

Atiar Rai Vs. Emperor

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Court : Kolkata

Decided On : Jan-22-1912

Reported in : (1912)ILR39Cal476

Judge : Holmwood and; Sharfuddin, JJ.

Appellant : Atiar Rai

Respondent : Emperor

Judgement :

Holmwood and Sharfuddin, JJ.

1. This was a Rule calling upon the District Magistrate of Shahabad to show cause why the conviction of the petitioners should not be set aside on the ground that the lower Court inspected the place where the offence is said to have been committed and did not record a note of what he saw.

2. Now, what happened in this case was this. The defence urged that the sides of the kote or mound on which the assault took place were unscaleable, and the space was not sufficient to hold so many persons. This being a point on which the Magistrate says he could satisfy himself, he visited the place on the 23rd of July, and found, as he puts it, that his trouble for the defence had been wasted; there was no question of the place being inaccessible, it was merely a slight slope on the south, and on the north it was practically on a level with the village, while as for

the place of assault it was sufficient to hold twice the number of persons.

3. The learned Judge in appeal, in dealing with this point, briefly recapitulated the above findings, and says that the Magistrate visited the spot as these were points that could be verified by a local enquiry. Before the Judge it was urged that the Magistrate had made no note at the time of his local inspection. This, the Judge says, he certainly should have done. However he had embodied the result of his inspection in his judgment, which was delivered only four days later, and when what he saw must have been fresh in his memory. Thus in the Judge's opinion his omission to make a note at the time, though irregular, cannot be said to have caused any failure of justice.

4. In this we fully agree, and the only question we have to consider is whether in all cases the omission to place on the record the results of a local inspection is a fatal error of jurisdiction apart from any prejudice which it may cause to the accused.

5. We do not find any authority for such a proposition. The case relied on by the learned vakil who obtained the Rule is that of Babbon Sheikh v. Emperor (1910) I.L.R. 37 Calc. 340. But none of the judgments delivered in that case consider or deal with the ruling in the case of Joy Coomar v. Bundhoo Lall (1882) I.L.R. 9 Calc. 363 though that case was cited in argument for another reason. That ruling imports a reason for giving evidentiary value to local inspections which seems to have been overlooked in subsequent decisions. What those reasons are we shall deal with later on. But what we desire to point out here is that there are in effect three different kinds of local inspections

(i) Those that are authorised or directed by the Code of Criminal Procedure, and which are governed by the rules and limitations imposed by the Code itself.

(ii) Those which are in the nature of the view by the Jury laid down in Section 293 of the Code.

6. Magistrates having the functions of both Judge and Jury in cases decided by them may, in our opinion, view the place in any case, in order, as the rulings on

the point say, to follow or understand the evidence. We are fortified in this opinion by the ruling of *In re Lalji* (1897) I.L.R. 19 All. 302. It is, as the Judges there say, not only not objectionable, but in many cases highly advisable, that a Magistrate trying a criminal case should himself inspect the scene of the occurrence, in order to understand fully the bearing of the evidence given in Court. But if he does so, he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other. This is the same rule which is applied in the Code itself to the inspection by the Jury.

(iii) But there is a third class of local inspections under which we think the present and very many other cases fall, and that is the class referred to in the ruling in *Joy Coomar v. Bundhoo Lall* (1882) I.L.R. 9 Calc. 363. above-mentioned.

7. There is express provision for these local investigations in the Code of Civil Procedure, but there is nothing that can be deemed to prevent them in the Code of Criminal Procedure, and in so far as they, conform to the provisions of the law of Evidence, it is obvious they cannot be excluded.

8. Now, we desire to draw particular attention to what the Judges say as to the evidentiary value of such local inspections. They say: 'The District Judge also appears to have been of opinion that the results of the enquiry, conducted by the Munsif in this case, could not be considered by him, because it was not evidence according to the definition of that word in the Evidence Act. He is perhaps right in this view. The definition of the word 'evidence,' as given in the Evidence Act, means and includes (a) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry: such statements are called oral evidence; () all documents produced for the inspection of the Court: such documents are called documentary evidence. The result of a local enquiry by a presiding judicial officer does not come under either of these two heads; but the District Judge has not taken into consideration the definition of the word 'proved' which comes immediately after. It is to this effect: 'A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.' It

