Queen-Empress Vs Zakir Husain

Court: Allahabad High Court

Date of Decision: Dec. 21, 1898

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 172
Evidence Act, 1872 â€" Section 80
Penal Code, 1860 (IPC) â€" Section 193

Citation: (1899) ILR (All) 159

Hon'ble Judges: Banerji, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Banerji, J.
The applicant, Zakir Husain, has been convicted, u/s 193 of the Indian Penal Code, upon the two following charges:

First, that on or about the 30bh July 1898, he fabricated the special diary of July 29th, in the case of Queen-Empress v. Dalla and Ors. so as to

make it appear that the list of stolen property was furnished on that date; and, secondly, that on or about the 4th of August, in the Court of the

District Magistrate, in the same case, he stated that the list of stolen property was furnished before the search and arrest of the accused.

2. The conviction and sentence have been affirmed by the learned Sessions Judge on appeal. It is urged that the conviction on each of the two

charges is bad in law. In my opinion the contention is valid.

3. The facts found are these: The house of one Ranjit was broken into by burglars, who carried away some of his property. He made a report of

the burglary at the Etah Police station. The applicant, who was the second officer at that station, suspected Balla and others, and searched their

houses. He discovered certain property, and after having done so, caused Ranjit to give him a list of the property stolen from his house, so as to

make it correspond with the articles found in the houses of Balla and others. This was on the morning of the 30th July 1898: but in his special diary

of the previous day, the 29th, he entered a list of stolen property as given to him on that date before the search. It is in respect of this entry in the

special diary that the applicant has been held guilty of having fabricated false evidence as defined in Section 192 of the Indian Penal Code.

4. In my opinion the conviction for that offence cannot be maintained. In order to constitute the offence of fabricating false evidence, three things

must exist: First, that the entry or document in question is false; second, that the false entry or document was made with the intention that it may

appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator; and, third, that

so appearing in evidence it may cause any person who in such proceeding is to form an opinion upon the evidence to entertain an erroneous

opinion upon a material point. Where any of these elements is wanting, the offence is not that of fabricating false evidence. As two of the elements

of the offence are that the false document is intended to appear in evidence, and that when it so appears in evidence it should cause a judicial

officer, or other public servant, or an arbitrator, to form an erroneous opinion upon a material point, it is clear that the document must be capable

of being used in evidence. The offence of fabricating false evidence cannot therefore be committed in respect of a document which is not

admissible in evidence. This view is supported by the ruling of this Court in Empress v. Gauri Shankar (1883) ILR All. 42, and that of the Madras

High Court in Keilasum Putter (1870) 5 Mad. 373, to which the learned Counsel for the applicant has drawn my attention. The document which

the applicant, Zakir Husain, is said to have fabricated is a Police special diary, which u/s 172 of the Code of Criminal Procedure, is not evidence.

It was held by a Full Bench of this Court in Queen-Empress v. Mannu ILR (1897) All. 390, that ""entries in the special diary cannot by themselves

be taken as evidence of any date, fact or statement therein contained."" The diary may, it is true, be used by a Police officer for the purpose of

refreshing his memory, or it may be used for the purpose of contradicting the Police officer who made the entries which it contains; but the entries

by themselves are not evidence, and therefore a special diary is not a document which is capable of being used in evidence. The learned Sessions

Judge is wrong in holding that the entry in the diary could be referred to in support of the allegation that the list of the stolen property was produced

before the discovery of the property. The entry could not be used as corroborative evidence, and this is conceded by the learned Government

Advocate. He contends that it is the intention of the accused which is the gravamen of the charge, but he loses sight of the fact that not only must

the accused intend that the document may appear in evidence, but the document must be such as may appear in evidence before the officer who is

to form an opinion upon the evidence. A document which is inadmissible in evidence can never be produced for the purpose of enabling an officer

to arrive at any conclusion, erroneous or otherwise, upon a relevant point. A special diary, which can never be used as evidence, cannot be

produced for the purpose mentioned above, and therefore the offence of fabricating false evidence cannot be committed in respect of it. Whether

the accused in this case committed the offence punishable u/s 218 of the Indian Penal Code, or any other offence, it is unnecessary at present to

decide. But I am of opinion that his conviction for the offence of fabricating false evidence cannot be sustained.

5. The conviction of the accused upon the second charge, namely, that of giving false evidence, is equally unsustainable. The charge itself as drawn

is very defective. It does not set out the particular statement in respect of which the accused is charged with perjury. It only states the substance of

what the accused is said to have stated in his deposition. As the accused pleaded not guilty to the charge, it was the duty of the prosecution to

prove the particular statement which the accused was charged with having made falsely. For this purpose the deposition itself ought to have been

put in evidence and formally proved. This was not done in this ease, and there is absolutely no evidence on the record to prove that the accused

made any statement on the 4th of August, and, if he made any, what that statement was. I am unable to follow the observation of the learned

Sessions Judge that the ""Court could take judicial notice"" of the deposition, and that the accused ""did not, and could not, deny having made it.

When the accused pleaded not guilty he did deny everything. If by the judicial notice to which the learned Judge referred he meant the provisions

of Section 80 of the Indian Evidence Act, he was clearly in error. Even if the alleged deposition of the 4th of August 1898 had been produced in

evidence, it would not have been admissible against the accused unless it was proved that it was he who gave the deposition and made the

statement which was the subject of the charge. The mere production of the deposition would not, u/s 80, have made it admissible. As the

deposition was not produced and the identity of the accused with the person who gave the deposition was not proved, the charge of giving false

evidence was not established. I may observe that the learned Government Advocate very properly abandoned this part of the case against the

applicant.

6. The result is, that the application is allowed, the conviction and sentence are set aside, and the applicant is acquitted of the offences with which

he was charged. I direct that he be at once released.

7. The learned Government Advocate has asked me to order the trial of the applicant for the offence punishable u/s 218 of the Indian Penal Code.

I do not deem it desirable to make any such order at present; but I may observe that this decision will not preclude the Magistrate of the District

from taking any proceedings justified by law against the accused for any other offence with which the accused may be lawfully charged.