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(1945) 06 AHC CK 0001

Allahabad High Court

Case No: None

Ram Kala APPELLANT

Vs

Emperor RESPONDENT

Date of Decision: June 7, 1945

Citation: AIR 1946 All 191 : (1945) 15 AWR 287

Hon'ble Judges: Sinha, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Sinha, J.
Ram Kala, a young Jat of 18, who has been convicted under Sections 376 and 302, Penal Code, and sentenced to death by the learned Sessions Judge of Bulandshahr, has come in appeal before us. Along with the appeal there is the record of the case for the confirmation of the sentence of death. The charge against the appellant, in common with two others, Sheodan and Karan Singh, was that they committed rape on one Bir Wati, a Jat girl, of 13, on 23rd. August 1944, in mauza Bharaoti in a field and then murdered her. Sheodan is of the same age as the appellant; Karan Singh is 45. Both Sheodan and Karan were acquitted as the evidence against them was not satisfactory. The story for the prosecution is briefly this : On 23rd August 1944 Mt. Bir Wati, the deceased, along with her cousin, Mt. Vidya. Wati, went to her grandfather, Surja, with, his food and after giving the food, when she was on her way back, the appellant, Sheodan and Karan caught hold of her. Vidya Wati ran away and informed her mother about the incident. A hue and cry was raised and a search was made. Her corpse was found in a maize field belonging to the accused Sheodan. She had been raped and throttled. A report was sent to the police-station Siana by the Mukhia of mauza Bharaoti. The Station Officer arrived the next day, held an inquest and sent the body for post mortem examination. He took the clothes from the person of the deceased. He arrested Ram Kala, appellant and searched his house. He took the knickers Ram Kala was wearing at the time, and a Kurta and a dhoti from his house. He found the clothes blood-stained and injuries on the face and other

parts of his body. Ram Kala was examined by the doctor. The Imperial Serologist also found his clothes stained with blood. He also found spermatozoa on some of them.

2. The defence of the appellant was that there was no search made. Nor were the knickers taken from his person. The further and the common defence of the appellant and the other two accused was that they were implicated on account of enmity with the Mukhia of the village, viz., Malook Singh. Before going into further detail, it might be mentioned that Mt. Bir Wati and Mt. Vidya Wati were cousins, daughters of two brothers, Ramphal and Himmat, sons of Surja, the grandfather, for whom the girls had taken the food. This Surja is the brother of a man named Chandan whose son Raghubir is one of the principal witnesses in the case. It might as well be mentioned that Bharaoti, the scene of the occurrence, and also the residence of the appellant adjoins mauza Saidpur, the residence of the family of the deceased. There is another village Khairpur at a distance of a mile from Saidpur and two furlongs and a half from Bharaoti.

3. The learned Sessions Judge has rightly held that the evidence in the case is mainly circumstantial. There are witnesses who saw the accused in the vicinity of the field where the body was later found at about the time the murder was committed. There is the statement of Vidya Wati, a girl of about ten, and there are the blood-stained clothes. To these may be added the evidence furnished by the medical examination of the accused. The case lies in a narrow compass, but an attempt to ascertain the truth has met with considerable difficulty created by certain uncommon features. The failure of the accused to produce any defence - whether due to poverty or other-wise - has made no small contribution to that difficulty. Apart from the medical evidence, the evidence of, Mt. Vidya Wati and Malook Singh, the Mukhia of Bharaoti, who sent the report through Inder Bal, the chaukidar, must form the main plank of the prosecution. It is not clear why the Mukhia of Saidpur took practically no interest in the matter. It may be that it fell on Malook as the Mukhia of Bharaoti - the scene of the occurrence - to send the report, but this does not explain the utter indifference of the Mukhia of Saidpur. Malook Singh scribed the first information report which is to be found at page 5 of the paper-book and is in these terms:

It is submitted that a girl of mauza Saidpur, aged 12 or 13 years, whose fields are on the boundary line of Bharaoti and who was going back to her village from her field after giving food, was found dead in a juar field. The deceased is the daughter of Ramphal Jat, resident of Saidpur. He had been searching her for 3 or 4 hours. When he found the dead body he came to me and said "the body has been found in a juar field and I have identified it as that of my daughter". He also said that she had been raped. Please come to the spot and examine the dead body. I am sending the report through the chaukidar.

