

Sahdeo Ram Vs. Emperor

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Court : Allahabad

Decided On : Mar-15-1935

Reported in : AIR1935All579

Appellant : Sahdeo Ram

Respondent : Emperor

Judgement :

Bennet, J.

1. This is a criminal revision on behalf of one Sahdeo Ram, who has been convicted by an Assistant Sessions Judge under Section 377, Penal Code, and sentenced to two years' rigorous imprisonment, 12 stripes and a fine of Rs. 100 or in default four months' further rigorous imprisonment. He appealed to the Sessions Judge and his appeal was dismissed. This revision is filed against the appellate order of the Sessions Judge. The facts found by the Sessions Court were that a small boy Modan aged six and a half years was playing with another boy at the house of the accused and that the accused took him into a room and committed the offence of sodomy on him and the boy Modan was seen by two witnesses to> run out of the house of the accused weeping, and the boy went to his father and told his father his story and took his father with a constable to the house of the accused and the boy pointed out the house and a head constable was called and the boy pointed out the accused and the accused was arrested and taken to the

thana. On the next day medical examination by the civil surgeon took place of the boy and of the accused and injuries, were detected on the anus of the boy which showed that he had been a victim of sodomy and an abrasion was found on the penis of the accused, which the medical witness stated might have been caused by committing sodomy. There were also some blood stains on the dhoti of the boy and none on the dhoti of the accused and the dhoty of the boy was also stained with some kind of oil. This was certified by the chemical examiner and the imperial serologist stated that the dhoty was stained with human blood. A number of witnesses were produced at the trial two of whom stated that they saw the boy coming from the house of the accused weeping, and the medical witness appeared before the Magistrate and gave his evidence. The trial in the first place took place before a Magistrate. The Magistrate convicted, the accused under Section 377, Penal Code, and sentenced him to 18 months rigorous imprisonment and a fine of Rs. 300. The accused made an appeal to the Sessions Judge. The Sessions Judge was of the opinion that the sentence passed by the Magistrate was quite inadequate and that the case ought to have been committed to Sessions. He passed an order stating:

I, therefore in the exercise of the power conferred on me by Section 423(b) of the Criminal P.C. reverse the finding and sentence of the learned Magistrate and direct him to commit the case to the Sessions for trial.

2. On this order the Magistrate corrected the charge sheet into a charge triable by the Court of session and passed an order:

Under the order of the Sessions Judge dated 5-7-1934 I commit the accused to the Court of Sessions where he will stand his trial. I have amended the charge and explained it to the accused.

3. Some argument was made that the accused did not have sufficient opportunity for summoning witnesses, but the record shows that the Magistrate called on the accused to furnish a list of witlessness when he amended the charge and the accused did in fact file such a list next day. The case was tried by an Assistant Sessions Judge and no less than twelve witnesses were produced for the defence, Several points of law have arisen in this proceeding. The first point of law which

was argued is in regard to the method adopted by the Assistant Sessions Judge in regard to the boy Madan. This boy was called as prosecution witness No. 2 and the Court noted:

No oath was administered, being of tender age cannot understand its significance.

4. The boy then made a statement which was recorded in full, more than 2 typed pages of which the cross-examination occupied rather more than half. It is clear that the boy fulfilled the criterion for a witness laid down by Section 118, Evidence Act, and that he was not a person who was prevented by tender years from understanding the questions put to him or from giving rational answers to those questions. In fact if he had been prevented by his tender years from being able to understand the questions and giving right answers his statement would probably not have been taken at all. He having given his statement at a considerable length and in an intelligent manner is a person who according to Section 118, Evidence Act, should have testified as a witness. Now under the provisions of Section 6, Oaths Act, where a witness has an objection to making an oath, he shall make an affirmation and in every other case he shall make an oath. The Oaths Act does not recognise the criterion adopted by the Assistant Sessions Judge that an oath should not be administered because a child being of tender years cannot understand its significance. The oath therefore should have been made by this boy Madan under Section 6, Oaths Act. The oath was not made and the question arises whether this omission comes or does not come under the language of Section 13, Oaths Act, which states

