

Emperor Vs. Mofizel Peada

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Court : Kolkata

Decided On : May-01-1925

Reported in : AIR1925Cal909

Appellant : Emperor

Respondent : Mofizel Peada

Judgement :

Sanderson, C.J.

1. This is a Reference by the learned second Additional Sessions Judge of the 24 Pergannahs in the case of Mofizel Peada: and the learned Judge has recommended that he should be convicted under Section 302 of the Indian Penal Code.

2. There were 13 persons involved in the charge, all of whom, with the exception of Fazal Zamindar, were convicted of an offence under Section 147, I.P.C. Mofizel Peada was found not guilty under Sections 302 and 342 read with Section 109, but the jury found him guilty of an offence under Section 147 and also of an offence under Section 304 (A).

3. Dhanu Peada was found not guilty of an offence under Section 802 read with Section 109 and also of an offence under Section 342 read with Section 109: but, as I have already said, he was found guilty under Section 147, I.P.C.

4. That there was a riot on the 28th June 1924, there can be no doubt, between the party of the accused on the one hand and the party to which Momtaz Molla, the man who was killed belonged I do not think it necessary to deal in any detail with the allegations of enmity which existed between these two parties. There is evidence that enmity existed, at all events, between certain individuals of the one party with certain individuals of the other party. It is clear that on the 28th of June there was some incident which caused both parties to assemble- Momtaz's party near the bari of Dhanu Peada and the accused's party partly inside and partly outside the premises of Dhanu. There was undoubtedly abusive language: and I think the verdict of the jury involves the finding that there was throwing of bricks by the accused's party at Momtaz Molla and his companions. Momtaz Molla was killed by a bullet entering his body in the neighbourhood of the heart and penetrating his lungs and. coming out at the back at the tenth intercostal space about an inch in the left of the spine: he must have died very shortly after he had received that wound. 1 here is no doubt that the bullet which killed him was fired from a gun by Mofizel Peada.

5. The prosecution story, in short, is that the gun was fired by Mofizel Peada, that he was standing behind the wall which adjoins the road which passes the premises of Dhanu Peada, that Momtaz was in the field on the opposite side of the road on a rather lower level and that Mofizel took a deliberate aim at Momtaz and killed him.

6. The written statement made by the Defendant Mofizel Peada was to the effect that it was true that he had fired the gun but that he was standing on the west of the verandah (the verandah of the house and not behind the wall adjoining the road) that he fired the shot towards the field with a view to threaten the opposite party and that it was a pure accident that the bullet struck Momtaz, that he fired the shot towards the field thinking that there was no one there and that he had no intention to kill Momtaz or any one else.

7. It was part of the prosecution case that Dhanu had incited Mofizel to shoot Momtaz. Some of the witnesses said that they had heard Dhanu ask Mofizel to fetch Dhanu's gun and shoot Momtaz. It seems to me that the learned Judge made

a very significant observation with regard to that part of the case when he said: 'The gun and license were in his name, but if there were such a shooting and hullabaloo, who would hear him give an order in the terms that we have given here? Besides that does not agree with the F.I.R. statement that the gun was taken by Mofizel from the house. The evidence now given looks like an inference drawn by angry and prejudiced men.'

8. It seems to me that it would be difficult, having regard to the distance which separated some of the witnesses and Dhanu Peada and the noise and shouts which apparently were going on, for those witnesses to have heard what is alleged to have been said namely, that Dhanu had asked Mofizel to fetch his gun and shoot Momtaz.

9. With regard to the witnesses who were called on behalf of the prosecution, the learned Judge summarised his criticisms in the following manner:-'Thus it may be said generally that none of the witnesses can really be said to be disinterested except the Doctor who is not an actual eye witness, and there is no eye-witness who has not apparently made statements which conflict with his evidence before the committing Magistrate or the statements recorded by the Sub-Inspector.'

10. There are other matters to which the learned Judge referred which the jury were entitled to take into consideration: but It is not necessary for me to deal with them in detail. It is sufficient for me to say that this was a case in which the jury might come to the conclusion that they could not accept the evidence of the prosecution witnesses as being reliable in all respects.

11. If I understand the learned Judge's summing up and his Reference, it seems to me that he has based his conclusion that the accused deliberately shot Momtaz on certain facts and inferences which are to a certain extent Independent of the evidence of the witnesses for the prosecution, who are alleged to have been present at the time of the occurrence. He pointed out that the course of the bullet was in a downward direction and that it went through the body of the man. He was of opinion that there was an important corroboration of the case which was put forward by the prosecution, because It was alleged and apparently it was a fact-that the ground behind the wall over which the accused is alleged to have fired the

gun was on a higher level than the road and that the road again was on a higher level than the field on which the deceased man was standing and the learned Judge came to the conclusion that if the gun had been fired by the accused from that position and the deceased man was standing in the position, which I have stated, the course of the bullet would be downward from the front to the back.

12. I agree with the learned Judge that that is a matter which is material for consideration. At the same time I feel that it would be dangerous for us to rely to any large extent upon that, especially in the absence of any expert evidence as to the exact level of the ground and the angle in which the gun would have had to be held in order to inflict such a wound upon the deceased man if he had been standing in the position, which I have stated. It is, therefore, possible, in my opinion, that the jury may have come to the conclusion that it would not be safe to accept the case for the prosecution.

