Samser Ali Vs. Emperor

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Court : Kolkata

Decided On : Dec-06-1945

Reported in : AIR1947Cal342

Appellant : Samser Ali

Respondent : Emperor

Judgement :

Sharpe, J.

1. The appellant Samser Ali has been convicted under Section 395, Penal Code, following the unanimous verdict of the jury and sentenced to five years' rigorous imprisonment. The case for the prosecution was that there was a dacoity in the house of P.W. 7 Anandamoyee Debi on the night of 3rd July 1943. A large number of persons entered the court-yard and demanded ten rupees each from Anandamoyee. Subsequently they wrenched gold-ornaments from Anandamoyee and from her daughter, broke open an iron safe and a lot of boxes and departed with property valued at about fourteen thousand rupees. Anandamoyee sustained some injuries which were examined subsequently by a doctor. Neighbours came and were told of the occurrence and that Anandamoyee had recognised certain of the dacoits whose names she did not disclose. An ejahar was lodged at the thana on the following morning by P.W. 6 in which the information previously stated has been recorded. Investigation followed in the course of which a coat marked Ex. 3

was found and identified by Anandamoyee and her daughter as belonging to Anandamoyee's husband and having been stolen in the course of the dacoity. The prosecution case is that this coat was placed under the mango tree where it was found by the present appellant. The appellant Samser Ali absconded during the course of investigation and could not, therefore, be placed on trial along with certain other persons who have been already tried. He eventually surrendered and was produced in Court on 29-6-1944. The defence is simply a plea of innocence.

2. It does not appear that the fact of dacoity was at all challenged in the trial out of a which this appeal has arisen. The question on which there was dispute related to the identification of Samser Ali as one of the dacoits. In his charge, the learned Assistant Sessions Judge told the jury that the evidence to connect the appellant with the dacoity consisted in the evidence of (1) the recognition by Anandamoyee and her daughter, (2) the recovery from the accused's possession of a black coat Ex. 3 stolen in the dacoity and (3) his having absconded for a considerable time after the dacoity. The evidence relating to (2) and the manner in which this has been placed before the jury have been challenged before us as having been improperly treated, in consequence of which the verdict has been vitiated.

3. The only evidence offered by the prosecution to connect the present appellant with possession of the coat Ex. 3 was given by P.W. 2 Abdul Gafur Sheikh. His evidence, however, as pointed out by the learned Assistant Sessions Judge in his charge, indicated that the coat had been kept in a hole in a certain mango tree by one Mir Samser and not by the appellant Samser Ali. The jury were told that the evidence given by this witness in the enquiry preparatory to commitment for trial was also to the same effect. That statement was put in by the defence under Section 288, Criminal P.C. The Assistant Sessions Judge then proceeded to place before the jury the evidence given by Abdul Gafur Sheikh in the previous sessions trial of certain other persons and also his evidence in the enquiry preliminary to the commitment of those persons. Those statements purport to have been put in by the prosecution under Section 145, Evidence Act. Presumably they were intended to be put in under Clause (3) of Section 155, since Section 145 only lays down the procedure to be adopted. Clearly, however, they were put in for the purpose of contradiction. The Assistant Sessions Judge then referred to certain portions of

those earlier statements in which Abdul Gafur said that one Samser Sheikh had put a coat into a hole in a mango tree. He then proceeded to ask the jurors to decide which version they would accept and whether it was the present appellant who actually kept the coat in the hole in the mango tree. We think his treatment of this evidence was entirely improper.

4. In the first place, he failed to emphasise to the jurors that the positive evidence in the present trial was that the present appellant was not the person who had concealed the coat, and that nothing definite could be said as to what Samser was alluded to in his statements in the previous trial when the present Samser was not before the Court.

5. The main defect is, however, his not pointing out to the jury that the statements in the previous trial were put in by the prosecution for the purpose of contradicting Abdul Gafur's evidence in this trial, that this could not be used as substantive evidence of identification of the present appellant even if they had in fact been evidence of that nature, that they could be used only to show that he was an unreliable witness who had made different statements at different times and that those statements did not actually contradict his statement in the present trial. His treatment of those statements amounted to an invitation to the jurors to hold that his previous evidence was evidence of identification of the present appellant and that such evidence could be accepted as positive evidence from which the jurors could conclude that he was the person who had concealed the coat in the mango tree. In our opinion this was a serious misdirection and one which may well have influenced the jury in coming to a verdict adverse to the appellant. For this reason we think this appeal must be allowed and the conviction and sentence passed thereon set aside.

6. Even excluding the evidence to which we have referred there is other evidence remaining which, if believed, might induce a jury to convict the appellant. We, therefore, direct that he should be retried according to law. Whether in the circumstances he should be released on bail pending his retrial is left to the Sessions Court to decide.

Roxburgh, J.

I agree.