Rustom Vs. Emperor

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Court : Allahabad

Decided On : Aug-03-1915

Reported in : 31Ind.Cas.817a

Judge : P.C. Banerji and ;Rafique, JJ.

Appellant : Rustom

Respondent : Emperor

Judgement :

Rafique, J.

1. The appellant in this case is one Rustom, who was committed to the Court of Session on the charge of murder under Section 302 of the Indian Penal Code. During his trial, the learned Sessions Judge added a further charge under Section 307, that is, an attempt at murder, and convicting him under that section sentenced him to transportation for life. The murder was committed as long ago as the 3rd of December 1897. The case for the prosecution is that on the night of the 3rd of December 1897, the appellant was driving a camel cart from Farrukhabad. On his arrival at Nandsa, he had to change the camel and askgd Sadullah, who was in charge of the camel that was relieved, to help him in the harnessing of the other camel and also to accompany him to the next stage. Sadullah refused to go with the appellant any further, upon which the appellant took up an axe and attacked him with it and inflicted blows on the head which resulted in almost

instantaneous death. Rustom, the appellant, then ran away and was not heard of till he was arrested this year, and put on his trial. Soon after the murder, the chaukidar of the place reported the occurrence and the Sub-Inspector proceeded to the spot at once. The case was sent up to the Court on the 24th of December 1897, and on the same date evidence purporting to be taken under Section 512 was recorded. Subsequently it was discovered that the proceedings which were taken in 1897 were incomplete and an order was issued to the Police to furnish proper evidence. This was in 1898. A proclamation under Section 87 was issued as also a warrant for the arrest of Rustom, both of which were sent to the district of Mainpuri of which district he was a resident. One Ataullah, a constable of the Mainpuri district, was examined on the 16th of August 1898, who deposed to having made a search for the appellant and to having failed to find him. On the 3rd of September 1898, the witnesses who were examined in 1897 were re-examined. Sometime in April 191.1, the prosecuting Inspector of Farrukhabad, presumably on going through the old files, came upon the file of this case. He reported that the evidence which purported to have been taken under Section 512 of the Code of Criminal Procedure, was not legally correct and re commended that fresh proceedings should be taken. In accordance with his suggestion, the case was again taken up by a Magistrate of the district and formal evidence of the appellant having absconded was recorded and the only surviving witness, Musammat Vilayatan, was examined. These facts we have discovered by going carefully through the files of 1897, 1898 and 1911, which are in the record of this case. The only evidence against the appellant on his trial in the present case consists of the deposition of Musammat Vilayatan who is alive and was examined before the learned Sessions Judge, and the depositions of four other witnesses who were examined in 1897, namely, Imtiazan, Husaini, Mohan and Ram Singh. The learned Sessions Judge, by a formal order dated the 21st of June 1915, brought the statements of the said four witnesses on the record as evidence on behalf of the prosecution. We also find the evidence of the said four witnesses recorded in 1898 on the file of the Sessions Court, though no order appears on the file showing how and when and under what circumstances were those statements brought on the record. The evidence of Musammat Vilayatan as recorded by the learned Sessions Judge at the present trial was rejected by him. The conviction of the

appellant rests on the statements of the other witnesses recorded in 1897. The. learned Counsel for the appellant contends, that the said evidence is inadmissible, inasmuch as no proof of the absconding of the accused had been formally received and recorded prior to the examination of the said witnesses. We think that this objection is valid and must prevail. In Section 512, it is distinctly laid down that if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. It is clear from the language of the section that the Court which records the proceedings under it, must first of all record an order that in its opinion, it has been proved that the accused has absconded and that there is no immediate prospect of his arrest. No such finding appears, on the file of 1897, in fact no evidence was taken in that year to show that the present appellant was absconding and that there was no immediate prospect of his arrest. The evidence of 1897 being inadmissible, the conviction of the appellant on the basis of such evidence cannot stand. But it is suggested on behalf of the Crown that the case should be sent back for re-trial with a direction to the learned Sessions Judge to admit the evidence taken in 1898, inasmuch as that evidence was taken after proof bad been received of the absconding of the accused. We find that the only statement in 1898 with regard to the absconding of the accused is that of one Ataullah, a constable of the Mainpuri district. He does not say that there is no immediate prospect of the arrest of the accused, nor is there any finding by the Magistrate that he is satisfied that the accused is absconding and that there is no immediate prospect of his arrest. Moreover, we have considered the evidence of the other witnesses who were examined in 1898 and are of opinion that their evidence is insufficient to bring the charge home to the appellant. Of the witnesses examined in 1898, Musammat Vilayatan cannot be relied upon. Mohan Chamar and Mahomed Yusuf distinctly say that they did not see Rustom, the appellant, strike the deceased. The other witnesses Imtiazan, Ram Singh and Husaini do say that they recognised Rustom as the assailant of the deceased. It should be observed here that none of the witnesses was present actually on the spot when the assault on Sadullah is said to have taken place. All the witnesses say that 'they

ran upon hearing the cries of Sadullah. Imtiazan and Husaini also ran up. It was a dark night and according to Mahomed Yusuf, it was not possible to recognise any person at any distance. There is, therefore, room for doubt as to the evidence of Imtiazan, Husaini and Ram Singh. In our opinion, it would serve no useful purpose to send back the case for re-trial with the direction to admit the evidence taken in 1898. We, therefore, accept the appeal, set aside the conviction and sentence passed upon the appellant and acquit him of the offence of which he has been convicted, and direct his immediate release.

Banerji, J.

2. I concur.