeared upon the evidence at all) participation in the dacoities into which the police were inquiring, and he plainly intimated to the police that he was willing to tell them what he knew, for a consideration. Eventually he was put up under Section 104 of the Code of Criminal Procedure. He made an elaborate statement under that section amounting to a confession. He was put upon his trial and has been convicted and that confession has been used by the learned Judge not merely under Section 30 of the Evidence Act against all the appellants as the confession of a co-accused, but it has, and this is the real difficulty in the case, formed the foundation and main structure of the whole of the learned Judge's reasoning in the judgment. No criticism could be passed upon the learned Judge for his method of dealing with the rest of the evidence, if this confession had been admissible. He has sought, and found to his own satisfaction, adequate corroboration of the confession in the case of each person whom he has convicted upon it, but the serious question is whether it was admissible at all. Both of us are satisfied beyond question that it was not only inadmissible, but that the learned Judge has really made a serious mistake in not realizing from the first how clearly on his own statement it was rendered inadmissible. The Assistant Government

Advocate did not attempt to combat the view which we take upon the assumption that the learned Judge meant what he said. What the learned Judge has said is this:--First, Kishan was clearly asking for a pardon. He refused to give any information to the police until some quid pro quo could be, as he hoped, obtained. Secondly, he communicated his frame of mind to Ram Sarup, the investigating officer. Thirdly, on the morning of the 6th of August, Ram Sarup took Kishan to the Collector's bungalow for the express purpose of negotiating for a pardon. It is not suggested that Kishan took part in the negotiation. Of course he did not. But it would be equally absurd to suppose that he was not well aware of the object of the visit to the Collector's bungalow. There was a hitch in the negotiation. Ram Sarup and Kishan were sent back to the Sub-Divisional Officer with a note and some part of Kishan's statement was recorded that day. The rest of it was completed the next morning. It would not be a violent presumption to conclude that having regard to all that had passed before, Kishan, when he returned to the Sub-Divisional Officer from the visit to the Collector's bungalow in the custody of the investigating officer, entertained, and had been encouraged to entertain, reasonable hope that if he told the truth, or what appeared to be a truthful story, he would get a pardon in the end. The learned Judge uses this language:-- 'The meaning of this exchange of notes between the Collector and the Sub-Divisional Magistrate has been explained. The Collector apparently was at first of the opinion that Kishan should be given a pardon, which was clearly what Kishan was working for. Indeed it would appear that Kishan specifically bargained for a pardon as the price of his statement. The Sub-Divisional Magistrate objected that it would be premature to make a firm offer of the pardon at that stage, and the Collector eventually agreed and it was explained to Kishan that he would have to take his chance, and he then made his statement,' So stated, the position is as clear as daylight. If a man prepares the ground by expressing his own position, and invites the other party to treat with him, and the other party goes so far as to consider whether he is willing to pay the price, and eventually, without refusing to do so, postpones the decision until further examination of the article to be sold, there must remain in the mind of the proposing vendor a reasonable hope that when the purchaser sees the article he is thinking of buying, he will pay the price. I have used this commercial language, because, throughout, the matter was discussed by the executive authorities, and

has been considered by the Judge, in the light of negotiations for a bargain. How the learned Judge could possibly come to the conclusion that the making of the confession by Kishan under Section 164 of the Code of Criminal Procedure was not caused by the inducement that, if it was satisfactory, a pardon would probably be granted to him, I cannot for myself conceive, but, in my opinion, he has plainly found that it was so induced, and where he has failed is in not realizing that Section 24 makes a confession so induced irrelevant in a criminal proceeding. Mr. Malcomson, on behalf of the Crown, preferred to take his stand upon a denial that the learned Judge meant what we think he said in his judgment, and we, therefore, allowed him to obtain, and tender, copies of the correspondence referred to by the Judge. Any doubt lurking in the mind of any body up to this point is entirely removed by a perusal of this remarkable correspondence. The Sub-Divisional Officer and the District Magistrate exchanged notes with the greatest candour, as indeed they might, in considering whether or not a pardon should be offered, but they went much further than that. They discussed the terms of the offer, or bargain, which was to be made with the accused. The District Magistrate signed the note on the 6th of August and wrote to the Sub-Divisional Magistrate as follows:-- 'He may, however, be told that if he makes a voluntary confession which is considered to be full and true, his prayer for being made an approver will receive due consideration.' How in the world any officer of experience, or any one with any legal training at all, or acquaintance with this section, could doubt that this was an inducement to the man to make a statement, we are at a loss to understand. The very document in which the Magistrate uses that language contains a statement that the confession must be voluntary and without any inducement. The Sub-Divisional Officer in his note expressed his opinion that there was very little value in such a confession. 'Whether there is or whether there is not any intrinsic value in the statement, the law makes it irrelevant, and the learned Judge ought to have refused to bring it on the record, and to have ruled it as irrelevant under Section 24 of the Evidence Act, The result is that it has to be struck out of this case, as well as of the other cases in which appeals are pending, and in which it has been used. We are bound to say that it really is a lamentable result of the expenditure of time and money on this case, and that the error into which both the Judge and the District Magistrate have, fallen is an elementary one. Judges from time to time

have exhausted themselves in endeavouring to explain the working of this section, and, for my own part, I refer to and repeat what I said in the recent case of *Emperor v. Khetal* (1923) I.L.R. 45 All. 300 with which my learned brother entirely agrees. It really ought to be unnecessary for Judges constantly to be referring to the working of this section. It looks as though we were endeavouring to lay down some new principle, when really all we do is to repeat the law as it should be known by those who have to administer it.

