

Hanuman Sarma Vs. Emperor

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Court : Kolkata

Decided On : Jun-10-1932

Reported in : AIR1932Cal723

Appellant : Hanuman Sarma

Respondent : Emperor

Judgement :

Mallik, J.

1. The appellant Hanuman Sarma has been convicted under Section 354, I. P. C., and sentenced to rigorous imprisonment for two years and a fine of Rs. 300. Hanuman was put on his trial on charges under Sections 376 and 354, I.P.C. The trial was held with the aid of four assessors. Two of the assessors found the accused not guilty, according to one the accused was guilty under Sections 376 and 354, I. P. C., while according to the fourth the accused was guilty under Sections 354 and 376/511, I. P. C. The learned Judge acquitted the appellant of the charge under Section 376, I. P. C., but convicted him of the charge under Section 354, I. P. C., and sentenced him in the way as stated before.

2. The accused Hanuman Sarma is a young man of about 22 or 23 and the victim in the present case is a girl aged about 6. The case for the prosecution was briefly this: Ajodhya Prosad, the father of the girl whose name was Gumti on his way to office, left her on the road in the police bazar in the town of Shil-long in front of the

Thakur Bari there, his idea being that on return from his office he would take the girl with him to the house of one Badri Prosad where he had to go to attend a feast. When Ajodhya came back from office he found that the girl had already returned home. This was on 18th May 1931. The girl told her father that a brother of Chima the little daughter of the priest of that Thakur Bari had done a bad deed to her, Ajodhya did not pay any particular heed to what the girl said. On 22nd May however he noticed some marks on the bed sheet of the girl and on the 22nd as well as on the 23rd the girl complained of some pain when passing urine. On the next day the 24th Ajodhya took the girl to the shop of a Marwari opposite the Thakur Bari and there the girl identified the present accused Hauuman who was a son of the priest as the person who had done the bad deed to her. There was a panchayati held and the father of the accused expressed his regret. The girl was examined by the Civil Surgeon on the 26th when the doctor found that she had gonorrhoea. The accused was examined by the same Civil Surgeon on the next day, namely, the 27th and the Civil Surgeon found that Hanuman also had gonorrhoea. On these facts the accused was put on his trial with the result as stated before. The order passed by the learned Judge was assailed before us on several grounds and I propose to deal with them one by one. The girl Gumti was the most important witness in the case, in fact she was the only eyewitness to the occurrence. It was said that Gumti was not a competent witness under Section 118, Evidence Act, and that being so, her testimony should be thrown out altogether. In support of the contention that Gumti was not a competent witness our attention was drawn to the answer which she gave in Court when she was asked for the reasons why she had identified the accused. On being asked why she had pointed out the accused she replied, *malum nehi; bera nehi*. But a perusal of the girl's deposition would show that before she gave this answer she had given another answer and that was that she pointed out the accused because her father asked her whether the accused was the man who had done the deed. To argue from this that Gumti was a witness who could not give any comprehensible or rational replies to questions would in my opinion be a contention without much substance in it. The deposition which the girl gave in Court was a pretty long one and a perusal of the same would show that although her replies might not always have been of a very analytical nature she could understand questions and she

could give reasonable and comprehensible answers to them. (After discussing the evidence, his Lordship proceeded.) I have referred to the fact that the girl as well as the accused were found to have gonorrhoea, the girl being examined on the 26th and the accused Hanuman Sarma on the 27th by the Civil Surgeon.

