

Hachani Khan Vs. Emperor

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Court : Kolkata

Decided On : Jan-21-1930

Reported in : AIR1930Cal481

Appellant : Hachani Khan

Respondent : Emperor

Judgement :

1. This case arises out of a dacoity that was committed on the night of 2nd November 1928, in the boat of one Kali Kumar Banikya, an itinerant vendor of metal utensils. The other occupants of the boat were Kali Kumar's nephew, Lebu, and two Manjhis named Rajendra and Bir Oharan. They were all strangers to the locality and so were unable to recognize any of the dacoits as men who had been known to them from before. Kali Kumar lodged a first information at the thana on 3rd November, in which he stated that none of the occupants of the boat had been able to recognize anyone, but that he thought that he might be able to recognize two or three of the dacoits, if he saw them again. He also gave descriptions of three of the dacoits, one of whom, he said, had threatened him with a knife, while the other two had caught him by the throat. On coming to the spot, the Sub-Inspector arrested one Samiruddin, and in consequence of information given by Samiruddin, a box of utensils that had been stolen by the dacoits was recovered from the bed of the river. Various other articles were also seized, and a number of persons were arrested and sent up for trial. When produced before the Magistrate, Samiruddin made a confession and was subsequently made an approver Seven

persons, including the three appellants, were committed for trial before the Third Additional Sessions Judge of Mymensingh, and of these, three were acquitted, while the three appellants and one other person, who has not joined in the present appeal, were convicted on a unanimous verdict of guilty.

2. The evidence consists mainly of that of the approver Samiruddin who gives a detailed account of the whole affair from start to finish, and the evidence of Kali Kumar, Lebu and Rajendra to the effect that the three appellants were among the dacoits, and also the evidence of some of the local men regarding the movements of the approver and of his associates immediately before and immediately after the occurrence, as well as evidence regarding the recovery of the box of utensils and the proceedings of the police in the course of the investigation.

3. The statements of the appellants at the trial were to the effect that they were innocent and knew nothing about the occurrence, while the defence sought to be set up on their behalf in cross-examination and in argument appears to have been that they had been falsely implicated by the approver, partly in order to exculpate his real associates in the crime and partly out of enmity. It was not denied by the defence at the time of the trial that the dacoity had actually taken place as alleged and that the approver had been one of the dacoits, nor has any such contention been urged on appeal.

4. In his charge to the jury the learned Additional Sessions Judge has dealt with the matter in the following way. After explaining the charges he places the approver's evidence before the jury at great length, at the same time stating that though it is not illegal to convict an accused person on the uncorroborated testimony of an accomplice, it is considered as a rule of practice unsafe to do so, unless the testimony of the approver is corroborated by independent and reliable evidence in material particulars fixing the guilt on that person. He next places before the jury the evidence of Kali Kumar, Rajendra and Lebu with special reference to the question of identification, at the same time drawing the attention of the jury to the discrepancies in the evidence of these witnesses and of the approver as regards the specific acts attributed by them to the various accused persons. He also draws the attention of the jury to the fact that Rajendra and Lebu

had not been able to identify any of the accused before the police, and asks them to consider whether in these circumstances the evidence of these witnesses is not altogether worthless, and whether it, can at all be relied on as corroboration of the evidence of the approver Samiruddin. As regards Kali Kumar, the Judge points out that Kali Kumar has stated in his evidence that he hopes to get back his money in case of conviction, and he asks the jury to consider whether this hope may have induced Kali Kumar falsely to identify some of the accused as having been among the dacoits. After discussing the evidence of the approver and of the occupants of the boat in the above manner, the Judge proceeds to place the evidence of the remaining witnesses before the jury. This he does at great length, indeed at too great length, for the important facts elicited from these witnesses are to some extent buried under a mass of unnecessary and unimportant details. This is especially unfortunate in view of the fact that the Judge, instead of grouping the witnesses in such a way as to direct the attention of the jury to the evidence regarding each of the particular facts sought to be proved on either side, has merely placed their depositions before the jury in the order in which they were examined. This method of dealing with the evidence may have tended to confuse the minds of the jury in some respects, but this defect has in our opinion been remedied (except to some extent, as regards the existence or the absence of corroboration of the approver's evidence, a point which will be referred to again presently), by the summing up of the evidence against each individual accused in the concluding portion of the charge.

