

Kasimuddin and ors. Vs. Emperor

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Court : Kolkata

Decided On : Aug-24-1934

Reported in : AIR1934Cal853

Appellant : Kasimuddin and ors.

Respondent : Emperor

Judgement :

S.K. Ghose, J.

1. The five appellants were placed on their trial with one Jamir Dai before the Assistant Sessions Judge of Dinajpur, Mr. S. S. E. Hattisngadi, and a jury on a charge Under Section 395, I. P.C. The jury brought in a mnanimous verdict of guilty as against these appellants. The learned Judge agreeing with that verdict has convicted the appellants as aforesaid and sentenced each of them to rigorous imprisonment for five years. The prosecution case shortly stated is that on 21st November 1933 there was a dacoity in the house of one Mobarak Ali. The dacoits, about 10 to 15 in number, forced their way into the house, assaulted the inmates, and took away ornaments and money. Some of the appellants were recognized as being among the dacoits. One Jamardi, husband of the sister of Mobarak, went to the thana and lodged the first information. Thereupon the police investigated and recovered some articles, alleged to have been stolen, from some of the appallants and one of them Kasimuddin made a confession which be retracted at the trial.

The defence is a denial.

2. I may say here that we had some trouble over this simple case because the learned advocate appearing for the appellants thought fit to address us on the merits of the case without taking care to provide himself with a copy of the record, so that he was not in a position to refer us to those portions of the evidence on which he relied in his argument. The Crown however was represented by Mr. Rahim and we have examined the record for ourselves. The evidence as set forth in the charge to the jury may be divided into three classes, namely (1) the retracted confession of Kasimuddin, (2) the evidence as to the recognition of some of the appellants (by the inmates) and (3) the finding of the stolen property. For the present, we may leave aside the confession and the evidence as to the alleged recognition and take up the case of those accused with whom stolen property is alleged to have been found. These are appellants Samiruddin and Asimuddin. The occurrence had taken place on 22nd November. On 9th December following the houses of these appellants were searched and two gold Koris Ex. 23 and a gold mache Ex. 24 were found in the house of Samiruddin, and a gold beshar Ex. 22 and a pair of silver arboukis Ex. 25 were found in the house of Asimuddin. The learned Judge while dealing with this part of this case set out the evidence, which is quite simple, fully and fairly. He at first drew the attention of the jury to the evidence as to the finding of these articles which in fact is not denied. Then he drew attention to the evidence as to the identification of the articles by Mobarak Ali, his mother, and his sister.

3. The first two identified all the four articles. The sister identified only two. Then the learned Judge also drew the attention of the jury to the circumstances under which the identification was made, namely, that there was a test identification carried out in the presence of the President of the Union Board. The sister stated that she saw her mother identifying the ornaments through a window, but the learned Judge was quite justified in drawing the attention of the jury to the fact that this sister herself did not identify all the four articles. Samiruddin claimed the two articles found in his house as belonging to his aunt and Asimuddin claimed the articles found in his house as belonging to his wife. But there is no evidence in support of this defence. The entire evidence was thus fairly placed before the jury

and the learned Judge stated quite correctly that unless the accused could satisfactorily explain the possession of the articles the jury would be entitled to infer that these two accused were either among the dacoits or had received the properties knowing that; they had been stolen in the course of the dacoity. The jury believing the evidence returned a verdict of guilty. In the circumstances, we see no reason to interfere with the conviction of the appellants Samiruddin and Asimuddin.

4. Then as to the appellants Satku and Ujir the only evidence is that they were recognized at the time of the dacoity by Moborak and his sister. For the present, we leave aside the confession of Kasimuddin. On this point the learned Judge no doubt drew the attention of jury to the first information report in which it was stated that Mobarak Ali had recognized some of the dacoits, but that he did not mention his name and stated that he would do so afterwards. But the learned Judge did not properly draw the attention of the jury to the probabilities upon this point. The first information report further stated that from the appearance of the dacoits and from their conversation they seemed to belong to this part of the country as if the inmates of the house were not very sure as to their identity. Then their evidence is to the effect that the dacoits wore galpatta and turbans and it was for the jury to consider whether in these circumstances, as also having regard to other circumstances at the time of the dacoity, it was at all possible for the inmates to recognize the appellants correctly. In this state of the evidence we do not think that the learned Judge placed the matter properly before the jury and the omission to do so amounts to a misdirection. Therefore, the two appellants Satku and Ujir are entitled to acquittal.

5. Then comes the case of Kasimuddin and the only evidence against him is his retracted confession. On this point the learned Judge spoke as follows:

There is also one point about the law relating to confessions which I must place before you. In order to decide a question of law, viz., the admissibility of the confession it is necessary to decide a question of fact, viz., whether the confession was voluntary or extorted. All questions of fact which are necessary for the decision of a question of law are for me to decide, and so it is for me to decide

whether the confession in the present case is voluntary. I have decided that it was voluntary, that warning was duly given to the accused as required by law, that enough time was given to him to ensure that the confession was really voluntary and that he made it of his own accord without any inducement. You should take all these points as settled and then decide what value should be attached to the confession and whether the accused was telling the truth when he made it.

