

Niaz Mohammad Vs. Crown

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Court : Rajasthan

Decided On : Aug-23-1948

Reported in : 1949CriLJ1003

Judge : Nagarkar, J.C.

Appellant : Niaz Mohammad

Respondent : Crown

Judgement :

Nagarkar, J.C.

1. This is an appeal by the accused Nyaz Mohammad son of Mohammad Murad who has been found guilty by the Sessions Judge, Ajmer-Merwara, by his order dated 6th May 1948, of the offence of murder under Section 302, Penal Code, and sentenced to undergo transportation for life. When the case was originally sent up to the Court of the Committing Magistrate, seven persons were charged with offences of murder, abetment of murder, rioting armed with deadly weapons,, and the offence of voluntarily causing grievous hurt. The Committing Magistrate on going through the evidence discharged five of the accused persons and committed the case to the Sessions Court against the appellant Nyaz Mohammad and his father Mohammad Murad, charging the former with the offence of murder under Section 302, Penal Code, and the latter with the offence of abetment of murder under Section 302 read with Section 114, Penal Code.

2. The prosecution alleged that on the morning of 23rd June 1947 witness Abdul Razak went to his mango grove in Mohalla Inderkot as he saw the accused-appellant and some others raising a small platform around one of his mango trees. As Murad appeared to be prominent among the persons engaged in raising a platform round the mango tree, Abdul Razak protested to him and told him that the tree belonged to him (Abdul Bazak). Murad, getting annoyed, slapped Abdul Bazak and sent him away. Abdul Bazak then went and informed his father, the deceased Abdul Jabbar, who immediately went to the mango grove to speak to Murad about the matter and to tell him that the mango tree was not his property and that he had no business to interfere with it. Abdul Jabbar went and called out Murad from his house and sat down nearby. When Murad came out a heated altercation ensued between him and the deceased and both men exchanged abuses, Murad then is alleged to have immediately called for his son the appellant Nyaz Mohammad, and he came out of the house armed with an axe, and dealt axe-blows on Abdul Jabbar's head and ribs. His son Abdul Bazak tried to intervene but he also was struck with the axe. It is alleged the other persons who were with Murad were armed with sticks and they also belaboured Abdul Bazak and his father Abdul Jabbar. The injured Abdul Jabbar was taken immediately to the Victoria Hospital. He was in a very serious condition and the doctor on seeing an injury to some of his ribs performed an operation on him, but he succumbed to his injuries and died soon afterwards that very day.

3. Abdul Bazak was also treated for his injuries which were not serious. Murad and one of his companions were also found to have been injured and in course of time they also received treatment. Their injuries were not serious and so they were sent away after treatment.

4. The matter was reported to the police, and as a result, a case was sent up to the Committing Magistrate's Court which was later sent up to the Sessions Court when the appellant Nyaz Mohammad and his father Murad were committed for trial.

5. The learned Sessions Judge on going through the evidence came to the conclusion that no case had been established against Murad and so he was

acquitted. He however found the appellant guilty of an offence under Section 302, Penal Code. The case was tried with the help of four assessors, three of whom were of opinion that Murad was not guilty. The learned Sessions Judge accepted their opinion and acquitted Murad. As regards appellant Nyaz Mohammad the assessors were equally divided in their opinion, and the learned Sessions Judge agreed with two of them who said the appellant Nyaz Mohammad was guilty of the offence of murder. The appellant has now preferred this appeal against his conviction and the sentence passed on him by the Sessions Judge.

6. It is not disputed that the deceased Abdul Jabbar had received very serious injuries to his ribs and that one of the fractured ribs had penetrated into one of his lungs as a result of which he died in the hospital soon after an operation. Though it appears there is no evidence on record to show that the deceased had any incised wounds on his person to justify the inference that he had been struck with a sharp-edged weapon such as an axe, there is no doubt whatever that he had been severely injured in the region of his ribs and that he died as a result of such injuries. It is also in evidence that during the post mortem it was found that the deceased's brain had been lacerated and there was haemorrhage in the skull. There is therefore no doubt that the deceased died a homicidal death. He appears to have been belaboured severely and he succumbed to the injuries inflicted upon him.

