

Samarali and ors. Vs. Emperor

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Court : Kolkata

Decided On : Jul-30-1936

Reported in : AIR1936Cal675,166Ind.Cas.323

Appellant : Samarali and ors.

Respondent : Emperor

Judgement :

Cunliffe, J.

1. These appeals have been ably argued before us and are put forward on behalf of three men who were convicted by a Judge and jury at Mymensingh for crimes of abduction and rape upon a young Hindu married woman. The appellants are Mohammedans. In my opinion, this was a false case and it was made no more easy before the jury to come to a correct conclusion by the manner in which it was handled by the learned Judge. As the learned Deputy Legal Remembrancer pointed out, it is perhaps difficult to put one's finger upon any striking piece of misdirection: but the whole of the summing up, in my opinion, was apt to mislead the jury by the learned Judge's misappreciation of the evidence which was laid before the Court. One of the most striking features of the case was that the witnesses whom one might have expected to have been called for the prosecution were called for the defence, while other witnesses whose names were originally mentioned as being prosecution witnesses concerning whom the defence alleged

that they were at the bottom of the false charge made against these three men, were never called at all and the extra feature of the case is that one of the prosecution witnesses gave evidence which was quite inimical to the prosecution case and thereupon the learned Judge recorded in his diary that the Public Prosecutor declared this witness to be a hostile witness. He refers again to this event in the charge by using the expression. 'The witness was declared hostile by the prosecution'-a phrase which I imagined at first was a slip, but evidently it is a true version of what occurred. It is very difficult to appreciate exactly what effect it would have upon a jury. But I think it is fair to draw the conclusion that the Public Prosecutor in this Court has very much more influence than he ought to have, and if he has very much more influence than he ought to have, it would only be a step further to imagine that the jury think that his evidence or rather the way he presents his evidence is to be accepted at a greater value than the way in which the defence evidence is presented. The conclusion that I draw is not far fetched in that regard and it is not right to declare a prosecution witness as hostile. The only way in dealing with witnesses who go back on their statements or testify in a way which is frankly against the interest of the party calling them lies with the Judge of the Court.

2. That is laid down quite correctly by Section 154, Evidence Act, and it is the duty of the Public Prosecutor in such circumstances or of counsel representing the Crown to formally ask the leave of the Court to cross-examine the offending witness both with regard to the evidence he has already given which is complained about and also, if necessary, to put questions to him to discredit his testimony generally. The case is also an unfortunate one, because one of the charges against the accused is under that dreadfully drawn Section 366 of the Code which is always giving trouble in these Courts, because we never know in an appellate Court really how the jury have made up their minds. It is an omnibus section dealing with both abduction and kidnapping and I think it is the duty of Judges with jury to adopt in part the system which is prevalent in England, and that is to put a specific question to the jury as to the conclusion they have come to in relation to the age of the girl whose maltreatment has been the subject of the charge. It was not done here. I very much doubt that the jury, unless it is specifically put to them, ever really understand what their duty is under Section 366. It is difficult even for a

trained lawyer to appreciate and it must be extremely difficult for a layman. I am leaving to my learned brother a close analysis of this charge. I think the appeals must be allowed, the convictions and sentences set aside and the appellants set at liberty forthwith.

Henderson, J.

3. The prosecution case was briefly as follows: One night at about 10 o'clock Tarubala, P. W. 4, who is the wife of the complainant Jatindra Nag went out of the house to ease herself accompanied by her mother-in-law. She was suddenly attacked by a body of 8 to 10 persons, including the appellants and was forcibly carried off after being gagged. A search organised by the mother-in-law proved fruitless. The girl said in her evidence that the appellants had committed rape upon her at various places. Eventually the complainant received information from the thana to the effect that his wife had been found and was there. He accordingly, went and recovered her. It was never disputed by anybody that she was taken to the thana by the Chaukidar who gave evidence for the defence and who, as my learned brother has pointed out, ought really to have been called by the prosecution. There is divergence as to what happened at the thana. According to the police witnesses, the girl refused to return to her husband and the Sub-Inspector made her over to the witness Ram Kumar Das, with the request that he would send her back either to her brother or eventually to her husband.

