

APPELLATE CRIMINAL.

Before Cunliffe and Henderson JJ.

1936
Aug. 12.

ALIM JAN BIBI

v.

EMPEROR.*

*Conspiracy—Sentence for conspiracy, what it should be—Indian Penal Code
(Act XLV of 1860), ss. 120B, 109, 115.*

Under s. 120B of the Indian Penal Code the punishment for conspiracy is the same as if the conspirator had abetted the offence. In a case of conspiracy to murder, under s. 109 if the deceased was murdered in consequence of that conspiracy, the punishment is either death or transportation for life. If on the other hand, murder is not committed in consequence of the conspiracy then under s. 115 the maximum punishment is rigorous imprisonment for seven years. In any case a sentence of 10 years' rigorous imprisonment is illegal.

CRIMINAL APPEAL.

The material facts of the case and arguments in the appeal appear fully from the judgment.

Suresh Chandra Talukdar and Bhagi Rath Das
for the appellant.

*The Deputy Legal Remembrancer, Khundkar, and
Siddheshwar Chakrabarti* for the Crown.

CUNLIFFE J. The trial out of which this appeal has arisen was one of arsenic poisoning. Six persons were originally brought before a Magistrate and accused of being concerned in the death of a man called Kera Mat Ali, who has been described both by the Magistrate and by the Judge presiding at the

*Criminal Appeal, No. 479 of 1936, against the order of H. Banerji, Additional Sessions Judge of Bakarganj, dated May 14, 1936.

Sessions as a simpleton or almost half-witted. It appears that his wife, one of the accused by the name of Alim Jan Bibi, had an intrigue with a neighbour, also one of the accused, by the name of Abdul Ali. These two tried to trick the husband into living all three together and made him some kind of a bogus offer for sharing their property. Somehow or another it appears that Abdul Ali and the wife did get hold of some property and then doubtless the husband's relatives woke up to the position and he resisted the efforts of his wife and her lover and went off to live by himself. The prosecution story was that subsequently some cakes were made up into which arsenic had been introduced. This was done, it is said, by the mother of another of the accused by the name of Ledu. Mysteriously enough this old woman has disappeared and is not on her trial. Ledu and the accused Fazal induced the simple-minded husband to come along to Ledu's hut where there were gathered together all the accused in this case and cakes were administered to Kera Mat by his own wife if she could be called his wife. He swallowed some of the cakes and then appears to have been rushed out of the hut towards the hut which he was occupying. On the way he was seized with violent convulsions and was left by the side of the road by the accused Ledu who had taken him away.

Unfortunately for these people there was present at the time the cakes were being eaten his daughter who gave evidence at the trial. The jury seem to have believed her evidence. She does not seem to have been upset in cross-examination and she was supported by the evidence of the doctor who held the *post-mortem* examination and discovered arsenic in the internal organs of Keramat. No witnesses were called for the defence. Other persons gave evidence with regard to Kera Mat Ali's accusations after he had had his meal. This does not seem to be a very difficult case, but it has been made difficult by the way in which the prosecution has been permitted to present their case to the Court. Instead of making a

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straightforward case of murder and abetment of murder, by way of trying to be very clever—at least I suppose that is the only reason that actuated the Public Prosecutor or whoever he was—they have introduced the inevitable conspiracy charge under s. 120B and just to make it even more difficult for the jury, in the case of three out of the five accused, they have thrown in an abduction charge as a kind of make-weight, the abduction no doubt being the inducement which Ledu, Fazal, and a man called Mujaffar used to get Kera Mat to the party where the poison cakes had been prepared. I ought to have said that there was another man charged before the committing Magistrate, but he was acquitted and as a result of this jury trial, the accused Mujaffar was acquitted. Abdul Ali, the wife's lover, was convicted under s. 302^b and s. 120B—conspiracy for poisoning—and he was sentenced to transportation for life. So was the accused Ledu and the accused Fazal. Both of them have been convicted of abduction and sentenced to transportation for life. As to the wife, who, according to the prosecution evidence, was certainly the co-murderess of Kera Mat Ali with the old woman who is absconding, she was convicted of conspiracy to murder, but not of murder and has been sentenced to 10 years' rigorous imprisonment, a sentence which I should have thought was illegal.

Turning to the charge with which the learned Judge favoured the jury, on the whole it cannot be said to be at all unfavourable to the accused. If anything, it was rather inclining towards a lenient view of the whole case as is illustrated by the manner in which he handled the sentences. There is the usual padding about of proof, not proof and disproof, and he also indulges in something which I think he must have got from a book—and I know my learned brother thinks that too—when he tells the jury that—

Evidence is of three kinds : oral, documentary and circumstantial ; circumstantial evidence is more reliable, documentary evidence less reliable, and oral evidence the least reliable.

