

Emperor Vs. Panchu Shaikh

Emperor Vs. Panchu Shaikh

SooperKanoon Citation : sooperkanoon.com/872762

Court : Kolkata

Decided On : Jul-18-1930

Reported in : AIR1931Cal178

Appellant : Emperor

Respondent : Panchu Shaikh

Judgement :

Rankin, C.J.

1. In this case the learned Sessions Judge and a jury of nine tried the two accused persons Panchu Shaikh and Lalu Shaikh and they have been convicted of the murder of a small child called Kililaddi on 19th January of this year.

2. The case for the prosecution is that there was much enmity between the accused" and the family of one Basiruddi who is the father of. a boy called Afsar of some 17 years of age, another called. Momtajuddin of some seven years and the small child Kililaddi who is dead. These people appear to have been living in the same bari and, as the accused persons allege enmity between Basiruddi's family, and themselves and there is considerable evidence of quarrels between these two parties, the subordinate question of motive in this case gives little trouble. The jury have been unanimous in the case of both the accused.

3. Some exception was taken to the form of the trial as regards the constitution of the jury. It appears that the jury at the end of the ballot were found to be four short,

and four gentlemen were chosen by the Judge from among the bystanders in accordance with the provisions of Sections 276 and 277, Criminal P. G. The learned Judge, having satisfied himself as to the social status and fitness of these gentlemen,' let them be appointed as members of the jury. It seems to me that we have no material before us to give ground for the suspicion that the law has not been entirely complied with in that respect. In the circumstances, it was entirely for the learned Judge to exercise his discretion as to whether ,to adjourn the trial or to proceed with it with the aid of these bystanders. So far as the composition of the jury is concerned, it certainly appears that these persons were persons of considerable education and were proper persons to be jurors in such a case as this.

4. The outline of the case for the prosecution is simple enough. The story is that these three brothers Afsar, Momtajuddin and Kililaddi went to a field a little way from their home to collect fuel for the purpose of boiling date juice, and that while they were collecting fuel Afsar noticed that the accused were looking out from behind a palm-tree near the north end of the field. At that time the youngest of them was nearest to the northern end. The eldest brother grew apprehensive and called the youngest brother to come; but before he could move away, the accused Lalu came rushing out and seized the little boy by the left arm. Panchu followed with a dao and began giving him strokes upon the right side of the neck. There can be no doubt that the boy was killed then and there and that some six injuries were inflicted on him with a cutting instrument. The prosecution case is that Afsar immediately raised a cry and fled towards the thana and that he got to the thana at about half past twelve and lodged the first information report. That first information report is to the effect which I have already indicated as being the prosecution case. It states that Panchu with a katari dao gave a cut on the shoulder of Kilu, that it was on the neck and shoulder that he gave four or five cuts one after another and that Lalu Shaikh was holding the deceased throughout. It says also that, as the child fell down, the two accused ran towards Afsar with the dao and said Shala, we shall finish you as well. ' In addition to that, we have at the trial, reinforcing the evidence of Afsar to the same effect, the evidence, first of all of the second brother Momtajuddin-a small boy of some eight years of age. The trial was held in May and the events were in January, and this small boy of eight alleged

how, on the day of the occurrence, they went to this field and were collecting dry wood, how Afsar called out to Kililaddi and Lalu rushed out and caught him by the left arm and Panchu struck him with a dao and also how he went to and told his mother what had happened. We have the evidence of the mother who says that Momtajuddin came back alone and told her that Panchu and Lalu had cut Kill with a dao. She says that her husband had gone to the river at the time to bathe, that she went to her husband and told him of what she had heard, that she then ran to the house of Samiruddi and told him of the occurrence, that on her return from Samiruddi's house she met Panchu running and that Panchu threw something on her which struck her on the left leg and said that he would rend them root and branch. She says further that she met Edar Mir on her way to Samiruddi's bari. She says also that she went to the cutchery, met the manager and told him that Panchu and Lalu had killed her son and that afterwards, when the Daroga arrived on the scene, he sent her to the dispensary where the injury to her leg was attended to. We have the evidence of the father Basiruddi. When he was in the river, he says, his wife came to him and told him that Lalu and Panchu. had cut down Kililaddi. He says that he then went home, changed his cloth and en route to the place of occurrence met Edar Mir, that in company with Edar Mir he went where Kililaddi's body was lying and that after a time many people came to the spot. Samiruddi is called and he speaks of the mother coming to his house that morning and telling him the story which she has told. The Manager Babu is called. He says that on 19th January, before he had his bath or breakfast, at about 11 a. m., a woman unknown to him then, but whom he now knows to be Nurunnessa-the mother of the boy-came to him and told him that Panchu and Lalu had killed Kililaddi.

