

Karey Vs. State

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Court : Allahabad

Decided On : Sep-17-1958

Reported in : AIR1959All347; 1959CriLJ673

Judge : M.C. Desai, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 110 and 117

Appeal No. : Criminal Revn. No. 1419 of 1956

Appellant : Karey

Respondent : State

Advocate for Def. : Asstt. Govt. Adv.

Advocate for Pet/Ap. : Hari Swarup, Adv.

Disposition : Revision allowed

Judgement :

ORDER

M.C. Desai, J.

1. The applicant has been bound down under See. 110, Cr. P. C. on account of being a habitual thief and burglar. Two types of evidence were produced against him by the Prosecution, one consisting of witnesses who deposed that they

suspected the applicant to have been responsible for thefts and burglaries committed in their houses and the other consisting of residents of the village where the applicant resides and its neighbourhood, who stated that he is a man of bad character and that his general reputation is that of habitual thief and burglar. The applicant denied the evidence of general repute; his defence witnesses deposed that his reputation is good and that he maintains himself by plying a tonga.

2. The Magistrate has disposed of the whole case in which 24 witnesses were examined for the prosecution and 25 for the defence in a judgment covering little more than two pages. Only the briefest gist of the evidence given by the prosecution witnesses is given; the names of most of them are not given. There is a longer discussion of the evidence of the defence witnesses but the names of most of them are not given. The Magistrate after discussing the defence evidence observed that it was not free from discrepancies and contradictions and is not worthy of much reliance.

He admitted that most of the defence witnesses pay substantial land revenue and that some of them are bhumidhars. Still he accepted the evidence for the prosecution and bound down the applicant. The learned Sessions Judge's judgment is more detailed and there is greater discussion of the evidence. He accepted both types of evidence against the applicant and disbelieved the defence evidence about good reputation of the applicant and maintained the Magistrate's order.

3. Coming to the evidence of the first type, namely, of suspicions I find that it is inadmissible. What the prosecution had to prove is that the applicant is by habit a house breaker, or thief; this can be proved by proving that he has committed burglaries or thefts to such an extent that he can be said to be a habitual burglar or thief or by proving that his general reputation is that of a habitual burglar or thief. I do not think there is any third way of proving the fact.

That he has committed a number of burglaries or thefts can be proved not only by previous convictions but also by evidence to the effect that such and such burglaries or thefts were committed by him. It is not essential that the evidence

about the commission of burglaries or thefts be given by eye witnesses; it can also be given by persons who personally know the facts leading to the inference that the applicant was responsible for the burglaries and thefts.

In other words, evidence to prove commission of burglaries and theft can be direct or circumstantial. But what is important to note is that the evidence must prove the commission of burglaries and thefts and not merely the suspicion that they might have been committed by the applicant. He can be bound down on the ground that he is a habitual burglar or thief and not on the ground that he is suspected to be a habitual burglar or thief. It is well known that suspicion does not amount to proof; a person suspected to have committed a burglary or theft is not a person proved to have committed a burglary or theft.

Consequently suspicions that a person has committed a series of burglaries or thefts would at the most prove that he is suspected to be a habitual burglar or thief but not that he is (actually) a habitual burglar or thief. If suspicion does not amount to proof when a person is accused of having committed an offence, it does not amount to proof also when he is accused of being a habitual burglar or thief. The prosecution examined some persons in whose houses a theft or burglary was committed but none of them has proved that it was committed by the applicant or that he was concerned in it. Some of them deposed that they suspected him but that evidence is not admissible.

Some of them deposed that they heard subsequently that he was responsible for the theft or burglary; this evidence is so patently inadmissible that one is surprised that it was received by the Magistrate. One of them, Salga deposed about seeing him roaming about prior to the theft committed in his house; this was the reason given by him for suspecting him to be responsible for the theft.

This fact may only lead to a suspicion but does not prove that the applicant committed the theft. The other witnesses, whose houses were burgled or plundered, did not depose about any facts even leading to the suspicion of the applicant's complicity in them.

The Magistrate has said in his judgment that S. I. Reoti Saran Sharma deposed that he had investigated crime No. 53 of 1953 in which suspicion roll was put up against the applicant but no such statement is to be found in his deposition. He does not even prove that he investigated crime No. 53 of 1953. Further an investigating officer's statement that he suspected a certain person to have committed a burglary or theft is inadmissible because it is only an opinion of his and not a statement of fact within his personal knowledge. An opinion about certain person's having been concerned in a crime is inadmissible even that of a person who is expert in investigations.

