

Jessarar and ors. Vs. Emperor

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Court : Kolkata

Decided On : Jan-08-1925

Reported in : AIR1925Cal729,87Ind.Cas.833

Appellant : Jessarat and ors.

Respondent : Emperor

Judgement :

Mukerji, J.

1. This appeal has been preferred by nine persons, Chota Jessarat, Baro Jessarat, Tazer, Gendla, Mazarulla Mistri, Kasim, Genda Fakir, Mohorulla and Amanulla Gachua, who were tried by the Sessions Judge of Rangpur with the aid of a jury. The jury brought in a unanimous verdict of guilty against all the accused under Sections 147 and 366, I.P.C., and against Chota Jessarat, Tazer, Gendla Kasim, Genda Fakir and Mohorulla under Section 457, I.P.C., and against Baro Jessarat Mazarulla Mistri and Amanulla Gachua under Section 457/149, I.P.C. The learned Judge agreeing with and accepting the said verdict convicted the accused in respect of the offences of which they were found guilty by the jury, and sentenced them only under Section 336, I.P.C., the accused Chota Jessarat, Tazer and Gendla being each sentenced to undergo rigorous imprisonment for 7 years, and the accused Baro Jessarat, Mazarulla Mistri, Kasim, Ganda Fakir, Mohoruila and Amanulla Gachua being each sentenced to undergo rigorous

imprisonment for 6 years.

2. The appellant Kasim died in jail during the pendency of the appeal, and his case is not before us now.

3. Of the grounds urged in support of the appeal it is necessary to notice only a few inasmuch as the others either relate to the sufficiency or insufficiency of evidence as supporting a particular finding on a question of fact, or to omissions on the part of the learned Judge to deal specifically with some conflicts or discrepancies in the evidence-grounds which, even if made out, would not entitle us to interfere with the verdict of the jury.

4. One of the objections worth noticing relates to the constitution of the jury who sat at the trial. What happened with regard to this matter was this. A jury consisting of five persons was chosen by lot. Of these one was objected to on behalf of the defence; he was eliminated and another gentleman was chosen by lot from amongst the present. The jurors so chosen then elected their foreman and were sworn. Thereafter two petitions were filed on behalf of the accused one praying for a trial by a mixed jury of Hindus and Mahomedans based upon the ground that as the* case was one relating to the alleged abduction of a Hindu girl by the accused who are all Mahomedans and as the Hindus 'bear a sort of instinctive hatred or prejudice against the accused in a case of this nature the accused would not get a fair trial before a jury composed entirely of Hindus,' and the other objecting to one of the jurors Babu Nalini Kumar Chakravarti, said to be 'the Head-master of the Ulipure School of the Maharajah Bahadur' and 'an acquaintance of the Public Prosecutor who is a retained pleader and am mukhtear of the estate of the said Maharajah Bahadur.' The learned Judge rejected both the petitions and proceeded with the trial. I may say at once that so far as the second of the aforesaid two petitions is concerned the ground on which it is based is frivolous. As for the first one, it is sufficient to say that the law does not provide for a mixed jury of this character, and accused were not entitled to get what they asked for. The reason on which this petition was based, however, has some force: and if the matter had been properly represented to the learned Judge before the jurors were summoned, it would perhaps have been considered by him and

arrangements made to secure a mixed panel. Having regard, however, to the stage at which the application was made no grievance can legitimately be made of its rejection. All this took place on the 6th February, 1924, and the trial then commenced. On the next day Baroda Sundari was examined-in-chief and partly cross-examined and on the day after, that is to say, on the 8th February, 1924, an application was filed on behalf of the defence, the order passed on which forms the subject-matter of the next ground of objection. It was alleged in that petition that one of the jurors Babu Basanta Kumar Singha Roy has stated to a pleader Babu Jatindra Nath Sen that he had already formed his opinion regarding the case and it was prayed that evidence might be taken on the point and the jury discharged and the trial recommenced with a fresh jury. The learned Judge heard the pleader who filed the application and recorded the following order on the order-sheet:

This is an application for changing one of the jurors and calling another juror in his place, I heard the pleader who filed this application. The complainant has not been cross-examined as yet and the whole of the evidence is not before the Court now. Under such circumstances I do not think that the juror has formed any opinion. The juror named in the petition is a highly educated man and is the Professor of the Carmichael College, Rangpur. I have no doubt that he will give his opinion after hearing both parties and the charge of the Court. The petition of the accused is rejected.

