

Rased Molla Vs. Emperor

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Court : Kolkata

Decided On : Jun-14-1945

Reported in : AIR1948Cal102

Appellant : Rased Molla

Respondent : Emperor

Judgement :

Ellis, J.

1. The appellant, Rased Molla was placed on trial before the learned Sessions Judge of Khulna on a charge under Section 304, Penal Code in that on 30-11-1942 ho committed culpable homicide not amounting to murder by causing the death of one Samarthaban Bibi. The jury unanimously returned a verdict of guilty under Section 326, Penal Code and in agreement with that verdict of learned Sessions Judge convicted the appellant and sentenced him to rigorous imprisonment for two years.

2. The facts material to the disposal of this appeal are as follows. On 30-11-1942 the accused Rased Mella along with some other persons went to reap the paddy of a plot of Land close to the house of one Samarthaban Bibi, a woman 70 years of age. Samarthaban Bibi was actually in possession of this plot of land which she cultivated through her bargadar, one Gagan, when the appellant and his party began cutting paddy from the land. Samarthaban Bibi went to the spot with a dao

in her hand, protested against their conduct and asked them to stop reaping the paddy. One of their number Rajabali by name snatched away the dao from her hand. Thereupon, under the orders of Rajabali the present appellant Rased Molla inflicted a spear blow on the abdomen of Samarthaban Bibi. The disturbance attracted the attention of neighbours who came in a body and were informed of the occurrence. At about noon Samartbaban Bibi was taken in a boat to the police outpost where a first information was lodged. Thereafter she was taken to the Bagerhat Hospital at about 9:30 P.M. and as her condition was serious her dying declaration was recorded by a Sub-Deputy Magistrate. She died in the early hours of 1-12-1942.

3. The police proceeded to investigate the matter but did not take any step against the accused and so a naraji petition was filed by Samarthaban Bibi's bargadar Gagan before a Magistrate. Thereafter Samartbaban Bibi's daughter one Ayesha Bibi filed a petition before a Magistrate implicating Gagan as an accused. The police were ordered to hold an inquiry into the petition of Ayesha Bibi. They submitted a charge-sheet against Gagan and he was subsequently sent up for trial before the Court of Session on a charge of murdering Samarthaban Bibi. The result was that he was acquitted. Thereafter the Magistrate took up the naraji petition which had been filed by Gagan and asked him to produce witnesses in its support. Gagan adduced evidence and on that evidence the present appellant was committed to the Court of Session to stand his trial.

4. Mr. Mukherjee appearing on behalf of the appellant has first of all drawn our attention to the dying declaration which was recorded at 8-40 P.M. on 30.11.1942 by Mr. J. N. Mukherjee, a Magistrate of Bagerhat. In that dying declaration Samarthaban Bibi stated that the present appellant Rashed Molla gave a sarki blow on her belly, a statement which is in accord with the evidence given in the trial by the prosecution witnesses. Mr. Mukherjee, however, has claimed that the learned Sessions Judge did not give the jury adequate directions as to the value which was to be placed upon dying declaration. What the learned Sessions Judge said in his charge was:

However, before accepting this dying declaration, you must be satisfied that there is absolute guarantee of its accuracy and that it is true in its entirety.

This requires a high standard of proof so far as a dying declaration is concerned. At the same time, it cannot be denied that the learned Sessions Judge nowhere gave the jury the customary directions that they should not forget that a dying declaration is not made on oath and is not subject to cross-examination. These cautions are generally found in every charge to a jury in a case in which a dying declaration has been recorded. Mr. Mukherjee has quoted the ruling in *Goloke Behari v. Emperor* : AIR1938 Cal51 but we do not see that that ruling is directly in point.

5. Secondly, Mr. Mukherjee has drawn our attention to the failure of the learned Sessions Judge to give an adequate direction to the jury with regard to those witnesses whose names appear in Gagan's naraji petition and who were not examined in the Court of Session. The learned Sessions Judge in commenting on the evidence of one prosecution witness P.W. 6 Hanif has pointed out that his name does not appear in the naraji petition as a witness and he has also drawn their attention to the fact that four witnessss whose names had appeared in the petition were not put into the witnessbox:

Here I may also point out that the defence has commented on the non-examination of Daliladdi, Ismail, Jitendra, Manmatha whose names appear in the Naraji petition (Ex. 1) and who according to the prosecution witnesses came to the place of occurrence. The defence has also commented on the non-examination of the police officer in this case. You will consider if nonexamination of those witnesses in any way makes the story of the prosecution witnesses who have deposed in this case doubtful.

We do not think that this is an adequate direction to the jury with regard to the non-examination of those witnesses and we think that the learned Sessions Judge would have done well had he drawn the attention of the jury prominently to the presumption arising in such cases under Section 114, Evidence Act.

6. Lastly, Mr. Mukherjee has drawn attention to the point that the police who investigated the case were not examined as witnesses. It is true that there is nothing on the record to show that the defence asked for the examination of any investigating officer. At the same time, there is evidence on record which shows that the witnesses were questioned as to the statements they are supposed to have made to the police during investigation. Those statements of course cannot legally be admitted in evidence unless the investigating police officer is actually put into the witness-box and is invited to give evidence thereon.

7. In the result then, as we find that the learned Sessions Judge did not give what we consider adequate directions to the jury either as regards the dying declaration or as regards the non examination of the witnesses named in Gagan's naraji petition or with regard to the non-examination of the police officer, we think we have no alternative but to set aside the conviction and sentence and direct a retrial in this case. Accordingly we direct that this appeal be allowed and the conviction and sentence be set aside and that the appellant Rashed Molla be retried according to law.

8. The appellant who is on bail will remain on the same bail pending his re-trial.

Blank, J.

9. I agree.