Bankey Vs. State

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Court : Allahabad

Decided On : May-18-1960

Reported in : AIR1961All131; 1961CriLJ330

Judge : V.D. Bhargava, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 376, 509, 511; Code of Criminal Procedure (CrPC) , 1898 - Sections 238

Appeal No. : Criminal Appeal No. 2302 of 1959

Appellant : Bankey

Respondent : State

Advocate for Def. : Asst. Govt. Adv.

Advocate for Pet/Ap. : B.C. Saksena, Adv.

Disposition : Appeal dismissed

Judgement :

V.D. Bhargava, J.

1. Bankey has filed this appeal against his conviction under Section 376 read with Section 511, I. P. C

2. According to the prosecution there was one Chunni resident of Mauza Basoma, police station Bisault district Budaun. On 6-11-57, which was a day previous to Puranmashi, Chunni along with his son Jai Lal went to Asafpur railway station on his way to Chaubari for taking a dip in the Ganges. He left the ladies and children at the house. Since the train was to leave in the night, they had gone a little earlier and they were sleeping] at the railway station. It is alleged that the accused taking the opportunity of the absence of the adult male members of the family entered the house at about 10 O'clock in the night, caught hold of Smt. Tufania, wife of Jai Lal who was sleeping alone in the Kothri and forcibly wanted to remove her dhoti and to have sexual intercourse with her.

Tufania is alleged to have resisted. Thereafter her mother-in-law Smt. Dbarmfa arrived. Both of them raised alarm. Other witnesses also arrived upon which the appellant ran away. Kehri and Ram Kumar are the persons who had come. They were also going for having a dip in the Ganges, and when they reached the railway station: Asafpur they informed Chunni about the incident. Chunni, when he heard about the matter did not go for the bath but returned home and came to know the details from the ladies.

A report was lodged thereafter at the police station. It is alleged that the report was not properly written by the police people at the police station. After three days Chunni came to Budaun and lodged a complaint on 11-11-57. The accused was challaned under Section 376 read with Section 511 I. P. C. and convicted and sentenced to five years R. I. and a fine of Rs. 50/-. The accused has denied the allegation, but has produced no defence evidence, nor has he told why he has been implicated.

3. According to the appellant there had been a dispute about the mend of a field between him and Chunni and Chunni had threatened to implicate the accused in some false case and therefore he has been implicated. He has not been able to produceany evidence of the fact that there had been anydispute about the mend. He has not been able to show when the dispute took place. If it had taken place only a short time before the incident that may have been a reason for false implication, but if it had taken place long ago that would be no ground for falsely

implicating,

4. In order to prove its case the prosecution has produced five witnesses. They are Chunni, Smt. Toofania, Kehri, Ram Kumar and Smt. Dhara-mia. So far as Chunni is concerned, his evidence is not a direct evidence but only hearsay evidence about the incident. So far as Toofania (P. W. 2) Kehri (P. W. 3), Ram Kumar (P. W. 4) and Smt. Dharamia (P. W. 5) are concerned, they have given the evidence that on the night between 6th and 7th November the accused entered their house. According to Toofania he came and started an altercation (hujjat karne laga) and he removed her rezai, upon which Toofania came out. She was wearing a petty coat. She cried upon which her mother-in-law was awakened.

5. According to Smt. Dharamia (P. W. 5) the accused was having a quarrel (jhanjhat) with her daughter-in-law Smt. Toofania. Smt, Toofania was raising noise, crying 'thief; thief'. None of these' two witnesses has deposed that the dhoti of Smt. Toofania was removed and she was naked, while the other witnesses Kehri and Ram Kumar, who are neighbours, have said that when they went to the roof of their house on hearing the alarm they could see that Toofania was shouting and the accused was holding her and that Smt. Toofania was naked.

6. From the evidence of these witnesses there does not appear to be any doubt that Bankey had entered the house of Chunni with probably some improper motive. But I do not think that he had gone to the extent of actually committing rape. He appears to have been making only gestures and uttering sounds, and intruding upon her privacy by removing her petticoat or sari in order probably to persuade Smt. Toofania to agree to his immoral desire, on which her mother-in-law and the neighbours got up.

