Emperor Vs. Naibulla Alias Fulir Bap S/O Baser Fakir

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Court : Kolkata

Decided On : Sep-16-1941

Reported in : AIR1942Cal524

Appellant : Emperor

Respondent : Naibulla Alias Fulir Bap S/O Baser Fakir

Judgement :

Pal, J.

1. This is a reference under Section 374, Criminal P.C., for confirmation of the sentence of death passed on the accused by the Additional Sessions Judge of Dacca, on 6th August 1941. The accused also has preferred the Appeal No. 518 of 1941 from the same order of conviction and sentence. The reference and the appeal are heard together and disposed of by this judgment. The prosecution case is that on 12th April 1941, at village Atusal, P.S. Monohardi at about 10 A. M. the accused Naibulla killed his wife by inflicting out wounds on her neck in his hut and then ran away. The cries of the deceased attracted the attention of a neighbour, C.W.1, who saw the accused running away, chased him and arrested him about half a mile away with the help of two others. He was made over to the rural police and then sent up to the police station. Information of the crime was given to the police by the elder brother of the accused. Upon these facts the accused has been charged with having committed murder of his wife, an offence punishable under

Section 302, Penal Code. The accused pleaded not guilty. He has not set up any special story by way of defence. The accused was tried by a jury of nine jurors. Eleven witnesses including the investigating Police Officers and the Medical Officer who held the post mortem examination were examined by the prosecution in this case. The Jury returned a unanimous verdict of guilty under Section 302, Penal Code, against the accused and the learned Additional Sessions Judge accepting this unanimous verdict, convicted the accused under Section 302, Penal Code, and passed the sentence of death on 6th August, 1941. The Reference by the Additional Sessions Judge is for the confirmation of this sentence of death and the appeal by the accused is from this conviction and sentence.

2. The learned advocate appearing in support of the appeal urges the following points for our consideration : (1) Theverdict of the jury is erroneous owing to a misdirection by the Judge on a material point; (2) The verdict of the jury having been vitiated by the misdirection, the conviction and the sentence based oh such verdict must be set aside and the case sent back for retrial unless the High Court acquits or discharges the accused in exercise of power under Section 423 (1)(b), Criminal P.C.; (3) If the appeal of the accused thus succeeds, the reference under Section 374, Criminal P.C., automatically fails and the High Court can no longer exercise the powers conferred upon it by Section 376, Criminal P.C.; (4) Even if the High Court can still proceed under Section 376, Criminal P.C., the evidence in the case is not sufficient to establish the guilt of the accused. In support of the first point the learned advocate refers to a passage in the heads of charge to the jury where the Additional Sessions Judge charged the jury in the following terms:

The evidence which consists of the depositions of witnesses and of the first information report and a search list is entirely circumstantial, that is to say, nobody saw the accused inflioting wounds on his wife which resulted in her death, but there are circumstances which are supposed to lead to the only inference therefrom that it was the accused and none else who caused the death of his wife.

3. The first information report ran as follows :

I am Abdul Hossain, son of late Basir Fakir of Atushail P. S. Manohardi, District Dacca. Coming to the thana in company with Ashanulla Chowkidar of my Mahalla,

