Mohammad Illias Vs. the State

Mohammad Illias Vs. the State

SooperKanoon Citation : sooperkanoon.com/875891

Court : Kolkata

Decided On : Aug-07-1950

Reported in : AIR1951Cal212

Judge : Harries, C.J. and ;Bose, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 161, 162, 297, 299 and 423; ;Indian Penal Code (IPC), 1860 - Section 96

Appeal No. : Criminal Appeal No. 147 of 1949

Appellant : Mohammad Illias

Respondent : The State

Advocate for Def. : Ajit Kumar Dutta, Adv.

Advocate for Pet/Ap. : Debabrata Mookerjee, Adv.

Disposition : Appeal allowed

Judgement :

Harries, C.J.

1. The appellant in this case was tried by a learned Additional Sessions Judge sitting with a jury upon two charges of murder. The jury found the appellant guilty on both the charges by a majority. Five of the jurors found the appellant guilty

under Section 302, Penal Code, on both the charges: two found the appellant guilty not under Section 302, Penal Code, but under Section 304 on both the charges, whereas the remaining two jurors found the appellant not guilty on both the charges. The learned Additional Sessions Judge accepted the majority verdict of guilty under Section 302, Penal Code, and sentenced the appellant to transportation for life in respect of the charge of murdering one Golam Hossain. He did not think it was necessary to sentence the appellant in respect of the other charge of murder upon which the jury by a majority had found the appellant guilty.

2. The case for the prosecution was that the appellant had murdered two persons, namely, Golam Hossain and Safatunnessa Bibi by shooting them early in the morning of 1-6-1948. The case was that the appellant fired one shot which killed both these persons and the appellant was charged in separate counts in respect of the death of each of them.

3. The appellant Md. Illias was the son of a deceased brother of one Khosnobi who was the complainant in the case. The appellant, Khosnobi and other co-sharers lived in separate rooms in a homestead which was surrounded by a compound wall. It was the case for the prosecution that there was considerable ill-feeling between the appellant and Khosnobi and there was undoubtedly litigation proceeding over the properties which were held joint. On the morning of 1-6-1948, there was, it is said, an altercation between the appellant and Khosnobi over the question of fishing in an ejmali tank which belonged to them and the other co-sharers. The appellant had hired two fishermen to catch fish in the tank; but it was suggested that nothing should be done until all the co-sharers in the tank had been consulted. The appellant said that that was unnecessary and asked Khosnobi to go with him to the tank to see the fish being caught. Khosnobi, it is said, refused to go and the appellant flew into a rage and declared that he would teach Khosnobi a lesson and exterminate his family. The appellant is said to have entered his room and later persons tried to pacify him. The case for the prosecution is that the appellant eventually fired a gun from his room and hit Golam Hossain and Safatunnessa Bibi who were standing outside. Both fell to the ground and died. It is said that one Abdul Sukur went up to the window through which the appellant had fired his gun and advised him to run away. The appellant

eventually came out of the room and made good his escape. Khosnobi at once ran to a Police outpost, which was about half a mile away and gave information of the occurrence to one Jamuna Prosad Sukul, the Head Constable, who was stationed at the outpost. The Head Constable telephoned to the Metiaburuz Police Station. Later the Officer-in-charge of Metiaburuz Police Station took up the investigation and the appellant was found and arrested in the house of one Jamsed Ali in a village nearby. Investigation took place and in due course the appellant was committed to stand his trial in the Court of Session, where he was convicted and sentenced as I have indicated.

4. It is most unfortunate that considerable delay has occurred in bringing this appeal for hearing, but that delay was unavoidable. Certain documents were in such condition that it was extremely difficult to translate them and all sorts of attempts were made to have these documents translated. They were eventually translated as far as they could be translated and the matter has now come before us.

5. The defence of the appellant was that he did not fire the shot that caused the death of these two persons. His case is that he never went into his room, but that he was attacked by a number of prosecution witnesses in the courtyard and mercilessly beaten. According to the appellant someone in his room fired the shot and he had nothing whatsoever to do with it.