5. It is contended on behalf of the appellants that the rejection of the aforesaid petition was improper and reliance is placed on their behalf on the cases of *Ramadge v. Ryan* (1832) 9 Bing. 333 and *Allum v. Boulton* (1854) 9 Ex. 738. Reference has also been made to the cases of *In the matter of Bonomali Gupta* (1916) 44 Cal. 723 and *Beni Madhub Kundu v. Emperor* (1918) 46 Cal. 207. It is urged that the verdict is fit to be set aside as the juror aforesaid formed this opinion and expressed it in the midst of the case and before hearing all the evidence. The learned Advocate. General appearing on behalf of the Crown contends that the statement contained in the aforesaid petition is too vague to deserve an enquiry, that it is at variance with what is to be found in the affidavit filed in support of it in this Court and that the mere expression of opinion by a juror

in the middle of a case is no ground for ordering a retrial. He seeks to distinguish the cases relied upon by the learned Vakil for the appellants and refers to the case of *Campbell v. The Hackney Furnishing Co., Ltd.* (1906) 22 T.L.R. 318.

6. In my opinion the learned Judge was right in rejecting the petition. It was not supported by any affidavit. It only alleged that the juror told the pleader that he had already formed his opinion regarding the case, without mentioning any details. The details, such as they are to be found in the affidavit which has been filed in this Court, and that only a few days before the hearing of the appeal. The contents of the affidavit are said to be true to the information and belief of the deponent who happens to be a relation of one of the accused, and no disclosure has been made as to the source of the information. What is stated is that one morning before the juror took his seat the said juror and the said pleader were standing in the verandah attached to the Court room, and while they were talking the juror told the pleader, 'I have already formed my opinion regarding the case.' No details are given, nor any circumstance mentioned as to why the juror felt it necessary to communicate the matter to the pleader, and the statement is singularly devoid of all features that might guarantee its truth. If this was the way in which it was put before the learned Judge, and I have no reason to think that it was put before him in any other form, the learned Judge was perfectly right in not believing that the juror had actually formed any opinion and in refusing to take any notice of such a casual remark as the juror may have happened to make, assuming that he did make it. As for the cases cited at the bar, it is sufficient to say that they are all distinguishable.. An inherent power in a Court to discharge a jury on the ground of misconduct or necessity has been recognised in the cases of *King-Emperor v. Nazarali Beg* A.I.R. 1921 Cal. 631 and *Mamfru Chowdhury v. Emperor* : AIR1924 Cal323 , but no facts have been established in this case as would have justified such a course. This objection therefore fails.

7. The next ground of objection relates to the non-compliance with the provisions of Section 360, Criminal Procedure Code. In support of this ground an affidavit was filed on behalf of the appellants, paras. 2, 3 and 4 of which run as follows:

Para. 2. 'That I was present in the Sessions Court when the following witnesses deposed at the trial, viz., P.W. No. 25 Babu Baroda Govinda Chaki, pleader, and Court witnesses Nos. 1 and 2 Babu Hem Chandra Sen Gupta, Inspector and Rukunuddin Ahmed, Sub-Inspector.'

Para. 3. 'That after recording the evidence of the above witnesses the record of their depositions was handed over to them and the said witnesses seemed to have read their depositions themselves.'

Para. 4. 'That the learned Sessions Judge did not read over their depositions to the said witnesses in the presence of the accused or their pleaders.'

8. On behalf of the Crown has been filed an affidavit sworn to by one Akshay Kumar Pal, who was the Sessions clerk at Rangpur during the trial of the present case. While not denying the statement contained in the affidavit filed on behalf of the appellants, the deponent states in paras. 3 and 4 of his affidavit as follows:

Para. 3. 'That in the presence of the accused I read over and explained in Bengali the depositions of the prosecution witnesses Babu Baroda Gobinda Chaki and Court witnesses Babu Hem Chandra Sen and Moulvi Rukunuddin Ahmed.'

Para. 4. 'That the depositions as recorded by the Judge were admitted correct by the witnesses and none of the accused raised any objection as to the correctness of the record.'