4. The report is conspicuous by the absence of all reference to the name or names of the accused and also to the fact that there was, besides the deceased, another girl ac companying her. Malook Singh says that he received the information from one Fattoo and that he had no other information although, according to Vidyawati, Fattoo was not present at the spot. Now, according to Malook himself, the report was made once by him to Inder

Bal, the man who took it to the police-station, at 6 P.M. If it is true that he had, by that time, been told that the three accused were responsible for the death of the unfortunate girl, it is difficult to follow why those names were not mentioned. He admits that he had met Raghubir at 4 P.M. We have now to see if the information that the three accused were the authors of the crime had been conveyed to him. According to Vidya Wati, after Ram Kala, Sheodan and Karan had caught hold of Bir Wati, she ran home and told her mother about the incident and also her aunt, the mother of Bir Wati. Ramphal, the father of the deceased, says that at midday his wife told him that the three accused had caught hold of his daughter in Imrat''s field and he started for the field with five or six men and found the body after about three or four hours. He then informed the Mukhia of Saidpur, who advised him to make a report to Malook Singh. To use his own words:

Malook Singh came to the body and I gave him the names of the murderers and asked him to make a report. He said he would send the report.

Raghubir, Ramphal''s cousin, also says that, when Malook came to the body, Ramphal, Deep Singh, Dharma and Tarif were present and all of them told him that the accused had raped and killed the girl. It is, therefore, obvious that either Malook is telling the truth when he says that he did not know, nor had he been told, the names of the murderers and all these witnesses are lying or that Malook did not know and deliberately abstained from mentioning their names in the report. The learned Sessions Judge has criticised the conduct of Malook Singh. In the view he took he was perhaps right. But the accused is entitled to say that it is not Malook but the other witnesses who are telling an untruth. He is also entitled to say that by the time the report was scribed by Malook and made over by him to Inder Bal, the people in the village were neither clear nor sure about the perpetrators of the crime and that the story as now told is an after, thought. While the truth must in these circumstances remain shrouded in obscurity, there are no doubt certain circumstances favouring the appellant. Apart from the contradiction furnished by the evidence of Meda, Dharam Singh and Harbans, for instance, Dharam Singh, who was according to Raghubir present at the time of the discovery of the corpse, distinctly says : "No one present there told me that Ram Kala and other accused had killed Bir Wati," there is a definite plea of enmity taken by the accused which has been conceded by Raghubir Singh. He admits that "the entire population of Bharaoti and Saidpur is hostile I to the accused."

5. The learned Government Advocate contends that it is not established whether the enmity had existed even before the occurrence or whether it is due to it. The line of cross-examination, which elicited this information from Raghubir, indicates that old enmity was in the contemplation of the counsel and it was in answer to such a question that Raghubir admitted the hostility. Besides, once this was brought out, it fell on the prosecution to clear the point further by re-examination. The accused is - if the statement is compatible with both the theories, one favouring the prosecution and the other, the defence - entitled to ask the Court to construe it in his favour and hold that the enmity preceded the occurrence. And, in so asking, the appellant is supported by the principle

laid down in Will''s Circumstantial Evidence, chapter VI:

In order to justify an inference of guilt, the circumstances from which such an inference is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt Mt. Jahura Bibi Vs. Emperor, .

6. Coming now to the witnesses examined by the prosecution, witnesses 1 to 7 are all formal witnesses and may be dismissed from consideration. (His Lordship then considered the evidence of certain other witnesses and proceeded.) It now remains to consider the most important evidence, that is, the statement of Vidyawati. She is a young girl of ten years of age. She says that Ram Kala accused caught hold of her cousin and Sheodan and Karan also caught hold of her later. Then they took her to Imrat''s maize field. She began to cry and ran away to her home and told her mother about it after which she told her aunt, that is, the mother of the deceased. Later, in the day she learnt that the dead body of her cousin had been found in the field. She gives a lie to Malook when the latter says that he got all the information from Fattoo as she says that Pattoo was not even present there.

7. If her story is a true story, there can be no doubt that all the accused are equally guilty. But there are inherent improbabilities in this story. Surja, the grand-father, to whom both she and the deceased had taken the food was at a very short distance. The more probable thing was that she should have gone to him rather than to her home, about a mile from the scene. The learned Sessions Judge says that she is a girl of immature mind and it is more natural that she should have gone to her mother. We agree that she is a girl of immature mind. But we do not agree that the first impulse was not to go to the grand-father, who was much nearer, but to go to the mother who was so far away. Then, again, before the police she did not mention the names of Sheodan and Karan. They have for this reason been acquitted by the learned Sessions Judge. But, to our mind, if her story with regard to the other accused is found false, her story even with regard to the appellant must be received with considerable caution. This conclusion is not based upon the principle of falsus in uno falsus in omnibus, but owing to certain inherent improbabilities. We now come to the medical evidence. The medical examination of the deceased leaves no room for doubt that she was raped and murdered. We have to find out the man or men who were guilty of this offence. At p. 11 of the paper-book are to be found the injury reports of Ram Kala and Sheodan. It does not appear that Karan was examined. There is, besides, the report of the Chemical Examiner at page 12 of the paper-book. The learned Counsel for the appellant contends that where as one of the articles sent to the Chemical Examiner was the underwear of the appellant, the witnesses have all said that he was wearing knickers and not an underwear. It appears from the evidence of Dharam Singh that the witnesses meant the same both by knickers and drawers and the learned Sessions Judge himself treated them as the same. At page 38 of the paper-book he says : "The Chemical Examiner found the kurta, dothi and the underwear (Knickers)...stained with blood." The above, therefore, makes it clear that

knickers and drawers were used as synonymous expressions. The learned Sessions Judge has treated the nature of the injuries received by Ram Kala as only compatible with the crime. But the medical examination is lacking in one very important particular. Why did not the doctor examine the most material part of Ram Kala"s body? Why did not he examine, to put it quite bluntly, his male organ or the penis. Such an examination would have proved conclusively whether Ram Kala was guilty of the offence. In a case of rape we find the following passage in Lyon"s Medical Jurisprudence for India by Waddell (Edn. 7) at page 313:

