

Emperor Vs. Kauser Ali Sk. S/O Kasem Sheikh and anr.

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Court : Kolkata

Decided On : Nov-18-1943

Reported in : AIR1944Cal249

Appellant : Emperor

Respondent : Kauser Ali Sk. S/O Kasem Sheikh and anr.

Judgement :

Khundkar, J.

1. This is a reference under section 374, Criminal P.C. for confirmation of the sentences of death passed upon the two accused Kauser Ali Sk. and Asmat (Ali) Mallik, who were convicted under section 302/34, Penal Code. Along with the reference there is an appeal by the two condemned men. The verdict of the jury as against Kauser Ali Sk. was unanimous, but in the case of Asmat it was divided in the proportion of 5 to 2. Before saying anything about the merits of the case, a point of law raised on behalf of the appellants should be dealt with. Upon the order-sheet of the learned trial Judge the first entry under the date 9th August 1934 reads as follows:

Owing to the paucity of Jurors, the trial commenced with seven Jurors. Out of eighteen Jurors called, only nine attended. Out of those nine one is too ill to sit and another gentleman, who is a Chemical Assistant in the Government Test House, Alipore, submits a letter from the Director, Government Test House, with the

request to exempt the Assistant, as the Assistant is engaged in the testing of important war material. Thus, two gentlemen can't sit (one being ill.)

The entry just quoted makes it clear that eighteen jurors were summoned for the trial, that nine attended, that out of these, two were unable to sit, and that in the result seven persons were empanelled as the jury for the case. As far as the record goes, it does not appear that it was practicable in the circumstances for the learned Judge to have empanelled a jury consisting of nine persons. It has nevertheless been argued on behalf of the appellants that the jury was not constituted in accordance with law. It seems to us that the point is covered by authority: see in this connexion the following cases, Emperor v. Damullya Molla : AIR1931 Cal261 ; Mukunda Murari v. Emperor : AIR1934 Cal10 ; Emperor v. Benat Pramanik : AIR1935 Cal407 and Emperor v. Kishori Khanra : AIR1943 Cal515 . The case in Emperor v. Benat Pramanik : AIR1935 Cal407 has been referred to with approval by the Judicial Committee of the Privy Council in Mirza Akbar v. Emperor . This point must accordingly be negatived.

2. The case for the prosecution very briefly stated was as follows: Accused 1 Kauser Ali Sk. had at one time been married to a niece of one Sona Sk. who is P. W. 10. After her death he married one Jamila Bibi who was an orphan living with her grand-mother Naju Bibi, P. W. 7, an old beggar woman. Kauser, who is a mill-hand, lived with Jamila in the cooly lines attached to a mill at Budge Budge. But there is some evidence that before the occurrence he used to spend his holidays in the house of P. W. 10 Sona Sk. Jamila whose age, according to the evidence, could not have exceeded 16, was in the habit of running away from Kauser and of going to stay with her grand-mother Naju Bibi. On Wednesday, the 3rd of March at or about 6 o'clock in the evening Kauser and Jamila together left their quarters in the cooly lines at Budge Budge, and there is evidence that Kauser said that he was taking his wife to Balarampore which is the village in which his relation Sona Sk. lives. At a spot not far from the cooly lines the pair were joined by accused 2 Asmat. They proceeded to a place which, as far as the evidence goes, would seem to be on the way to Balarampore and not far from that place. This place has been variously described in the evidence as Nandanpur and Nandarampur. Here the party halted for a time, and the accused Asmat went away and procured toddy

some of which was consumed by the accused Kauser. Thereafter the party entered a bamboo grove, which as far as we can ascertain from the evidence on the record lies in secluded spot. Here Asmat stabbed Jamila to death with a knife, while the husband Kauser stood by.

3. As against Kauser the case for the prosecution would indeed seem to be that he took an active part in the murder by holding his wife by the hands while Asmat was stabbing her. After the occurrence Kauser appeared at the-house of his relation Sona Sk. where he complained of pains in the body, and said he-wanted to lie down. As regards the movements-of Asmat after the occurrence there is no evidence whatever. The body of the murdered girl was discovered on the following day when the police recorded an information of unnatural death, and took up the investigation. While 'the investigating officer was moving round searching for clues and for any information which would lead to the identification of the murdered girl, the accused Kauser entered into another marriage, his third wife being another niece of p. w. 10 Sona Sk. The marriage took place on Sunday, 7th March. In consequence of information which the police were able to obtain, both the accused were-arrested on Tuesday, 9th March, and on the following Thursday, 11th March, the accused Kauser Ali made a confession before a Magistrate the material portion of which should here be set out :

On Wednesday last at 6-30 or 7 in the evening I took my wife Jamila Bibi with me from the Budge Budge cooly Lines to the Star Field at Budge Budge. Assak Mallik was sitting there. He came with us from there and coming through a swamp we reached Poke-pari. Assak made us wait on the road and went away. Then he brought a Jhapa (earthen pot) of toddy and asked me to drink the same and he made me drink a glass of toddy. Thereafter he came from there taking us with him to the swamp at Balarampur and there he went to see a garden. Then he came back and took us to the garden. He stopped there suddenly and at this time my wife looked at me again and again. At this time Assak stabbed my wife on the back; my wife tried to clasp me and at this time I seized both of her hands and then Assak stabbed her further. Then my wife cried out 'babaray' (I'm finished) and fell down. Then Assak Mallik began to stab her and I fled away out of fear and I stood at a little distance.

