

Arshed Ali Vs. Emperor

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Court : Kolkata

Decided On : Nov-25-1924

Reported in : 92Ind.Cas.890

Judge : Babington Newbould and ;Mukerji, JJ.

Appellant : Arshed Ali

Respondent : Emperor

Judgement :

Babington Newbould, J.

1. Arshed Ali has been found guilty by the unanimous verdict of the Jury on the charge of abetment of murder. He has been sentenced by the Additional Sessions Judge of Backerganj to death under Section 302 read with Section 109 of the Indian Penal Code. Under Section 374 of the Or. P.C. the proceedings have been submitted to this Court for confirmation and the accused has also preferred an appeal against his conviction.

2. The facts according to the case for the prosecution are as follows:

Lalsom Bibi, the principal witness in this case, has lived as the wife of five men. To how many of them she was legally married is not clear, but her marriage to the appellant Arshed Ali who was the fourth of her so-called husbands was certainly

bigamous as it took place during the lifetime of the third Abdul Hussain who had not divorced her. After living with the appellant for a few months she left him and went to live in her father's bari. She was then one month pregnant. In Magh last she went through a form of nika marriage with the deceased Sher Ali. This enraged Arshed Ali and twice in the months of Falgoon and Chaitra, Javed Ali who is Arshed Ali's dharma-bhai asked Lalsom to return to Arshed Ali and threatened her when she refused to do so. On the night of the 10th April (28th Chaitra) Sher Ali, Lalsom and her three children were sleeping in her hut. At a little before midnight Lalsom woke up hearing the noise of a scuffle. She heard Javed Ali, whose voice she recognised, say 'Let me go.' She got up to light a lamp and then heard Arshed Ali saying 'Javed Ali, is the deed done.' By the light of the lamp she saw that Sher Ali's viscera were protruding from a wound in his stomach and another wound on the left side of his chest. Her cries brought several neighbours to the scene and both Sher Ali and Lalsom told them that they had recognised Javed Ali and Arshed Ali by their voices.

3. Sher Ali was taken by boat to Patuakhali, the Sub Divisional headquarter, where he arrived at, about 11 A. M. He was taken to the hospital and there his statement was recorded by an Honorary Magistrate from 3.30 to 4.10 p.m. He said that he had been wounded by Javed Ali and Arshed Ali and that Javed Ali inflicted the wound 'with a dao. He also stated that he was wounded because he married Arshed Ali's wife. He died before sunset that afternoon. The doctor who held the post mortem examination found three incised wounds on the body, of which two were homicidal. In his opinion death was due to shock and haemorrhage from these two wounds.

4. That Sher Ali was murdered on the night of the 10th April has been clearly proved. Whether the appellant before us was guilty of abetting this murder depends on the credibility of the evidence that he was recognised by his voice. Though the Jury have unanimously convicted him, this being a reference under Section 374, Cr.P.C., we must be satisfied that their finding of fact is justified by the evidence on the record. After full consideration we are compelled to hold that there are several points in the case which make it unsafe to rely on this evidence. We also find that there has been positive misdirection on one important piece of

evidence in the case in addition to non-direction by reason of the learned Judge having omitted to draw the attention of the Jury to several points which throw doubt on the truth of the case for the prosecution.

5. In his charge to the Jury the learned Sessions Judge has said: 'On Wednesday, the 27th Chaitra (9th April) Arshed Ali. was seen in Kalagachia village which adjoins Kewalumia walking towards the bari of Javed Ali.' But the evidence is that Arshed Ali was seen in the neighbourhood not on the Wednesday but on the Thursday afternoon. The fact of the case for the prosecution rests on a statement alleged to have been made by Sher Gazi and is supported by the evidence of his brother Mahomed Gazi who deposed that Sher Gazi said he had seen Arshed Ali on the previous afternoon. That the expression 'the previous afternoon' cannot mean the afternoon of the previous day is clear from the statement of Lalsom Bibi in the First Information to the effect that her husband had told her in the afternoon of the day of occurrence that when he returned after noon of that day he saw Arshed Ali and Javed Ali. This is a very serious misdirection since it was proved by witnesses who were examined by the Court to test the accused's plea of alibi, that he was present at Patuakhali as an accused in a case which was the last heard on the 10th April. Though this might not have prevented him being present at the murder he could not possibly have been at Kalagachia at the time that Sher Ali said that he saw him.

