

Emperor Vs. Tazem Ali

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Court : Kolkata

Decided On : Dec-22-1930

Reported in : AIR1931Cal796

Appellant : Emperor

Respondent : Tazem Ali

Judgement :

Rankin, C.J.

1. In this case, the two accused persons, Tazemali, son of Nasaruddi, and Hatemali, a cousin of accused 1, were put on their trial before the learned Sessions Judge of Bakarganj and a jury of nine upon the following charges, first of all, a charge under Section 364, I. P.C., of abducting one Ahadali with the intent that he should be murdered, and, secondly, and this charge was originally framed against both the accused-that they had agreed with each other and also with some other persons to murder Ahadali and that, in pursuance of that conspiracy, Ahadali was murdered. The date of the occurrence was Saturday, 5th July of this year. The proceedings before the committing Magistrate concluded in August and the trial was held in November.

2. The story for the prosecution is that Nasaruddi and his son Tazemali, accused 1. had great enmity against the deceased by reason that they had for a very long time been in possession of and cultivating certain land belonging to Ahaiali, that

they had been Ahadali's bargadars but that owing to nonpayment of rent or produce Ahadali had taken the land out of their possession and refused to settle it again with them. This being the motive alleged, the prosecution case is that about 8 or 9 o'clock on the Saturday in question the two accused persons went to the deceased's house and induced him to come along with them to Nasaruddin's house saying that Nasaruddi was lying ill and wanted to talk to Ahadali about resettling the land in barga. The prosecution case then is that at some time between 10 o'clock and midnight a disturbance in Nasaruddi's house was noticed by the nearest neighbours, that in the morning when the deceased's son Hachanali came to Nasaruddi's house he saw that a dead body covered with a blanket was lying in the verandah, that he then gave the alarm and discovered that it was his father's body and that it was then made apparent that Ahadali had died owing to some mechanical pressure being brought to bear upon his ribs which had made a symmetrical fracture both on the left side and on the right side and had apparently accounted for his death.

3. In these circumstances, it is said that the two accused when they went to Ahadali's house to induce him to come to Nasaruddin's house employed deceitful means by pretending that Nasaruddi who appears to have, in fact, been ill, wanted to talk to him at all events about the settlement of the land and it is further said that the two accused had done that intending that murder should take place.

4. Now, when the case is examined, the first thing that has to be observed is that this Court is acting in the exercise of the powers conferred by Clause (2), Section 418, Criminal P. C, as it now stands in the case of accused 2 and that accused 2, although he has only been convicted under Section 364, I. P.C., has the same right as accused 1 who has been convicted under Section 364 and also under Section 302 read with Section 120-B, I. P.C. and has been sentenced to death. We have therefore to examine into the facts-no doubt having regard to the opinion of the jury who saw the witnesses; but we have to examine into the facts to see whether the conviction against either accused should be upheld.

5. Now, the first thing that one notices about the course of the trial is that neither accused was charged under Section 302, I.P.C., by itself. The trial appears to

have proceeded upon the footing that, unless the bringing of Ahadali to the house of Nasaruddi was done with the intent that he should be murdered and unless there was a conspiracy to murder him, the prosecution had no further case. When the learned Judge charged the jury, he charged them entirely upon the footing that the charge against accused 1 was one of murder constructively by Section 120-B, I. P.C. The jury found against both the accused, that when they went to ask Ahadali to come to Nasaruddi's house they did so to induce him by deceit and to induce him with the intent that he should be murdered.

6. As regard the charge however of conspiracy, the position may be stated shortly thus: that whereas upon the evidence it is certain that accused 1 was present in his house that night there is no evidence that accused 2 was present or that he took any part in what went on in the house later in the evening. It appears to be common ground that accused 2 is a person who was not living at Nasaruddi's house, but was living at a considerable distance away and had been so living for a considerable number of years--two years certainly, and it may be a great many more. The charge being that these two people had conspired with themselves and certain others, the learned Judge at the end of the trial refused to leave to the jury as against accused 2 any question of conspiracy to murder. He was of opinion that there was no evidence to go to the jury on that charge and he took a finding upon that charge from the jury only as against accused. In these circumstances, we have to consider, first of all, whether the conviction of accused 2 under Section 364, I. P.C., should be allowed to stand notwithstanding the verdict of the jury. I am of opinion that it cannot be allowed to stand. We are dealing with a man who it is true is a cousin of accused 1; but, as is quite certain, he is a person who was visiting this village only from time to time, and the only evidence of a substantial character against him is that he accompanied Tazemali when Tazemali came to the house of the deceased to invite him to go and see his father..

