

CALCUTTA HIGH COURT

Provash Kumar Bose

Vs.

King

Criminal Appls. Nos. 229 and 230 of 1948

(Harries, C.J. and Das Gupta, J.)

25.01.1949

JUDGMENT

Das Gupta, J.

1. These two appeals are by two persons, Provash Kumar Bose and Azizur Rahman who were tried together by a Presidency Mag. of Calcutta. Provash Kumar Bose was convicted under Section 384, Indian Penal Code and Azizur Rahman under Sections 384-199, Indian Penal Code. Both were sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 201 in default to undergo rigorous imprisonment for another three months.

2. The prosecution case was that in the early hours of the morning of 21.12.1947 these two accused came to the bakery belonging to Daud Rahman at No. 9, Nawab Abdul Latif Street and when the door was opened, entered the bakery saying that they were men from the Civil Supplies Dept. Azizur Rahman, it is said, weighed one loaf of bread and said that it was under-weight and when, on his demand, Daud Rahman was called, the appellant Azizur Rahman told Daud Rahman that he would have to go to the thana as the loaves of bread in his bakery were under-weight and it is said that the appellant Provash caught hold of his hand and threatened him with a revolver while Azizur Rahman whispered something to Daud Rahman's son Gani who was also there. Thereafter Gani opened the box and brought out Rs. 250 in notes. Azizur took the money away. Both the accused, it is said, then left these premises and went to Md. Yakub's confectionary which was almost next door. There it is said, Provash told Yakub that there was a complaint against him and that he would have to go to the thana, but that if he paid some money he would not have to go. On this Yakub paid Rs. 100 and the two left.

3. Information was lodged at the thana at about 3-30 P. M. on that day. Provash it appears, was arrested on December 23, at about 11-30 A. M. while Azizur was arrested on the following day at about 4-45 P. M. There was a test identification parade on 23.12.1947 in which two witnesses,

Md. Yakub and Daud Rahman were brought to identify the suspect. Azizur Rahman was not placed on any test identification parade. It appears that after he was produced before a Mag. on December 24 he made a statement which was recorded by the Mag. as a confession.

4. Both the accused pleaded not guilty.

5. That there was an occurrence as mentioned above at Daud Rahman's bakery in the early hours of the morning of 21.12.1947 is the evidence given in Ct. by three witnesses - Daud Rahman himself, his son Md. Gani and his officer Sadan. Corroborative evidence has been given by one Jawhar Ali, Asst. Secretary of the Calcutta Bakers' Asscn. who has said that Daud Eahman told him that an officer from the Enforcement Dept. had come to his shop, weighed loaves, had asked for money and had taken money. As regards the occurrence in Md. Yakub's confectionary the only eye-witness is Md. Yakub himself and he has given an account as mentioned above. Daud Rahman has given corroborative evidence by saying that Md. Yakub informed him of the occurrence at his shop immediately after the culprits left. Jawhar Ali, whom I have mentioned above, has said that on being told that the two men had just gone, he with some other people folld. them and found two persons going, one of whom was in the uniform of a police officer and with whom he had some conversation.

6. On a consideration of this evidence I have no doubt that the occurrence as alleged did take place both in Daud Rahman's bakery and in Md. Yakub's confectionary and that of the two persona who took part in the occurrence, one committed the offence of extortion punishable under Section 384, Indian Penal Code and the other was guilty of abetment of that offence by adding him.

7. That leaves for consideration the very important question as to whether these two accused persons were the two men who took part in that occurrence. On this question of identity it is necessary to remember that admittedly none of these witnesses knew either of these accused persons from before. The fact therefore that these witnesses have identified in Ct. Provas as the man who was in police uniform and Azizur Rahman as his companion is of very little consequence. Before we can accept such identification as sufficient to establish the identity of the accused, it is very necessary that there must be good corroborative evidence and the corroborative evidence which one is entitled to expect in cases of this nature is the evidence of the witnesses having pointed these accused persons whom they identified in Ct. from the midst of other persons with whom they were mixed up at a test identification parade. The evidence of their having identified such persons at a test identification parade has no substantive value, but is very important corroboration of their evidence in Ct. It is in circumstances like this that test identification parades are held. Strange to say, no attempt even appears to have been made to have any test identification parade for the accused Azizur Rahman. It is Daud Rahman's evidence that on December 23, he met the Inspector when he was going to buy clothes for his children and then he proceeded with the Inspector to trace the accused, chough he did not know where Azizur

Rahman lived. But just as they were going along on foot they saw Azizur Rahman on the road. If the police were fortunate enough to have such a coincidence by which a culprit was discovered, it is all the more astonishing that they would throw away the benefits of that good luck by the omission to have the person placed at a test identification parade where Sadan, Gani, Jawhir and Yakub could all have an opportunity of saying whether this was the man. I find it difficult to believe that the omission to do so was a mere mischance or due to carelessness. My conclusion is that it was because the investigating officers had grave doubts as regards the ability of these several persons to identify the accused at a test identification parade that it was decided not to hold a test identification parade as regards this accused. Be that as it may, the position is that while several persons have in Ct. Advocate identified this appellant Azizur Rahman, as the man who accompanied the other accused Provash, we have no means of ascertaining that this identification in Ct. is correct. That means could have been supplied, if all or some of these witnesses had identified this accused at a test identification parade, but the test identification parade was not held. It is well to remember in this connection that the evidence as recorded does not disclose whether there was sufficient light in the room where the occurrence took place and whether these witnesses saw the faces of the accused persons clearly. The fact that the accused was not placed on the test identification parade is, in my opinion, a circumstance which justifies the inference that there was either not sufficient light in the room or that he was not there at all.

