

Sumera and ors. Vs. Emperor

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Court : Allahabad

Decided On : Sep-22-1933

Reported in : AIR1934All326

Appellant : Sumera and ors.

Respondent : Emperor

Judgement :

Iqbal Ahmad, J.

1. Six persons named Sumera, Badri Bisal, Shyam Lal, Nannhoo, Debi Dayai and Bissey were tried by the learned Sessions and Subordinate Judge of Cawnpore, for an offence punishable under Section 395, I.P.C. The trial was by jury. The jury unanimously returned a verdict of guilty against Sumera, Badri Bisal and Shyam Lal accused and by a majority of 3 to 2 the jury held that the charge was also brought home to Nannhoo. The learned Judge accepted the verdict of the jury as regards these four persons and convicted them. The present appeal is by the four convicted persons. The jury returned a unanimous verdict of not guilty as regards Debi Dayal and Bissey. The learned' Judge disagreed with the verdict of the jury and has referred their case to this Court under Section 307, Criminal P.C., with the recommendation that the verdict of the jury so far as Debi Dayal and Bissey are concerned be set aside and they be convicted under Section 395, I.P.C. A reference to the charge to the jury discloses serious misdirection's by the Judge

and as we have arrived at the conclusion that the verdict of the jury is vitiated owing to such misdirection's we have decided not only to refuse to accept the reference, but to allow the appeal and to set aside the conviction of the four accused who in accordance with the verdict of the jury have been convicted by the learned Judge and to direct a retrial of all the six accused. We have refrained from going into the evidence in the case with a view to satisfying ourselves as to the propriety of the conviction of the four accused persons named above as, by so doing, we would be substituting our decision for the verdict of the jury and this, for obvious reasons, is undesirable.

2. In order to appreciate the misdirection by the Judge it is necessary to set out the facts and the extracts from the charge to the jury in some detail. A dacoity is alleged to have been committed in the house of a man named Beni Madho in village Sukhanevada on the night of 17th May 1932. A report of the occurrence was made in Sheorajpur police station by the Chaukidar of the village on 18th May at 8 a.m. Chinni Lal, the officer in charge of the station, proceeded at once to the scene of the occurrence and commenced the investigation. A list of the looted property was given to him by Beni Madho. Nannhoo accused was arrested on 22nd May, and on 21st May the investigating officer arrested Sumera, Badri Bisal, Hhyam Lal and Badlu. Badlu Was made an approver in the case. He is alleged to have given certain ornaments to the investigating officer which according to the case for the prosecution belonged to Beni Madho and were taken away by the dacoits. The confession of Badlu was duly recorded by a Magistrate on 26th May. Bissey accused was arrested on the 5th July. Three accused, viz., Debi Dayal, Bissey and Shyara Lal, are residents of village Phando which is at a distance of about four miles from Sukhanevada. The accused Sumera, Badri Bisal and Badlu, approver, reside in village Judaypur which is also at a distance of four miles from Sukhanevada. The accused, Nannhoo Brahman resides in village Birdha which is at a distance of only two miles from Sukhanevada. The evidence against the accused consisted of the statement of the approver, the alleged recovery of certain articles from the house of some of the accused and their identification by witnesses who professed to have recognized them at the time of the dacoity. In his charge to the jury the learned Judge at first set out the evidence of the approver. The statement of the approver is rich in details. According to the approver the

dacoity was organized at the instance of Nannhoo Brahman who has got certain relations residing in village Sukhanevada. The approver has given details about the operation by the dacoits at the time of the commission of the dacoity by them. After soting out the evidence of the approver the learned Judge in his charge observed that the important evidence in the case was that of Badlu Brahman and then noticed the argument of the defence counsel that although, according to the statement of the approver, he was asked by the Magistrate, who recorded the confession, to speak the truth, the confession was the outcome of inducement and was inadmissible in evidence. The Judge characterized this argument as hairsplitting and observed that:

