

The State Vs. B.K. Pal Choudhury

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Court : Guwahati

Decided On : Mar-19-1959

Judge : H. Deka and G. Mehrotra, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 476A, 479A and 479A(5)

Appeal No. : Criminal Misc. Case No. 2 of 1958

Appellant : The State

Respondent : B.K. Pal Choudhury

Advocate for Def. : S.K. Ghose and J.P. Bhattacharjee, Advs.

Advocate for Pet/Ap. : D.N. Medhi, Sr. Govt. Adv.

Prior history : Deka J. 1. This matter arises out of a criminal proceeding heard by this Court--or as a matter of fact two matters heard jointly and disposed of by one judgment dated 31-/58. One was Govt. Criminal Appeal No. 11/1956 and the other was Criminal Appeal No. 168 of 1956 filed by one of the convicted persons. The Government appeal was against the order of acquittal in favour of three persons Mahendra Nath Barua, Lalit Mohan Chanda and Nikunjabehari Paul who were tried of an offence under Section

Judgement :

Deka J.

1. This matter arises out of a criminal proceeding heard by this Court--or as a matter of fact two matters heard jointly and disposed of by one judgment dated 31-/-58. One was Govt. Criminal Appeal No. 11/1956 and the other was Criminal Appeal No. 168 of 1956 filed by one of the convicted persons. The Government appeal was against the order of acquittal in favour of three persons Mahendra Nath Barua, Lalit Mohan Chanda and Nikunjabehari Paul who were tried of an offence under Section 376, Indian Penal Code by the Court of Sessions with the aid of a jury and the other appeal was by Mahendra Nath Barua, one of the two accused convicted under Section 342, Indian Penal Code in the same trial on a verdict of guilty returned by the jury. The appellant Mahendra was sentenced to a fine of Rs. 1000/- in default to six months' rigorous imprisonment. The other accused Lalit Mohan Chanda. convicted under Section 342, Indian Penal Code did not appeal. The Court heard the two matters together as it arose out of the same sessions trial, it being Sessions Case No. 72 (L)/55, tried by the Additional Sessions Judge, Upper Assam Districts at Dibrugarh.

2. The prosecution story was that a minor girl by the name of Roheswari aged about thirteen to fourteen, who had been to the place of the accused which was a country liquor shop on the wayside, with her elder sister's husband one Bihuram Changmai at about 11 A. M. on 19-3-54 was wrongfully detained and violated by the accused persons in turn. She was subsequently rescued from the place of the accused with the help of the Moran police before whom an information was lodged about the occurrence by Bihuram that very day.

The girl was produced before a doctor at the Moran Dispensary soon after her rescue, on her reporting that she was ravished by the accused against her will. Her clothes in wear were also seized by the police and together with some slides containing vaginal smears were sent to the expert for chemical examination. The chemical examination revealed that there were marks of human semen and spermatozoa on the clothes seized and the doctor of the Moran Dispensary P. W. 1 Dhanbar Pait found marks of outrage on the person of the girl and on her private parts including rupture of hymen. The examination was conducted by him in

presence of a day or a female attendant on the date of occurrence at about 6 p. m. A short extract from his deposition in the Court of Session may be reproduced below:--

'I found the following external injuries on her person:

She had two circular teeth marks on both sides of the cheeks. Another reddish circular mark was found in her left breast. Left side of her leg was found swelling. I found several tender spots all over her body.

On examination of her genital organ, I found few pubic hairs. There were seminal like stains surrounding the vagina. The vulva was reddish and swollen. The vagina was dilated to admit two fingers. Her hymen was ruptured. Mucous membranes of the vaginal walls were abraded and from those areas blood was oozing out. Inside the Vagina, I found some blood clots.

I took vaginal smears from her vagina for microscopic examination and made over the same to Police as I have no microscope, Exs. I and II are those slides.

She was 5 feet in height.

Her garments were taken away by Police in my presence.

In my opinion, her age is 12 1/2. I say all these from her examination by me.

From the injuries, I consider her to have been raped.'

