Abdul Halim Vs State and Others

Court: Allahabad High Court

Date of Decision: Nov. 10, 1964

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 107, 151, 172, 439
Evidence Act, 1872 â€" Section 35
Police Act, 1861 â€" Section 44
Uttar Pradesh Police Regulations, 1948 â€" Regulation 295(14), 295(15)

Citation: AIR 1966 All 222 : (1966) CriLJ 498

Hon'ble Judges: Satish Chandra, J

Bench: Single Bench

Advocate: B.C. Saxena, for the Appellant; J.N. Chaturvedi and H.N. Seth, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Satish Chandra, J.
Aggrieved by an order of acquittal the complainant has come to this Court in revision.

1-a. At about 10. 30 P. M. on 22nd March, 1962 Sri G.K. Saxena, the station officer, Kotwali, Allahabad, received a message on the telephone

that in mohalla Dandipur in the city of Allahabad, two parties were seriously fighting and exchanging brickbats etc. Sri G.K. Saxena thereupon

collected a police force and rushed to the spot. He made an entry in the general diary to this effect, a copy whereof is Ex. C-1. On return Sri

Saxena made another report in the general diary, a copy whereof is Ex. C 2. In this report he stated that he found the parties rioting and that he

arrested some persons of either party, u/s 151 of the Code of Criminal Procedure and that after investigation a proper report u/s 107/117 Cr. P.

C. shall be filed against both parties. In this report Sri Saxena also stated the facts which he had come to know as to the cause of this occurrence

between the parties.

2. Soon after the arrested persons were released on bail. Both parties filed complaints against each other for noting and causing hurt. Sri

Moinuddin conducted the further investigation of the occurrence and ultimately both the parties were challenged u/s 147 and 323/149 I. P. C. The

Magistrate acquitted the present complainant"s party and convicted the accused-opposite parties under the aforesaid sections and sentenced each

of them to six months'' R. I. On appeal, the conviction and sentences passed on the accused-opposite parties were set aside and they were

acquitted. This led to the complainant filing the present revision in this Court.

3. The only point pressed on behalf of the complainant is that the report Ex. C2 made by Sri Saxena was inadmissible in evidence and the learned

Sessions Judge having relied upon it in support of his conclusion, his judgment is vitiated.

4. Section 172 Cr. P. C. directs every police officer making an investigation to enter his proceedings in the investigation in a diary setting forth the

time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a

statement of the circumstances ascertained through his investigation. Sub-section (2) prohibits the use of the diary as evidence in the case. The

accused is further prohibited from seeing the diary or call for them except to contradict the police officer in case he uses the diary to refresh his

memory.

5. Section 44 of the Police Act, 1861, directs an officer in charge of a police station to keep a general diary and to record therein various matters

mentioned in that section as well as in Regulation 295 of the U. P. Police Regulations. It is urged for the accused-opposite parties that Section 172

Cr. P. C applies only to the diary kept under that section and the prohibition from use as evidence relates only to this diary; that prohibition does

not apply to general diary kept in virtue of Section 44 Police Act.

6. That may be so. Section 172 Cr. P. C. is a special rule of evidence. In so far as it goes, it overrides the provisions of the Evidence Act. It

prohibits the use of the police diary of a case as evidence in the case. It also provides for the various matters which have to be mentioned in the

diary of the case. Some of the matters mentioned in Section 172 (1) are common to Section 44 of the Police Act and the Regulation framed

thereunder. But Section 172 (1) Cr. P. C. directs that the diary of the case will contain ''a statement of the circumstances ascertained through

investigation''. This is a matter which is not prescribed to be mentioned in the general diary by Section 44 of the Police Act or Regulation 295.

7. u/s 44 of the Police Act all complaints and charges preferred have to be entered as also the names of the witnesses who shall have been

examined. It does not contemplate that the statements of the witnesses examined are also to be recorded Similarly the information gathered during

investigation is foreign to the purview of Section 44. Under Regulation 205 Clauses (14) and (15), reports of all occurrences and action taken on

reports have to be recorded in the general diary. These matters will not cover the recording of the impressions gathered by a police officer on the

spot as to the cause of an occurrence.

