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Court : Rajasthan

Decided On : Oct-06-1952

Reported in : AIR1953Raj66

Judge : K.N. Wanchoo, C.J. and; K.L. Bapna, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 154, 252, 256 and 286; Evidence Act, 1872 - Sections 33

Appeal No. : D.B. Cr. Appeal No. 28 of 1952

Appellant : The State

Respondent : Gajraj

Advocate for Def. : Madhusudan Narain, Adv.

Advocate for Pet/Ap. : Kansingh, Adv.

Disposition : Appeal allowed

Judgement :

Wanchoo, C.J.

1. This is an appeal by the State against the acquittal of Gajraj accused by the Sub-divisional Magistrate of Jodhpur.

2. The case relates to an incident which took place on the night between the 24th and 25th May, 1948. The prosecution story was briefly this:

3. Mst. Patasi is the wife of one Chhela. On the night in question, Chhela had gone out, and she was alone in her house in village Bala. She was sleeping when at about 10 P. M. or so, somebody touched her feet. She woke up and asked who he was, and the man replied that he was Gajraj. Thereafter, Gajraj wanted to have sexual intercourse with her; but she was not willing. On her refusal to submit to his wishes, Gajraj slapped her first, and when she raised an alarm picked up a Basola, which was lying nearby and hit her with it. As it was not very late, some people were awake, and were sitting at the Hatai which is an open place in the midst of the village. These persons were Manrupa, Ruggha P. W., Chautha P. W., and one or two others. They immediately ran to the house of Chhela, from which side they had heard the shouts of 'Mare re' 'Mare re'. On arrival there, they heard as if some one was beating somebody inside the house. Two of them, namely Manrupa and Chautha, then stood on one side at the door, while Ruggha remained standing at another place.

By this time, the accused got on the wall of the house and jumped down in the Bara and then started running away. He was chased by Manrupa and Chautha, while Rugga, who was an old man, remained there. Ania P. W. had a house not very far away, and he had also waked up on hearing the alarm raised by Manrupa and Ghautha who were chasing the accused. He came from the other side, and the accused Gajraj was then caught. He was taken to the house of Chhela. Thereafter, as the door was closed from inside, Manrupa got into the house by scaling the wall and opening the door. It was then found that .Mst. Patasi was seriously injured, and had a large number of cut wounds inflicted by a sharp weapon on her body. These persons, who had caught the accused, wanted to hand him over to somebody, and hence called upon the Havaldar.

It is not clear what the name of the Havaldar is; but the evidence is that that man was not prepared to keep the accused for the night. Consequently, he was handed over to one Mangilal who is a cousin of the accused. Next morning, Manrupa went to report at the Thana. It is however not possible to refer to the first report,

because the prosecution has neither produced Manrupa, nor the man who wrote out the report at the Thana. The police arrived that very day and took up investigation of the case.

4. The accused pleaded 'not guilty', and set up a story of his own, which is in many respects similar to the story for the prosecution. The house of the accused is also not very far from the house of Mst. Patasi. He says that he was sleeping at his house on the night in question. When he heard an alarm from the house of Mst. Patasi that somebody was beating her, he ran up to the house of Mst. Patasi, and saw Ania P. W. jumping out of the house. He immediately gave chase to Ania, and continued chasing him through the Baaar till he caught him near the kot. Mangilal, Panna and Bhika Vishnuis, who have been produced as defence witnesses, saw him chasing Ania and catching him, as they were at the shop of Mangilal, Havaldar Budhram and Rama Bavri had also come when Ania was caught.

These people then took Ania to the house of Chhela, and there found Ruggha, P.W., Chautha P. W. and Manrupa. Thereafter, Manrupa was asked to go in and find out what had happened to Mst. Patasi. He scaled the wall, went into the house and opened the door. He then came out and informed the people that Patasi had been seriously injured. Then Ania begged of Manrupa and Ruggha to save him and asked Gajraj to keep quiet. Gajraj however replied that he would tell the truth. Thereupon, all these people got angry with him and falsely implicated him in this case.

