

CALCUTTA HIGH COURT

Molla Khan Kabuli

Vs

Emperor

(Lort-Williams , J.)

06.06.1933

JUDGMENT

Lort-Williams, J.

1. The appellant Molla Khan Kabuli alias Munna Khan Kabuli alias Hamidullah was tried by the Additional Sessions Judge of the 24-Pargannas and a jury on a charge Under Section 302, I.P.C, and convicted by a majority of 7 to 2. The learned Judge accepted the verdict of the jury and sentenced the appellant to be hanged, subject to confirmation by this Court.

2. The case is somewhat unusual. On the evening of 15th October 1930 one Abdul Gani was in a Panshop with a man named Hanif generally known as Mohammad Hanif. There was present In the Panshop another Hanif called "Bara Hanif," apparently because he was bigger than the other Hanif. A man named Molla Khan Kabuli well-known in the neighbourhood, who used to hawk articles round the adjoining villages, came into the shop. He was known to Abdul Gani and had made improper overtures to him a few days before and had been refused. Abdul Gani and Mohammad Hanif left the shop and proceeded a little way when Molla Khan followed and passed them, waited until they came up and then stabbed Abdul Gani in such a way that it is clear that he intended to kill him. Subsequently, Abdul Gani was taken to the hospital and died. Bara Hanif ran after Molla who had disappeared up the road. He failed to catch him and gave up the chase. Abdul Gani's father was called and information was given to the police. They started an inquiry and examined about half a dozen witnesses. Search was made for the accused but he could not be found and the case was dropped. Subsequently, more than two years afterwards, information reached the police that this Molla Khan who had committed the murder was living in Peshawar. Information was sent to the police at Peshawar that an absconder Molla Khan Pathan now living with Nasher Khan Pathan at village Hoti in she District of Peshawar was wanted in a case at Calcutta. Whether any further description of the wanted" man, beyond his name was given to the Peshawar Police we do not know. However the police sent a man down to Calcutta who was charged with this murder. Directly he got here, he strenuously denied that he was Molla

Khan or that he had ever been in Shyam-nagar where the murder was committed and said that his name was Hamidulla and that he lived in a village near Peshawar. Subsequently, he was put on trial and a number of witnesses stated that they had no doubt that the man in the dock was the man who murdered Abdul Gani, and whom they had known quite well for a good many years. Abdul Gani's father Ramzan said that he had known him for ten years selling fruits at Shyamnagar. Mohammad Hanif was called and said that he had no doubt that he was the man known to him as Mulla Khan who used to sell "hing" and dried fruits in the district. Their evidence was supported by Sheikh Banoo, and Thakur Prosad who was the owner of the Panshop referred to, and also by Pir Muhammad. On the other hand, the accused called four witnesses from Peshawar who strenuously denied that the man in the dock was Mulla Khan and said that his name was Hamidulla, that he had never been in Shyamnagar, that all along he lived with his mother in a village called Hoti and within a few yards of the houses where these witnesses lived. They stated that they had seen him almost daily, at any rate for the last five or six years, that during this time he had never left Hoti and certainly he had never been to Calcutta.

3. The learned Judge in his letter of reference says that he is free to confess that had he been a juror, he should as two of them did, have given the accused the benefit of the doubt. It is not necessary for me to refer in any detail to the evidence which was given at the trial, because the whole case turns upon the question of identity. There is no doubt that Abdul Gani was attacked in the manner described by him and the witnesses, and by a person who was well-known to them, and as described by them. The whole question was whether the man in the dock was that man. In our opinion, this case was not at all satisfactory. The investigation and the trial were defective and slipshod, and marred by illegalities, and characterised by a lack of thoroughness which is surprising, if not shocking, in a trial for murder. Even the record supplied to this Court is incomplete. The depositions before the Magistrate were used during the trial for the purpose of cross-examining the witnesses, and extracts from those depositions were put in evidence. Yet because the depositions were not formally tendered as evidence to the Court, they have not been included in the record. Such formality really amounts to absurdity. If questions are put and extracts included from depositions, during the trial of a case, it must be obvious that that evidence has been admitted by the Judge and that it must form part of the record, whether technically speaking it has been properly tendered or not. The matter is of some importance in this case because the learned Judge has remarked upon the considerable discrepancies between the evidence given by certain witnesses to the police, and to the Magistrate, and at the trial. Yet we have not held a full opportunity of examining the different sets of statements so as to be able to form a clear opinion about whether the discrepancies are as important as the learned Judge says. He refers specially to the evidence of the witness Banoo. I, at any rate, have found some difficulty in appreciating that there is much contradiction in the statements which he gave. The

difficulty is to understand exactly what the evidence means as it stands in the present record. That brings me to the second point of criticism, that the evidence is badly translated. Much depends in this case upon accuracy about what exactly the witnesses said whether they were talking of the present or the past. It is obvious from the translation which we have before us that the English words in the printed book are not the correct equivalents of what the witnesses said in their own language. Further a number of facts are left in uncertainty. If the Public Prosecutor and the pleader appearing for the accused cannot or will not probe thoroughly the evidence which is being given, so that an intelligible story can be included in the deposition, it is the duty of the Judge to do it, instead of leaving bits of evidence in the air so to speak, so that this Court cannot make out from the record what it was that the witness was intending to say. The learned Judge has referred to the police investigation in the following words: The investigation of the case was lax to a degree and Mulla Khan was not arrested till about two years later, and then on the information of a man who knew him, he may be inferred to have said in both Hoti and Shyamnagar, who was not examined as a witness:

4. And then the learned Judge goes on to refer to various defects in the investigation. We think the learned Judge's remarks are justified. It is difficult to speak in temperate language of the conduct of Police officers who, in respect of a charge so serious as this, have dealt with the investigation in so careless a fashion. One of the main witnesses was not examined till two months afterwards, though he was living within a few yards of the thana. Another important witness was not examined till two years afterwards, actually the owner of the Pan-shop opposite which this crime was committed and who was present when it was done. The facts about the two Hanifs have been so completely muddled by the police that it is difficult to know which witness we are dealing with at any moment, and it has enabled the defence to set up a plausible story that the actual Md. Hanif was never called into the witness-box, but somebody else. With regard to Banoo, whom I have mentioned already it is impossible to understand exactly from the record in the Sessions Court or from what he is reported to have said to the police and the Magistrate what was the evidence which he purported to give.

