

CALCUTTA HIGH COURT

King-Emperor

Vs

Osman Sardar

(Sanderson ,J.)

09.08.1923

JUDGMENT

Sanderson, C.J.

1. This is an appeal by one Osman Sardar, and there is also a Reference by the learned Judge under Section 374 of the Criminal Procedure Code.

2. The Appellant Osman Sardar and one Bhasai were committed by the Magistrate for trial on a charge that they on or about the 12th of March, 1923, committed murder by causing the death of one Tokani Sardar and thereby committed an offence punishable under Section 302 of the Indian Penal Code. Osman Sardar and Bhasai were tried by the learned Sessions Judge of Bakerganj and a jury.

3. At the trial the learned Sessions Judge added two further charges which were as follows: first, that they (Osman and Bhasai) on or about the 12th of March 1923, were party to a criminal conspiracy to murder Tokani Sardar, and thereby committed an offence punishable under Section 120-B read with Section 302 of the Indian Penal Code and, the second charge, which was added, was that they, on or about the day above-mentioned, abducted Tokani Sardar in order that he might be murdered or might be so disposed of or be put in danger of being murdered and thereby committed an offence punishable under Section 364 of the Indian Penal Code so that at the trial there were three distinct charges: first, a charge of murder; secondly, a charge of conspiracy to murder; and, thirdly, a charge of abducting Tokani Sardar in order that he might be murdered.

4. Those three charges were left to the jury by the learned Judge.

5. The verdict was as follows:

"Q. Are you unanimous?

"A. No. "Q. Is there any chance of your being unanimous?

"A. No. "Q. What is the verdict of the majority?

"A. Osman is guilty under Section 364 and Section 120-B read with Section 302, Indian Penal Code, by a majority of 4 to 1. One juror holds Osman not guilty. Bhasai did not go there knowing that there would be murder. Osman duped him and took him there. We give the benefit

of the doubt to the accused Bhasai. We are unanimous in the verdict as regards Bhasai.

6. The result of the verdict, therefore, was that Bhasai was acquitted of all the charges: Osman was found guilty by a majority of the jury of the charge under Section 120-B read with Section 302 of the Indian Penal Code: that is to say, he was found guilty of a criminal conspiracy to murder Tokani. He was also found guilty of abducting Tokani in order that he might be murdered.

7. It is to be noted that the jury returned no verdict, so far as Osman was concerned, with regard to the charge under Section 302 of the Indian Penal Code that is to say they did not find whether Osman was guilty of murder or not.

8. The learned Judge accepted the verdict of the Jury as far as Bhasai was concerned, and acquitted him. He further agreed with the verdict of the jury and accepted the verdict of the majority: as far as Osman was concerned, and convicted him under 8. 120-B read with Section 302, and under Section 364 of the Indian Penal Code and the sentence which he passed under Section 120-B read with Section 302 was the extreme sentence, viz., that of death.

9. The first question which I have to consider is whether the conviction under Section 120-B read with Section 302 that is to say, the conviction for criminal conspiracy to murder, against Osman Sardar can stand.

10. In my opinion, it is clear that it cannot stand.

11. It is perhaps right to say that the learned vakil, who has appeared for the Crown, has agreed that this conviction cannot stand: and the reason for it is obvious. The charge under Section 120-B read with Section 302 was, as I have already pointed out, that Osman Sardar and Bhasai were parties to a criminal conspiracy to murder Tokani.

12. It was alleged that these two men had agreed and conspired to murder Tokani, and it was left to the jury in that way. The learned Judge said, when he was dealing with this part of the case, "In order to find that the accused are guilty under this section" (Section 120-B) the following things must be proved. –

- (1) That the accused agreed together to do a certain act.
- (2) That the act was an illegal one.
- (3) That some overt act was done by one of the accused in pursuance of the agreement.

13. It was not suggested to jury that the appellant Osman had agreed with any body, except Bhasai, to commit the murder - the allegation was that these two men had agreed to commit it.

14. Now the gist of the offence under Section 120-B, was an alleged agreement between the two accused: and, when the jury found that Bhasai was not a party to such an agreement, and acquitted Bhasai of that charge, it followed as a matter of course that Osman could not be convicted of that charge. The assent of them both was necessary to constitute the agreement, which was the basis of the conspiracy charged. With great respect to the learned Judge I fail to understand how he convicted Osman of the conspiracy to commit murder when the only

allegation was that he had conspired with Bhasai and when he accepted the verdict of the jury that Bhasai was not a party to the conspiracy. It follows, therefore, that the conviction and sentence under Section 120-B read with Section 302 must be set aside.

15. Now I have to consider the conviction under Section 364.

16. The allegation with regard to that part of the case was that Osman had by certain deceitful means induced Tokani to leave the ban in company with Osman in order that he might be murdered. The evidence called on behalf of the prosecution was to the effect that Osman on the evening of the occurrence at about dusk asked Tokani to accompany him to the bari of Bhasai to settle about the hire of bullock. That is all as regards the alleged inducement. The evidence shows, as far as can be ascertained from the record, that they did go to the bari of Bhasai: and, there is nothing to show that the reason given by Osman for inducing Tokani to lease his bari and to go to Bhasai's bari was not a truthful reason.

17. The learned vakil for the Crown has told us that the case as presented by the prosecution at the trial Court was something as follows: that inasmuch as Tokani was murdered by one of the accused persons, the means by which he was induced, to leave his bari by Osman must have been deceitful: and, as I understood him he went so far as to agree that if the charge under Section 302 or the charge under Section 120-B read with Section 302 is not substantiated, then it follows that, the charge under Section 364 must fail. In my judgment the learned vakil is right in making that submission. In my judgment, therefore, the conviction under Section 364 must be set aside.

18. Now I come to the final question where it is necessary for me to consider, that is, what course is to be adopted with regard to this case.

19. It is clear that the main charge against Osman was that of murder. It is also clear that as far as Osman is concerned, the jury returned no verdict with regard to the charge of murder, The fact that the jury found Osman guilty of a conspiracy to murder, in my judgment, on the facts of this case is not inconsistent with the case of the prosecution viz., that Osman was guilty of murder or to put it in another way, the jury's verdict under Section 120-B read with Section 302 does not in itself negative the charge under Section 302 of murder.

20. Consequently, in my judgment, the question arises whether this case should be remanded in order that Osman may be tried on the main charge, namely, that of murder under Section 302.

21. The learned vakil, who appeared for the appellant, urged that we ought not to remand the case because> he argued that on the evidence no jury would convict Osman of murder. I am not prepared to go so far as that. I desire to say no more than is necessary on this part of the case. In my opinion this case should be remanded, and I am anxious not to say anything which in the smallest degree may prejudice the appellant. In my judgment it is not possible for this Court to hold that there was no evidence of murder against Osman or that the evidence is so slight that it would not be right to leave it for the discussion of the jury. In my judgment there was evidence which the Judge was bound to submit to the jury against the accused Osman Sardar in respect of the charge of murder.

22. For these reasons in my judgment the conviction of the appellant Osman Sardar in respect of both the charges, of which he has been convicted, and the sentence which was passed upon him must be set aside and, the case must be remanded in order that he may be tried on the main charge of murder under Section 302 of the Indian Penal Code.

Cuming, J.

23. I agree.