5. The judgment of acquittal in this case by the Magistrate is, in our opinion, unsatisfactory, and even perverse. He has not considered the main point to which he should have addressed himself, namely whether there was any reason why Mst. Patasi had given false evidence and substituted Gajraj in place of Ania. After the defence that was taken, it was admitted on both sides that an incident of the nature disclosed by the prosecution had taken place, and all that had to be decided was whether the man, who had caused these injuries, was Gajraj. The defence of course took upon itself to prove that the man was Ania. But even if the defence was not able to prove that it was Ania, the Magistrate had to decide whether the prosecution had been able to prove satisfactorily whether the man

was Gajraj. On that point, as we have already said, the most important evidence was that of Mst. Patasi, and the judgment of the Magistrate does not show that he realised the importance of that evidence; nor has he given anywhere any satisfactory reason why the statement of Mst. Patasi should be disbelieved in the circumstances of this case.

6. We now propose to deal with the evidence which has been led by both sides in this case. The main prosecution witness is Mst. Patasi. We have set out her story while giving the prosecution case. That she must have recognised the man who caused her as many as twenty injuries goes without saying. She says that the man was Gajraj. Nothing has been brought out in her cross-examination as to why she should name Gajraj as her assailant if the real assailant was Ania or some other person. It has not been suggested that she was carrying on an intrigue with Ania, and that she was prepared, in order to save Ania, to give out the name of Gajraj accused falsely. She has no enmity whatsoever with Gajraj, and therefore there was no reason for her to say that the assailant was Gajraj if it was somebody else.

7. Her statement has been supported by two witnesses, namely Chautha P. W. 2, and Ruggha P. W. 4. These two persons along with Manrupa were sitting at the 'Hatai'. On hearing the shouts raised by Mst. Patasi, they immediately ran to the house of Chhela. Both of them saw the accused jumping out of the house of Mst. Patasi and running away towards the court. Chautha and Manrupa gave chase to the accused, while Ruggha remained standing, there. It was urged that therewas no reason why the accused should have run towards the kot which is to the south and not towards his house which is to the south-east. The explanation to this however is simple, namely that the accused had jumped into the Bara which is towards the west of Mst. Patasi's house, and two persons were standing at the door of Mst. Patasi's house, i. e. between the Bara and the house of the accused. Therefore, the best course that the accused could take was to run to the south in the hope that he might escape that way and come to his house by a round-about way. These two witnesses also have no reason to implicate the accused falsely. No enmity between them and the accused has been brought out, nor has it been shown that they are particular friends of Ania, which would induce them to save Ania and implicate the accused in his place. These two witnesses and Mst. Patasi

were not even questioned about the story put forward by the defence that it was Ania who had jumped over the wall of. Mst. Patasi's house, and had run away and was being chased by Gajraj. It is true that a number of defence witnesses have been produced to say that Ruggha P. W., and Manrupa wanted to side with Ania and to save him. But when there is nothing to show why these witnesses should side with Ania and should falsely implicate Gajraj in his place, we are not prepared to accept the evidence which is given by the defence. We shall deal with that evidence in detail later on; but it is enough to say that nothing in that evidence has induced us to disbelieve the evidence of Chautha and Ruggha.

8. It was further urged that the evidence of Ruggha cannot be looked into at all when he was not produced by the prosecution for further cross-examination after the charge. The Sub-divisional Magistrate also says in his judgment that the evidence of Ruggha cannot be looked into because he was not produced for cross-examination. This shows that the learned Magistrate did not care to go through the evidence carefully, otherwise, he would have discovered that there was very good reason why Ruggha was not put up for cross-examination after the charge. The order-sheet of the 19th July 1948, shows that Ruggha was produced for cross-examination after the charge. The then Magistrate however found, after questioning Ruggha that he was mentally deranged, and was not in a fit state to give evidence. He, therefore, thought it fit to send Ruggha immediately to the Doctor and obtain his opinion also before deciding whether Ruggha was fit for giving a statement. The matter came up before the Magistrate next day, and the Doctor's report was that Ruggha was mentally deranged and was not in a fit state of giving evidence. Therefore the Magistrate ordered the discharge of Ruggha, as he obviously could not be cross-examined in that state.

