

Khoda Baksh Munshi and Another Vs The State

Court: Gauhati High Court

Date of Decision: Aug. 10, 1955

Acts Referred: Penal Code, 1860 (IPC) " Section 396

Citation: AIR 1956 Guw 30 : (1956) CriLJ 204

Hon'ble Judges: Sarjoo Prasad, C.J; Ram Labhaya, J

Bench: Division Bench

Judgement

Sarjoo Prasad, C.J.

The two appellants in this appeal, Khoda Baksh Munshi and Akser Ali have been convicted u/s 396, Penal Code,

and sentenced to transportation for life. The trial was with the aid of a jury who gave a unanimous verdict against the appellants holding them guilty

under the aforesaid section and the learned Sessions Judge accepting that verdict has convicted them as already stated above.

2. The prosecution arises out of a very tragic occurrence which happened during the early hours of the morning of 6-6-1952, in which the two

cousins Hakim Khan and Yaz Khan lost their lives. Yaz Khan died on the spot having in addition to other injuries a bullet injury on his abdomen,

while the lifeless body of Hakim Khan with injuries was discovered next morning a little removed from his house near a sheam.

3. The case for the prosecution is that on the night of the occurrence a little before morning there was a dacoity in the house of Hakim Khan and

Yaz Khan, who although occupying different rooms, were residing in the same courtyard. The dacoits are said to have been armed with various

deadly weapons including guns, and that during the commission of the dacoity Yaz Khan was shot dead by one of the dacoits and he died

instantaneously, while Hakim Khan was mercilessly beaten, his hands were tied and the dacoits dragged him out of his house.

Subsequently, his body was found near a river Lank. This was in the month of Ramjan in 1952. It appears that as usual in the period of Ramjan,

the "female inmates of Hakim Khan and Yaz Khan"s house were preparing their early morning meal; when the sneal was ready Matijan Bibi, wife

of Yaz Khan, oused her husband from sleep and kept water ready for him to have his wash, Yaz Khan asked his wife to call for the servant

Wahed Ali who was also sleeping in an out house.

They both washed their hands and feet and were ready to take their morning meal before day break in order to start the fast for the day. At this

time, it is alleged that a number of miscreants rushed into the compound of Hakim Khan and Yaz Khan, some ran towards Hakim Khan's house

and others towards the portion occupied by Yaz Khan: the servant Wahed Ali was also beaten and then the miscreants dealt with the two cousins.

Hakim Khan's wife Mt. Sabura (P. W. 2) who was sleeping with him inside the room hid herself in a corner of the sleeping room, Hakim Khan's

ther wife, Mt. Fuljan Bibi and his daughter Mt. Hazra were also said to have been sleeping in the same room in another bed. Mt. Fuljan Bibi

escaped out of the room, but the daughter Mt. Hazra could not do so and she stayed behind her mother Mt. Subura clinging to her in fear.

The dacoits are alleged to have broken open boxes and taken away cash, ornaments and clothes. On the noise which followed, Aslat and his

brother Kurman cousins of Hakim Khan went running to his house. He saw about 20 to 25 persons moving here and there and recognised some of

them. Then other neighbours also came. It is stated that Aslat Khan's brother Kuvman Ali also received some lathi blows at the hands of the

dacoits and he fell down.

It also appears that out of some of the other neighbours who tried to rush to the spot, one other person Mokshed also received a bullet injury.

(3A) At about 10 A. M. the same morning a first information of the occurrence was lodged at the Police Station which is about 4 miles off. The

information was lodged by Aslat Khan, who appears to have been accompanied to the Police Station by a number of villagers, and the police after

investigation: submitted chargesheet against the appellants and some other persons, some of whom were discharged while others acquitted by the

learned Sessions Judge at the trial. The appellant pleaded not guilty to the charge and stated that they were innocent.

4. In the view which we are inclined to take, I do not consider it necessary to go into the details of the case or enter into a discussion of the

evidence led by the prosecution, The learned Counsel appearing for the appellants has pointed out some prominent defects in the charge to the jury

which, we think, has materially affected this verdict.

At the outset, it is pointed out that the learned Additional Sessions Judge in his charge to the jury appears to have accepted the case of dacoity as

proved without making any attempt to analyse the prosecution evidence on the point. The learned Judge observes in his charge as follows:

As regards the commission of dacoity at the house of Yaz Khan and Hakim Khan the defence has not challenged it nor has admitted it; but the

prosecution has established by evidence that a dacoity was committed on the night of 6-6-52 at the house of Hakim Khan and Yaz Khan and

during the course of that dacoity that murder of Yaz Khan and Hakim Khan was committed.

This aspect of the matter is also not challenged by the defence. Now the question will be who were the persons that committed the offence of

dacoity and during the course of the commission of dacoity committed murder of Yaz Khan and Hakim Khan. It is quite clear from the above

observation of the learned Judge that he assumed that the prosecutior had established the case of dacoity simply because the defence had not

challenged it. In a criminal case the burden of proving the offence with, which the accused is charged is entirely on the prosecution. It was therefore

for the prosecution to establish the fact of dacoity as also the fact that the appellants took part in the dacoity. It was not a civil case where the

Court could proceed on admission in the pleadings.

It was therefore the duty of the Court to analyse and place before the jury the evidence of the prosecution witnesses which would have enabled the

gentlemen of the jury to come to a finding on that point one way or the other. In the first information which was lodged by Aslat Khan, he stated

that he did not know whether any cash or any other things had been taken away, but that he had heard from others that the dacoits had taken

away the gramophone of Hakim Khan.