7. It is quite true that the learned Judge in a part of his charge has mentioned that this accused pleads that he has long been absent from the village and that, although he has severed all connexion with the village, he has been implicated in the present case by reason merely of his relationship to Tazemali; but the learned Judge has not pointed out to the jury- as I am bound to say that he ought to have-

that it is quite possible that, even if the prosecution witnesses who spoke to that visit of the accused were reliable, accused 2 might have been acting quite innocently; and that the circumstance that there was; no evidence that he was in the house on the night when the murder took place-was a fact which was well worth the attention of the jury before they came to the conclusion, by reason merely that he went with his cousin to invite the deceased to come to Nasaruddi's house, that he. intended that the deceased should be murdered.

8. The charge to the jury does not seem to me to have distinguished between these two accused sufficiently upon that point and I am bound to say, looking at the matter for myself, that the view taken by the learned Judge that there was no evidence against accused 2 to show that he had any part in the conspiracy to murder confirms the opinion that there is no reliable evidence that earlier on that evening he intended that Ahadali should be murdered at the time when he asked him to come to the house of Nasaruddi. The two things seem to me to be very much intermixed and upon the whole, as this Court has by virtue of Section 418, Criminal P.C., a responsibility for the findings of fact in such a case as the present, I am not of opinion that the verdict of the jury should be allowed to stand. I think this is on(c) of the cases where it can be said that the verdict of the jury was not arrived at upon a sufficiently clear charge on an, important point and I am also of opinion that the evidence on the record, while it raises a case of suspicion certainly and it may be a considerable degree of suspicion-is not enough to enable such a charge as this to be brought home to accused 2, Hatemali. I am therefore of opinion that Hatemali's appeal should be allowed and that he should be acquitted and discharged.

9. It remains then to deal with the case of accused 1. Now, the learned Judge, in dealing with the law and the evidence, directed the jury as follows:

It is, of course, a presumption in law that a witness should be believed while deposing on oath. In other words, you should accept what these witnesses say as being true until the defence give you some reason to reject their evidence as being tainted.

10. In my opinion, that is a direction which cannot be supported. The matter is made worse when it is put by saying:

until the defence give you some reason to reject their evidence as being tainted.

11. In my judgment that will not do at all. The usual way of directing the jury is to tell them that they must start with a presumption of the innocence of the accused, that the prosecution must prove their case beyond a reasonable doubt; according to the language of Section 3, Evidence Act:

a fact is said to be proved when the Court either believes it to exist or considers its existence so probable that a prudent man under the circumstances of the particular case to act upon the supposition that it exists.

12. Now the learned Judge has done all this and done it very well at the beginning of his charge, but when he comes to deal concretely with the evidence I think the passage to which I have referred spoils the effect and value to the prisoner of these directions. The one thing which a jury must be made to understand is that before they find the prisoner guilty they must be convinced, and anything which seems to mean, that they ought by reason of a presumption of law to accept statements of which they are not convinced beyond a reasonable doubt is objectionable. We have been referred by Mr. Bhattacharjya to *Ambar Ali v. Emperor* : AIR1928 Cal769 and to the unreported case mentioned therein, *Sheikh Gani v. Emperor*, Criminal Appeal 607 of 1926 where reference is made to Section 352 of *Best on Evidence*, That section opens with the statement which can hardly for the present purpose be correct:

all testimony given in a Court of justice is presumed to be true until the contrary appears,