9. On a perusal of the two affidavits it is rather difficult to make out what exactly happened. It will be observed that in the first affidavit it is stated only that the witnesses in question seemed to have read their depositions themselves and that the learned Judge did not read over the depositions to them in the presence of the accused or their pleaders, and that while in the second affidavit all that is not denied, it is asserted that the deponent read over and explained the depositions of the said witnesses in the presence of the accused, but it is not stated that their depositions were read over and explained to the witnesses themselves. Under the circumstances we are entitled, I think, to assume that both the affidavits are true; and if that is so, then what happened was this: The records of the depositions

were made over to the witnesses who seemed to read them and the Sessions clerk also read over and explained the depositions in the presence of the accused, though not in the presence of the witnesses. If this was what was done it was only a colourable compliance with the provisions of the law. I am, however by no means sure that this double procedure was adopted. The learned Advocate-General assures us that the omission to deny the allegations contained in the first petition was due to the fact that a copy of it was not before the deponent Akshay Kumar Pal when he swore to his affidavit, and the omission to state that the depositions were read over and explained to the witnesses was purely accidental. He says that if we are not satisfied on this point we should give the Crown a further opportunity to put in a further affidavit on fuller materials. In view of the opinion which I have formed on some of the other points urged on behalf of the appellants, I do not think it necessary to adopt that course.

10. An objection of a far more serious nature has been taken, and that relates to the omission on the part of the learned Judge to present in his summing up to the jury the first information in the case in its true perspective. This omission affects at once the complicity of the different accused persons as also the credibility of the evidence given by such of the witnesses examined in the case as profess to have seen a part of the occurrence and recognised the culprits. The occurrence is alleged to have taken place at about one and a half prohar of the night of the 20th March, 1923, and the first information was lodged at the thana, 5 miles distant, by Keshab Chandra Bairagi, the husband of Baroda Sundari, at 10 A.M. the next day. In this information Keshab Chandra Bairagi named five accused persons and alleged that there were some 20 or 25 others unknown. This is what appears in the column provided for recording the names of the accused persons. He arrived at the thana accompanied by chowkidar Maharaj Tatwa and Duffadar Elahi Bux Sheikh. He stated in the information that when he was assaulted and wounded in the course of the occurrence he cried very loud and on hearing his cries the neighbours came but he did not see that then. He stated that he heard afterwards that Kalia Bairagi Barkandaz, and a master who lives in a Thakurbari and an Amla named Nitya Malakar came at the time of the occurrence and witnessed the occurrence, and that he did not ascertain whether any one else came or not. He also stated that after the occurrence, and after the accused had left, Pranbondhu

Deb Doctor, Natobar Doctor, Bipin Sonar and many other persons came and to them ha narrated the occurrence in detail. From the information, therefore, it would appear that he classified the persons whom he named as having come to this place into two groups: the first group consisting of Kalidas Bairagi, the master, and Nitya Malakar who came and saw a part of the occurrence, and the second group consisting of Pranbondhu Deb, Natobar Doctor, Bipin Sonar and others who came after the occurrence was over.

11. As already stated Keshab in his first information named only five persons as accused, viz., Chota Jessarat, Kasim, Tazer, Genda Fakir and Mohorulla. Almost all the witnesses who have been examined as eye-witnesses deposed to having gone to Keshab's house during or shortly after the occurrence and not only heard from Keshab about the persona whom he had recognised but also gave out to the people assembled there the names of the accused persons whom they themselves had been able to recognise, and in point of fact some of the accused persons whom they profess to have recognised are persona other than the five mentioned by Keshab in his first information. Then there is the fact that several witnesses have been examined as eye-witnesses who alleged to have seen some part or other of the occurrence and came to Keshab's house and gave out that they had done so, and yet their names are not to be found in the first information. Nextly there is the fact that in spite of the clear distinction made by Keshab in his first information as between the two classes of witnesses, Bipin Sonar who is classed there in the same category as Pranbondhu Deb, claims to have seen a part of the occurrence and recognised some of the accused persons, while Pranbondhu Deb speaks only to have come to the place after the occurrence was over and does not profess to have seen any part of it. These are matters of considerable importance and their bearing on the question of the credibility of the witnesses and the complicity of the accused cannot be over estimated. Omission to place such important matters having a material bearing on the case constitutes serious misdirection 'sufficient to vitiate the verdict of the jury.

12. The next objection of importance relates to the evidence which was adduced in the case for the purpose of impugning the conduct of the investigating Police Officers' and thereby discrediting the record of the police investigation as also the

record of the statements alleged to have been made by the witnesses in the course of the said. investigation. It is not necessary to set out what the charges against the police are that the prosecution prefer against them; they are set out at length and in sufficient detail in the learned Judge's elaborate summing up. There are two points, however, in connection with this matter which deserved specific mention and omission to refer to which must necessarily have prejudiced the appellants. In the first place the evidence that has been adduced with regard to this matter, although relevant for the particular purpose of showing how the police dealt with the case, and thereby impugning the correctness of the police records, inevitably carries with it a certain amount of prejudice against the accused persons in whose interest the police are charged with behaving in the way they are said to have done.

