

Fazlur Rahman Vs. Emperor

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Court : Kolkata

Decided On : May-17-1946

Reported in : AIR1947Cal192

Appellant : Fazlur Rahman

Respondent : Emperor

Judgement :

Khundkar, J.

1. This is an appeal by three persons Fazlur Eahman, Imanuddin, and Saidar Rahman, who have been convicted of the offence of dacoity under Section 395, Penal Code. They were tried along with the six other persons who were charged with the same offence, but those others were found not guilty and were acquitted.

2. The case for the prosecution was that on 7-2-1945 a number of weavers were returning to their homes from a Hat where they had been selling certain handloom cloths during the day. The hour was about 9-30 P.M., and one of them prosecution witness No. 3, was carrying a hurricane lantern. At a lonely spot they were suddenly surrounded by a number of men who assaulted, them, and took away certain bundles of cloth which they were carrying, as also the money which they had obtained by the sale of their wares.

3. The First Information Report was lodged the next day at about 1 P.M., at a police station which is 12 miles distant from the village to which the weavers were proceeding. In the First Information it is definitely stated that none of the weavers had recognised any one amongst the dacoits. At the trial, however, evidence of identification was given, P.W. 3 identifying Fazlur Rahman and admitting that he was a person whom he knew fairly well. P.Ws. 5, 6 and 8 identified Imanuddin and P.Ws. 4, 5, 7 and 8 identified Saidar Rahman, as persons known to them. We are not here concerned with the evidence given against those of the accused persons who were acquitted. In the circumstances just referred to, the statements made by the witnesses to the police during investigation are of the utmost importance. The well-known provisions of Section 162, I Criminal P.C., afford to accused persons an opportunity of showing that the statements made by the witnesses at the trial are opposed to statements which the same witnesses actually made to the police at an earlier stage during investigation. The first proviso to Section 162(1), Criminal P.C., says that the Court shall, on the request of the accused, refer to the statements of prosecution witnesses made in an earlier enquiry or trial, when those statements have been reduced into writing, and that the accused is to be furnished with a copy thereof in order that any part of such statements if duly proved, may be used to contradict such witness in the manner provided by Section 145, Evidence Act. The language of Section 145, Evidence Act, is clear and unambiguous. The section says:

A witness may be cross-examined as to previous statements made by him in writing...or reduced into writing...but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

The words in italics, (which are mine) clearly show that the evidence of a witness at a trial may be shown to be inconsistent with the previous statements, and the method by which this may be done is by producing previous statements of the witness which have been reduced to writing and which are contradictory of the witness's evidence in Court. The whole foundation of this procedure is the principle that a witness who makes inconsistent statements is unreliable. If a Judge says to a jury that the previous statements of the witness are not necessarily true, and

may possibly be false and leaves it at that, the object of the first proviso to Section 162, Criminal P.C., is largely defeated.

4. In dealing with the previous statements of the witnesses to the police during investigation, the Judge gave them the following direction:

In this connexion, gentlemen, I should like to tell you that there is no legal obligation to speak the truth in answer to question of the police under Section 161, Criminal P.C. So the witness cannot be prosecuted for giving false evidence. The statement is not given on oath and the police officer is not trained in taking evidence and such police proceedings are not substantial evidence and cannot be used in order to test the correctness of the statements made on oath before the Court. When the statement to police is inconsistent with the statement in Court, the jury is to see if the latter is made unreliable thereby.

5. This direction clearly loses sight of the notorious tendency of witnesses in criminal cases in this country to change and improve the statements made by them to the police during investigation. It also clearly has the effect of creating in the minds of a jury the impression that the previous statements of witnesses made to the police are of such a character as not to be of any real importance. Once a jury takes that view, then the purpose of contradicting a witness in the manner provided by Section 143, Evidence Act, by his previous statements made to the police and reduced to writing is largely frustrated.

6. The correct position in regard to the veridical considerations which arise in connexion with previous statements to a police officer, which have been reduced to writing, and to which the provisions of Section 162 of the Code apply, have been elaborately stated in *Heramba Lal v. Emperor* : AIR1945 Cal159 . For the purposes of the present case, it is the following points elucidated in that decision which have to be noted: (1) That the statement recorded by the police officer is not the writing of the witness nor is it a writing signed by the witness; (2) that it may not represent what the witness actually did say; (3) that the police officer may nevertheless testify on oath that the writing is an accurate record or a correct summary of the statement of the witness; (4) that the attention of the witness should be called to those parts of the recorded statement by which it is intended to

contradict him in order to enable him, if he desires to do so, to furnish an explanation for any alleged contradiction or material omission. But when, the Court having steered, in regard to the statements under Section 162, a judicial course set by these considerations, real contradiction or material inconsistency still nevertheless remains between what are proved to be a witness's earlier statements recorded by the police, and the witnesses' evidence given in Court, what then? What is the duty of the Court in that event? Clearly it is to tell the jury in no uncertain terms that the witness is unreliable, and that they would be well advised to ignore his evidence. To leave the matter where the Judge has here left it, amounts at the very least to an incomplete direction.

