

Nabi Rasool and ors. Vs. Emperor

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Court : Kolkata

Decided On : Mar-12-1942

Reported in : AIR1943Cal32

Appellant : Nabi Rasool and ors.

Respondent : Emperor

Judgement :

Lodge, J.

1. This is an appeal against convictions and sentences under Section 395, I.P.C. The four appellants were placed on their trial before the Sessions Judge of Hughly on a charge of dacoity, the allegation being that at about midnight on 3rd April 1941 they committed dacoity in the house of one Upendra Nath Das in village Morepookoor within the jurisdiction of the Serampore Police Station. They found no property of value in this house and took away only a small tin box containing boys school books. Immediately after committing this dacoity, they proceeded to the house of one Sheikh Aroon which is not far distant from the house of Upendra Nath Das and committed dacoity in that house also. They assaulted the householder Sk. Aroon and stole Rs. 170 in cash and a hurricane lantern and other articles. The jury returned a unanimous verdict in respect of the four appellants finding them guilty of dacoity. The learned Judge accepted the unanimous verdict of the jury, convicted the appellants of dacoity and sentenced

them under Section 395, Penal Code, each to undergo rigorous imprisonment for seven years.

2. According to the prosecution, the four appellants were arrested at 3-30 A.M. at gate No. 4 which is a level crossing over the railway line. Two constables had been deputed by the Officer in Charge of the Police Station to this gate after information of the dacoities had been received at the thana. One of the appellants, namely, Nabi Rasool, was carrying a hurricane lantern at the time of his arrest. On the day following the dacoity, four of the inmates of the houses in which dacoities were committed were sent to hospital for examination. On the same day, the four appellants were also sent to the hospital, because the investigation officer was of opinion that their breaths smelt of liquor and he wanted medical opinion on this subject. It is clear from the evidence on record that the four inmates of the looted houses and the four appellants were at the hospital at the same time. Some four days later, a test identification parade was held in the jail compound. The four appellants were identified by those four inmates of the looted houses who had been sent to the hospital for elimination. In addition to this piece of evidence the prosecution asserted that the hurricane lantern which Nabi Rasool was carrying at the time of the arrest was the property of Sk. Aroon, and the lantern was in fact identified by Sk. Aroon in the course of his examination. Another piece of evidence was also adduced by the prosecution. A mirror in the house of Sk. Aroon was seized by the police as it seemed to bear finger impressions. According to Sk. Aroon the mirror had been handled by the dacoits during the dacoity. When the impressions on the mirror were examined by a finger-print expert it was found that one of the impressions was the thumb impression of the appellant, Jumrati Meah. This was the evidence relied upon by the prosecution to establish the guilt of the four appellants.

3. Mr. Carden Noad appearing on behalf of the appellants has argued that the learned Judge did not point out to the jury that the evidence of identification by the four inmates of the looted houses was of no value whatever. According to Mr. Carden Noad, it was the duty of the learned Judge to point out to the jury that though a number of prosecution witnesses deposed that they saw the dacoits when the dacoity was being committed, and though seven persons in all were

arrested on suspicion by the police only the four accused who were sent to the hospital on 4th April were identified and the only persons to identify even these four accused were the four inmates of the looted houses who had been sent to the hospital for examination. In view of these circumstances according to Mr. Carden Noad, the learned Judge ought to have told the jury that the evidence of identification was worthless. The learned Judge in dealing with this part of the evidence observed:

Now, Gentlemen, let us consider certain matters relating to the test identification. It is certainly in evidence that Nitharbala, Becharam, Upen and Arun Sheik were at the hospital on the day the four accused persons were examined. They were there until 5-15 in the afternoon, that is, the last among the witnesses was examined at that hour, at 5-20 the Doctor began to examine the four accused persons. As was very rightly pointed out to you by the learned pleader appearing for Nabi Rasool, they were all, probably, at the hospital at the same time. It is for you to say, Gentlemen, whether you can take it that the accused persons and the witnesses were at the hospital, all together, and the witnesses had ample opportunity of observing the accused persons : you may consider whether it was because of this that the witnesses were able to identify them at the test identification. You may remember, in regard to this, that Upendra Das was not able to point out anyone but Nabi Rasool.

4. At a later stage in the charge, the learned Judge dealt with the argument that the identification of four accused only, by the witnesses was an extraordinary coincidence. The learned Judge put this argument before the jury, but he indicated fairly clearly that he was not impressed with the argument. It seems to us that the learned Judge placed the evidence fairly before the jury, and left it for the jury to form their own opinion. In our opinion, it was necessary for the Judge to leave it to the jury, and the mere fact that he was not himself impressed with the argument put forward by the defence, and that he indicated his belief in the honesty of the identification does not mean that there was a misdirection in the charge on this point. Mr. Carden Noad then drew our attention to the fact that though according to the first information report and the evidence of Sk. Aroon a large amount of property was stolen from the house of Sk. Aroon, no property was discovered in

the possession of the four appellants except the broken hurricane lantern. It was suggested to us that the learned Judge ought to have emphasised this fact in his address to the jury and pointed out that it was a strong indication that the accused could not have taken part in the dacoity. The learned Judge dealt with this argument in his charge to the jury. He discussed the argument on the point and showed that he considered whether there might be good explanations for persons who actually took part in the dacoity being found shortly after the dacoity without any stolen property in their possession, and he summed up the argument on this point with the words:

However the fact is that there was no property discovered in the possession of these four persons. I leave the matter to you gentlemen as you are sole judges of the facts.

