

AlimaddIn Naskar Vs. Emperor

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SooperKanoon Citation : sooperkanoon.com/887128

Court : Kolkata

Decided On : Aug-01-1924

Reported in : (1925)ILR52Cal253

Judge : Walmsley and ;Mukerji, JJ.

Appellant : AlimaddIn Naskar

Respondent : Emperor

Judgement :

Walmsley, J.

1. There are two appeals before us, and a reference under Section 374 of the Criminal Procedure Code. The circumstances are as follows. It is said that the accused had a quarrel with the family of one Momrej, and that one night they went to his house and set fire to the hut in which Momrej and his two wives and some children were sleeping: the inmates of this hut were not allowed to escape, and they were all burned to death. In other huts Entaz and Bibijan were sleeping, and they were also killed.

2. The Committing Magistrate framed charges under Section 120B, read with Section 302, of the Penal Code, and under Section 302 of the Penal Code, and Section 436 of the Penal Code. The learned Judge made changes in the charge under Section 120B read with Section 302 of the Penal Code. The jury was

unanimous in finding all the accused guilty on all the charges. The Judge agreed with the verdict and sentenced two of the men to death, and the others to transportation for life. Hence the two appeals and the reference. Objection is taken on behalf of the appellants that the trial was vitiated by the charges. It is said that there has been misjoinder of charges and also of persons.

3. It must be conceded that a crime of such a wholesale nature presents considerable difficulty.

4. The charges framed by the Committing Magistrate were as follows:

That you, between December 1923 and 7th January 1924 at Daria, p.-s. Canning, did agree with one another and with other persons, unknown, to do and cause to be done an illegal act, to wit, commission of the offence of murder of Momrej Boddy and other members of his family by setting fire to his huts, and by means of guns, daggers, spears and other deadly weapons, and in pursuance of the said conspiracy, caused the death of Momrej Boddy, his two wives, Chandra Bibi and Dasi Bibi, his sons Entaz, Safed Ali, Javed Ali, Yunus and his grandson, Jiad Ali, and mother, Bibijan Bibi, and thereby committed an offence punishable under Sections 120B/302 of the Indian Penal Code, and within the cognizance of the Court of Sessions. And I hereby direct that you be tried by the said Court on the said charge. In this charge the conspiracy to commit and the actual commission, with the names of the persons killed, are mentioned:

(2) of murder under Section 302 of the Penal Code. In this one charge the names of the seven inmates of Momrej's hut are mentioned;

(3) of murder, under Section 302 of the Penal Code, in regard to the killing of Entaz;

(4) of murder, under Section 302 of the Penal Code, in regard to the killing of Bibijan;

(5) of arson, under Section 436, in pursuance of the conspiracy in the first charge, in respect of the hut occupied by Momrej.

5. These five charges were drawn up against all the accused.

6. The charge under Sections 112B/302 of the Penal Code drawn by the learned Judge differs from that drawn by the Magistrate in two respects, namely, that it refers to the date of the occurrence only, and that it mentions only the conspiracy to commit and not the commission.

7. It is merely a technical defect that the seven inmates of Momrej's hut are all named in one charge of murder, instead of a separate charge of murder being drawn in regard to each. To that I attach no importance. It is more serious that all the accused are charged in regard to the killing of Entaz and in regard to the killing of Bibijan, for those deaths were caused by particular members of the attacking party, and it is possible that they lay outside the common intention, at any rate that the killing of Bibijan did so.

8. No objection, however, was taken at the trial to the charges as framed, and it appears to me that they gave the accused full information of what they were said to have done.

9. The learned Judge, however, in his address to the jury seems to have added difficulties. He says 'that the first charge of conspiracy does not seem to be important in view of the main charge of murder. Again he says since the murder was accomplished, the charge of conspiracy is of no importance. He did, however, continue if you find that the accused agreed with one another to kill Momrej and the other members of his family, then you can find them 'guilty under Section 120B. With regard to the killing of Entaz he said that it was for the jury to decide whether any one but Belat Ali should be held guilty, and with reference to Bibijan he said that the murder may not have been in the programme, adding For that Alimaddin himself alone is responsible. Then lie went on Against all the accused it is the charge of murder of Momrej and six others with him. That is the important charge'.

10. These remarks show some confusion or carelessness, but it is clear that the Judge set the main issue before the jury---was it proved that the accused were the men who shut Momrej in the burning hut

11. The answer of the jury was free from all ambiguity, but it has this defect that it found all the accused guilty on all the charges, that is to say the jurors ignored the Judge's reference to the individual responsibility, in the case of Entaz and Bibijan.