would appear therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the words 'matters before it.' The Judges then proceeded to hold that the Appellate Court cannot exclude the personal observations of the lower Court from its consideration. Whether there are good grounds for accepting the results of the local investigation as correct or rejecting it as incorrect, are matters with which the High Court in second appeal (and, we may add, also in revision) has nothing to do. It is for the Appellate Court to decide these questions. In this very case the Judges for the first time emphasize the importance of putting upon paper the result of the investigation when completed. 'It is very desirable,' they say, 'that judicial officers conducting local investigations should place upon record the results of their investigations as soon as they are completed, so that the parties may have an opportunity of seeing what the facts are which the judicial officers consider to be established by the local investigations.' But where none of those facts are impugned as incorrect, the Appellate Court cannot exclude them from his consideration. It would seem to follow that if they are so impugned and there is no contemporaneous record of them, the Judge would not be able to act upon them, but it is certainly not a positive rule of law that a note must be placed on the record on the spot. In this case none of the objections that have been taken in the various cases cited in this Court apply. The defence practically said: 'The mound itself is our witness; go and look at it.' The Magistrate went and saw that it was a witness against them. His finding was not impugned before the Judge, but it was sought to exclude this most relevant and important matter before the Court on the mere technical ground that the observation was not made matter of record on the spot. The Judge considered the points, and rightly considered it, from only two points of view--first, whether the fact observed was correct; second, whether the defence had been in any way prejudiced--and he found that the correctness of the finding was not impugned and that there was no prejudice in the irregularity in omitting to record a note at the time. The present case is clearly not touched by the decision in *Babbon Sheikh v. Emperor* (1910) I.L.R. 37 Calc. 340. There are no doubt passages in the judgment of Woodroffe J. which might seem to imply that the observation of a fact by the Magistrate could not be admitted. But a careful perusal of the judgment as a whole shows that what is meant is that mere observation cannot be allowed to override

the necessity of evidence, and a case cannot be decided merely on observation made by the Court locally. If in looking at a place, in order to understand the evidence, the Magistrate thereby understands that the description of the place given in the evidence is erroneous or false, he is certainly not precluded by the laws of Evidence from holding that the facts, as stated by the witnesses who gave that erroneous or false description, are not proven, and in so holding he does not make himself a witness but acts as a Judge deciding on matters before him. We have shown that the judicial system in this country, of which the Evidence Act is a most important factor, gives the Court power to adjudge the existence of facts on matters before it as well as according as they are deposed to on the evidence. To hold otherwise would be in direct conflict with *Joy Coomar v. Bundhoo Lall* (1882) I.L.R. 9 Calc. 363 which as far as we know, has never been dissented from. Woodroffe J. clearly shows that the danger to be guarded against is the supersession of all evidence by mere observation, and the head-note of the case appears to us to go too far in saying that the Magistrate cannot import into the case matters or facts which he has himself observed, if that is what is intended. But the use of the word 'import' and the words 'other matters' leave it doubtful what is intended. No such words occur in either of the concurrent judgments which govern the decision, and the words that do occur are those cited in the next paragraph of the head-note, with which we fully agree, that a Magistrate cannot import into his judgment matters of opinion and inference based on circumstances not on the record.

9. The case of *Girish Chunder Ghosh v. Queen-Empress* (1893) I.L.R. 20 Calc. 857 is one which, we may observe, has nothing to do with local investigations made after hearing evidence by a trying Magistrate. Upon it is based a contention in this and similar cases that a Magistrate constitutes himself a witness by holding a local inspection in a case in which he is the presiding Judge. The facts of that case clearly show that the District Magistrate who had seen the occurrence and was the best witness for the prosecution constituted himself the Judge for the trial of the case, and the decision was that a witness could not be a judge in the case, inasmuch as it is impossible that a Magistrate can be a witness in a case in which he is the sole judge of law and fact. In other words, a man who is a priori a witness to an occurrence cannot assume jurisdiction which he might otherwise have to

decide on the facts of that occurrence as a judge. But as local inspections are recognised by the law, and as the Magistrate must make observations of fact in such an inspection and cannot, as Chatterjee J. points out, fail to believe the testimony of his own senses, it is clear that by making such observations he cannot constitute himself a witness in the case. As long as he is a witness he cannot be a judge, and as long as he is a judge he cannot be a witness. If he is a witness, he ousts his own jurisdiction. If he is a judge, he may adjudicate on all matters before him which require proof and in doing so he may use his eyes as well as his ears. We do not for one moment desire to minimize the importance of making a note of what is observed at a local inspection, nor to in any way appear to condone the introduction either into the report or the judgment of matters of opinion and inference depending on the facts observed. But if the facts observed support or rebut the evidence adduced by either side and cause the Court to understand that that evidence is true or false, inaccurate or exaggerated, then the statement that the facts observed negative or support any of the evidence in the case is not a matter of opinion or inference, but a matter of observation, and it is in our opinion the duty of the Judge, as laid down in *Joy Coomar v. Bundhoo Lal* (1882) I.L.R. 9 Calc. 363 to consider the results of such observation and state them in his judgment. Here the case is clearly one where direct observation explained and cleared up a doubt which had been thrown on the prosecution evidence by the allegations of the defence, and there was clearly no impropriety in the course of the inspection nor in the way in which its results were used. The Rule must, therefore, be discharged.