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Emperor Vs. Abdul Sheikh

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Court : Kolkata

Decided On : May-01-1919

Reported in : 54Ind.Cas.887

Judge : Walmsley and ;Syed Shamsul Huda, JJ.

Appellant : Emperor

Respondent : Abdul Sheikh

Judgement :

Walmslby, J.

1. This case comes before us under the provisions of Section 374, Criminal Procedure Code, as the learned Sessions Judge, accepting the verdict of the majority of the Jury, has sentenced the accused to death under Section 302, Indian Penal Code. The accused has also preferred an appeal.

2. The case for the prosecution briefly stated is that the accused one night committed a violent assault with a knife on his two wives Saratan Bibi and Kafunnessa Bibi, killing the former and severely injuring the latter. The charges framed against him were under Section 326, Indian Penal Code, in respect of the injuries caused to both women, and under Section 302, Indian Penal Code, in respect of the fatal injuries caused to Saratan.

3. The Jury by a majority of three to two found the accused guilty under Section 326, Indian Penal Code, and Section 302, Indian Penal Code.

4. There is singularly little evidence against the accused. It is not proved that be was alone with Saratan Bibi on the night of occurrence. In fact the only evidence consists of statements which the unfortunate women are said to have made.

5. Kafunnessa, as already mentioned, survived her injuries, and she was sailed as a witness for the prosecution, but in Court she said that she did not recognize her assailant. The prosecution, however, produced evidence to show that, shortly after her arrival at hospital, when it was believed that she was at the point of death, she made a statement to the effect that it was her husband, the accused, who attacked her and her oo-wife. This evidence was admitted by the learned Judge and the statement was placed before the Jury. It is urged on behalf of the appellant that the Judge was in error in admitting this evidence. When the objection was taken in the Court below, the learned Judge overruled it on the ground that 'the fact that Kafunnessa made such a statement to a Magistrate on the day of occurrence is relevant as rendering highly probable a fact in issue, viz., that Abdul Sheikh killed the other woman and assaulted her.' He added that Section 11 of the Evidence Act was not confined to facts other than statements. It appears to me that the reasoning is unsound, and I think the fallacy lies in confusing the fact that the woman made a statement with the contents of the statement. The mere fact that the woman made a statement has no bearing on the main fact in issue, and Section 11 of the Evidence Act does not justify the admission of the contents of the statement. Mr. Orr on behalf of the Crown has conceded that he cannot uphold the Judge's decision that the contents of the statement are admissible, It follows that there was a misdirection to the Jury in this respect, and in the circumstances of the case a misdirection of a very serious nature.

6. There remains the alleged statement of Saratan Bibi. This was not reduced to writing, and the evidence to show that she made any statement at all consists of the testimony given by the Dafadar and the Choukidar. Their evidence has been discussed before us at some length and I think the criticisms passed upon it are well deserved. They contradict one another on several points and although the

woman was lying with her intestines protruding and succumbed after a few minutes, the Dafadar says, she spoke in an ordinary way. I cannot think it would be right to believe these witnesses, and this was the view placed before the Jury by the learned Judge.

7. The result, therefore, is that there is really no evidence to prove that it was the accused who attacked the women. It may be extremely probable that he is the guilty man, and that those who are in a, position to give evidence against him are shielding him, but a conviction cannot be based on such probability.

8. So far as the charge under Section 302, Indian Penal Code, is concerned, I think we should set aside the conviction and sentence, and acquit the accused. In regard to the conviction under Section 326, Indian Penal Code, our position is different. There was a misdirection to the Jury in placing before them the so-called dying statement made by Kafunnessa Bibi, and it was of a character to vitiate the trial. We must, therefore, set aside the conviction and sentence. Inasmuch as Kafunnessa Bibi's statement must be excluded, and the evidence as, to any statement being made by Saratan' Bibi rejected as unreliable, there appears to be no evidence to warrant a re-trial. I think the accused mast be acquitted on this charge also.

Shamsul Huda, J.

9. I agree.

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