Ali Raza Vs Emperor

Court: Patna High Court

Date of Decision: Nov. 16, 1943

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 288, 374, 403(2)

Citation: AIR 1944 Patna 247

Hon'ble Judges: Shearer, J; Reuben, J

Bench: Full Bench

Judgement

Shearer, J.
This is a reference made by the learned Sessions Judge of Patna u/s 374, Criminal P.C., for confirmation of the sentence of

death, passed by him on one Ali Raza. The trial was with the aid of a jury which returned a verdict of guilty by a majority of four to three. Ali Raza

has appealed against his conviction and sentence and the appeal has been heard along with the reference.

2. Mt. Soghra, for whose death Ali Raza is said to have been responsible, was a middle aged woman, who was the wife of one Billu Mian, a

railway employee who resided at Khagaul. Shortly after the occurrence Billu Mian who was an engine driver was killed in a railway accident. Mt.

Soghra died as the result of two thrusts with a knife in the abdomen. The Sub-Inspector found her lying dead in a room in her house at about 9.30

a.m., on 24th December 1942. It is clear that she must have been in her house when she was attacked and that death must have occurred within a

very short time of the attack on her. At about 9 a.m., Mt. Kaniz, who is the sister of the appellant, Ali Raza, and her daughter, Akbari, a girl of

about ten, had appeared at the police station at Khagaul. Both of them had obviously been attacked by some one armed with a knife and Mt.

Kaniz lodged a first information, stating that it was her brother Ali Raza, who had attacked them. Mt. Kaniz is the wife of one Yusuf, who, also,

belongs to Khagaul and is also an employee of the East Indian Railway. For some considerable time prior to the occurrence, Yusuf had, however,

been stationed at Moghulsarai, and Mt. Kaniz had been living, not in her own house, but in the house of Billu. Billu had been carrying on an intrigue

with her, and, eventually, Mt. Kaniz became pregnant by him. A week or so prior to the occurrence, she was delivered of a child, which, later, she

and some other persons took to Gaya and disposed of.

3. According to the prosecution, the appellant, Ali Raza, had resented the intrigue between Billu and his sister and had been endeavouring to

compel Billu to marry her. This Billu had declined to do, possibly because he had already two wives, or possibly because one or both of the wives

had objected to it. It is said that at about 7.30 a.m. on 24th December 1942, Mt. Kaniz was sweeping the floor in one of the rooms in Billu''s

house when Ali Raza suddenly attacked her and then her young daughter, Akbari, with a knife. Both of them succeeded in getting out of the house

and making their way to the police station. It is said that having attacked Mt. Kaniz and Akbari, and having chased them out of the house and a

short distance along the road, Ali Raza then returned and attacked and killed Mt. Soghra. There was no one else in the house when the attack on

Mt. Soghra took place, and the case for the prosecution, therefore, rests on circumstantial evidence. The circumstantial evidence which was relied

on, was however of the most complete and convincing kind.

4. In the first place, there is the evidence of Mt. Kaniz and Akbari that it was the appellant, Ali Raza, who attacked them. Secondly, there is the

evidence of four neighbours of Billu Mian, who said that their curiosity was aroused by the cries of Mt. Kaniz and Akbari, and that on running up

to see what was happening, they saw Ali Raza come out of the house with a bloodstained knife in his hand, chase the woman and the girl for a

short distance, and then go back into the house again. These men and another, Nur Muhammad Khalasi, who seems to have come up in the

interval further said that, shortly afterwards, they saw Ali Raza jump out of the house from a window and go to his own house or the house of his

brother which was close by and, within a few minutes, emerge again with a suit case in his hand and hurry away.

5. Admittedly Ali Raza disappeared immediately after the occurrence and could not be traced for a period of about three months. Mr. Yunus, for

the appellant, pointed out that there were several other persons, whose houses were much closer to the house of Billu than were the houses of the

five men, who were called by the prosecution. It is not very clear that the inmates of these houses all of whom are Mahomedans were at home at

the time the occurrence took place. They may not have been, and, even if they were, they may have been reluctant to give evidence against Ali

Raza, with whom, very possibly, they may have sympathised, as his sister, Mt. Kaniz, had brought disgrace on him. The persons, who were called

by the prosecution, all live within 100 yards of the scene of the occurrence at the outside. Some of them, in fact, live much closer to it. There is no

reason at all to suppose that they did not see something of it, or that the account, which they gave of what they did see, was incorrect. One of them

may, perhaps not have been telling the truth in saying that, when Ali Raza went away carrying the suit case, he still had the knife in his hand.