5. After placing the evidence before the jury in the manner indicated above, the Judge briefly discusses the evidence to show that the dacoity actually took place, and that the approver was one of the dacoits. He then goes on to say that the most important question is whether any of the accused persons standing in the dock and if so, which of them, were concerned in the dacoity, and again warns the jury that it would be extremely unsafe to rely solely upon the uncorroborated testimony of the approver. He also reminds them that they will have to consider whether the statement of the approver regarding the complicity of any of the accused have been corroborated by independent, untainted and reliable evidence, and points out that

it is one thing that a dacoity was committed, but it is quite another thing that any of the accused was concerned in the crime.

6. In this connexion he invites the attention of the jury to the evidence suggesting the existence of enmity between Samir and some of the accused and to the defence contention that Samir may have implicated them falsely out of enmity and in order to shield his real associates. He then again refers to the evidence of identification, pointing out that there was moonlight at the time of the occurrence, and that Kali Kumar had no grudge against any of the accused; and after referring again to the discrepancies regarding the part played in the dacoity by the persons whom Kali Kumar had identified, he asks the jury to consider whether, independently of the evidence of the approver, they can rely upon the identifications made by Kali Kumar at the trial.

7. In his summing up of the evidence against each individual accused, the Judge draws the attention of the jury, so far as the accused persons other than the present appellants are concerned, to the existence, or the absence, of independent evidence corroborating the approver. In dealing with the case of Hachani Khan one of the present appellants, the Judge refers to his identification by Kali Kumar, to the discrepancies regarding the part played by him as pointed out in the earlier part of the charge, and to the evidence suggesting the possible existence of enmity between him and the approver Samiruddin. He omits, however, to refer to the evidence of (P.W. 11), Safiruddin, who speaks of the assemblage of a number of people (including Meghu, one of the appellants), in Hachani's, house on the night of the occurrence. This is a piece of evidence which if believed, tends to corroborate the evidence of the approver, both in respect of Hachani and in respect of Meghu. The Judge has dealt with Meghu's case in a manner similar to that in which he has dealt with Hachani's case referring again to the evidence of identification by Kali Kumar and to the discrepancies between the evidence of Kali Kumar and Samiruddin regarding the particular part played by the accused. He has also referred to Safiruddin's evidence regarding Meghu's presence in Hachani's house on the night of the occurrence and to the evidence of (P.W. 19), who says that he saw Samiruddin (the approver) and Meghu sleeping together in a hut in Meghu's bari shortly before sunrise on the morning after the

occurrence. This is a piece of evidence which, if believed, tends to corroborate the approver's evidence as against Meghu. The Judge has not in so many words drawn attention of the jury to the fact that the evidence of Safiruddin and of Samiruddin Taluqdar (P.W. 19), tends, if believed, to corroborate the approver's evidence as regards Meghu's participation in dacoity, but he has, after referring to their evidence, again reminded the jury of the evidence of enmity between Meghu and the approver.

8. As regards the appellant Shah Newaj alias Fuler Bap, the Judge asks the jury to consider whether they can rely on the identification by Kali Kumar and the approver. He has not, however, specifically drawn their attention to the fact that, apart from the identification of Shah Newaj by Kali Kumar, there is no other evidence of the approver so far as the participation of Shah Newaj in the dacoity is concerned. It may here be remarked that there is some evidence on the record to the effect that some of the accused persons, including the three appellants, had been at the hat on the day immediately preceding the occurrence, but the Judge has quite rightly not treated this as corroboration of the approver's evidence to the same effect, and has in fact not referred to it in his charge, except quite casually while placing the evidence of the witnesses before the jury. It would perhaps have been better, if the Judge had told the jury in so many words that the evidence on this point ought not to be regarded as corroborating that of the approver inasmuch as it in no way tended to connect any of the accused with the actual occurrence.