7. The point which has been disputed before me is whether there is any satisfactory evidence on record to connect the appellant Nyaz Mohammad with the incident, and whether it has been proved that he dealt axe-blows on the person of the deceased, causing injuries to his ribs as a result of which he died in the hospital. It appears, soon after the committal proceedings were over in the Magistrate's Court the principal Witnesses in the case, except the deceased's son Abdul Bazak, migrated to Pakistan and so these witnesses were not available in the Sessions Court, These witnesses had however been examined and cross-examined in the Committing Magistrate's Court. The investigating officer was also not available when the case was tried in the Sessions Court as he also had migrated to Pakistan. But as the learned Sessions Judge was satisfied that it was not possible to secure the presence of these witnesses without unreasonable

delay, their evidence was taken or the record of the Sessions Court under Section 288, Criminal P. C. read with Section 33, Evidence Act the objection advanced by defence counsel of this point having been overruled. It is no doubt unfortunate that the principal prosecution witnesses and the investigating officer should not have been available when the trial began in the Sessions Court. But I think the objection raised to the admissibility of their evidence in the Sessions Court was rightly overruled since it was not the defence case that any of these witnesses were in fact available at Ajmer and could be summoned by the Sessions Court. It is true a defence witness named Habib Bux stated in his evidence that prosecution witness Abdul Behman was available at Ajmer, but this point was not pursued further as no details of the witness's address, etc., were furnished. The objection raised was thus vague and half-hearted since the defence did not contend that any of the witnesses were deliberately kept back. Though the learned Judge was justified in having recourse to Section 288, Criminal P. C. and Section 83, Evidence Act, I think the Mazkuri who is said to have taken the summonses for service to these witnesses should have been examined in Court, and his deposition recorded to the effect that though he made efforts to serve summonses on these witnesses he could not do so and that they had gone to Pakistan, This link is unfortunately missing, but the omission is of a technical nature and has not caused any miscarriage of justice.

8. Now, if the evidence of Abdul Eazak and the other eye-witnesses to the incident who are Abdul Gaffar, son-in-law of the deceased, two students named Sardar Khan and Abdul Behman, a witness named Nathan (all of whom except Abdul Bazak, were not available in the Sessions Court), is examined carefully, as I have done in this case, I think it is clear that the appellant did attack and belabour the deceased Abdul Jabbar. But I cannot agree with the finding of the Sessions Judge that the deceased was set upon by the appellant with an axe, and that he dealt successive axe-blows on his head and ribs. It does not also appear to me that any axe-blows were dealt on the person of Abdul Bazak. It is significant that not a single incised injury was found on the person of Abdul Bazak and his father (the deceased) which makes it unlikely that an axe could have been used, and I am not prepared to accept the somewhat ingenious explanation offered by the doctor to the effect that if repeated blows are given with an axe on the -same spot the edges

of incised injuries may get so badly, cut up that ultimately the injuries would assume the shape of contusions and not incised wounds, I think there is no reason to suppose that in this case repeated axe-blows fell on the person of the deceased on the same spot to' such an extent as to cause traces of incised injuries to disappear. On the contrary I am inclined to think that Abdul Razak and the other eye-witnesses appear to have exaggerated the incident when they deposed and said that the appellant Nyaz Mohammad suddenly appeared from his house armed with an axe, and started dealing blows with it to Abdul Bazak and his father, the dead man. Though this part of the version appears to be exaggerated I think it has been satisfactorily established that among the persons who belaboured the deceased (most probably with a lathi), and also injured Abdul Bazak, the most prominent assailant was the appellant Nyaz Mohammad. In all probability he was armed with a lathi or some such blunt weapon of attack and it is on record that the police when they went to attach incriminating articles found some lathis which they attached, but they did not attach an axe.

