

Bhondar Vs. Emperor

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Court : Kolkata

Decided On : May-06-1931

Reported in : AIR1931Cal601

Appellant : Bhondar

Respondent : Emperor

Judgement :

Lort-Williams, J.

1. The accused in this case was charged with rape upon a girl, nine years old. He himself is stated to be about fifteen though there is no definite evidence upon the point. He was tried by the Additional Sessions Judge, Hooghly, at Howrah and a jury who brought in an unanimous verdict of acquittal saying that they gave him the benefit of the doubt.

2. The prosecution case is that the girl Panchu Bala Dasi was the wife of Rajani Khanra, who was about eighteen years old and that she had been married to him four years before at the age of five. They had never lived together as man and wife. The girl lived with her father and mother and the husband and wife used to visit each other in their parent's houses from time to time. At the time when this crime was alleged to have been committed the husband was away from his home and the father and mother of the girl also were away temporarily leaving her alone in the house.

3. She says that the accused Bhondar came up and asked her for some water, then caught her by the hand, dragged her into the cowshed, laid her down on the mud floor, and ravished her after stripping her naked. She cried and the witness Benode Mandal came and according to his evidence, he saw the accused get up from the body of the girl leaving her on the ground. The accused tried to escape but Benode Mandal caught him: he begged for mercy but Benode took him to another part of the village to the girl's mother.

4. Another witness, Benode Shaha, says that he saw the accused being taken along the main road by Benode Mandal, and that he saw the girl standing by the ghat near at hand and blood was trickling from her on to the ground. There is evidence that the girl's cloth was saturated with blood and there is other evidence given by the girl's mother that when she saw the girl for the first time, blood was dripping down her legs on to the ground. Evidence was given by the medical officer to show that the injuries he found on the body of the girl were consistent with her having been raped.

5. Also he was allowed to give evidence that he had examined the boy (the accused), and that he found injuries on both his shoulder blades. Also there was an abrasion upon the frenum of his penis, which he said was consistent with an injury sustained when penetrating with difficulty the vagina of a girl.

6. The defence set up by the accused was that he had been falsely implicated, that the rape had been committed by the husband, that this had been discovered by Benode Mandal and others and that they had taken advantage of this knowledge to force the husband and this child and her mother to join them in concocting this story against the accused, in pursuance of a settled plan to drive the accused's family from the village, and obtain their lands, that in pursuance of this plan they had caught hold of the accused and had inflicted the injuries upon him which were discovered by the doctor and had put blood upon his cloth in order to strengthen the case against him.

7. The learned Judge disagreed with the verdict of the jury and has referred the case to this Court because he considered the verdict to be perverse and contrary to the weight of the evidence. He relied considerably upon the medical evidence

and upon the fact that the accused's penis was injured. Also he thinks that the story that the accused was deliberately injured for the purpose of proving this concocted case is absurd.

8. I must confess that at first sight this looked to me to be a very clear case, and but for the arguments of the learned advocate for the accused I should have been inclined to accept the Judge's reference.

9. The learned advocate has pointed out a number of matters in evidence, not of very great importance but each one sufficient to cause any reasonable jury to pause and to consider before accepting the story of the prosecution.

10. There are one or two incidents in the case which also may have influenced the jury. The first one is that the pleader for the accused was prevented from putting a number of questions in cross-examination. How far he was prevented is not quite clear. But he did have to present a petition to the learned Judge in which he set out a number of questions which he desired to put but which he had been prevented from putting, On examination of those questions, it is clear that they were all admissible in cross-examination in this case for the purpose of discrediting the witnesses for the prosecution. The only note made by the learned Judge upon this petition is that it was rejected. The learned advocate for the Crown has pointed out that on the same day that it was rejected there is a note made saying that this witness was further cross-examined, and there is evidence to show that one or two further questions were put to him. But I am not satisfied that the pleader was allowed to put the whole of the questions set out in the petition which he was entitled to do.

11. The second matter, which has been dealt with at some length, is the admission of the medical evidence derived from the examination of the accused. I am quite satisfied in my own mind that this evidence is not admissible. If it were permitted forcibly to take hold of a prisoner and examine his body medically for the purpose of qualifying some medical witness to give medical evidence in the case against the accused there is no knowing where such procedure would stop. It is to my mind quite contrary to the spirit of the law, that evidence should be obtained in this way. It is argued that in this case the accused was sent for examination to the

hospital. He was not asked whether he consented to such examination and a boy of fifteen can hardly be expected to know what his rights are in the matter. In such circumstances it is clearly incumbent upon the Crown to prove that the accused consented, before such evidence is received. Any such examination without the consent of the accused would amount to an assault and I am quite satisfied that the police are not entitled without statutory authority to commit assaults upon prisoners for the purpose of procuring evidence against them. If the legislature; desires that evidence of this kind should be given, it will be quite simple to add a short section to the Code of Criminal Procedure expressly giving power to order such a medical examination. It was pointed out by the learned advocate for the accused that until it was specifically provided by the Evidence Act and the Code of Criminal Procedure, there was no power even to take the thumb impression of a prisoner, nor was there any power to search him or to strip him or to bathe him, or to do any similar acts to him until it was provided by specific Acts of the legislature.

12. There are other points to which the learned advocate for the accused has drawn our attention. It is a curious fact that although two or three witnesses speak to the presence of blood trickling down the child's legs, no blood was found upon the floor of the cowshed, and this throws some doubt upon the prosecution story that the act was committed in that place. This may be explained by the fact that although the girl was stripped, her cloth was underneath her, and that might have prevented any blood from falling upon the floor.