9. It is true that the evidence on this point tends to corroborate Kali Kumar's evidence to the effect that he had seen these persons at the hat on the day in question. The first information, however, contains no mention of Kali Kumar having recognised any of the dacoits as men whom he had seen in the hat on the previous day, (as he now says), and it would have been better if the Judge had drawn the attention of the jury to this fact. It is very doubtful whether there is any truth in the allegation but the Judge, though he did mention it in stating the case for the prosecution, does not appear to have laid any stress on it and there is no reason to suppose that the jury attached any importance to it or that they might have taken a different view of Kali Kumar's evidence if their attention had been

specifically drawn to the fact that the first information¹ contains no mention thereof. As a matter of fact, the first information was read over to the jury in the course of the charge : so they were in a position to notice the omission for themselves and to draw such inference therefrom as they might think fit.

10. It has been urged on behalf of the appellants that there are certain defects in the charge which amount to mis-directions and that the result has been a failure of justice. It is contended in the first plac³ that there was an omission amounting to a misdirection in not drawing the special attention of the jury to the fact that the first information contains no mention of Kali Kumar having, as he stated in his evidence seen some of the dacoits including the present appellants, at the hat on the day immediately preceding the occurrence. This point has already been referred to above and for the reasons given we are of opinion that the accused have not been prejudiced by the omission in question, and that there is, therefore, no substance in this contention.

11. Another point that has been taken is that the Judge did not draw the attention of the jury to the fact that there was no evidence to show that Kali Kumar identified any of the present appellants before the investigating police officer. It is a fact that there is no such evidence on the record, and the reason is obvious, namely that, having regard to the provisions of Section 162, Criminal P.C., it was not open to the prosecution to question Kali Kumar on this point. It was, however, open to the defence to cross-examine him on the point (if he had, in fact, not identified the appellants before the Sub-Inspector) and this the defence did not do. The approver was arrested on 7th November and the appellants, Shah Newaj and Meghu were arrested on the following day. There is evidence that Shah Newaj and some others (but not Meghu) were taken to the complainant's boat after arrest and that Rajendra and Lebu failed to identify any of them as having been among the dacoits. There is, however, no evidence as to whether Kali Kumar did or did not identify any of these persons before the Sub-Inspector as having been among the dacoits. Now would such evidence have been admissible unless the defence had chosen to cross-examine Kali Kumar on the point. As regards Meghu, there is no evidence to show that he was at any time taken to the complainant's boat for the purpose of identification or that Kali Kumar and his companions were ever asked

during the course of the police investigation whether they could identify him or not. As regards Hachani he was arrested later and was shown to Kali Kumar at the thana, but there was no cross-examination as to whether Kali Kumar did or did not identify him at that time.

12. In these circumstances the Judge was quite right in only drawing the attention of the jury to the fact that Rajendra and Lebu had not been able to identify Shah Newaj before the police, and in making no comments as regards the evidence or lack of evidence of identification before the police in respect of the other two appellants, Hachani and Meghu.

13. Then again, it is pointed out that Bir Charan, one of the occupants of the boat, was not examined as a witness and it is urged that the Judge was guilty of a misdirection in not telling to the jury that it might and indeed should be presumed from the fact of his non-examination that if he had been examined his evidence would not have supported the case for the prosecution. This contention is perfectly correct so far as it goes. The Judge should in our opinion have given the jury a direction on these lines. There is, however, evidence that Bir Charan is a very old man and there is nothing to show that he ever came out of the covered portion of the boat or that he saw anything of the dacoity. This being so we have no doubt that the jury, though not given any special direction on the point drew the correct inference for themselves, namely that Bir Charan if he had been examined as a witness would not have been able to throw any light on the question of the identity of the dacoits. In this view of the matter, the omission to give the jury the direction that is usually given in such circumstances, is a matter of little importance and cannot possibly have had any effect on the verdict.

