

**(1949) 11 GAU CK 0002**

**Gauhati High Court**

**Case No:** None

Kasim Ali and Another

APPELLANT

Vs

The King

RESPONDENT

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**Date of Decision:** Nov. 21, 1949

**Acts Referred:**

- Evidence Act, 1872 - Section 167, 33, 38, 83
- Penal Code, 1860 (IPC) - Section 148, 302, 304

**Citation:** AIR 1950 Guw 75 : (1950) CriLJ 641

**Hon'ble Judges:** T.V. Thadani, Acting C.J.; Ram Labhaya, J

**Bench:** Division Bench

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**Judgement**

Thadani, Ag. C.J.

1. This is an appeal by one Kashim Ali and Fatik Sheikh against their convictions and sentences passed by the learned Sessions Judge, Lower Assam Districts upon a unanimous verdict of guilty brought by the Jury, the appellant Kasbim Ali having been sentenced to transportation for life u/s 302, Penal Code and 2 years" R. I. u/s 148, Penal Code the sentences to run concurrently; the appellant Fatik Sheikh having been sentenced under Ba. 802/149, Penal Code to transportation for Hie.

2. Dne Mfc. Dalimannessa was married to one Badaruddin, a son of the deceased Yad Ali. Adarjan, a daughter of Yad Ali, was married to the appellant Fatik Sheikh. For some 3 or 4 years, Mt. Dalimannessa had ceased to live with her husband, Badaruddin, and was living With her parents. While Dalimannessa was living with her parents, she was once abducted by the appellant, Fatik Sheikh, and detained in bis house for some ;3 months. Fatik Sheikh then divorced bis wife, Mt. Adarjan. Badaruddin, the husband of Dalimanneasa, thereupon filed two criminal cases against the appellant Fatik. During the investigation of these case, Mt, Dalimannessa waa recovered by the Police about a year before the present murder and was handed over to her parents.

3. On 11th July 1948, at about 1 A.M., some 10 to 15 persons came to the house of Badaru-din, and shouting from outside the house, asked Badaruddin to hand over Dalimannessa to them. Badaruddin answered back saying that his wife was not therQ. The intruders then went to the house of Yad Ali, the father of Badaruddin. Yad Ali's house was next door to that of Badatuddin. The appellant Kaeim is alleged to have asked Yad Ali to hand over Mt. Daliman-neesa to them. Yad Ali said Dalimannessa was not in his house, whereupon the two appellants entered the house of Yad Ali and, when they did not find Mt. Dalimannessa, Kasim who was armed with a spear, pierced Yad Ali in the region of his chest. This attack upon Yad Ali was witnessed by his wife, Fulmala, and his divorced daughter, Adarjan. As a result of the injury, Yad Ali fell to the ground, On alarm being raised, the two appellants left the house of Yad AH and disappeared along with their companions. After the appellants had disappeared, Dalimanneesa, Badaruddin and his brother, Kadam Ali, Game to the house of Yad Ali. Shortly afterwards, some neighbours also arrived. Yad Ali who was still alive, was then taken to the Barpeta hospital in a boat. Yad Ali's brother, one Abed Ali, reported the matter to the Police. Yad Ali died the following day. On completion of the investigation, the two appellants and two others were sent up for trial, but the appellants only were convicted and sentenced by the learned Judge for the murder of Yad Ali.

4. The defence of the accused was that on the night in question, they had not visited the house of Badaruddin or the deceased for any purpose; they suggested that some dacoits might have visited the house of Yad Ali and in the Kasim Ah v. The King course of the commission of a dacoity, had murdered Yad Ali.

6. Mr. Sen for the appellants has argued (1) that the learned Sessions Judge misdirected the jury in that he summed up the evidence in a way which caused confusion in their minds, a confusion which has resulted in an erroneous verdict; (2) that the learned Sessions Judge, in omitting to explain to the jury the provisions of Section 304, Penal Code, has misdirected the jury, (3) that the learned Sessions Judge, in omitting to direct the jury to discard the evidence of the prosecution witnesses as worthless and unreliable, has misdirected them, (4) that the learned Sessions Judge misdirected the jury in omitting to direct them to discard the prosecution evidence altogether because, according to the medical evidence, Yad Ali could not possibly have made any statement after he had received the injury, (a) that the learned Sessions Judge ought to have directed the jury that it was not likely that the appellants would come to abduct Mt. Dalimannessa after the lapse of a year, (6) that the learned Sessions Judge, in wrongly admitting the evidence of Mt, Adarjan u/s 33, Evidence Act, has caused a failure of justice, (7) that the learned Sessions Judge misdirected the jury in omitting to draw their attention to the inherent improbabilities of the prosecution case, (8) that the learned Sessions Judge should have stressed the difficulty of identifying the appellants by the light of a torch, (9) that the learned Judge misdirected the jury in omitting to direct them to consider the case of each of the appellants separately.

