
(1916) 03 CAL CK 0022

Calcutta High Court

Case No: None

Emperor

APPELLANT

Vs

Sheik Abdul and Others

RESPONDENT

Date of Decision: March 21, 1916

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 118
- Penal Code, 1860 (IPC) - Section 75

Citation: 33 Ind. Cas. 825

Hon'ble Judges: Walmsley, J; Chitty, J

Bench: Division Bench

Judgement

1. This reference has now been returned with the further evidence recorded by the learned Second Presidency Magistrate under our order of 3rd January 1916. The learned Magistrate has also, in accordance with that order, recorded an opinion. We regret, however, to find that he has not taken steps to carry out our directions to the full extent. The additional evidence which has been recorded is of very much the same type as the evidence recorded in the first instance of which we had reason to complain, and the statements now made by the additional witnesses do not carry the case much further against any one of the six accused.

2. With regard to the statement of the learned Magistrate as to the procedure adopted in the Police Court for the proof of previous convictions, we may say at once that we cannot accept the learned Magistrate's suggestion that Presidency Magistrates are absolved from the ordinary rules of evidence in taking proof of such previous convictions. Whenever it is required to prove a previous conviction against a man, whether it be for the purpose of enhancement of punishment u/s 75, Indian Penal Code, or in proceedings under Chapter VIII of the Criminal Procedure Code, such previous conviction must be proved strictly and in accordance with law. Unless they are so proved, no Court, whether it be that of a Presidency Magistrate or not, can properly take such previous convictions

into consideration against an accused person.

3. In the present case, the learned Magistrate says that against the accused No. 1, Sheik Abdul, five previous convictions have been proved, against No. 3, Abdul Rahim, one previous conviction, against No. 5, Ishak Khan, two previous convictions, and against No. 6, Sheik Bombia, eight previous convictions. Apart from the proof of previous convictions with which we will deal in discussing the case of each accused, additional evidence was directed to proving instances of picking pockets against the accused or some or one of them. Speaking generally, we may say that at the second hearing, no attempt was made in the Court below to fix these witnesses to any particular time or detail by which their statements might be tested. Their statements are of the vaguest possible character.

4. Taking the case of each accused in turn, we start with Sheik Abdul who has a number of aliases. He is said to have been convicted 5 times. The last conviction was on 20th January 1914, when he was sentenced to one year's rigorous imprisonment u/s 379, Indian Penal Code. He, therefore, emerged from jail presumably in January 1915. Since then there is no evidence of his having committed any offence except the statement of Abdul Wahid (P.W. No. 40), who says that he saw the first accused pick a pocket once about seven or eight months ago near the statue of Kristo Das Pal, when he was accompanied by accused No. 2. This witness admits that, though he saw accused No 3 throw the purse which had been stolen into Jumman's shop, he did not inform the person whose pocket had been picked. That man, he says, raised a hue and cry; and yet the witness went away without saying anything. This is evidence on which no Court could possibly place any reliance. Another witness Abdur Rahim (P.W. No. 28), speaking of the accused picking pockets at the crossing of Harrison Road, says that he last saw the first three accused picking a pocket about a year and half ago. Allowing due latitude for the statement of a witness of this class when speaking of time, it is impossible that he could have seen the first accused picking a pocket about a year and half ago (he was giving evidence on 24th January 1916), inasmuch as the first accused was safely in jail for almost the whole year 1914. This evidence, therefore, cannot be accepted. It has been held in this Court that accused persons should be given some chance of reforming their characters and that they should not be proceeded against under this section soon after they have emerged from jail. In this case the first accused had been out of jail for about eight months only when the present proceedings were started. There is no definite evidence of his having committed any offence during those eight months. Though he may be and possibly is a man of bad character we do not think that, on evidence such as this, an order u/s 118, Criminal Procedure Code, ought to be passed against him.

5. The cases against the other accused are much weaker than against accused No. 1. Against Sheik Doma and Sheik China no previous convictions at all are alleged. The learned Magistrate himself, who bound down Sheik China in the first instance, now, on the single statement of the witness Moulvi Abdul Hamid (P.W. No. 31) who says China is a good man, recommends that he should be discharged. Against these two men the evidence is wholly insufficient to support the order. With regard to Abdul Rahim it appears

that he was imprisoned u/s 379, Indian Penal Code, for three weeks on 10th May 1910, e.i., nearly six years ago. Ishak Khan was imprisoned under the same section for two weeks on 12th April 1913 and for three months on 13th October 1914. So far as the period which has lapsed between his last release from jail and the commencement of these proceedings, he stands on much the same footing as accused No. 1. Against these two men there is nothing but general statements of witnesses who say that they have seen them picking pockets. They have, however, never taken steps to bring those cases of theft home to the accused. The learned Presidency Magistrate considers that the evidence of Superintendent Farrow (P.W. No. 41) is of great importance. We are unable to see that it carries the case against the accused of whom he speaks, i.e., Nos. 1, 3 and 6, much further. He says that he often wanted to find them after a man's pocket had been picked but never succeeded. We think, therefore, that the evidence against these two men is also insufficient to justify an order u/s 118, Criminal Procedure Code.