6. We consider that the learned Judge was not happy in this part of his charge and that in saying that he had decided that the confession was voluntary, that the confessing, accused had made it without any inducement, and that the jury should take all these points as settled he committed a serious misdirection inasmuch as he withdrew from the jury an issue of fact relating to the truth of the confession. The duties of a Judge and a jury are prescribed in Sub-section 298 and 299, Criminal P. C. Briefly the position is that all questions of fact are for the jury and all questions of law are for the Judge. By Clause (a) to Sub-section (I), Section 298 the Judge has to decide the admissibility of the evidence and in order to enable him to do so he has to decide the necessary question of fact. This would appear from Ill. (a) to Section 298 which runs as follows:

It is proposed to prove a statement made by a person not being the witness in the case on the ground that circumstances are proved which render evidence of such statement admissible: It is for the Judge, and not for the jury to decide whether the existence of those circumstances has been proved.

7. As regards a confession the question may arise as to whether it was voluntary and also whether it was true. Neither is a question of law; both are questions of fact. But the point that initially arises is whether the confession is admissible in law and in order to decide that point it is necessary to decide prima facie whether the confession was voluntary. In other words to the extent of the admissibility of the confession, the Judge has to decide whether the confession is voluntary. Now these two questions of fact, namely, whether the confession is voluntary and whether it is true, are in a sense entirely separate from each other. A confession that is voluntary is not necessarily true and vice versa. But when we come to the question not of admissibility but of proof, that is to say, proof of the truth of the

confession, it is not surprising to find, having regard to the course of human conduct, that the two questions are mixed up, the truth of the confession may to a certain extent be inferred from its voluntariness. Therefore if the Judge has to decide the question of voluntariness in its bearing on admissibility, there is no reason why the jury should not consider the question of voluntariness in its bearing on the truth of the confession. Proof according to the law of evidence is a matter of reasonable belief amounting to moral certainty and the jury are supposed to be reasonable men and they are, therefore expected to take reason naturally. To ask the jury to accept the voluntariness of a statement as decided and then to consider its truth quite apart from the question of its voluntariness is to ask them to attain a mental detachment which is unpractical and perhaps impossible.

8. Moreover, such a process of reasoning would be faulty and prejudicial to the accused. By way of illustration we may refer to certain common classes of cases, for instance, where the accused makes a confession, and in the course of it says: 'I was not going to tell, but the police compelled me,' or where the evidence shows that the confession was made in the presence of a police officer. In such cases it is certainly the duty of the Judge to withdraw the confession on the ground that it was not voluntarily made. But take another class of cases, also common, where the accused confesses *prima facie* voluntarily and then at the time of the trial retracts and alleges torture and tutoring and says: 'All that is false. I know nothing. I was tutored by the police,' and the police officer deposes and denies the alleged tutoring. In such a case the truth of the confession is mixed up with its voluntariness, and it would be quite correct for the Judge to admit the confession for the consideration of the jury and leave it to the jury to decide whether the police officer should be believed or not.

9. It has been said that the study of the principles of evidence falls into two distinct parts. One is admissibility and the other is proof in the general sense. These matters have been the subject of consideration by text book writers and I may refer to Wigmore on Evidence, Edition 2, Articles 12, 29, 487, 2550 and 861. The following passage may be quoted. After pointing out that so far as admissibility in law depends on some incidental question of fact it is for the Judge to determine before he admits the evidence to the jury; the learned author says:

No doubt the Judge after admitting evidence leaves to the jury to give it what weight they think fit, for they are the triers of the credibility and persuasive sufficiency of all evidence which is admitted for their consideration. But to hand the evidence to them to be rejected or accepted according to some legal definition and not according to its intrinsic value on their mind is to commit a grave blunder.

10. Again:

When a confession is ruled to be admissible, the same evidence and all other circumstances affecting the weight of the confession may be introduced for the jury's ultimate consideration.

11. The distinction between 'admissibility' and 'proof' is also brought out in Wigmore's 'Principles of Judicial Proof.' There the learned author points out that

the procedural rules for admissibility are merely a preliminary aid to the main activity, viz., the persuasion of the tribunal's mind to a correct conclusion by safe materials. This main process is that for which the jury are there, and on which the Counsel's duty is focussed: see p. 4 Edn. 2.

12. For a detailed analysis of the confessional psychology it may be interesting, to refer to Ch. 23 of this book where at p. 506, the learned author remarks:

A consequence affecting the valuation of testimony is that in an ordinary case a confession made voluntarily by a normal person shortly upon arrest is likely to be true.

13. It may be worth while referring to another text book of authority, namely, Taylor on Evidence, Edn. 2, p. 27:

In all these cases however after the evidence has been finally admitted, its credibility and weight are entirely questions for the jury, who are at liberty to consider all the circumstances of the case, including those already proved before the Judge, and to give the evidence such credit only as, upon the whole, they may think it deserves. The Judge merely decides whether there is, *prima facie*, any reason for presenting it at all to the jury, and his decision on this point, if

erroneous, may be reviewed at the trial.

