

Asraf Ali and anr. Vs. Emperor

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Court : Kolkata

Decided On : Mar-15-1933

Reported in : AIR1933Cal426

Appellant : Asraf Ali and anr.

Respondent : Emperor

Judgement :

Rankin, C.J.

1. The accused before us are Asraf Ali and Ananta Kumar Sarkar. They have been convicted by the unanimous verdict of a jury of seven under Section 302 read with Section 109, I.P.C., and have been sentenced to death. We have before us a reference under Section 374, Criminal P.C., and an appeal by each of the two accused. Between 9 and 10 o'clock on the night of Monday, 28th March 1932, in a village called Panchgaon, an old man named Kalachand Banerjee, a woman called Hiran Moyee and a small girl called Sulakshana, aged about three were hacked or stabbed to death in Kalachand's bari and his nephew's wife, Nagendrabala Debi, was very seriously injured by a sharp cutting weapon. She had an incised wound 7 long round the left shoulder joint cutting the head of the left humerus in two; she had an incised wound at the back of her right wrist and another on the palm of her right hand. The case for the prosecution is that the accused Asraf Ali inflicted these wounds with a big dao in the kitchen or cookshed, and that present with him at the time was the accused Ananta. The case depends

upon the evidence of Nagendrabala identifying the accused as the persons who entered the kitchen and committed the assault.

2. The crime was not committed for any purpose of theft. As two of Kalachand's women-folk, including a small girl of three, were brutally killed, after Kalachand himself had been killed, and Nagendrabala had been savagely attacked, the crime had all the appearances of a crime of vengeance. From the first it was accordingly associated with the fact that Kalachand had assisted the police and had given evidence on behalf of the Crown in a case under Section 400, I.P.C. (a gang case) which had lasted from 1924 to 1926. A large number of dacoits were prosecuted in that case, among them being the present accused. Both received substantial sentences. Asraf Ali was released from jail in June 1931 having served his sentence; Ananta was released on 10th December 1931 before he had completed his sentence by reason that he was suffering from phthisis. For some months therefore before the crime both had been living in the village of Panchgaon. Ananta's home was very close to Kalachand's-apparently about five minute's walk away. Asraf Ali's home is a little further; the evidence is not very clear as to the distance but I find it described by a responsible police officer as about ten minutes' walk from Kalachand's. The first information report was lodged at 7 a.m. on the morning after the occurrence, i.e., on 29th March and by next day (i.e. the 30th March) both the accused had been arrested. They, together with a few others, were arrested on the strength of their connexion with the gang case.

3. Asraf Ali was described by the committing Magistrate, who may have accepted his own statement as being aged about 45 years. Before the Sessions Judge he gave his age as 50, but the learned Judge put him down as 'about 35 or 40.' Ananta was put down as about 65 by the committing Magistrate. Before the Sessions Judge he stated that he was 68, but the learned Judge put his age as 'about 55.' Asraf Ali is of course a Mahomedan and Ananta a Hindu.

4. Now the only eyewitness to any portion of the crime is Nagendrabala Debi, a woman of about 24. She had been married to Kalachand's nephew in 1924. The main building of the house is a brick building running east to west, consisting of three divisions, one occupied by Kalachand, one by Hiranmoyee and one by

Nagendrabala and her husband. A few feet north of this building is a corrugated iron garh, also running east to west. This is divided by a sort of fence, partly made of split bamboos. The eastern or smaller portion was used as a cookhouse, the western portion as a dining room. (After giving in detail the evidence of Nagendrabala and the statements made by her on several occasions, the judgment proceeded.) If we take the three statements of Nagendrabala made on the 29th March, it will be noticed that while in all three she says she could recognize the assailants, nevertheless in the first she speaks definitely of three persons: a man with a torch, a man with a dao and a man wearing a black vest; she only mentions two men to the daroga, and to the Deputy Magistrate at Munshiganj she says 'I saw two persons. I heard the whisperings of some other persons.' (After discussing the evidence regarding the identification of the accused by Nagendrabala, the judgment proceeded). There is no escaping the conclusion that on each one of the three cumulative descriptions Nagendrabala's identification does not fit in with what she said at the time. (After again discussing the circumstances under which Nagendrabala made her statements, his Lordship discussed the evidence given by Kasimuddi Haldar which seemed to support Nagendrabala and proceeded.) Now, I have two observations to make as a matter of law upon Kasimuddi's evidence. The learned Judge has not dealt in any way with the question whether that evidence could, and should, have been corroborated. He has not also warned the jury properly either in the case of Ananta, and still more noticeably in the case of Asraf Ali, as to how this evidence is to be regarded. Kasimuddi says that he told the dead man Kalachand. He also says that he told Hem Ghatak. If that be so, Hem Ghatak could, and should, have been called by the prosecution to corroborate the story under Section 157, Evidence Act. Hem Ghatak was not examined by the prosecution; he was tendered for cross-examination but was not cross-examined by the defence; both sides appear to be suspicious of Hem Ghatak. Again, it is quite true that the charge against the accused was under Section 302 read with Section 109, I.P.G. The particular form of abetment called 'conspiracy' was therefore before the Court. If it were once proved that Asraf Ali was present with Ananta at the commission of the crime then, and then only, would the evidence of this conversation in which he took no part have been of importance against him. In that event, however it would