You have seen Badlu in the witness-box. He appears to be a simpleton and has got a foolish appearance. The Magistrate who gave the pardon and the Magistrate who recorded the confession, have to be believed rather than Badlu.... It is difficult to agree with the argument of the learned advocate for the defence and my interpretation of law is that Badlu was legally made an approver...and that his confession recorded under Section 164, Criminal P.C., is also in accordance with law.... Badlu said that there was a police constable with him in the Court room of Birendra Pratap Sahi (Magistrate). It has been argued by the defence counsel that the confession of Badlu could not be considered to be voluntary on account of this fact. Badlu has not stated the time up to which the police constable was present. The Deputy Magistrate has stated that Badlu was in the custody of his own peons for more than three hours. The evidence of the Deputy Magistrate should be preferred. Badlu was never in jail. He was kept in Nawabgunj Thana. This fact does not seem to be of much importance. When Badlu had once made the confession and it was recorded under Section 164, Criminal P.C., it was immaterial whether he was kept in jail or in some then. It was rather safe for the prosecution to have kept him aloof from other accused so that he may not be influenced by them to retract his confession. The Darogha, Pt, Chunni Lai, has explained that there was congestion in Cawnpore Jail where there was no separate accommodation for Badlu and hence he was kept in Nawabgunj Thana by the order of the Court.

3. The learned Judge then told the jury that it is the established practice not to act upon the evidence of the approver unless it was corroborated in material particulars and observed that 'the approver has been corroborated on material points.' He then detailed the facts deposed to by the approver which in his opinion were corroborated by the evidence of other witnesses. The Judge then proceeded to detail the result of the identification proceedings held in jail and observed that

the identification in this case is very good.... It has been argued by the defence counsel that the identification is so good that it leads to the inference that there is some flaw in it. I may tell you that there is no flaw in the identification proceedings. Four of the accused, namely Debi Dayal, Badri Bisal, Shyam Lal and Sumera were arrested on 24th May 1932, and were taken to the thena together. They stated that on the Canal Bridge of Jagatpur they were shown by the Darogha to six men, three girls and one widow, who were all probably of Bukhanevada. It has been argued that it was difficult for the accused who were in jail to have proved this fact. The law does not allow us to act upon conjectures and surmises. Every fact must be proved before it is acted upon. The accused in spite of their being in jail have been able to engage counsel and produce witnesses on other facts. No question about this fact was put to the constable who took them from the police of their arrest to the thena. The Darogha Pt. Chunui Lal, who was asked this question, said on oath that he did not accompany these accused to the thena.... On one side there is the simple statement of the accused and on the other side there is the sworn testimony of a responsible police officer. The accused are given no oath under the law and they are entitled to say any thing and everything. In face of such good identification the accused could not have taken any other plea except the common plea that they were shown to the witnesses by the police. The machinery of the Government consists of police officers whose duty is to arrest them and take them in purdah from the place of their arrest to the thena and then to the jail. It is presumed that they do their duty as prescribed by law. The police officers are not the masters of their own actions, but they have to account for their conduct to their superior officers. If it is known that they violate their duties they are liable to be sacked. You are therefore to presume that the evidence of the police officers is correct and that the accused were taken in purdah as prescribed by law from the place of their arrest to the thena and they were not shown to anybody. If the

accused allege that they were shown to the witnesses it lies upon them to prove this fact.

4. The learned Judge then in the course of his charge to the jury dealt with the case of individual accused. While dealing with the case of Sumera the learned Judge observed that

you will thus see that the evidence against this accused is overwhelming and is also the best evidence.

5. When dealing with the case of Badri Bialal he remarked that

I have already remarked in cases of other accused that this allegation is an afterthought and is totally false.

6. Similarly when summing up the evidence against Bissey Brahman the Judge observed that

at least he has not been able to prove with any evidence that he was shown to the prosecution witnesses who have identified him.