5. Now, in the first information report which was clearly recorded at half past twelve, there is a statement by Afsar that on his way from the scene of occurrence to, the thana he had met two-people. One was Hamja Fakir who was pushing his boat-a witness who is not called; and Afsar says that he told him that his uncles had cut down his brother, Kilu. He also says that one Fulchand Muchi came out of his hut at that time and heard it. Afsar says:

I did not tell anything to anybody else. I have come straight to the thana.

6. Now, at the trial, Fulchand Mucbi is called, as a witness and he says that he heard a voice crying out: 'My brother has been killed,' and that it was the voice of Afsar that he heard, but he could not catch all what he said. Then there are two witnesses Krishna Bhusan De and Sarat Chandra Chakrabutty who also say that they heard words to the same effect of Afsar when he was on his way to the-thana. In this respect, no doubt, their evidence is in contradiction to that statement in the first information report in which Afsar said : I did not tell anything to anybody else.' When we come to look to the evidence of these two men, it is to the effect, in the case of Krishna Bhusan. that he was near his shop, that he saw Afsar running, that Afsar was-shouting that his brother had been killed, that he had no conversation with Afsar and that Afsar went away towards the-east and he remained in his shop. The evidence does not really seem to be in conflict with the first information report at all. The same however cannot be said with certainty as regards Sarat's evidence. Sarat's story is that Afsar was racing along and crying out and, that he asked Afsar what had occurred, and Afsar shouted that Panchu and his brother had killed Kililaddi.

7. Now, in these circumstances, we have to add one thing. On the 20th Lalu who. had been arrested on the afternoon of 19th, made a confession before a Magistrate. The learned Judge has rightly held that it was a voluntary confession, and though there are no elements in the story which would appear to make but that Lalu was anxious to show that his brother Panchu was more to blame than he was there can be no doubt at all that the effect of that confession is that these two people went to the field for the purpose of attacking the three brothers. It is not necessary for us therefore to consider any further the question whether or not Lalu's confession tells against him on the capital charge.

8. In these circumstances the case came on for trial before the Court of Session, and the learned Judge delivered a long, able and careful charge. To this charge Mr. Taluqdar has taken several objections, the objections taken being that there are passages in the charge in which upon matters of some importance the learned Judge has expressed himself in an assertive and dogmatic fashion which might unduly impress the jury against the accused and has not used such method of expression as was more proper to show that he was leaving all questions of fact

to the jury. The learned Judge's charge is no doubt in certain passages open to criticism as regards the terms and phrases which he has employed. But he has in almost all cases in which he had occasion to refer to facts explained to the jury that the question is for them and that they are entitled to disregard what he says. The caution is repeated and almost continuous throughout the whole of the charge. Nevertheless there were passages as to which one could wish that the learned Judge had used phrases that were a little less dogmatic.

9. Considering the matters of substance only, it appears to me that the first matter as to which there is complaint upon this point is the question whether or not the jury should pay much attention to the fact that in the committing Court the small boy Momtajuddin said that one cut had been given to Kililadcli while before the Sessions he said that he had seen two cuts being given to Kililaddi. The learned Judge has been anxious to point out to the jury that a child of eight speaking in May in an unusual and excited state of mind of an event he witnessed in January is not reasonably treated if he is disbelieved entirely upon a differing statement such as that. He has however used certain expressions for which there is no sufficient justification. He says of the child being able to speak to simple facts as to what he saw:

It is one thing for a child to do this, but entirely a different thing for him to withstand the vigours of cross-examination by a trained and skilful lawyer.