Q-Why did you take your wife to Assak Ali?

A.-I wanted to do another act (to take another wife) but he told me that I would not be happy to do another act (of marriage) so long as one (wife) was in existence and he asked me either to sell or to put an end to the one in existence. I told him that I would not be able to put an end to her (life). He asked me to bring her to him and he said that he would do the needful. So I brought her.

During the course of the investigation, the police were able to find some witnesses who were in a position to give evidence regarding the movements presumably on the date of the occurrence, of the two accused and the deceased woman between the time when they left the mill area, and that at which, according to the confession, the murder was committed. Prosecution witness 5 Dil Mohammad, a mill hand, deposed that on a Wednesday, at about the time of the murder, he saw Kauser going out with his wife after 6 P. M. after the mill had been closed. He asked the accused where he was taking his wife, and the latter replied that he was taking her to Balarampur. Not far from the cooly lines there is a football ground which is called the Star Field. Prosecution witness 16 Anguri Bhusan Ghosh who is an A. R. P. Warden, deposed that at about dusk on 3rd or 4th March, he saw the accused Asmat sitting on the grass at the foot of a tree talking to another man. The witness was then talking to P. W. 17 Sital Banerjee who is also an A. R. P. Warden. The two wardens were on the look out for bad characters who might be prone to commit theft during the alarm and confusion caused by air-raids, and the witness suspected that the two men might be thieves. He questioned them, and the accused Asmat replied that he was waiting for his cousin's husband who had gone to bring his wife. This witness further stated that the man to whom Asmat was talking went away, and that Asmat was then joined by the other accused, Kauser, who was accompanied by a girl aged about 15 or 16. The witness says that he saw this party of three persons going away shortly afterwards in an easterly direction. Prosecution witness 17 Sital Banerjee corroborated the evidence of P.W. 16 Anguri Bhusan Ghosh.

4. The next witness who gave some evidence about the movements of the accused persona and the murdered girl was P. W. 18 Sk. Munshi who lives in

Nandanpur. This witness deposed that about 7-30 P. M. upon some date which he does not specify, he saw the two accused, who were accompanied by a woman, standing somewhere in the village of Nandanpur or the village of Pokepari which is adjacent to Nandanpur. The witness flashed an electric torch on them. After two minutes the party of three went away. We would pause here to point out that the evidence of this witness has been taken and recorded in the Sessions Court in a most unsatisfactory manner. It is not clear from the record whether when the witness flashed his torch upon this party of three persons, it was in the village of Pokepari or in the village of Nandanpur. Moreover, as I have just indicated, there is nothing in the record to show on what date this happened. The omission of any reference to the date or the approximate date, is an oversight which suggests a lack of proper attention either on the part of the Judge, or the Public Prosecutor, or both. It was assumed by the learned Judge in his summing up to the jury that this witness was referring to the evening of Wednesday 3rd March. The assumption is entirely unwarranted by what appears in the record of the evidence of P. W. 18 Sk. Munshi, and we trust that greater attention in future will be paid by this Judge and this Public Prosecutor to matters of importance to which the attention of witnesses should be called. If it was not possible for this witness to state the approximate date of the incident to which he was referring this fact should certainly have been brought out in his examination-in-chief. Assuming, as the learned Judge has assumed, that the evidence of P. W. 18 Sk. Munshi refers to an incident of 3rd March, we find that four witnesses speak to the movements of the two accused and the deceased at a stage antecedent to the murder. Apart from the confession of Kauser there is no evidence to show when exactly Jamila Bibi met her death. The evidence of P. W. 10 Sona Sk. is as follows:

On the date before my seeing the dead body, Kauser came to my house complaining of pains in his body and he wanted to lie down. It was night. I asked him to take tea. I can't say if he took food. He came to me at 8-30 P. M. on the date-before the date I saw the dead body. I can't say exactly on which day, i.e., Wednesday or Thursday, I saw the dead body. I think I saw that on Thursday.