12. The question is whether in these circumstances the defects in the charge have led to a miscarriage of justice. For the purposes of this case that question means whether the accused were prejudiced in their defence, whether the jury was confused as to the problem which it had to solve.

13. As to the defence the accused have not gone further than saying that they are innocent: they said that to the Magistrate, and they declined to say more to the Judge: and the cross-examination is devoted to showing that the assailants were not recognised and that witnesses are hostile. I find it difficult to believe that more perfectly drawn charges could have lightened the task of the defence.

14. As to the decision of the jury, when we look at the substance, what they held was this that the accused are the men who went to Momrej's house, who set fire to his hut, who prevented the inmates from escaping. Instead, however, of dealing with the individuals responsible for killing Entaz and Bibijan,. they found all the accused guilty in respect of killing those two victims, and again they found all the accused guilty of committing arson.

15. The case is a very grave one, and it is most desirable that the charges should be framed in such a way as to render it beyond doubt that there was neither prejudice to the accused nor embarrassment to the jury. With some hesitation, I have come to the conclusion that it cannot be said that the charges were framed with sufficient clearness, and I think we must set aside the conviction and sentences, and order a retrial. I agree with my learned brother in the remarks which he makes about the form which the charges should take. The re trial should take place as early as possible, and not be allowed to wait until after the vacation.

Mukerji J.

16. The occurrence which forms the subject matter of the present case, though perhaps without a parallel in the history of crimes in this part of the country, may

yet be narrated in a few words.

17. In village Daria, within the jurisdiction of P. S. Canning, in the district of the Twenty-four Parganas, there lived two families, the Boddys and the Naskars. They were neighbours, but for the last four years or so there has been bitter enmity between the families owing to causes into the details of which it is unnecessary to enter.

18. On the night of Monday, the 7th January 1924, Entaz Boddy was up till about midnight; he was doing some accounts, and his wife Jasiman Bibi was sitting near him. In an adjoining hut slept Entaz's father, Momrej Boddy, the two wives of Momrej, named Chandra Bibi and Dasi Bibi, three sons of Momrej, named Safed Ali, Javed Ali and Yunus, and Momrej's grandson, Jiad Ali. In a third hut there were Eshar Ali, another son of Momrej, and his wife Maurjan Bibi, and Bibijan Bibi, the mother of Momrej. Suddenly the huts were set fire to, the exits from some of them being barred by closing some of the doors from outside with iron bolts or clamps. Out of the inmates of these huts, Jasiman Bibi somehow or other managed to escape with a child in her arms, and took shelter in the house of a neighbour. Eshar Ali and his wife Maurjan Bibi also succeeded in running away. Entaz stepped out with a gun, which he had in the hut in which he was, but while yet on the threshold he was speared in the leg and he fell in the courtyard. He tried to crawl and get up, but injuries were inflicted on him and his head was almost severed from his body. Bibijan Bibi succeeded in coming out of her room, and on her saying that she had recognised all the accused and there would be retribution the next day, she was shot dead. The villagers who came to the spot, on hearing the noise of the crackling flames and report of guns, or seeing the blaze, were scared away by the culprits. Those who arrived in the early hours of the morning found nearly the whole homestead reduced to ashes. In Momrej's hut, close to the door, were seven charred dead bodies. There were the four children, the sons and grandson of Momrej; over them lay the two wives of Momrej as if sheltering them from the flames, and over them all lay Momrej with his hands outstretched as if in their protection. Entaz's dead body was lying on a step to the threshold partly burnt, and his head almost severed from the body. Bibijan was lying dead on the verandah of her hut with her entrails out, and blood flowing from the verandah into

the yard.

19. The case for the prosecution was that the perpetrators of this horrible crime were the Naskars and their men. The accused Alimaddin Naskar, Belatali Naskar, Amir Naskar, Boinaddi Naskar, Farazali Naskar, Golam alias Golap Naskar are six brothers, and the accused Dudali Molla is their servant.

20. The charges upon which the accused were tried were as follows. First of all there was a charge, under Section 120 B of the Penal Code, that the accused conspired with one another and with others unknown to commit the offence of murder of Momrej Boddy and other members of his family, Then there were three counts of charges under Section 302 of the Penal Code; the first one for causing the death of Momrej Bobdy, his two wives Chandra Bibi and Dasi Bibi, and his sons Safed Ali, Jabed Ali and Yunus and his grandson Jiad Ali by barring the exit from their hut and setting fire thereto; the second one for causing the death of Entaz Ali; and the third one for causing the death of Bibijan Bibi. Lastly there was a charge, under Section 436, Indian Penal Code, for setting fire to the huts of Momrej Boddy.