14. Again at p. 865 while dealing with the question of confession the learned author remarks as follows:

Indeed all reflecting men are now generally agreed that deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law, their value depending on the sound presumption that a rational being will not make admissions prejudicial to his interest and safety unless when urged by the promptings of truth and conscience. Such confessions therefore so made by a prisoner to any person, at any time, and in any place are at common law receivable in evidence while the degree of credit due to them must be estimated by the jury according to the particular circumstances of the case.

15. It is needless to add; that these remarks in the text books are fortified by reference to authorities. Mr. Rahim for the Crown has drawn our attention to Taylor on Evidence at p. 25 and to certain English cases mentioned therein, namely *Cleave v. Jones*, (1852) 7 Ex 421 and *Bartlett v. Smith*, (1843) 12 LJ Ex 287. These cases however were decided on the question of admissibility. I have already stated and this is also supported by the aforesaid references that the decision as to the admissibility must be upon a prima facie rule of evidence. I do not mean by this that if a confession is once admitted and from subsequent evidence it transpires that the confession is defective according to law and therefore not admissible, then it is not open to the Judge to withdraw the confession from the jury. It is so open and it would be his duty to withdraw it and I have no quarrel with the remarks of Guha and Nasim Ali, JJ., in *Nayab Shana v. Emperor*, 1934 Cal 636 at p. 664, where the learned Judges observe:

We are of opinion that before a Judge places the confession of the accused before the jury for their consideration as evidence in the case, he should carefully consider all the circumstances disclosed in the evidence and come to a decision whether these circumstances do justify a well founded conjecture which may be sufficient for excluding it from evidence.

16. But what I mean is that admissibility itself is a prima facie consideration. It is only for the purpose of letting in evidence for the consideration of the jury, and when once it is let in then comes the question of proof. In the case of *Khirode Mandal v. Emperor*, 1929 Cal 726 the only evidence against the appellant was his own confession which was subsequently retracted. My learned brother Khundkar, J., who was then at the Bar, appearing for the Crown contended that the Judge had to be satisfied with the voluntary character of the confession before admitting it in evidence but that this would also possibly be a question for the jury to investigate into its truth and he fortified this latter proposition by a reference to an unreported decision of Newbould and B. B. Ghose, JJ., (see p. 650 of 57 Cal). With great respect I entirely agree with the proposition thus stated. But the decision in that case to which I was a party was on the question of admissibility alone, and so it did not deal with the other point, whether the jury were entitled to consider the question of voluntariness in so far as it related to the proof of truth. On the other hand, in the case of *Queen v. Shahabut Sheikh*, (1870) 13 WR Cr 42 where the confessions were only one link in the chain of evidence, Norman, C. J., remarked as follows:

If a prisoner has confessed before a Magistrate the attention of the jury should be drawn to the question whether there was any reason to suppose that the confession was made under any undue influence, and If there is no reason to suppose anything of the kind, the jury should be told so and advised that they may act upon it.

17. This proposition is considered more recently by Mukherji, J., in *Sheikh Abdul v. Emperor*, 1925 Cal 887. There he points out that a free and voluntary statement is some guarantee of its truth, and that where the consideration of the question as to whether a confession is Voluntary or not is taken away entirely from the jury, it amounts to a serious omission sufficient to vitiate the verdict. This is a proposition with which I respectfully agree. In *Emperor v. Panchkari Dutt*, 1925 Cal 587 the same learned Judge was dealing with the question of admissibility. In the present case the learned Judge was in error in entirely withdrawing from the jury the consideration of the question whether the confession of Kasimuddin was voluntary or not. Had the jury been directed to consider this question in its bearing on the

truth of the confession they would have seen that the so Called corroboration was of no material value. If the confession was a tutored one, the sort of corroboration that was sought to be proved in the case was of such a nature as could also be tutored since. It did not touch the identity of the criminal with reference to the crime.

18. Then there is another serious misdirection in the charge and that is that the learned Judge drew the attention of the jury to the fact that in the retracted confession the confessing accused had named the co-accused. In his summary of the evidence the learned Judge treated this as evidence against each of the accused. No doubt Under Section 30, Evidence Act, the confession of an accused person may be taken into consideration, but this is not tantamount to saying that such confession is to take the place of proof. On the other hand, it must be remembered that the confession of a co-accused is even worse in value than the sworn testimony of an accomplice and if it is necessary that the latter testimony should be corroborated independently both as to the crime and as to the criminal it is still more necessary that the confession of a co-accused should be so corroborated, and when that confession is retracted it has no value at all as against the co-accused. This is a proposition which has been laid down in more than one decision of this Court and it will be sufficient to refer to Emperor v. Noni Gopal, (1911) 38 Cal 559. The learned Judge committed a serious error in not mentioning this to the jury. Therefore the confession has to be left out of account and, as against the appellant, Kasimuddin, there is no other evidence, he is entitled to acquittal. The result is that the appeal of Samiruddin and Asimuddin stands dismissed. The appeals of the other three appellants are allowed. In the case of each of them the conviction and the sentence are set aside and they are directed to be set at liberty.

Khundkar, J.

19. I agree.