What he should depose about is the facts personally noticed by him and on which he found his opinion that the accused was a burglar or thief; it would be for the court to decide whether to draw the same inference from those facts or not. Accordingly the evidence of S. I. Tejvir Singh that the applicant was suspected in several thefts and burglaries was inadmissible and ought not to have been received. It was the duty of the Magistrate to see that no inadmissible or irrelevant evidence was brought on the record.

4. In Emperor v. Ram Lal : AIR1929 All273 . Boys and Sen, JJ. observed at p. 668 (of ILR All) : (at p. 275 of AIR) :

'A mass of evidence was led to show that this person or the other had 'suspected' the accused to be guilty of this or that theft. The Magistrate has weighed the value of this evidence. He need not have done so, for it has no value whatever. Time after time this Court has pointed out that the suspicion of a witness that a particular man committed either singly or with others, a theft in his house is wholly inadmissible.'

5. They strongly deprecated the waste of public time and energy by reception of inadmissible evidence like this. They pointed out at p. 670 (of ILR All) : (at p. 276 of AIR) that 'a witness cannot say what he suspects,' though he can give evidence as to facts which are within his knowledge leaving it to the court to determine whether they alone or supported by other evidence prove that the accused is a habitual thief or burglar. As regards evidence of general repute they observed at p. 671 (of ILR All) : (at p. 276 of AIR) :

'The mere production of a string of witnesses who say that an accused person's general repute is so and so can carry very little weight unless some attempt has been made to show that he is a person in a position to know the general repute, and there has been some reasonable attempt by the counsel for the accused or by the court to check the value of the evidence.'

6. In *Jagat Singh v. Empetor*, 23 Cri LJ 507 (Lah), Abdul Raoof, J., stated that the powers of Section 110 are to be exercised in only those cases where the evidence is very clear and precise. 'It is the unanimous opinion of the High Courts in India that the mere suspicion of the sub-inspector is no legal evidence;' see *Tor Gul v. Emperor*, AIR 1935 Pesh. 158 at p. 159, per Mir Ahmad, A. J. C. In also *Alep. Pramanik v. King Emperor*, 11 Cal WN 413, Brett and Gupta, JJ. rejected as worthless evidence consisting of bare statement that the accused was suspected without mention of any single fact in support of the suspicion. The view taken by Beachcroft and Ghose, JJ., in *Jogendra Kumar Nag. v. King Emperor*, 25 Cal WN 334 at p. 336 : (AIR 1921 Cal 625 at p. 627) is :

'The value of suspicion which only arose later is naturally very much weaker and at best the existence of suspicion can only be material as corroborating a witness's evidence as to repute.'

Evidence of suspicion was rejected as inadmissible in *Amjad Ali v. Emperor*, 25 Cri LJ 35 : (AIR 1924 Pat 498) Kulwant Sahay, J. observing at p. 38 of Cri LJ: (at p. 499 of AIR), that 'the evidence of mere suspicion of a person having taken part in certain criminal offences is not an evidence of general repute.' Rafique, J. observed in *Rahman v. Emperor*, 14 Cri LJ 407 (All), to the effect that evidence of cases in which the accused was suspected does not fall within the meaning of general repute. Mere suspicion of complicity in this or that isolated offence is not evidence of general reputation and it is not enough merely to assert that the accused was suspected of having committed certain crimes; see *Islam-ud-Din v. Emperor*, AIR 1939 Lah 269. In that case Din Muhammad, J. struck a note of warning against passing orders under Section 110 on vague allegations. In *Emperor v. Kurwa* : AIR1928 All357 , Boys, J. with the concurrence of Weir, J. observed at p. 358 :

'It has been ruled number of times by this court and other Courts that evidence cannot be led in these cases under Section 110, that an accused person has been suspected of committing such and such offences. To allow that sort of evidence is to admit what is purely hearsay evidence and nothing else evidence of general repute can be given in support of a charge of being an habitual thief, etc., but evidence of general repute is evidence of a definite fact.'

7. One comes across observations suggesting that evidence of suspicion is admissible or can form the basis of an order binding down a person to be of good behaviour. In *Raja Ram v. Emperor*, 22 Cri LJ 273 (Oudh), Daniels, A. J. C., said at p. 273 :

'That a person had been suspected and named in a large number of cases extending over a considerable interval may, however, the very useful corroboration of general evidence of bad reputation.'

