

Alimuddin Naskar and ors. Vs. Emperor

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Court : Kolkata

Decided On : Aug-01-1924

Reported in : 85Ind.Cas.231

Judge : Hugh Walmsley and ;Mukerji, JJ.

Appellant : Alimuddin Naskar and ors.

Respondent : Emperor

Judgement :

Hugh Walmsley, J.

1. There are two appeals before us and a Reference under Section 374, Cr. P.C. The circumstances are as follows. It is said that the accused had a quarrel with the family of one Momrez and that one night they went to his house and set fire to the hut in which Momrez 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 Intaz and Bibijan were sleeping and they were also killed.

2. The Committing Magistrate framed charges under Section 120B read with Section 302, Indian Penal Code and under Section 302, Indian Penal Code and Section 436, Indian Penal Code. The learned Judge made changes in the charge under Section 120B read with Section 302, Indian 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 mis-joinder of charges and also of persons.

3. It must be conceded that a crime of such a whole-sale nature presents considerable difficulty.

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

(1) 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 Momrez Baddy 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 Momrez Baddy, his two wives Chandra Bibi and Dasi Bibi, his sons Intaz, Safed Ali, Javed Ali, Yunus and his grandson Javed Ali and mother Bibijan Bibi and thereby committed an offence punishable under Section 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, Indian Penal Code. In this one charge the names of the seven inmates of Momrez' hut are mentioned.

(3) Of murder under Section 302, Indian Penal Code, in regard to the killing of Intaz.

(4) Of murder under Section 302, Indian 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 Momrez.

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

6. The charge under Sections 120B and 302, Indian 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 Momrez'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 Intaz 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 imports anything 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 to with one another to kill Momrez and the other members of his family then you can find them guilty under Section 120B.' With regard to the killing of Intaz he said that it was for the Jury to decide whether any one but Bilait 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 Alimuddin himself alone is responsible.' Then he went on: 'Against all the accused it is the charge of murder of Momrez, 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 Momrez 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 Intaz, 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 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 Momrez's house, who set fire to his hut, who prevented the inmates from escaping. Instead, however, of dealing with the individuals responsible for killing Intaz 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 re-trial. 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 24-Pargannas there lived two families, the Baddys 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, Entaj Baddy was up till about midnight; he was doing some accounts and his wife Jasiman Bibi was sitting near him. In an adjoining hut, slept Intaz's father Momrez Baddy, the two wives of Momrez, named Chandra Bibi and Dasi Bibi, three sons of Momrez names Safed Ali, Jabedali and Yunus, and Momrez's grandson Jiad Ali. In a third hut there were Esharali, another son of Momrez and his wife Maurjan Bibi, and Bibijan Bibi, the mother of Momrez. 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. Esharali and his wife Maurjan Bibi also succeeded in running away. Intaz 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 on 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 that 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 Momrez's hut, close to the door, were seven charred dead bodies. There were the four children, the sons and grandsons of Momrez; over them lay the two wives of Momrez as if sheltering them from the flames, and over them all lay Momrez with his hands outstretched as if in their protection. Intaz'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 Alimudid Naskar, Bilaitali Naskar, Amir Naskar, Bainaddi 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 120B, Indian Penal Code, that the accused conspired with one another and with others unknown to commit the offence of murder of Momrez Baddy and other members of his family. Then there were three counts of charges under Section 302, Indian Penal Code, the first one for causing the death of Momrez Baddy, 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 Intaz 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 Momrez 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 Indian Penal Code, he sentenced Alimuddin and Bilaitali to death, and Amir Boinaddi, Farazali, Golam alias and Amir, transportation for life. He passed no separate sentence for the offence under Section 120B or under for the offence under Section 436, Indian 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 Momrez Baddy 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 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 Momrez Baddy 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 Mamorez Boddy, his two wives Chandra Bibi and Dasi Bibi, his sons Intaz, Safed Ali Javed 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.

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 met. If instead of the words 'you used the death', the words 'death was used' were substituted, and the allegation as to the huts having been set fire was introduced it would have been a full charge of conspiracy consonant with the facts of the case. It would then have run on the lines of the charge of conspiracy in the case of *Abdul Salim v. Emperor* 69 Ind. Cas. 145 : 49 C. 573 : 35 C.L.J. 279 : 26 C.W.N. 680 : (1922) A.I.R. (C.) 107 : 23 Cr. L.J. 657. The amended charge, however, 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, Indian 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 Momrez Baddy, his two wives Chandra Bibi and Dasi Bibi and his sons Safed AH, Javed 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 some apparent ambiguity in the meaning of the expression 'distinct offences,' Sir Henry Prinsep observed: 'Section 35, Cr. P.C. 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, Cr. P.C., 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 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 my 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 persons 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, Cr. P.C. 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 Alimuddi 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 Momrez 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, Indian Penal Code. If you believe that the accused went to the house of Momrez that night, you will not have much difficulty in holding that they agreed with one another to kill Momrez 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, cannot 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 Intaz there is nothing on which such a charge can be framed against any of the accused other than Bilatali. As to the offence of murdering Bibijari none except Alimuddi 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, 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, 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 offence. '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 as murder and arson, 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 inspite of the fact that there is no, evidence in suppose 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 Intaz although the evidence was that Belait struck him on the neck with a dao, and that although Alimuddin 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 further more they were told as regards the murder of Momrez 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 they were so misled is evident from the verdict 'which, they returned.

30. 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.

31. In my opinion the observations of the Lord Chancellor in the case of Subrahmania Iyer v. King-Emperor 25 M. 61 : 28 I.A. 257 : 11 M.L.J. 233 : 3 Bom. L.R. 540 : 5 C.W.N. 866 : 2 Weir. 271 : 8 Sar. P.C.J. 160 (P.C.), apply in substance to the charges framed in the present case. In that case though their Lordships were dealing with Section 234, Cr. P.C., 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 such parts of the written accusation as ought to have been submitted to the Jury.'

32. I would, therefore, set aside the convictions of and the sentences passed upon the accused and direct that they be re-tried on a charge of conspiracy against all of them under Section 120B, Indian Penal Code, together with a charge under Section 302, Indian Penal Code, against Belaitali for the death caused to Intaz Ali and a charge under Section 302, Indian Penal Code, against Alimuddin for the death caused to Bibijan Bibi.