No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

5. On the one hand on, behalf of the accused it has been argued with great ability by Sir Charles Ross Alston that the words 'no omission to take any oath or make any affirmation' mean 'no accidental omission' and that those words cannot cover the present case-where the Court deliberately refrained from administering an

oath, to this child on the ground that the child could not understand the nature of the oath. On, the other hand it is argued on behalf of the Crown that the words 'no omission to take any oath' are not qualified in any way by the statute and that it is improper for the Courts to read into that section the word 'accidental' when the word 'accidental' is not in the section. This is a matter on which different, views have been taken in this High Court and in. other High Courts. In the case of *Queen Empress v. Maru* (1888) 10 All. 207 a learned Single Judge, the late Mahmud, J. took the view that these words in Section 13 will only coyer an accidental omission and the view was taken in *Queen Empress v. Lal Sahai* (1889) 11 All. 183 by a Bench of this Court, that having regard to the language of the Oaths Act a Court has no option when once it has elected to take the statement of a person as evidence but to administer to such a person either an oath or an affirmation as the case may require, and reference was made to the ruling of *Queen Empress v. Maru* (1888) 10 All. 207; but in this Bench ruling no reference was made to the provisions of Section 13, Oaths Act, and therefore this ruling cannot he taken as an authority on that section. In a later ruling of *Emperor v. Dhani Ram* 1915 All. 437 a Bench of this Court specifically dissented from the ruling of the Single Judge in *Queen Empress v. Maru* (1888) 10 All. 207 and it held as follows on p. 51 (of 38 All):

We are unable to hold that the mere fact that the Court advisedly refrained from administering the oath renders the statement of the witness inadmissible. In our opinion a Court should only examine a child of tender years as a; witness after it has satisfied itself that the child; is intellectually sufficiently developed to enable it to understand sufficiently of the deeds seen and to afterwards inform the Court thereof. If the Court is of opinion that by reason of tender years the child is unable to do this it ought not only to refrain from administering the oath but from examining the child at all. If, on the other hand, the Court thinks that the child, though of tender years is capable of informing the Court of what it has seen or heard, it is best that the Court should comply with the provisions of Section 6 in the case of a child just as in the case of any other witness.

6. In that case the child m question was about six years, that is about the same age as the boy Madan whose age is given as six and a half years. In the particular

ruling no reference was made to 2. Queen Empress v. Lal Sahal (1889) 11 All. 183. Now the matter has been considered by other High Courts and a Full Bench of the Calcutta High Court in the 4. Queen v. Sewa Bhogta (1875) 23 W.R. 12 Cr. held that Section 13, Oaths, Act, would cover any omission whether intentional or otherwise. In this case four learned Judges were in favour of this view and the remaining learned Judge Jackson, J. held the opposite view. In the case of 5. Queen Empress v. Viraperumal (1893) 16 Mad. 105 there was a difference of opinion between the learned Chief Justice who held that Section 13 would not cure the defect and Parker, J. who held that it would cure the defect. In the case of 6. Fatu Santal v. Emperor 1921 Pat. 109 a Bench of the Patna High Court held that Section 13 would cure the defect and that was also held in the case of 7. Hussain Khan v. Emperor 1923 Lah. 332. Therefore there is, a great preponderance of opinion in favour of the view that Section 13, Oaths Act, does cure a defect such as in the present case where there was not an accidental omission but an intentional omission to administer the oath. I consider this view is the correct one and I agree with the quotation which we have made from the case of 3. Emperor v. Dhani Ram 1915 All. 437, I may note that in the present case the learned Sessions Judge applied the criterion of English Law as to whether the child understood the nature of an oath. In Powell's Law of Evidence, 1921, Edition, p. 187, it is stated that a child of tenders years who does not in the opinion of the Court understand the nature of an oath may now give un-sworn testimony in all proceedings for any criminal offence if in the opinion of the Court the child is possessed of sufficient intelligence to justify the reception of the evidence and to understand the duty of speaking the truth, but an accused person cannot be convicted unless the evidence of the child is corroborated in; some material particular implicating the accused. This provision comes from the statute of the Children Act, 1908, 8 Edward, 7 C. 67. Section 30. We consider that this provision of the English Law is sounder than the provision of the Indian Law in two respects: In the first place it makes provision for a child who may not understand the meaning of an oath but may be able to give intelligent replies, and in the second place it makes the provision that the evidence of the child requires corroboration. In my opinion it would be well if the Indian Evidence Act and the Oaths Act were amended in this particular and if it were not left to the Courts to apply Section 13,

