

Muhammad Bashir Vs. Emperor

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Court : Allahabad

Decided On : Jun-19-1931

Reported in : 140Ind.Cas.246

Judge : Bajpai, J.

Appellant : Muhammad Bashir

Respondent : Emperor

Judgement :

ORDER

Bajpai, J.

1. Two persons Muhammad Bashir and Bassan alias Bashir were convicted by a Magistrate of the First Class under Section 60(a) of the United Provinces Excise Act and sentenced to two years rigorous imprisonment and a fine. On appeal their convictions were maintained by the learned Sessions Judge of Cawnpore. They have applied in revision, to this Court and their case has been presented before me by Mr. Kapil Deo Malaviya and he has asked me to consider the cases of the two applicants separately.

2. It appears that Muhammad Bashir is the occupant of the house which was raided at 6 P.M. on the 8th of December, 1930. Some cocaine was found in his house at three, or four different places. It is quite clear that the Excise Inspector

went to the house with his peon without having taken a warrant from a Magistrate and without having taken a couple of respectable witnesses of the locality. These were irregularities and a great deal has been made by the defence put of these irregularities. It is of the utmost importance that search should be conducted in a highly regular manner, so that the defence might have no opportunity to question the bona fides of the prosecution. When the Excise inspector and his peon reached the house, they found Muhammad Bashir and Bassan in a room. On the approach of the party Muhammad Bashir ran away and the Excise Inspector ordered his peon to arrest Bassan who was in the room and Bassan was accordingly arrested. The Excise Inspector also told his peon that after arrest Bassan should be brought out of the room and the house then chained. The Excise Inspector in the meantime went in pursuit of Muhammad Bashir and after having arrested him brought him back to the house when he sent for search witnesses. The door remained chained during this time, but the fact remains that for some short time the peon entered that house when he went to effect the arrest of Bassan, and he did so in the absence of any search witnesses. Later on in the presence of the search witnesses and after the usual formalities the house was searched and as I said before, certain quantity of cocaine was recovered at various portions of the house.

3. The learned Sessions Judge in appeal has been very fair to the defence and has not attached any importance to the cocaine that was recovered from places where there was a possibility of the cocaine having been planted by an outsider or an enemy, but he has attached a great deal of importance to the cocaine that was discovered in a cupboard, and he has attached some importance to certain pieces of paper that were found lying about in the room and which when sent to the Chemical Examiner were reported to contain traces of cocaine. I myself am not prepared to attach any importance to those pieces of paper, but the cocaine recovered from the cupboard has influenced my judgment to a great extent, I am, however, told by Mr. Kapil Deo Malaviya that the conviction of Muhammad Bashir is unsound for various reasons. He contends that there was irregularity in the search inasmuch as a warrant was not obtained. He further contends that the search witnesses ought to have been at the spot from the very beginning. Irregularity in a search and the failure to obtain warrant would always afford

ground for scrutiny, but, if after close scrutiny the court comes to the conclusion that an excisable article was recovered from the possession of the accused, then I am of the opinion that the conviction would be sound. This view has been taken by the Calcutta High Court in the case of Romesh Chandra Banerjee v. Emperor 23 Ind. Cas. 985 : 41 C. 350 : 18 C.W.N. 498 : 15 Cr.L.J. 385 and by the Madras High Court in the case of Queen Empress v. Pukot Kotu 19 M. 349. The same is the view of our own High Court as would appear from the cases of Emperor v. Allahdad Khan 19 Ind. Cas. 332 : 35 A. 575 : 11 A.L.J. 933 : 15 Cr.L.J. 19; Emperor v. Sayeed Ahmad 22 Ind. Cas. 163 : 35 A. 575 : 11 A.L.J. 933 : Cr.L.J. 19 and the case of Abdul Hafiz Khan v. Emperor : AIR1926 All188 . There is yet another argument advanced on behalf of the accused. It appears that the search witnesses were examine on behalf of the prosecution, and they instead of supporting the prosecution help the defence. The search lists and the search witnesses should invariably be produced by the prosecution, and they would be guilty of suppression of material evidence if they did not produce the same. This was held in Munni Sonar v. Emperor 9 C.W.N. 438 but the prosecution can prove the recovery of the incriminating article by other evidence as well. As was held by the Madras High Court in the case of Solai Naik v. Emperor 8 Ind. Cas. 178 : 34 M. 349 : 8 M.L.T. 451 : 21 M.L.J. 281 : 11 Cr.L.J. 576 : (12910) M.W.N. 677 the court having due regard to the statements of the search witnesses and of any other witnesses that might be produced on behalf of the prosecution has got to form an opinion of its own regarding the truth of the Crown case and the trial Court and the Appellate Court are the final Judges on this point. In the present case I And that both the trying Magistrate as well as the learned Sessions Judge have thought fit to rely upon the evidence of the Excise Inspector and the Excise peon in preference to the evidence of the search witnesses, and I am not prepared to accept the contention on behalf of the defence that the courts had no jurisdiction to do so. It is contended that in view of the provisions of Section 103 of the Criminal Procedure Code, the competent witnesses in the case were the search witnesses. This argument contravenes the provisions of Section 133 of the Evidence Act, and I am not prepared to give effect to it. Sitting as a court of revision I must accept the finding of the courts below on the credibility of witnesses. The result is that the finding of the court below on the question that cocaine was discovered in the

house which was in the occupation of Muhammad Bashir must be upheld. His conviction is sound and I maintain the same and the sentence.

3. Now I pass on to the case of Bassan alias Bhashir. All that the prosecution have been able to prove against him is that he was in the house of Muhammad Bashir sitting with him in the same room, at least that is what I can gather from the judgment of the trying Magistrate and from the arguments of the Assistant, Government Advocate. This in itself without other incriminating circumstances would, be a very slender foundation for basing a conviction, but apart from that, I have looked into the judgment of the trying Magistrate and I find that he was discussing at length the case of Muhammad Bashir and has very very incidentally considered the case of Bassan. On appeal the learned Sessions Judge starts his judgment by saying that

the appellant Muhammad Bashir has been sentenced etc. etc.

and all along he speaks of the case of the appellant (in the singular). He has mentioned the name of Bassan only casually in the fifth line of his judgment and nowhere else do I find any discussion of his case. That being so, I have got to choose between two alternatives (1) to quash his conviction and (2) to remand his case either to the lower Appellate Court or to the trial Court. As I said at the very outset all that I could gather so far as the prosecution case regarding this accused is concerned was that he was found in the same room with Muhammad Bashir, and upon this material no useful purpose would be served by remanding the case. I, therefore, adopt the first alternative, allow his application and set aside his conviction and sentence. He need not surrender to his bail and his bail bond is discharged.