9. It has been urged that the Magistrate was wrong in not examining Ruggha on the 19th or the 20th of July, and that, because the Magistrate did not do so, his evidence cannot be looked into. Reliance in this connection is placed on-- 'SC Mitter v. The State', AIR 1950 Cal 435. In that case, the witness was said to be seriously ill and a medical certificate was produced, and thereupon he was not produced for cross-examination. The learned Judges held that as the Doctor was not examined, and no attempt was made to prove that the witness was seriously

ill, his evidence could not be taken under section 33 of the Indian Evidence Act. The facts in the present case are however different. The witness was produced and was before the court. The court questioned him, and came to the conclusion that he was not in a fit state of mind to give evidence. The court could have act-ed on its own judgment and discharged the witness then and there; but the court wanted to fortify itself and therefore sent the witness to the Doctor and took the Doctor's opinion also. That opinion was received by the court in the form of a report next day, and thereupon the court discharged the witness who was present on the next day also. Under these circumstances, it must be held that the witness had been proved to be incapable of giving evidence.

10. The other point that is urged is that even if the witness was incapable of giving evidence, his statement could not be used under Section 33 of the Evidence Act, as the accused did not have the right & opportunity to cross-examine the witness. So far as opportunity is concerned, the accused certainly had the opportunity to cross-examine Ruggha and did actually cross-examine him when he was first produced before the charge. So far as the right is concerned learned counsel relies on the case of S. C. Mitter cited above, and on two further cases, namely, --'Emperor v. C. A. Mathews', AIR 1929 Cal 822 --'Lachmi Narain v. Emperor', AIR 1931 All 621. In Mathews' case it was held that the accused has no right to cross-examine till the stage provided in Section 256, is reached. The same view was taken in Lachmi Narain's case. With all due respects to the learned Judges, we find ourselves unable to agree with the view taken in these three cases. No reasoning is given in Mitter's case at all, while in Lachmi Narain's case, the learned Judge says that as express provision is made for cross-examination in Section 256, the accused cannot be said to have a right to cross-examine a witness at the earlier stage, though the learned Judge had to admit that the word 'evidence' used in Section 252 means not only the examination-in-chief of the prosecution witness, but also his cross-examination and re-examination if any.

He however held that the accused had no absolute right to cross-examine before the framing of the charge, but added that the Magistrates would generally be exercising a proper discretion if they permitted some cross-examination at least at that stage. We feel that this last observation of the learned Judge detracts from

what he has said above, and can only be justified when the accused has a right to cross-examine the witness. Whether he actually does so or not is a different matter. We may in this connection refer to a number of cases of other Courts, where it has been held, and if we may say so with respect rightly held, that an accused has a right of cross-examination even when the witnesses have been examined under Section 252 Cr. P. C. These cases are:-- (i) --'Ramyad Singh v. Emperor', AIR 1920 Pat 149; (ii) --'Varisai Rowther v. King Emperor', AIR 1923 Mad 609; (iii) --'Gurudin v. Emperor', AIR 1935 Nag 8.

We are therefore of opinion that the accused had both the right and opportunity to cross-examine Ruggha, and therefore when he became incapable of giving evidence at a later stage when he was to be cross-examined after the charge, his statement is admissible under Section 33 of the Indian Evidence Act.

11. We may now turn to the evidence produced by the defence. The Magistrate was particularly impressed by the evidence of Bhika Vishnui D. W. 2. because he thought that the presence of this witness was admitted by the prosecution Witnesses also. We find however that Bhika Vishnui does not belong to this village. He is aresident of Rawat. Chautha in his statement mentioned also Bhika without giving his caste or his residence. Ruggha however gave the caste of Bhika who was present as 'Rao'. The man who has been produced as defence witness is Ehika Vishnui. Therefore it cannot be said that this witness is the same whose presence has been admitted by the prosecution witnesses. Further, according to the evidence of these prosecution witnesses, the man named by them as Bhika was sitting at the Hatai with these people, while the statement of Bhika Vishnui D. W. 2 is that he was at the shop of Mangilal. As for the actual evidence of Bikha D. W. 2, it is enough to say that we are not prepared to believe him. He says that he had come to pay rent, while Panna and Mangilal say that he had come to sell wheat. Further he does not say that he actually saw Ania being caught by Gajraj though he was there. There is no reason why he should not have seen this.

