

Emperor Vs. Motiram Raising

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Court : Mumbai

Decided On : Jun-30-1936

Reported in : AIR1936Bom372; (1936)38BOMLR818

Judge : Broomfield and ;Wassoodew, JJ.

Appeal No. : Criminal Confirmation Case No. 9 of 1936 and Criminal Appeal No. 131 of 1936

Appellant : Emperor

Respondent : Motiram Raising

Judgement :

Broomfield, J.

1. [After setting out the facts of the case, his Lordship proceeded:] The learned advocate who appears for the accused in this Court has devoted a large part of his argument to the question of the admissibility of the dying declaration alleged to have been made by Sita to the Magistrate. The Magistrate was examined as a witness and has deposed to the questions which were put by him and to the manner in which Sitabai answered the questions by signs and gestures. The record of the examination is exhibit 14 and is as follows :-

Q. Who caused you the injury to your neck ?

A. She points out her finger to the accused Motiram alias Tana walad Raising Rajput of Aundane in front of her.

Q. How is the injury caused ?

A. She points out at the vili and the accused in front of her and makes signs with her finger on her neck as if cutting with vili.

Q. In what position you were when the injury was caused Were you standing or sitting ?

A. She pointed out at the accused by taking her right leg in her hand and touching her chest with her fingers and makes indication as if the accused fell her down by placing his foot on her and cutting her neck with vili.

Q. At what time this happened ?

A. By showing her ten fingers she makes an indication as if this happened at 10 a.m.

2. It is contended that this evidence is not admissible under Section 32 of the Indian Evidence Act or otherwise. Section 32 provides that statements, written or verbal, of relevant facts made by persons who cannot be called as witnesses are relevant facts in certain cases, one of the cases being when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death. Now, apart from authority, I must admit that I should greatly doubt whether Sita's gestures in reply to the questions put to her or the questions put to her taken together with her gestures in reply to them, could without straining of language be regarded as a verbal statement made by Sita within the meaning of Section 32. On the other hand, apart from authority, I should myself have thought that her gestures as explained by the questions put to her would be relevant as conduct under Section 8 of the Act, although I must admit that Section 8 is a little difficult to understand, in particular the precise meaning of the expression 'influences or is influenced by any fact in issue or relevant fact.'

3. There is no decision of this High Court on the point, but the authority of other High Courts is the other way. That is to say, it has been held that evidence of this kind is admissible under Section 32, not under 3. 8. In the oldest case, *Queen-Empress v. Abdullah* I.L.R. (1885) All. 385 the only case in which reasons have been given, the facts were that an injured person had been questioned at considerable length. A large number of questions had been put to her, some of them leading and some not leading, to which she had replied by various signs and gestures. The Sessions Judge had allowed the evidence to be given and the question which was referred to the full bench was whether the evidence was admissible. At the commencement of his judgment the learned Chief Justice said that he understood the question submitted to come to this :

When a witness is called who deposes to having put certain questions to a person, the cause of whose death is the subject-matter of the trial, which questions have been responded to by certain signs, can such questions and signs, taken together, be properly regarded as verbal statements' under Section 32 of the Evidence Act or are they admissible under any other sections of the same Act

The learned Chief Justice took the view that the evidence was admissible under Section 32 and not Section 8. Two of the learned Judges concurred with that answer. Mr. Justice Mahomed, though agreeing with the other Judges that the answer to the question referred in the form given to it by the Chief Justice should be in the affirmative, took the view that the case came under Section 8 and not under Section 32.

4. The argument which has been put forward before us is that the majority of the Judges in this Allahabad case made a distinction between (a) leading questions such as ' Did A inflict the injuries on you ', answered by a nod, and (b) 'Who inflicted the injuries on you?' answered by pointing to an individual present, and that they held that (a) was admissible as a verbal statement under Section 32, and (b) was not. I can see no logical basis for such a distinction. As I say, my own view, apart from authority, would be that in neither case is there any verbal statement of the person questioned. But if (a) is to be regarded as a verbal statement, I can see no reason why (b) should not. At one passage in his

judgment at p. 397, the learned Chief Justice said :-

The same objection which is now made to the admission in evidence of these signs might equally be made to the assent given by a witness in an action to leading questions put by counsel. If, for example, counsel were to ask-' Is this place a thousand miles from Calcutta ?' and the witness replied ' Yes', it might be said that the witness made no statement as to the distance referred to. The objection to leading questions is not that they are absolutely illegal, but only that they are unfair.

It would almost seem from this passage that the learned Judge was relying on the narrative form which is given to the evidence when recorded. But if any argument could be based upon that the same argument would apply in the case of the answers by signs or gestures which I have classified under the heading (b). If the question were 'who inflicted the injuries?', and it was answered by pointing to a person named A, the record of the evidence, if it were recorded in a narrative form, would be ' A inflicted the injuries on me.'

