

Satish Chandra Saha Vs. the State

Satish Chandra Saha Vs. the State

SooperKanoon Citation : sooperkanoon.com/866504

Court : Kolkata

Decided On : Feb-25-1953

Reported in : AIR1954Cal379,58CWN160

Judge : Mitter and ;Sen, JJ.

Acts : [Evidence Act, 1872](#) - Sections 32(1) and 157; ;[Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 162, 297 and 423

Appeal No. : Criminal Appeal No. 63 of 1952

Appellant : Satish Chandra Saha

Respondent : The State

Advocate for Def. : N.C. Talukdar, Adv.

Advocate for Pet/Ap. : A.C. Roy Choudhury and ;Gaganendra Kanta Deb, Advs.

Judgement :

Mitter, J.

1. The appellant was tried by a learned Assistant Sessions Judge at Alipore, sitting with a jury, upon a charge under Section 304, Penal Code for causing the death of one Chaitanya Saha. The jury returned a unanimous verdict of guilty under Section 304, Part I, whereupon the appellant was convicted of the offence and

sentenced to suffer rigorous imprisonment for 7 years.

2. The prosecution case against the appellant was as follows: The appellant and the deceased Chaitanya were co-villagers and neighbours. Between 8 and 8-30 P. M. on 26-5-1951, in the village called Makalgacha, Chaitanya went to the house of the accused to recover his cow which the accused had kept confined. While proceeding from his own house to that of the accused, along the village road, he was accosted by one Keshab Saha who was then sitting with another person on a 'Machan' in front of a shop. Chaitanya stated that he was proceeding to the accused's house to recover and fetch his cow which the accused had kept confined there. Shortly after Chaitanya had passed that way, Keshab and his two companions, named respectively Bhusan and Baharali Gazi, the latter having in the meantime joined Keshab, heard Chaitanya cry out as follows:

'I am being killed by Satish Kala. Save me.'

On hearing this, Keshab flashed a torch light in the direction of the cry and saw the accused strike Chaitanya on the shoulder and then walk back to his house. This happened near the southern boundary fencing of the accused's house. Keshab and his two companions rushed to the spot and thereafter helped Chaitanya, who had been seriously injured, to walk a short distance upto a banyan tree. There underneath the tree Chaitanya was made to lie down, and shortly thereafter he was given first aid by a Doctor called Dr. Bahaman. In the meantime, many persons from the village had assembled on hearing the 'golmal'. Chaitanya's wife and daughter also turned up. Before the arrival of the Doctor, Chaitanya muttered in a feeble but distinct voice that 'Sate Kala', had wounded him. After first aid had been rendered to Chaitanya, he was taken to Basirhat hospital at a distance of about 7 miles from the place of occurrence.

The party reached the hospital at about 2-30 A.M. At 3-30 A.M. Chaitanya made a statement to a Deputy Magistrate. By reason of Chaitanya's death, which took place at 7-45 A.M., the statement became Chaitanya's dying declaration. Keshab and his companion Bhusan had accompanied Chaitanya to the hospital and from there they left for Hasnabad Police Station about 10 or 12 miles away from the hospital. Keshab's departure was long before the death of Chaitanya. The first

information report was lodged at about 7-45 A.M. The Assistant Sub-Inspector of Police who recorded the first information report then left for the place of occurrence and on arrival there seized certain articles including an axe from the house of the accused. In addition, he took charge of a certain quantity of earth from underneath the banyan tree. The earth contained blood.

Subsequently, a seizure list in respect of the articles seized on that occasion was prepared indicating the different places from which they were recovered. These articles were in due course sent to the Chemical Examiner and the Imperial Serologist. These were found to have upon them marks of human blood. It was until July 1951 that the accused surrendered in Court. After the investigation a charge-sheet was submitted and thereafter a preliminary enquiry was held and, as I have stated before, after being committed to the Court of Sessions, the appellant was tried and convicted of an offence under Section 304, Penal Code.

3. The defence of the accused, as it appeared from the cross-examination of prosecution witnesses, was that he had been falsely implicated as a result of a conspiracy among some of the prosecution witnesses. It was also suggested on his behalf that another person of the name of Satish Chandra Saha, also a co-villager, might have committed the offence.

