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Court : Kolkata

Decided On : Feb-18-1952

Reported in : AIR1952Cal621

Judge : Chakravartti and ; Sinha, JJ.

Acts : Indian Penal Code (IPC), 1860 - Section 96; ;Evidence Act, 1872 - Sections 105, 114 and 154; ; Code of Criminal Procedure (CrPC) , 1898 - Sections 154, 161(3), 162, 286, 297 and 439

Appeal No. : Criminal Revn. No. 900 of 1951

Appellant : Dhirendra Nath

Respondent : State

Advocate for Def. : Harideb Chatterjee, Adv.

Advocate for Pet/Ap. : Ajit Kumar Dutt, Adv.

Judgement :

Chakravartti, J.

1. This Rule is directed against the conviction of the petitioner under Section 325, Penal Code, and a sentence of two years' rigorous imprisonment passed on him at a trial held by Sri P. N. Lahiry, Assistant Sessions Judge, Alipore, with the aid of a

common jury. An appeal to the Sessions Judge was dismissed.

2. The incident which led to the prosecution in this case was a quarrel between to brothers. The petitioner, Dhirendra Nath Bera and one Fakir Bera are brothers, living separately in contiguous villages. Each village has, however, an ancestral homestead. There is a homestead in village Bechuabati, in one half of which the petitioner has his residence while the other half is possessed by Fakir Bera who grows vegetables on it. Similarly, there is a homestead in village Alamnagar, in one half of which Fakir Bera has his residence while the other half is possessed by the petitioner. The petitioner has a son named Prafulla and Fakir Bera had two sons, named Pran Krishna and Siba Prasad. It is alleged that on the 4th August, 1950, Siba Prasad reported to his father that he had detected the petitioner arranging some 'pan' leaves which he had obviously pilfered from their 'boroz'. On receipt of that information, Fakir Bera proceeded, to the spot, engaged the petitioner in an argument and ultimately slapped on the face. Not content with administering this punishment, Fakir Bera called a 'salish' in the evening at which the petitioner at first denied having pilfered any 'pan' leaves but ultimately admitted the offence and begged his brother's pardon which was readily granted. The matter might have ended there, but according to the prosecution it did not. It is alleged that the insult and humiliation to which the petitioner was subjected continued to rankle in his mind and next day, at about noon, when Pran Krishna was returning from the field, the petitioner engaged him in a quarrel and would have pierced him with a 'chowki' if he had not been restrained by the womenfolk in his house and certain other co-villagers. Later; in the after-noon, Siba Prasad went to the field to do some transplantation work and the petitioner, it is alleged, engaged him also in a quarrel. Siba Prasad, it is further alleged, hurled back the insults which the petitioner threw at him and instead of fleeing from the spot, as Pran Krishna had done, began to advance and the two came to grips near a 'gola' belonging to Kunja. There, it is alleged, the petitioner picked up a stout club of Babla wood and dealt a blow with it on the head of Siva Prosad with the result that he collapsed instantly, bleeding profusely from his mouth and nostrils. A village doctor was called in but he pronounced the case to be too serious for his limited skill and advised removal of the patient to the town hospital. The wounded man was removed to the hospital at Budge Budge where he died the next morning

without regaining consciousness. The post-mortem examination revealed that the frontal bone of his head was fractured from side to side and, according, to the medical opinion, death was due to the injury suffered on the head. About three hours after the death of Siba Prosad, his younger brother Pran Krishna lodged a first information, report at the police station.

3. On the above facts, proceedings were commenced against the petitioner on a charge under Section 304, Penal Code. His defence before the Committing Magistrate appears to have been that it was Siba Prosad who was the aggressor, and it was he and his men who had chased the petitioner and his son Profulla and in the course of the affray which ensued, some unknown person struck the blow which had killed Siba Prosad. Before the Sessions Court this version was slightly varied or clarified and the defence made the positive case that the blow was actually struck by Profulla.