The learned Counsel for the appellants has referred to some discrepancies in the evidence of the prosecution witnesses as to the things carried

away by the dacoits. The discrepancies may or may not have been important, but it was necessary for the learned Judge below to sum up all the

evidence on the point in his charge in order to enable them to make up their mind as to whether a dacoity had been actually committed in the house

as alleged and in the course of the dacoity the two persons were killed or there was some other kind of occurrence in which the tragedy was

enacted. A suggestion was made in the cross-examination of Aslat Khan that he had lodged an ejahar against Akser for stealing a cattle. This fact

was admitted by Aslat Khan. The incident of course happened about six months ago. Enmity, it is true, cuts both ways; but in view of this

admission, it was all the more necessary for the learned Judge to examine the evidence on the question of dacoity with greater care and place that

evidence before the jury for obtaining their verdict on the point. The fact that in his charge he assumed the case of dacoity to have been proved by

the prosecution must have seriously misdirected the jury on the point.

5. The next defect in the charge relates to the point of identification. It appears that the appellant Khoda Baksh Munshi was identified by Aslat

Khan and two of the female inmates of the house Mt. Sabura Khatun (P. W. 2) & Mt. Hazra Bibi (P. W. G). They knew Khoda Baksh Munshi

from before. The appellant Akser Ali was also identified by Mt. Sabura Khatun, Mt. Matijan Bewa, widow of Yaz Khan, and Mt. Hazra (P. W.

6).

The evidence shows that Mt. Sabura has since been married to Kurman Ali the younger brother of Aslat Khan. Mt. Nazra Bibi is a minor daughter

of Hakim Khan. Now in dealing with this evidence of identification the learned Judge appears to have omitted to point out to the Jury that in the

first information, there was nothing to indicate that these inmates of the house had identified the accused persons.

The first information states that all the female members of Hakim Khan's house were in an unconscious condition and when they were asked

something, not to speak of getting any response from them, they fainted. So, they could not tell whether they had recognised any dacoit or the

things which had been stolen. This explanation in the report may or may not be correct it is possible that having regard to the ghastly tragedy that

bad taken place in the house, killing and almost killing the adult male member of the family, the ladies may not have been in a position to collect

themselves sufficiently to give all the information which was required of them.

But that was really a matter for the jury to consider. It was for them to decide whether or not there was an important omission or lacuna in the

prosecution case, in that at the earliest stage in the first information report, the fact that these women inmates had been able to identify the accused

persons was not mentioned. Our attention has been drawn by the learned Counsel for the appellants to the evidence of a witness called

Fayejuddin.

In the Sessions Court he was merely tendered by the prosecution for examination; but he was cross-examined by the defence and he then made

some statements on which much reliance has been placed by the learned Counsel. He says that he met amongst others Mt. Sabura and Mt.

Matijan on the spot from where they were all watching the dacoits. The spot referred to is some place outside the house and courtyard.

It is contended that on the statement of this witness it was clear that Mt. Sabura was not in the room and therefore could not have identified the

dacoits. It is suggested that she may have immediately fled away from the room and her evidence in Court therefore was untrue. Whether Mt.

Sabura's statement was true or whether that of Fayejuddin was false or confused was a matter to be considered by the jury; but there is some

strength in the submission that all these materials should have been placed before the jury in their proper setting, which the learned Judge failed to

do.

6. Another defect pointed out is that in dealing with the evidence of the child witness Mt. Hazra Bibi, the learned Judge did not sufficiently apprise

the jury of some important admissions which she made in course of her cross-examination. She admitted that she was living with the witness

Saudulla (P. W. 12)...

She further admitted that she had been brought to Court of Saudulla who instructed her to depose and that three or four days earlier she had been

told that she would have to depose what she saw during the night of the occurrence and that she had recognised accused Akser and Khoda

Baksh. This may be regarded either as an attempt to tutor the child witness or to remind her of what she actually knew about the occurrence

asking her to depose about it.

Indeed, the whole evidence of the child witness had to be appraised and at the same time the attention of the jury should have been drawn to those

admissions for whatever they were worth. It was for the jury to decide whether in spite of these admissions there was a ring of truth in her

statement and so they were prepared to accept her testimony on the point of the occurrence and the identification of the accused. The omission to

do so, in. our opinion, has undoubtedly prejudiced the case of the appellants.

7. Another factor to which reference should be made is about the evidence of the alleged neighbour witnesses Matabar Khan (P. W. 11} and

Saudulla (P. W. 12). These witnesses have sought to corroborate the evidence of the identifying witnesses to the extent that the witnesses told them

of the identification when they arrived at the spot.

Now Matabar and Saudulla accompanied Aslat Khan to the Police Station when he lodged the first information report, and the first information

report does not give any indication that the ladies who are now said to have identified the accused made any such statement to these witnesses. It

was therefore material to draw the attention of the jury to this fact.

8. In our opinion, the defects pointed out above are serious omissions in the charge which may have vitiated the verdict of the jury and we have

therefore no option but to direct that the case should be retried by the learned Sessions Judge or by his Additional according to law. The verdict of

the jury and the conviction based thereon are therefore set aside.

9. We have deliberately refrained from making any comments on the facts of the case so as not to prejudice the trial at all. It would be entirely for

the jury to take such view of the evidence as they like and to come to any finding as they like. All that we do emphasise is that these material

considerations should be duly placed before the jury and then a verdict obtained from them.

It may be further observed that as we are directing a fresh trial of the accused, it would be for the prosecution to consider whether they would not

be well-advised in taking action u/s 236, Criminal P.C. and in suggesting any amendment or alteration in the charge. The appeal is accordingly

allowed,

Ram Labhaya, J.

10. I agree.