7. In *Leonard Harris* (1927) 20 Cr. App. R. 144, it was laid down that if a witness is proved to have made a statement, though unsworn, in distinct conflict with his evidence on oath, the proper direction to the jury is that his testimony is negligible and that their verdict should be found on the rest of the evidence. That was a case in which a charge of incest was not supported at the trial by the evidence of the girl, who however had made and signed a previous statement to the police in which she had said that the accused had committed the act. Cross-examined by counsel for the prosecution, she admitted making the previous assertion, but denied that it was true. In relation to these facts, Lord Chief Justice, Hewart laid down the rule in words which it would be well always to bear in mind:

It is well established in the familiar words which are to be found, for example, in Archbold, that 'The character of a witness for habitual veracity is an essential ingredient in his credibility; for a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appears that he has formerly said or written the contrary of that which he has now sworn (unless the reason of his having done so is satisfactorily accounted for), his evidence should not have much weight with a jury, and if he has formerly sworn the contrary the fact (although no objection to his competency; *The King v. Teal* (1809) 11 East 3073 at p. 309), is almost conclusive against his credibility, in other words, it was permissible to cross-examine this girl upon the assertions she had previously made, not for the purpose of substituting those unsworn assertions for her sworn testimony, but for the purpose of showing

that her sworn testimony, in the light of those unsworn assertions, could not be regarded as being of importance. It is upon that matter that confusion has sometimes arisen. It has undoubtedly sometimes been thought that where a witness is cross-examined upon a previous unsworn statement and admits the fact that the statement was made but says that the statement was untrue, that unsworn statement may sometimes be treated as if it could be accepted by the jury in preference to the sworn statement in the witness-box, and in like manner sometimes where the witness has denied having made the previous statement, and evidence has thereupon been given that the previous statement was made, there has been, at least, a suggestion that the jury, if they chose, might accept the previous in preference to the sworn statement. That of course, is all wrong, as has been pointed out on various occasions by this Court, and not least in the case of *Hex v. A. White* (1922) 17 Cr. App. R. 59 at page 60; c.q. No such question as that arises here, because when the learned Judge came to sum up he was exceedingly careful to say that the effect of this collision between the sworn testimony of the girl, on the one hand, and her unsworn assertions on the other hand, was to make her a witness who should be neglected.

8. In our judgment, the direction of the learned Judge in the present case is fragmentary and insufficient, and we are in no position to say that it has not affected the verdict. One of the other criticisms directed against the charge by the learned advocate for the appellants requires to be mentioned. He has pointed out that in dealing with the confession of the approver the Judge has said:

The Magistrate who recorded the confession has deposed before you and you have heard him. You are to decide whether the confession of the approver is a voluntary one or not.

This passage clearly suggests that the learned Judge was of the opinion that a decision on the question of the voluntary character of the confession was a matter not for him but for the jury. The words just quoted are not very happy. It is open to a Judge to say to a jury that they may consider whether the confession was voluntarily made or not. But we ought to be careful to explain to them that that is merely for the purpose of enabling them to make up their minds as to whether the

confession is true. It is not wrong to say that a finding by the jury that a confession is voluntary may assist them in holding that it is true, but whether the confession is voluntary or not is for the Judge to decide before allowing the confession to be received in evidence, and therefore before it goes to the jury at all. We have had before us in' previous cases a direction to this effect. I have decided that the confession is voluntary, otherwise, I would not have admitted it in evidence. But that does not preclude you, the jury from, also considering whether this is a voluntary confession. The real question for your decision is whether this confession is true. But if you think that it is not true because it is not voluntary you ought not to abstain from saying so simply because I have said that it is voluntary. You may consider whether this confession is voluntary in order to ascertain whether it is true. Such a direction would be unexceptionable.

9. The convictions of and the sentences passed upon the appellants must be set aside. There is evidence of a not substantial nature upon which a conviction of these three appellants could well be founded, provided the jury accepted that evidence. We accordingly direct that the three appellants be retried in accordance with law, but by some Judge other than the Judge who presided at the last trial. They will remain on bail to the satisfaction of the District Magistrate.

Ellis, J.

I agree.

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