8. The provisions of Section 35 of the Indian Evidence Act are pressed in service to uphold the admissibility of the report Ex. C 2. The material

provisions of this section say that an entry in any public or official book, register or record made by a public servant in the discharge of his official

duty is itself a relevant fact. It is necessary that the entry must be made by a public servant in the discharge of his official duty. The making of an

entry in a diary is enjoined on a police officer by Section 44 of the Police Act. But that section as well as the Regulations framed thereunder

mention the specific matters which are to be recorded in the general diary. If a matter which is not covered by the provisions of Section 44 of the

Police Act or Regulation 295 is nonetheless entered in the general diary it will not be an entry made in the discharge of the official duty. The

impression gathered or the circumstances ascertained by a police officer at the spot are not required to be entered in the general diary and as such

they will not be relevant facts u/s 35 of the Indian Evidence Act. These matters are appropriately to be mentioned in the diary of the case u/s 172

Cr. P. C. Such matters have been specifically prohibited u/s 172 Cr. P. C. from being used as evidence. Hence even though such mailers have

been recorded not in the diary of the case but in the general diary, yet since they properly fall within the purview of Section 172 the prohibition will

apply and they cannot be used as evidence in that case.

9. While narrating the facts, the lower appellate Court mentioned that Sri Saxena made a report (Ex. C 2) in which it was mentioned that

at the time of the arrival of the police, these persons along with their associates were found exchanging brickbats and the incident was said to have

taken place on account of the breaking of the betrothal by Rais Ahmad with the niece of Abdul Haleem.

This portion of Sri Saxena''s report would not be covered by Section 44 of the Police Act or Regulation 295. As such it will not be admissible u/s

35 of the Indian Evidence Act. It will only be a record of a statement made by Sri Saxena. Sri Saxena was not examined as a witness in this case.

This sort of the report would, therefore, not be relevant at all in this case.

10. This portion of the report would be ""a statement of the circumstances ascertained through investigation u/s 172 (1) Cr. P. C."" It is urged that

Section 172 (1) applies to an investigation under ""this Chapter""--meaning Chapter XIV of the Code. It is urged that in the report Sri Saxena stated

that he had arrested the various persons on the spot u/s 151 Cr. P. C. and that he was filing reports u/s 107/117 Cr. P C. against both the parties.

The investigation, therefore, was not under Chapter XIV but under Chapter XIII which is headed as ""Preventive Action of the Police.

11. I am not impressed by this argument. Section 156 Cr. P. C. authorised an officer in charge of a police station to investigate any cognizable

offence. Section 157 Cr. P. C. provides that if from information received or otherwise an officer in charge of a police station has reason to suspect

the commission of a cognizable offence he shall proceed to the spot to investigate the facts and the circumstances of the case and to take measures

for the discovery and arrest of the offenders. In this case Sri Saxena received a message that the parties were committing a riot, which was a

cognizable offence. The action taken by Sri Saxena in collecting a police force and going on the, spot was properly an action within meaning of

Section 156 or 157 Cr. P. C. The action taken by him was investigation. Sections 150 and 157 are in Chapter XIV. Investigation done thereunder

would be covered by Section 172 Cr. P.C.

12. Section 150 Cr. P. C. applies where a police officer receives an information of a design to commit any cognizable offence. Where from the

information a police officer suspects the commission of such an offence, Section 150 Cr. P. C. is not attracted. Section 156 or 157 Cr. P. C. will

be the proper provision for taking action. Here Sri Saxena received the information that exchange of brick-bats was going on. According to the

information a riot had taken place.

13. The mere statement in the report that several persons have been arrested u/s 151 Cr. P. C. or that proceedings u/s 107/117 Cr. P. C. are

contemplated are of no consequence. In fact, no proceedings u/s 107/117 Cr. P. C. were taken. On the contrary both the parties were prosecuted

for rioting and causing hurt.

14. Learned counsel for the accused has relied upon two cases: Muhammad Salim Vs. Ramkumar Singh and Others ; and Abhey Raj v. Gaya

Singh AIR 1932 Oudh 137. Both these decisions arose in a civil court. The provisions of Section 172 were not attracted nor were they

considered. The question whether a statement which docs not properly form part of the general diary was admissible in evidence was not

considered in these cases. They are both distinguishable. The Lahore High Court in the case of Ahman v. Emperor AIR 1938 Lah 787, held that

an entry made by a sub-inspector in the general diary before the recording of the first information report, mentioning the names of some of the

accused alleged to have been given to him by one of the victims, is a part of the police proceedings and is not admissible in evidence. This case is

more apposite and applicable. Sri Saxena, the maker of the report, not having come into the witness-box the aforementioned portion of the report

Ex. C 2 was not admissible in evidence.

