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Tulsi Ram Vs. the State

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Court : Madhya Pradesh

Decided On : Jan-19-1956

Reported in : 1956CriLJ1290

Judge : Mathur, J.C.

Appellant : Tulsi Ram

Respondent : The State

Judgement :

Mathur, J.C.

1. This is a jail appeal by Tulsiram against his conviction of offences under Sections 366 and 376, I.P.C. for kidnapping and also for committing rape on Kumari Sumitra Devi, aged 10 years.

2. From the judgment under appeal it does not appear that the main eye-witnesses, namely, the prosecutrix, Kumari Sumitra Devi, and Chotey Khan, who were the first to see her after the commission of the crime did not appear before the Sessions Judge to give their statement on oath.

But the learned Government Advocate took pains in studying all the papers existing on the and it then came to light that though Kumari Sumitra Devi and Chotey Khan had been referred to as PWs. 15 and 13 respectively, they were examined only in the committing Court and not before the Sessions Judge, Their

statements were admitted and brought on the record under Section 33 of the Evidence Act, on the ground that they were not available.

When such a step was taken, the depositions should have been transferred from the file of the Committing Court to that of the Sessions Judge and the depositions should have been given an exhibit mark and placed amongst the documents proved and duly exhibited. Instead, what the learned Sessions Judge did was to give the numbers of the prosecution witnesses of the Sessions Court at the top of the depositions and to place these depositions just after the depositions of the witnesses examined in the Sessions Court. This was a wrong procedure.

3. It appears to me that both the learned Sessions Judge, who has since retired from service, and the Public Prosecutor, were anxious to have the case decided without any further delay, instead of ensuring that the Police took all the possible steps to secure the attendance of the witnesses, and if after a bona fide effort their whereabouts could not be known to lead evidence on this point, before having the depositions admitted under Section 33 of the Evidence Act.

Similarly, the Police Sub-Inspector, V. N. Prasad, (P. W. 12), made a statement on oath that certain witnesses were not traceable, though he did not do his best to serve those witnesses and to secure their attendance. This statement has been lightly made and is contradicted by the report dated 6-2-1955 of another Sub-Inspector, The report pertains to the summons issued for service on Kumari Sumitra Devi, Chotey Khan, and others. It is mentioned therein that these persons were previously working with the Hindustan Construction Company and thereafter went to Budhni and that it has been found from Budhni that these persons had gone to Bombay where they were working with the Hindustan Construction Company.

The Sub-Inspector also mentioned that as time was short and insufficient for sending a special messenger to Bombay, the summonses were being returned unserved. There is nothing on the record to show that an attempt was made to serve the witnesses at Bombay and such an attempt proved unsuccessful. The Sub-Inspector, V. N. Prasad, has also not made any statement on oath as to the attempts made by him.

In these circumstances it must be held that the prosecution had failed to prove that the whereabouts of Kumari Sumitra Devi and Chotey Khan, and, also others, were not known and their presence could not be obtained without an amount of delay and expense considered unreasonable under the circumstances of the case.

4. It is a well settled rule of almost all the High Courts that the evidence of an important witness recorded in a previous judicial proceeding is to be brought on record and used as substantive evidence in a subsequent case between the same parties in exceptional circumstances only, chiefly because by the use of Section 33 of the Evidence Act the accused or the other party loses a valuable right to cross-examine that witness.

Consequently, a heavy responsibility is cast upon the Courts of law to satisfy themselves that there exist circumstances which make the previous deposition admissible under tin's section. The satisfaction of toe Court is to be in the form of a proof. In other words, therefore, before a deposition can be admitted under Section 33 of the Evidence Act, all the reasonable steps should be taken to secure the attendance of the witness.

If the Court is informed by the Police or through any other agency that a witness has shifted to a particular station, an attempt should be made to serve that witness at that station. The whereabouts of a person can be said to be unknown when he cannot be found at all the places which he had, or was informed to have, visited either permanently or for a temporary stay. In the present case no such steps were taken.

When the conditions laid down under Section 33 of the Evidence Act have not been proved to exist, the depositions of the above witnesses could not be admitted and brought on record under this section. In the circumstances of the present case more rigorous proof of the circumstances enumerated in Section 33 of the Evidence Act is needed, considering that the conviction of the accused was being based solely upon the evidence of witnesses who were not being examined in the trial Court and whoso depositions were being used by virtue of Section 33 of the Act.

5. To sum up, the depositions of Kumari Sumitra Devi, Chotey Khan, and others cannot be considered against the accused and if this evidence is disregarded, there remains no judicial evidence on which his conviction can be based. There are thus only two orders in the alternative which can be passed by me either to acquit the accused or to remand the case for a fresh hearing after securing the presence of all the witnesses. The offences of kidnapping a girl aged 10 years and committing rape on her by an accused person of a mature age of about 37 years cannot be said to be petty and such that on mere technicalities of the offender, of course, if the charges are established, should go unpunished. A retrial would, therefore, be a more appropriate order.

6. The jail appeal is hereby allowed, the order of conviction is set aside and the case is sent back to the lower Court for a fresh do novo trial according to the law. In view of the fact that the appellant is in jail for a long time, the case should be disposed of without unnecessary delay.

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