

Munshi Vs. the State

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Court : Allahabad

Decided On : Nov-10-1966

Reported in : AIR1968All345

Judge : Gangeshwar Prasad, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 161, 162, 342(1) and 342(3)

Appeal No. : Criminal Revn. No. 647 of 1965

Appellant : Munshi

Respondent : The State

Advocate for Def. : Addl. Govt. Adv.

Advocate for Pet/Ap. : Mohd. Asif Ansari, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Gangeshwar Prasad, J.

1. The applicant Munshi was tried along with five other persons, viz. Atma Singh. Sher Khan, Sem Singh, Hetam and Zulfi, by a Magistrate 1st Class Meerut Munshi

and Sher Khan were each convicted under Section 380 I. P. C and sentenced to fifteen months' rigorous imprisonment, Atma Singh was convicted under Section 411. I. P. C., and sentenced to nine months' rigorous imprisonment, while the remaining three accused were acquitted. The convicted persons preferred an appeal. The learned Additional Sessions Judge Meerut allowed the appeal of Atma Singh and set aside his conviction, but dismissed the appeals of Munshi and Sher Khan and maintained their convictions and sentences. Munshi has come up in revision to this Court.

2. The case of the prosecution was that on the night between 25th and 26th August 1963 a Bhainsa belonging to Sheo Ram and two bullocks belonging to Ram Swarup were stolen from the respective Ghers of the said persons in village Chhabli. The loss of these cattle was discovered soon afterwards in the night and some men of the village, including the owners of the cattle started immediately on a search. When they reached near the road which is at a distance of about a mile from village Chhabli they heard the sound of a truck, thereupon they rushed up to the road. There they saw that the two bullocks of Ram Swarup had been loaded in the truck and the abovenamed six accused persons were trying to put the Bhainsa of Sheo Ram also into it.

Four of the accused persons were standing on the ground and were actually engaged in pushing up the Bhainsa and Munshi applicant was one of them. On seeing the village people, the four accused who were standing on the ground, including Munshi, run away, but Atma Singh the driver and Sem Singh the conductor of the truck were captured. It was alleged that the village people had torches with them and in the light of the torches they saw and marked the features of the culprits who managed to escape. An information about the occurrence was sent to police station Baraut, situate at a distance about three miles from the place, and a report as registered there at 6-35 P. M. Bhikam Singh Sub-Inspector reached the spot and started investigation. He took into his custody Atma Singh and Sem Singh who had been captured by the village people. On the same day at about 8-15 P. M., he arrested Munshi applicant, Sher Khan, Hetam and Zulu, who are all Banaras, from their Deras in Shamli. After identification proceedings the six accused were sent up for trial.

3. The case against Munshi applicant rested only on his identification by prosecution witnesses Ram Swarup and Rameshwar Dayal, who claimed to have seen them when the stolen cattle were being loaded in the truck. At the identification parade Rameshwar Dayal made two correct identifications and committed no mistake, whereas Ram Swarup correctly identified two persons and made one mistake. The result, therefore, was that there was only one good identification against the applicant. The learned Additional Sessions Judge has observed that there are certain circumstances which lend assurance to the identification even though it is by one good witness only. The obvious inference is that, but for what he regarded as assuring circumstances, he would not have considered the identification evidence as a sufficient and secure basis for a finding of guilt against the applicant. Let me, therefore, examine those circumstances.

4. The first circumstance noted by the learned Additional Sessions Judge is that the applicant was arrested at Shamli in the night following the night of theft. How this circumstance can in any manner support the identification evidence or be suggestive of the presence of the applicant at the place where the stolen cattle were being loaded in the truck is, however, incomprehensible. The four accused persons who were arrested by the Sub-Inspector at Shamli are admittedly Banjaras, a class of people living a sort of nomadic life, and there was something suspicious (Sic) or strange about the fact that they were found in their Deras at night.

5. The second circumstance, according to the learned Judge, is that 'the I. O. was led to these persons on his interrogation of Atma Singh and Sem Singh who were captured on the spot'. In utilizing this as an incriminating circumstance the learned Judge fell into a grievous error of law. What, after all, has been made the basis of an inference of guilt? Obviously, the statements of Atma Singh and Sem Singh made to the investigating officer in the course of investigation. The chain of reasoning behind the inference is this: Atma Singh and Sem Singh who were arrested by the village people were certainly involved in an attempt to carry away the cattle and they must therefore, have known the remaining four accused persons; when interrogated by the investigating officer they gave out the names of the four culprits and the place where they would be found; the persons named by them were actually found at that place; and it therefore, appears that they were

really trying to put the cattle in the truck when the village people arrived near the place where the truck was standing. It is manifest that the main link in the chain of this reasoning is the statement made by Atma Singh and Sem Singh to the investigating officer, and the use of that statement for the purpose for which it has been used by the learned Judge is clearly prohibited by law.

