

Ashraf Ali Vs. Emperor

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Court : Kolkata

Decided On : Jul-05-1917

Reported in : 43Ind.Cas.241

Judge : Teunon and ;Shamsul Huda, JJ.

Appellant : Ashraf Ali

Respondent : Emperor

Judgement :

Teunon, J.

1. In this case the appellant before us has been convicted under Section 302 of the Indian Penal Code and sentenced to transportation for life. The trial was by Jury and in finding the appellant guilty, the learned Judge has agreed, with the majority in their verdict. We have anxiously considered this case and have come to the conclusion that there are defects in the trial which render it necessary to set aside the conviction and sentence and direct a re-trial. In the first place, there is evidence that at the place spoken of as Bharamba the appellant left the boat now in question with the clerk Jogendra at about 6 to 7 P.M. and followed the latter upto Munsihat, a distance of some 1 1/2 to 2 miles from the ghat. It is not clear from the record of the heads of charge that this portion of the evidence was brought specially to the notice of the Jury. At the same time it would seem to be clear that the appellate could be convicted only if the Jury were satisfied that the

appellant returned to the boat, and returned in time to take part in causing the disappearance of the peon whose death is in question.

2. The second contention urged On behalf of the appellant was based on the non-examination of the second boatman Abdul Majid. On the case for the prosecution the Crown regarded and had reasonable grounds for regarding Abdul Majid as an accomplice. I am unable to read the case of Dhunno Kazi, In the matter of the petition of 8 C. 121 : 10 C.L.R. 151 : 6 Ind. Jur. 251 : 4 Ind. Dec. (N.S.) 77 as an authority for the proposition that the prosecution is required to produce and examine such a witness. But as this person has been examined as an approver on the former trial of the accused Raham Ali, it would doubtless have been more satisfactory if the prosecution had at least secured his attendance, and failing in this, had given detailed evidence of the efforts made in that direction.

3. A third matter touched on in the course of argument was the question of the coat said to have been found in the Manjhi Raham Ali's possession. On this point, I find no misdireotion. In my judgment evidence of Raham Ali's conduct in regard to the coat is not admissible against the appellant but the evidence going to show that this coat was found in Raham Ali's possession and identifying the coat as belonging to the deceased is in my view admissible as corroborating the other evidence regarding the identity of the boat.

4. With regard to the further observations of my learned brother in the judgment which I have had the advantage of perusing, I may remark in the first place that it has not been suggested and indeed cannot be suggested here that the learned Judge failed sufficiently to impress upon the Jury that a person placed on his trial for a criminal offence must be presumed to be innocent until the contrary has been established to the satisfaction of the Jury.

5. Similarly, it has not been here said or suggested that a prima facie case of circumstances making out or tending to support the charge against the accused having been established, the accused has withheld evidence in disproof or explanation available to him and not accessible to the prosecution. In such a case inferences unfavourable to the accused may legitimately be drawn, but so far as appears it was not urged on behalf of the Crown that the present is a case of that

nature and there is no such suggestion in the charge. On the contrary the learned Judge clearly instructed the Jury that it was not incumbent upon the accused to adduce evidence.

6. On the other hand, under the provisions of Section 342 of the Criminal Procedure Code, it is open to the Court and the Jury to draw such inferences as they may think just from the answers made by the accused to the necessary questions put to him by the Court. The Jury were sufficiently instructed that they were the sole judges of fact, and, therefore, of the value of the evidence given. It was certainly open to them to draw inferences unfavourable to the accused from his false denial of his presence on the boat (if they believed the denial to be false) and from his failure in that view to offer any explanation of the deceased's disappearance. If in the opinion of the learned Judge (an opinion which, as had been clearly explained, the Jury were at liberty to disregard) this false denial and this failure to explain were strong points against the accused, it was no misdirection in him to say so. In short the question in the present case was not one of adducing or of withholding evidence but one of the inferences to be drawn from conduct of which the omission and the denial above referred to are but items, That there was no direct evidence, that the evidence was purely circumstantial and that such evidence to the minds of reasonable and prudent men must satisfy certain conditions were all clearly explained to the Jury, and to say that these directions were all neutralised by the concluding sentence of the heads of charge as recorded is in my judgment to detach that sentence from its context and to misapprehend its meaning. No doubt the sentence might have been more happily worded, but it follows immediately upon the customary warning, that the Jury must give to the accused the benefit of doubt and as I read it embodies concisely the Judge's further explanation that such doubt must be a reasonable and not a fanciful and fantastio doubt, and his further warning that they should acquit if they, as reasonable and prudent men for good reasons, thought that the prosecution evidence was not satisfactory, i.e., (as is apparent from the preceding sentences) did not satisfy them that guilt had been brought home to the accused.

