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**(1924) 02 CAL CK 0004**

**Calcutta High Court**

**Case No:** None

Sheikh Abdul and Another

APPELLANT

Vs

Emperor

RESPONDENT

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**Date of Decision:** Feb. 14, 1924

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 120B, 302, 364

**Citation:** AIR 1925 Cal 581

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**Judgement**

1. The three accused before us have been convicted by a unanimous verdict of a Jury. The first accused has been sentenced to ten years" rigorous imprisonment u/s 364 and accused Nos. 2 and 3 to seven years" rigorous imprisonment each u/s 120-B read with Section 364. They were convicted under other sections to which I shall presently refer but no separate sentence has been passed in respect of the convictions under the other sections. Now the accused were all charged originally with offences u/s 120-B and with rioting u/s 147. They were further charged u/s 302 and also u/s 364 read with Section 34 that is to say, with abduction for the purpose of murder. Accused No. 1 was further charged u/s 302 read with Section 34 and accused No. 3 was further charged u/s 323, The Jury unanimously found all the accused not guilty u/s 120-B read with Section 302 and also not guilty u/s 302 read with Section 149. They further found accused No. 1 not guilty u/s 302 read with Section 34 and accused Nos. 2 and 3 not guilty u/s 364 read with Section 34. All the three accused, however, were found guilty u/s 120-B read with Section 364, although they were not charged with these particular offences. They were all further found guilty u/s 147 and the first accused was found guilty u/s 364 and the third accused guilty u/s 323.

2. Now nine points have been urged before us on behalf of the accused. First, it is said that they have been convicted in respect of a charge u/s 120-B read with Section 364 with which they were not in fact charged. Secondly, it is said that so far as accused No. 1 is concerned who has been convicted u/s 364, the Judge has erred

in the general form of his charge to the Jury under this section and it is said that he should have applied to the facts of this case the provisions of Section 364 and it is suggested that because he has failed to do so the Jury have misunderstood the law it being urged that upon the evidence there is nothing to support the charge of abduction to murder. The third point is that the learned Judge failed to direct the jury that there was no evidence to support either the charge u/s 364 or u/s 364 read with Section 120-B. Fourthly, we were referred to certain passages at pages 8 and 10 of the copy of the charge which is before me as showing misdirection. I will refer to the passages later. Fifthly, it is said that as the common object of murder which was one of the common objects charged has failed by reason of the acquittal of the accused under the sections to which we have referred and by reason of the other common object of abduction not being established by the evidence, the conviction u/s 147 cannot stand. The seventh point is that, all the important witnesses are interested persons and related to the deceased man Prosanna. The eighth point is misdirection with regard to the first information given by Sahadali. The ninth and the last point is the alleged misdirection as to the opportunities of Chandra Kanta and Sahadali to identify the three accused who are the appellants before us. The main point really is with regard to the conviction u/s 364 of the first accused and the conviction of accused Nos. 2 and 3 u/s 120-B read with Section 364. It is true that the accused were not charged under these sections under which they have been convicted and sentenced and if we thought from the perusal of the charge as a whole that the accused have been prejudiced by the fact that they have been convicted on charges which had not been framed against them, we would have been forced to set aside the conviction and direct a re-trial. But we think that it was open to the Jury to convict as they did under these two sections and we think too that the accused have not really been prejudiced by what has happened.

3. Now the facts are shortly as follows:- Prosanna the man who met his death was generally unpopular in the neighbourhood both with the zemindars because of the location of a certain ghat and with tenants of his, because he is said to have been unduly strict with regard to his exaction of rent. It is said that Prosanna had for some 10 or 15 years before the date of the occurrence never failed to be accompanied by a guard. On the night of the occurrence he was returning from a market where he had been doing business in respect of the despatched of betel nuts. It was late at night, sometime about 11 o'clock when Prosanna was proceeding along a pathway, with his nephew Chandra Kumar leading and carrying a lantern and the guard armed with a lathi, following behind. While so proceeding the party were attacked, Prosanna was first attacked and Chandra Kumar and Sahadali apparently made off. In a tobacco field close by subsequently were found stains of blood and a trail was found leading from there to the river or to the neighbourhood of the river where ultimately the body of Prosanna was found with a picther fastened round his neck. Now it seems to us that the Jury were not satisfied upon the evidence before them that Prosanna met his death in the tobacco field

where blood was found and accordingly with this in their minds they formed the conclusion that Prosanna met his death not there but at or near the river where his body was found and consequently they came to the conclusion that Prosanna was abducted from the tobacco field, to which he had been taken from the pathway to the river and that he there met his death and that this is the reason why they have convicted u/s 364 and accused Nos. 2 and 3 u/s 120-B read with Section 364.

