

Sailendra Nath Kuar Vs. Emperor

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Court : Kolkata

Decided On : Jun-01-1945

Reported in : AIR1948Cal104

Appellant : Sailendra Nath Kuar

Respondent : Emperor

Judgement :

Ellis, J.

1. The appellant Sailendra Nath Kuar, a youth 17 years of age, was charged with committing rape on a girl, Kalidasi 7 years of age on 23-4-1944 thereby committing an offence punishable under Section 376, Penal Code. He was found guilty by the unanimous verdict of the jury and was convicted under Section 376 and sentenced to rigorous imprisonment for five years. He has appealed to this Court against his conviction and sentence.

2. The houses of the appellant Sailendra and the girl Kalidasi are close to one another and Kalidasi was in the habit of going to the house of the appellant to play with the appellant's nephew, a boy Sona alias Santosh Kumar 8 years of age. On the day in question the appellant asked Kalidasi to go with him to the tank on a promise of giving her some lotus flowers. So she accompanied him to the tank. The appellant took three cows with him and Sona, his nephew, was with the party. Two of the cows were tethered to pegs and one was actually washed in the water

of the tank. The appellant's nephew Sona was asked to take the cow that had been washed on to the other side of the tank and to tether it there. Sona went away with the cow. In his absence the appellant took Kalidasi into the water and inserted his finger into her vaginal canal. She cried out. Sona came there and asked what had happened and the appellant said that he had pressed her foot with his. Sona went away again and after he had gone Sailendra caught Kalidasi, took her to a bush near the tank, made her lie down on her back on the ground and then inserted his penis into her vaginal canal. He put a gamcha into her mouth so that she could not cry out. She began to bleed and when he saw the blood the appellant left her and went home. Kalidasi has no mother and on her return home she did not find her father in the house. But she told a woman of the locality called Mangala Didi what had happened and she gave the information to Kalidasi's father. She was then taken to Dr. Netai Haldar who examined her, saw the injury and the bleeding, and on the next day her father took her in bullock cart to the Dhaniakhali police station 11 miles away. There a first information was lodged and the investigation of the case was set on foot.

3. The case of course rested on the evidence of the two witnesses Kalidasi aged 7 and the boy Sona alias Santosh Kumar aged 8. Sona in giving his evidence deposed that he and his uncle went to the tank on the day of occurrence and Kalidasi went with them. At the tank his uncle bathed the cows and he tethered them on the bank. Kalidasi accompanied them from the bank of the tank without taking any bath. At this stage of his examination Sona was declared hostile and was cross-examined by the Public Prosecutor. Mr. Mukherjee on behalf of the appellant takes the point that the learned Assistant Sessions Judge in his charge to the jury has nowhere given them any adequate direction as to the value to be assessed on the evidence of a hostile witness. That paragraph in the charge reads as follows:

P.W. 4 Sona alias Santosh Kumar is a brother's son of the accused. He corroborates P.W. 1 Kalidasi so far as going to Banian Pukur is concerned. Thereafter this boy witness has tried to help his uncle by saying that Kalidasi came back with them from the tank with him. The witness has been declared hostile and cross-examined by the learned Public Prosecutor. You will consider

whether the boy has suppressed something in order to help his uncle.

So far from giving the jury any assistance in the matter of the value to be attached to the evidence of a hostile witness the learned Assistant Sessions Judge has given them no direction at all in the matter. He has merely declared that the witness has been declared hostile and has been cross-examined by the Public Prosecutor, and then has asked them to consider whether the boy has not suppressed something in order to help his uncle. We cannot hold that this is any adequate exposition of the law so far as the evidence of a hostile witness is concerned.

4. There is the further point to be noticed that the case depends on the evidence of the two child witnesses, Kalidasi aged 7 and Sona aged 8. But nowhere in his charge to the jury this learned Assistant Sessions Judge ever cautioned the jury that in dealing with the evidence of child witnesses they must be very circumspect. He has never expressed to them that children of that age often find it difficult to distinguish between truth and fiction and are apt to draw on their imagination and he has never told them that children of that age are also very liable to be tutored and lend themselves as good witnesses for that purpose. We think that the learned Assistant Sessions Judge certainly in a case of this nature which turns entirely on the evidence of two child witnesses should have given them some directions on this point.

5. In the result then we find that there are serious non-directions on these two points in the charge to the jury and the conviction and sentence on that account must be set aside. We have given full consideration to the question as to whether or not we should order a retrial and we consider that in view of the circumstances, the age of the accused and the length of time he has been in prison already we do not think that any retrial is required. Accordingly we allow this appeal, set aside the conviction and sentence and direct that the accused be discharged from his bail bond.

Roxburgh, J.

6. I agree.