7. I am also unable to hold that there has been any misdirection in the charge regarding the crime committed. There appears to be no evidence or suggestion

that the deceased was an unhealthy man suffering from enlarged spleen or any other form of disease and if from the evidence as a whole, e.g., from the presence of the mill-stone tied round the neck of the deceased and the other circumstances, the Jury were satisfied that the death was due to violence (neither accidental nor self inflicted), it was also open to them to conclude that the crime committed was murder. With such hypothesis as arose on the evidence the learned Judge has, in my opinion, sufficiently dealt.

8. Lastly, I must emphatically dissent from the proposition that in criminal cases the standard of proof varies with the magnitude or enormity of the crime. No doubt in the charges of certain learned Judges observations to that effect may be found, but such observations cannot be regarded as embodying the true or accepted view of the law.

9. For the differing reasons given in our respective judgments, we agree in setting aside the conviction of and sentence imposed upon the appellant and direct that he be re-tried.

Huda, J.

10. The appellant Ashraf Ali was tried by the Sessions Judge of Chittagong with the aid of a Jury and the learned Judge agreeing with 3 out of 5 Jurors convicted him of the offence charged, viz., that he on or about the 10th day of January 1916 on the Karnafuli river or at a place near about it committed murder by causing the death of one Saroda Charan Dey, a peon of the Superintendent's Office at Rangamati, and thereby committed an offence punishable under Section 302 of the Indian Penal Code. Ashraf Ali as a result of the conviction was sentenced to transportation for life. The points argued on either side involve a consideration of the facts, which are shortly these: 'The Assistant Superintendent of ChittSgong Hill Tracts was travelling by road from Chandraghona to Bunderban. His clerk Jogendra' Mohan Biswas had to follow him with furniture, papers etc., accompanied by the peon Saroda Charan Dey. Saroda impressed two boats out of which Jogendra selected one. The present accused and Abdul Majid were the mallas and Raham Ali was the manjhi of that boat. At about midday Jogendra and

Saroda started from Chandraghona on the boat. On reaching Berhambha Jogendra left the boat to spend the night at his house, which was at a short distance from that place. He left instructions with the boatmen and Saroda to take the boat next morning to a bridge of the Boalkhali khal where he said he would re-join them. Next morning Jogendra went to the appointed place, but did not find the boat though he waited long for it, nor did Saroda appear. On January 14th he gave information to the Police. The next day, i.e., on January 15th the dead body of Saroda was found with a grinding stone tied round the neck at a place near the mouth of the Baalkhali khal, and was subsequently recognised as that of Saroda. The post mortem took place on the 18th of January but the body was then too decomposed to allow any opinion to be expressed as to the cause of death.

11. Saroda is said to have written on a slip of paper the names and address of the 8 boatmen and to have kept it in a box which was in the boat. This box was caught in a fishing trap sometime on the morning of January 11th, but no information was received in the thana about the finding of the box till January 17th. The slip containing the names and address of the boatmen was found in the box and with the clue furnished by it the Police went to Gurdawara and searched for the accused but could not find them. On January 28th the boat was found sunk in the river close to the house of Baham Ali with its number obliterated. Warrants, were issued against Raham Ali, Abdul Majid and Ashraf Ali on the 7th of February 1916; the first two surrendered on the 21st February 1916 and were placed on their trial and one of the boatmen Abdul Majid was tendered a pardon by the Committing Magistrate on 23rd May 1916 and was examined as a witness under Section 337 of the Criminal Procedure Code. Ultimately Raham Ali was convicted.

12. The present appellant, Ashraf Ali, was arrested subsequently and placed on his trial on a charge of murder. In his statement before the learned Sessions Judge he stated that he was innocent, that he knew nothing about the case and that he did not go to Chandraghona in Raham Ali's boat. He examined no witnesses in support of his defence.

13. In appeal it has been contended by Mr. Jacob on behalf of the appellant that the learned Judge misdirected the Jury on several important points. The evidence

shows that when Jogendra left the boat to visit his house at Sarwatoli, Ashraf Ali had accompanied him for some distance upto Munshi's Hat. Jogendra, however, told him not to come as he could go alone, but Ashraf Ali went upto Munshi's Hat as it was a Hat day. It is argued that there is no evidence that the appellant ever returned to the boat from Munshi's Hat and. That this was an important point in his favour, to which the learned Judge failed to draw the attention of the Jury. In reply the learned Counsel, appearing for the Crown, has referred to the evidence of two prosecution witnesses, Mukhlesur Rahaman and Abdul Aziz (Nos. 15 and 16), to the effect that Ashraf Ali had left Gardawara on a Sunday in Pous and had returned on the Tuesday following with the boat and the other two boatmen. A reference to the heads of charge shows that the learned Judge placed this evidence before the Jury and made a pointed reference to it. I do not, therefore, think that there is much force in this objection.

