

CALCUTTA HIGH COURT

Emperor

Vs

Rajab Ali Fakir

(C Ghose, J.)

19.05.1927

JUDGMENT

C.C. Ghose, J.

1. This is a reference under Section 374, Criminal Procedure Code, the reference being numbered 4 of 1927. There is also an appeal by the accused which is numbered 208 of 1927. The accused was charged with having committed offences punishable under Sections 302 and 324, Indian Penal Code and the case for the prosecution shortly stated is as follows: It appears that the accused has a younger brother named Kaseem. The latter had helped the accused for a long series of years in the cultivation of his lands, and it appears that by the profits of the successful cultivation of his lands other lands had been acquired. Kaseem, not unnaturally put forward a claim to a share in the acquired lands, but the accused was not prepared to admit Kaseem's claim. In the end the accused got dissatisfied; and shortly before the date of the occurrence he had separated from his brother and retained all the lands. There were therefore disputes between the brothers and their mother tried to intervene and bring about a settlement; of the same. The accused, however, proved obdurate and the mother told him that she would inform the elders of the village and would ask for their mediation. This apparently made the accused very angry. It appears that the accused immediately thereafter took a dao and struck his mother on the forehead with it. There were other wounds inflicted by the accused on the mother and as the result of the injuries the mother died. While the mother was being attacked Kaseem and his wife threw themselves at the feet of the accused and implored him to stop. Kaseem was attacked by the accused and he got very serious injuries. The wife of Kaseem was literally hacked to death by the accused, the injuries inflicted on her being no less than 21 in number. She was a little girl of 16 with a four months old child in her womb. She also died.

2. The accused was arrested by the police and sent up for trial. The trial was held by the learned First Additional Sessions Judge of Mymensingh and a jury. It appears from the learned Judge's charge to the jury that the learned Judge practically withdrew the case from the jury and told them in so many words that the case itself presented no difficulties whatsoever and that no

reasonable man could have any doubt whatsoever that the accused had any intention other than that of killing his mother and his brother's wife, or at the very least, the intention of 'inflicting bodily injuries sufficient, in the ordinary course of things, to cause death. The learned Judge proceeded to refer to some of the exceptions to Section 300, Indian Penal Code; and in dealing with the charge under Section 324, Indian Penal Code, he observed that there could be no shadow of doubt that an offence under Section 324, Indian Penal Code, was committed by the accused against Kaseem and that the task of the jury was very simple. In dealing with the evidence in the case it appears that the learned Judge did nothing more than read out the evidence to the jury and finally in dealing with the points raised by the defence, he observed that they all seemed to be very trivial and beside the point. No doubt, in the beginning of the charge to the jury the learned Judge gave certain cautions to the jury but the charge taken as a whole is entirely one sided and the jury, having regard to the way in which the learned Judge summed up the case to them, could not but come to the conclusion that their function in this case was to register the opinion of the learned Judge. We regret to have to make this observation in a case of this description, but there can be no doubt that the jury were practically told that there was no use considering the matter from any point of view other than the point of view presented by the prosecution and that in the events which had happened, there was only one course open to them, viz., to bring in a verdict of guilty. In our opinion the charge of the learned Judge to the jury offends against the most elementary rules to be observed in cases of summing up the evidence to the jury after the examination and cross-examination of the witnesses are finished and there has been no proper trial of the case in this instance. The accused was entitled, as a matter of right, to a proper summing up of the case to the jury : in this instance he did not get that and the jury did not receive that assistance from the learned Judge which they were entitled to get.

3. In this view of the matter, there is no escape from the conclusion that there has been no proper trial in this case. The charge was under Sections 302 and 324, Indian Penal Code; the accused was being tried for his life and it is imperative in cases of this description that the provisions of the law should be strictly adhered to and that the accused should not have any manner of grievance with regard to the procedure adopted at the trial, It is not enough to merely read out the evidence to the jury : it was incumbent on the learned Judge to analyze that evidence and to present before the jury such points as could legitimately arise in favor of the accused. That has not been done; and on that ground alone there has been grave misdirection.

3. The learned Deputy Legal Remembrancer has argued that the entire case is open to us under Section 374, Criminal Procedure Code; no doubt that is so; but that assumes that whatever has happened, before the case comes to this Court, has been done in strict accordance with the provisions of the law, namely that there has been a proper trial before a Judge and jury. But if we are unable to say that there has been a proper trial in this case, then the only course that is open to us is to set aside the conviction and sentence and to direct a re-trial.

4. In this view of the matter we set aside the conviction and sentence and direct that the accused

be re-tried before the learned Sessions Judge of Mymensingh and a jury. We very much regret that this course has been forced upon us; but as far as we can see, there is no help for it.

Graham, J.

5. I entirely agree. There are passages in the learned Additional Sessions Judge's charge the effect of which was to withdraw from the jury the determination of facts which it was their province, and their province alone, to decide. Some of these passages may be quoted: There might have been sufficient provocation to justify Rajab in using as much force as was necessary to turn his mother out of the bari, but I can see nothing to justify Rajab's previous and murderous attack on his mother. If Kaseem, after seeing his mother being killed before his eyes had killed Rajab, I should hold that he had indeed grave and sudden provocation.

6. Again: The fact that it made Rajah want to kill his mother goes to show that he knew his case was bad, and that she was right, and he did not want the division discussed in a baithak.

7. Then again As regards Section 324, I.P.C., there can be no shadow of doubt that an offence under Section 324, I.P.C. was committed against Kaseem, and again your task is simple.

8. These directions from the Judge are open to serious objection because they are calculated to suggest to the jury that there was practically no doubt as to the main facts that is to say, the attack on the accused's mother and on Kaseem and Kaseem's wife. But these were obviously matters for the decision of the jury; and no matter how clear the case may have appeared to be, it was the bounden duty fit the Judge to leave them to the jury to decide. It is true that at the commencement of the trial the learned Judge had told the jury that they were the judges of fact and were not bound by his opinion, but that direction cannot cure the defect, inasmuch as these passages come at a later stage in the charge, and in my judgment they must have created a wrong impression in the mind of the jury and may have induced them not to consider the evidence with that care which they would otherwise have bestowed upon it.

9. Another point which may be mentioned is the fact already mentioned by my learned brother that there is no proper summing up in the charge. It is not enough merely to read out the evidence in extenso. What the learned Judge should have done was to sum up the evidence on both sides and to place the case succinctly before the jury.

10. For these reasons I agree with my learned brother; and much as we regret having to adopt such a course we have I think no alternative but to direct a retrial of the case.