6. We come to the case of accused No. 6, Sheik Bombia, who is said to be a bad character, who left Bombay because that place was too hot to hold him, and is now carrying on the profession of a thief in Calcutta. This man is said to have posed under a number of aliases giving sometimes Mahomedan and some times Hindu names. No less than eight previous convictions are alleged against him and the learned Magistrate considers that they have been proved. We may say at once that, with the exception of the order u/s 109, Criminal Procedure Code, which was passed against this accused at Howrah on 22nd May 1912, when he was sentenced to one year's rigorous imprisonment for being without visible means of subsistence, none of the previous convictions alleged has been properly proved. It was sought to prove the seven previous convictions which were all in Bombay, by the evidence of the two witnesses Suresh Chandra Mukerjee (P.W. No 35) and K.A. Kumudaker (P.W. No. 37). The first of these witnesses was a certified expert in finger prints and he produced what has been marked as Exhibit 4(1) from the Central Bureau. That purports to be a register of the thumb impressions of the accused on the first page and on the reverse his descriptive roll and a list of his previous convictions. No evidence has been recorded as to how this paper comes to be made and lodged in the Central Bureau nor from what particulars the previous convictions on the reverse are recorded and certified. There is, therefore, nothing on this paper except the two certificates at the foot to show that the person convicted seven times in Bombay is the same man as was convicted at Howrah on 22nd May 1912. The witness K.A. Kumudaker is a clerk in the common prison at Bombay. He produced an extract from the jail register showing previous conviction of one Mahomed Hussain alias Ambalal Amritlal alias Faiz Mahomed signed by the Superintendent, and certified copies Exhibits 9 (1 to 5) of previous convictions of the same man. There is nothing, however, to show that the man who was convicted at Howrah is the same man who was convicted at Bombay. There is a gap here in the evidence to which the learned Magistrate has not alluded and which, when he expresses the opinion that the previous convictions have been proved, he has obviously disregarded. We may notice that the witness K.A. Kumudaker was directed by the learned Magistrate to examine the sixth accused Sheik Bombia to see if

the marks which had been attributed to the convict in Bombay were to be found on the accused Sheik Bombia and he expressed the opinion that they were. This was not the proper method of identifying those marks. But there are other difficulties in the way of the proof of these previous convictions. We notice, in the first place, that the first conviction mentioned in Exhibit 4(1) is said to have been on 23rd August 1901. The certified copy from Bombay gives the date as 28th August 1901. This, however, may be a slip in copying. In the extract, Exhibit 4(1), produced from the Central Bureau the age of the accused person is given as 27 years and it is recorded that he has no particular mark. If he was 27 years of age in 1912 and his first conviction was in 1898, it follows that he must have been a boy of about 13 years of age when he commenced his career of crime. The Bombay certificates, however, put him down as 18 in 1898, 25 in 1901, 25 again in 1902 and 30 in 1904. If he appeared to be 30 in 1904 it is difficult to see how he could appear to be only 27 in 1912. With regard to the marks, though no particular mark was attributed to him in the Alipur jail in 1912 the Bombay convictions all give very definite marks, such as a scar on the right eyebrow, a scar on the right temple, a scar on the right leg, which marks purport to have been compared by the witness K.A. Kumudaker. They can hardly have been overlooked when his descriptive roll was made out at Alipur in 1912. It may be that the man Sheik Bombia is the same person as was convicted on previous occasions in Bombay; but it would be idle to maintain that that has been satisfactorily proved in the present case. Some two years elapsed from his release from jail on the Howarh conviction and the commencement of proceedings in the present case. Whether this would be a sufficient time for reformation we do not express an opinion. It was held in the case of *Junab Ali v. Emperor* 31 C. 783 : 8 C.W.N. 909 : 1 Cri L.J. 801 that 15 months would not be sufficient period in which to give a convict an opportunity of reform. Against this accused there are no definite acts of picking pockets alleged, certainly nothing which would point to his having committed that offence on any particular occasion or with regard to any particular individual. The evidence against him is general and consequently as vague and as weak as that against the other five accused.

7. We regret to have to come to this conclusion in this case because there are grounds for suspecting that these men are members of a gang; but having regard to the way in which the evidence against them has been recorded and the general state of the record we are quite unable to confirm the Magistrate's order u/s 118, Criminal Procedure Code. We accordingly set it aside and direct that the six accused be released. In the case of those who are on bail their bail-bonds will be discharged.