Oaths Act, in this connection.

7. The next point on which arguments centred was in regard to the provisions of Section 423, Criminal P.C. which, prescribes in Sub-section (1)(b) for an appellate Court that the appellate Court may:

in an appeal from a conviction (1) reverse the finding and sentence, acquit or discharge the accused, or (2) order him to be retried by a, Court of competent jurisdiction subordinate to such appellate Court or committed for trial.

8. Now learned Counsel for the accused has argued at considerable length that what the appellate Court is empowered to do by the second alternative in this sub-section is only to direct a Magistrate to hold an enquiry under Ch. 18, Criminal P.C. and he argues that in the present case as the Magistrate merely made a formal order of commitment the provisions of Section 423 have not been carried out, and he says that the duty of the Magistrate was to re-summon all the witnesses for the prosecution and hear their evidence again in the presence of the accused and have them cross-examined and have the statement of the accused taken and after that draw up a charge sheet under Section 210 and carry out the procedure laid down in Sections 211, 212 and 213; whereas in the present case all that the Magistrate did after receiving the order of the Sessions Judge was to amend the charge and call on the accused to give a list of witnesses and make a formal order of commitment. Now learned Counsel relies on a ruling of a learned Single Judge of this Court reported in 8. Emperor v. Maula Khan (1907) A.W.N. 178. In that case an accused person had been sentenced by a Magistrate and the learned Sessions Judge committed the accused to his own Court and tried and convicted him. The learned Single Judge of this Court held that under Section 193, Criminal P.C. no Court of session shall take cognizance of any offence unless the case has been committed by a Magistrate duly empowered, and Section 477 was the only section which authorised a Court of session to commit the accused person to itself, and under Section 423, Criminal P.C. a Court of appeal may order an accused person to be committed for trial. That it was clear that what the section means is that the Court of appeal can direct the Magistrate competent to make a commitment to commit the accused to the Court of session for trial and that the

learned Judge was in error in thinking that he had a power to make a commitment to his own Court. The ruling does not support the proposition of learned Counsel because it is nowhere laid down in the ruling that when the Magistrate is directed to commit the accused to the Court of session for trial, the Magistrate is required to make an enquiry under Ch. 18, Criminal P.C. and to re-summon and re-hear the witnesses for the prosecution and take the statement of the accused again. Learned Counsel in fact has not produced any ruling whatever in which such a procedure is laid down. His argument however is that when a Magistrate has been ordered to commit an accused person for trial, the Magistrate can only act under Ch. 18, Criminal P.C. and if he acts under that chapter, he must therefore hold an enquiry.