4. The Committing Magistrate, after considering the evidence led before him, thought that a prima facie case had been made out against the petitioner and committed him to the court of Sessions on a charge under Section 304(II), Penal Code. It is not clear on what view of the facts the prosecution framed a charge under Section 304, as the Committing Magistrate himself points out that if anyone takes out a stout club of Babla wood and deals a blow on the head with such force that the skull is fractured, he certainly does something which he at least knows to be likely to cause death. Probably, but this is only a guess, the prosecution thought the case came under the fourth exception to Section 300.

4a. A number of witnesses who claimed to be eye-witnesses were examined before the learned Sessions Judge and there were of course the doctors who had examined the deceased and the investigating police-officer. The jury returned a unanimous verdict of guilty under Section 325, Penal Code, and the learned Judge sentenced the petitioner in the manner I have already stated.

5. In order to appreciate the points which were canvassed before us, it is necessary to state a few more facts. The first information report in the present case was lodged by a person who did not claim to have seen the occurrence. The second fact which it is necessary to notice is that in respect of three of the

prosecution witnesses at least, the investigating police officer recorded what had come to be known as a boiled statement. The third fact to which attention requires to be drawn is that a particular prosecution witness, namely P. W. 12, Sridhar Das, was tendered by the prosecution for cross-examination and after the defence had cross-examined him, he was cross-examined by the prosecution itself. The record does not show that the leave of the learned Judge was taken.

6. In support of the Rule, it was first contended by Mr. Dutt that the direction given by the learned Judge on the question of the right of private defence was neither correct nor accurate. It was complained that while the learned Judge had stated that a plea of the right of private defence was a special plea which it was for the accused to establish, he did not say further that the standard of proof required of an accused person was much lower than that required of the prosecution. It was contended that while the prosecution was bound to prove its case beyond reasonable doubt, it was sufficient for an accused person if he succeeded in making out a prima facie case. In other words, while the duty of the prosecution was to exclude doubt altogether, it was sufficient for the defence to cause doubt; for, if doubt was caused, the prosecution case was not proved beyond reasonable doubt and the accused person would be entitled to an acquittal.

7. There is some controversy in the reported cases in this country as to whether the principle that an accused person is not required to establish a special plea taken by him beyond reasonable doubt applies to cases where Section 105, Evidence Act applies. That section says specifically that it lies on the accused person to prove any of the special or general exceptions laid down in the Penal Code and there are cases in the books which say that the incidence of proof does not vary simply because the burden lies on the accused person. It is pointed out in support of this view that Evidence Act seems to make a departure from the rule of English law, because it uses the word 'prove' in Section 105. I need not enter into that controversy in the present case and shall proceed on the basis that even in respect of a plea of private defence, it would be sufficient for an accused person to make out something like a prima facie and probable case. Even so, however, it seems to me that on the facts of the present case the complaint is entirely unreal.

8. It will be useful to recall what the defence case was. The defence case was that the petitioner had not struck the blow at all, but it had been struck by Profulla. On that case the only question which arose for decision was whether or not the petitioner was the author of the blow. In denying that he had struck the blow, the petitioner excluded the plea of a right of private defence altogether. A plea of the right of private defence can be taken by a person who admits the act charged against him, but pleads an excuse. If a person, however, states that he had not done the act at all, it is difficult to see how at the same time the question of a right of private defence would arise. Whether or not an accused person, taking a plea of the right of private defence, is to prove it in the same manner as the prosecution is required to prove its case or whether a lower standard of proof would suffice the accused must, at least, make a case out of which a plea of the right of private defence might arise. In the present case, as I have pointed out, the only case put forward by the petitioner was that he had not struck the blow at all. It was not his case that he and his son were chased and in order to prevent the danger to the person of himself and his son, he had struck the blow. On the facts, therefore, no question of a right of private defence arose, as correctly pointed out by the learned Additional Sessions Judge.