3. It was said that the testimony of the Civil Surgeon when he deposed that he had found gonorrhoea on the accused on examining him, was inadmissible in evidence inasmuch as the Civil Surgeon had not recorded that before examining the accused person he had obtained his consent to such examination and in support of this contention our attention was drawn to the case of *Emperor v. Bhondar Prodhan* : AIR1931 Cal601 . I do not think this case can be of much assistance to the accused. It is true that the Civil Surgeon admits that he did not put down in writing that before examining the accused he had obtained his consent. But the case cited is not an authority for the proposition that unless the fact that consent has been obtained is put down in writing it is to be held that no consent was in fact [obtained. The case lays down it is true that unless such consent is taken the Civil Surgeon's evidence would be inadmissible. But the Civil Surgeon was as a matter of fact examined in the present case and he has deposed in clear terms that before examining the accused he told him that he (the accused) had the right to refuse examination and he deposed also that the accused was quite willing to be examined by him. Mr. Basu next contended that a conviction under Section 354, I. P. C., is not maintainable in view of the fact that a sense of modesty had not sufficiently developed in the girl. Apart from the question whether a development; of sense of modesty would be necessary for a conviction under Section 354, I. P. C., I am of opinion that the case was clearly a case of attempted rape under Section 376/511, I. P. C. On behalf of the appellant it was urged that it will not be within our competency to convict the accused under Section 376/511, I. P. C , remembering that the order of the Sessions Judge amounted to an acquittal of the accused of the charge of rape under Section 376, I. P. C.

4. The learned Judge may have acquitted the accused under Section 376, I. P. C., But there was no charge against the accused under Section 376/511, I. P. C., and consequently there was no acquittal by him of that charge. The fact that the accused was found to be not guilty of the charge under Section 376, I. P. C.

cannot in my judgment be said to be tantamount to an acquittal under Section 376/511, I. P. C. as well. The facts established in the present case, namely, that the accused took the girl on his lap and after undoing his own dhoti and the dhoti of the girl pushed his male organ into the private parts of the girl thereby causing her some pain were, in my judgment sufficient for establishing a charge under Section 376/511, I. P. C., an offence for which the accused could have been convicted in view of the provisions of Section 238 (2-A), Criminal P.C. I would accordingly dismiss the appeal altering the conviction under Section 354 to one under Section 376/511, I. P. C. The sentence inflicted in the case, namely, two years' rigorous imprisonment and a fine of Rs. 300 with a direction that out of the fine when realized Rs. 240 would go to the father of the girl as compensation does not appear to me to have been unduly severe, regard being had to the serious nature of the crime. The appellant will surrender to his bail and serve out the unexpired portion of the sentence.

Remfry, J.

5. I agree with the conclusion arrived at but on different grounds. So I will give my reasons shortly. As it appeared that the accused was guilty of an attempt at rape and that the story of the child was corroborated, it was intimated to counsel that the Court would hear him as to why the finding of the lower Court should not be altered and the accused convicted under Sections 376 and 511. It was then urged that this would prejudice the accused, for though it was admitted that at the trial he had notice that he might be convicted of an attempt, it was argued that the argument before this Court was not directed to meet any such contingency. Counsel was therefore heard on this point.

6. It was then argued that under Section 423 (b) on an appeal by the accused, the Court could not find him guilty of an offence in respect of which he had been acquitted. In this case the Judge did not record an acquittal under Section 376, but there is a decision of the Judicial Committee that nevertheless in such circumstances the accused is acquitted, and it seems to me that it follows that he must be taken to have been acquitted of an attempt at rape also, but it is not necessary to decide that point. Section 423, it was argued, only gives the power to

a Court on appeal to convict in the case of an acquittal if there is an appeal against such acquittal by the Local Government and it was contended that the words in Section 423 (b) 'may alter the finding' do not include a finding of acquittal.

7. Under Section 423, Clause (b), the Court can alter a finding and there is no express provision limiting that power, and it cannot be implied that because Section 439 is subject to a proviso Section 423 is similarly limited, especially as under Section 439 the Court can increase the sentence whereas under Section 423, Clause (b), it can only do so in one way. If the words 'alter the finding' were limited as it is suggested their scope would be very restricted. In my opinion the words are not so limited and an appeal by a convicted person entails the possibility that the Court may alter the finding and convict him of an offence of which the lower Court acquitted him.