9. We consider that this is a very narrow view to take and that the particular view of the learned Counsel for the accused would lead to great difficulties and would be prejudicial to accused persons. On this view if an appellate Court directs that a commitment should be made, it would give the prosecution an opportunity to call fresh witnesses who had not been produced before. Such a matter would be definitely to the disadvantage of an accused person. It would also lead to the conclusion that although the appellate Court had ordered that the accused should be committed for trial, the Magistrate would have jurisdiction to decide whether the accused person should be committed for trial or not and if he thought fit to disregard the order of the appellate Court and discharge the accused person. I consider that there is nothing whatever in the language of Section 423 to warrant the view which has been taken by learned Counsel. There has been some difference of opinion in different rulings as to whether the language in Section 423 which we have quoted means that the actual order for commitment is the order passed by the Sessions Court or whether it means that the appellate Court directs the Magistrate to pass an order of commitment under Section 213. In *Sessions Judge of Mangloer v. Malinga* (1908) 31 Mad. 40. *Queen Empress v. Krishna Bhat* (1886) 10 Bom. 319 and *In the matter of Kalagava Bapiah* (1904) 27 Mad. 54 this matter has been considered. Those Courts have come to the conclusion that the appellate Court may order the commitment itself, and in *Sessions Judge of Mangloer v. Malinga* (1908) 31 Mad. 40, it was held that both the courses are open to the appellate Court. In *Hasan Raza v. Emperor* 1922 All. 345 a learned Single

Judge of this Court made an order that the commitment should be to the Sessions Court and apparently he intended that there should be no intervention by a Magistrate In Queen Empress v. Maula Baksh (1893) 15 All. 205 a Bench, of this Court on p. 207 used language which can be read as intending that the order of the appellate Court, is sufficient without the intervention of a Magistrate and this can also be deduced from the ruling of a Bench in Emperor v. Mohan Lal 1915 All. 185 I think that this point is of no great importance, and I consider that both courses are legal, that is, that the appellate Court under Section 423 may either itself commit the accused for trial before the Sessions Court or it may direct a Magistrate to do so. But where it adopts the latter course, it does not give the Magistrate any jurisdiction to make any further enquiry and that the enquiry already held is sufficient for the purposes of Ch. 18. Some difficulty however arises from the provisions in Section 291, Criminal P.C. that the accused shall be allowed at the trial to examine any witness, not previously named by him, if such witness is in attendance, but he shall not except as provided in Sections 211 and 231 be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial. Section 231 which allows further witnesses only applies in those cases where there has been an alternation of the charge after the accouchement of the charge. It, is important therefore that the right of the accused to give the list of witnesses under Section 211 should be maintained in the case we are considering. It is therefore more convenient if an appellate Court adopts the course of directing a Magistrate to make an order of commitment. The Magistrate then frames a charge or amends the charge under Section 210, Criminal P.C. and under Section 211 requires the accused to give in his list of witnesses and the Magistrate makes a formal order of commitment similar to the order in the present case under Section 213. I consider that the course adopted in the present case is therefore most convenient for the ends of justice and there is nothing whatever in that course which is irregular.

10. The next point which was argued was in regard to the statement of the accused. The Magistrate had originally taken the statement of the accused and at the trial the Assistant Sessions Judge took the statement of the accused at the close of the prosecution in the usual way. The case was argued and the opinions of the assessors were taken and all the assessors stated that they consider that

the accused is not guilty. This was on 12th September 1934. A date was then fixed for judgment, 25th September, and on that date the accused appeared before the Court and the following order was recorded:

Today is the date for the pronouncement of judgment in this case. The accused is present. On being enquired he told that the hurt observed by the Civil Surgeon on his male organ was due to the fact that he was kept in the Kotwali in the night and there the Police people had handled it and during that it might have got hurt by the nails of the fingers of those people. I did not tell this to the Civil Surgeon, as he did not ask me about it. I did not mention this fact up till now.