9. In the second place, it has to be remembered that the petitioner called no evidence. It is true that an accused person taking the plea of the right of private defence is not required to call evidence but can establish that plea by reference to circumstances transpiring from the prosecution evidence itself. But the question in such a case would be a question of assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden. On that ground also, it seems to me that the insufficient direction by the learned Judge which was being complained of could not possibly have caused any prejudice or led to any failure of justice in the present case.

10. In the third place, it seems to me not impossible that in spite of the deficiency in the direction of the learned Judge of which complaint was made, the jury did give the accused the benefit of the right of private defence. They obviously did not believe the defence case that it was not the petitioner but his son Profulla who had struck the blow. If that case had been believed, the obvious verdict in respect of

the petitioner would be a verdict of acquittal. Since they did not acquit him, it is clear that they held the petitioner to be the person who had struck the blow. I have already indicated what the nature of the blow was. If in spite of holding that the petitioner had struck the blow and a blow of that degree of severity with the weapon that was used, the jury yet found the accused guilty only under Section 325, Penal Code, the verdict is explicable only on the assumption that probably the jury-gave the accused the benefit of a right of private defence.

11. For all the above reasons, I am of opinion that there is no substance in the first ground taken by Mr. Dutt, and it must accordingly fail.

12. I am of opinion, however, that each one of the remaining grounds taken by Mr. Dutt has some substance.

13. The second ground urged was that the use made by the learned Judge of the first information report in the course of the charge had not been legitimate. I have already pointed out that the first information was lodged by a person who was not a witness of the occurrence and did not claim to be so. He said that he had heard of the occurrence from one Ajit and went running to the spot where his brother lay wounded. So far as it was an account of the actual occurrence, the first information report thus suffered the infirmity of being only hearsay evidence, if evidence it was. The learned Judge, it is true, did, in one part of his judgment, make the routine observation that the first information report could not be treated as a piece of substantive evidence, but when it came to the learned Judge himself making use of the first information report, it appears that, more than once, he referred to it as giving an account of the occurrence independently of what any witness had said. For example, he says at one place that the first information is an extremely valuable piece of document inasmuch as it gives the earliest account of the case on which the prosecution had been launched. That of course is true, in a general sense, of a first information report, but the learned Judge omitted to point out that the report in the present case, although it was the earliest in point of time, suffered from the infirmity that it was lodged by a person who had no personal knowledge of the incident at all. Later on at several places the learned Judge contrasts the account given in the first information report with the case made in the

course of the evidence but that evidence is not the evidence of the person who lodged the first information but the evidence given by other witnesses. I am aware that the first information report is, at times, regarded as part of the 'res gestae' and on that basis it is sometimes used, not merely for the purpose of corroborating or contradicting the person who lodged it but also for the purpose of lending some assurance to or negativing the general account as given by other witnesses. In the present case, however, the first information report, besides being lodged by a person who had not seen the occurrence at all, was lodged about 18 hours after the occurrence. The merit of being a very early account of the incident and thus of being presumably authentic could not therefore be claimed for this first information report to the same extent as in ordinary cases. It was, however, a question for the jury to decide, but the learned Judge ought to have pointed this aspect of the matter out to the jury. In my opinion, the use made by the learned Judge of the first information report in the course of his charge to the jury was, at many places, not legitimate and in view of the importance which the jury often attach to the first information report, I am unable to say that the petitioner was not prejudiced.

14. The next ground taken by Mr. Dutt was that the learned Judge did not marshal the evidence of the prosecution witnesses as he ought to have done, but discharged his duty simply by referring to them in a lump. That complaint, it appears to me, is well-founded. What the learned Judge did say was that he merely stated that there were five eye-witnesses of the assault and then he proceeded to give in a single sentence what he conceived to be the substance of their evidence. Now, Section 297, Criminal P. C, requires the Judge to sum up the evidence and, it seems to me that the duty of summing up, is not discharged by merely placing before the jury the greatest common measure of the evidence of the several prosecution witnesses. What the Judge is required to do is, I conceive, to dissect the whole prosecution case into its component parts and concentrate on each part the evidence bearing upon it and having done so, he has to draw the at tention of the jury to the relevant evidence regarding each part of the case, point out to them the effect of the evidence, if it is believed, and then add, if he likes, whether, in his opinion, the evidence ought to be believed or not. At the end of a protracted trial and after the partisan speeches of the Counsel for the prosecution and the defence, all that will remain in the untrained minds of the jury must often