7. This, however, does not dispose of all the difficulties in this case. The learned Judge, in a most painstaking judgment, has reviewed all the evidence, but when Kishan's confession is struck out, the balance against the remaining appellants consists of the sworn testimony and identification made by the approver Ghafur, and as against certain appellants, the evidence of one Musammatt Ganga Dei. As a question of principle is involved in their evidence, it is necessary to consider whether as a class those mentioned by Ganga Dei ought to be convicted unless her evidence is corroborated by satisfactory independent testimony. Somehow or other the police got hold of this woman, and it was a creditable piece of detective work, but her husband was a notorious dacoit who was absconding. According to her, he left his house on the night of the dacoity with several of the appellants, and next day returned with the loot. In any case, it is certain that her husband is a fugitive from justice. According to her testimony he is implicated in this dacoity, and, probably, in the others too, and he left in his house, and probably in her custody, silver ornaments and other jewellery, the proceeds of this dacoity. She may or may not have motives of either spite or fear against specific individuals whom she has named. She may or may not have been either persuaded or frightened by the police. But, taking her position broadly, she was placed in considerable difficulty. She had every motive for assisting the police, every motive for naming anyone whom the police wished her to name. The police were in a position to put pressure upon her by the very fact of her possession of the property, and to use persuasion with her by the very fact that her husband was absconding. In the case of a low class woman in this country, who has very little independence, education or public spirit to influence her, it is obvious that such a person may become an easy victim to an astute police investigator, and all I can say is that if I had a jury trying this case, I should unhesitatingly have told them

that they should not convict a single individual on the testimony of the Woman alone. It is made no better when there is added to it the testimony of the approver who is one of the most despicable specimens of humanity one can imagine, a man steeped in crime, living at war with society, ready to commit any violence to enable him to carry out his thefts, and ready to sell his comrades if only he can get freedom for himself, and, for my own part, I am not prepared to accept the evidence of a worthless creature of this kind, as corroborating an almost equally worthless and particularly helpless wife of an absconding dacoit. The difficulty in this case is that, having acted, as the Judge has done, very largely on the confession of Kishan, one does not know whether he would have been prepared to act on the residuum which I have just mentioned after Kishan was withdrawn, and really the logical thing to do would be to send the case back; but we are agreed that in 'substance nothing is to be gained by that, and we, therefore, deal with the case by final orders. In the case of four of the appellants (leaving out Kishan for the moment) we find that the evidence of Ghafur is satisfactorily corroborated by the learned Judge's view of the evidence. These four are Kalian, Nasib Khan, Aslub and. Zabar Khan. In the case of these four we dismiss their appeals and confirm their convictions and sentences. In the case of the remainder, namely, Tara, Dalip, Azan, Kanhaiya, Bucha, Khacheru, Budhan, Khiali, Chiranji, Bihu or Baba, Kalian son of Ghasita, and Diwan, we are driven by force of law to allow their appeals and to direct that they be released, subject to any other punishment standing against them unperformed.

8. This leaves only the case of Kishan. His appeal is also dismissed and we confirm his conviction and sentence. As I have already said, his confession was irrelevant, but my brother pointed out during the argument, and Mr. Malcomson has also argued, that in substance he confessed again before the trial. When he was examined under Section 364, before the Committing Magistrate, his previous statement under Section 164 was put to him. It ought not to have been, if they knew as much about it as we do now. But he then stated that he had no hope of a pardon. He had discovered that his previous hopes were doomed to disappointment, and he said that that statement was true. Whether it was or whether it was not, and the probability is that it was not, it is ample on which to convict him, and I am prepared to agree that that amounts to a fresh confession in

the Magistrate's court, which was duly proved against him at the trial, and that his conviction on that ground must stand. It may be said, if so, why is it not a confession made before the trial so as to be proved at the trial affecting the other persons who were being tried jointly with him? I think that technically it could be used under Section 30 even against his co-accused. But however satisfactory it may be as a piece of damning testimony against himself, I am not prepared to regard it as of any real value, standing alone, or even in association with the evidence of Ghafur and Ganga Dei, against the other accused. Therefore on that ground, in my opinion, it is still to be disregarded except as sufficient to convict Kishan. Our order, therefore, is that the appeals of the above five are dismissed and of the others are allowed and their convictions are set aside.

Kanhaiya Lal, J.

I agree with the order proposed.

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