6. Mr. Debabrata Mookerjee who has appeared on behalf of the appellant has contended that the learned Judge in his charge to the jury did not make the position taken by the defence as clear as he should have. He complains that the learned Judge stressed the possible defence of killing these people in the exercise of the right of private defence of person and Mr. Mookerjee suggests that in stressing this aspect of the case the real defence of the appellant was not clearly put to the jury. There can be no doubt that the learned Judge did lay considerable stress on a possible defence of private defence of person; but I do not think that it can be said that he did not place fairly before the jury the real defence of the appellant, namely, that he was not guilty because he had not fired the shot which killed the two unfortunate people in the court-yard. Strictly speaking no question of

the right of private defence arose in this case as the appellant's defence was that he was not responsible for the killing. However, I think the learned Judge was right in pointing out to the jury that even if the jury were not satisfied with the case for the defence, but, on the other hand, were satisfied that it was the appellant who fired the shot which caused the death of Golam Hossain and the woman, nevertheless they might well consider that he fired in the exercise of the right of private defence. The right of private defence could only arise as an alternative and of course it is most important in this case that the jury should be told that it is only an alternative and that the main defence is that the appellant never killed anyone at all. I do not think that it is necessary to say any more on this aspect of the case because unfortunately this case will have to be re-heard for other reasons.

7. It seems clear that a number of statements of witnesses in this case were taken down in writing by the police, but the procedure laid down by Section 161, Criminal P. C., was not followed. The police in this case did what they frequently do in this Province and that is take down what is a precis or a condensed version of the statements by a number of witnesses. One Bench of this Court has referred to this method of taking the evidence of the witnesses as taking the evidence in a boiled form. That such was done, I think, is clear from the evidence of the investigating officer, Balai Kishore Gupta (P. W. 28). He stated as follows:

'It is not that I recorded the statements of witnesses as they were narrating the story. After examining a witness or some witnesses I recorded the substance of the statement or combined statements. I do not remember if I stated in the lower Court that I examined some witnesses in a lump.'

8. Here is a clear admission that the provisions of Section 161 were not complied with and that the statements were recorded in a manner which has been disapproved of by this Court on a number of occasions. The learned Judge in his charge to the jury makes no reference whatsoever to the improper methods adopted in taking down the evidence of the witnesses. The failure to draw the attention of the jury to this matter has been considered by this Court on a number of occasions and this Court has held that the failure to tell the jury that these statements were taken down improperly and to warn the jury that they might well

presume that if they had been taken down properly, the state-merits might have contradicted the witnesses, is a serious misdirection which vitiate the charge to the jury. The matter was last considered by this Court in the case of Bejoy Chand v. The State, : AIR1950 Cal363 , which followed an earlier decision of this Court in Lahshman Chandra Ghose v. Emperor : AIR1948 Cal278 . In Bejoy Chandra Patra's case : AIR1950 Cal363 , the Bench of which I was a member held that where in & trial by a jury the provisions of Section 161, , Criminal P. C., have not been complied with, the jury ought to be directed that the police had not observed the law and that the jury, if they thought proper, might presume under Section 114, Evidence Act, that if the statements had been recorded as they should have been, the witnesses might well have been flatly contradicted. It was further held that failure to warn the jury of the effect of the non-compliance with Sub-section (3) of Section 161, Criminal P. C., vitiated the verdict. This case, as I have said, followed an earlier decision of this Court in which a Bench consisting of Roxburgh and Chakravartti JJ. came to the same conclusion.

