

State of Rajasthan Vs. Vijairam

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Court : Rajasthan

Decided On : Apr-17-1967

Reported in : 1968CriLJ270

Judge : D.M. Bhandari and; P.N. Shinghal, JJ.

Appellant : State of Rajasthan

Respondent : Vijairam

Judgement :

D.M. Bhandari, J.

1. This is an appeal by the State from the judgment dated 30th March, 1963 of the Sessions Judge, Partabgarh, acquitting Vijairam accused-respondent of the offence under Section 376/511 I.P.C.

2. Briefly, the case for the prosecution is that on 6th November, 1962, at about 4-00 P. M. Vijairam respondent, resident of Khariakheri, met Mst. Shyam Kanwer (P.W. 4), a minor girl, aged about 11 years, of the same village, in the bed of the 'nallah' flowing on the outskirts of that village and attempted to commit rape on her. A report of the incident was made by Arjunsigh, father of the said girl, who was posted as a constable at Police Station, Deogarh, on 8th November, 1962, at 3-30 P.M. On the date of occurrence, Arjunsingh was at Police Station Deogarh and his elder son Bheronsingh and his wife had gone from village Khariakheri to

Partabgarh to make purchases leaving Smt. Shyam Kanwer and her younger brother Amar Singh in the village.

When Bheronsingh returned to the village, he was informed by Smt. Shyam Kanwer that she and Amarsingh had gone to graze the bullocks near the field of Arjunsingh, when Vijairam came there and took the girl to the 'khal' and there felled her on the ground and then attempted to commit rape on her. Bheron Singh went to his father Arjunsingh on 7th November, 1962, at Police Station Deogarh and informed him of the occurrence. Arjunsingh went to his village to make enquiries from Smt. Shyam Kanwer and then submitted a written report to the Station House Officer, Partabgarh, who had reached village Khariakheri on 8th November, 1962. Smt. Shyam Kanwer was examined by Dr. I.P. Agarwal on 9th November, 1962, but the doctor found no mark of injury, or blood or seminal stains on the external genitals or the thighs of the girl. The hymen was found intact. The accused was also examined by the said doctor. He appeared to be a young man of 25 years, capable of having sexual intercourse.

3. The accused was arrested and challaned before the Magistrate First Class, Partabgarh, and was committed to the Court of the Sessions Judge, Partabgarh, for trial under Section 376/511 I.P.C. The accused pleaded not guilty and stated that he had been falsely implicated on account of enmity. He produced Chhagan (D.W. 1) in his defence. The learned Sessions Judge took the view that if the statement of Smt. Shyam Kanwer was to be believed, the accused was guilty of an offence under Section 376/511 I.P.C., but he refused to act on her statement as he found inconsistencies in the statements of Smt. Shyam Kanwer and her brother Amar Singh. The prosecution also examined Bheronlal (P.W. 6) who turned hostile and did not support the prosecution case. Taking this view of the evidence, the learned Sessions Judge acquitted the accused.

4. In this appeal, it has been argued by the learned Deputy Government Advocate that the learned Sessions Judge has wrongly acquitted the accused by treating minor inconsistencies in the statements of Smt. Shyam Kanwer and Amarsingh as substantial. His contention is that it is proved by the evidence of Smt. Shyam Kanwer, which is corroborated by the statement of her brother Amarsingh, that the

accused attempted to commit rape on her and that, in any case, he felled her on the ground and assaulted her indecently.

5. For appreciating the arguments of the learned counsel for the accused, it may be mentioned that before examining Smt. Shyam Kanwer, the learned Sessions Judge put certain questions to her and he came to the conclusion that the witness did not understand the sanctity of oath, and, therefore, she was examined without the administration of oath. No questions were put to her to judge her competency as a witness. In the case of Amarsingh also who, in the opinion of the Sessions Judge, was aged about 8/9 years, no questions were put to judge his competence. Neither were any questions put to him as to whether he understood the necessity of speaking the truth, or understood the sanctity of the oath, and the learned Sessions Judge proceeded to examine him without the administration of oath in view of the tender age of the witness.

It is contended by the learned Counsel for the accused that, in these circumstances, both the witnesses could not be taken to be competent witnesses and their evidence is inadmissible. He has further urged that the statement of Amarsingh, which was taken without administering oath, is inadmissible in evidence. He has further urged that there were material inconsistencies in the statements of Smt. Shyam Kanwer and Amarsingh, and if the trial Court did not rely on the evidence of these child witnesses, his appraisal of their evidence should not be disturbed in appeal from an order of acquittal. Then it is contended that the un-sworn testimony of a child witness cannot be corroborated by the un-sworn testimony of another child witness.