6. This, however, was obviously a trivial matter. Next, there is the circumstance that, at the moment when Mt. Kaniz and Akbari were attacked,

there was no one in the house but Ali Raza and Mt. Soghra. No doubt, at the trial, Mt. Kaniz said that, not merely Billu, but also the four sons of

Billu, were in the house at the time. The girl, Akbari, said that Billu was (sic). In the Court of the committing Magistrate, Akbari had however said,

quite positively, that neither Billu nor his sons were there. Mt. Kaniz, in answer to a question in cross-examination,, had similarly said that the

children of Billu were somewhere else at the time the occurrence took place. Possibly, in view of this, the was apparently not asked whether Billu

himself was at home. The Sub-Inspector said that there was no one in the house when he arrived there at about 9.80 A.M. and that it was not until

about noon that Billu arrived. Billu, as I have already said, died in a railway accident shortly after the occurrence, and could not, therefore, be

called to give evidence at the trial. It is, perhaps, a pity that no evidence was adduced to show where exactly he was at the time the occurrence

took place.

7. At the same time, I am completely satisfied that the evidence given by Mt. Kaniz and Akbari on this point at the trial, was untrue, and that the

evidence, which had been given by them in the lower Court, was true. It was admitted, and indeed could not possibly have been denied, that Ali

Raza was incensed with his sister and with Billu, if not, also, with Mt. Soghra herself. He had, therefore a motive for attacking Mt. Soghra and Mt.

Kaniz. His conduct in going back into the house with the knife in his hand, and his subsequent conduct in packing a suit case and running away,

immediately after he came out of the house, again point very clearly to his having been the murderer. The various circumstances surrounding the

death of Mt. Soghra are, to my mind, wholly inconsistent with any other conclusion than that it was Ali Raza, and could not possibly have been any

one else, who was responsible for it.

8. Such difficulty as there is in disposing of the reference and appeal arises from the action of the learned Sessions Judge in excluding certain very

material evidence. As I have already said, when Mt. Kaniz and Akbari appeared at the police station, the Sub-Inspector recorded a first

information on the statement of Mt. Kaniz. When he reached the house of Billu Mian and discovered the dead body of Mt. Soghra he recorded

another first information. In consequence of this, two charge sheets were submitted, two preliminary enquiries were held and eventually, Ali Eaza

was committed to the Court of Session under two separate commitment orders.

9. For some reason, he was tried, in the first instance, on a charge of having attempted to murder Mt. Kaniz and was acquitted by the learned

Assistant Sessions Judge. He was then tried by the learned Sessions Judge on a charge of having murdered Mt. Soghra. A plea of autrefois aquit

was put forward on his behalf and was, of course, rightly rejected. The learned Sessions Judge, however, directed that the Public Prosecutor

should not be permitted to ask Mt. Kaniz or Akbari who it was who attacked them. At the trial, as I have just said both Mt. Kaniz and Akbari

made statements which were entirely at variance with statements they had made in the lower Court, and, in consequence, the Public Prosecutor put

in their depositions in the lower Court u/s 288, Criminal P. C. In the lower Court, they had said that it was Ali Raza who had attacked them so that

in spite of the ruling of the learned Sessions Judge some evidence on this material point was brought on the record. Mr. Yunus, for the appellant,

has put forward an argument in the alternative. On the one hand, he has contended that the learned Sessions Judge was right in excluding the

evidence he did, and was, therefore, wrong in admitting the whole of the evidence, which had been given by Mt. Kaniz and Akbari in the lower

Court. On the other, he has contended that, if the learned Sessions Judge was wrong in excluding this evidence, his client was in consequence

embarrassed in putting forward his defence. In either case, it was urged, there ought to be a re-trial.