3. The plea taken by the accused was that they were not guilty and that the girl was left stranded at their place by her brother-in-law Bihuram and that they had committed no rape as alleged. The police produced the girl for further medical examination at Dibrugarh the next day (20-3-54) before an Assistant to the Civil Surgeon one Md. Muhibulla who was subsequently examined by the defence as D. W. 1 in, the committing court. In his opinion, there was rupture of hymen but he considered it to be nine to ten days old and not recent though he stated in the cross examination that he could not give any idea as to how old the rupture was.

He was however, categorical in the matter of stating that there could be no two opinions as regards the rupture of hymen. The police or the accused not being satisfied with this improvement, the girl was produced on the third day of the occurrence before the Civil Surgeon at Dibrugarh Mr. B.K. Pal Choudhury who examined the girl Roheswari on 21-3-54 at the request of the Police Assistant Sub Inspector Moran, and stated that his examination of the girl did not reveal any evidence of rape on her. He was examined as D. W. 2 in the committing court and his evidence was tendered in the Sessions court by the defence. I reproduce below the material portion of his deposition;

'Mussammat Roheswari was identified by D.N. Bora, A. S. I. and her uncle Dambhir Sangmai, (1) Height--4' 11". (2) Weight--82 lbs. (3) Teeth 28 permanent. (4) Development of breast has just begun. (5) Growth of hairs of pubic and axillary region--growth has just begun in the pubic region and there was none in the axillary region, (6) Hymen--intact. (7) Marks of violence--There are two marks on the left cheek which the girl alleges to be teeth mark but to me they appear like insect bite.

From the above data and from her general appearance her age in my opinion is about 13 years.

Examination does not reveal any evidence of rape.

Ex.--I don't think that hymen once ruptured can heal up and become intact without bearing any mark of rupture.

I know Dr. D. Pait of Moran dispensary and also Dr. Muhibullah. They both worked under me. Both of them are L. M. Ps.

It is malicious He to say that some interested person on behalf of the accused approached me before this examination'.

The girl was examined in the committing court as well as in the court of Sessions and her consistent story was that she was violated by the accused persons against her will.

4. The jury returned a verdict of not guilty against the three accused in respect of the charge under Section 376, Indian Penal Code; but returned a verdict of guilty against accused Mahendra the lessee of the liquor shop and his sales-man Lalit, in respect of the charge under Section 342, I. P. C. for wrongfully confining the girl on the date of occurrence. The learned Additional Sessions Judge accepted the jury's verdict and convicted and sentenced the two accused under Section 342, I, P. C. and acquitted them in respect of the charge under Section 376. I. P. C. Against this order of acquittal the State Government appealed under Section 417 Cr. P. C. and one of the two convicted accused also appealed against his conviction and sentence under Section 342, Indian Penal Code.

5. This Court after hearing of the two matters together, held by its judgment dated 31-/-58 that the charge to the jury was materially defective and that on the evidence on record the two accused Mahendra and Lalit could be convicted both under Sections 376 and 342 I, P. C. the evidence being overwhelming. The Court accordingly set aside the order of acquittal in respect of the charge of rape passed by the learned Additional Judge and convicted the two accused under Section 376 I. P. C. and sentenced Mahendra to three years and Lalit to two years rigorous imprisonment under that charge. Their conviction under Section 342 I. P. C. was also maintained.

6. While dealing with the evidence in the case, it appeared to the Court that there was a reasonable and probable cause to hold that the Civil Surgeon Mr. B.K. Pal Choudhury had intentionally lied while deposing in the committing court as to the marks and symptoms on the girl as to alleged violence on her. The Court accordingly directed notice to issue on him to show cause why a complaint for commission of an offence under Section 193, I. P. C. should not be filed against him as provided under Section 476 or 476A, Cr. P. C., for intentionally giving false evidence at a certain stage of a judicial proceeding This order was passed the day the two connected appeals were disposed of by this Court.

7. The witness concerned showed cause and he pleads that he deposed truly and honestly on the data found as a result of his physical examination of the girl--whom he examined as alleged. Or, in other words, he pleads bona fides and denies to

have given false evidence intentionally. The learned counsel appearing for him further contends that the procedure laid down under Section 479A, Cr. P. C. applied to the circumstances of this case, and that correct procedure has not been followed. Another submission is that even assuming the evidence given is false, the person need not be prosecuted since he is an old physician and has retired from office. He might as well be honestly mistaken. Another branch of argument is that a direction for prosecution by the High Court itself means that the lower court or courts are sure to convict the person.