9. Since Abdul Razak is a son of the deceased and there is no evidence on record to show that the two parties had been on hostile terms for some time past, his evidence must be examined very carefully as it is the evidence of a party to the case. His evidence cannot be accepted without sufficient corroboration and I think there is strong corroboration in the evidence of the two independent students, who are Sardar Khan and Abdul Rehman aged 17 and 14 years, respectively. It was alleged that these two witnesses are interested persons because the deceased Abdul Jabbar used to do barber's work in their families. But I do not think their evidence should be discarded on this score. As to these witnesses say that a quarrel took place and that Nyaz Mohammad dealt several blows to the deceased, and according to them an axe was used, As I have said, the version so far as it refers to the use of an axe must in fairness to the accused be excluded, since it is not supported by the nature of the injuries on the deceased that have been testified to by the doctor. The only discrepancy which I can see in the evidence of these two boys is that while Sardar Khan says the other men who were with Nyaz Mohammad came simultaneously with him and began to belabour Abdul Razak's father and those who were with him, whereas while Abdul Rehman says the appellant Nyaz Mohammad, after belabouring Abdul Razak, ran away from the

scene and after he had gone away the other men came forward and beat Abdul Razak. I do not think the above discrepancy to be so material that the evidence of these two disinterested witnesses must on that account be rejected in its entirety. Witness Abdul Gaffar, who is a son-in-law of the deceased also supports the prosecution case, But being a near relative of the deceased his evidence must be taken with caution ; but his version is however corroborated by witness Nathan who says Nyaz Mohammad came forward and began to deal blows with an axe to the deceased and to his son Abdul Razak. It is true that some sort of a quarrel appears to have started between the two parties when the deceased came to protest to Murad about the latter's interference with the mango tree. It is in evidence that three of the accused persons originally sent up for trial to the Committing Magistrate's Court, viz., Murad, Gbotu and Badoo, were also injured. According to the medical evidence these three men had contused wounds and bruises on their person. But the prosecution appear to have offered no satisfactory explanation as to how it came about that three persons in Murad's party were injured, It was argued that the injuries to Murad and two of his companions show that the deceased and his companions went out armed with sticks, and on going to Murad's house they immediately began to belabour Murad and that his son (the accused) on seeing that his father was being attacked, came forward to defend him, and in doing so he and his companions exercised the right of defending and protecting Murad and so no offence was committed. I am not prepared to accept this defence for, it is clear from the evidence of the eye-witnesses that when Abdul Jabbar came to Murad's house he sat down thereby and began to talk the matter over with Murad, Sinee Abdul Jabbar came to protest it is possible that he was in an angry mood and so hot words were bandied about when the altercation began. And even if it is true that the deceased and some of his companions had sticks in their hands that will not necessarily justify the conclusion that they went to Murad's house for the set and deliberate purpose of wreaking vengeance on him and his companions. From the evidence it appears to me that it was Murad's party who took the initiative, and when the fight began three men in Murad's party came to be injured because Abdul Razak and his father (the deceased) retaliated when they were attacked. I therefore think the accused had no right of self-defence for if Abdul Jabbar came and sat down near Murad's house it is not likely that he could

have taken the initiative and started a fight.

10. According to one of the prosecution witnesses, viz., Abdul Gaffar, all the accused came forward and began to beat the deceased Abdul Jabbar; whereas according to Nathan and the two boys Sardar Khan and Abdul Rehman, it was only Nyaz Mohammad the appellant who belaboured the deceased. In view of the above statement of Abdul Gaffar, and in view of the nature of the injuries ultimately found on the person of the deceased, which do not corroborate the prosecution case that blows with an axe were dealt, I do not think the whole responsibility for the assault can be fastened on the appellant. It seems to me possible that other persons besides the appellant Nyaz Mohammad took part in beating the deceased, and that his death was the result not of the injuries inflicted by one man, but by several men in Murad's party. In the circumstances I think it will not be safe and proper to convict the accused of the offence of murder. I think in a case of this kind where the injuries do not appear to have been caused by the violence of one single man but were caused by several persons belabouring the victim, some of whom have not been identified, the safer course would be to convict the accused of the offence of causing grievous hurt under Section 325, Penal Code. I accordingly alter the conviction from Section 302 to 325) Penal Code, and set aside the sentence of transportation for life. For the offence under section 323, Penal Code which I hold has been proved against the accused, I sentence him to seven years' rigorous imprisonment as I think a deterrent sentence is called for in view of the fact that one man has been killed. Subject to the above modification the appeal fails.