11. The trial Court stated in its judgment:

Before taking up the defence I shall further like to note that today I had asked the accused how he got the hurt on his male organ and he replied that he was kept by the police in the Kotwali and there they had handled it and thus got scratches by their finger-nails. This explanation was never put forward by the accused up till now. It was no doubt suggested during argument by his advocates but I am not ready to believe it,

and the Court rejected it. A point was taken about this in appeal, when the learned Sessions Judge stated that the further statement of the accused can and should be disregarded, and that the accused was not prejudiced thereby: that after all it was an irregularity which cannot vitiate the trial. The point is now brought forward that the statement should not have been taken after the assessors had given their opinions and it is argued that the language in Section 342 that the Court may at any stage of any enquiry or trial put the questions to the accused to enable him to explain any circumstances appearing in the evidence against him would not cover the action of the trial Court. I do not express an opinion on this point but we consider that, the accused cannot have been prejudiced in the present case because for one thing all the assessors had brought in a finding of not guilty and for another thing the appellate Court has specifically stated that it did not take this statement into consideration. The accused cannot therefore in any way have been prejudiced by the procedure if the procedure did in fact amount to any irregularity. An objection was taken that the chemical examiner's report was not placed before

the trial Court but was taken on record by the appellate Court. This allegation however is incorrect because the record shows that the report of the chemical examiner was placed on the record by the Magistrate and has remained on the record ever since. Some objection was then taken that the Magistrate had not placed a certificate on the evidence of the medical witness. Presumably he did not do so, because he was not the Magistrate who committed the accused for trial to the Court of session. Therefore it was not necessary to do so. This defect was cured by calling the Magistrate as a witness under Section 428 to the appellate Court. In no way was the accused prejudiced by this procedure. No other point was raised in this criminal revision. The sentence and conviction appear to be correct.

Sulaiman, C.J.

12. I agree. The first question is whether the omission to administer oath to the child made his statement legally inadmissible and accordingly the trial is vitiated. There is certainly a distinction between a person not understanding questions put to him or prevented from giving rational answers to questions by reason of his tender years and a person not realising the significance of an oath, and his obligation to state the truth and liability for speaking falsehood. So far as the Indian Acts are concerned. Section 5 of the Oaths Act makes it obligatory upon all persons who may be lawfully examined or may give evidence to take the oath or solemn affirmation; and Section 118. Evidence Act, makes only such persons, competent to testify who are not prevented from understanding questions put to them and from giving rational answers to those questions by reason, of tender years, etc. Now even though a child may be sufficiently grown up, so as to be able to understand questions put to him and to give rational answers to such questions, although he is of tender years, he may nevertheless, be so young as not to be capable of realising the significance of the oath, and his liability for it. As a matter of fact a child under 7 years of age would not be liable criminally even if he spoke an untruth. It would therefore seem to follow that, in India even, children, must be made to take oath. If they are unable to understand the questions put to them, or to give rational answers to questions, then there would be no point in questioning them at all and taking their statements. On the other hand, if they are

competent, to do this, then it is obligatory on Courts to administer oaths to them.

13. The question whether Section 13 would cure the defect in, every case is not free from difficulty. The preponderance of authority now is certainly in favour of the view that even an intentional omission to take oath or make affirmation would be cured by this section. The word 'omission' is certainly wide enough to include a case where the witness has not taken the oath either due to any accidental omission which may be unintentional or even where the omission is intentional; but I should like to guard myself against being understood to hold that even in an extreme case, which is not likely to happen, where a Court defies the law and knowing that the law requires that an oath should be given and that, it is his duty to administer oath or to make an adult witness affirm it, deliberately omits to ask him to do so or prevents the witness from taking oath the defect is cured and a record of his verbal statement is legal evidence. In such a case it may be difficult to say that the act was a mere omission what the meaning of Section 13 and was not something more than a mere omission. Again there may be a case where parties in a civil suit agree to abide by the statement on oath of a referee or a witness, in which case it could hardly be contended that an omission, to administer oath to the referee would be cured by Section 13, Oaths Act. But where the Court acting in good faith and possibly under some error of law considers that, the oath in the circumstances is not necessary, I agree that there would be an omission within the meaning of Section 13.

14. In the present case the Court in not administering oath to the child took great care to note on the document on which his statement was recorded that the child was of such tender years that in the opinion of the Court, he was not capable of realising the significance of an oath and it, was on that ground only that the Court considered it useless and futile to ask him to take an oath.