8. We have given our best consideration to all the arguments addressed to us and the stand taken by the witness. We cannot, however avoid the responsibility as the evidence given by the person concerned in the committing court appears to be in direct conflict with many things found to be proved satisfactorily with the aid of reliable evidence and scientific tests. The procedure laid down in Section 479A, Cr. P. C. has been followed substantially except that the reasons for supposing the witness to have perjured are not elaborately or specifically dealt with to avoid prejudice to the accused at a subsequent stage. While we are inclined to be lenient to

the witness for his age,--we cannot neglect the dictates of justice and fair play,--it being within our experience that all medical men do not behave properly and some help to hinder the cause of justice.

The learned counsel for the witness drew our attention to the case of Hiranand Ojha v. Emperor, 4 Cal LJ 558 and urged that in order to prosecute a person for perjury, it must be shown that the statement said to have been false, could not but be false. We must say that that test applies only to conviction. What is necessary for the purpose of a complaint for prosecution is laid down in Section 476 Cr. P. C.--and in our opinion those tests are satisfied. We are reluctant to discuss the matter more elaborately,--or state the grounds on which we have based our opinion as to justification for a prosecution or why we think it to be expethent in the interest of justice.

9. The learned Senior Government Advocate while supporting a prosecution, suggests that we should direct the Sessions Judge concerned to file a complaint

as he did not, or failed to exercise his powers under Section 476A of the Cr. F. C. We consider that we enjoy the same power and in the circumstances of the case, we need not authorise him to file a complaint. The proceeding in the committing court in which the person deposed can be said to be a proceeding both in relation to the sessions trial as well as in relation to the criminal appeals heard by this Court, We are therefore of opinion that this court can file a complaint and that is what we direct.

10. The complaint will be drawn up and signed by the Registrar of this Court in the following form and sent to the Deputy Commissioner, Lakhimpur for trial by himself or by the Additional Deputy Commissioner:--

'Whereas it appears to the High Court that Sri B.K. Pal Choudhury, Retired Civil Surgeon, Dibrugarh gave false evidence or made certain statement intentionally as D. W. No, 2 on 19th July, 1955 in the court of Mr. B.N. Das, Sub-Divisional Magistrate in G.R. Case No. 654/54 of his court,--State v. Mahendra Nath Barua and others--which statement or evidence he knew or believed to be false or did not believe to be true and thereby committed an offence punishable under Section 193. Indian Penal Code and it is desired by the High Court that he should be prosecuted for the said or alleged offence according to law.'

The portion of the evidence of the witness (D. W. 2) quoted in this judgment may be annexed as containing the false evidence which was given with a view to prove that there was no rape upon the girl.

11. We further direct that the Public Prosecutor or any other competent lawyer as chosen by the Deputy Commissioner at Dibrugarh should be in charge of prosecution in this case and the police should render such assistance as may be necessary for securing the presence of necessary witnesses. The accused may be summoned under Section 193, Indian Penal Code and may be permitted to go on adequate bail. Prosecution witnesses should be asked to appear after the accused appears in court. The hearing should be expedited.

12. Records of the case are to be sent down immediately. The cause shown By Sri B.K. Pal Choudhury is not accepted.

Mehrotra, J.

13. In response to a notice issued by this Court to show cause why he should not be prosecuted for an offence under Section 193, Indian Penal Code, Dr. B.K. Pal Chowdury has appeared before

us through counsel. The facts are fully set out in the order of my brother and need not be reiterated. Three persons Mahendra Nath Barua, Lalit Mohan Chanda and Nikunja Behari Paul were prosecuted under Sections 342 and 376, Indian Penal Code and tried with the aid of jury. The three accused were acquitted by the Sessions Judge of the charge under Section 376, Indian Penal Code but the first two were convicted under Section 342, Indian Penal Code. The State Government filed an appeal against acquittal and a Bench of this Court consisting of the then Chief Justice and my brother Deka J. allowed the appeal against acquittal and convicted them under Section 376, Indian Penal Code.