and very old authority is cited in support of it, viz., *Cro. Jac.* 601, pl. 28 and 20, *Hvii* 11 B pl. 21. In modern times witnesses who are interested are not regarded by the law as incompetent and the jury is called upon to listen to all kinds of witnesses on the footing that their credibility can be left entirely to the jury. Also mediaeval religious motives as to the sanction of an oath have not been

incorporated without modification into the Evidence Act. It would hardly be worth while to inquire at any length into the principles and practice of English Criminal Law at the time of the dicta cited by Best. Indeed the matter is both too important and too simple to be left to ancient dicta. Unless there were some probability that by the evidence of witnesses the truth could be arrived at no doubt some other system of trial would have to be devised. If all you know is that A gave evidence on oath in a Court of law and everything else is left for presumption, the presumption will be that he gave his evidence truthfully. But the moment you know something of the circumstances, something of his statement, of his demeanour, of his interest in the case, of the other evidence, this presumption has been overlaid with other much more strong presumptions and with other elements of probability.

13. Now a jury is never in the position of merely knowing that a certain man gave evidence. It sees him as he enters the box; the moment he opens his mouth he may show the class of man he is, whether he tends to exaggeration, or evasiveness, whether he is prompt and frank in answering questions without regard to consequences. It finds out whether he has any interest, whether his story was told at the first opportunity, whether the circumstances give antecedent probability to what he has stated, whether other evidence contradicts it. Whatever force or strength attaches to the mere abstract presumption that because he gives evidence at all his evidence will be true it is not by itself sufficient to convict any man of a crime. A man might be very safely and properly hanged upon the evidence of one witness, but that is a proposition *toto celo* different, In such a case the jury is convinced, they are satisfied by the circumstances, by the probabilities, by his frankness and lack of bias, by his opportunities of knowledge, by his accuracy of observation, by his intelligence, by his previous conduct and it may be by many other considerations that this witness is in this case speaking truthfully and without mistake. But I take the liberty to say that it is a serious error to tell a jury in any form of words that the law in a criminal case requires them *prima facie* to accept the particular statements of a witness and that it is only when the defence have shown good reason to reject his statements that the jury have any option in the matter. This is in effect to tell the jury that the general presumption of innocence and of accuracy in the witness is stronger than the presumption of innocence in the accused:

It is impossible to enumerate a priori the causes which may distort or bias the minds of men to misstate or pervert the truth, or to estimate the weight of each of these causes in each individual case or with each particular person.

14. To this passage from Best on Evidence (Edn. 11, p. 53), I will add for myself that it will in general be found equally impossible to enumerate these causes a posteriori. Why should one presumption, that one of the weakest be singled out as the central pivot of a criminal case At the highest it is one of a number of competing presumptions. When the learned Judge in this case told the jury that

you should accept what these witnesses say as being true until the defence give you some reason to reject their evidence as being tainted,

he applied the presumption to the prosecution witnesses as a body. He was proceeding to refer to suggestions that they were interested as relations of the deceased, biassed on account of enmity with the accused that they were chance witnesses' and so forth. The accused called three witnesses, but I cannot find in this charge that the presumption of innocence was pressed upon the jury with regard to these or any of them. Nor can I find in this charge any reference to the fact that apart from general criticisms as to relationship, likelihood of bias, etc., the jury have to assess the reliability of every witness and it may be of individual statements of each witness for themselves by carefully observing his demeanour, degree of intelligence, reluctance or over zeal, etc. The things which cannot be enumerated or exhausted which no jury can be expected to analyse too far are often the all-important things. This is well understood and it is not generally necessary that they should be expressly mentioned in the Judge's charge. But it becomes very necessary to refer to them and to enlarge upon them if the learned Judge is to lay down 'a presumption in law that a witness should be believed when deposing on oath'. The Evidence Act makes no reference to any such presumption probably because the legislature considered that it was a misleading refinement or at least a doctrine of no great practical utility, but if the matter be carefully analyzed it will be found that in Section 114, Evidence Act, reference is made to somewhat similar matters, e.g., the presumption in favour of the common course of business and the regularity of judicial and official acts. Why then are we to hold

that the presumption that a particular witness has discharged his duty properly is a presumption which the jury must make and not merely one of the things which a jury 'may presume' as distant from 'must presume'? (Section 4.)

