(1926) 04 CAL CK 0001

Calcutta High Court

Case No: None

Naibulla Shaikh and Others		APPELLANT
	Vs	
Emperor		RESPONDENT

Date of Decision: April 23, 1926

Citation: AIR 1926 Cal 996

Hon'ble Judges: Suhrawardy, J; Duval, J

Bench: Full Bench

Judgement

Suhrawardy, J.

The accused Naibulla and three others have been found unanimously by the jury guilty u/s 304 (Part II), I.P.C., and convicted and sentenced to 7 years'' rigorous imprisonment each. The case for the prosecution is that the deceased Mona Mandal was called out of his house late at night by Naibulla and was subsequently assaulted by these four persons so violently that he died in consequence of it a few hours later The only evidence against the accused is the extra judicial statement of the deceased made before his death to several men who have been examined in the case. In that statement he said that he was called from his house about midnight by Naibulla and was assaulted by the four accused with fists and kicks. With regard to the motive there is not much of evidence against Naibulla; but it is suggested that the deceased had reprimanded his wife for giving a seer of rice to her mother who is the wife of Naibulla. There is no mention of this quarrel about rice in the first information.

2. With regard to the other three accused persons, it is said that there was a quarrel with the deceased about goats which, the Judge has remarked, was not a sufficient motive. The evidence for the prosecution consists of the evidence of the neighbours before whom the statement was made by the deceased, his wife Saidan and his mother-in-law Nayan Bibi. These two witnesses were also examined before the committing Magistrate. On that occasion Saidan said:

Naibulla called my husband away saying that he had a talk with him. I recognized Naibulla both by voice and appearance.... On his return home I enquired my husband who had beaten him. He told me that these four men had beaten him in the field near a cart track.

3. In another part of the statement she said:

Our neighbours came that night and heard of occurrence from him including the names of his assailants.

4. In the Sessions Court she said that her husband wanted betels from her saying that his father-in-law, i.e., the accused Naibulla had come, but she did not see him. She thereafter fell asleep and could not say what happened then. She further stated that the Villagers questioned the deceased, but she could not say if he said anything about his assailants. Nayan Bibi (the wife of Naibulla and mother-in-law of the deceased) in her statement before the committing Magistrate said:

After our dinner, on Sunday, my husband went out. I cannot say why he did not return until midnight when I fell fast asleep. I cannot say when he returned home.

5. In the Sessions Court she said that Naibulla did not go out as he was "ill of fever." Commenting on these discrepancies in the evidence of these two witnesses the learned Judge in his charge made the following observation:

Saidan said in the lower Court that her husband was called out by Naibulla. Here she denies that. She admits she is now living with Nayan Bibi. Nayan Bibi now says that Naibulla was ill with fever that night though she made a different statement in the lower Court. These two witnesses were not declared hostile by the prosecution, but in view of their conflicting statements it will probably be safest to ignore their evidence on these points altogether.

6. IN another part of the charge the learned Judge said: "It is very doubtful if we can pick out any part of Saidan''s evidence now to rely upon." Further on he observed:

It seems rather improbable that he should go out again late at night on some casual intrigue or to smoke ganja.

7. This last observation was made in connexion with the suggestion of the defence that the accused was a man of loose character and addicted to ganja. Thereafter in dealing with the case of Accused Nos. 2, 3, and 4 the learned Judge remarked:

It seemed very strange that they (neighbours) should have fixed on these three people as Naibulla''s assailants unless they really have some evidence against them.

8. On these observations made by the learned Judge in his charge to the jury it is argued on behalf of the accused: [1907] 34 Cal. 698 that the advice by the learned Judge to the jury to ignore the evidence of Saidan and Nayan Bibi was a misdirection, and (2) that the learned Judge has expressed his opinion in the last two

sentences quoted above very positively and assertively which he should not have done. The learned Deputy Legal Remembrancer has referred to a statement in the charge to the following effect.

Taking all the facts into consideration, it is for you to judge whether villagers who have apparently neither any great friendship with the deceased nor any enmity at all against the accused would have combined to name the four accused in the absence of any dying declaration by the deceased. This, he says, gives the jury sufficient direction to exercise their independent judgment on the evidence in the case.

9. With regard to the first point, the learned Deputy Legal Remembrancer says that it was only a piece of advice which the Judge gave to the jury hence it is not irregular. I think that the language used by the learned Judge is objectionable; and that the advice, as it is an advice given to the jury to ignore the evidence of some witnesses for the prosecution, is not a proper direction to the jury. The duty of the Judge, it is needless to say, in summing up is to place the entire evidence, for or against the accused, before the jury and leave the ultimate decision of the questions of fact to it. He is not debarred from expressing his own opinion upon the evidence; but it should be done in such a way as not to create any impression in the mind of the jury that it was a direction from the Judge which they should follow; and such opinion should not be expressed as has been observed in the cases of Panchu Das v. Emperor [1907] 34 Cal. 698 Fanindra Nath Banerji v. Emperor [1909] 36 Cal. 281 and Abdul Gofur v. The King-Emperor AIR 1922 Cal. 192 strongly and dogmatically. Apart from this, any advice from the Judge to ignore or neglect any evidence is improper. As I have said, the entire evidence should be left for consideration to the jury. The passage which I have quoted (and that is the only passage), and to which the learned Deputy Legal Remembrancer drew our attention does not do away entirely with the objection taken on behalf of the accused that the Judge has nowhere in the charge left the entire case to the jury. In that passage the Judge has asked the jury to consider the evidence of the neighbours and to find upon it whether the accused were guilty or not. He has made no reference to the evidence of Saidan and Nayan Bibi. It is possible that, considering the discrepancies in the evidence of these two witnesses before the committing Magistrate and in the Sessions Court the jury would have come to the same conclusion as they did. But it is not proper that they should be asked to decide questions of fact without considering the whole of the evidence. The view that I take in this matter is supported by a decision of the Bombay High Court in Emperor v. Mira Gajbar [1903] 6 Bom. L.R. 31. In a case like the present, where there are no eyewitnesses and no sufficient evidence of motive, it is, in my judgment, proper to leave the whole case to the jury.

10. With regard to the second objection taken on behalf of the defence, the remark made by the Judge in his charge with regard to the three accused may seem to be couched in language calculated to influence the jury, but as I hold that on the first point the charge is defective, the result is that the conviction and sentence passed

on the appellants should be set aside and the case sent back to the Court below for re-trial. The accused will remain in custody until further orders by the Sessions Court.

Duval, J.

11. I agree in the order which my learned brother has made, though I do so with some diffidence. It really depends on what were the exact words which the learned Sessions Judge addressed to the jury in respect of these two witnesses. I do not say that they are not capable of the interpretation which my learned brother has put upon them though I myself am rather of the opinion that what the learned Judge meant to say was that here are two witnesses. They say one thing in one Court and another in the other. Both the statements are evidence and what will you do about it ? Probably it would be safest not to base your verdict on what they said at all. That would be my idea of what the learned Judge''s words meant to convey and I am doubtful whether that can cause a misdirection. It is a piece of advice which possibly is extremely good advice. However, as my learned brother considers that the case should be retried and as no doubt the learned Judge has expressed himself rather strongly in the course of the summing up in a case in which the evidence is confined to one or two points only, I agree with the order passed.