4. There were several startling features about the case and, in my opinion, the learned Judge altogether failed to put them before the jury in a proper manner. The charge was far too long, dealing with petty and unimportant matters and presented in a thoroughly confused manner. It was the sort of charge which has frequently been condemned by this Court, in which no attempt was made to marshal the evidence under the proper headings and I very much doubt whether the Jury derived any assistance from it at all. Now, the first thing to notice is that the explanation of the law was confused and unsatisfactory. The prosecution made a simple and straightforward case of abduction. Probably in view of the very unsatisfactory nature of the evidence with regard to the girl's age and the fact that she had given her age in the committing Magistrate's Court as 17, the prosecution

thought that they were not justified in putting forward a charge of kidnapping. In spite of that, the learned Judge introduced it himself and did so in a thoroughly confusing way. His first direction of the law is in these terms:

If these points are proved, then the charge under Section 366 should be regarded as proved. If it is found that her age is above 16 years and she willingly went with the accused, then the charge under Section 366 fails.

5. Now, the natural inference to draw from this is that if the girl was not over 16, the charge under Section 366 would be established even though she went willingly. Of course, it would and if the learned Judge thought that a parallel line of enquiry should go on in this case, he should have altered the charge accordingly and given the appellants due notice of the fact that the age of the girl was going to be called in question. It could not be doubted that if she was below 16 and went away willingly with the accused they certainly were guilty of an offence punishable under Section 366. Instead of dealing with the matter on these lines, the learned Judge tells them not to convict of kidnapping under Section 366, because no such offence was charged, and then proceeds to introduce a lot of irrelevancy about Section 366. Now, if all the odd passages dealing with this matter are put together, the irresistible conclusion is that the jury must have been in a hopeless muddle. We find it difficult to suppose that they really believed the evidence with regard to abduction and the directions of the learned Judge are such that they may well have thought that they were entitled to bring in a verdict of guilty of kidnapping. There are, of course, as the learned Deputy Legal Remembrancer points out, passages in the charge which should have prevented the jury from arriving at such a conclusion, but we are not concerned with isolated passages. We are concerned with the charge as a whole and the law has been presented in such a confused way that we really do not know what the Jury thought.

6. But it is not only with regard to the explanation of the law that the charge is unsatisfactory. There are several striking features about the case. The duty of the Judge was to marshal the evidence with regard to the points succinctly and clearly, so that the Jury would clearly understand the materials upon which they should take the facts into consideration. Instead of doing that, he delivered a

charge which is a long and rambling account of what the various witnesses said a matter of which the Jury were perfectly aware without any direction. I do not propose to deal with every matter but with only the more important ones. Now, the first admitted fact to which I would refer is the existence of Ex. A. This is an entry made by the officer in charge of Gaffargaon thana on 29th May 1935, and recorded by the Sub-Inspector Syder Rahaman. The occurrence is said to have taken place on the 24th May. It was, therefore, prior to this entry. The learned Judge rightly told the Jury that if they believed that this information was really given by Jatindra, they could not convict the appellants. He, however, did not point out to them the circumstances which related to the question whether such information was, in fact, given. It was really a serious misdirection in the sense that the learned Judge was not dealing with the realities of the case with regard to this particular entry. On this point the learned Judge said this:

As the statement of the informant is noted in a gist form and as it is not read over to him to show that it has been correctly recorded, these General Diary entries have in reality very little evidentiary value, as the writer of the entry can write anything according to his sweet will.