6. We first proceed to examine the question of the competency of these two witnesses. In the opinion of the learned Sessions Judge, Smt. Shyam Kanwer appeared to be 10/11 years old, while Amarsingh appeared to be 8/9 years old, and both may be taken to be witnesses of tender age, i.e., child witnesses. Now, when a child witness is produced before a Court of law, the first thing the Court has to consider is whether such a witness is not competent to testify on account of tender age. Section 118 of the Evidence Act lays down that:

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions....

Ordinarily the proper course to adopt, for a Court of law to judge the competency of a child witness, is to put preliminary questions to, see whether the witness is capable of understanding the questions and giving rational answers. Such questions should be simple questions, meant only to judge the level of understanding attained by the child witness. In the case of both these witnesses, no such preliminary examination was made by the Sessions Judge. Of course certain questions were put to Smt. Shyam Kanwer for the purpose of ascertaining whether she understood the necessity of speaking the truth and the sanctity of oath. Such preliminary examination is always desirable and a record of questions and answers put to the witness should be preserved, but it cannot be laid down as a matter of law that without such preliminary examination the statement of the witness is inadmissible. The preliminary examination is undertaken to save time. It enables the Court to form an opinion whether the witness is capable enough to understand the questions put to him and to give rational answers.

In a given case, the Court may form the opinion, after such preliminary examination, that a child witness produced before it is an incompetent witness and may refuse to examine him. In such a case, there is the obvious necessity that the record of the questions put and answers given, should be maintained, otherwise the appellate Court would not be in a position to give a verdict about the correctness of the opinion of the trial Judge. It is therefore desirable that the record of the preliminary examination of child witnesses should be kept. But where the statement of the witness has been recorded, the statement of the witness recorded by the trial Court will ordinarily furnish sufficient material to the appellate Court to judge the competency of the witness. This view has been taken in a large number of cases, all of which need not be cited. We may, however refer to the Division Bench case of Nafar Sheikh v. Emperor ILR 41 Cal 406 : AIR 1914 Cal 276, Mookerjee J. observed as follows on this point:

It has further been argued that, under Section 118 of the Indian Evidence Act, he was bound to ascertain, before these children of tender years were examined as witnesses, whether they had capacity to understand and to give rational answers. Reliance has been placed upon the decision in *Sheikh Fakir v. Emperor* (1906) 11 Cal WN 51, which, it has been urged, is an authority for the proposition that it is obligatory upon a Judge to test the capacity of a witness of tender years by appropriate questions and to form his opinion as to the competency of such a witness, before the actual examination commences. It may be conceded that there are expressions in the judgment in the case mentioned which tend to support this broad statement; but, in my opinion, the proposition thus widely formulated is not justified by the terms of Section 118 of the Indian Evidence Act. That section lays down that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years. The Legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned, the Court must, by a preliminary examination, test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness, before the actual examination commences. In fact, the case of *Queen v. Whitehead* (1866) 1 CCR 33, shows that the incompetency of a witness may very well appear in the course of his examination-in-chief, and that the evidence of a witness so found to be incompetent may at that stage be withdrawn from the jury. The true rule on the subject is concisely stated by Bremer, J. in *Wheeler v. United States*, (1895) 159 US 523, in these terms: 'The decision of this question (whether the child-witness has sufficient intelligence) primarily rests with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial Judge will not be disturbed on review, unless from that which is preserved, it is clear that it was erroneous'. The mere circumstance that the Sessions Judge did not interrogate the witnesses, before their examination began, with a view to test their capacity, does not, in the view I take of the true effect of Section 118 of the Indian Evidence Act, invalidate

the trial.

This view has been followed by the Calcutta High Court in *Krishna Kahar v. Emperor* ILR (1939) 2 Cal 569 : AIR 1940 Cal 182, and the Patna High Court in *Lakhan Singh v. Emperor* ILR 20 Pat 898 : AIR 1942 Pat 183, has also taken the view that there is no legal obligation to ask preliminary questions though it is a wise course and that the object of such preliminary questioning is not to legalise the evidence but merely to save the time of the Court, The Allahabad High Court in *Ram Hazoor Pandey v. State* : AIR1959 All409 , has also taken the view that:

Although it is not necessary to have a preliminary examination, namely, *voire dire*, of a child witness in order to make his testimony admissible, nevertheless, we are of the opinion that such a course is desirable and should be resorted to, for it offers an opportunity to the Court to assess the mental capacity of a child witness.