10. He says further:

If he was unable to cope with the onslaught in cross-examination, we cannot reasonably postulate that he is not a competent witness as to matters directly concerning the occurrence itself. It is for you however to estimate the credit of a witness but, in my opinion, to impeach the credit of a young-child by seeking to contradict him by proof of former statements is nearly taking an unfair advantage of his age. I leave that matter to you.

11. Now, I am of opinion that the learned Judge in this passage has omitted to note that the statement which the small child makes on an earlier occasion is a very relevant matter to consider in judging his evidence and, the learned Judge

has not so expressed himself as to show that he appreciated that it was the duty on a capital charge of the pleader for the defence to make clear before the jury anything that would be said in criticism of the accuracy of the child's recollection. But there, again, the important thing is whether or not the evidence given by this child in May before the jury can in any reasonable view be regarded as discredited by the circumstances that he said before the committing Magistrate that Panchu gave a cut to Kililaddi and did not go on to say that afterwards he gave another cut, so that he gave more cuts than one. The learned Judge's charge, as I have said, is not free from grounds of criticism; but the substance of the matter is, it seems to me, as the learned Judge has said.

12. The next matter which has been objected to is that the learned Judge has not made sufficient of the fact that it appears that the ground in question where the occurrence took place was not covered with undergrowth, but that there was jungle round the place. On that point however the learned Judge has, in my judgment, put the facts before the jury quite fairly and properly.

13. There is another passage in which the learned Judge deals with a point of which much is made by the defence. The defence were very anxious to show that the evidence of the two witnesses Sarat Chandra and Krishna Bhusan was inconsistent with Afsar's statement in the first information, and they were making a point that the whole story was probably concocted, because Afsar said after mentioning two names that he had spoken to these two people and had spoken to nobody else. The learned Judge, on that point, after stating the facts very fully and carefully says:

Now, had no mention been made in the first information report of Panehu and Lalu, the fact that Fulchand did not hear Afsar shouting the names of the accused would have been of some value, but we cannot avoid the undoubted fact that Lalu and Anchu were mentioned in the first information report, so it is of little consequence whether Fulchand or any other person who saw Afsar en route heard him say that Lalu and Panehu had killed Kilu or not. Afsar was on his way to the thana and when he got there he immediately mentioned Panehu and Lalu. It is useless therefore to contend that Sarat and Krishna were imported into the case

later. I ask you to consider particularly, gentlemen, whether we can expect Afsar to remember what he shouted.

14. I agree there again that that might have been better expressed. It was for the jury to say whether or not this observation was justified, and it would have been better if the learned Judge had said to the jury that they might very well think that, in the circumstances and in view of the first information report, the enquiry into what was said on the way was not of any great matter. Here again the learned Judge was putting something which is, in my judgment, abundantly reasonable and, although the term or phrase may perhaps be criticized, the substance of what the learned Judge was saying was no more than what would occur in the mind of any reasonable person dealing with the same fact. When he was dealing with Sarat's evidence as to his being unable to catch what Afsar was shouting, his questioning him and being told that Panehu and Lalu had killed Kililaddi, the learned Judge, referring to this statement and the statement made by the same witness in the committing Magistrate's Court that he heard Afsar shouting this information, says: 'I have no doubt that these statements are in substance indetical.' Well, in substance they are identical; but the learned Judge might, no doubt, have better expressed himself by putting it to the jury instead of putting it as an opinion of his.

15. In the course of a charge as long as this, it is to be observed that the learned Sessions Judge cannot be expected to pause always, to assure the jury that matters of fact are matters for them, and, in this case the cautions which he has given to that effect are so abundant that it would, I think, be hypercriticism to regard this charge as defective on this score.. The learned Judge has very pointedly remarked in certain cases that the observations apparently made by the pleader for the defence were based merely upon supposition and not upon evidence and I cannot find that in any single instance in this respect the learned Judge is wrong. I particularly refer here to the statement that

there is not one line of evidence which tends to show that the manager or the members of Waroda's staff had any reason to deal with partiality in this matter.