4. Mr. Roy Choudhury appearing on behalf of the appellant has impugned the learned Judge's summing up in many respects. The first point, urged by Mr. Roy Choudhury was that a piece of evidence, vital in the circumstances of this case was wrongly admitted in evidence. This concerned witness Keshab Chandra Saha's version of what Chaitanya had told him on his way to the house of the accused. The actual evidence of Keshab on the point was as follows : 'I asked Chaitanya where he was going. Chaitanya said that accused Satish had confined a cow of his and that he was going to release the cow.'

This evidence, Mr. Roy Choudhury argued, was hearsay and did not come within S, 32(1), Evidence Act. Mr. Roy Choudhury's argument was that the statement could not be said to refer to any of the circumstances of the transaction which resulted in the deceased's death. In support of this, he cited the decision reported in -- 'Venkatasubha Reddi v. Emperor' AIR 1931 Mad 689 (A). We must at once

point out that in the facts of that case the statement of the deceased was far too remote, both in point of time and as to its character to be regarded as a circumstance of the transaction which resulted in his death.

We have no doubt that Keshav's evidence is clearly admissible under Section 32(1), Evidence Act. The transaction which resulted in the death of the deceased was the assault committed in the course of a quarrel over the recovery of the deceased's cow which the accused had detained and for the recovery of which the deceased visited the accused's house, that he was going there to recover his cow which the accused had detained was immediately connected with the quarrel which resulted in the accused's inflicting the injury concerned. The statement concerned was made almost immediately preceding the quarrel over the recovery of the cow and was therefore a statement as to a circumstance of the transaction.

The meaning of the phrase 'circumstances of the transaction which resulted in his death' was considered by their Lordships of the Privy Council in the case of -- 'Pakala Narayan Swami v. Emperor' . In that case the point for decision was whether a statement made by the deceased to his wife that he was proceeding to Berhampore, where ultimately he was murdered, was admissible in evidence under Section 32(1), Evidence Act. Their Lordships held that the statement concerned was a statement as to one of the circumstances of the transaction which resulted in the man's death. In delivering the judgment of the Board Lord Atkin dealing with the evidence or the statement concerned observed as follows:

'The first question with which their Lordships propose to deal is whether the statement of the widow that on 20th March the deceased had told her that he was going to Berhampore as the accused's wife had written and told him to go and receive payment of his dues was admissible under Section 32(1), [Evidence Act, 1872](#). That section provides:

'Statements written or verbal of relevant facts made by a person who is dead... are themselves relevant facts in the following cases (1) when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question.'

A variety of questions had been mooted in the Indian Courts as to the effect of this section. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the 'circumstances' can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death had arisen or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible.

But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. 'Circumstances of the transaction' is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is on the other hand narrower than 'res gestae'. Circumstances must have some proximate relation to the actual occurrence: though as for instance in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose. It will be observed that 'the circumstances' are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility, of the evidence is that 'the cause of (the declarant's) death comes into question'. In the present case the cause of the deceased's death

comes into question. The transaction is one in which the deceased, was murdered on 21st March or 22nd March: and his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on 20th or 21st March that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house, appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted.'

5. The construction thus placed upon the phrase 'the circumstances of the transaction which resulted in his death' was followed in the recent case of -- 'Gokul Chandra v. The State', : AIR1950 Cal306 (C). We hold, therefore, that, Keshab's evidence was rightly admitted by learned Judge.

6. It was next contended by Mr. Roy Choudhury that the learned Judge misdirected the jury in stating that P. W. 3 Keshab had stated in the first information report that he had in fact seen the accused strike the deceased with an axe. The direction concerned was expressed as follows :

'P. W. 3 has said in the first information report that he saw the accused give the 'kop' with an axe. You have heard that the positive evidence of P. W. 3 is that he saw in the light of the torch that the deceased was given a 'kop' with the axe.'

7. We agree that this, as a statement of fact, was entirely incorrect, for P. W. 3 did not only not say that he saw the accused strike the deceased but from the narrative as given by him in the first information report it would be quite clear that neither he nor any of his companions saw the accused actually hit the deceased. Before the Sessions Court this witness stated that he had seen the accused strike the deceased. That being the position, the learned Judge should have pointed out that the witness's evidence at the trial was at variance with what he had stated in the first information report, then leaving it to the jury to decide whether they would accept his testimony or not.

It would also have been the learned Judge's duty to point out to the jury that according to the narrative in the first information report neither of the two companions of Keshab could have seen the actual striking. In this connection the

learned Judge should also have pointed out to the jury that Bhusan had accompanied Keshab to the thana and that it was in the presence of Bhusan that Keshab gave his story. There is no doubt that this error on the part of the learned Judge was bound to affect the jury's assessment of the evidence, not only of Keshab but also of his companions, with what result it is not for us to predicate.

