

Based Sheikh Vs. the King

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Court : Kolkata

Decided On : Nov-04-1949

Reported in : AIR1950Cal331

Judge : Roxburgh and ; Lahiri, JJ.

Acts : [Evidence Act, 1872](#) - Section 80; ; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 164 and 297

Appeal No. : Criminal Appeal No. 81 of 1949

Appellant : Based Sheikh

Respondent : The King

Advocate for Def. : Bireswar Chatterji, Adv.

Advocate for Pet/Ap. : S.S. Mukherjee, Adv.

Disposition : Appeal allowed

Judgement :

1. This is an appeal by one Based Sheik who has been convicted of dacoity under Section 395, Penal Code, on a majority verdict of 4 to 1 and has been sentenced to four years' rigorous imprisonment.

2. The evidence against the accused may be briefly summarised as follows: There were two eye-witnesses who identified him; they had also previously identified him at a test identification parade. There was some evidence of association with his co-accused both before and after the occurrence and there was evidence of a confession made by the accused Based.

3. The learned Sessions Judge has not properly dealt 'with the last piece of evidence, namely, the confession. He admitted the confession as evidence on the ground that he had accepted it as admissible as having been properly recorded by a Magistrate who had stated that he was satisfied that the confession was made voluntarily. The accused made a statement alleging torture by the police to extort the confession and there was some evidence of injuries found on him which the learned Judge considered supported this contention. The learned Judge thus placed the matter before the jury:

'The confession was therefore admitted in evidence under Section 80, Evidence Act, The section is explained. As the confession was taken in accordance with law the Court shall presume it to be genuine and therefore I admitted the document in evidence as prima facie; it looked as having been made voluntarily. But nevertheless it is for you, gentlemen of the jury, to consider the weight to be attached to it and to decide whether it is true or not and in doing so you should also consider whether it was made as a result of any torture, inducement or threat. The voluntary character of a confession is a mixed question of law and fact. You will exclude it altogether from consideration if it appears to you not to have been made voluntarily, when you consider the question in connection with the truth or Otherwise of the confession. You will consider the volitional character of the confession as detached from its credibility and in deciding its truth, you can at a part of it consider whether it was voluntary. The first thing that struck me was that the Magistrate who recorded the confession did not question Based as to whether he was being ill. treated or tortured or whether anybody had offered any inducement or threat to him, So the Magistrate did not duly caution the accused before he recorded the confession. Based had made a somewhat long statement before you and it is fresh in your mind. He stated that the Investigating Sub Inspector Moni Babu entered the look-up with two police constables and asked

him to implicate Guljar, Nirode, Kalu and Hedayet and four or five others, but he denied. Then he was abused and under the orders of Moni Babu the two police constables fisted him and assaulted him with ruler mercilessly as a result of which he sustained an injury on the upper pina of the left ear. Then he was given capsicum smoke to inhale and he was hung up with his head downwards tied by his leg to a rod. Then he consented to say whatever he was wanted to say. Then he again retracted. Then a constable pierced an iron nail inside the sole of his left foot. Then he consented to confess. On the following morning he was again given capsicum smoke to inhale and he was almost senseless and then even after he was taken to Court room, Moni Babu threatened him from outside and during the temporary absence of the Magistrate came into the Court room and exhorted him to confess just as he had been tutored. Gentlemen, you should remember that the statement of the accused is not made on oath but it is a mere statement. Nevertheless you should consider for what it is worth. It contains serious allegations against the investigating Sub-inspector. It is very difficult for an accused person in dock to prove torture. But on a petition filed by his mother on 3rd June 1948 after her interview in the-sub-jail with Based in which she complained about injuries on Based, the S.D.O. directed a medical examination and P. W. 16 Dr. Pal examined him on 3rd June 1948 and found (1) one prick mark at the inner aspect of the sole of the right foot through which a little pus came out on squeezing, (2) one little swelling mark $1/3 \times 1/6'$ on the upper margin of the pina of the left ear, (3) one ulcerated abrasion on the inner side of the lower part of the right leg $1 \frac{1}{2}'$ above the ankle joint. The doctor also said that Based complained of pain in the back and chest. He added that the duration of the wounds were $5/6$ days and so these might be caused on 28th May night. He said that injury No. 1 might be caused by ft pointed weapon and others by a blunt substance. So the medical evidence corroborates the statement of the accused. Based had also pain in the chest and back. According to the Magistrate he insisted on making confession which shows that he was unable to wait in the court room, Lyons in his Jurisprudence and Modi in his Jurisprudence have both stated that capsicum smoke is a common form of torture in India and this is a great irritant. You will consider whether the pain in the chest and back were not due to the inhalation of capsicum smoke. It is true that he did not complain of any torture