4. Then we have to consider whether the accused have been prejudiced inasmuch as the charges under these sections were not specifically framed against them. But after reading the charge and considering what has been urged before us with great care and in considerable detail by the learned Counsel for the accused we are as already stated not convinced that the accused have been so prejudiced in their defences by the fact that the charges were not actually framed under the sections in respect of which the conviction has taken place that we should set aside the conviction and direct a re-trial. This then disposes of the first point which has been raised before us.

5. So far as the second point is concerned what is really urged is that there was no justification for the Jury convicting the first accused u/s 364 and differentiating his case from that of accused Nos. 2 and 3 who were not convicted u/s 364, it being stated that, on the evidence as given before the Jury, the case against all the three was really identical. We think that there is some force in this contention and we accordingly think that accused No. 1 should receive the same sentence as accused Nos. 2 and 3 have received and we accordingly reduce the sentence which has been passed upon him u/s 364 from the period of ten years to seven years.

6. So far as the third point is concerned we have already dealt with this in the general observations I have made with regard to the conclusion at which the Jury arrived in convicting the accused u/s 364 u/s 120 B read with Section 364 and this point, therefore, calls for no separate treatment.

7. Then so far as the fourth point is concerned the two passages which we were asked to consider together were the passage at page 8 where the Judge lays before the Jury the evidence in which he speaks of Prosanna being way-laid and seized by the accused party on the road near the tobacco field and we are asked to compare this passage with the passage at page 10 where the learned Judge says that if the evidence of the witnesses is to be believed then the Jury may hold that the occurrence as alleged by the prosecution really took place and what is suggested is that the learned Judge has misdirected the Jury in the second passage because it is said that the evidence given by the witnesses does not show abduction and that the evidence which they really have given would go to show not abduction of Prosanna but his murder in the tobacco field and that inasmuch as accused have been acquitted of the charge of murder and there is no evidence of abduction the necessary and the natural result should follow from this. Here again this point seems to us covered by the general observations that we have made with regard to

the conclusion that the Jury have come to. It was, we think, open to them to hold as they have done that the murder did not take place in the tobacco field but that Prosanna was taken injured and this must, we think, be so having regard to the blood stains from the tobacco field to the river and that he was finally despatched there. We are not prepared to say that this would not amount to abduction within the meaning of Section 364.

8. Then so far as the fifth point is concerned, it seems to us that, although the Jury have acquitted these three persons of the actual charge of murder or conspiracy to murder, it does not necessarily mean that the common object of murder has failed for, as appears, it was the view of the Jury that the common object of the assembly was the murder of Prosanna.

9. Then so far as the sixth point is concerned it seems to us that there is some evidence of conspiracy. It is true that this does not amount to very much but after all the Jury apparently have accepted it and we think that it was a question for them and that they were entitled to arrive at the conclusion at which they did with regard to the conspiracy upon the evidence before them.

10. The seventh point does not, we think, call for comment. It was not suggested that the witnesses who gave evidence against the three accused had any ground of enmity against them.

11. Then so far as the eighth ground is concerned, the misdirection alleged is as to the first information.

12. It appears to us that having regard to what appears at page 19 of the charge read with what appeared on the preceding page, namely, that the first information Report (Ex. 1) named only Abdul Sheikh and Naimuddin it is not possible to say that there has been such a serious misdirection on this point as would justify our interference.

13. The ninth point is the, question of recognition on a night which was dark. That really was a matter for the Jury. The Judge did charge them upon the question of identity and apparently they were satisfied with the identity of these three accused as members of the body of persons who attacked Prosanna on the evening of the occurrence and this being so we are not prepared to interfere on this ground.

14. In the result, subject to the alteration of the sentence passed upon the first accused, the appeal stands dismissed.