8. Mr. Roy Choudaury next contended that the learned Judge was also in error when he pointed out to the jury, that with regard to the evidence of P. W. 7 Bhusan, P. W. 8 Paresh and P. W. 11 Hazari, not a single omission or contradiction had been brought out between the evidence they had given in the Court of the Committing Magistrate and that given in the Court of Sessions. It was also contended that the learned Judge was equally in error when he pointed out to the jury that no contradiction had been brought out by the defence between the statement which Hazari had made to the police and his evidence in Court. The actual direction was in these terms: 'I would mention that so far as the evidence of P. W. 7, Bhusan, P. W. 8, Paresh and P. W. 11, Hazari, in the lower Court is concerned, not a single omission or contradiction has been brought out. P. W. 11, Hazari, has not been confronted by the defence with any omission or contradiction so far as his statements before the police are concerned.'

9. This direction, in my view, would in the first instance suggest that the previous evidence of the witnesses concerned was the same as their evidence in the Court of Session, and that therefore the latter evidence was corroborated by the former. In my view, in the absence of a further direction that what a witness stated before the Committing Magistrate was not evidence in the Sessions trial, the Jury might be led to believe of the existence of such evidence. However, the evidence given before the Committing Magistrate ' could be admissible under Section 288, Criminal P. C., if the conditions laid down in the section were complied with. The accused could then have an opportunity to meet the situation. Such evidence could also be used under Section 157, Evidence Act for the purpose of corroborating the witnesses' evidence at the trial. But in either case the Judge would be required to follow the relative provisions of law laid down for the reception of such evidence. If it was intended to use the previous deposition as corroborative evidence the same should have been proved as required under

Section 157, Evidence Act. The accused would then have an opportunity to meet the prosecution case on the point.

The latter part of the direction, in my view, clearly offends against the provisions of Section 162, Criminal P. C., which controls the general provisions of Section 157, Evidence Act. In my view, the direction concerned involved the suggestion that the evidence of witness Hazari was corroborated by what had been stated to the police in the course of the investigation. The effect of this, in my view, was to affect the jury's assessment of the evidence of the 3 witnesses concerned. There were only three who should be called eye-witnesses. Bhusan, Keshab and Bahar Ali Gazi. There was a considerable volume of other evidence to connect the accused with the offence. We therefore thought that in spite of the misdirections to which I have already referred, we might go into the evidence in the case and decide whether or not it was sufficient to sustain the conviction. There are however certain features in that evidence which have led us to decide that the appellant should be retried upon the same charge. That being our decision, it is not desirable that we go into the evidence in any further detail. We must, however, observe that utmost caution ought to be exercised in leading evidence, irrespective of the result which such caution might entail.

10. In the result, the conviction and 'sentence imposed upon the appellant are set aside and I order that he be retried by a learned Sessions Judge _ sitting with a jury upon the same charge.

11. The appellant will continue on the same bail.

Sen, J.

12. I agree that the case must go back for re-trial because on a very important point, viz., with reference to the three eye-witnesses, the learned Judge undoubtedly made some mis-direction. He clearly made a mistake when he said that P. W. 3 Keshab had stated in the first information report that he saw the accused give the 'kop' with an axe. The first information report carefully perused shows that the informant Keshab did not really see the giving of the 'kop' himself and it would make highly doubtful whether any other witness had seen the 'kop'

with the axe. This aspect of the case was not placed by the learned Judge who only discussed the non-mention of the flashing of the torch light in the first information report. He should clearly have gone much further and stated that from the first information report it would appear that Keshab and his companions could not have seen the actual assault at all.

13. As to the learned Judge having mentioned that as regards the evidence of certain witnesses no contradiction had been brought out I am unable to agree that this constituted a misdirection. In so far as the statement before the police is concerned, the learned Judge stated that P. W. 11, Hazari had not been confronted by the defence with any omission or contradiction so far as his statement before the police was concerned. This did not, in my opinion, amount to an indirect use of the statement made before the police which is clearly inadmissible under Section 162, Criminal P. C., but this was merely a statement of the facts that had appeared at the trial, viz., that certain witnesses had been contradicted with reference to their statements before the police and this particular witness had not been so contradicted. The facts were already before the Court and the jury and there could be no mis-direction in merely putting the same in the words. In this connection Mr. Roy Choudhury has referred to two cases but both of them are clearly distinguishable.