before the Magistrate on 29th May 1948; nor did he make any complaint in the time of the T. I. Parade on 2nd June 1948 or to the Jail doctor before he was medically examined. But the facts in this case are telling. Based stated that he was pricked on his left foot. But the medical evidence is that there was a prick mark on his right foot. You will consider whether Based was not mistaken in making the statement.

Gentlemen, I have placed before you all the facts bearing upon the volitional nature of the confession. The confession is read out. You will consider whether it was true and in deciding its truth you will take into consideration its volitional character. Under Section 24, Evidence Act, a well founded conjecture reasonably based upon circumstances disclosed in the evidence is sufficient for you to exclude the confession because it is idle to expect the accused to prove torture, threat or inducement and in most cases it is difficult. If there is any conflict or doubt as to the manner in which the confession was obtained the accused should be given the benefit of that doubt and in the present case I have no hesitation in directing you that you should hold the confession to have been extorted by the police by severe torture and threat and in that view of the matter you should totally exclude it from your consideration. Supposing you disagree with me, which I do not think you will, it would be my duty also to say what value you will attach to a retracted confession. As against Based who made the confession and then retracted it, it should not be acted upon unless it is corroborated in material particulars, that is, unless you can hold that he has been properly identified by Subodh and Panchurani at the T. I. Parade and unless you can hold that he was seen in the locality immediately before and after the occurrence. As against his co-accused Kaly, Guljar and Hedayat, its value is nil and the word means what it says; and unless there is other evidence which can stand on its own legs the retracted confession of a co-accused should not in any way be used to support a conviction. It comes to this therefore that as against the other accused, if you cannot believe the recognition of Kaly by Subodh and of the identification of Guljar and Hedayat by Panchurani, there is an end of the matter and the accused persons must be acquitted. I have cautioned you that you should be very slow to accept the identification of Kaly by Panchurani for, if Kaly had snatched away the necklace from her neck, Subodh would have been able to recognise him. So unless you can

believe the recognition of Kaly by Subodh, he too must be acquitted.'

4. It appears from this that the learned Judge has to some extent misunderstood the effect of the provisions of Section 80, Evidence Act. It is clear that his own opinion was, having regard to all the evidence, that the confession had been induced by torture. His duty, therefore, in the circumstance was not to leave the confession to the jury but to exclude it entirely from the evidence, it is true that the learned Judge while leaving the confession to the jury for consideration, has done his best to tell them that it is worthless, but there is a patent error of law in his procedure in leaving the confession for the jury's consideration at all.

5. From the rest of the charge it is evident that the learned Judge himself was not satisfied with the evidence of identification as regards the present accused. The matter was complicated by the fact that the accused had a defective eye and there was also evidence that he was a man well-known in the locality. The learned Judge was clearly impressed by these facts because the complainant in the case had failed to name the present accused in the first information report although he did state therein that one of the dacoits was a man with a defective eye. The evidence is that there are two such men well-known in the locality.

6. The only question that remains for us to consider then is whether we should order a re-trial, or deal with the matter ourselves on the evidence as it stands. If we take the latter course we should see no reason to differ from the view of the learned Judge that the evidence was in the circumstances not reliable to support the conviction. On the whole we think that the proper course in the case is not to order a re-trial.

7. We accordingly allow the appeal, set aside the conviction and sentence passed on the accused and acquit him of the offence and direct that he be set at liberty at once.