What all that means it is very difficult to understand when it is used before a jury of laymen for the purpose of assisting them to try a case, where as far as I can see there is no documentary evidence at all and no circumstantial evidence either. This is one of those cases in which the charge, in my opinion, is so unhelpful to the jury that the appellate Court whilst trying to follow as best they can the jury's decision on the facts, must take the case into its own hands by way of putting matters right as far as is possible. It will be noted that certainly the most important criminal of the four who have been convicted received the least sentence, why I cannot conceive. There does not seem to be any real evidence against Abdul Ali and Abdul Ali ought, in my view, to have been acquitted.

We shall set aside his sentence and conviction as not justifying the decision that he took part in the conspiracy. With regard to the two others, Ledu and Fazal, it does seem to me that there was reliable evidence that they knew all about the plot to cause Keramat Ali's death. Their convictions and sentences will be upheld. The conviction on the woman poisoner, Alim Jan Bibi, will be confirmed and under our revisional powers we propose to increase her sentence to one of transportation for life and we order accordingly.

HENDERSON J. I agree. There can be no question that there was a complete muddle in the trial of this case. When the learned Judge's charge was put before us I reached the conclusion that it was a very strong case of murder against the appellant Alim Jan, that there was no evidence of abduction against anybody, and I was left in some doubt as to what the evidence with regard to the conspiracy was.

The first muddle is in connection with the sentence and the sentence passed by the learned Judge upon the appellant Alim Jan is clearly illegal. Under

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s. 120B it is provided that the punishment shall be the same as if the conspirator had abetted the offence. Therefore, under s. 109, if the deceased was murdered in consequence of the conspiracy, the punishment is that for murder, that is to say, death or transportation for life. On the other hand, if the murder was not committed in consequence of the conspiracy, under s. 115, the maximum term is rigorous imprisonment for seven years. Thus whatever view one might take of this case, the sentence of 10 years' rigorous imprisonment would be illegal.

Now the unsatisfactory nature of the charges framed by the prosecution in the case of the appellant Alim Jan is illustrated by what the learned Judge said in putting her case specifically before the jury. First of all, he dealt with the evidence with regard to the murder charge. Then he went on to say: "s. "120B, evidence is same as above." Clearly if he took that view, he would have been well-advised to withdraw the charge of conspiracy altogether on the ground that it was redundant and unnecessary and might muddle the jury. That they were muddled is apparent from the fact that in spite of this direction they brought in a ridiculous verdict of not guilty of murder and guilty of conspiracy.

The learned Judge in dealing with s. 364 said that the case was weak. My learned brother has pointed out the absurdity of that charge and, in my opinion, the learned Judge should have said that there was no evidence to support it at all. Officers in charge of prosecutions do not seem to realise that s. 364 provides for the punishment of a specific offence and is not intended as an indirect method of punishing persons who are suspected but not proved to have committed a murder. In this case there was no evidence of abduction at all. However, inasmuch as no separate sentence was passed on the only appellant found guilty under that charge, no harm has been done.

We have great difficulty in deciding what would be the best course for us to take and in connection with that we had a question raised whether we could order Alim Jan to be retried for murder. Having regard to the view we take it is not necessary to deal with that very difficult and much debated point. The learned Deputy Legal Remembrancer put before us very briefly what the case was. There was good evidence of actual administration of poison by Alim Jan and there was evidence that the appellants, Ledu and Fazal, brought the deceased to the house. There was no evidence that Abdul Ali committed any offence at all. The simple charges should, therefore, have been one of murder against Alim Jan and of abetment of murder against the other two. Whether their action with regard to the deceased should be interpreted in a sinister way or not was clearly a matter for the jury and it is apparent from their verdict that they thought that these men were helping in the commission of the murder. No useful purpose will be served by altering the conviction from one under s. 120B to one under s. 114 and I, therefore, agree that the appeal of these appellants ought to be dismissed.

It only remains to consider the question of sentence. I have already pointed out that, in any view of the matter, the sentence passed on Alim Jan was illegal. We, therefore, have to decide whether the case should be governed by s. 109 or s. 115. It is only a few days ago that we had to point out in another case that in these conspiracy charges a sentence of more than seven years' rigorous imprisonment is illegal, unless the case comes within s. 109 and it is really, a matter for the jury to say whether s. 109 or s. 115 applies. Now, we should be extremely reluctant to send the case back for a retrial on this point alone for this simple reason. There is no evidence at all to support a verdict of a conspiracy to murder by the accused persons and the murder being committed by somebody else altogether independent of the conspiracy. Unless the jury were prepared to hold

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that Kera Mat Ali was in fact murdered as a consequence of the conspiracy, their verdict would be entirely perverse and incapable of support. The only reasonable conclusion would be that the case really comes under s. 109 and not under s. 115 of the Indian Penal Code. That being the case, the only course open to us, with regard to Alim Jan, under our revisional powers, is to enhance her sentence to one of transportation for life.

Appeal dismissed. Sentence enhanced.

A. C. R. C.