14. The next objection to the charge by the learned Counsel for the appellant relates to the absence of Abdul Mijid from the witness box. It is contended on the authority of Dhunno Kazi, In the matter of the petition of 8 C. 121 : 10 C.L.R. 151 : 6 Ind. Jur. 251 : 4 Ind. Dec. (N.S.) 77 that it was the clear duty of the prosecution to examine this witness, specially as he was the only witness who could give direct evidence of the complicity of the accused in the crime, the rest of the evidence being wholly circumstantial, that no sufficient reason was shown for not calling this witness, that the learned Judge should have told the Jury that from this omission on the part of the prosecution they would be justified in drawing an inference adverse to the prosecution and favourable to the accused. In reply it is urged, that the evidence of witness No. 15 Mukhlesur Rahaman shows that Abdul Majid had left the village apparently on the conclusion of Raham Ali's trial, saying he would go to Calcutta, that this evidence must have been placed before the Jury as an explanation of Abdul Majid's absence from the witness box. There is, however, nothing to show that the attention of the Jury was at all directed to this aspect of the case. Assuming that Abdul Majid was absent from his village and was in Calcutta or somewhere else, in the absence of anything to show that an effort was made to ascertain his whereabouts and to produce him in Court, his absence from the village can hardly be said to be a sufficient explanation for his non-production. This omission was all the more prejudicial to the accused by reason of the fact that

the learned Judge told the Jury 'that the accused had said nothing about what had happened to Saroda and had given no explanation as to how Saroda came by his death and that this was a strong point against the accused. I think the learned Judge pressed the case unduly against the accused. Regarding the presumption arising from the accused's inability or unwillingness to give an explanation of Saroda's death it may be observed, as pointed out by the learned Judges in the case already cited, that the accused is merely on the defensive and owes no duty except to himself; that he is at liberty as to the whole or any part of the case against him to rely on the witnesses for the prosecution or to call witnesses or to meet the charge in any other way he chooses and no inference unfavourable to him can properly be drawn because he takes one course rather than the other. Reliance is placed on behalf of the Crown on the provisions of Section 106 of the Indian Evidence Act, which places the onus of proof as regards facts specially within the knowledge of a person on that person. But it seems well established that where in a criminal case there is a conflict between the presumption of innocence and any other presumption, the presumption of innocence prevails [R. v. Twynning, Gloucester shire (Inhabitants) (1819) 2 B.& Ald. 386 : 106 E.R. 407]. The strength of this presumption varies according to the seriousness of the charge upon which an accused person is put on his trial. It has been said that the greater the crime the stronger is the proof required for conviction' [Re Hobson (1827) 1 Lew. C.C. 261]. The same principle was laid down by Tindal, C.J., in Bland, Re 18 State Trials 1186. In this Court it was laid down in the case of Nibaran Chandra Roy v. King-Emperor 11 C.W.N. 1085 : 6 Cr.L.J. 304 that the fact that an, accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. It seems, therefore, to follow that whatever force a presumption arising under Section 106 of the Indian Evidence Act may have in civil or in less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence.

15. Wills, in his Treatise on Circumstantial Evidence (6th Edition, page 308), referring to the observation of Tindal, C.J., 'that in civil as well as in criminal casts

where there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon for his own sake and his own safety to state and bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence', says: 'it has been well observed that this doctrine is to be cautiously applied and only in cases where it is manifest that proofs not accessible to the prosecution are in the power of the accused.'

16. As the case rested entirely on circumstantial evidence, before the Jury could find the prisoner guilty they had to be satisfied not only that those circumstances were consistent with his having committed the act but that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person. *Rex v. Hodge* (1829) 2 Lew. C.C. 227.

17. The learned Judge, however, told the Jury in concluding the charge that they must not acquit the accused simply because in their opinion he may possibly not be guilty, but that they should do so if they thought the prosecution evidence was for good reason not satisfactory. The prosecution evidence, so far as it goes, may be quite satisfactory and yet may leave ample room for doubt regarding the complicity of the accused in the crime.

18. Upon the evidence on the record the possibility or even the probability of the deceased having met his death as the result, for instance, of a rupture of the spleen caused by a kick by one of the three boatmen and many other probabilities of the same kind have not been excluded, and I am not satisfied that this aspect of the case was present in the minds of the Jury when they gave their verdict. It was the duty of the Judge to have given the Jury clear and unambiguous directions on these points. The directions given in the beginning of the charge were neutralised by what the learned Judge said in concluding it.

19. For all these reasons I hold that the learned Judge misdirected the Jury on material points. I would, therefore, agreeing with my learned brother set aside the conviction and sentence and as there is some evidence to go to a Jury, I would direct that the appellant Ashraf Ali be re-tried.