9. Though the statements of the witnesses were not recorded in accordance with the provisions of Section 161, Criminal P. C., no reference to that fact was made to the jury by the learned Judge. That being so we are, following the cases to which I have made reference, bound to hold that the verdict of the jury was vitiated. Therefore it appears to me that this case will have to be reheard. It is true that a verdict of a jury is not to be set aside merely on the ground of misdirection. If the Court is satisfied that there has been no miscarriage of justice the verdict of the jury may be upheld Abdul Rahim v. Emperor . However, in the present case which is a case pre-eminently for a jury I do not think that we can possibly say that the jury would have returned the same verdict if they had been properly directed upon this point. That being so, we are bound to set aside the verdict of the jury and the convictions that followed thereon and direct a new trial.

10. Before concluding this judgment I should like to refer to certain other matters in connection with this trial. It seems that the defence made the usual application to have copies of the statements made by the witnesses under Section 161, Criminal P. C. The learned Judge made a most extraordinary order. He directed the Public Prosecutor to mark the relevant portions in these statements and let the defence

have copies of the portions so marked as relevant. This is a most amazing order of the learned Additional Sessions Judge because he delegated to the Public Prosecutor his own duties. In the second proviso to Section 162(1) it is provided :

'... if the Court is of opinion that any part of any such statement is not relevant to the subject matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reason therefor) and shall exclude such part from the copy of the statement furnished to be accused.'

11. The learned Judge overlooked the fact that it was the duty of the Court to decide what was or was not relevant and that duty could not be delegated. Further, it seems extraordinary that the learned Judge should delegate his powers to counsel for the other party, namely, the prosecution. Even if the Court had a right to delegate its powers under this proviso, surely it would not be right to delegate the powers to one of the parties in the proceeding. However, the order is one that clearly could not have been made and I wish to emphasise that where the statute requires the Court to exercise its discretion it cannot rid itself of its duty by delegating its powers to anybody else.

12. It is not clear what, if anything, the Public Prosecutor thought was irrelevant. However I wish to draw the attention of the learned Judge, who will preside at the rehearing, to this matter and to direct him to see that copies of the statements are given to the defence and that if any portions of the statements are thought to be irrelevant, then the learned Judge must order that such portions need not be given to the defence.

13. There is another matter to which I must make reference. It appears that the Court was of opinion that the jury should view the scene of this occurrence. The case seems to have been a fairly straightforward one and I do not know whether the jury were greatly benefited by viewing the scene. However, they were allowed to do so and were put in charge of the Bench clerk. Further Khosnobi who was a prosecution witness and the complainant in the case was allowed to go with the party to point the house out to the Bench clerk who was the jury bailiff. Perhaps it would have been better if somebody else less interested in the prosecution bad

been given this duty of pointing out the scene to the jury. However, what is really complained of is the fact that both the Public Prosecutor and the Investigating Officer accompanied the party and why they did so I cannot understand. Their presence raises a very grave suspicion and they should never have been allowed to accompany the jury. This matter was brought to the notice of the learned Judge and he simply states that there was nothing in his order which prevented them proceeding with the jury. But obviously counsel for the prosecution and the Investigating Officer should never be allowed to go with a jury unless of course counsel for the defence was present to see that neither the Public Prosecutor nor the Investigating Officer said anything which he should not say in the presence of the jury. If anyone on behalf of the prosecution was allowed to accompany the party when the jury viewed the scene of occurrence then a representative of the accused person should also be present. The better course is to allow no one to accompany the party except the jury bailiff and, if possible, some perfectly independent person who can point out the scene of the occurrence to the jury bailiff who can then take the jury to see what there is to see. If at a trial the jury expresses a desire to see the scene of the occurrence, then the presiding Judge must ensure that no one should be allowed to accompany the jury whose presence might give rise to suspicion.

14. As this case has to be re-heard, I do not think it advisable to say anything more about the matter lest anything in this judgment might influence the minds of the presiding Judge or the jury at the re-hearing.

15. In the result, therefore, I would allow this appeal, set aside the conviction and sentence and direct that the case be re-heard by the learned Sessions Judge or another learned Additional Sessions Judge of Alipore sitting with a jury. The appellant must remain in custody until the rehearing.

Bose, J.

16. I agree.