and Chowkidar Upendra Dey of Patali Union, and producing before you my brother Nayebulla brought under arrest and one dao with wooden handle both dao and handle besmeared with blood, I lodge this ejahar to the effect following : To-day at about 10 A. M., I was informed at my house by Soratali, son of Umarali of Galgalia that my brother Nayebulla had murdered his wifeMijajennessa alias Lalirma. His house is some quarter mile off to the north-east of mine. I then went to the house of Nayebulla and found that the neck of the said Mijajennessa alias Lalirma was out from behind and slightly remaining attached in the front and she was lying dead in the west-bhiti kitohen of Nayebulla. I found in that house Assu, Kadir, Ali-maddin Munshi, dead wife of Nayebulla and also other people of Atushail and learnt from them that Nayebulla had murdered Lalirma at about 9 A. M. this day. I found in the kitchen near the dead body cooked rice in an earthern pot (shanki) and also scattered around. I did not ask anybody why he had committed murder. My presumption is that the quarrel arose over rice and Nayebulla killed her. I learnt from them that after committing murder Nayebulla had gone towards south. I then went to that direction to search for him and after going to some distance I came to learn from Jalu son of Naju of Galgalia that Nayebulla had been arrested at Kashva, I went there at 12 noon and found Nayebulla in custody of Chowkidars Ashanulla and Upendra in the house of Abdul Ali Sarkar at Atushail and also found President Hamid Bhuya and (also) a dao besmeared with blood in the hand of Chowkidar Ashanulla and heard from the Chowkidars that Nayebulla had murdered his wife with this dao and the said dao was found by them in the ghar where murder had been committed. The aceused Nayebulla made a confession before President Hamid Bhuya in my presence that he had murdered his wife. Then the said Hamid Bhuya directed me and the Chowkidars to come to the Monohardi P. S. with the accused Nayebulla and that dao and lodge ejahar: hence I came to the thana and lodge this ejahar. Nayebulla is my younger brother and we live in separate mess. I am in good terms with him. Lalirma would be about 35/36 years old. She has two sons and one daughter. This is my ejahar. The ejahar being read over to me and finding the same to have been recorded according to my statement I put my signature thereon below. It may be noted that we reached the thana at 5-15 P. M.

4. The learned advocate contends that here the Additional Sessions Judge committed the following errors:

1. (a) The first information report is not substantive evidence in the case; yet the jury was told as if it was such substantive evidence on which alone the jury could base its findings: (b) The first information report contained a statement as to confession by the accused while in the custody o f the police; this confession was not admissible in evidence. The Additional Sessions Judge did not warn the jury as to this; on the other hand his direction that the first information report was evidence in the case must have led the jury to accept and rely on the entire document with all its contents as admissible evidence; (c) The warning of the Additional Sessions Judge as to confession contained elsewhere in the charge refers to another confession and as the record itself will show he did not expunge the portion of the first information report containing the alleged confessional statements.

2.(a) The learned Additional Sessions Judge did not at all direct the jury as to how to deal with the evidence when it is purely circumstantial; (b) On the other hand, he directed the jury that the circumstances were such as to lead to the only inference therefrom that it was the accused and none else who caused the death of his wife. Nothing was thus left to the jury to find. The Judge expressed his opinion unduly strongly and did not even warn the jury that it was not bound to accept this opinion.

5. In our opinion there is much substance in the first point thus urged by the learned advocate appearing for the accused. We are unable to take the view that the jury was properly directed on this important point. In a case like this where the whole evidence is circumstantial and where the whole case practically hinges on the evidence of a single man, the confession of the accused, if any, is of very great consequence and is certainly likely to weigh much with the jury. It is really regrettable that the learned Judge did not take that amount of care in directing the jury which the gravity of the charge demanded. We are not satisfied with the learned Judge's direction on the point of circumstantial evidence also. The handling of the circumstantial evidence is indeed a very difficult matter, and it is

too much to expect that a jury can deal with it without any assistance from the Judge on the point. The jury should have been warned that unless they were in a position to say that the circumstances all pointed only to the guilt of the accused and to nothing else and that they were not at all consistent with hisinoccence, they should not find against the accused. The third contention of the learned advocate appearing for the accused in this case raises a question about which there has already been a good deal of divergence of judicial opinion. The power of the High Court on a reference under Section 374, Cr. P.C., is defined by Section 376 of that Code. It is beyond controversy that on such a reference the High Court may look into the evidence in the case and may acquit the accused person (Section 376 (c)) or order a new trial on the same or an amended charge (Section 376 (b) last portion). It is again beyond all controversy that if there be no valid ground for an appeal, the High Court may confirm the sentence or pass any other sentence warranted by law (Section 376 (a)). The question about which there has been divergence of judicial opinion can really be reduced to this : where there has been such an error as would entitle the High Court to reverse the verdict of the jury under Section 423 (2), Cr. P.C., whether it is open to the High Court to look into the evidence in order to confirm the conviction on its own view of the facts or whether it isincumbent on it to direct a new trial if, in its view, there is evidence on record for the jury. The latest case of this Court on the point is Emperor v. Benoyendra Chandra : AIR1936 Cal73 . In this case Lort-Williams J. seems to have taken the view that a new trial would be necessary in such circumstances. There were some errors of law at the trial by the jury in this case. Lort-Williams J., referring to these errors, observed:

On the whole however, I have come to the conclusion that none of these errors are more than comparatively minor blemishes on what was otherwise a careful and very able charge, and a masterly exposition of intricate evidence at the end of a long and difficult trial. Nevertheless, if I thought that these errors had seriously prejudiced the accused or that their omission would possibly have led to a different result, or that they had caused any failure of justice it would have been necessary to order a new trial.