In the instant case, the trial Judge has not expressly given his opinion that the aforesaid witnesses were competent witnesses but he proceeded to examine them. No objection was taken by the counsel for the accused that they were not competent witnesses. After scrutinizing statements of both the witnesses, we are also of the view that they cannot be held to be incompetent witnesses. They have given rational answers to the questions put to them. Thus their statements cannot be rejected on the ground that they were not competent witnesses.

7. Now we proceed to examine the effect of non-administration of oath to these witnesses. At the outset we may point out that competency of a witness and the question of administration of oath to him are two different things. It is only when a witness is found to be a competent witness that the question of administering oath or affirmation arises and oath is administered to bind the conscience of a person to speak the truth. According to the decision of the Supreme Court in *Rameshwar v. State of Rajasthan* : 1952 CriLJ547 , the main object of the Oaths Act is to render persons who give false evidence liable to prosecution. The provision of Section 5 of the Indian Oaths Act, 1873, makes it incumbent that any witness examined by a Court of law in a judicial proceeding may be administered oath or affirmation. But the proviso to that section makes an exception in case of a child witness under 12 years of age. The administration of oath or affirmation may be dispensed with if

the Court which examines such witness is of opinion that though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation. Thus, under this provision, administration of an oath or affirmation may be dispensed with when the Court forms an opinion that a child witness does not understand the nature of an oath or affirmation but understands the duty of speaking the truth.

8. How is the Court to form such an opinion? The obvious course is to put certain preliminary questions to the child witness whether he understands the difference between truth and falsehood, and whether he does or does not understand the nature of the oath or affirmation. If the Court is assured that a child witness comprehends the necessity of speaking the truth, but does not appreciate that he will incur displeasure of God in case he speaks falsehood, he will be examined without administering oath. The reason is that in the case of a child witness, it may be that he may not have developed any notion about God or His pleasure or displeasure, but, nonetheless, he may understand that he is to speak the truth and relate to the Court of law what he saw and heard.

In this case, Smt. Shyam Kanwer was put certain preliminary questions, one of which was whether a man should speak the truth or falsehood and she stated that a man should speak the truth. But she could not give an answer to the question as to what would happen to a man who told a lie in a Court and, for this reason, no oath was administered to her. In case of Amarsingh, there is no record that any questions were put, but the Sessions Judge has mentioned that in view of the tender age of the witness he was examined without oath. We have thus the opinion of the Court why oath was not administered to Amarsingh, though we do not find on record the questions put to this witness.

9. The proviso to Section 5 of the Oaths Act does not require that the Court should also keep a record of the material which formed the basis of its opinion, The Sessions Judge was satisfied that it was a case in which oath should not be administered and statement be recorded¹ without the administration of oath. We cannot take it that the Sessions Judge was not cognisant of the provision contained in the proviso of Section 5 when we find that on the same day he had

recorded the statement of Smt. Shyam Kanwer and had taken the precaution of putting questions to see whether the witness understood' the necessity of speaking the truth, but did not understand the sanctity of oath. The only defect, if we may call it a defect, is that there is no-record of the question put to Amarsingh. But in law this does not matter.

10. We may also refer to Section 13 of the Oaths Act which lays down that:

No omission to take any oath or make-any affirmation., and no irregularity whatever in the form in which any of them is administered shall...render inadmissible any evidence....

This provision is quite unqualified in its terms and applies to all cases of irregularity, whether accidental or otherwise AIR 1952 SC 54. Any defect in recording the statement of Amarsingh must therefore be ignored by virtue of this section. Thus, we are not prepared to accept the contention of the learned Counsel for the accused-respondent that the evidence of Amarsingh is not admissible in evidence.

11. Coming to the merits of the case, the evidence of Smt. Shyam Kanwer is that the accused-respondent took her forcibly to the 'khal' and felled her on the ground and raised her skirt. Then the accused, after loosening his dhoti, put his male organ over her vagina. Amarsingh was at that time standing 5/7 steps from her. A little afterwards Bheron carpenter came-and the accused ran away. Amarsingh has supported the statement of his sister. On cross-examination, he has stated that the accused had tied the mouth of his sister and then he threw her on the ground and, after loosening his dhoti, he lifted the skirt of his sister and sat on her. He denied the suggestion that the accused had bent down on his sister, but maintained that the legs of his sister were below the accused. These answers given by the witnesses have been taken to be substantial and major inconsistencies, by the Sessions Judge. In our opinion, this approach of the trial Court, in the appreciation of evidence of these witnesses, is not justified. It may be that soon after the accused had sat on the girl after lifting her skirt, somebody came near the scene of the occurrence and the accused ran away.