6. We have heard Mr. Sen for the appellants at length in support of his contentions. We are not satisfied that the learned Sessions Judge has misdirected the jury on any material point in the prosecution evidence. The learned Judge's summing up, from the point of view of the appellants, is a summing up more in their favour than against them. The learned Sessions Judge has drawn the attention of the jury to the contradictions and discrepancies in the prosecution evidence, material and immaterial and left the appreciation of the evidence in the case to the jury. Indeed, where he has expressed any opinion, it is in favour of the appellants. We do not think it was the duty of the learned Judge to tell the jury to discard the prosecution evidence having regard to certain contradictions or discrepancies. The acceptance or rejection of the evidence in the case, notwithstanding contradictions and discrepancies, was a matter entirely within the province of the jury. In the third paragraph of his charge to the jury the learned Judge has expressly directed the jury to consider the case of each accused separately.

7. As regards the alleged dying declaration, the learned Sessions Judge invited the attention of the jury to the evidence of the Doctor who had stated that, in his opinion, Yad Ali must have lost all consciousness immediately after he received the injury. We do not think there is any substance in the contention that it is not likely that the appellants would attempt to abduct Mt. Dalimannesa after the lapse of a year.

8. "We can see nothing wrong in the summing up of the learned Judge on the question of identification of the appellants by the prosecution witnesses. This is not a case where the weight of evidence on this particular question rests on the evidence of casual recognition of unknown persons. In this case, the appellants who are related to the prosecution witnesses, were well known to them, and we do not think there was any difficulty in identifying them at the time of the occurrence. In any case, the learned Sessions Judge pointed out to the jury the passages in the evidence of the prosecution witnesses which affected their credibility in the matter of the identification of the appellants.

9. On the question of the learned Judge's failure to explain to the jury the terms of Section 304, Penal Code, it is sufficient to say that we do not think this was a case in which any reference to Section 804, Penal Code, was called for.

10. The only substantial ground taken in this appeal is that the learned Sessions Judge was in error in admitting the evidence of Mt. Adarjan under the provisions of Section 83, Evidence Act. The learned Judge has observed : "By the way, I should tell you that Mt. Adarjan could not be cross-examined in details before this Court though attempts were made for the purpose. She gave her evidence in examination-in-chief, but on account of illness, she was incapable of giving in Court answers to the questions in cross-examination put by the learned Advocate on behalf of the defence. On account of illness, she stated that she could not understand the questions of the learned Advocate and she appeared to be very

restless and she could not take the seat when she was given a stool for the purpose. Therefore, her evidence before our Court will not be placed before you and you should not consider the same. u/s 38, Evidence Act, her evidence before the Committing Court will be placed before you. She was partly cross-examined there by the defence, and she could not be cross-examined fully during the trial of the case. The value of her evidence before the Committing Court, and which will be placed before you, is very much lessened."

11. Me. Sen has argued that Section 33, Evidence Act has no application where a witness has been partly examined in the Court of Session : that a witness's evidence which has been recorded in committal proceedings, can be admitted only under the provisions of Section 2B8, Criminal P.C. if the same witness has been examined at the trial, as in this case.

12. We think there is considerable force in this argument, and on the facts of this case, we propose to exclude the evidence of Adarjan entirely from our consideration. Under the provisions of Section 167, Evidence Act, misreception of evidence is not a ground for interference. It is true that misreception of evidence in a particular case might have the effect of so influencing the minds of a jury as to render their verdict erroneous. In the case before us, however, the learned Judge has clearly said to the jury that the value of Mt. Adarjan's evidence was "very much lessened." We do not think the reception of the evidence of Mt. Adarjan u/s 38, Evidence Act, can reasonably be said to have influenced the mind of the jury in coming to their verdict. There is a mass of direct evidence of eye-witnesses who implicate the appellants. The jury apparently accepted it, and we do not think it acted in a manner in which no reasonable man would act. (Their Lordships then quoted the evidence of eye-witnesses, Fal-mala, Dalimunnissa and Kadin Ali. The judgment then proceeds as follows :)

13. Finally, the prosecution led evidence of Yunus, Abdul Salam, and Isub Ali, which corroborated the evidence of the eye-witnesses. If the evidence of these 6 witnesses is accepted\_\_ and the jury apparently accepted it—we do not think we can set aside the convictions and sentences on the sole ground that Adarjan's evidence was wrongly admitted under the provisions of Section 33, Evidence Act. In this view, we would scarcely be justified in ordering a re-trial by reason of the misreception of the evidence of Adarjan. We accordingly decline to interfere, and dismiss the appeal.