I respectfully disagree; evidence of general repute is evidence of a definite fact and can be given by persons who have personal knowledge of it.

Evidence of suspicion of complicity in a crime is doubtful circumstantial evidence of general repute is pointed out by Venkatramana Rao, J., in *In re Perne Maila Rai*, 39 Cri LJ 898 : (AIR 19G8 Mad 591) :

'reputation evidence is not what A. B. C. state about one's character but what the general opinion concerning him is because reputation is not the same thing as character' at; p. 901, (of Cri LJ) : (at p. 593 of AIR).

Emperor v. Gajadhar, 34 Cri LJ 160 : (AIR 1933 Oudh 58) is another case from Oudh, Chief Court in which the evidence that the accused was suspected of complicity was acted upon but without any discussion about its admissibility. There was also evidence of general repute against the accused and it was entirely unrebutted either by cross-examination or by production of any witness in defence; so the accused could have been bound down even if the evidence of the suspicion was rejected as inadmissible.

Ram Din v. Emperor, AIR 1946 Oudh 50 is a third case from Oudh in which evidence of suspicion was tacitly accepted, In Jai Singh. v. Emperor, ILR 6 Luck 36 : (AIR 1930 Oudh 357, it was remarked that if suspicion about the commission of a crime is unjustified the court would be reluctant to demand security; this was nothing but obiter dictum. In Emperor v. Khuda Baksh, 39 Cri LJ 599 : (AIR 1938 Lah 428), Blacker, J., simply relied upon the case of Emperor v. Bachchu, 37 Cri LJ 390: (AIR 1936 Oudh 238). In Firangi Rai v. Emperor, 34 Cri LJ 643 : (AIR 1933 Pat 189), Mohammad Noor, J. was of the opinion that

'specific instances where reasonable suspicion fell upon the accused are good evidence to show the basis of bad reputation,' but he was cautious to add that whether from these instances habit and character can be inferred or not is a matter to be decided on the facts of a particular case. In Emperor v. Kumera : AIR1929 All650 , King, J. (Ashworth, J. concurring) said at p. 279 (of ILR All) : (at p. 652 of AIR), that a witness can be permitted to depose that he himself suspected the accused of having committed a certain offence.

A statement that an accused is suspected by other persons is barred by the rule against hearsay, but not by that rule only and consequently a statement that the witness himself suspected the accused does not become admissible merely because it is not hit by the rule. The objection against the statement is that it is inadmissible inasmuch as it does not prove the commission of the offence or the general repute that the accused is a habitual thief or burglar.

King, J. was not prepared to question the proposition laid down in the case of 14 Cri LJ 407 (All), that evidence of suspicion is not evidence of general repute, but he treated the evidence of suspicion as relevant as a ground for the general repute. I respectfully disagree that any person can give evidence about the grounds for general repute. Grounds can be given for an opinion, not for a fact. General repute is the reputation among the public and a person cannot give evidence about the reasons why the public holds a certain opinion about the character of the accused because it would be hearsay.

With great respect to Ashworth, J. I cannot accept his statement that proceedings under Section 110, Cr. P. C. are not governed by the Evidence Act. In 37 Cri LJ

390 : (AIR 1936 Oudh 238), Oudh Chief Court went farthest in accepting evidence of suspicion even when not supported by any reason. Sriwastava and Nanavatty, JJ. were of the opinion that the absence of explanation for harbouring the suspicion was no bar to the reception of the evidence and that it was for the accused to cross-examine the witness about the grounds for his suspicion.

With great respect I am unable to agree with either of the statements. In *Lilu v. Emperor*, 32 Cri LJ 62 : (AIR 1930 Lah 345), Dalip Singh, J. rejected evidence of suspicion to prove that the accused committed the offence but was prepared to accept it as evidence of general repute. The Judicial Commissioner's court, Peshawar, also receives evidence of suspicion as evidence on general repute vide *Muzaffar v. Emperor*, AIR 1942 Pesh 84. I respectfully disagree and would rule out all evidence of suspicion. As regards the evidence of general repute, there is evidence of prosecution witnesses to the effect that the applicant's general repute is that of a habitual thief and burglar.

The applicant has also produced defence witnesses, who deposed that his reputation is good and that he maintains himself by plying a tonga, selling bangles and looking after a Sarai. The Magistrate has disbelieved the defence evidence because of contradictions about the number of ponies owned by the applicant, ignorance showed by some of them of the fact that he is under surveillance and denial of some of them that they go to his house or have enquired about his character. I am not impressed with the reasons given for rejecting the defence evidence.