21. The jury unanimously found all the accused guilty on all the charges, and the learned Judge accepting the verdict convicted the accused in respect thereof. Under Section 302 of the Penal Code he sentenced Alimaddin and Belatali to death, and Amir, Boinaddi, Farazali, Golam alias Golap and Dudali each to transportation for life. He passed no separate sentences for the offence under Section 120 B, or under Section 436, of the Penal Code. The matter has now come up before us on a reference for confirmation of the sentences of death as well as on appeals by the accused persons.

22. In dealing with this matter we are met at the outset with a serious difficulty arising out of the charges on which the accused were tried in the Court below.

23. As I have stated above, the first charge against the accused was a charge of conspiracy. As amended in the Court of Sessions, it ran as follows:

That you, on or about the 22nd Pous 1330 B. S., corresponding to 7th January 1924, at Daria, p.-s. Canning, conspired with one another and others, unknown, to commit the offence of murder of Momrej Boddy and other members of his family, and thereby committed an offence punishable under Section 120B of the Indian Penal Code, and within the cognizance of the Court of Sessions. And I hereby direct that you be tried by the said Court on the said charge.

24. It assumed this form, on amendment of a charge of conspiracy which the Committing Magistrate had framed in these words:

That you, between December 1923 and 5th January 1924, at Daria, P.-S. Canning, did agree with one another and with other persona unknown to do and cause to be done an illegal act, to wit, commission of the offence of murder of Momrej Boddy and other members of his family by setting fire to his huts, and by means of guns, daggers, spears and other deadly weapons; and in pursuance of the said conspiracy caused the death of Momrej Boddy, his two wives Chandra Bibi and Dasi Bibi, his sons Entaz, Safed Ali, Jabed Ali, Yunus, and his grandson Jiad Ali and mother Bibijan Bibi, and thereby committed an offence punishable under Sections 120B/302 the Indian Penal Code, and within the cognizance of the Court of Sessions. And I hereby direct that you be tried by the said Court on the said charge.

25. It is difficult to see why this amendment was made; if any thing the charge framed by the Committing Magistrate was fuller and more specific in details and gave the accused better notice of the case they had to meet. If instead of the words 'you caused the death', the words 'death was caused' were substituted, and the allegation as to the huts having been set fire to was introduced, it would have been an ideal charge of conspiracy consonant with the facts of the case. It would then have been on the lines of the charge of conspiracy in the case of *Abdul Salim v. Emperor* (1921) I. L. R. 49 Calc. 573. The amended charge, however, is not open to any objection which can be said to have vitiated the trial or caused prejudice to the accused.

26. Then as to the charges under Section 302 of the Penal Code the first count runs thus:

That you, on or about the 7th day of January 1924, at Daria, committed murder by intentionally causing the death of Momrej Boddy, his two wives Chandra Bibi and Dasi Bibi, and his sons Safed Ali, Jabed Ali and Yunus, and his grandson Jiad Ali. by barring the exit from their hut and setting fire thereto, and thereby committed an offence punishable under Section 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions.

27. This charge on the face of it relates to seven offences of murder. Causing the death of one person is one offence; there can be no question that seven offences were committed. Whether the offences were separable or not, so as to justify the application of Section 71 of the Indian Penal Code, is outside the purview of this enquiry. They may have been committed by one single act or set of acts, but the result has been seven different offences. That they are distinct offences cannot for a moment be doubted. Even under the Code of 1898, wherein in Section 35 there was same apparent ambiguity in the meaning of the expression 'distinct offences,' Sir Henry Prinsep observed: 'Section 35 of the Criminal Procedure Code seems to have been intended to enhance the ordinary powers of a Court convicting, at the same trial, a person of distinct offences, rather than to declare what are to be distinct offences.' By Act XVIII of 1923, the Explanation and the Illustration have been deleted; and there is nothing to suggest now at any rate that separate or different offences are not distinct offences. The first part of Section 233 of the Criminal Procedure Code lays down that for each distinct offence there shall be a separate charge. This provision is mandatory, and seven different charges should have been framed for these seven offences of murder which appear to have been huddled into the first count as it stands. Whether this provision of the law is obligatory or merely directory, or whether the failure to comply with it is an illegality which vitiates the trial or is a mere irregularity,---a question with regard to which there is a clear conflict of judicial opinion in this Court,---is a matter upon which I need not express any opinion on the present occasion. Suffice it to say that it is clear that the practical effect of the charges has been to try the accused person in respect of a charge of conspiracy, and on nine separate charges of murder, and one of arson. I do not suggest that, upon the allegation that all these offences were committed in pursuance of the conspiracy, or at any rate in the course of the same transaction, such a joinder of charges was not permissible. Applying the

exceptions laid down in Sections 235 and 239, Criminal Procedure Code, all these charges could, no doubt, be legally joined; but it should be remembered that the provisions of these sections are merely enabling ones, and if there is risk of embarrassing the defence such joinder of charges should not be resorted to.

