

Abdul Malek Vs. Emperor

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Court : Kolkata

Decided On : Jun-10-1946

Reported in : AIR1947Cal343

Appellant : Abdul Malek

Respondent : Emperor

Judgement :

Chakravartti, J.

1. The appellant Abdul Malek has been convicted by the learned Sessions Judge of Noakhali in agreement with the unanimous verdict of the jury under Section 395, Penal Code, and sentenced to rigorous imprisonment for six years. Along with him seven other persons were placed on their trial. Of the total number of 8, six including the appellant were charged under Section 895, Penal Code, and one of those 6 as also two others were further charged under Section 412, Penal Code. The jury returned a unanimous verdict of not guilty as regards all the accused persons except the appellant. The appellant was found guilty, also by a unanimous verdict and he was sentenced as already stated.

2. The facts of the case, briefly stated, are the following. The prosecution case is that on 27-12-1943 a dacoity was committed at a place called Safarpur in the house of one Chandra Nath Chodhury. The dacoits were a very large number. It is said that they were about fifty and in the course of the dacoity the inmates of the

house received injuries. The first information was in due course lodged and police investigation started but on 21-2-1944, the police submitted the final report to the effect that no clue as to the culprits could be found. There the matter rested for the time being.

3. It is alleged that on 24-4-1944, that is to say, about four months later, another dacoity was committed at a place called Char Sherpur at the house of one Ambika Charan Das. The dacoits concerned in that dacoity, it is alleged, were resisted and in the course of the chase that was given to them, two were secured. One of them, it is alleged, was the appellant before us. He had received some injuries in the course of the scuffle and while he was at the hospital for treatment he, it is stated, expressed a desire to make a confessional statement and on 6-6-1944, he made one. In that confessional statement he admitted his own complicity as well as the complicity of several other persons not only in the dacoity committed at Char Sherpur on 24-4-1944, but also in the dacoity committed on 27-12-1943, at Safarpur with which we are concerned in the present appeal. Thereafter, the investigation into the Safarpur dacoity was reopened and the accused, along with others, came in due course to be placed on his trial.

4. The evidence against the appellant consisted of identification by two witnesses, viz., P.W. 2, Khetra Nath Choudhury and P.W. 5, Bepin Chandra Nath, his own confessional statement and evidence of some association coming from two witnesses. The learned Judge placed before the jury the entire confessional statement with reference to both the dacoities. He also allowed the prosecution to call two witnesses namely P.W. 22 and P.W. 23 who spoke only to the dacoity at Char Sherpur with which the trial was in no way concerned.

5. In support of the appeal, Mr. Mukherji, in his opening, took three grounds. He contended in the first place that the trial had been vitiated by the reception of inadmissible evidence; in the second place, that the learned Judge's direction to the jury regarding the confessional statement amounted to misdirection and thirdly that the learned Judge had misdirected the jury further as regards the inference to be drawn from the confession. In the course of the argument, however, Mr. Mukherji abandoned the last two points.

6. With regard to the admission of inadmissible evidence, the matter stands thus : As I have already stated, the learned Judge placed before the jury the entire confessional statement and then he charged the jury as follows:

The whole of the statement has been placed before you and here you find his confession also about his complicity in a dacoity committed at Char Sherpur. The whole of the narrative has been placed before you so that you may form your impression about whether his statement about the present dacoity is voluntary or not. You must not however form any bias against the accused on account of his reference to another dacoity in which he confessed his complicity. That part of the statement may be true or not.

7. One other fact remains to be noticed. The evidence against the co-accused, persons who were unanimously found not guilty by the jurors also consisted mainly of identification by one or more witnesses. Of the two witnesses who identified the appellant, one had identified some of the other accused as well.

8. With respect to the evidence of identification, the learned Judge placed before the jury all its infirmities and stated that in his opinion it was practically without any value. The accused persons were not previously known to the witnesses who claimed to identify them and the identification actually took place over a year after the occurrence when they claimed to have seen them at night in the light of torches.

9. It was contended before us that the jury having acquitted the other accused persons against whom the evidence of identification proceeded partly from the same witnesses and was, in all respects, similar, it may reasonably be presumed that they rejected the evidence of identification in the case of the present appellant as well. The only material upon which the jury must have convicted the appellant was therefore reduced to his confessional statement and the evidence relating to the other dacoity coming from P.W. 22 and 23, if that was any evidence at all. Mr. Mukherji complained that if the conviction of the appellant was based upon these materials, it was obviously bad because the jury must have been influenced mainly, if not wholly, by the evidence relative to the other dacoity which was wholly inadmissible.

10. In our judgment this contention is right and must be accepted. As I have stated already, one of the two identifying witnesses, namely Khetra identified other accused persons as well and the identification took place at a long distance of time from the date of occurrence. The learned Judge directed the jury to the effect that the evidence of identification was practically valueless and the verdict which the jury returned with regard to the other accused persons indicates, to our mind, that they accepted this direction as correct. That being so, we are in agreement with Mr. Mukherji that the conviction of the present appellant may reasonably be taken to have been based on such other evidence as had been adduced.

11. With regard to such other evidence, it is perfectly plain that that portion of the confessional statement which related to the dacoity at Char Sherpur could on no account be used at the present trial. Mr. Sen, who appeared for the Crown, contended that if the learned Judge had committed an error, he himself had rectified it by giving a proper warning to the jury. We are not of opinion that such warning as the learned Judge gave to the jury could in fact remove the effect already produced by the confessional statement. We have looked into the statement for our selves and we find that the two portions relating to the two dacoities are distinct and separate and there was no bar whatever to placing before the jury only that portion which was relevant to the present charge. In these circumstances, it is impossible not to hold that the jury must have been influenced considerably by the confessional statement, so far as it related to the other dacoity.

12. As regards the evidence of P.Ws. 22 and 23, its inadmissibility is beyond argument. It might have been necessary to make some reference to the circumstances in which the appellant had been arrested but we can see no reason at all and no justification in law for importing into the case the evidence of the facts of the other dacoity. The two witnesses whom I have mentioned spoke to that dacoity alone, and to nothing else.

13. The position therefore is that the verdict of the jury was caused very largely, if not wholly, by evidence which was utterly inadmissible. There can be no question here of the remaining evidence being sufficient to justify the verdict. The conviction

cannot, in our opinion, be maintained.

14. The next question to consider is whether we ought to direct a re-trial. Mr. Sen, on behalf of the Crown, contended that we ought to follow that course, because there was still some evidence left which was not open to objection. We have considered that matter carefully and our conclusion is that there is no such evidence in this case as would justify us in directing a retrial. The evidence of identification having been disbelieved by the jury, there remains only the retracted confessional statement of the appellant. The contents and nature of that statement are not, in our opinion, such as to require that a re-trial should be held.

15. We therefore set aside the conviction and sentence of the accused and acquit him of the charge brought against him and we direct that he be set at liberty at once.

Khundkar, J.

I agree.