13. Other points go to show that there were answers given by several of the witnesses which prove that they were not telling the strict truth upon all matters. For example, according to the mother, the girl went to her husband who stoutly denied this. It is argued that if this act had been committed by the accused, it is most unlikely that the husband would so soon afterwards have received the girl into his house. Whereas if the truth be that the deed was committed by the husband there would be no such reason for refusing to receive her. There was a great deal of cross-examination going to show enmity between the families of the chief witnesses for the prosecution and the family of the accused, and a great deal of cross-examination to show that some of the witnesses have been very highhanded to other inhabitants of the village whom they wished to get rid of.

There are discrepancies between the evidence and the statement made in the First Information Report. Rajani had stated in the report that Benode Mandal had taken the boy and the girl together to her mother. But the evidence went to show that the girl had been left behind in the cowshed. The explanation of this may be that Rajani was not an eyewitness and may have confused the ' story. Nevertheless the discrepancy is there. For some reason or other the witness Rasik denied that he sent for the husband when the offence was committed; whereas other witnesses swear that he did. It is a small point, but it shows that either Rasik or other witnesses, for some reason or other did not wish to make the admission, or else it shows that their memory was not to be trusted. Rasik also refused at first to admit that he had been a witness in a case brought against the brother of the accused. The point is not of great importance except that it showed the jury that this witness could not be accepted as a truthful witness upon all points. It is clear that the boy was injured on the shoulder blades and no satisfactory explanation that would explain the injuries on his back found by the medical officer. No part of the prosecution story will explain them.

14. All these matters doubtless were taken into consideration by the jury. The learned Judge charged the jury clearly and forcibly and with an obvious leaning towards the case for the prosecution. He was entitled to do this if he had formed the strong opinion which obviously he had formed about the case. In spite of this and in spite of deliberation which lasted for just under an hour, the jury acquitted the accused.

15. This case comes before us under Section 307. The section was passed doubtless to provide a safeguard in jury trials, because the legislature was not satisfied that a jury could always be relied upon to do their duty. Otherwise, in my opinion, the verdicts of juries were intended to prevail, and it was not contemplated that this Court would upset the verdicts of juries unless it came to the conclusion that they were perverse, that is to say, that the jury deliberately refused to do their duty as jurors, or that they had failed to comprehend the evidence. Under the section we have to give due weight both to the opinion of the Judge and of the jury. Personally, I have little faith in the decisions of single Judges upon questions of fact in criminal matters and in this case there were five jurors who thought either

that the accused was innocent or that the case for the prosecution had not been proved. As I have pointed out so often in this Court we suffer under the disadvantage of never having seen either the accused or the witnesses. The jury have had that advantage and in view of all the facts to which I have alluded, I cannot understand how we can say that no reasonable jury could have come to such a decision, and that it is clear that the jury deliberately refused to carry out their duties as jurors or were so stupid that they could not comprehend the evidence. I am quite sure that the provisions of Section 307 are necessary and in a suitable case must be used. But I am not satisfied that those conditions are present in this case. For these reasons the reference must be rejected.

16. The accused who is in jail is discharged and acquitted.

S.K. Ghose, J.

17. I agree that the reference must be rejected. But I should like to add a word with regard to the general question as to the examination of the body of an arrested person. Under Section 51, Criminal P.C., the police have the power to search an arrested person. It is expressly provided there that the officer making the arrest,' or when arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person and place in safe custody all articles, other than necessary wearing apparel, found upon him. Considering that a police officer has the power to arrest on mere suspicion unconnected with a particular occurrence, it seems to me that it is not necessary that the purpose of the search should always be to look for something definite, such as, an incriminating article, The provision is that the police officer may take into custody all articles and seize offensive weapons found upon the prisoner : Section 53. This does not mean that he is to shut his eyes to other things. He may, and should, take note of anything worthy of attention, such as marks of injury, and if called as a witness he may depose to such marks. There is a special provision in the case of women : Section 52. These provisions are made in the interests of proper investigation and they are not dependant on the consent of the arrested person. Indeed I cannot see many prisoners, who have really done something wrong, consenting to their persons being' searched and thereby enabling the police to get,

what often would be, the best evidence in the case, and if this power of search were to be read as subject to the prisoner's consent valuable evidence would be shut out. Under the Prisons Act also a prisoner, at the time of his admission into prison, is liable to be searched and there again consent would not be necessary. In such a case also the searching officer may be called as a witness and he may depose to the existence of injuries or anything else that he might have noticed. It must be admitted that in the case of injuries, the ends of justice require that the examination should be by a doctor, and it would be anomalous to admit the evidence of a searching police officer and not to admit that of an examining doctor.

18. Indeed examination by a doctor is specially provided for by Section 24, Prisons Act 9 of 1894. Nevertheless the examination of an arrested person in hospital by a doctor, not for the benefit of the prisoner's health, but simply by way of a second search, is not provided for by the Code, and in such a case the doctor may not examine the prisoner without his consent. It would be a rule of caution to have such consent noted in the medical report, so that the doctor would be in a position to testify to such consent if called upon to do so. I believe that in the case of females this is generally done and it is necessary, for the law enjoins 'strict regard to decency.' At the same time I am not prepared to go so far as to say that, in the case of a medical examination mere absence of consent would indicate an assault in the sense in which that offence is defined in the Penal Code.