Provided this witness is telling the truth, it is reasonably clear that he is speaking of an event which occurred on the date of murder. Now, provided it is, established

that the evidence, to which I have already referred regarding the movements of the accused and the deceased woman before the murder took place, relates to the same date as that on which the murder was committed, and as that on which Kauser came to the house of Sona Sk. then it is clear that we have a more or less connected story of the movements of the accused Kauser both before and after the murder. The evidence shows that, accompanied by Asmat and his wife, he went to Nandanpur or Nandampur which is on the way to Balarampur where P. W. 10 lives, in the evening of Wednesday 3rd March. It is equally clear that at 8-30 on that evening he appeared at the house of Sona Sk. in Balarampur unaccompanied by either Asmat or Jamila Bibi. The evidence of P. W. 10 Sona Sk. definitely suggests that Kauser was then suffering from something like shock, because he complained of pains in his body, and the witness thought it necessary to offer him a stimulant in the form of tea.

5. One defect in the trial out of which this appeal and this reference arise is that the exact date to which the evidence of witnesses Dil Mohammad, P. W, 5, Anguri Bhusan Ghosh, p. W. 16, Sital Banerjee, P. W. 17 and and Sk. Munshi, P. W. 18 relates has not been clearly brought out in the evidence, and that the learned Judge in charging the jury seems to have assumed that the evidence must have related to what took place on the date when the murder was committed. All we can say is that, if it was impossible for these witnesses to give either the real or the approximate date, the learned Judge should have brought this fact, and its necessary implications to the notice of the jury in a prominent manner.

6. Assuming for purposes of argument that the evidence to which reference has just been made does in fact relate to the movements of the two accused and the deceased on the date of the murder, it is necessary to consider the compartments into which all the evidence in the case falls and to see what portion of it may be regarded as substantive evidence, and what portion of it is merely evidence of corroboration. It is also necessary to examine with care the evidence which is really available against the accused Asmat in Order to ensure that margin of safety which it is necessary to have for a conviction for a criminal offence. Regarding Asmat it is clear that the only evidence which really connects him with the crime is the retracted confession of Kauser Ali. If that goes, then even the fact that he

accompanied Kauser Ali and his wife from Budge Budge to Nandanpur on the day the murder was committed is consistent with Asmat's innocence. As has already been stated, there is no evidence at all regarding his movements on the night of 3rd March after 7-30 P.M. when he was seen by P. W. 18 Sk. Munshi. The evidence against Asmat, apart from the confession, amounts to no more than this, that he was in the company of the deceased and the other accused Kauser Ali up to some point of time prior to the murder. Evidence of this kind does create great suspicion, but it is certainly not sufficient in law to establish the charge against this accused. We are left, therefore, with Kauser Ali's confession. It is the statement of a person who, upon his own showing, was an accomplice and who is anxious to attribute the major part in the crime to his companion. It is a retracted confession, and it has repeatedly been held that a retracted confession of this character is for all practical purposes of no value at all against a co-accused. Even if the evidence of association to which reference has already been made above could be regarded as corroboration of some part of the story which the confession contains, it certainly does not amount to substantial corroboration of particulars connecting the accused Asmat with the murder. In these circumstances we are satisfied that the conviction of Asmat being unsupported by evidence legally sufficient, cannot be upheld. We accordingly direct that he be acquitted and set at liberty forthwith.

7. The case against Kauser Ali stands on a different footing. Against him there is his own confession, which though it was retracted is nevertheless evidence which the jury were entitled to take into consideration. Further, as has been already indicated, the evidence regarding the movements of this accused upon the night when the murder must have been committed can be regarded as some corroboration of the story contained in the confession. The evidence of his movements before the hour of 7-30 P.M. provided it can be shown to relate to 3rd March, shows that he left home accompanied by his wife and that he was with her when she was last seen alive. There is then a gap as to what happened, but the accused's own confession makes it clear that the murder was committed in this interval. The fact that he appeared in the village of Balarampur, unaccompanied by his wife and suffering from symptoms of shock, is not only consistent with the story in the confession, but goes some way to support it. As regards his subsequent conduct that also is consistent with the confession. After Wednesday 3rd March

Jamila was missing. Kauser took no steps whatever to trace her, and displayed no interest in her whereabouts. Instead of that he married another wife on the following Sunday which was 7th March.

8. The evidence apart from that which relates to the date which is not clear has been placed before the jury with fairness. The learned Judge's summing up is in other respects sufficiently full and ample and yet in the special circumstances of this case, we are not sure that the jury were invited to approach the evidence from quite the proper angle. It should have been pointed out to them that the only direct evidence in the case was that of the confession, that a retracted confession is not as strong as one which the accused adheres to, but that even so it was open to them if they believed the confession to found a conviction upon it. It should further have been pointed out to them that the evidence of association up to the hour of 7-80 P.M. the conduct and movements of the accused after 8-30 P.M. on that evening and on subsequent days was, if they believed it, evidence which afforded some corroboration of the confession.

9. The appeal of Kauser Ali must be allowed and he is directed to be retried according to law. The attention of the learned Judge who will hold the trial is directed to what has been stated regarding the evidence of P. Ws. 16, 17 and 18 with reference to the date of the incidents to which they deposed.

Das, J.

10. I agree.

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