be only a general impression of the evidence. It is, therefore, that the Code requires the Judge to intervene at that stage and remind the jury of the essential points of the evidence which might, by that time, have become a little blurred by reason of the addresses they had heard or by passage of time. The Judge is, therefore, required at that stage to sift the evidence, collect out of it portions bearing on different parts of the case, to relate each portion to the facts which it is intended to prove, comment on its quality, if he chooses and then leave the jury to coma to their own conclusion. Nothing whatever of that kind was done or attempted by the learned Judge in the present case. The charge, I regret to have to say, conforms to a pattern which has become far too common, a pattern of merely referring to the prosecution witnesses in a lump and giving to the jury merely what the Judge conceives to be the greatest common measure of their evidence. To give but one instance, it is true that the five witnesses named by the learned Judge spoke to having seen the occurrence, but they did not all give the same evidence, nor give it in the same way. For example, it was extracted from P. W. 9 Akshoy Bera, that while the petitioner fled from the cowshed, Profulla, his son, fled from the field. This admission brought the case very near the defence version as regards the presence of Prafulla and although whether the defence case would be established by it or not would have to be decided by the jury, the petitioner was certainly entitled to have the attention of the jury drawn to significant details of that kind. I need not multiply instances because, as I have said, the learned Judge discharged his duty only by referring to the witnesses in a lump and setting out what he conceived to be the effect of their evidence in a single sentence. I am of opinion that in this regard also the charge is clearly defective.

15. It was next contended by Mr. Dutt that the learned Judge had omitted to direct the jury that since many material witnesses had not been called, they might draw a presumption that if those witnesses had been called, their evidence would be adverse to the prosecution case. Now, it is true that the doctrine that the prosecution must call all available witnesses, irrespective of what they might say, now stands exploded after the decision of the Privy Council in the case of 'STEPHEN SENEVIRATNE v. REX', 41 Cal W N 65 (PC). There, delivering the judgment of the Board, Lord Roche pointed out it was a mistake to suppose that the prosecution in a criminal case was to discharge the function of both the

prosecution and the defence. His Lordship added that although certain witnesses might be witnesses of the occurrence, if the prosecution had good reason to believe that they were not going to speak the truth, they would be, in no way, bound to call them, and the maximum that they might be expected to do was to keep those witnesses available to the defence so that the defence might examine them., if it liked. In that view of the duty of the prosecution, the Privy Council was anticipated in this Court by Lort-Williams and McNair, JJ in the case of 'BHUBAN BEJOY SINGH v. EMPEROR', 37 Cal W N 1098 and still earlier by Graham and Lort-Williams JJ. in the case of 'NAYAN MANDAL v. EMPEROR', 34 Cal W N 170. But while that may be the true position, it, by no means, disposes of the question as to what the proper direction by the Judge to the Jury should be. When certain witnesses are known to be witnesses of the occurrence and the prosecution does not call them, I should think that the prosecution ought to place before the Court some explanation as to why they had not been called, either by way of examining the investigating police officer or otherwise. It would then be for the Judge to tell the jury that the witnesses not called were witnesses of the occurrence, but the prosecution had given a reason for not calling them and that it would be for the Jury to consider whether that reason was a good and credible reason. But if they came to the conclusion that the reason could not be accepted, the position would be that material witnesses had been withheld and the jury would be entitled to draw a presumption against the prosecution. In the present case, all that the learned Judge did was to tell the jury that they had noticed that some 'likely' witnesses had been omitted and he specifically named Kunja Das and his brother Haru Das. The learned Judge then proceeded to give his own explanation as to why those witnesses had not been called and of the two explanations he suggested, one was in favour of the prosecution and the other against it. He concluded his discourse on that part of the case with the following sentence:

'If you feel that the prosecution has fumbled with the eye-witnesses, you will form your impression accordingly.'