6. It is mistake to think that it is only when a statement made by a person to a police officer in the course of investigation is expressly referred to as supporting a finding of guilt that the statement can be said to have been used in contravention of the provisions of Section 162 Cr. P. C. but if that statement is not made part of the record and no express reference to the statement is made and it is only inferred from what followed as a result of it, this inferential use of the statement is outside the prohibition of the section. It is well settled that what is not permitted by law to be done directly cannot be done indirectly. Section 162. Cr P. C., imposes an absolute bar to the use of a statement covered by the section for any purpose save for the purpose provided therein, howsoever garbed the use may be.

It is one thing to know that a certain step in the investigation of a crime was taken subsequent to the statement of a particular person having been recorded under Section 161, Cr. P. C., but it is quite another to proceed from this knowledge of mere sequence to assume that what happened as a result of such a step must necessarily have conformed to the statement of the said person and the statement is, therefore, likely to have been true. The latter, apart from being fraught with dangers of erroneous conclusion and false implication, amounts to using the statement for an impermissible purpose. Such use constitutes not merely a circumvention of the prohibition contained in Section 162 Cr. P. C., though even that the law would not countenance -- but a clear disregard of it.

The second circumstance pointed out by the learned Judge must, therefore, be excluded from consideration.

7. The last circumstance on which the learned Additional Sessions Judge has placed reliance is that, in their statements in Court, Atma Singh and Sem Singh 'specifically named the four accused, Munshi, Sher Khan, Hetam and Zulfi as the ones who had engaged them and who were trying to load the animals and then

ran away' Dealing with their statements the learned Judge has observed:

'The statement of an accused at the trial is a matter that can be taken into consideration by the Court in such trial under Section 342 Cr. P. C., which implies that it can be taken into consideration even qua the co-accused, though ordinarily the value of such a statement would be slight or even negligible, in the present case it does go to lend assurance to the identification evidence, particularly when we consider that the accused were camping at Shamli, to which place the driver and the conductor belonged and that the police arrested the Banjaras appellants the same evening'.'

Here, again, the learned Judge is not, in my opinion, correct.

8. It is true that Section 342 (3) Cr. P. C., provides that the answers given by the accused may be taken into consideration, and it does not expressly say that, in the inquiry or trial in which the answers are given, they can be taken into consideration only for or against him. But having regard to the purpose and scope of an examination of the accused person as laid down in Section 342 (1) Cr. P. C. and to accepted principles relating to criminal trials it seems clear that answers given by an accused person in response to questions put to him under Section 342 (1) Cr. P. C., cannot be taken into consideration against his co-accused. I find that this view has been taken in a number of cases: *Kunwar Sen v. Emperor*, AIR 1933 Oudh 86, *Mst. Sumitra v. Emperor* , *Tahsinuddin Ahmad v. Emperor* : AIR1940 Cal250 and *Des Raj Sharma v. State*. AIR 1951 Simla 14.

9. There is no question of the statements of Atma Singh and Sem Singh being considered against the applicant under Section 30 of the Evidence Act. In their statements these persons denied knowledge of the stolen character of the cattle. Their statements were, therefore, entirely self-exculpatory and did not at all partake of the nature of confessions. Besides, on the view taken by this Court in *Emperor v. Mahadeo Prasad*, ILR 45 All 323 = (AIR 1923 All 322), with which I am in respectful agreement and which is also the view taken by several other High Courts Section 30 of the Evidence Act applies to pre-trial confessions and not to confessions made at the trial.

10. The judgment of the learned Additional Sessions Judge leave no room for doubt that his mind was influenced by considerations which should not have been taken into account against the applicant. In this connection I may pertinently draw attention to a passage in the decision of the Privy Council in Walli Mohammad v. King, AIR 1949 All LJ 154 = (AIR 1949 PC 103). The passage is as follows:--

'The difficulty in all cases where two persons are accused of a crime and where the evidence against one is inadmissible against the other is that however carefully assessors or a Jury are directed and however firmly a Judge may steel his mind against being influenced against one by the evidence admissible only against the other, nevertheless the mind may inadvertently be affected by the disclosures made by one of the accused to the detriment of the other'.

11. More than this has happened in the instant case; matters which could not be taken into consideration have been expressly considered by the learned Additional Sessions Judge and regarded as supporting the case against the applicant. The circumstances relied upon by the learned Judge as lending weight to an otherwise unsatisfactory identification evidence have to be entirely ignored. On the prosecution evidence itself the villagers could only have had a momentary and passing glimpse of the applicant in the light of the torches said to have been flashed by them and it is difficult to accept that Rameshwar Dayal and Ram Swarup were able to mark the features of the culprits. There is, as the learned Judge has observed, only one good identification against the applicant, and it cannot be a safe basis for conviction in the circumstances of the case. The applicant is, therefore, entitled to acquittal.

12. The revision is accordingly allowed, the conviction and the sentence of the applicant are set aside and he is acquitted. The applicant is on bail; he need not surrender to his bail and his bail bonds are discharged.

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