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Court : Kolkata

Decided On : Feb-25-1935

Reported in : 163Ind.Cas.768

Judge : Costello and; M.C. Ghose, JJ.

Appellant : Alef Sheikh and ors.

Respondent : Emperor

Judgement :

M.C. Ghose, J.

1. The four petitioners in this case were tried by a jury in the Court of the Assistant Sessions Judge of Khulna, on charges under Sections 147, 301, read with Section 34 and Section 323 of the Indian Penal Code. The jury by a unanimous verdict found all the four accused men guilty under Section 147, second part of Section 304, and Section 323 of the Indian Penal Code; accepting that verdict the trial Judge sentenced the petitioner Alef Sheikh to rigorous,, imprisonment for two years, and the other three petitioners to rigorous imprisonment for one year each.

2. In appeal the learned Sessions Judge upheld the conviction under Section 304 of the petitioners Alef Sheikh and Abdul Rajak Sheikh and he set aside the conviction of Ismail Sheikh and Sabdu Sheikh under Section 301. He upheld the sentences of Alef and Abdul Rajak and reduced the sentence of Ismail and Sabdu

to rigorous imprisonment for six months.

3. This Rule was issued on two grounds, namely (1) that the Court of Appeal below was wrong in convicting the petitioners Alef and Abdul Rajak under Section 304, read with Section 34 of the Indian Penal Code, and (2) that the Court of Appeal below should have held that the learned trial Judge misdirected the jurors while dealing with the charge under Section 117 of the Indian Penal Code.

4. Upon hearing the learned Counsel on behalf of the petitioners who has taken us through all the relevant parts of the record, we are satisfied that there was no misdirection by the trial Judge on the charge of rioting and that the Court of Appeal below was right to hold that the petitioners Alef and Abdul Rajak were guilty of culpable homicide under Section 301.

5. Upon a consideration of the record we thought it necessary to ask the learned Counsel to show cause why the sentence on the petitioners should not be enhanced. The learned Counsel suggested a long adjournment so that a notice might be served on the petitioners themselves. This, in our opinion, is unnecessary and not required by the law. The petitioners are already before the Court represented by a learned Counsel and he is in possession of all the papers upon which he may argue on the question of the enhancement of the sentence. We allow an adjournment over the week-end so that he might prepare all the points carefully to show cause why the sentence should not be enhanced.

6. It was urged by the learned Counsel that since Section 439 (6) of the Code of Criminal Procedure provides that a convicted person in showing cause why his sentence should not be enhanced is entitled to show cause against his conviction, the petitioners are entitled to go behind the jury's verdict and show upon the evidence that the conviction was wrong. This argument appears to us to be unfounded. It is true that in showing cause against enhancement of sentence they are entitled to show cause why they should be acquitted. But in showing cause against their conviction the petitioners must proceed according to the provisions of Section 423(2), which provides that the Court shall have no authority to alter or reverse the verdict of a jury, unless the Court is of opinion, that such verdict is erroneous owing to a misdirection by the Judge to the jury or to a

misunderstanding on the part of the jury of the law as laid down by him. Since in an appeal the accused person cannot go behind the verdict of the jury, but can only show that there was a misdirection by the Judge or a misunderstanding on the part of the jury of the law as laid down by the Judge, it cannot be said that a petitioner in showing cause against enhancement of sentence in a conviction in a jury trial, can go behind the same. In this connection I may refer to the case of *Khoda Bax Haji v. Emperor* : AIR1934 Cal105 , which was decided by us in May, 1933.

7. We are satisfied that there is no misdirection in the charge given by the trial Judge to the jury. There was indeed an error when he was explaining the effects of Section 34, but that error was in favour of the accused persons and not against them. It cannot be said that the accused men were in any manner prejudiced by the charge of the trial Judge.

8. The facts found by the Court of Appeal below are that the petitioner Alef Sheikh instituted a mortgage suit against one Paresh. He on July 11, 1932, attached the land before judgment and thereafter in January, 1934, he obtained possession of the land in satisfaction of the decree. But two months before the attachment, namely, in May 1932, Paresh, the mortgagor, had given lease of the land to one Rambaran of the prosecution party and the said Rambaran continued in possession. After the petitioner Alef got symbolical possession in January, 1934, he and his partisans on February 6, 1934, went upon the land with weapons. Their appearance in force was sufficient to drive Rambaran and his men away from the land. But the petitioners pursued the men to another field and they so severely assaulted one Rasik that he died on the spot. The learned Judge found that the petitioners Alef and Abdul Rajak took part in the beating of Rasik which resulted in his death. The deceased was a man of about twenty-six years of age. He received a lacerated wound 1' long scalp deep on the head. The blow on the abdomen ruptured his spleen which was enlarged and he died of the shock of the injuries.

9. Having regard to the circumstances, we are of opinion, that the sentences are inadequate. The petitioner Alef Sheikh is an old man and Abdul Rajak is a very young man. But considering the grave offence which they committed in beating a

man to death, we think that the sentence passed on them should be enhanced to three years' rigorous imprisonment each.

10. Ismail Sheikh and Sabud Sheikh have been convicted of rioting, their sentence of six months is enhanced to one year's rigorous imprisonment.

Costello, J.

11. The Rule must be discharged with the variation of sentence indicated by my learned, brother.

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