The prosecution case was that on 19-3-54 the accused raped a minor girl Poheswari. The girl was examined by three Doctors in succession and the doctor Mr. B.K. Paul Chowdhury who was the Civil Surgeon at Dibrugarh at that time, and has since retired, examined her on 21-3-54. He on examination found the hymen intact, and in his opinion examination revealed no evidence of rape. The Bench hearing the appeal was of opinion that Dr. B.K. Pal Chowdhury had deliberately given a False statement and had thus committed an offence under Section 193, Indian Penal Code.

Mr. Gosh who appears for the doctor has contended that it is not expethent in the interest of justice to direct the complaint to be filed in this case. The Doctor gave his honest opinion on the examination and even if his opinion was wrong, it cannot be said that he intentionally gave false evidence. According to Mr. Ghosh there was no reasonable chance of conviction and therefore this Court will not direct the filing of complaint under Section 476, Cr. P. C. It was also urged that the jury believed the evidence of the witness in preference to the evidence of other doctors and it cannot therefore be said that because this Court preferred to accept the testimony of other doctors, the evidence of Dr. B. K. Paul Chowdhury was necessarily false.

There are two-fold answers to this contention Firstly that these are matters which may be taken into consideration by the Court trying the case but cannot be considered by this Court at this stage. Any observation by this Court on merits is likely to prejudice the trial of the case. Secondly to my mind this notice was not issued with a view to hold any preliminary inquiry under Section 476, Cr. P. C. but is one issued under Section 479A(5). Section 479(A) v/as inserted by Section 89 of the Amendment Act XXVI of 1955 and the object was to avoid any further inquiry contemplated under Section 476, Cr. P. C. Cases where perjury is committed by a witness in Court it was thought that in such cases the Court had an opportunity to watch the demeanour of the witness and had already examined the materials on which it had come to the conclusion that the witness had perjured, it was therefore not necessary before filing a complaint to have another inquiry.

It should also be noted that no appeal is provided against any finding recorded in such cases and against a complaint made. The power given to the trial Court under Section 479(A)(1) can also be exercised by the appellate court under Section 479(A)(5) after giving an opportunity to the witness of being heard. In this case action was taken by this Court under Section 479(A) and it is not for this Bench to sit in appeal over the judgment of the Bench which heard the appeal and hold that the witness did not give any false evidence intentionally and that it was not necessary for the eradication of the evils of perjury or expethent in the interest of justice to file a complaint. The witness is in effect challenging the correctness of the finding of the Bench hearing the appeal that he intentionally made a false evidence. It is not open to this Bench to upset this finding.

It may be open to the Magistrate trying the case to come to a different conclusion on the evidence produced before him but this Bench cannot record a different finding. It is contended that if this Bench after hearing the person affected by the finding cannot refuse to file a complaint the provisions of Section 479(A)(5) giving an opportunity to the witness concerned of being heard becomes nugatory. To my mind it is not open to the other Bench to record a finding different from the Bench hearing the appeal on the question of the witness intentionally giving a false evidence but it may be open to the Bench to hold that it is not expethent in the interest of justice or necessary to avoid the evil of perjury to file a complaint but

once the finding that the witness intentionally gave a false evidence is to be accepted it cannot be said in this case that it will not be expethent in the interest of justice or necessary to avoid the evil of perjury to file a complaint.

It was then contended that before a complaint can be filed under Section 479A(1)(5) the Court at the time of the delivery of judgment must record a finding to that effect stating its reasons for the finding which was not done in this case. Reading the judgment of the Court as a whole and the notice issued to the witness it is abundantly clear that this Court at the time of the delivery of judgment had come to the conclusion that the witness had intentionally given false evidence and had given its reasons for that conclusion. Therefore, I agree with the order proposed. The complaint should specify the part of the statement which this Court considers

to have been false and made intentionally. The two parts of his statement which have been considered false are (1) Where he on the basis of the said re

port states that the hymen was found by him in tact and (2) Where he states that the examination revealed no evidence of rape.

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