15. Even where oath has not. been administered to a child and his testimony cannot be legal evidence, there may be cases where the fact, that he identified the accused consistently from the time soon after the occurrence till his appearance in Court may perhaps be some corroborative evidence and admissible on that ground.

16. As to the other question, Section 423, Criminal P.C. as worded undoubtedly allows both courses to be adopted by a Court of appeal. In an appeal from a conviction, the appellate Court not only may reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court but may also 'order him to be committed for trial.' The words 'order him to be' must necessarily be construed to be understood before the words 'committed for trial.' It is clear that the section does not require that the appellate Court should 'order the Magistrate to commit the accused for trial' but what it requires, is; that it should 'order the accused to be committed for trial.' The section is silent as to the Court which should commit the accused. It should therefore follow that it is open to the appellate Court either to commit the accused for trial to the Sessions Court itself or to order a Magistrate to commit him for trial. Section 437 which deals with cases exclusively triable by the Court of session also contains the same words and empowers a Sessions Judge or a District Magistrate, instead of directing; a fresh enquiry, to 'order the accused to be committed for trial.' Although, cases triable exclusively by the sessions are different in some respects, there is, no doubt that under Section 437, it would be open to a District Magistrate to commit the accused for trial to the Sessions Court direct without reference to a Magistrate from whose order he was hearing the appeal. The same words occur in Section 423 and must therefore have the same meaning.

17. There are some difficulties no doubt caused by the language of some of the sections in Ch. 23, for example, Sections 287 288, 291, etc., where the words 'committing Magistrate' are used. In cases where the Sessions Judge commits the accused for trial direct we would have to substitute the words 'Sessions Judge' in place of a 'Committing Magistrate' in many sections of Ch. 23, which would certainly create a certain amount of awkwardness. But as has been pointed out by my learned brother, before 1923 there was a provision in Section 477, Criminal P.C. under which a Sessions Judge could commit an accused person for trial direct without reference to any subordinate Magistrate and the same difficulties had to be got over even under the unamended Code.

18. The contention urged on behalf of the accused that in cases where the Sessions Judge directs and Magistrate to commit the accused to trial, the proceedings before the Magistrate are governed by Ch. 18 of the Code and that accordingly it is obligatory on the Magistrate to follow the provisions of all the sections in that chapter, has in my opinion no force. Where in the case of an appeal the appellate Court is of the opinion that the accused should not be acquitted straight off and is also of the opinion that the case was a fit one to be tried by a Sessions Court so that a more adequate sentence may be passed on the accused, it is empowered to commit the accused for trial. When such an order is passed, the Sessions Judge has already considered that there are sufficient grounds for committing the accused for trial. It may be that the Magistrate who first tried him was of a different opinion, but his opinion must be deemed to have been superseded by the appellate Court, and therefore the opinion of the latter Court must prevail. It follows that it should no longer be open to the Magistrate to go back upon this order and decide for himself whether the accused should or should not be committed for trial. I do not think that it could ever have been the intention of the legislature that even where an appellate Court, has ordered that the accused should be committed for trial, it would still be open to the Magistrate to overrule the appellate Court and discharge the accused. It, therefore follows necessarily that, when an order by the appellate Court has been passed, the only course open to the Magistrate is to proceed under Section 210 to frame the charge and under Section 211 to take the list of witnesses and even take witnesses for the accused under Section 212, but not to discharge the accused but only to commit him for trial by the Court of session under Section 213. The rest of the procedure relating to the issue of summonses for the witnesses for defence, for demanding bonds by complainants and witnesses, the detention in custody of the complainant or witnesses in case of refusal to execute the bond, notifications, etc., have to be followed as laid down in the sections following Section 213. This undoubtedly would be a more practicable and convenient course and would in most cases save the time of the Sessions Court, which would otherwise have to be spent, unnecessarily if the commitment were made by the Sessions Judge to the Court of the Sessions direct.