10. I will deal, in the first place, with the latter of the points taken by Mr. Yunus, as there is in my opinion more substance in it than in the former. In

order to ascertain what exactly took place at the trial, we called for a report from the learned Sessions Judge. It is clear from this report that,

although the learned Sessions Judge prevented the Public Prosecutor from asking Mt. Kaniz and Akbari who it was who attacked them he did not,

in any way, prevent the defence from showing or suggesting that it was not Ali Raza but some one else who attacked them. I have already said that

at the trial, both Mt. Kaniz and Akbari were in cross-examination, led into admission that Billu and his sons were in the house at the time of the

occurrence.

11. These admissions quite clearly were obtained. in an attempt to show that it was or might have been Billu or one of his sons, and not Ali Raza,

who was responsible for Mt. Soghra"s death. Mt. Kaniz was further led into an admission that Ali Raza had been carrying on an intrigue with Mt.

Soghra and that Billu had detected this and was extremely annoyed. In fact, she went so far as to say that Billu had, some two or three weeks prior

to the occurrence attempted to kill Mt. Soghra with an over dose of opium. It has not been suggested that the learned pleader, who conducted the

defence, was prevented from asking either Mt. Kaniz or Akbari whether it was. Billu, and not Ali Raza, who attacked them. The indications,

however, are that no such question was attempted to be put, the reason no doubt being that neither Mt. Kaniz nor Akbari could possibly have

answered it in the affirmative. It is, I think, perfectly clear that the defence, which was put forward, was that it was either Billui or one of his sons,

who had attacked and killed Mt. Soghra and wounded Mt. Kaniz and Akbari. I am not satisfied that the defence were in any way hindered or

prevented from establishing this by the ruling given by the learned Sessions Judge at the commencement of the trial.

12. As to the alternative argument put forward by counsel for the appellant, namely, that the learned Sessions Judge was correct in excluding any

evidence as to Ali Raza having been the person, who attacked Mt. Kaniz and Akbari, it is not, in my opinion, well-grounded. The attack on Mt.

Kaniz and Akbari was quite clearly part of the res gestae, and, on principle, evidence as to the identity of the person who attacked them was,

therefore, admissible. Evidence on the point being ordinarily admissible, is there any other provision in the Evidence Act, by which the Crown was

debarred or estopped from leading it? The provisions in the Evidence Act, which deal with estoppel by record, are contained in. Sections 40 to

44. It is, however, clear from these sections that the judgment of the learned Assistant Sessions Judge, acquitting Ali Raza at the previous trial, was

not relevant at the subsequent trial, as he was not being prosecuted again in respect of the attack made on Mt. Kaniz and Akbari. The ordinary

practice in England, when a prisoner is indicted for murder and also for some other crime, such as robbery, is to proceed, in the first instance, on

the indictment for murder and not to proceed on the other indictment unless and until the prisoner is acquitted of murder. In. fact, any other

practice has been condemned:

see the case in Rex v. Joseph Jones. (1918) 1 K.B. 416 . Although this practice is not followed so often as I think it might well be in India, it is

clearly provided for by Section 403(2), Criminal P.C. In England also there are a number of cases in the books in which, the facts and evidence

being the same, a man has been prosecuted a second time. Whether having been prosecuted once on a certain set of facts, a man can be

prosecuted again depends entirely on whether, at the earlier trial, he was in jeopardy of being convicted of the offence, for which he is tried or

sought to be tried at the later trial. If he was not, the subsequent trial may proceed, and any evidence admissible in law to support the charge may

be led, even if the identical evidence has been led at the earlier trial. As the point is quite well settled, I do not propose to cite any of the English

cases, except one, and that I cite, as the argument, which was put forward there on behalf of the prisoner, was substantially the same argument as

has been addressed to us by Mr. Yunus, for the appellant. In that case, Rex v. Stephen Norton (1910) 5 Cri. 197 , the prisoner was, in the first

instance, charged with having had carnal knowledge of a girl under thirteen. On that charge he was acquitted. He was then tried and convicted on a

charge of having feloniously wounded the girl by striking her with a'' stone on the head. In appeal, it was contended that, admittedly, the man, who

struck the girl on the head with a stone, was the same man as had raped her or attempted to rape her. The question at the subsequent trial, as at

the earlier trial, was, counsel submitted, the identity of the girl''s assailant, and the decision at the earlier trial operated as res judicata. This argument

was, however, very summarily rejected by the Court of criminal appeal.