6. The case against this accused depends solely on the recognition of his voice by Sher Ali and Lalsom Bibi. It is certainly suspicious that no mention of this fact was made to anyone outside the village before, the 18th of April when Lalsom Bibi's first information was recorded. Though the chowkidar Adam Ali went to the Amtali Police Station the morning after the occurrence, nothing was recorded there. The explanation given is that it was thought that information would be taken at Patuakhali. We think it unlikely that no entry would have been made even in the station diary if the chowkidar had then asserted that the accused had been recognised by their voices at the time of occurrence. The statement of Sher Ali recorded by the Honorary Magistrate contains no mention of how Javed Ali and Arshed Ali were recognised, though both are named.

7. It is difficult to rely absolutely on the statements of the deceased and his wife since they are clearly untruthful on one important point, the period that elapsed between Lalsom Bibi leaving Arshed Ali and her marriage to Sher Ali. Lalsom Bibi's evidence is that she married Arshed Ali 4 years ago and after living with him 4 months she went to live at her father's house. Sher Ali stated to the Honorary Magistrate that she was at her father's bari for about 4 years. But the age of the child of which Lalsom Bibi says the accused is the father, is inconsistent with her having lived apart from the accused for as long as two years. If the accused had raised no objection to Lalsom Bibi leaving him for even two years there is no reason why he should have committed this murder. Whatever the truth may be we have no doubt that there was good reason to suspect the accused and that the true story of the illfeeling between the parties has been concealed.

8. There are other reasons besides the delay in informing the authorities which make us suspect the truth of the story of recognition, apart from the question as to how far such recognition can support the conviction. It is most improbable that when a murder is being committed the murderer's companion should call to him by name. This suggests that the actual words that may have been heard, have been altered to strengthen the case against Javed Ali who is absconding.

9. Lalsom Bibi's evidence is contradictory on some material points. She said she had no talk with her husband before he made the statement to the neighbours and that when she lit the lamp her husband was senseless and he came to after the neighbours came. Then in cross-examination she said: 'It is a fact that before any neighbours came up my husband told me he recognised Javed Ali and Arshed Ali, he told me this while I was lighting the lamp.' Also in her deposition she said that her husband said 'o ma' before any statements were made by the assailants, but when questioned by a juror as to the order of events she places this cry of 'o ma' last of all. The evidence of the neighbours who came afterwards is not free from discrepancies. It is noticeable that when Ibrahim called to the chowkidar he spoke of some one unknown having committed the murder though according to the evidence he had then heard the story of recognition. There are also important discrepancies as to whether Lalsom Bibi said anything that night. The deceased's brother's account of a conversation with the deceased is very significant. He says

that the deceased gave three reasons for accusing Javed Ali and Arshed Ali, (i) that he had no other enemies, (ii) that he saw Arshad Ali in the afternoon, (iii) that he had recognised their voices.

10. We think that the real reason for the accusation of these men was the first and that the third reason on which the case now rests is as unreliable as the second has been proved to be.

11. For these reasons we must hold that the guilt of the accused Arshed Ali has not been proved. We refuse to confirm the sentence of death passed on him. We allow his appeal and set aside his conviction and sentence and acquit him of the charge on which he was tried and direct that he be released.

Mukerji, J.

12. I entirely agree. I only wish to add a few words as regards the identification test that was held in the course of the trial in this case. The matter, however, is not of much importance in the present case, inasmuch as the witness who was subjected to this test was for sometime the wife of the accused, who was sought to be identified. In any case it is not reasonable to expect that she would have failed to identify the accused. What happened in this case was this:--Lalsom Bibi was examined as a witness on behalf of the prosecution and after her examination was over with the permission of the accused and his Pleader the identification test of the accused's voice was held, the accused being mixed up with seven other men. The accused was actually numbered six on the file, and his voice was correctly identified by Lalsom Bibi as the 6th voice. Personally I have always entertained grave doubts as to the propriety of such a test being adopted during the trial. It makes no difference that in the present case it was held with the permission of the accused and his Pleader, for a request in the matter of this description is always very embarrassing to the defence. There is no warrant for this procedure in the Statute and it is likely to lend spurious weight to the testimony which should be available for the purposes of a criminal trial.