16. It has been pointed out to us that this witness and that person were tenants of the zamindar and it is said that the learned Judge should have called the attention of the jury to that circumstance. It does not seem to me that the observation is at all unreasonable. Again, the story put forward by Lalu to account for the evidence given against him by the manager is that the manager had asked him to give him a much cow for use while it was still milking and told him that if he consented he would not give evidence against him.. The learned Judge observes:

In this tale, gentlemen, we find an obvious working of such a mind as we would expect to find existent in Lalu. You may place your own construction upon the story but it appears to me to be more than somewhat strange that the manager should select such a time to enquire about a cow. I leave the matter to you.

17. What the learned Judge appears to mean is that this is a familiar kind of story given to account for enmity and that on the other hand it would be a very exceptional thing to find a zamindar's manager acting in the way in which the accused has endeavoured to. account.

18. I do not propose to deal with the question of the alterations in the time mentioned in the first information report because I am satisfied that there is nothing in that.

19. We have been asked to look at the case diary with a view to see whether the arrest of one Syed Ali Mir at about 6 p. m. on 19th January does not tend to show that in spite of the first information report and the evidence in the case, Panchu and Lalu were not being accused by Afsar and others but that other people were at that time being suspected of having taken part in this murder. At the request of Mr. Taluqdar we have investigated into that matter and we find that it is entirely explained. It seems that the Sub-Inspector heard from the deceased's mother that Lalu and Panchu were conspiring together in the house of this Syed Ali Mir when he was not very far away to finish Basiruddin's family and on that Syed. Ali Mir was taken to the thana but was immediately released on bail and afterwards discharged.

20. In this case Mr. Taluqdar has quite properly taken us through the evidence and he has put the case of the two accused with great energy and ability. He has contended that the accused have an appeal upon facts and that we have to go through the paper-book and make up our minds whether these two people are guilty. I do not think that there is really much room for difference of opinion though there is no doubt room for differences of expression as regards the power and function of this Court in a death reference under Section 374, Criminal P.C. It is quite clear that the powers of this Court are not limited as they are ordinarily limited in the case of an appeal from a trial held by a jury. It is open to this Court, and this Court has more than once so conducted the matter, to come to the conclusion that the finding of the jury is an unsafe finding, a finding not justified by the evidence on the record. But on the other hand I must demur strongly to the idea that this Court has to deal with the case merely on the paper-book. This Court has to deal with a case which has been tried upon the evidence of witnesses whom it has never seen. The Judge and the jury who hear the case in the first instance have had the advantage not only of seeing the witnesses in the box but of noticing the development of the prosecution case and the development of the evidence, the lines of defence that were taken and attempted and abandoned and the lines that were insisted upon and pursued. I desire to say for myself that in a case such as the present 'I shall always attach the greatest possible weight to the conclusion of the jury and as upon an examination of the record in the present case it appears to me that the evidence is abundant and convincing and as the jury in this case have taken that view and have unanimously convicted both the accused, I have no doubt at all that their verdict must be upheld.

21. Now, the question to consider next is the question of sentence. So far as Panchu Shaik is concerned I confess I think there is nothing to discuss. But Mr. Taluqdar has pressed upon us that Lalu Shaikh who is the younger brother did not actually inflict the cuts himself but merely caught Kulu and held him while the elder brother inflicted the cuts with a dao. I have very carefully considered whether the offence of which Lalu has been proved to be guilty is one which merits the capital sentence or whether it would be consistent with our duty to reduce the sentence passed upon him to a sentence of transportation for life and upon a careful review of all the facts from this particular stand point, I have arrived at the conclusion that

there is no reason for commuting in any way the sentence passed upon him. After all here are two grown up men lying in wait to attack these three brothers one of them with a dao and there can be very little doubt that their enmity with the eldest brother was greater than their enmity with this tiny child of 5 or 6 years. When it is found that their presence is discovered and only the little one is very near to them we find that one of these two brothers rushes out, catches the small child by the arm and holds him while the other brother attacks him and murders him by a dao. In my opinion there is only one sentence that can properly be imposed for such an offence as this and that is the sentence which has been passed by the learned Judge. The conviction and sentence of both the accused persons must be confirmed and their appeal dismissed.

C.C. Ghose, J.

22. I agree.

Patterson, J.

23. I agree.

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