PRIVY COUNCIL

Malak Khan

Vs.

Emperor

P.C.A.No.20 of 1945
(Lord Thankerton, Porter and Goddard, Sir Madhavan Nairand Sir John Beaumont JJ.)

03.07.1945

JUDGMENT

LORD PORTER J.

1. This is an appeal from the judgment of the High Court of Judicature at Lahore dated 18th October 1944, dismissing the appellant's appeal from the judgment of the Sessions Judge of Jhelum dated 1st July 1944, and confirming the sentence of death passed upon him. Special leave to appeal to His Majesty in Council was granted by an Order in Council dated 21st March 1945. The main legal point for decision in this appeal is whether in an appeal from a conviction of murder, the High Court is entitled to accept, as corroboration of the guilt of the accused, evidence (given in the Sessions Court where the charge was one of murder and robbery) which was material to both charges but failed to convince the Sessions Court of the guilt of the accused of the crime of robbery with the result that he was acquitted of that charge.

2. Akbar Khan was a lambardar of the village of Bahl, and he and his brother-in-law Nur Khan were waylaid on 6th January 1944, on their way back from the village of Munara three or four miles distant, where Akbar Khan had been collecting land revenue. The time at which the assault took place is disputed, but the finding of the Courts in India is that it was between 4 and 5 P.M. Both men received severe injuries apparently with blunt weapons, and Akbar Khan died the same evening. Nur Khan survived and was a witness in the case. The first information report was registered at the Police Station of Buchal Kalan at 10 A.M. on 7th January 1944, but is said to have been taken down at an outlying post at 4 A.M. by an Assistant Sub-Inspector of Police. The maker of the report Imam Din Said that he had heard of the affair from

one Mohammad Nawaz and that he had gone to the spot and heard a statement made by Akbar Khan, who subsequently died on the road. The persons named as the assailants were Umar Hayat, Malak Khan, appellant, Nur Alam, Gulsher, Aurangzeb and Sarsa, all residents of the village of Bahl.

3. In the course of investigation, Nur Khan and two witnesses, said to be eye-witnesses, told the police that Umar Hayat and the appellant had taken from Akbar Khan a black purse containing money and a list and a gold ring. As a result of this information it is said that on 8th January 1944, Inspector Lutaf Khan and two other police officers who were taking part in the investigation went together with one Fateh Khan and one Allah Yar Khan to the appellant's house and there recovered the purse, money, list and gold ring which it was alleged the appellant had told the Inspector he had buried in his garden. The articles are said to have been buried under a stone and thence dug up and produced by the appellant. The Inspector thereupon, as he says, drew up a search list dated 8th January, and it was signed by the three police officers and the two others who were present. On 29th February 1944, separate charges were framed by the Magistrate, namely (1) against all six accused "that they committed murder by intentionally causing the death of Akbar Khan in prosecution of the common object of the unlawful assembly and caused grievous hurt to Nur Khan" under Sections 302/325/149, Penal Code, and (2) against Umar Hayat and Malak Khan only that they committed robbery by forcibly removing the articles described above from the person of Akbar under section 392, Penal Code. The trial under those charges was conducted before the Sessions Judge of Jhelum from 27th to 30th June 1944.

4. The prosecution examined Nur Khan, Mohammad Nawaz and Alam Khan who professed to be eye-witnesses of both offences, Imam Din who made the report, Mt. Begam mother of the deceased and Mohammed Ismail whom he visited shortly before his death. The three police officers gave evidence for the prosecution, but the Inspector alone spoke to the finding of the articles alleged to have been stolen. The Crown called neither of the attesting witnesses of the search list. Allah Yar Khan was, however, summoned as a defence witness to prove an alibi for Umar Hayat and Aurangzeb and in the course of his evidence alleged that Imam Din had told him that the appellant had been one of the assailants. As to the search he said in examination in chief:

> "The A.S.I., S.I., Inspector, Fateh Khan and myself went to the house of Malak Khan, but Malak Khan was not with us. The Inspector himself removed the

stone and took out the purse, etc. The stones were lying near the entrance to the courtyard by the side of the wall which is not very high. I do not remember if there is any berry-tree there. A man standing outside the compound wall could have placed the purse etc. from where the articles were recovered. The residential Kotha (house) of Malak Khan is about 25 or 30 yards from those stones."

5. In cross-examination he said :

"The fard (list) Exh. P. C. about the recoveries made from Malak Khan's courtyard is signed by me. I signed the fard without reading or understanding it. The fard was not read out to me. I was merely told that I was to sign the memo, of recovery re purse etc. The A.S.I. held the papers in his own hand when I signed the fard. It was neither dark nor light at the time of the recovery. The fard was not made out at the spot, but at the dera (office)."

6. Other witnesses belonging to the village of Munara gave evidence to the effect that the attack was made after sunset, that Akbar had set out after taking an evening meal with Falak Sher D. W. 5 and that the first statement of Nur Khan had been that he did not recognise the assailants, whose faces were bandaged. Two of the assessors were for convicting all six accused, and one for convicting all but Hayat and Aurangzeb, who pleaded alibi. The Sessions Judge in his judgment dated 1st July 1944, said it was clear that enmity did exist between the parties.

