

Emperor Vs. Khushal Jeram

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Court : Mumbai

Decided On : Jun-09-1926

Reported in : (1926)28BOMLR1026

Judge : Fawcett and ;Madgavkar, JJ.

Appeal No. : Criminal Application for Revision No. 113 of 1925

Appellant : Emperor

Respondent : Khushal Jeram

Judgement :

Fawcett, J.

1. In this case the applicant has been convicted of having indecently assaulted the complainant, Bai Manki, under Section 354, Indian Penal Code. That conviction has been confirmed by the Sessions Judge.

2. The only legal point that is raised is that the Magistrate inspected the scene of offence and failed to make a record of any relevant facts that he observed at that inspection under Section 589-B, Criminal Procedure Code. It is argued that that constituted an illegality vitiating the whole trial, and the ruling in Hriday Govinda Sur v. Emperor I.L.R. (1924) Cal. 148 is cited in support of that contention. Another Bench of the same Court has, however, subsequently taken the contrary

view that such an omission is not an illegality: *Forbes v. Ali Haidar Khan* I.L.R. (1925) Cal. 46. We agree with the latter view, and especially with the observation of Ghose J. that there is no universal rule that disobedience of a mandatory provision in a statute has the consequence of nullification of all proceedings, irrespective of any question of prejudice. The case, in our opinion, falls under the provisions of Section 537 of the Criminal Procedure Code, and no interference is justified, unless this omission has in fact occasioned a failure of justice.

3. The conviction of the accused depended mainly on evidence of identification. The offence took place at night, and a kitson lamp, by the light of which the girl said that she saw the person who assaulted her, was in front of the house and not at the back where the girl went. Whether the light of the lamp penetrated to that place is a question which could only properly be decided on evidence, and not by any inspection or experiment, such as was condemned by the Privy Council in *Kessowji Issur v. G.I.P. Railway Company* I.L. R (1907) 31 Bom. 381. The object of an inspection is to help the Court in properly appreciating the evidence, and this is the purpose mentioned in Sub-section (1) of Section 539-B. Therefore, complainant's witnesses on the question of identification should have been cross-examined as to whether there was any light at the back of the house from this kitson lamp. It is said that the accused's pleader refrained from doing so, because he was under the impression that the Magistrate would record a memorandum of the result of his inspection ; but that is no sufficient reason for the accused's pleader not taking the course I have mentioned. It could not safely be assumed that the Magistrate would record anything that would favour his contention that there was no sufficient light. In fact the omission of the Magistrate to refer to his inspection in the judgment presumably means that that inspection gave him no reason to disbelieve the prosecution evidence that there was sufficient light to enable the accused to be identified ; otherwise he would surely have referred to the result of his inspection. The case, in our opinion, is not, therefore, one where it is shown that this omission occasioned a failure of justice, and, consequently, there is no ground for our interfering because of this objection. At the same time we would observe that Courts ought to be careful to comply with the provisions of Section 539-B, and give no loop-hole for objections such as have been raised in this case.

4. It is further urged that a lighter sentence should have been awarded, having regard to the age of the accused, his antecedents, and other circumstances. The offence, however, is not one of a trivial kind. There was a deliberate dragging of the girl with intent to outrage her modesty, and, in our opinion, it is not a case where the benefit of Section 562 of the Criminal Procedure Code could properly be extended to the accused. But, in view of the fact that no harm, except the dragging, occurred to the complainant who was rescued, we think it will suffice if we substitute for the remainder of the term of imprisonment passed on the accused a fine of Rs. 50. In default of payment of that sum; the accused will have to be arrested and sent back to jail to serve the remainder of the imprisonment to which he was sentenced. Three days' time from the date of the warrant being received at the head quarters of the Taluka, where the accused resides, will be allowed for payment. The sentence of imprisonment actually suffered by the accused is confirmed.