6. No doubt, the learned Judge did not discuss the law or the various decisions on the point. But at the same time he expressed his view clearly enough in the above passage. Our learned brother Nasim Ali J., in this case, however, held otherwise on this point. On a review of the various decisions as also of the law on the point he seems to have concluded that the High Court can convict the accused on its own view of the facts and is not bound to order a re-trial. Had it been necessary for us to come to any decision on the point a reference to the Pull Bench perhaps would have been desirable in view of the divergence of judicial opinion which has already accumulated round this point. The inclination of our own views on the point is towards holding that an order of retrial by the jury would be the only course left to the High Court on such an occasion.

7. Section 376, Cr. P.C., by its proviso clearly indicates that even when there has been a reference under Section 374 the appeal by the accused still remains to be disposed of on its own grounds. Section 423, Cr. P.C., lays down the powers of the Appellate Court in disposing of such appeals. It seems to be the settled law that at least in cases of trial by jury and where there has been no sentence of death the appellate Court cannot convict on its own appreciation of facts. If in its opinion the verdict of the jury is vitiated that verdict is to be set aside and unless the Appellate Court acquits or discharges the accused a re-trial by the jury should be directed. Section 418 (2), Criminal P.C., no doubt extends the right of appeal of an accused so as to entitle him to appeal on matters of fact as well. But that, in our opinion, would not necessarily mean that where the accused prefers an appeal on a. question of law only the High Court will be entitled to look into the questions of facts as well in order to maintain the conviction. Section 376 (a), Criminal P.C., empowers the High Court to confirm the sentence only after the disposal of the appeal, if any, by the accused. Consequently, if in the appeal the accused makes out his grounds of appeal and thus succeeds in having the conviction set aside there will be nothing before the High Court for confirmation under Section 376 (a). No doubt, usually the appeal under Section 418, Criminal P.C., and the reference under Section 374 are heard together. But that, in our opinion, should not prejudice the appellant in any way so as to entitle the High Court to throw out the appeal as the result of its own appreciation of the evidence coming before it for the purposes of the reference. Section 376 (b), Criminal P.C., lays down that on a

reference under Section 374, the High Court 'may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or amended charge'. This at the first blush might appear wide enough to cover exactly the case in question and to empower the High Court to convict the accused on its own appreciation of facts. The clause no doubt says 'may annul the conviction and convict the accused of any offence', but it seems that the clause really has in view the circumstances of Section 237, Criminal P.C. If the words 'any offence' would include also the offence of which there was conviction, then at least when the accused is convicted again of the same offence it amounts to confirmation of the conviction and not a conviction on annulment of the conviction. In our opinion, the power conferred on the High Court on a reference under Section 374, Criminal P.C., is subject to the results of the appeal under Section 418, Criminal P.C. If the appeal itself succeeds on its own grounds its result should not be allowed to be affected by the exercise of any power conferred on the High Court by Sections 374 to 376, Criminal P.C.

8. Section 376 (b) expressly empowers the High Court to order a new trial and there cannot be any possible controversy that if the High Court finds that the verdict of the jury is erroneous owing to a misdirection by the Judge, the High Court can direct a re-trial. As we are inclined to follow this course in the present case it is not necessary for us to discuss the controversial point any further. As we are going to direct a re-trial in this case, it is not necessary for us to consider the fourth point raised by the learned advocate for the accused. It would be sufficient to say that in our opinion even after excluding the inadmissible evidence there will still remain enough evidence for the jury. The result is that we reject the reference and allow the appeal, the conviction and the sentence passed on the accused are set aside, and the case is sent back for re-trial by a fresh jury.

Akram, J.

9. I agree.