7. Of course, in any view of the matter, the learned Judge was over stating it when he said that such entries have very little evidentiary value. It is only when definite circumstances are proved to suggest that it has not been made in a bona fide way that its value could be called in question. Now, it is quite true that if Jatindra said that he did go to the thana and that he gave the information that his wife had been carried off by the appellants and others, then the observation of the learned Judge would have been to the point and of some use. But in the present case, they are entirely irrelevant and misleading. The case of the prosecution is that Jatindra never went to the thana at all and never gave any information. What the learned Judge should have put before the Jury was two theories: (1) that the Police Officer made this entry in the ordinary course of business, as he made hundreds of other entries; and (2) that he invented the whole thing out of his own head about a person whose existence, so far as 'we know, he may have been quite unaware of for no reason whatever. The very fact that a great deal of this entry is admittedly true is enough to show that the prosecution suggestion is purely fantastic. Another

fact is that the girl was brought to the police station by the Chaukidar D. W. 3 and it was obviously necessary to instruct the jury how this admitted fact fitted in with the respective cases of the two parties. Now, it would be perfectly idle for the prosecution to suggest that the Chaukidar is not a real and genuine witness. He obviously is and the explanation which he gives is perfectly natural and straightforward. He was a witness who ought to have been examined by the prosecution and they ought not to have thrown his evidence overboard in the absence of very strong reasons.

8. The reason for doing so is a ridiculous explanation given by the prosecution witness, the girl herself. She solemnly suggests that she was sent to the thana by the accused. What reason the accused should have for doing so, it is impossible even to imagine. But she is not consistent even about this. First of all, she says that she was taken to the thana by the Chaukidar after he had consulted with the accused. Later on she says that the accused told the Chaukidar to take her back to her own house. Instead of pointing out to the jury the circumstances in which the girl was produced at the thana, which strongly suggest that the prosecution case was entirely false, the learned Judge devoted a good deal of time to dealing with petty discrepancies in the depositions of witnesses which did not make the least difference one way or the other. Then another admitted fact is the existence of Ex. B, which is the entry in the General Diary with regard to the admitted fact that the girl was produced in the thana by the Chaukidar. An abstract of the statement alleged to have been made by the girl is included and it contains a reference to the alleged ill-treatment by a person referred to as her dadi sasuri. The prosecution pounced upon this word and proceeded to erect a huge theory that a Hindu girl would not refer to dadi sasuri, and it must have been introduced by some Mahomedans, presumably some of the appellants, although it is common ground that none of them was there.

9. The thana officer who is said to have engineered this falsehood was of course himself as well aware of the use of the word as anybody else. Instead of pointing out to the jury that there was no evidence to support this theory except the use of the word itself, the learned Judge expatiated on it at great length and appeared to attach enormous importance to it, the result being that he presented before the

jury a highly coloured picture and entirely neglected what was on the other side. He failed to point out the whole of this entry part of which was admitted by everybody to be true and was therefore not invented by some un-known Mahomedans. It is quite obvious that when the girl was produced in the thana she must have made a statement of some kind and there is no reason to suppose that the Sub-Inspector, instead of recording what she really stated, invented something else for no reason at all. Then, again, the jury were positively misled with regard to the general effect of the evidence. The learned Judge should have placed it prominently before them in the forefront of the charge that they could not possibly convict, unless they believed the girl and her mother-in-law. Instead of doing that, he suggests that the evidence of certain other witnesses is sufficient to prove the charge. Further, his language is so unhappy that the jury may well have thought that he intended to lay down that if they disbelieved the defence witnesses or were not satisfied with the genuineness of the entries in the General Diary, they would be justified in finding the accused guilty.

10. It only remains for me to say a word or two about the witness Ram Kumar Das. As my learned brother has pointed out, the Public Prosecutor ought not to have been allowed to declare him hostile and deal with him on those lines. It was for the learned Judge to decide whether he would allow the Public Prosecutor to cross-examine this witness. On turning to his deposition it appears that the witness had given a great deal of what was almost transparently false evidence in favour of the prosecution, and it was only a substratum of truth which came out at one place that induced the Public Prosecutor to declare him hostile. In these circumstances, the learned Judge would have exercised a wise discretion if he had rejected the application and left the cross-examination to the defence alone. From what has been said above, it will appear that the prosecution might have been able to establish a case with regard to kidnapping. But it is really very doubtful whether the evidence with regard to the age of the girl justified such a course. The learned Deputy Legal Remembrancer did not really ask for it and we have reached the conclusion that we ought not to send the case back for a re-trial. I therefore agree that this appeal must be allowed.