15. From a perusal of the appellate judgment it is clear that this portion of the report has been used extensively to test the veracity of the versions

of the incident given by the parties as also the trustworthiness of the prosecution witnesses. The prosecution case was that the incident took place

owing to the uprooting of a Congress flag by some of the accused. On the other hand, the accused alleged that the cause of the incident was the

breaking of the betrothal by Rais Ahmad with the niece of Abdul Halim. To test as to which version was correct the learned Judge observed:--

We have in this connection Ex C2 report lodged at the police station on 22-3-62 by S. O. G. Saxena who had reached the spot on the

information Ex, C-1 having been received by him. In this report there is a mention of the cause why the party of Abdul Halim attacked the present

appellants. The version that the accused have now put finds support from it

16. Furthermore, having seen the contents of the report, the learned Judge drew a presumption against the prosecution case from the fact that Shri

G.K. Saxena was not produced in evidence because the report did not support the prosecution version.

17. At page 8 of his judgment the learned Judge tests the conduct of the prosecution witnesses (Abdul Halim and others) and observes:

This conduct on the part of Abdul Halim and others is indicative of the fact that the version that was given in the report lodged by Sri Saxena that

the party of the complainant was found indulging in brick-batting has plenty of support.

18. Here also the learned Judge uses Shri Saxena''s report directly to test the veracity of the prosecution case and evidence.

19. At page 9 the learned Judge discusses the question whether the prosecution has come forward with clean hands. The prosecution case to

explain the injuries received by one of the accused, namely, Mohammad Yunis, has been tested by using Sri Saxena''s report as a touchstone. The

evidence of prosecution witnesses (Abdul Qayyum, and Abdul Rauf) has been tested by reference to the police report. There is on record no

police report other than that recorded by Shri Saxena.

20. The learned Judge has, while dealing with the defence evidence, drawn support from this report. He observes:--

D. W. 6 Antoo Lal supports police report about the arrest of the party of the complainant and some of the party of the appellants in the manner

indicated in the report lodged at Kotwali by Section O. Saxena.

21. Learned counsel for the accused urged that the appellate Court has recorded an independent finding to the effect that the eye-witnesses

produced by the prosecution were unreliable and partisan and that the alibi set up by Mohammad Islam, one of the accused, has been established.

The finding of alibi is based upon disbelieving the prosecution witnesses. In respect of this matter also the learned Judge has animadverted to the

impugned portion of Sri Saxena''s report as an integral part of his discussion and conclusion. The findings on these matters, therefore, cannot be

said to be uninfluenced by the report. Since Sri Saxena''s report has formed an integral part of the judgment, the judgment, as a whole, is vitiated.

22. In my opinion, this case falls within those classes of cases in which, according to the Supreme Court, the High Court can interfere with the

order of acquittal at the instance of the complainant. See K. Chinnaswamy Reddy Vs. State of Andhra Pradesh, . Their Lordships observed that a

case where the appeal Court has wrongly held evidence, which was admitted by the trial Court, to be inadmissible would be a proper case for

interference. In my opinion the same principle would apply where inadmissible evidence has been used to record the finding of acquittal.

23. The Supreme Court further observed that where the trial Court had convicted the accused but the appeal Court has committed an error, the

High Court has the discretion to either order a re-trial or send the case back to the appeal Court to re-hear the appeal.

24. In the instant case, the entire evidence has been recorded. The appeal Court has erroneously relied upon a piece of inadmissible evidence. The

trial Court judgment does not use it. The proper course would be to send the appeal back for rehearing to the appeal Court.

25. It was urged that even after excluding the inadmissible evidence there was left sufficient material to justify the acquittal and that in the interest of

justice no interference was called for. This Court cannot alter the acquittal and convert it into a conviction. It can only order re-trial or re-hearing of

the appeal. If after going into the evidence this Court comes to the conclusion that the acquittal cannot be sustained it would be as pointed out by

the Supreme Court in Logendra Nath Jha and Others Vs. Shri Polailal Biswas, 6 and re-affirmed in Chinnaswamy''s case (Supra), ""loading the

dice against the accused"" when that case goes back for re-trial or rehearing. This is something which is improper. In K. Chinnaswamy Reddy Vs.

State of Andhra Pradesh, , in paragraph 8 the Supreme Court held that the fact that admissible material was wrongly excluded was sufficient to

enable the High Court to set aside the acquittal in the case. Same position should obtain when inadmissible material has been used by the appeal

Court. Under the circumstances, it is desirable that the appeal should be sent back for re-hearing. I do not, therefore, propose to assess the

evidence myself.

26. In the result, the revision succeeds. It is allowed. The judgment of the appellate Court is set aside. The matter is remitted back to the lower

appellate Court for re-hearing the appeal filed before it by the accused-opposite parties. The lower appellate Court shall hear and decide the

appeal on merits in accordance with law but without taking into consideration the aforesaid portion of the report Ex. C2 made by Sri Saxena.