In the case of -- 'Nandalal Chakravartty v. King Emperor' 49 Cal WN 484 (D), the Court was concerned with a statement that an accused was supposed to have made before the police. The Court directed the jury as follows:

'Though the statement the accused made when first challenged is not admissible in evidence, and we do not know what it was, we know that it caused the Inspector to begin searching him. It could not therefore have contained any admission that he had actually received any notes, and so could not have been that he had accepted the notes for the purpose of giving change. This explanation he put forward sometime later in the elaborate statement which the Magistrate recorded.'

14. Here the Court practically drew the conclusion as to what the accused must have stated before the police when first challenged, viz., that he did not then take the defence which he subsequently took in Court. This was a clear use of the

statement before the police by the accused, and their Lordships naturally held that it was not open to the Court to circumvent the provisions of Section 162, Criminal P. C., by a process of deduction in this way.

In the case of -- 'Sital Chandra v. Emperor' : AIR1942 Cal495 , one witness called for the prosecution gave a version altogether contradicting the prosecution case. In this connection the learned Sessions Judge directed the jury as follows:

'He (witness) has deposed entirely against the prosecution and it is necessary for us to see how far his deposition is true....The investigating officer has told us that not merely did he examine Bhaskar Pal (witness), but he actually took down the statement under the provision of Section 161, Criminal P. C. This statement would not go in as evidence. Had Bhaskar Pal then made a statement before the investigating officer which was so entirely contrary to the prosecution case as the one he has made before you, do you think it likely that the prosecution would have put him in the witness box?'

15. This was clearly telling the jury that before the police the particular witness had made a statement supporting the prosecution case and this, of course, was clearly against the provisions of Section 162, Criminal P. C. In the present case the learned Judge has not asked the jury to draw any conclusion as to what statement the witness might have made before the police. He has merely pointed out a fact which was already before the jury, viz., that a particular witness Hazari has not been confronted by the defence with any omission or contradiction so far as his statement before the police is concerned. The learned Judge placed before the jury the contradictions elicited in respect of other witnesses and, in my opinion, he was quite entitled to place a fact that in respect of a particular witness no such contradiction existed.

16. The same remarks apply to the observation of the learned Judge as regards three witnesses P. W. 7, Bhusan, P. W. 8, Paresh and P. W. 11, Hazari that in respect of their evidence no different statements which they might have made before the Committing Court had been brought out. Certain witnesses had been contradicted by the defence lawyer with reference to their statements made before the Committing Magistrate. The learned Judge placed these contradictions before

the jury. The learned Judge was therefore entitled, in my opinion, to remind the jury of the fact already before them viz., that certain other witnesses had not been so contradicted with reference to their statement before the Committing Court. In respect of a statement made before the Committing Court there is no such bar to the using of such statement as there is in Section 162, Criminal P. C., in respect of a statement before the Police.

On the other hand, the statements before the Committing Court, may, under certain conditions being satisfied, be put in under Section 288, Criminal P. C., both for the purpose of contradiction and for the purpose of corroboration. That the statement may be used for the purpose of corroboration was laid down by the Supreme Court in the case of -- 'Bhagwan Singh v. State of Punjab' : 1952 CriLJ1131 (F). The Supreme Court stated that the prosecution was entitled to use a former statement of a witness either to contradict what was said in cross-examination or to corroborate what was said in chief, Section 157 being as much a provision of the Indian Evidence Act as Section 145.

But apart from the question that the evidence before the Committing Court could be legally proved and was not a bar, we are only concerned with the mention of the mere fact that certain witnesses had not been contradicted by showing that they had stated differently before the Committing Court. This was not, in my opinion, an attempt to use the statement in the Committing Court without taking the trouble to prove the same under Section 157, Evidence Act and Section 288, Criminal P. C. If the learned Judge had gone on to state further that the jury might presume that before the committing court or before the police the witnesses had made some consistent statement that would no doubt amount to misdirection. The learned Judge carefully stopped short of making such statement and contented himself by merely stating fact which was also before the court and the jury.

17. As I have already mentioned, on one very important item, namely in dealing with eye-witnesses, the learned Judge clearly went wrong. There is sufficient other evidence in the case which justifies a retrial and I agree that the case should go back for a retrial.