12. An argument has been addressed that there was some delay in making the report, but that delay has been sufficiently explained by the statement of Arjunsingh (P.W. 1) and Bhaironsingh (P.W. 2), the father and the brother of Smt. Shyam Kanwer respectively.

13. Next we take up the question of corroboration. It has been repeatedly laid down by Courts of law that the evidence of a child witness should be treated with caution and the need for corroboration of the evidence of a child witness must be present in the mind of the Court, though the Court may convict an accused on the testimony of a child witness if it feels satisfied about the guilt of the accused. In the instant case, the trial Court felt that corroboration of the statement of Smt, Shyam Kanwer was necessary. But such corroboration was available to the Court in the statement of Amarsingh. Of course, the evidence of both the witnesses was not taken after the administration of oath, and we have a case in which the unsworn testimony of a child witness is being corroborated by the unsworn testimony of another child witness. In *R. v. Campbell* 1956 2 All ER 272, it has been held that the unsworn evidence of a child must be corroborated by sworn evidence and if the only evidence implicating the accused is that of the unsworn child, the Judge must stop the case. But the law in England is somewhat different from that in India. In England, under Section 38(1) of the Children and Young Persons Act, 1933, it has been provided that:

Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the Court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

Thus, it has been specifically provided under Section 38(1) of the said Act that the accused shall not be liable to be convicted of the offence on the unsworn

testimony of a child witness unless that evidence is corroborated by some other material evidence implicating him. Such a restriction in the matter of acceptance of the evidence of an unsworn child witness is not to be found under the provisions of the Indian Oaths Act. The weight to be attached to the evidence of child witnesses will of course depend on the circumstances of each case, and it may be that a Court may come to the conclusion, on appreciation of evidence, that the unsworn testimony of a child witness does not furnish sufficient corroboration to the unsworn testimony of another child witness. But in India it cannot be laid down as a matter of law that the unsworn testimony of a child witness must always be corroborated by some sworn testimony. Even in 1956 2 All ER 272, Goddard C.J. has pointed out that the sworn testimony of a child witness can be corroborated by the unsworn testimony of a child witness. In this connection, we may refer to the following observation:

It is true that for very many years the Courts have always warned juries that it is dangerous to convict on the uncorroborated evidence of a child, whether of tender age or not, but so also is a similar warning given in all sexual cases. In a case where the complaining party is a grown woman the jury would be advised to look for corroboration and, if the evidence were that of a child, that is, of a child under the age of fourteen but who in the opinion of the Court can be sworn, we can find no reason for saying that such evidence could not be accepted by the jury as corroboration. To hold otherwise would mean that if a mother was indecently assaulted in the presence of her son aged say twelve or thirteen his evidence could not be accepted as corroboration if the jury believed him. Whether evidence that is legally admissible does corroborate is for a jury to determine. The Court points out to them what can be corroboration, and then it is for the jury to decide whether it does corroborate and it is open to them to accept or, if they do not think it safe to act on the evidence of one so young, to reject it. It is no doubt also desirable to remind the jury that the evidence of a child, not only of one in respect of whom the charge is made but of one called to corroborate, needs to be looked at with care, but that the jury may accept it as corroboration we think is not open to doubt.

Under the Indian law corroboration of the unsworn evidence of a child witness should not necessarily be by the sworn testimony of another witness. Such corroboration may be available from the unsworn testimony of a child witness. Of course, it is to be always remembered that the evidence of both the child witnesses is to be looked at with care and acted upon with caution, but it cannot be laid down that the unsworn testimony of a child cannot be corroborated by the unsworn testimony of another child and he must always be corroborated, if corroboration is required, by sworn evidence.

14. In the instant case, after carefully considering the evidence, we are of the view that it is established beyond any manner of doubt that Smt. Shyam Kanwer was taken by the accused in the bed of the 'nallah', and there the accused, after raising her skirt, sat on her, To this extent the evidence of Smt. Shyam Kanwer is corroborated by the evidence of Amarsingh and we accept their evidence as reliable. This certainly makes out an offence under Section 354 I.P.C. and there was no reason for the trial Judge not to believe this part of the prosecution case. The accused is undoubtedly liable to be convicted under Section 354 I.P.C.

15. We therefore accept the appeal and convict Vijairam accused-respondent under Section 354 I.P.C. and sentence him to undergo four months' rigorous imprisonment and a fine of Rs. 200/-. In default of payment of fine, the respondent shall undergo further rigorous imprisonment for two months. The accused is on bail and the District Magistrate shall cause him to be arrested to undergo the sentence.