

Harendra Kumar Mondal and ors. Vs. Emperor

Harendra Kumar Mondal and ors. Vs. Emperor

SooperKanoon Citation : sooperkanoon.com/871392

Court : Kolkata

Decided On : Jul-16-1937

Reported in : AIR1938Cal125

Appellant : Harendra Kumar Mondal and ors.

Respondent : Emperor

Judgement :

Biswas, J.

1. These two appeals have been heard together. There are three appellants before us, Harendra Kumar Mondal, Amulya Bagdi and Ratan Para-manik. Appeal 236 is by Harendra and Appeal 287 is by the other two. The appellants were charged with abetment of murder. The charge was in these terms:

That an unknown person or persons on the night of 18th June 1936, at, Simulia, P.S. Mongalkote, committed the offence of murder of Khudi-ram, and that you at Simulia, P.S. Mongalkote, abetted the unknown person or persona in the commission of the said offence of murder of Khudiram Mandal which was committed in consequence of your abetment, and thereby committed an offence punishable under Ss, 109/302, I.P.C., and within the cognizance of the Court of Session.

2. They were tried before the Sessions Judge of Burdwan, Mr. M. H. B. Lethbridge, by a jury, who returned a unanimous verdict of guilty against all the accused, and the learned Judge agreeing with the verdict sentenced each of them to transportation for life. The prosecution case briefly is that the deceased was a gomostha of the local zamindars, and that for some months past, Harendra and Amulya had been contriving to get him killed. On the night of the alleged murder, these two accused with Ratan were seen 'together in Harendra's baitakkhana, and overheard to say, 'The work must be finished to-night', meaning the work of murdering Khudiram. It is said that Khudiram held a satish that evening at his kutcherry or baitakkhana at which Ratan was present, and that after the salish he went home at about 11 P. M. for his meals. He ate a few pieces of bread in his house, and while returning from there to his baitakkhana to sleep, was murdered on the way. The prosecution cannot say who committed the murder, but their case is that the deceased was escorted by Ratan on the way from the baitakkhana to his house and back. They have also given evidence that Amulya and Ratan were seen together on the night of the murder near the scene of the crime, hurrying from south to north with their clothes tucked up in malkocha fashion, and further that Amulya and his son were seen washing their clothes in a tank near-by very late at night. The dead body was discovered in Kashi Nath's khamar the next morning, and was identified to be that of Khudiram Mandal.

3. The appellants have assailed the Judge's charge to the jury on various grounds of misdirection. A preliminary point is takers that the charge as framed was too vague thereby prejudicing the accused. The complaint is that the charge did not specify the particular species of abetment of which the appellants were accused. Section 107, I.P.C., shows that abetment may be by instigation, or by engaging in a conspiracy to commit the offence abetted, or by intentionally aiding a person to commit it. From the Judge's summing up, it is clear that the prosecution case was one of abetment in the second of the three ways mentioned, but the appellants argue that this had not been indicated to them at the commencement of the trial, and that the summing up cannot therefore be regarded as having cured the prejudice that had been already occasioned. We do not think that the accused have really made out a case of prejudice on this head. It was in our opinion open to the prosecution to charge abetment generally, and then, if the evidence did not

establish abetment other than in one particular form, to rely on this particular form for a conviction. The charge would amount to notice to the accused that they had to meet a case of abetment in one or more of the different ways indicated in Section 107. Section 221 (2), Criminal P.C., says that if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only, and Section 222 (1) requires that the charge shall contain such particulars as are reasonably sufficient to give the accused notice of the matter with which he is charged. It cannot be said that the nature of the case here was such that the non-particularisation of the species of abetment charged resulted in withholding such reasonably sufficient notice as the appellants were entitled to. It would no doubt have been better, having regard to the evidence which the prosecution had at their disposal, to have made the charge more specific.

4. The next complaint is that the medical evidence in the case was not put fairly or properly before the jury, and that in particular, this evidence was not placed before them in relation to other evidence, specially to that of P. W. 1, the deceased's widow, and of P. W. 5, the local zamindar. We think there is substance in this complaint. P. W. 1 said that the deceased came back to the house at about 11 P. M. on the night of the murder to take his meals, and that he actually took one or two pieces of bread and some milk. She denied that she had stated before the police that the deceased had taken four pieces of bread and some vegetables. P. W. 5's evidence is that there was a feast at his house on the day of occurrence, and that the deceased took a meal of chira, jack-fruit, mangoes, plantains and other things at the feast at 2-30 or 3 P. M. The doctor, S.P. Roy Chowdhury, could not be examined in the Sessions Court, but his deposition before the committing Magistrate was put in. His evidence is as follows:

Abdomen :-Stomach healthy, contained about 11/2 pound of semi-liquid gruel-like brownish coloured food with few particles of undigested jack-fruit and few particles of chira.

5. In cross-examination he said this:

The food found in the stomach was probably taken by the deceased about an hour before his death. Ordinary roti takes about three or four hours to be digested by a

man of normal health.