8. There are two decisions of this Court on the point. In *Queen-Empress v. Jabanulla* [1896] 23 Cal. 975 there was a conviction by a Sessions Judge who tried the case with the aid of assessors, under S.326, I. P. C. The assessors thought that the accused was guilty under Section 148, I. P. C. The charges on which he was tried were under 'tis. 148, 302/149 and 326. The accused appealed and the High Court, after hearing his counsel on the point, altered the finding, and found him guilty under Section 149 read with Section 326 although he had 'been acquitted by the Sessions Judge under Section 148; the sentence was not altered. In the case of *Lala Ojiha v. Queen-Empress* [1901] 26 Cal. 863 the Sessions Judge convicted the accused, charged under Sections 196 and 471, I. P. C., of an attempt under Section 196 and Section 471. The trial was with the aid of assessors. The accused appealed. The High Court altered the finding and convicted the accused under Section 471. In this last cited case the Court did not refer to the earlier case. In both cases the High Court informed counsel appearing for the accused that the finding might be altered.

9. In *Krishna Dhan Mandal v. Queen-Empress* [1895] 22 Cal. 377 the Court held that Section 423 (b) enabled a Court, on an appeal by the accused, to remand the whole case although the accused had been acquitted on some charges on the ground that Section 423 (b) certainly empowered the Court to alter a finding of

acquittal in any case covered by Section 236 of the Code. It was argued that the decision of the Judicial Committee in *Rishan Singh v. Emperor* A.I.R. 1928 P.C. 254 was against the view. But there the Local Government did not appeal against an acquittal, but presented an application for revision. There was no appeal by the accused who had been tried for murder and convicted under Section 304, I. P. C. There was no order acquitting him under Section 302. It was held that under the express provisions of Section 439, the High Court had no power to alter the acquittal under 302--for it was held that in law there had been an acquittal--into a conviction under that section although there had been a conviction under Section 304. The reason given was that Section 439 so provided. Their Lordships said it was unnecessary to consider whether the decision of the Madras High Court in *Re K. Bali Beddi* A.I.R. 1914 Mad. 258 was correct.

10. In the Madras case, according to the Judicial Committee, the accused appealed against their convictions under Sections 147 and 302, and the High Court, as a Court of revision, gave them notice to show cause why they should not be convicted of murder and be sentenced for that offence. Then the Madras High Court altered the finding to one of murder. The view taken was that the proviso to Section 4 to 9 only applied to cases in which there had been an acquittal and no conviction at all. That view the Judicial Committee decided was wrong and therefore any power to alter the finding must have been under Section 423, Clause (b). Section 439 is concerned with the powers of a Court in revision when findings of fact are not open to review and a proviso against altering an acquittal into a conviction was expressly added by the legislature in that section. Section 423, Clause (b), is concerned with the powers of the Court in an appeal where the facts are before the Court; and in the absence of any proviso limiting the powers given whereby the Court can alter the findings, such a proviso cannot be implied. In my opinion the decisions of this Court cited above are binding on us unless of course we differed from them and referred the point to a Full Bench. Clearly when a Court in an appeal by a convicted person considers that it may be its duty to alter the findings, notice should be given to the advocate or counsel appearing for the accused if any, or to the accused, and the accused must be heard on that point. That was the procedure adopted in both the cases decided by this Court. It is equally clear that the Court ought not to alter a finding and convict the accused of

an offence unless the defence in the original trial was directed to meet a charge of that offence. If the accused had not had an opportunity to meet the charge, a new trial could be directed.

11. Now in this case the accused was committed under a charge in respect of Section 376, I. P. C.; a charge under Section 354 was added in the Court of Session. He therefore could have been convicted of an attempt AT rape. In my opinion the appellant should be convicted under Section 376 read with Section 511. The Court was asked to reduce the sentence and impose any fine. But in the circumstances in my opinion the sentence errs on the side of leniency, and the sentence should stand.

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