8. The only other evidence against this person is his retracted confession. I have gone through the statement which was put in evidence as Ex. 4. Here he said that he was an informer of police and gave information to Provash that certain persons were preparing cakes without permit at No. 9 Abdul Latif Street, that he accompanied Provash to this place and that he stood outside the godown while Provash entered the godown and said that they had committed some offence and handed over to him some loaves of bread for taking weight, and then came to some settlement with the shopkeeper and left the place and informed him that they had settled the matter amicably by paying money. His further statement was that he accompanied Provash to Yakub's shop and when he charged Yakub with preparing cakes without permit, Yakub pleaded guilty and offered to pay some money and paid some money. He is careful enough to say that he himself was outside when the money was paid and that it was only from Provash that he learnt that Rs. 100 had been paid. This is in every sense a self-exculpatory statement and cannot be considered in law to amount to a confession. For, by this statement he merely admits having, as an informer, accompanied Provash and does not admit having taken any part directly or indirectly in what Provash did. Even if this statement had not been retracted, I doubt if it would have been of much assistance to the prosecution. But as this statement has been retracted and as the evidence of identification in Ct. of any is not of any value, no conviction can possibly be based on such a statement.

9. My conclusion therefore is that the prosecution has entirely failed to prove that Azizur Rahman was one of the men who took part in the occurrence that night at Daud Rahman's bakery or Md. Yakub's confectionary.

10. The position is somewhat different as regards the other accused Provash, as in his case it appears that a test identification parade was held and two witnesses, Md. Yakub and Daud Rahman did identify him at the test identification parade. It is very surprising however that Gani and Sadan, who it seems to me had a better opportunity of seeing this accused as they were with him for a longer period, did not come to the test identification parade at all. It is no less strange that the other man Jawhar who, according to his evidence, had the opportunity of seeing the two accused persona on the open road when it was a little lighter was not asked to identify even though he did come with Daud Rahman and Yakub for the test identification parade. His evidence is that after he came to Ct. for the parade the Sub-Inspector asked him to go away. The irresistible conclusion is that though at one time it was thought that he might be able to identify, Sub-Inspector Alam, who it is said came with the party to the test identification parade, had doubts at the last moment about the ability of Jawhar to identify. That must be the sole reason why he was asked to go away. No explanation has been suggested why Gani and Sadar were not sent up for the test identification parade. We are bound to conclude that they were not sent up because the police were satisfied that they would not be able to identify. The fact that these persons had not come to identify takes away materially from the value of the evidence of the two persons who actually identified this man at the parade. It is important to notice in this connection the fact which appears from the cross-examination of P. W. 5 Jawhar Ali that Sub-Inspector Alam accompanied the party to the Ct. for the test identification parade. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of the occurrence are to identify them from the midst of other persons without any aid from any other source. That is why provisions are made that the police are not to be present at the time of the parade. Identification in the test identification parade loses much value if the Sub-Inspector has been with the identifying witnesses for some time before the parade is held.

11. Along with this we have to consider the fact, as mentioned above, that the evidence does not disclose the state of light inside either the bakery or the confectionary. The time was about 4 or 5 O'clock in the morning in December, so that the rooms would be comparatively dark unless there were artificial lights there. It is suggested by Mr. Banerji for the Crown that some lamps must have been lighted as otherwise money could not have been counted and made over to the accused. If there were lights, I do not see any reason why this was not properly brought out by the examination of the witnesses. The absence of evidence and the circumstance that two other persons who were in the room were apparently not prepared to try in the test identification parade make me think that the light was in fact insufficient.

12. In view of all these circumstances I have grave doubts whether even Daud Rahman and Md. Yakub who actually identified the man at the test identification parade did actually see the culprit's face well at the time of the occurrence. The fact that they identified him may well be due to other reasons, about which it is not necessary for me to theorise.

13. Some reliance was sought to be placed on the evidence of the handwriting expert who says that the writing "30, Bowbazar St., 2nd floor" in Bengali on a portion of a packet of Wills cigarettes is in the hand of the accused Provash. If the witnesses are to be believed this was written by the accused before he left Daud Rahman's bakery. It is to be remembered that 30, Bowbazar Street, is actually the address where the accused Provash lives. This is the first time in my experience that I hear a story of an accused leaving his correct address and that also in his own handwriting, with his victims. If more culprits adopted this practice the task of the police would certainly be very much easier. Unfortunately I cannot believe that this was actually done and in spite of the evidence of the expert I am unable to believe that this was actually in his handwriting. This writing is not therefore of any help to the prosecution.

14. My conclusion therefore as regards Provash also is that the prosecution has failed to prove that he was one of the men who took part in the occurrence on that night.

15. The result is that the orders of conviction and sentence as regards both the appellants are set aside and the appellants are acquitted of the charges against them. The appeals are allowed. The appellants will be discharged from their bail bonds. The fines, if paid, will be refunded.

Harries, C.J.

26. I agree.

Conviction set aside.