13. In fact in one of the petitions filed on behalf of the Crown and which is to be found in the record there is reference to Section 10 of the Indian Evidence Act, as justifying the reception of that evidence. It is hardly necessary to point out that the Police Officers were not parties to the conspiracy which the accused persons might have been members of and the object of which was to commit the offences for which they were tried and so Section 10 of the Indian Evidence Act can possibly have no application in the matter. It is gratifying to note that the learned Judge did not ask the jury to use the evidence in that way. It is, however, to be noticed that no directions were given by the learned Judge as to how that evidence was to be treated, and nothing was said by him to remove from the minds of the jury the prejudice which the admission of that evidence must necessarily have caused, and no warning administered to them to use the evidence for the limited purpose for which it can legitimately be taken into consideration. There is also a very important matter in this connection which should have been prominently brought to the notice of the jury. Even if all that were urged against the police were found to be true that would not touch the first information lodged by Keshab, and the contents of the said document were still to be regarded as the statement of Keshab truly and correctly recorded by the police, whatever might be the subsequent conduct of the investigating Police Officers. It is to be noticed also that under the guise of evidence adduced on this head, a mass of matter wholly inadmissible and of purely hearsay character has also been let in,

the effect of which could not but have been highly prejudicial to the accused persons.

14. The charge of the learned Judge though a very lengthy one is far from satisfactory and is defective in more respects than one. The summing up contemplated by law is a fairly full and distinct statement of the evidence with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion [would suggest. The Judge in a proper summing up must formulate and specify simple issues for consideration, and collate the evidence pro and con bearing upon the issues in order to assist the jury to arrive at the correct decision thereon. Merely summarising the evidence, examination-in-chief, cross-examination and re-examination of the different witnesses who have deposed at the trial, and putting before the jury all that has been said by the witnesses or by the lawyers appearing on the two sides and huddling together important facts as well as trivial points without any attempt at discrimination, instead of aiding the jury, only confuse them.

15. It is unnecessary to go further into de-tail in this matter in order to examine some of the inaccuracies that have been pointed out to us for in my opinion the jury upon such a charge as was delivered to them in the present case had no assistance rendered to them in order to find out what were the questions of fact which they had to determine and what was the evidence that bore upon those questions. The effect left upon their minds must have been that if they found the police papers to be unworthy of reliance they were to find the case against the accused, all of them, proved. It was scarcely desirable to tell the jury as the learned Judge did that he had set aside the order of discharge passed in favour of three of the accused persons. Nor was the learned Judge right in telling the jury that the way in which the girl pointed out the various houses and described the contents of the same or in other words the verification was a substantial corroboration of her story, without at the same time warning them that in spite of all that the jury were not relieved from the task of weighing the evidence of the girl as to identification with every care and scrutiny. There has been no real attempt made by the learned Judge to deal with the evidence pointing to the complicities of the different accused persons, except by merely differentiating the cases against

them by reference to the number of witnesses who spoke about the different accused persons, in other words, the strength or weakness of the evidence of the witnesses as against each accused individually does not appear to have been pointed out to the jury. It cannot be disputed that the evidence as against some of the accused persons is not quite so strong as against the others. The defences of the different accused persons and the statements made by them were no doubt placed before the jury; but the evidence, such as, it is on the record supporting the said defences or portions of them were not brought to their notice. Facts and circumstances have been elicited in the cross-examination of the prosecution witnesses which do assist some of the accused persons to a certain extent. In short the learned Judge's charge to the jury is not that intelligent summing up which the law requires and aims at.

16. The verdict of the jury in the present case therefore cannot be upheld. Consequently the appeal must be allowed and the said verdict set aside.

17. I have carefully considered the question as to whether the order for retrial which will have to be made should be made in respect of all or only some of the accused persons. The evidence against some of the accused persons is no doubt distinctly weak and not absolutely free from infirmities, but in the case of none of them can it be said that it is of such a character as would justify us in withholding the case from a jury.

18. I am therefore of opinion that all the appellants with the exception of course of Kasim who is dead, should be retried in accordance with law.

19. The appellants will be released on bail to the satisfaction of the District Magistrate pending the retrial ordered.

20. Let the order with the records be sent down at once.

Newbould, J.

21. I agree.

