

In Re: Ibrahim and ors.

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Court : Kolkata

Decided On : Feb-19-1925

Reported in : 88Ind.Cas.458

Judge : Babington Newbould and ;B.B. Ghose, JJ.

Appellant : In Re: Ibrahim and ors.

Judgement :

1. The seven appellants have been convicted of committing dacoity. The first three have been sentenced to seven years' rigorous imprisonment each, the fourth to three years' rigorous imprisonment, the last three to five years' rigorous imprisonment each.

2. The case for the prosecution is that a dacoity was committed in a river in the night following the 8th of March, It was committed on, a boat in which a sum of about Rs. 11,000 was being taken from a place called Galachipa to Nalchiti and Jhalakati.

3. The principal evidence against the appellants is that of an approver. This evidence has been corroborated by evidence as to the accused being seen together at different times and places before and after the dacoity and also as to other circumstances. But as the learned Sessions Judge has correctly pointed out in his heads of charge there is no evidence besides that of the approver to show that the appellants actually took part in the dacoity. So far as the evidence of the

approver and the corroborative evidence given by witnesses is concerned, we hold that there has been no misdirection. But we must accept the contention urged on behalf of the majority of the appellants that there has been serious misdirection in the charge where he deals with the evidential value of the so-called confession made by the accused Kalu and also of certain extra judicial confessions made by the accused Sundarali as against the accused other than the makers of the confessions.

4. It will be convenient to first deal with the appeal of the 4th appellant Kalu. The case for the prosecution is that this accused did not actually take part in the dacoity. He was with the others before the dacoity and went with one of the dacoits, who is now absconding, to borrow a boat, but during the dacoity he was left in a larger boat at a place some five or six miles from the place of the dacoity and told to wait for the other dacoits. In the case of this accused the Jury gave a special verdict in these terms:

When asked with regard to Kalu the reply of the Jury was 'Guilty. He is their servant and at first he did not know a dacoity would be committed. He was not present when the dacoity was committed. His case may be considered.

5. Though the Jury apparently held that Kalu was to some extent aiding the commission of the dacoity having regard to the definition of dacoity in Section 391, Indian Penal Code, we hold that on this finding he should not have been convicted. He was not one of those who were conjointly committing or attempting to commit robbery, and though he may have been aiding such commission or attempt he was not present and, therefore, his action did not come within this definition. This Kalu was examined by the Magistrate as a confessing prisoner and it is contended that this statement made by him was not a confession so that it can be taken into consideration as against the other accused under the provisions of Section 30.

6. We think there is considerable force in this contention. Kalu in this statement describes the movements of himself and other accused tried for the dacoity. The only really incriminating statement that he makes is that after the dacoity he was offered Rs. 100 which he took. This statement is certainly not a confession that he

committed the dacoity, and we think that it should not have been put to the Jury as a matter to be taken into consideration as against the other accused. But it is not necessary to consider to what extent an incriminating statement is to be regarded as confession within the meaning of Section 30 of the Evidence Act, for whether we hold that this statement was not a confession or whether we hold that it was a retracted confession, it has no evidential value as against Kalu's co-accused. The learned Sessions Judge treated it as a retracted confession, and although in one part of his charge he correctly told the Jury that the retracted confession of a co-accused is practically of no value against anybody but himself, he prevented this direction being properly appreciated by the Jury by referring to this confession of Kalu and also to the extra-judicial confession of the appellant Sundarali, asking evidence to be taken into consideration in considering the case of each of the other accused. When the Jury were referred to the mentioning of individual accused in the confession of Kalu and the extra-judicial confession of Sundarali, they were not likely to properly appreciate the direction that they were to regard these statements as of no value as against the other accused. We must hold that this was likely to prejudice the Jury and lead them to give some weight to these statements when they should have disregarded them altogether; and we hold that this caused a mis-carriage of the justice and necessitates a re-trial of all these accused in respect of whom there has been such misdirection. This applies to all the appellants except Kalu and Sundarali.

7. Sundarali was not named in Kalu's statement or confession. So, as regards him there has been no misdirection on this point. It is urged that there has been misdirection on other points. It is said that the evidence of witnesses who corroborate the approver as to association before and after the dacoity is no real corroboration, because the approver was examined by the Police after the Police had obtained this information as to these movements from these witnesses. It certainly cannot be said that as a point of law the evidence of witnesses who support the statement of the approver is not corroborative evidence because this evidence was known to the Police before the approver was examined by them. It may be urged and probably was urged at the trial that the approver's evidence should not be believed because he might have been tutored by the Police to make a statement which fitted in with the evidence of witnesses who had been

previously examined. But at the most it was a matter of non-direction on the part of the Judge not to draw the attention of the Jury to this point. We do not consider it a serious matter of misdirection since the attention of the Jury was fully drawn to the necessity of considering how far the evidence of the approver can be believed.

8. Another point on which misdirection is alleged is that the attention of the Jury was not drawn to the statement in the First Information that the informant Benode Behary Pal's gomashtha in charge of the money suspected his own boatmen. We think that having regard to the reasons there given for the suspicion nothing can be based on it to support the case for the defence. It rather renders the story as to the fact of the dacoity more probable.

9. It is urged that the evidence as to the extra-judicial confession made by Sundarali was not properly put to the Jury. The learned Sessions Judge when referring to this confession spoke of it as the alleged confession of Sundarali and in placing the evidence before them he pointed out to the Jury that it was for them to decide whether this confession had been made. We cannot say there was misdirection because attention was not drawn to the statement of the witness Najamali talukdar that he did not inform the Police or panchayet of the confession. The objection to the statement of Darbarulla that he understood that Khabiruddin gomastha, Sundarali and Jaban Mirdha had committed dacoity would be open to serious objection as regards Khabiruddin and Jaban Mirdha since it was not clear from the definition that this understanding in respect of them was based on the statement made by Sundarali. But in the case of these two appellants we have already held that there must be a re-trial. His statement as to Sundarali's confession is somewhat vague, but the attention of the Jury appears to have been sufficiently drawn to this point. So far as Sundarali is concerned we can see no ground for holding that there was misdirection on any other ground for setting aside the verdict of the Jury.

10. We accordingly allow the appeal of the appellant Kalu. We set aside his conviction and sentence and direct that he be released.

11. The appeal of the appellant Sundarali is dismissed.

12. We allow the appeals of the appellants Ibrahim, Jaban Mirdha, Sherajuddi, Kadamali and Khabiruddin gomastha. We set aside their conviction and sentences and direct that they be re-tried according to law.

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