The number of defence witnesses examined by the applicant is also equal to the number of witnesses examined for the prosecution. A majority of them are men of substance and a majority of them come from the village where the applicant resides.

8. Evidence of general repute is admissible to prove that a person is a habitual burglar or thief But it is quite a different question whether in a particular case a person can be said to have been proved to be a habitual thief and burglar only on the basis of the general repute. If there is no evidence produced by the applicant in rebuttal the evidence of general repute may be accepted.

Even, if there is evidence in rebuttal it may be accepted if the defence evidence is not fit to be acted upon or if the prosecution evidence is supported by evidence of specific instances of commission of burglary or theft by the applicant or by evidence of previous convictions. The commission of a sufficient number of burglaries or thefts must be proved in order to make out a case of being by habit a burglar or thief; but commission of a smaller number of burglaries or thefts may supplement, or be supplemented by the evidence of general repute.

9. Referring to such statements as 'I knew the accused 'I knew the accused he bears a bad reputation and is given to committing burglary and dacoity and has bad associates,' Seshagiri Ayyar, J. observed in Ranga Reddi v. Emperor, ILR 43 Mad 450 : (AIR 1920 Mad 534) at p. 455 (of ILR Mad) : (at p. 537 of AIR) :

'Such a general statement can be of no assistance to a Court. It is against all principles to record such vague statements, without calling upon the witness to give specific instances which could be scrutinized and which the accused will be in a position to rebut.'

On page 456 (of ILR Mad) : (at p. 537 of AIR), he observed :

'Evidence relating to mere beliefs and opinions, without reference to acts or instances which have induced the witnesses to form the opinion, can? hardly be regarded as evidence of repute.'

He was of the opinion, vide at p. 457 (of ILR) : (at p. 537 of AIR), that

'the evidence of prosecution witness which speaks generally of the reputation of the accused without reference to specific acts, is not sufficient to bring the charge home to the accused.'

Evidence of general repute 'is obviously a type of evidence which requires to be weighed very carefully; and that is the greater reason for being careful that no improper laxity is permitted;' per Boys and Weir, JJ., in : AIR1928 All357 . In Wali Mahomed Khan v. Emperor, AIR 1925 Lah 166, Scott-Smith, J. said that a person should not be bound down under Section 110 'upon evidence of repute unless such evidence is very strong and almost universal.' Evidence of reputation was

considered to be 'weakest form of evidence" and requiring material corroboration by other evidence proving the habits, In the case of In re Shanmughan Asari, 39 Cri LJ 588 : (AIR 1938 Mad 482). Horwill, J. said on p. 589 (of ILR Mad) : (on p. 482 of AIR) :

"Evidence of reputation, although admissible and even important, has to be accepted with caution as it is very easy to say that a person is of ill repute, and in the nature of things such evidence is too indefinite to permit cross-examination.'

An accused should not be bound over on evidence of bad repute where there are respectable persons on his side to clear him of the charge, AIR 1935 Pesh 158. It was observed in Hakim Singh v. Emperor (AIR 1915 All 415), that where an accused is able to produce witnesses on his behalf to speak of his good character, the court ought to pay particular attention to their evidence, and although not required necessarily to believe it must find substantial reasons for not believing it.

10. The evidence of general repute in this case is not particularly strong and is counter balanced by evidence of good repute given by witnesses of an equal number. There is hardly anything to corroborate the evidence of general repute. The evidence of Saiga, about suspecting the applicant of the burglary committed in his house is only a wild guess of his.

There is no evidence at all to prove that the applicant has committed any burglary or theft. The learned Sessions Judge accepted the evidence of suspicion and it may be on account of this that he was prevailed upon to accept the evidence of general repute; One is not sure what his inclination would have been if only the evidence of general repute produced by the prosecution and defence had been before him.

It is quite likely that if he had been faced with only the evidence of general repute, he would have said that the evidence was almost balanced or in any case did not prove beyond reasonable doubt that the applicant was a habitual thief or burglar. I find that the prosecution has not discharged the onus of satisfying the court that he is a habitual thief or burglar and the order demanding security from him is unjustified.

11. The application is allowed and the order passed by the Magistrate binding down the applicant is set aside and he is discharged. If he has given security it shall stand cancelled.

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