5. We are unable to find in the learned Judge's direction on this point any misdirection whatever. Mr. Carden Noad then drew out attention to the learned Judge's charge where it deals with the identification of the hurricane lantern found in the possession of Nabi Rasool. The learned Judge pointed out to the jury that Sk. Aroon explained how he caused repairs to be carried out to the lantern and had caused the ring on the top of the lantern to be changed and the up-right supports on both sides soldered. He also pointed out to the jury that the base plate of the oil reservoir had been renewed and that Nabi Rasool who claimed the lantern as his own gave his explanation that it was he who caused the base-plate to be removed. The learned Judge put his own argument on these circumstances before the jury but at the end he left it for them to decide whether the lantern had been satisfactorily identified or not. The learned Judge did not place before the jury all the arguments regarding this identification which were placed before us by Mr. Noad but he seems to have placed before the jury all the arguments on the subject that were urged before him or which appeared to him to be reasonable and we are unable to find that the mere fact that he omitted to place certain possible arguments regarding the evidence amounts to a misdirection.

6. Mr. Carden Noad further argued before us that the learned Judge ought to have pointed out to the jury that the dacoits according to the evidence had a number of

electric torches with them and there was no occasion for them to steal a battered old hurricane lantern and take it away with them leaving their torches somewhere before they were arrested. This is an argument which might well have been addressed to the jury, The mere fact that this argument was not put forward at the time of the trial does not, in our opinion, justify a conclusion that the omission to mention this argument is a misdirection. We have gone very carefully through the charge to the jury. The learned Judge placed before the jury all the items of evidence for and against the accused and he placed before them most of the arguments which could be built up round this item of evidence. He attached his own value to these arguments and made it perfectly clear what his view regarding some of the arguments was; but we are unable to find that in doing so, he misdirected the jury in any material point. The mere fact that he had his own opinion of the arguments placed before him and expressed them does not amount to a misdirection.

7. Mr. Carden Noad next contended that the mandatory provisions of Section 356(2), Criminal P.C., had not been complied with. It appears from the record that one of the witnesses, viz., P.W. 16, F.C. Ward, Town Police Inspector deposed in English and his evidence was recorded in the English language. No authenticated translation of this evidence in the language of the Court forms part of the record of the Court. It has been contended that it was incumbent on the learned Judge under Section 356(2) to have an authenticated translation of the evidence of P.W. 16 prepared and to keep that translation on the record. Section 356(1) requires that evidence shall be taken down in the language of the Court; and it is clear that the ordinary procedure contemplated is that the record of evidence shall all be in the language of the Court. Sub-section (2) of the section is a corollary and permits the actual recording of the evidence of an English speaking witness in the English language provided that an authenticated translation of it in the Slanguage of the Court forms part of the record. Under Section 357 of the Code, the Local Government may empower (and in this province has empowered) Courts of Session to record evidence in the English language, and the record of the evidence in the present case is in fact in the English language. None of the evidence on record has been recorded in Bengali. It seems to us that Sub-section (2) of Section 356 must be governed by Section 357, and that the learned Judge

complied sufficiently with the provisions of Section 356 when he recorded the evidence of the witness in English, provided of course that the evidence as recorded was intelligible to the pleader for the accused. In our opinion, there is no substance in this objection. It may be noted in this connexion that the evidence of P.W. 16 might be excluded from the record without affecting in any way the case against the present appellants or without affecting in any way the charge to the jury on that evidence.

8. Lastly it was urged before us that the sentences passed upon the appellants were unduly severe. It was pointed out that in the first dacoity that was committed, viz., that in the house of Upendra Nath Das nothing of value was stolen but the dacoits did take away a tin-box containing school books, and the clothes and rice found in that house were scattered by them. In the house of Sk. Aroon the dacoits took away a battered old hurricane lantern which was practically of no value. When the dacoits were produced before the medical officer some 15 hours after the occurrence the medical officer was still able to smell liquor on them. This circumstance indicates that the dacoits might have been under the influence of liquor at the time of the occurrence and possibly the dacoity committed by them was committed under the influence of liquor. No serious injuries were caused to anybody in the commission of the dacoity. In these circumstances, we consider that the sentence of seven years rigorous imprisonment each is unduly severe. In the result we allow the appeal in part only. We uphold the convictions of the appellants under Section 395, Penal Code, but we reduce the sentences passed upon them to sentences of two years rigorous imprisonment each. The appellant who is on bail must surrender to his bail and serve out his sentence.

Roxburgh, J.

9. I agree. I will only add a word in regard to the point raised by Mr. Noad under Section 356, Criminal P.C. Under Sub-section (1) evidence is to be recorded in the language of the Court which in this province is Bengali. Under Sub-section (2), special provision is made to the effect that if any witness whose evidence shall be required to be recorded in Bengali under Sub-section (1) happens to depose in English then the Court may take the evidence down in English. Under the proviso

to Section 357, and in virtue of orders issued by the Provincial Government in Bengal all evidence in whatever language it is given is to be recorded in the English language. Therefore if a witness happens to depose in English there is no occasion to call in aid the provisions of Sub-section (2) of Section 356 to justify recording that evidence in English and hence the requirements of that sub-section of an authenticated translation of such evidence in Bengali cannot operate.

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