**ALLAHABAD HIGH COURT**

Bansidhar

Vs

Emperor

(Sulaiman, CJ. Harris, J.)

22.08.1934

**JUDGMENT**

**Sulaiman, CJ. Harris, J.**

1. This is an appeal by Bansidbar and Ram Kishen from their convictions under Section 460, Penal Code, based on the unanimous verdict of the jury that they were guilty, The grounds taken in the memorandum of appeal are: (1) That there has been a grave misdirection to the jury and the verdict is therefore vitiated. (2). That the sentence is too servere.

2. The facts are perfectly clear. The deceased Gauri Shankar was an old gentle man of about 75 years of age who was a retired Deputy Collector. He was living in a big house with many rooms and several doors and had considerable valuables in the house, most of which were kept in an iron safe. On the night preceding the 24th January, he was found murdered in one of the rooms with his neck cur. The medical evidence showed that there were at least three cuts on his neck which had caused his death. There were plenty of blood marks on the bed stead on which his body was found as well as on the ground. There can therefore be no manner of doubt on the medical evidence that the deceased had been deliberately murdered. The Committing Magistrate set up the case against the accused persons both under Section 302 and Section 457-75, Penal Code, but in the Session a Court, unfortunately on some mistake made by the Crown Counsel, the charge was altered to one under Section 460, Penal Code, only. There can be no doubt whatsoever that murder was committed in the house with the object of stealing the valuables belonging to the deceased and if any of the accused persons were guilty, be would certainly be guilty of murder and not only of an offence under Section 460, Penal Code.

3. The jury returned a unanimous verdict of guilty against all the three accused who were standing their trial, although as regards Kanhaiya Lal the Judge had made it clear to them that there was really no evidence against him at all. It has to be conceded on behalf of the accused that unless there has been misdirection on the part of the Judge this Court cannot go into the question of fact and examine the evidence. By merely showing that the prosecution story was

improbable or that there were material discrepancies or even contradictions in the evidence, Counsel for the accused cannot succeed in persuading us to set aside the conviction. There is often a considerable misapprehension as to the manner in which the Judge is to address the jury. The Sessions Judge is only a Judge "on questions of law on which point his opinion is conclusive, but on questions of fact he can only express his opinion and must, leave the decision to the jury. No doubt the Judge must point out the important evidence in the case as well as emphasize the points for and against the accused, draw the attention of the jury to the contradictions and discrepancies in the evidence and even express his own opinion as to what conclusion the evidence on particular points leads to, provided he makes it perfectly clear to the jury that they are the final Judges on the questions of fact. It is not for the Sessions Judge to propound new theories which have never been suggested at the Bar and to put them before the jury which, would have no other effect than that of confusing them. Of course where he is satisfied that there is no legal evidence against any accused person he is bound to tell the jury that there is no such evidence and that they should acquit that particular accused.

4. In this case the learned Counsel for the accused has taken us through the charge as recorded by the Sessions Judge and we have examined it very carefully. We must say that it is a very carefully worded, thorough and elaborate charge to the jury and the learned Judge has taken pains to impress upon the jury repeatedly that it is their opinion only which would ultimately count. In this connection a few passages may be quoted. At the outset he said that it was for the jury to say what conclusion should be drawn from the facts and that the Judge could only put the facts before them and comment on them and give his opinion: but in the end it was for the jury to say what should be believed and it was the opinion of the jury only that must prevail and not his. He again emphasized that it was for them to believe the evidence of the Sub-Inspector and draw their conclusion or not to believe it. After putting several matters before the jury he again emphasized that it was of course for the jury to answer all questions of fact. Referring to the contradictions which had been pointed out by the accused's Counsel, the learned Judge said that there may be certain contradictions between Lachman and Debi Prasad and the Police in the matter of time, but he thought that there was not really very much contradiction. We think he was entitled to express his opinion. Dealing with the confession of the accused he was careful to remark that it may or may not be true. He pointed out certain matters in the confession which made it highly improbable and drew the attention of the jury particularly to such points. He then again emphasised that he had already given it his opinion that the jury were the ultimate Judges of such things and that it was still for the jury to say whether they were satisfied on the evidence or not. Perhaps it will be convenient to quote the very words used by the Judge at two places where he referred to the defence set up by the accused Bansi:It is for the prosecution to persuade you that what he says cannot possibly be true. If you think it may be true and may not be, so that you are in doubt about the matter, you must give the benefit of your doubt to Bansi. Of course if you do give the benefit of your doubt to Bansi, then you will have to find him guilty of an offence under Section 411, Indian Penal Code, on his own admission If, on the other hand, you find that what he says cannot possibly be true that it is an absurd story, then, so far as I can see, although you are the ultimate Judges in the matter, you will have to find him guilty of the offence charged, an

offence punishable under Section 460. So that it comes to this. Can you be lieve the story of Bansi or can you not? Now I must again emphasize it that it is for you to say whether this is a ridiculous story or a story which may quite possibly be true, I can give you an opinion. But you are not bound to act on that opinion. In any case, I have got to put what I consider the relevant facts for consideration before you and I proceed to do so.

5. Having warned the jury that they were the ultimate Judges on questions of fact; he proceeded to sum up the evidence and then wound up by saying:However, I repeat that it is for you to say. You must take these facts and any other facts that occur to you into consideration, and if after doing so you conclude that Bansi's story is absurd, then you must convict him under Section 460, Indian Penal Code, and otherwise you must convict him under Section 411.

6. We find no serious impropriety in this part of the charge and do not think that the jury could have understood that the burden was on the accused. The learned Judge naturally laid great emphasis on points which have been urged before him on behalf of the Crown or on behalf of the accused. There is nothing to suggest that there was any alternative theory seriously put forward before him which was not considered by him while addressing the jury.

7. Minor matters regarding discrepancies in the exact hour at which any of the accused was arrested or the exact hour when the stolen properties were recovered or the exact hour when certain footprints on the ground were discovered were wholly unimportant and the learned Judge was perfectly right in telling the jury that much importance could not be attached to such discrepancies. It was not part of the Judge's duty as is suggested before us by the learned Counsel for the accused, to invent the hypothesis that the servant of the deceased might have been one of the murderers and to put it pointedly before the jury when no suggestion had been thrown out in the cross-examination of the witnesses, nor in the arguments urged before the Judge on behalf of the accused. We think that the address to, the jury was perfectly appropriate and flawless and no serious objection can be taken to it. In these circumstances we cannot interfere with the verdict of the jury and must upheld the conviction.

8. The ground as regards sentence can hardly be pressed. The accused are lucky that owing to some mistake they were not charged with the offence of murder. Had they been so charged and even if they had been sentenced to transportation for life, we might have been inclined to issue notice to the accused to show cause why such sentence should not be enhanced. It was apparently a case of deliberate murder with the object of committing robbery and there were no extenuating circumstances, but as the accused were never charged under Section 302, Penal Code, we are helpless in the matter. We do not think that we should order a re-trial. The sentence of transportation for life is by no means severe in the circumstances and is the only appropriate sentence which could have been passed. The appeal is accordingly dismissed.