15. I am the last person to regard a charge as unsatisfactory merely because general explanations of the law of evidence are not stated with complete accuracy, but in the charge before us the passage which I have quoted appears to me to be a governing principle. There seems to be a danger lest learned Judges should get into the habit of employing this kind of direction which seems to me to be confused and unfair. The present is at least the third case in which similar language has been employed, though in Ambar Ali's case the direction as a whole was not approved upon this point and it was very pertinently observed that the presumption of veracity of a witness and the presumption of innocence of an accused were in their nature different and should not be classed together. I desire to see this kind of direction abandoned altogether. In my opinion a jury cannot be required to make the presumption against an accused person that the particular statements of a particular witness are true still less can it be required to make such a presumption as regards the prosecution witnesses as a body or the prosecution evidence as a whole. The jury should be told that it is their duty to consider carefully and to say whether they are convinced by the prosecution evidence and that if they are not convinced there is no law which obliges them to convict. If they do in such a case convict they stand without excuse before the law.

16. The direction given in the present case makes it exceedingly difficult for me to consent to uphold the verdict against accused 1. But there is more in the matter than that. First of all I do think that, in a case of this character, it was a pity that the accused Tazemali, if he was to be charged with conspiracy with people other than the co-accused Hatemali, was not charged more specifically and satisfactorily. Of the other people in the house at the time Ahadali was done to death, we know the names of several; but none of them are mentioned in the charge and none of them have been put on their trial as conspirators along with the accused 1. That is a somewhat unsatisfactory position. In the second place, this question of conspiracy was begun as a conspiracy with accused 2 and others and although accused 2 has been convicted only of abducting Ahadali with the intention that he should be

murdered, the charge of conspiracy so far as he is concerned, was withdrawn in the middle of the case thus leaving against accused 1 a charge of conspiracy with persons unknown, the circumstance being that of the people in that house the majority at all events were perfectly well known. It does seem to me that, in these circumstances, it is unfortunate that a charge should not have been laid under Section 302 against accused 1 and that the jury should not have been carefully directed to the effect that it was perfectly possible that the deceased man had been invited to the house of Nasaruddi without any intention on the part of the accused at that time in advance to murder him and that having gone to this house and having refused to let out the land again to Nasaruddi some kind of quarrel had broken out in the course of which he was done to death. The matter was left to the jury on the footing that either there was a conspiracy or there was nothing; and that being so, it appears to me that the circumstance that the man might have been done to death and that accused 1 might have been responsible for his death and yet there might be no conspiracy in advance was not properly put before the jury. Looking at the matter as a whole, it seems to me that the case of accused 1 should be retried; and it also appears to me that we should give a direction that when he is retried a charge under Section 302, I. P.C. be added.. The learned Judge will then no doubt have an opportunity of carefully instructing the jury as to the circumstances that have to be considered by them in making up their minds as to the responsibility that accused 1 had for the death. I may here say that accused 1 called as defence witnesses his wife and his mother who told a story to the effect that Ahadali had come to the wife's room in the middle of the night and had apparently been belaboured to death by the wife and the mother Tazemali himself coming in after the event. Tazemali's own story is inconsistent with this story. In his charge the learned Judge says after commenting upon the effect of the evidence:

So the Crown asks you to hold that, as the defence has failed to establish the positive case they put forward to account for Ahadali's death, you have no alternative but to accept the prosecution case that he was deliberately decoyed to Tazem's house in pursuance of a conspiracy to murder him and actually was murdered there.

17. It appears to me that it was very necessary for the proper disposal of this case that the jury should have been told that even after they had rejected the defence case altogether they were by no-means in law obliged to accept the prosecution case, that there were many things even still to consider and that, unless the prosecution proved its own. case to the hilt they were not entitled to find the charge of murder established. The result is that the appeal on the part of accused 1 Tazemali is allowed and he is directed to be retried, a charge under Section 302, I.P.C., being added to the charges already framed.

Graham, J.

18. I agree.

Mallik, J.

19. I agree.

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