Signs of recent intercourse - Glans. If this be covered by uniform layer of smegma. It negatives the possibility of recent complete penetration. If not, any abrasions should be noted, especially on fraenum.

8. To the same effect is the observation of Modi in his Medical Jurisprudence (Edn. 5) at page 340:

If the accused is not circumcised, the existence of smegma round the corona glandis is proof against penetration, since it is rubbed off during the act of sexual intercourse. The smegma accumulates if no bath is taken for twenty-four hours.

9. The appellant is entitled to say that if a medical examination of the vital or the material parts of his body had been conducted, he would have been in a position to show that the condition of those parts "negatived the possibility of recent complete penetration" or "proved that there was no penetration." The learned Government Advocate, however, argues that, as the medical examination had taken place more than twenty-four hours after the occurrence, the result would have been inconclusive be cause in Modi"s Medical Jurisprudence it is made plain that "the smegma accumulates if no bath is taken for twenty-four hours." This is no answer to the plea of the accused. It was the duty of the prosecution, if, according to the medical jurisprudence, medical examination was capable of yielding conclusive results, to ensure that examination1 within a period of time when conclusive results could be achieved. Speaking in a case of a very similar character in Surendra Nath Mukerji Vs. Emperor, Piggott J. has observed that:

In a case of this sort, where a human life is at stake, no motives of delicacy, however natural or in themselves commendable, can be allowed to interfere for a moment with any attempt to sift out the truth.

10. In that case a young girl had been killed by her husband. The prosecution case was that she had been killed by the husband as she was unchaste. The argument of the defence in the High Court was that the girl was virgo intacta and that, as she had resisted him in the exercise of his marital rights, the husband used more force than was necessary and this proved fatal, although there was no intention of killing her. The private parts of the body of the girl had not been examined and speaking of this his Lordship said that:

It appears not very probable that the medical examination, if directed expressly to this point, would have proved that this unhappy girl was at the time of her death a virgo intacta, but if this had happened to be the case it would have thrown a most important light upon the consideration of the entire evidence.

11. His Lordship held that the possibility of the husband"s version was not excluded by the materials upon the record and gave effect to his plea, There is yet another line of defence open to the appellant and that line has been made available to him by the admission of Mt. Vidya Wati. She admits that the deceased did not raise an alarm, nor did she. The deceased was a healthy Jat girl living in a village. It is not surprising if she was a full grown girl It is again not surprising if she was a consenting party to the overtures of the appellant. If this is so, the case assumes a different complexion. If she was a consenting party, there was no occasion for the accused to exercise any force, much less to throttle or to kill her. The crime then will be traced not to the appellant but either to Sheodan or to Karan or to both. The medical examination does not rule out cohabitation by more than one man. And the injuries on the person of Sheodan do not completely negative his complicity in the crime. Indeed, the evidence of Vidya Wati which goes a long way in favour of the theory of consent, if it does not fasten the guilt on Sheodan and Karan, at least throws doubt on the guilt of the appellant.

12. The learned Government Advocate contends that the Crown has adduced such evidence as the circumstances and nature of the case demanded and it is now for the accused to establish his innocence. There is, no doubt, some authority for the above view in Poster"s Crown Law (1762) but the trend of subsequent authority, both here and in England, is otherwise. In Major Robert Stuart Wauchope Vs. Emperor, Lort Williams J., delivering the judgment of the Court, said that "In criminal cases the onus of proving the general issue never shifts." And Viscount Sankey, in delivering the judgment, in the well-known case in Woolmington v. Director of Public Prosecutions (1935) 1935 A.C. 462, disagreed with the view of Sir Michael Foster and held:

(a) It is the passage in Sir Michael Foster and this summing-up which are usually relied on as the authority "for the proposition that at some particular time of a criminal case the burden of proof lies on the prisoner to prove his innocence. (p. 480).

(b) Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt he is not bound to satisfy the jury of his innocence. (p. 481).

13. In view of what has been said above, the prosecution must, even though there may be some lacuna in the defence, not strictly consistent with the innocence of the accused, still prove his guilt beyond all reasonable doubt. And this the prosecution has not

succeeded in doing. We, therefore, allow the appeal, set aside the conviction and sentence and direct the accused to be released forthwith.