13. Mr. Yunus, in developing his argument on this point, relied on Emperor v. Noni Gopal Gupta (1911) 15 C.W.N. 646 and the English decision

in Rex v. Plummer (1902) 2 K.B. 339 , which was there cited. Noni Gopal Gupta was one of a number of men, who were tried on a charge of

conspiring to wage war against the King by a Bench of three Judges of the Calcutta High Court. At this trial, a man, who was said to have been

one of the conspirators, was tendered a pardon and gave evidence against the others. Counsel for the Crown 1 proposed to examine him

regarding certain declarations made to him by one Indra Nandi. Objection was taken to this evidence being led, on the ground that Indra Nandi

had been previously tried on the same charge of conspiracy and had been acquitted. The objection succeeded and the Court declined to permit the

questions to be put. It being an original trial, there was no necessity for the learned Judges to give, nor did they give, their reasons at length, and it

is, I think, possible that the report does not set out very fully the arguments which were put forward. It has to be remembered that the trial was a

trial for conspiracy and, although there may not be any special principles of evidence applicable to the crime of conspiracy, the application of the

principles of evidence may be affected by the fact that, in ordinary crimes, participation in an act has to be proved, whereas, in conspiracy, the

question is of participation in a design: see Wright on the Law of Criminal Conspiracies, page 71. A person may be tried for conspiracy in the

absence of his fellow conspirators, but he cannot be convicted unless the Court is satisfied that these fellow conspirators or at least one of them

were as much guilty as himself: see Phipson on Evidence, page 90. In other words, at a trial on a charge of conspiracy, the Court may be required

to determine the guilt of a person who is not actually before it. In the Calcutta case, any declarations or statements, made by Indra Nandi, were not

evidence against the accused persons unless Indra Nandi was himself a fellow conspirator of theirs. If Indra Nandi had not previously been tried

and acquitted, the Court, before taking any act of declaration of his into consideration as against the accused persons, would first have had to

determine whether he too had been a party to the conspiracy.

14. In effect, what the Crown sought to do was to try Indra Nandi over again for a crime of which he had been acquitted, and" the Court decided

this could not be done, it being immaterial that Indra Nandi was not actually put into the dock or sought to be made liable to punishment. The

decision, which, with respect, I venture to think, was very probably correct, depended on the nature of the offence and is no authority for the

general proposition that, when a man has been tried for one offence committed in the course of a particular transaction and acquitted and is then

tried for another offence committed in the course of it, any material part of the transaction must, on that ground, be kept back from the jury. That

would be certain to result in miscarriages of justice. In this case, it was the prosecution which was prejudiced but in another it might well be the

defence. Moreover, it is not practicable to keep a jury in ignorance, as what happened at this trial shows. It is bound to realize that something has

been kept back from it and it will speculate as to what that was, and these speculations are almost certain to affect its verdict.

15. While I am of opinion that Ali Raza was the person responsible for the death of Mt. Soghra and has been rightly convicted of murder, I am

also of opinion that the case is one in which the extreme penalty of the law need not be imposed. The murder does not appear to have been a

premeditated one. It seems that, on the day prior to the occurrence, Mt. Kaniz had returned from Gaya after disposing of the child to which she

had, shortly before, given birth. It also seems that Ali Eaza had spent the night in the house of Billu Mian. The indications are that something,

probably quite unforeseen, occurred between Ali Raza and the woman, as a result of which he completely lost his temper and self-control, and

suddenly attacked them with a knife. His conduct in striking the little girl, Akbari, shows, I think fairly clearly, that he was for the time being

scarcely in his proper senses. The behaviour of his sister, Mt. Kaniz, had brought disgrace on him, and the refusal of Billu Mian to marry Mt. Kaniz

may have been praying on his mind. I would, therefore, reject the reference, but would, at the same time, dismiss the appeal, confirming the

conviction and altering the sentence to one of transportation for life.

16. I would add that, in every case when a person is to be tried for murder, the trial ought to take place as soon as it possibly can. It was most

improper to allow this man to be '' tried on a charge of attempted murder in the first instance. I can see little or no reason why he should not have

been tried at the same trial for all of the offences he committed; but, if he was to be tried separately, he ought most certainly to have been tried for

the murder first and. not for the other offences at all unless and until he was acquitted of the murder.

17. The procedure adopted was not merely unfair to him but resulted in a waste of public time and money.

Reuben J.

18. I agree.