

Nababali and ors. Vs. Emperor

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Court : Kolkata

Decided On : Jul-09-1930

Reported in : AIR1930Cal708

Appellant : Nababali and ors.

Respondent : Emperor

Judgement :

Panckridge, J.

1. This is an appeal on behalf of the accused persons, Nababali, Biswanath Das and Rameswar who have been convicted by the Assistant Sessions Judge of Mymensingh and sentenced to various terms of imprisonment under Sections 221, 388 and 342, I.P.C. The jury returned a unanimous verdict of guilty against all the accused in respect of the charge under Section 342, a unanimous verdict of guilty against Rameswar in the case of the charge under Section 221, a majority verdict of three to two guilty in the case of the charge under Section 388, I.P.C., against all the accused. The Judge accepted the verdict of the majority of the jury and sentenced the accused to various terms of imprisonment.

2. A preliminary technical point is taken on behalf of the accused persons, namely that the convictions are bad because the jury have returned a verdict of guilty against Rameswar under Section 342 and Section 221, whereas the charge was framed in the alternative. No one could suppose from reading the charge of the;

learned Judge that the charges had been framed in this way, and indeed the only fact that supports this is the word 'or' appearing at the beginning of the charge under Section 342 against Rameswar. Logically, there was no justification for charging Rameswar in the alternative as will appear from the facts of the case when we come to deal with him. We think that the form of the charge was a mere slip and that none of the accused was in any way prejudiced by the fact] that in form the charge was in the alternative, whereas in substance two quite distinct offences were charged and, in the view of the jury, proved against the accused. There is however another point which we consider h of some importance. The story for the prosecution was that the complainant Jogendra met the first two accused Nababali and Biswanath in a certain bazar where it is the practice of persona so disposed to gamble. A dispute arose owing according to the prosecution, to the fact that Nababali tendered to the complainant Jogendra a counterfeit currency note in payment of gambling loss. Thereupon Jogendra according to the prosecution case called on the third accused Rimes-war to take Nababali and Biawanath into custody. This Rameswar refused to do and at the instigation of the first two accused proceeded to apprehend Jogendra. Thereafter Jogendra was removed to a place which has been referred to as the bari of one Santosh where by threats of violence a sum of Rs. 105 was extorted from him, and he was not successful in obtaining his release until this sum had been made over. This is the story of the prosecution in respect of which the charges were brought and the accused persons were convicted.

3. Now the passage in the learned Judge's charge to which exception is taken is that which deals with the stage when the gambling was going on. It is evident that the place where the occurrence is alleged to have happened is, as one would expect not unfrequented and it is also evident that some of the prosecution witnesses spoke to the presence of other persons at the scene of the occurrence in addition to those who were directly concerned. Prosecution witness 5, for example, said that 10 or 12 elderly men were present at the time of the occurrence, and with reference to the 'witnesses named in the complaint Jogendra said that of them, Dwijendra Gurudayal, Phanindra and Narendra Sukladas saw the occurrence. None of these witnesses was called in support of the prosecution case. This aspect of the matter is dealt with as follows : The learned Judge says

that Jogendra said that Gurudayal belonged to the party of gamblers and that another prosecution witness said that Dwijendra and Phanindra are cousins of Biswanath, that is to say, accused 2 and he adds that as it was not likely that they would depose against their uncle the prosecution did not call them. He goes on as follows:

It is for you to consider if you will accept this explanation for the non-production of those witnesses.

4. Then he proceeds to observe that the occurrence admittedly took place near the shop of one Kunja Saha and he alludes to the fact that Kunja Saha has not been called nor any other person frequenting the bazar. Then he proceeds to make some general observation as to the likelihood of the persons engaged in the gambling being desirous of assisting the prosecution. With regard to Kunja and the witnesses who are described as 'the bazar people' we do not think that any harm has been done by the omission of the learned Judge to carry the matter further. But we do consider that the learned Judge failed to direct the jury properly as regards the absence of those persons who according to the complainant's case were witnesses to the occurrence. He does, it is true, with regard to three out of the four draw the attention to the explanation which is suggested by the prosecution for their absence and he says that it is for the jury to accept or reject it. But what he does not say is that the jury would be at liberty to draw an inference adverse to the prosecution story if the explanation suggested by the advocate for the prosecution is not acceptable to them.

5. With regard to witness 4 apparently no explanation was offered but the learned Judge does not call the attention of the jury specifically to this fact. Our attention has been directed to the case of *Tenaram Mondal v. Emperor* A.I.R. 1921 Cal. 257 where in circumstances which we do not feel justified in distinguishing from the present, the omission of the trial Judge to direct the jury as to the inference they were entitled to draw if they were not satisfied with the explanation suggested for the absence of material witnesses was held to be a non-direction amounting to a misdirection and to be a good reason for setting aside the conviction of the accused persons. A previous decision of this Court was referred to in that case

namely the case of Fanindra Nath Banerjee v. Emperor (1909) 36 Cal. 81 in which it was said that it is not necessary that the actual word 'presumption' should be used. But the two cases taken together seem to indicate that it is necessary that there should be a substantive direction on the part of the learned Judge as to the view of the prosecution which the jury is entitled to adopt if they are not satisfied with the explanation offered for the absence of a witness who is material. We have also been referred to the case of Hachanikhan v. Emperor : AIR1930 Cal481 . But this in our opinion merely shows that there may be a case where this omission in the particular circumstances is unimportant.

6. In that case it does not seem that it was clearly established that the witness who, it is alleged should have been called, was really a material witness at all. That case differs from the present case. As I have pointed out, from the evidence of the complainant himself there were at least four eyewitnesses to the beginning of the transaction in respect of which the prosecution was eventually launched who were not called. It has been urged that this omission only affects the case in so far as some of the charges are concerned and with regard to the charge of extortion the convictions can stand, inasmuch as it cannot be suggested that the witnesses could have testified as to the subject matter of that charge. We do not agree. Although the charges are concerned with different incidents yet all the incidents are parts of one transaction and we think that it is quite possible that if the jury under a proper direction of the learned Judge were not disposed to accept the prosecution evidence with regard to the commencement of the transaction they would probably have been equally loth to accept the prosecution story with regard to the subsequent transactions.

7. In the circumstances we direct that the convictions and sentences of the appellants be set aside and that the case be retried. Pending the retrial the appellants will be released on bail to the satisfaction of the District Magistrate.

Jack, J.

8. I agree.

