

Kadira Vs. Emperor

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Court : Kolkata

Decided On : Mar-13-1928

Reported in : AIR1928Cal466

Appellant : Kadira

Respondent : Emperor

Judgement :

C.C. Ghose, J.

1. This is a reference under Section 374, Criminal P.C. by the learned Sessions Judge of Chittagong in a case in which the appellant before us named Kadira alias Abdul Kadir was tried along with five others before him and a jury under various sections of the Indian Penal Code. The appellant Kadira was charged with having committed offences punishable under Sections 302 and 120-B/302 I.P.C. The five other persons who were tried along with the present appellant and who were acquitted by the jury were charged under Sections 302/102-B and 302/109 I.P.C. As regards the appellant, the jury brought in a verdict of not guilty under Sections 302 and 302/102-B and a verdict of guilty by 4 to 3 under Sections 302/109, I.P.C. The learned Judge accepted the verdict of the majority of the jury under Sections 302/109, I.P.C. and sentenced the appellant to death. In his letter of reference to this Court the learned Judge states that in his opinion the evidence on the record is sufficient to justify the conviction of the appellant under Section 302 read with

Section 109, I.P.C., and that in the circumstances of this case he had no alternative but to sentence the appellant to death.

2. Now, the case for the prosecution, shortly stated, was as follows : It appears that at the instance of one Iasinali, one Anu Boli and some others were charged under Section 304, I.P.C., on the allegation that they had caused the death of Iasinali's brother Azimuddin. After the preliminary investigation a charge-sheet was submitted against the accused in that case and they were committed to the Sessions. One Kumud Ghosal was taking an active interest in the prosecution of that case and was assisting Iasinali. It is alleged that he was approached by Anu Boli, among others, with a view to arrange some sort of compromise of that case. Kumud Ghosal was not inclined to favour the compromise, but Iasinali, it is said, was not unwilling to effect a compromise. Be that as it may, the attempted compromise fell through.

3. Some days thereafter Kumud Ghosal and one Asmat Ali, along with two others named Amir Hamza, who is a brother of Iasin Ali, and Isaf Ali, set out for Cox's Bazar in the district of Chittagong. The four persons named above met at the Ferry Ghat at Balukhali and from there onwards they travelled together. They got out of the boat at a place called Tambru Ghat and from there they set out by road to Cox's Bazar. The road to Cox's Bazar passes after the dak bungalow at Ukhia through some dense jungle and thereafter the road rises for some distance and then continues on the level again. After passing this rise, the four persons named above began to pass along the higher level of the dhala; Kumud Ghosal was leading and the other three were following him. There was a gun with Kumud Ghosal; it was being carried by Asmat Ali. After they had passed some distance over the level road, a gunshot was heard from the direction of the west and it was found that Kumud had been shot on the left side. He fell down exclaiming that Kadira had shot him. The men who were with Kumud Ghosal, namely, Asmat Ali, Amir Hamza and Isaf Ali, turned their eyes towards the west and it is said that they saw a gun being withdrawn into the jungle, smoke rising and Kadira's head was peering-out over the jungle growth. It is also said that these three persons also saw Anu Boli. Anu Boli, it is said, gave an order to seize the three men and thereupon a number of men came out of the jungle and advanced upon the men

who were accompanying Kumud Ghosal. These latter fled in terror towards the north. They ran for some distance but when they found that the people who had been chasing them had gone away, they returned to the place where Kumud Ghosal lay and found that other passengers from the boat which stopped at the Ferry Ghat had gathered round Kumud Ghosal. When they returned they spoke to Kumud and it is said that each of the three men told Kumud that they had recognized the men who had attacked. Kumud told them to go and inform the police. One of the three men, namely Amir Hamza, went to the police station where he lodged the first information. This was about 3:30 p.m.

4. The Sub-Inspector of Police thereupon proceeded to the place of occurrence. He held an inquest and sent the dead body to Cox's Bazar for post-mortem examination. The doctor who held the postmortem examination was examined in the Sessions Court and he was of opinion that the killing of Kumud Ghosal was clearly a homicidal one.

5. Now the main evidence against the appellant Kadira consists of the deposition of the three witnesses, being P.Ws. 3, 6 and 7, and it is really on the evidence of these three witnesses that the charge under Sections 302 and 302/120-B, I.P.C. was sought to be sustained. We have carefully examined that evidence for ourselves to see whether in the circumstances, apart from any question of law, it is sufficient to sustain a conviction under Section 302/109 I.P.C. In my opinion that evidence is wholly insufficient to sustain a conviction under Section 302/109 I.P.C. Further there was no charge before the jury against the present appellant of being guilty of an offence, punishable under Section 302 read with Section 109 I.P.C. As indicated above the two charges against the present appellant were under Section 302 and Section 302 read with Section 120-B, I.P.C. In these circumstances the learned vakil for the appellant has contended that the jury having found the appellant not guilty under the charges against him and which included a charge of conspiracy, and there being no charge against him under Section 302 read with Section 109 I.P.C. the verdict of the jury, that is, of the majority of the jury, against the present appellant under Section 302 read with Section 109, is one that cannot be sustained and that it is open to us on a reference under Section 374, Criminal P.C., in a case of this description, to set aside that verdict.

6. It is true that there was no charge of abetment of murder against the present appellant before the jury, but in my opinion it cannot be laid down as a universal rule that in no circumstances whatsoever, where there is a charge of a substantive offence and there is no charge of abetment of that substantive offence, can the person so charged with the substantive offence be convicted of abetment of that offence. The cases on the point under Sections 236, 237 and 238, Criminal P.C., indicate a conflict of judicial opinion but the true rule seems to me, as indicated by J. Woodroffe in his Annotations to the Criminal Procedure Code, that the answer to the question really depends on the facts of each case and that we have to find out in each case whether or not prejudice has been caused to the accused by reason of the conviction for abetment of the substantive offence in the absence of a charge therefor. I do not propose to go through the cases which were discussed at the bar as no useful purpose would be served thereby. In this case the question resolves itself whether on the record before us the appellant can be properly convicted of abetment of murder of Kumud Ghosal. The jury have found, that the persons before them, i.e., Kadira and the said other persons, were not guilty of murder of Kumud Ghosal. Therefore the murder of Kumud Ghosal must have been committed by some person unknown. Now, the record before us is insufficient for conviction of the present appellant of abetment of murder of Kumud Ghosal by an unknown person. The evidence on record points to the conclusion that there was either a murder of Kumud Ghosal by the persons arraigned before the jury or nothing. There being therefore no charge of abetment of murder and no evidence to sustain such a charge, even if made, the verdict of the jury cannot be allowed to stand, and it is our manifest duty to set the same aside. In my opinion, in a case like this it would be extremely risky to allow the verdict of the jury to remain and the safer course would be to set aside the same and to allow the present appeal.

7. The result therefore is that the verdict of the jury is set aside and the appellant must be discharged from custody.

Rankin, C.J.

8. I agree.