12. Then we come to the evidence of Pukhraj. He also does not belong to this village. He says that he had come to purchase Ghee and was sleeping at the house of the accused when the incident took place. In the first place, we do not

understand why it was necessary for him to stay overnight if he had merely come to purchase Ghee. In the second place, he admits that there was no entry of the purchase and sale of Ghee in the account books which he keeps. He is therefore a chance witness, and we are not prepared to rely on his evidence on that account.

13. Then we come to Dhulsingh. He is the man who is admitted by both the parties to having been sent to fetch Chhela, husband of Mst. Patasi. He says that he went and informed Chhela that Ania had assaulted his wife. Chhela's evidence however is that Dhulsingh came and informed him that Gajraj had assaulted his wife. As between the two we prefer to accept the evidence of Chhela who had no reason whatsoever to substitute Gajraj for Ania.

14. Then there is Mangilal who is a cousin of the accused, and is obviously interested in saving him. The evidence that this witness and other witnesses have given about the intervention of Manrupa and Ruggha in favour of Ania is so discrepant that we are not prepared to rely on the story put forward on behalf of the defence that it was Manrupa and Ruggha who wanted to save Ania, and therefore implicated Gajraj falsely.

15. The other witnesses are Ramla chowkidar, Budhmal Havaldar and Panna. The evidence of these witnesses as well as of the other defence witnesses is open to the criticism that no attempt was made, when the prosecution witnesses were under cross-examination, to put the story that these witnesses have given in court. Even Mst. Patasi was not asked that it was Ania who had entered her house and assaulted her and not Gajraj. Further, the story, that has been given by these witnesses, namely that Manrupa and Ruggha openly asked Gajraj in the presence of so many witnesses to let go Ania and to compromise the matter, and when Gajraj refused to do so they threatened to implicate him, seems to us to be absurd on the face of it. In any case, Gajraj was not the person who could arrange a compromise, and we are sure that if there was any question of any compromise even Manrupa and Ruggha should have realised that they had to wait till the husband of the woman came back. The very fact that these witnesses say that immediately after Ania had been caughtManrupa and Ruggha took interest on his behalf and wanted to compromise even before the husband of Patasi came back

shows that this defence is false.

16. We are therefore satisfied that the evidence of Mst. Patasi is true and there is no reason whatsoever for her substituting Gajraj in place of Ania or somebody else. Her statement has been supported by the statements of Chautha and Ruggha and also Ania. There is nothing to show that she had any intrigue whatsoever with Ania & desired to save him. The story put up on behalf of the defence also shows that the facts as given by the prosecution are correct, and the only question that remains to be decided is whether the man, who caused the injuries to Mst. Patasi, was Gajraj. On this point, the best evidence is of Mst. Patasi, and we accept her statement as correct.

17. It has been urged that some witnesses particularly Manrupa have not been produced. Generally is is certainly the duty of the prosecution to produce all the witnesses who know about the facts of the case. But where the number of such witnesses is large, it is not, in our opinion, necessary that every one should be produced. In this connection we may refer to -- 'Malak Khan v. Emperor', AIR 1946 Privy Council 16 where their Lordships observed as follows at page 19 :

'It is no doubt very important that, as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution and though a Court ought, and no doubt will, take into consideration the absence of witnesses whose testimony would be expected, it must judge the evidence as a whole and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses.

In this case, it would have been better if Manrupa had been produced, taut we have got the evidence of Mst. Patasi and two other witnesses who are as good as Manrupa, and whose statements, in our opinion, are true. Under these circumstances, the non-production of Manrupa is of no consequence.

18. On a careful consideration therefore of the evidence in the case, we are satisfied that the accused is guilty under Section 457 of the Indian Penal Code. He committed house breaking by making entry into the house by scaling the wall at night. The intention obviously was to commit rape on Mst. Patasi. He is also guilty under Section 326 of the Indian Penal Code, for he caused injuries with a sharp weapon and thereby caused permanent disfiguration of the face, as will appear from the evidence of Doctor Mathur. We now come to the question of sentence. Considering the nature of injuries, we are of opinion that two years' rigorous imprisonment would be adequate punishment for the accused.

19. We, therefore, allow the appeal, set aside the order of acquittal passed by the trial court, and convict Gajraj accused under sections 326 and 457 of the Indian Penal Code. He is sentenced totwo years' rigorous imprisonment under each section. The two sentences will run concurrently.

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