28. It is, therefore, necessary to consider the facts and materials upon which these charges have been framed. So far as the charge of conspiracy is concerned, there is no direct evidence of it, but it is based upon some evidence as to preparation on the part of Alimaddin, and perhaps of some of the other accused as well. The main evidence, however, is afforded by the presence of the accused at the house of Momrej and the acts done by them there, and the learned Judge was right in directing the jury thus : 'To bring home the charge of conspiracy against them (meaning the accused) the prosecution rely on the same evidence on which they rely for their charge under Section 302 of the Indian Penal Code. If you believe that the accused went to the house of Momrej that night, you will not have much difficulty in holding that they agreed with one another to kill Momrej and the other members of his family.' So far then as the charge of conspiracy was concerned, there was ample foundation for it.

29. The same, however, can not be said in respect of the other charges framed in this case. As for the offences of murder, as regards the seven persons named in the first count, there is no evidence against any of the accused such as would justify the framing of the charge. As to the offence of murder of Entaz, there is nothing on which such a charge can be framed against any of the accused other than Belatali. As to the offence of murdering Bibijan, none except Alimaddin can be charged with it. As for the offence of arson, there is evidence only against Dudali. The charges, however, have been framed on the assumption that, as they were all members of a conspiracy for committing these offences, and these offences were committed, they may be charged with having themselves committed the offences. This position is hardly tenable in law. It is true that where a conspirator is present at the commission of the offence, he may, under the provisions of Section 114 of the Indian Penal Code, be deemed to have committed the offence but if that is the way in which the accused are all to be made responsible for the offences, they should be specifically charged with such

offences as read with the provisions of Section 114 of the Indian Penal Code. There may arise a further question in that case, in respect of some of the accused, namely, whether it would be permissible to infer conspiracy from mere presence, and again to make them liable as principals by taking into account the fact that they were present at the commission of the offences.

30. The charges of murder and arson, apart from the weight and number of them, which in itself is sufficient to crush the accused, relating as they do to such serious offences, must necessarily embarrass the accused all the more when there is really no foundation for them as regards most of the accused persons in this case. They are likely to be bewildered in their defence, unable to discover how they are to meet the charges, when there is no allegation upon which such charges could be based. They are equally apt to confuse the jury; and that they did confuse them is clear, for in spite of the fact there is no evidence in support of these charges, so far as many of the accused are concerned, as pointed out above, the jury returned a unanimous verdict of guilty against all the accused in respect of all the charges. The confusion could perhaps have been avoided by giving them proper directions discriminating between the different charges; but that does not appear to have been done in this case. On the other hand the learned Judge observed as follows: 'the first charge of conspiracy does not seem to be important in view of the main charge of murder against the accused, for if you do not believe the charge of murder I do not suppose that you will believe the charge of conspiracy against the accused. Then the jury were asked to consider whether they would not hold all the accused responsible for the murder of Entaz, although the evidence was that Belat struck him on the neck with a dao, and that, although Alimaddin shot Bibijan dead, whether they should not hold any of the others responsible for it, and it was also suggested to them they might not hold the others responsible, as the murder of Bibijan in the manner in which it was done might not have been in the programme; and furthermore they were told, as regards the murder of Momrej and the other six persons, that if they believed that the accused had a common intention to cause the death of these people in that way then they could find them all guilty. These directions had the effect of misleading the jury as to how they were to deal with the charges before them, and that that they were so misled is evident from the verdict which they returned.

31. In my opinion the accused were embarrassed in their defence and the jury misled and confused, and there has not been a trial of the case upon charges properly framed in consonance with the facts alleged by the prosecution; a multitude of charges not having any proper foundation, obscuring the case which the accused had got to meet were put forward, and, therefore, there was no proper trial which the accused were entitled to under the law.

32. In my opinion the observations of the Lord Chancellor, in the case of *Subrahmania Iyer v. King-Emperor* (1901) I. L. R. 25 Mad. 61, 97., apply in substance to the charges framed in the present case. In that case, though their Lordships were dealing with Section 234 of the Criminal Procedure Code, the importance and necessity of precision in the framing of charges was pointed out in the following passage in the judgment: The reason of such a provision is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability, and the consequent embarrassment both to Judges and the accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence, which it is the object of all criminal procedure to obtain. The policy of such a provision is manifest, and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure. The mischief sought to be averted by the Statute has been done, as is evident from the verdict of the jury, and the acceptance of it by the learned Judge; and the effect cannot now be 'averted by dissecting the verdict' and appropriating the finding of 'guilty' only to.