7. He dealt with the alleged recovery of the Stolen property by saying :

"Nothing at all about these articles was mentioned in the first information report which was lodged on the same day by Imam Din P. W. 6 a brother-in-law of the deceased. The story about the robbery of this ring, etc., was mentioned for the first time on the next day, i.e., 7th January 1944, in the inquest report Ex. P-9 prepared by Assistant Sub-Inspector Man Mohan Lal P. W. 18. It is significant that the inquest report is silent as to who actually disclosed these facts about the removal of the ring, etc., before the Assistant Sub-Inspector.

The case for the prosecution is that subsequently these articles were recovered from the courtyard of Malak Khan accused on 8th January 1944, when Malak Khan himself produced them before Inspector Lutaf Khan P. W. 15 from under a stone in his courtyard.

It is difficult to understand why the accused should have committed this robbery and particularly of such things as the receipts Ex. P-3 and Fard Ex. P-4 which could be of no use to them at all, unless they merely wanted to place some

evidence against themselves at the disposal of the police. 1 will ignore this part of the story and concentrate on the main case about the assault committed by the accused on Akbar Khan deceased and Nur Khan P.W. 3."

8. The learned Judge nevertheless accepted the evidence of the eye-witnesses to the attack and convicted all the accused of murder under section 302/149, Penal Code, and of causing grievous hurt under section 325/149, Penal Code, but said :

"The case under section 392, Penal Code, (robbery) does not appear to me to be established and I acquit all the accused of that charge."

9. Their Lordships would observe that the learned Judge had failed to notice that only Umar Hayat and the appellant were accused of robbery, but so far as this appeal is concerned the fact appears to be immaterial. Three appeals were presented to the High Court at Lahore, one by Umar Hayat, Malak Khan, Nur Alam and Aurangzeb, a second by Gulsher and a third by Saisa, and all the death sentences were referred for confirmation. The judgment of the High Court was delivered on 18th October 1944 by Teja Singh J. with whom Bhandari J. agreed. They apparently regarded the appellant as the principal culprit and decided that there was at least one incident proving the existence of serious ill-will between Malak Khan on one hand and Akbar Khan, Nur Khan and Alam Khan on the other and providing a motive for Akbar Khan's murder.

10. As to the time at which it was alleged that the first information report had been made, they disbelieved both Imam Din who made it and the Assistant Sub-Inspector who wrote it, regarded it as having been made at a much later time than that given in evidence and drew the conclusion that the deceased was unconscious when Imam Din arrived and that the statements which were said to have been made to Imam Din by him were inventions pure and simple. The learned Judge placed little reliance on the evidence of Mohammad Nawaz and Alam Khan and even of the injured Nur Khan, of whom he says :

"The result, in my opinion, is that it is highly unsafe to act upon his statement unless it is corroborated by any other evidence of unmistakable character or by circumstances the correctness of which cannot be denied."

11. In his view, apart from the general tendency in cases of this nature to rope in innocent persons, Nur Khan and Imam Din-were not the kind of persons who would scruple in confining themselves only to the men who were really guilty. He then proceeds :

"The only corroborative evidence that we have in this case is with respect to

Malak Khan. Nur Khan stated that after the deceased and he had been injured Umar Hayat removed a purse, a ring and some papers from the deceased's pocket and made them over to Malak Khan. Malik Lutaf Khan, Inspector of Police, deposed that he reached the spot on 8th and Malak Khan informed him that he had concealed the purse, etc., in his courtyard. After that he took the Inspector and his companions to the courtyard of his house and from underneath a few stones he produced the purse Ex P-1, ring Ex. P-2 and fard Ex. P-4. We are also told that the purse contained a few papers including a receipt which evidently belonged to the deceased. The mother of the deceased identified the purse and the ring. The learned Sessions Judge has disbelieved the factum of theft and has taken the view that this part of the prosecution story was not true. This finding of his is not correct. There is no reason to disbelieve the evidence of the Inspector so far as the recovery of the articles is concerned. One of the appellant's own witnesses who had attested the memo, evidencing the recovery admitted that the purse, etc., were recovered by the Inspector from a heap of stones lying in the courtyard of Malak Khan's house."

12. He goes on to say that it was contended that it was a fake recovery but gives reasons for rejecting that view and concludes :

> "The result, in my opinion, is that Malak Khan should be taken to have participated in the crime and the case regarding the others is doubtful."

13. The High Court accordingly allowed the appeals of the five other accused persons, but confirmed the sentence of death passed on the appellant under section 302, Penal Code. They do notmention section 325 Penal Code, and leave the question of rioting open. From this conviction and sentence the appellant obtained special leave to appeal to His Majesty in Council, the substantial ground being that

> "in view of the acquittal under section 392, Penal Code, it was not open to the Court to review the finding of the Court of Sessions Judge as to the recovery of these articles supported as it was by the evidence of the only search witness examined and by the probabilities of the case."