6. Now, if the medical evidence is taken along with that of P. W. 1, the murder must have taken place at least three or four hours after 11 P. M. when the deceased is said to have taken his evening meal of ' one or two pieces of bread '. This would however be inconsistent with the evidence of P. W. 4 (Umapada Mondal) who said that he saw Ratan and Amulya walking with hurried steps with mulkocha on at about midnight. If, on the other hand, the medical evidence is taken with that of P. W. 5, the murder must have taken place about an hour after the deceased had taken his meal of jack-fruit and chira at the feast at the house of the witness that afternoon. In either case, the medical evidence would falsify the prosecution story as to the time of the occurrence. It does not appear that the learned Judge put the matter in this way before the jury, as undoubtedly he should have done, having special regard to the fact that the evidence on this part of the case was circumstantial. The learned Judge no doubt drew attention to the defence argument that the medical evidence belied the story that Khudiram went home on the day of the murder at 11 P. M. for his evening meal, but he went on to tell the jury:

If either the prosecution or the defence want to make an argument like that, they should put that question directly to the doctor. In this case they should put the question in this way : If Khudiram had eaten throe or four pieces of bread at about 11 o'clock in the night, would you expect to find them still undigested in the stomach?

7. This was a clear suggestion to the jury that the defence had not put such a case to the doctor, but, as we have shown, this is directly negatived by the cross examination of this witness which is on record. We are of opinion that this was a serious misdirection in the ease.

8. The next point relates to the admissibility of certain evidence which was given to corroborate the -testimony of the witnesses who spoke to the alleged conspiracy to murder Khudiram. These witnesses were Obed Sheikh (P. W. 7), Solai Sheik (P. W. 8), Gholam Molla (P. W. 12) and Elahi Sheik (P. W. 13). They were all bad characters and three of them were registered dagis under the Criminal Tribes Act.

The learned Judge warned the jury that these were not men whose words they could trust, but pointed out that in the case of two of them, Obed and Solai, there was some corroboration. It is the evidence of this corroboration that is objected to. In the case of Obed, the corroboration is said to be that of the zamindar, P. W. 5, and in the case of Solai, the evidence of Bhabani and Bhupati, P. Ws. 15 and 16, among others.

9. Obed speaks to an incident which took place in Aswin 1342, i.e. several months before the murder, when accused Haren and Amulya approached him with an offer to hire his services for Rs. 200 or Rs 400 for killing Khudiram. He reported the matter the next morning to Khudiram, who brought it to the notice of the zamindar, P. W. 5. The zamindar then sent for the witness as well as for Harendra and Amulya. At this meeting Haren and Amulya were questioned as to what Obed had reported against them to Khudiram. The zamindar has given evidence about the statement which Khudiram had made to him on the subject, and this is said to corroborate Obed. The appellants object that Khudiram's statement cannot be proved in this way, as it could not be brought within Section 32 (1), Evidence Act, and they rely on the cases in *Imperatrix v. Rudra* (1901) 25 Bom 45 and *Autar Singh v. Emperor* AIR 1924 Lah 253. It seems to us, [having regard to the fact that the statement is said to have been made months before the alleged murder, it could hardly come within the terms of Section 32 (1). It could not be regarded as a statement as to the cause of Khudiram's death, and it would be straining the language of this sub-section very much to hold that it came within the words, 'statement as to any of the circumstances of the transaction which resulted in his death.' On the evidence of Obed as well as of the zamindar, it is clear that the death of Khudiram was not brought about as the result of what had been proposed by the accused to Obed and what the deceased is said to have reported to the zamindar.

10. Then, as to the evidence of Solai, who speaks to Amulya having sent for him about a week before the murder and asked him as to whether he could secure men to do the killing, and to his having refused to do so. The corroboration is sought to be found in the evidence of Bhabani and Bhupati, among others, who say that on the morrow of the murder, Solai gave out to the people who were

assembled near the dead body that he had been approached by Amulya a few days ago with that object. This is really trying to secure confirmation of Solai's statement by evidence of witnesses who had heard him make that statement. In our opinion, this might be corroboration of the fact that Solai had made that statement in the presence of others on the day following the murder, but is certainly not corroboration of Solai's statement that Amulya had approached him in the manner suggested. There is no evidence that Solai had made any statement regarding this matter anywhere else at any previous time, and so there was no 'former statement' by Lim on the subject within the meaning of Section 157, Evidence Act, which could corroborate his present and subsequent statement. The words 'former statement' in Section 157 mean a previous statement of the witness who is to be corroborated made on another occasion, i.e. an occasion other than that at which the subsequent statement requiring corroboration is made.

11. We think therefore that much of the evidence which the learned Judge relied upon as corroboration of Obed and Solai was really not admissible, and there was thus a material misdirection in this respect. There is other corroboration however of the evidence of these witnesses, and we cannot say that if the inadmissible evidence is left out, there would be no case to go to the jury. The corroboration of these witnesses may fail as regards particular matters, but if the jury think that their evidence is generally corroborated, it would be for them to say what value to attach to their testimony on the particular points. We need not say more, specially as we have come to the conclusion that there is evidence to go to the jury in the case, and must consequently order a re-trial. The learned advocates strongly pressed for an acquittal, but we think that would not be in the interests of justice. We accordingly set aside the convictions and sentences passed on the accused, and direct that they be re-tried by the Sessions Judge before another jury on the charge of abetment of murder, and suggest that at such re-trial the charge be made more specific, if the prosecution really seek to make out a case under only one of the clauses of Section 107, I.P.C. The appellants are on bail now and will continue to be on the same bail.

Guha, J.

12. I agree.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com