7. The first information report which had been lodged by Chunni also mentions that he was making indecent jokes with Smt. Toofania upon which she asked as to why he had come in the night. The accused is alleged to have threatened to beat her if she would make any noise. Thereafter Chunni went to make a complaint to Bankey's family, and Bankey threatened to murder Chunni who therefore, lodged a report under Sections 509 and 506, I. P. C. In the first information report there is no mention at all of any attempt to commit rape by the appellant,

The report had been lodged on 10-11-57, i.e.three days after the incident. The absence of any direct allegation of attempt to commit rape appears to be significant. The evidence of Smt. Toofania as well as that of Smt. Dharamia also supports the theory that actually the appellant had come in the night and was making indecent gestures and was removing the rezai of Smt. Toofania. But it does not go beyond that. Under the circumstances I think the later allegation that she had been madenaked and he wanted forcibly to commit rape does not appear to be true. But the fact of the entry in the house and intruding into the privacy of Toofaniaby trying to remove her clothes is correct. Under the circumstances the accused will be guilty of Section 509 and not Section 376 read with Section 511, I. P. C.

8. When a person makes entry into an apartment occupied by a lady the first and foremost rational inference that can be drawn in the circumstances must be that it was with the intention of committing some offence in relation to that lady. If it is only making gestures and uttering words requesting her to agree to commit some sexual offence, or remove the petticoat or dhoti, then, in that event, it would amount only to an offence under Section 509, I. P. C., but if he proceeds further and thereafter tries forcibly to commit rape and does not stop only at intruding into the apartment and making gestures, those offences will be under Section 376 read with Section 511, I. P. C. and the last step would be when he actually Succeeds in committing rape.

Then it would be an offence under Section 376, I. P. C. Intruding upon the privacy of a woman and making gestures would be a common ingredient both of Section 509 and of Section 376, I. P. C. An offence under Section 509, in my opinion, would be a minor offence of the offence under Section 376, I. P. C. The later portion as to actually attempting to commit sexual intercourse has not been established in this case,

9 Under Section 238, Cri. P. C. :

'When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be

convicted of the minor offence, though he was not charged with it.'

As I have already pointed out, entry into' a woman's! apartment and trying to catch hold of her and trying to persuade her by removing garments has been established, which constitutes a full offence under Section 509, I. P. C. The remaining particulars of actually forcibly attempting to commit rape in my opinion, have not been established in, this case.

10. Learned counsel for the appellant has argued that ingredients of Section 509 were not put to the appellant when he was being examined under Section 342, Cri. P. C. The appellant was asked a question that according to the prosecution he on the night between the 6th and 7th November 1957 entered the house of Chunni and he removed the clothes and petticoat of Smt, Toofania and tried to commit rape. The first portion of this question clearly shows that the appellant had been put a definite question about his action of removing the clothes or petticoat from the body of Smt. Toofania. This action clearly would amount to intruding upon the privacy of a woman and if this action does not, probably no action would amount to intruding upon the privacy of a woman. Therefore so far as this portion of the question is concerned, it clearly covers Section 509, I. P. C.

11. Learned counsel for the appellant has further placed reliance on single Judge decision reported in Dhum Singh v. Emperor : AIR1925 All448 . There the question was whether a convictionunder Section 34 of the Police Act could be converted into one under Section 279, I. P. O. It was held that the accused was entitled to know what offence he was to answer. There the offence had been committed under different Acts and possibly Section 238 Cri. P. C. may not be applicable. But in Section 238, if there are certain ingredients which are common to both the offences and some of them, have been established, it is always open to the court to convert the conviction from the major offence to the minor offence. In this case I have held that an act under Section 509 is a minor offence of the offence under Section 376, I. P. C. In my opinion the conviction can be converted from one under Section 376 read with Section 511 to one under Section 509, I. P, C.

12. I would, therefore, alter the conviction of the appellant from one under Section 376 read with Section 511 to one under Section 509, I. P. C. and sentence him to simple imprisonment for six months and a fine of Rs. 100/-, and in default, three months' simple imprisonment.

13. The appellant is on bail. Ho shall surrender to his bail and serve out the sentence as now imposed.