be entirely superfluous. As against Ananta, evidence that he was projecting some suspicious work with others of his gang might be used as affecting the probability that Nagendrabala's identification of him was correct. There is here however room for a distinct complaint in the charge of the learned Judge which, on this point contains not a word of caution; nothing but an invitation to the jury to accept evidence of a most doubtful character. (After referring to the evidence of the chowkidar, the judgment proceeded). The charge of the learned Judge was a very clear and a very able one.

5. It is attacked before us on the ground that in some respects it is expressed too dogmatically. I have no fault to find with the manner in which the learned Judge deals with the question whether the criminals had masks on; with the question whether there was any lamp in the kitchen; with the argument that Nagendrabala must have pulled down her veil and that she had no time to see the assailants. I think it is true however that on certain salient points the learned Judge in addressing the jury has put the prosecution case too strongly and has failed to put the defence case as strongly as it should have been put. Of the earlier statements of Nagendrabala it was perfectly right and proper that the jury should be reminded of the pain weakness and agitation under which they were given. But I do not think that the effect of the charge as a whole is to give due weight to the outstanding facts; that the man with the dao was the only man of whom she ever gave any description, that she told Mr. Latif that on seeing the dao she did not notice the appearance of the other man, that the description given of the man with the dao was a young Hindu without a beard -all three elements being inapplicable to Asraf Ali, and that she identified a wrong man in circumstances in which so far as we can gather from her previous statements, she was acting recklessly. These are all strong circumstances for the defence, a case in which the identification rests entirely upon one witness. While I do not suggest that the learned Judge has not referred to these circumstances, I think that he has left them to the jury in such a way as to obscure their cumulative force.

6. Nagendrabala's injury and terror at the time of the occurrence and at the time of her previous statements are considerations which cut both ways, and in dealing with her evidence the learned Judge has used much too broad a brush. In my

judgment he has not left properly the various items of the description of the accused and in the long run he should have told the jury that while Nagendrabala's first statements may well have been mistaken, the fact remained that her impression at the time was of two men (a) the man with the dao-a young Hindu with no beard but a small moustache whereas Asraf Ali, was a man of middle age and a Mahomedan with a small beard; (b) a man of whom she has given no description unless it is the description that he had a small beard, of whom at one time she said that she did not notice his appearance, and that Ananta had no beard. He should also have warned the jury to be most careful in view of the identification of Barendra to consider whether they could reasonably be satisfied that the parts attributed by her to the two accused had been attributed in the same way on 23rd April. He should have pointed out with greater force that as she was identifying men seen by the light of a tin kupi in circumstances of horror followed by grave wounds, mistake was to be accounted a grave risk. This portion of the charge is too favourable to the prosecution.

7. By Section 374 read with Section 418, Criminal P.C., the accused have in this Court, what the legislature has recently (Section 418(2), described as an appeal on matters of facts as well as of law. I have no doubt that these convictions cannot stand and we have to consider whether the correct course is to acquit the accused persons or to direct a retrial of one or both of them. For this purpose we may put on one side any chance of further evidence having come to light. The question is whether if, upon proper direction, the jury on this evidence were to convict the accused persons again, and the matter were to come before this Court under Section 374, it would be possible for this Court notwithstanding that it had not seen Nagendrabala give her evidence, to let that conviction stand. In other words, now that the evidence has been taken can we, or can we not, come to a clear conclusion as regards either of the accused that he ought not to be convicted on it. In capital sentence cases, though we are not bound by the verdict of the jury, we must rely upon the jury's verdict if it answers a reasonable test. I repudiate altogether the doctrine that capital offences are tried as *res integra* on the paper-book. But if there is no sufficient evidence to warrant a conviction we have in my judgment, the obligation to say so.

8. As regards both of these accused I am well satisfied that if they were properly defended before a reasonable jury instructed by a fair and adequate summing up, they would never be convicted. That men who may have taken part in the murder of three persons should be acquitted because the evidence does not amount to proof; may seem to some a pity. This Court can recognize no value in such considerations. I would set aside the conviction and sentence and direct that both the accused be acquitted and discharged.

Pearson, J.

9. I agree.

Guha, J.

10. I agree.

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