14. Lastly, and this is a point of some importance, it is contended that the charge is defective inasmuch as the Judge did not properly direct the jury regarding the kind of corroboration that is required before placing reliance on the evidence of such an approver as the approver in the present case. It is conceded that the Judge repeatedly told the jury that it would be unsafe to base a conviction on the evidence of the approver, unless, such evidence was corroborated by independent and reliable evidence in material particulars, but it is contended that the Judge

should have gone further than that, and should have explained to the jury that by the expression 'material particulars,' as used in this connexion, is meant such particulars as tend to connect each of the accused with the offence charged. In this connexion reference has been made to the case *Rebati Mohan Chakravarti v. Emperor* : AIR1929 Cal57 in which it was held that it is for the Judge to determine whether there is any evidence that does corroborate the story of the approver so far as the complicity of the accused is concerned, and that it is the duty of the Judge to direct the attention of the jury to those portions of the evidence : confirming or corroborative the accomplice's story, which do or do not fulfil the requirements referred to above, namely the evidence corroborating the accomplice's story in material particulars implicating the accused. In that case the Judge had, in his charge to the jury, treated as corroborative evidence, evidence which in no way tended to connect the accused with the offence, and in this he was held to have been wrong, but the conviction was nevertheless upheld as it was found that there was in fact sufficient corroborative evidence in law against the two appellants, that is to say, evidence corroborating the accomplice in some material particulars implicating the accused. In the present case the Judge has not indeed told the jury, in so many words, which portions of the evidence should be regarded as corroborative in the above sense, and which portions should not be so regarded, but there are several, passages in his charge which must in our opinion have had the same effect on the minds of the jury as a specific direction on the lines indicated above would have had, as for example, the passage that has already been quoted, namely:

it is considered as a rule of practice unsafe to convict an accused upon the testimony of an approver, unless corroborated by independent and reliable evidence in material particulars fixing the guilt on that accused.

15. Then again, after placing the whole of the evidence before the jury, the Judge says:

The most important question is whether any of the accused persons standing in the dock, and if so which of them, were concerned in the dacoity. On this point the jury, unless they are inclined to rely solely upon the uncorroborated testimony of

the approver which would be extremely unsafe, will have to consider whether the statements of the approver regarding the complicity of any of the accused have been corroborated by independent, untainted and reliable evidence. It is one thing that a dacoity was committed, but it is quite another thing that any of the accused was concerned in the crime.

16. Lastly, in the concluding paragraph of the charge, the Judge again reminds the jury that

though it is not illegal to convict any of the accused on the-uncorroborated testimony of the approver, it would be extremely dangerous to do so without corroboration of Samir's statements regarding the complicity of the accused or any of them by independent reliable evidence.

17. In view of these remarks it may, we think, be assumed that the jury were well aware that the sort of corroboration that was required, was corroboration in material particulars tending to connect each of the accused with the offence, and this being so, it cannot, in our opinion, be held that the omission to state the law on the point in more precise language amounted to a misdirection.

18. Turning now to the cases of the individual appellants, it is, in our opinion to be regretted that the learned Sessions Judge, in summing up the evidence against each, did not indicate more clearly in what respects the approver's evidence had been corroborated as against each, and in what respects it had not been so corroborated. This is not a matter of much importance so far as the appellants Hachani and Meghu are concerned, for there is, in our opinion, as in *Rebati Mohan v. Emperor* : AIR1929 Cal57 , sufficient corroborative evidence in law against those two appellants, on the record, and that evidence has been very fairly and fully placed before the jury in other portions of the charge.

19. As regards Shah Newaj, however, the Judge ought, in our opinion, to have drawn the special attention of the jury to the fact that though there was some corroborative evidence as regards the movements of the appellants, Hachani and Meghu, immediately before and immediately after the occurrence, there was no such corroboration in respect of this appellant, Shah Newaj. The omission to do so

amounts in our opinion, to a misdirection, and having regard to the weakness of the evidence of identification of Shah Newaj and the evidence regarding the existence of enmity between this appellant and the approver, it must, we think, be held that the evidence against him, is insufficient to justify a conviction, and that the misdirection referred to above has in fact occasioned a failure of justice, so far as this appellant, Shah Newaj, is concerned.

20. In these circumstances, the conviction and sentence in respect of the appellant Shah Newaj should, in our opinion, be set aside, and he should be acquitted and released from custody. As regards the other two appellants, Hachani and Meghu, the convictions and sentences should be upheld, and their appeals dismissed.

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