He did not proceed to explain to the jury what impression it would be legitimate for the jury to form and made no reference directly or indirectly to the presumption which they might draw under Section 114, illustration (g), Evidence Act.

16. I do not consider that the directions given by the learned Judge on this part of the case was either adequate or correct. It was for him to point out who the witnesses, who had not been called, were. That he did but only to a certain extent, because he did not name all the witnesses mentioned in the first information report as eye-witnesses who had not been called. Having done so, he should have invited the jury to consider whether they were material witnesses and then to consider the explanation, if any, given by the prosecution for their not having called them and lastly, to invite them either to accept or reject that explanation and to tell them that if they rejected the explanation, they would be at liberty to draw the presumption provided for in Section 114, illustration (g), Evidence Act. As I have pointed out, the learned Judge did nothing of the kind. The way in which he discharged his duty in this part of the charge can be best described by a word which he himself has used. He simply 'fumbled'.

17. The above were the points which Mr. Dutt made against the learned Judge's charge to the jury. In addition, he took two further points which affected the regularity of the trial. The first related to the boiled statement recorded by the investigating police officer in the case of three witnesses, Sudhir, Kartick and Saila. The learned Additional Sessions Judge, on appeal, disposed of this objection by saying that, of the three witnesses, Saila was not a witness of the occurrence, Kartick had not been examined in the case and so far as Sudhir was concerned, he had been examined separately for a second time, so that his statement to the police was available. The learned Judge was right in saying that Saila was not a witness of the occurrence, but why he should have said that Kartick had not been examined in the case it is impossible to see, because Kartick had, in fact, been examined. As regards Sudhir, the fact that he was examined by the police twice makes the position worse, because it would certainly be of interest to the defence to see whether Sudhir, besides deposing in a different sense to the police from his evidence in court, had also deposed to the police differently on the two different occasions. The police officer was asked in the course of cross-examination whether he could say what statements each of these three witnesses had made. He pleaded his inability to do so and the result was that the defence was deprived of testing1 the evidence of Sudhir and Kartick, given in court, by contrasting it with the statements they had made before the police.

18. It is, however, not possible to hold in favour of the petitioner on this point in the present case, because, as Mr. Dutt candidly admitted, there is nothing on the record to show that the defence had ever asked for a copy of the statements made to the police. Section 162 clearly states that a request for the statements must be made. The request need not be by means of an application, but unless the defence makes a request for copies of statements made to the police and thereby indicates its intention to make use of them, they do not earn a right to complain that they had been prevented from cross-examining the witnesses by reference to statements made to the police. Although, therefore, what the police officer did in this case was in clear contravention of Section 161(3), Criminal P. C. it cannot be held that there was an irregularity at the trial, because it has not been proved that the defence made any request for copies of statements made to the police.

19. The last point taken by Mr. Dutt related to the way in which P. W. 12 was dealt with by the prosecution and the learned Judge. He was one Sridhar Das who was examined before the Committing Magistrate and, according to the record of the Sessions Court was merely tendered for cross-examination in that court. It appears that after the witness had been cross -examined by the defence, he was cross-examined by the prosecution itself. The defence immediately put in a petition, drawing the learned Judge's attention to the fact that no permission to cross-examine the witness had been asked for from the learned Judge and none had been given and that in those circumstances, the cross-examination by the prosecution of its own witness had been unwarranted. The learned Judge merely directed that petition to be kept on the file and we do not know what he thought about it at all.