13. The jury then had to consider the statement which had been made by the accused person. The learned Judge seems to have formed the opinion that that statement could not possibly be true, for amongst other reasons, that if the shot had been fired in the direction and in the (manner described by the accused, the bullet must have gone over the head of the deceased person. I am inclined to agree with the learned Judge that the statement made by the accused person as it stands cannot be accepted and the jury may have been of the same opinion.

14. The jury, however, may have come to a further opinion, viz., that the case for the prosecution was not in every respect accurate, and that the statement of the accused in every respect was not accurate but that he may have fired the gun with a view to threaten the deceased man or some of his companions, although he did not fire it from the place in which he said he did and in the direction in which he said he did.

15. At the same time they may have concluded that he had no Intention to hit anybody. In other words, the jury may have rejected both the prosecution story and the story told by the accused and may have come to a conclusion relying only upon these facts which they thought had been proved.

16. When a learned Judge makes a Reference to this Court under Section 307, it is the duty of this Court not only to consider the entire evidence, but also to give due weight to the opinion of the learned Judge and the jury and in the circumstances of this case, in my judgment, it would not be right for this Court to hold that the verdict of the jury was perverse.

17. The result is that in my opinion, this Reference ought not to be accepted.

18. It was open, in my opinion, to the jury to convict Mofizel Peada under Section 304 (A) having regard to the fact that there was a charge against him under Section 302. Therefore the verdict of the jury as regards this accused, namely, that he was guilty under Section 147 and also of one offence under Section 304 (A) ought to be accepted.

19. Before leaving this case, I regret to say that I find it necessary once more to refer to the way in which the map in this case was prepared. It is many years since this Court drew attention to the way in which plans were prepared: and the matter was expressly dealt with in the case of *Emperor v. Abinash Chandra Bose* : AIR1924 Cal1029 the head-note of which runs as follows:

20. A person who makes a map in a criminal case ought not to put upon it anything more than what he sees himself. 'Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed to the map as an index thereto: and this Court drew attention to the fact that the Police Regulation dealing with the preparation of maps had been amended so long ago as 1920 in consequence of a representation which had been made by this Court. The Police Regulation as amended in this respect (r. 178) is set out in the report.

21. I should have thought that a sufficient time has elapsed to enable those who have the conduct of criminal cases in subordinate Courts to see that the directions of this Court and of the Government of Bengal are carried out.

22. In this case the map which, we were informed by the learned Counsel who appeared for the Crown, was placed before the jury, is a glaring instance of what

ought not to be done. In this case there was a dispute between the prosecution and the defence as to the exact position in which the accused was standing, when he fired the gun. The prosecution said that he was standing behind the wall near the road. The accused saw that he was standing on the verandah of the house at some distance away. In spite of this I find on the map, a place marked near the wall with the following note: ' From this place the accused Mofizel Peada fired his gun.'

23. This is the place alleged by the prosecution. Anything more improper it is difficult to imagine. This I find in another part of the map. 'The deceased Momtaz Molla was standing here when he was met with the gunshot.' These are two things which the Sub-Inspector of Police who, we were told, prepared the map, could not possibly have seen, because he was not there at the time and he must have made those insertions in the map relying upon information which he received from the witnesses.

24. There is one thing which it was most important for the person who made the map to note but which he did not mark on the map: that is, the place where he found the body of the 'deceased man. The Sub-Inspector said that he found the body lying in the field. He ought to have taken careful measurements so as to identify the exact spot. That is a thing which he saw but which he did not note on the map.

25. I do not think it necessary for me to say anything more upon this point as the matter has already been dealt with so frequently by this Court. In my judgment, the map in its present state ought not to have been allowed to be placed before the jury. If it was necessary for the map to be placed before the jury, the proper thing to be done was to have a clean copy made with these entries omitted, so that the jury would have a map before them which would not have prejudiced their minds in any way.

26. We now have to consider what sentence should be passed upon the accused Mofizel Peada. He was convicted by the jury under Section 304 (A). There is no doubt that Mofizel Peada caused the death of Momtaz Molla by doing a very rash and negligent act, which did not amount to culpable homicide. In my opinion, there

was no justification for the accused person taking out the gun and firing it specially with a ball cartridge in view of the situation which existed. A person who goes into a riot with a gun loaded with a ball cartridge is apt to cause serious injuries to some one person or persons; and it is a practice which cannot; be looked upon lightly by a Court of justice. In this case, the unfortunate result was that the accused caused the death of Momtaz Molla.

27. The trial in this case concluded at the end of January this year and the Reference was made by the learned Judge on the 3rd of February, so that Mofizel Peada has been in jail for three months already expired which, but for the Reference, would have been served as part of his sentence. The result therefore is that we take that into consideration and pass a sentence on Mofizel Peada under Section 304, (A), of fifteen months' rigorous imprisonment to commence from to day and we pass a similar sentence for the offence under Section 147; the two sentences to run concurrently.

Panton, J.

28. I agree.

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