5. Directly the accused was brought from Peshawar, it must have been evident to everybody concerned that the trial would turn upon a question of mistaken identity. The accused raised this defence from the very first moment and before he had had any opportunity to get into touch with a pleader. If ever there was a case when it was essential that the strictest possible adherence to the regulations with regard to identification should be made this was one. Yet we are amazed to find that no attempt was made to hold a test identification, which was the only safe way of ascertaining whether the witnesses for the prosecution could be relied upon, when they said that they could identify this man, and not being satisfied with omitting this essential safeguard, the Police actually took the witnesses near to the hajat where this man was incarcerated, and there

pointed: him out to them as Mulla Khan who had been brought down from Peshawar. This was when the witnesses were in the Court Inspector's office from which the hajat could be seen. The witness Ramzan states that the office and the hajat are only separated by a rail. Such identification, of course, is utterly worthless. It is about as worthless as the identification of a man when he is in the dock. It may be that the police were anxious that there should be no mistake over the identification. It may be that they had no wish to bolster up the prosecution case. But the point is, that it is much too dangerous to rely upon identification of this kind.

6. The learned Judge has remarked that in his view an important and material witness was withheld by the prosecution. This was the man who had informed the police about the presence of the absconder in Peshawar. The explanation given was that secret information was given to the police and doubtless in many cases it would be unsafe to expose the sources from which such information is obtained. But in this case the prosecution had to face the argument that if this witness was not called, the jury might presume that his evidence would not help the prosecution and the learned Judge has no doubt pointed that out to the jury. But in our opinion what he said was not anything like strong enough. This was a most important witness. If he were to be believed, he must have had knowledge of Mulla Khan both during the time when he was in Shyam-nagar and during the time when he was in Hoti in Peshawar. He would have supplied the link which is so badly wanting in the evidence, and would have disposed of a great deal of the difficulty which has arisen. But not only was he not called, but a part of his evidence was allowed to go to the jury. Thus mistakes upon mistakes were made by those who were conducting the prosecution and by the learned Judge.

7. The statement that the man in Shyam-nagar and the man in Hoti were the same person, possibly the most important sentence in the whole case was placed before the jury without calling the witness. It would have been most interesting and most important to know what was said by him to the police about the man whom he indicated as being in Peshawar. "Whether this man has been arrested simply because his name is like that of the absconder, or because he resembled his description, we do not know; we are left completely in the dark. All that we know is, that a man named Mulla Khan was wanted, and the only evidence we have on the record is that this man at Peshawar is not known as Mulla Khan, but as Hamidulla. Of course the witnesses for the prosecution have now recognized him, but how could they fail to do so when he was pointed out to them by the police. In spite of all these defects, I am not at all sure that the jury would not have come to a proper conclusion in this case if they had been properly directed by the learned Judge. His charge was sketchy and unhelpful to a degree.

8. Whatever the conditions and the difficulties may be in this country, Judges, Advocates and Police must realize that; in a trial where a man's life is in jeopardy, it is essential to take the

greatest possible care to avoid mistakes being made. It is not sufficient for the Judge simply to point out this piece of evidence and that this presumption, and that, this bit of law and that. It is his duty to help and guide the jury to a proper conclusion. It is his duty to direct the attention of the jury to essential points. It is his duty to point out to them the weight to be attached to the evidence, and it is his duty to warn them gravely about the responsibility which rests upon their shoulders in a trial of this kind, and to impress upon them that if there is any doubt in their minds, they must give the benefit of that doubt to the accused. It may be said that the learned Judge has done all this, and if you search through the charge, you will find something said somewhere upon each of these matters. But that is not enough. It is the manner of saying it, the arrangement and the structure of his charge, which will make it either of value or valueless to the jury. As I have pointed out already practically the most important matter in this trial was the omission of a test identification which the learned Judge has not even mentioned. The second is the admission of that most important piece of evidence of the absent witness.

9. The learned Judge has totally disregarded it. Finally, he has not made any real attempt to deal with the evidence of the witnesses, that is to say, to invite the jury's attention to the value of it and the weight which should be put upon it whether the witnesses' recollection after three years is to be relied upon, whether the witnesses from Peshawar are persons whose evidence can be relied upon, and matters of that kind. The learned Judge has failed to do these things and to give the jury any helpful guidance in coming to their verdict. The result was that by a majority of seven to two they found this man guilty. In our opinion, it is not safe to condemn a man upon a charge of murder upon such evidence as this, or in a trial conducted in this way and he ought to have been given the benefit of the doubt. We do not therefore confirm the sentence of death passed on the appellant ; we allow the appeal, set aside the conviction and sentence and acquit the accused. The reference made by the Additional Sessions Judge is rejected.

M.C. Ghose, J.

10. I agree.

McNair, J.

11. I agree.