20. It is not easy to understand from the record of the case what actually was done in regard to this witness. 'Tendering for cross examination' can cover two types of cases. There is a type of case where witnesses of a secondary importance who have been examined before the Committing Magistrate are not called before the Sessions court, because the prosecution considers that it has already had1 a sufficient body of evidence on the point concerned and then in fairness to the defence, it tenders those witnesses for cross-examination. But the fact that the witness is tendered for cross-examination means and implies that there has been

some examination-in-chief. As far as I can see, the only practical way in which a witness can be tendered for cross-examination-is by asking him generally, may Be by a single question, in the Sessions court as to whether the statements made by him before the Committing Magistrate were true and on his answering in the affirmative, tendering the evidence given in the Committing Magistrate's court which would then serve as the examination-in-chief. Unless the examination-in-chief is brought on the record in that fashion, I cannot understand on what the defence will cross-examine the witness tendered for cross-examination. It does not appear from the record in this case that the evidence of the witness before the Committing Magistrate was brought on the record at all. In those circumstances, tendering for cross-examination seems to me to have been almost meaningless.

21. But the phrase 'tendering for cross-examination' has also been used in this country in cases where the prosecution discards a witness examined before the Committing Magistrate on the ground that, in its opinion, he is not likely to prove himself to be a witness of truth. In such cases, the prosecution really declares the witness to be hostile, and what it actually does is that although it does not consider it expedient to call the witness itself, it nevertheless, makes the witness available to the defence so that the defence may examine him, if it likes. In such a case, the witness is really examined-in-chief by the defence and not cross-examined. But in order that a witness may be dealt with in that way, it is clearly necessary that the leave of the court contemplated by Section 154, Evidence Act should be asked for and obtained. It may be that such leave need not be asked for by an application. It may also be that where it is found from the record that the prosecution did cross-examine one of its own witnesses, leave will be presumed, as was done in one of the cases in this Court. But in the present case it is impossible to proceed on any presumption. There was an application by the defence in which it was specifically and categorically alleged that no leave had been asked for and none given and yet the learned Judge thought fit merely to consign the petition to the record without making any observation thereon at all. If he had given leave, nothing could be easier for him than to say that leave had been asked for and given or given without it being asked for. Since the evidence of the witness given before the Committing Magistrate was not brought on the record, it seems to me that the tendering for cross-examination in the present case was of the second of the two varieties I

have discussed above and if so, leave of the court becomes essential. The prosecution had examined the witness once in this very case but was not proceeding on his evidence and wanted rather to cross-examine him. I feel accordingly bound to say that the evidence of this witness, at least so much of it as was elicited from him by the cross-examination by the prosecution itself, was not properly and legally obtained and to that extent the defence has certainly been prejudiced.

22. In view of all the irregularities that I have pointed out, it is impossible to maintain the conviction of the petitioner and the sentence passed upon him.

23. The next question is what order we ought to pass. In Revision we can exercise all the powers of a court of appeal. This was a jury trial and the limits of our power in appeals from jury trials were authoritatively defined by the Privy Council in the case of 'ABDUL RAHIM v. EMPEROR', 50 Cal W N 692 (PC). Their Lordships pointed out in that case that, initially, misdirection or non-direction must be established, but that by itself would not entitle this court to reverse the Verdict of the jury. It must further be established that the misdirection or non-direction led to an erroneous verdict, but even that would not entitle the court to disturb the verdict. It must also be established that the erroneous verdict was such as caused a failure of justice in fact. The last phrase which occurs in section 537 of the Code has been interpreted to mean that the High Court must itself consider what the legitimate effect of the evidence would be, and not merely whether the jury, if properly directed, might have come to another verdict. In the present case, however, we find it impossible to take the responsibility of considering the evidence ourselves, because so much depends on the credibility of the witnesses whom we have never seen. It seems to us that this is a case where we are not in a position, and it will not be right, to pronounce finally on the question of fact merely upon a reading of the paper evidence.

24. In the result, the Rule is made absolute. The conviction and the sentence passed upon the petitioner are set aside and he is directed to be retried by some Judge other than Sri P. N. Lahiry.

25. Pending the commencement of the retrial, the accused will continue to be on the same bail. The question of further bail will be in the discretion of the trial judge.

Sinha, J.

26. I agree.

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