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Court : Kolkata

Decided On : Jan-17-1961

Reported in : AIR1962Cal173

Judge : Debarata Mookerjee and ;D.N. Das Gupta, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 297, 288 and 423

Appeal No. : Criminal Appeal No. 97 of 1960

Appellant : Nidhan Misra and anr.

Respondent : The State

Advocate for Def. : Anil Kumar Sen, Adv.

Advocate for Pet/Ap. : S.S. Mukherjee and ;Kishore Mukherjee, Advs.

Judgement :

Debabrata Mookerjee, J.

1. The two appellants, Nidhan Misra and Sudasan Misra who are brothers have been convicted on a jury's unanimous verdict for murder and each sentenced to imprisonment for life.

2. The case for the prosecution briefly stated was that there was a quarrel between the appellants their brothers, Kusadhaj and one Banamali on the one

hand and Dandahar, the deceased man on the other. It is unnecessary to set out the details of that quarrel. There was definite unpleasantness on the 20th October, 1958 between them, but the parties were separated. The quarrel was revived the next day when it is said that the two appellants and the aforesaid Kusadhaj and Bonamali engaged in an attack on the deceased, which ended his life. The allegation is that after the first phase of the quarrel the parties were separated, when Banamali called in the deceased and the two appellants, Nidhan and Sudarshan approached with spears from different directions and struck him, one of them striking on the chest and the other on the back. Each of the appellants was said to have been responsible for an injury which by itself was considered sufficient in the ordinary course of nature to cause death. Before the injured person could be removed to hospital, he succumbed to his wounds. An information was lodged which resulted in investigation and eventual charge sheet against the appellants and aforesaid Banamali and Kusadhaj.

3. After the usual preliminary enquiry the appellants and their co-accused were committed to lake their trial before the Court of Session upon a charge of murdering Dandahar.

4. The defence denied the charge and the appellants case seems to be that they had been falsely implicated.

5. On behalf of the appellants it has been argued that the jury were seriously misdirected byf an instruction to the effect that the statement of a particular witness (P. W. 2 Kanailal Chakravorty) before the committing Magistrate could be treated as substantive evidence in the case. Reliance was placed upon certain excerpts which appear to us to have conveyed to the jury's mind the impression that what the witness had stated before the committing court could be used as substantive evidence although the statement had not been admitted under Section 288, Cri. P, C. The learned Judge distinguished, between statements before the committing court and those before the Police by emphasising that while the former were capable of being used as substantive evidence the latter were not. This produced the impression on the jury that they were free to choose between the witness'spresent evidence and his previous statement al-though it had not been

admitted under Section 288.This is clearly a misdirection which must be held to have vitiated the jury's verdict.

6. In this case we have been exercised upon the question as to whether it would be right for us to determine the question of guilt or innocence upon the present materials. The law requires that when misdirection is established this Court should enter into evidence and decide whether it justifies the verdict in spite of the misdirection that has occurred. But the Court has power to grant a new trial where interests of justice so require. In this case it appears that the eye-witnesses concerned was cross-examined with reference to certain statements made by him before the committing Magistrate. He denied having made those statements; his attention was accordingly drawn to them in the manner provided by Section 145 of the Evidence Act, It does not appear from the learned Judge's record that those statements were admitted under Section 288 of the Criminal Procedure Code. The statements ran counter to the evidence given before the Court of Session. Such statements were therefore capable of being used only to contradict his present evidence. But if that is all that was done and nothing more, then the position would be that the evidence of the witness being in conflict with what he had said earlier before the committing Magistrate, the credit of the witness was liable to be shaken and the jury might on that ground hesitate to accept his evidence. One of the statements in question related to a very vital matter namely that the deceased had been seen approaching with a ballam in hand. Used substantively, it might have the effect of changing the complexion of the whole case. There is nothing definite on the record to indicate that the learned Judge had, in the exercise of his discretion, admitted that statement under Section 288, Cri. P. C. The Judge's order sheet does not encourage the view that it was so treated and yet the summing up conveys a contrary impression. We think the matter is far too serious to be lightly passed over; it requires to be cleared up.

7. Whether to admit or refuse to admit a statement under Section 288, Cri. P. C. is a matter which involves the exercise of discretion of the trial Judge alone. The opinion of the Appellate Court cannot be substitute for the Judge's view. Indeed, the law forbids such substitution. The discretion must be the discretion of the presiding Judge. An orderof remand seems therefore imperative in the

circumstances.

8. The learned Judge who comes to deal with the case will have an opportunity to consider whether the statements in question should be admitted under Section 288, Cri. P. C. Far be it from us to suggest that the statements should be so admitted. All that we wish to say is that it is desirable that the trial Judge's mind should be exercised on the question as to whether the statements should be brought on the record and treated as substantive evidence. Nothing that we have said will fetter the discretion of the trial Judge.

9. It was suggested on behalf of the State that we might as well decide the case on the present materials since there is on the record the evidence of other eye-witnesses who have supports ed the case for the prosecution. 'We decline to do so for the reason, that it is by no means clear whether the statement was admitted under Section 288. If it was, a jury properly directed might well believe that statement, transmuted Unto substantive evidence, in preference to the evidence of others who claimed to have witnessed the occurrence. This is the ground of our hesitation in deciding the case on the merits. We think, the interests of justice require that the matter should be remanded for a new trial.

10. We accordingly set aside the conviction and sentence and direct a new trial to be had upon a charge under Section 302/34. I. P. C. The other two accused persons having been acquitted, there is no question of their being tried again. The appellants alone will be tried anew.

11. The appeal succeeds. Let the records be sent down as early as possible.

D.N. Das Gupta, J.

12. I agree.