7. The extracts from the charge quoted above leave no room for doubt that the learned Judge expressed his opinion on questions of fact, that were of cardinal importance in the case, in terms too dogmatic and unqualified and this, in our judgment, amounted to a misdirection. The Judge is entitled, in the course of his summing up, to express his opinion to the jury on any question of fact. But he should not state his own view on important matters of fact in so positive a manner as to lead the jury to believe that it is not open to them to take any other view. If the Judge does so he takes questions of fact out of the hands of the jury, and thus deprives the accused of the valuable right, given to him by law, to have the questions of fact considered by the jury. A summing up to the jury in which the Judge goes on dictating his own finding on questions of fact, which ought to be left for the decision of the jury, is no summing up at all and a verdict following, upon such charge cannot be sustained. While stating the evidence for and against; the accused the Judge is entitled to make his own comments as regards each piece of evidence, note discrepancies and inconsistencies in the evidence, and point out

generally the way in which it is favourable or unfavourable to the accused. But it is not open to the Judge to tell the jury that any explanation offered by the accused of any fact appearing against him in evidence is incredible without telling the jury plainly, that it is merely his own opinion, and that the jury are entitled to draw their own conclusions. In short in his charge to the jury the Judge should give substantial help and guidance to the jury by properly marshalling the facts, sifting the evidence and expressing his own opinion about the estimate of that evidence, but he should always be careful to tell the jury that the decision on questions of fact is within their province, and that decision is to be arrived at by them untrammelled by the opinion expressed by the Judge as regards the credibility or otherwise of a particular piece of evidence. The Judge must be careful to see that there has not been such positive and dogmatic assertion by him about questions of fact in his charge to the jury as to leave an impression on the mind of the jury, when they retire to consider their verdict that, in arriving at their conclusion, they must abide by, and try to reconcile their verdict with the definite and positive expressions of opinion by the Judge. In the case before us the Judge was not entitled to tell the jury that Badlu's statement that there was a police constable with him in the Court-room of the Magistrate who recorded the confession should not be believed and that the evidence of the Deputy Magistrate should be preferred. The Deputy Magistrate may or may not have remembered the fact as to whether a Police Constable was or was not present at the the time of the recording of the confession. The Judge was equally wrong in telling the jury that once the confession was recorded it was immaterial whether Badlu was kept in the jail or in the police lock-up. When remarking that the approver was corroborated on material points, he ought to have qualified this statement by adding that that was his opinion, and that the jury were free to consider whether the evidence adduced in the case afforded corroboration of the testimony of the approver on material points. Similarly he ought to have left it to the jury to consider whether the identification in the case was good or bad and ought not to have dictated his own opinion on the point to the jury. While dealing with the result of identification he ought to have pointed out to the jury that the accused resided within four miles of the scene of the dacoity and, it is possible that the identification witnesses knew them from before. His observation that the jury is

to presume that the evidence of police officers is correct and that the accused were taken in purdah as prescribed by law from the place of their arrest to the thana and they were not shown to anybody

was wholly unwarranted and amounted to a serious misdirection. There is no such presumption in law as the learned Judge seems to think. It was open to the Judge to toll the jury that no evidence was led by the accused to substantiate the allegation that they were shown on the Canal Bridge to tire witnesses for the prosecution, but he was bound to qualify this statement by pointing out to the jury that the defence was not bound to call any evidence and that they could rely on the prosecution evidence, and the circumstances disclosed by that evidence, so far as it could help them and that they were entitled to the benefit of any doubt.

8. The questions what value should be attached to Badlu's confession and whether the identification of the accused by the prosecution witnesses was entitled to any weight were questions of cardinal importance in the case and as we consider that the Judge misdirected the jury so far as these questions are concerned we cannot uphold the verdict of the jury and the conviction of the four appellants by the Judge. We accordingly set aside the verdict of the jury and the conviction of the appellants and direct that all the six accused be retried by some Judge other than the learned Judge who heard the case. The record must be returned forthwith to the Court below.

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