5. In the course of the argument our attention was directed to Section 119 of the Act, which says :-

A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, Evidence so given shall be deemed to be oral evidence.

This section has no direct relevance. It deals with statements of witnesses, i.e., persons who are actually examined in Court, whereas Section 32 deals with statements made by persons who cannot be called as witnesses. But perhaps Section 119 has some little importance as suggesting that the framers of the Act were prepared to include answers given by signs in the category of oral evidence. It cannot, of course, be suggested that Section 119 only permits answers to be given by signs to leading questions.

6. I am by no means sure that the distinction which is now suggested was really intended by the learned Judges who formed the majority of the bench in *Queen-Empress v. Abdullah*. In any case that decision has been followed in a number of cases of other High Courts, *Emperor v. Sadhu Charm Das* I.L.R. (1921) Cal. 600, *Chandrika Ram Kahar v. King-Emperor* I.L.R. (1922) 1 Pat 401, and *Ranga v. The Crown* I.L.R. (1924) Lah. 305, and in none of these cases has any such distinction been made. *Emperor v. Sadhu Charan Das* was in fact a case very similar to the present. The dying ' declaration' which had to be considered merely consisted of evidence to show that three persons were made to stand before the injured person. She was asked to point out which of the three wounded her and she pointed out her husband as the person who wounded her. So far from taking the view that the question put to the woman should have been in a leading form in order to make the answer by signs admissible, the Court said that it was regrettable that the question was put in a form which suggested that the injury was homicidal. So that the Court apparently thought that it would have been better if the questions had not been put in a leading form at all. It would seem that since 1885 if not before it has been more or less settled law that dying declarations of this kind are admissible under Section 32. Whether under Section 32, or as I should myself rather prefer to hold under Section 8, I think there can be no doubt that the evidence is admissible.

7. [After discussing the evidence, the judgment concluded:] We take the view, therefore, that the learned Judge was fully justified in agreeing with the opinion of two of the assessors and in convicting the accused of murder. It is clearly a case in which there can be no sentence but the sentence of death. It was a brutal attack on a defenceless woman and there were no extenuating circumstances. The sentence, therefore, must be confirmed and the appeal dismissed.

Wassoodew, J.

8. [After narrating the facts of the case, the judgment proceeded :] There is also evidence of the dying declaration of the deceased. The first indication of that declaration is given in the testimony of Bhika. In his examination-in-chief he distinctly stated that the deceased with great effort said that Moti, meaning the

accused, had cut her. He resiled from that statement in his cross-examination in which the answer was extracted that he did not put her any question with regard to her assailant. The Police Sub-Inspector is, however, definite that the deceased in a low voice and with great effort uttered the word Moti when she was questioned as regards her assailant and she also pointed out the sickle with which she was cut. Before the panch she repeated that accusation against Motiram. The dying declaration was then formally recorded by the Subordinate Judge and Magistrate, exhibit 13, at about 4 p.m. that day. The deceased was then unable to speak owing to the nature of her injury. But in reply to questions she indicated by signs that Moti who was present was her assailant, and that the instrument used was a sickle. It is reasonable to suppose that the deceased was unable to speak after she had received the injury. That is also the view of the doctor. Objections have been taken to the admission of these dying declarations on the ground that they cannot be described as 'verbal statements' within the meaning of Section 32 of the Indian Evidence Act. That point has been considered by a full bench of the Allahabad High Court in the case of Queen-Empress v. Abdullah (1885) I.L.R. 7 All. 385. The learned advocate for the accused has tried to distinguish that case from the present one on the ground that the majority deciding that case restricted the admissibility of such declarations only to signs signifying assent or dissent by the dying person upon hearing leading questions put to him. It seems to me that the form of the question cannot affect the admissibility of the signs if such signs are rendered admissible under the Indian Evidence Act. Indeed the question whether such signs are admissible under Section 8 or Section 32 of the Indian Evidence Act is not free from difficulty; but I see no reason to differ from the views expressed by the learned Chief Justice in Abdulla's case which has been followed without dissent by Patna, Calcutta and the Lahore High Courts since 1885. If the objection was to the interpretation of signs, then unquestionably the interpretation of the person recording the dying declaration would not be admissible. Here the record is full enough to permit the Court to interpret the signs independently. After carefully reading the declaration my own interpretation is that the accused was indicated in no unmistakable way as the assailant of the deceased. The dying declaration, therefore, lends confirmation to the proof available, and I agree with my learned brother that the accused is guilty of the murder of Sita and that the

sentence passed on him should be confirmed and his appeal dismissed.

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