14. Indeed this argument was put in the, forefront of the appellant's case. The Sessions Judge, it was said, had acquitted the appellant of robbery; he was therefore, not guilty of that offence; no appeal had been taken against that acquittal and therefore no court was entitled to take into consideration the allegation upon which the accusation of robbery was founded even as corroborative evidence in another case. Their Lordships cannot accept this contention. The learned Sessions Judge did not in fact find the

accusation baseless; he only found the crime not proven. But even if he had disbelieved the whole story of the recovery of the stolen property from the, appellant, his finding would not prevent the High Court from weighing its value and if they accepted its substantial truth from taking it into consideration in determining whether another crime had been committed or not. The acquittal no doubt would have entitled the accused man to plead autrefois acquit if again charged with the same crime, but it would not prevent a civil action being brought against him for the return of the things stolen or for their value upon the same evidence.

15. It could not, in their Lordships' opinion, be objected to as evidence in another case, criminal or civil, though no doubt its weight would be diminished. Before the Seasons Judge it was given for two purposes-(1) as corroboration of the testimony given in the charge of murder and (2) as direct evidence of robbery. Before the High Court its use for the first purpose was in no way precluded even though no appeal was taken against the dismissal of the charge of robbery. In such circumstances to appeal from the acquittal would be a mere idle form when the question at issue was whether the accused man was guilty of murder or not.

16. In their Lordships' view the conviction recorded by the High Court cannot be challenged on this ground. Two further arguments were, however, put before their Lordships in support of the appellant's case. In the first place, it was said that the two witnessess who saw the articles recovered should have been called by the Crown. The argument was put in two ways. It was said that the requirements of Section 165 Criminal Procedure Code, were not followed. That section enacts :

> "(1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purpose of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may after recording in writing the grounds of his belief and specifying in such writing so far as possible the thing for which search is to be made, search or cause search to be made for such thing in any place within the limits of such station.
> (4) The provisions of this Code as to search warrants and the general provisions as to searches contained in Sections 102 and 103 shall, so far as may be, apply to a search made under this section."
> Section 102 need not be quoted but Section 103 provides :

"(1) Before making a search....." the officer, or other person about to make it, shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attest and witness the search.

(2) The search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses: but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it."

17. In their Lordships' opinion the presence of witnesses at a search is always desirable and their absence will weaken and may sometimes destroy the acceptance of the evidence as to the finding of the article, but their attendance at the search is not always essential in order to enable evidence as to the search to be given. Where, as here, it is alleged and proved that the articles were produced by the accused man himself, section 165 does not apply. That section is meant to be used in cases where a search warrant would be made use of in the ordinary course, but lack of time renders it impolitic to use it. If the section did apply, proof of the search might be inadmissible for other reasons, but there would be no necessity to call either of the witnesses to the search having regard to the express terms of Section 103 (a). But a further objection has been taken: it is said that the two witnesses to the search were Crown witnesses and should have been called by the prosecution and that, as the provisions of Section 103(2) do not apply, the rule that the Crown should call or at least tender all its witnesses should be followed.

18. Their Lordships do not stay to consider whether in truth the two witnessed to the search are properly described as witnesses for the Crown since the argument breaks down on a wider ground. It is no doubt very important that, as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution and though a Court ought, and no doubt will, take into consideration the absence of witnesses whose testimony would be expected, it must judge the evidence as a whole and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses.

19. These views have often been expressed by their Lordships and are to be found in their latest form in a judgment of the Board pronounced in May 1944, in the case of

Adel Muhammed El Dabbah v. Attorney-General of Palestine, [1] *Reported in All England Reporter 139.* The arguments so far considered have been objections aimed at establishing that there was error in law in the conduct of the case. For the reasons they have given their Lordships think that this contention has not been made good. Apart from this objection the only remaining ground of attack on the conviction and sentence is not that wrong evidence was admitted or that there was no evidence on which a conviction would be based, but that the evidence had been wrongly evaluated and was not of sufficient weight to justify the conclusion reached. It has many times been pointed out that for their Lordships to interfere it requires more than an allegation or even proof that a Court might take a different view of the compelling force of the evidence given. The grounds on which their Lordships' Board are justified in interfering with the decisions of Courts in India in criminal matters have been the subject of numerous statements, the last of which was made at a Board held on 16th July 1941, when Viscount Simon (L. C.), pronouncing the view of their Lordships, quoted the well-known passages from Lord Watson's words in delivering the opinion of their Lordships in *WR 81, In re Dillet* [2] :

> "The rule has been repeatedly laid down and has been invariably followed, that His Majesty will not review, or interfere with, the course of criminal proceedings, unless it be shown that, by a disregard of the forms of legal process, or otherwise, substantial and grave injustice has been done."

20. It has not been established before their Lordships that there has been a disregard of the forms of legal process in the present case or that grave or substantial injustice has been done and for these reasons their Lordships will, as they have already indicated, humbly advise. His Majesty that this appeal should be dismissed.

Appeal dismissed.

Cases Referred.

1. 32 AIR 1945 PC IC 381: 1944 AC 156 : 113 LJ PC 65 : 171 LT 266 : (1944) 2

2. (1887) 12 AC 459: 56 LT 615: 36