(1925) 02 CAL CK 0039

Calcutta High Court

Case No: None

Keramat Mandal and Another		APPELLANT
	Vs	
King-Emperor		RESPONDENT

Date of Decision: Feb. 12, 1925

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 162
- Penal Code, 1860 (IPC) - Section 366

Citation: AIR 1926 Cal 320

Judgement

1. The appellants in this case, Keramat Mandal and Belat Ali Mandal, were tried by the Sessions Judge of Rajshahi with the assistance of a jury on two charges under Sections 366 and 376, Indian Penal Code. The jury returned an unanimous verdict of guilty against the first appellant on both charges and a verdict by a majority of four to one of guilty on both charges against Belat Ali. The learned Sessions Judge accepted the verdict and sentenced both the appellants to transportation for life Tinder Section 376, Indian Penal Code, no separate sentence being awarded under S. 66, Indian Penal Code.

2. On behalf of the appellants several grounds have been taken the first of which being with reference to misjoinder of charges. With regard to the first charge u/s 366, Indian Penal Code, no objection is taken and it appears to us to be quite in order. The difficulty is caused with regard to the second charge which runs thus: "Secondly that you on or about the 25th day of May 1921 at Dasmari P.S. Paba and other places committed rape on Benodini." The story of the prosecution was that rape was committed on Benodini on a field at Dasmari by both the accused persons. Subsequently this woman was taken either by force or by fraud by Belat All alone to different places where he alone committed rape upon her. In this circumstance a joint charge against both the accused of having committed rape upon Benodini at Dasmari and in other places is improper. We are of opinion that such a charge is also embarrassing. It is urged on behalf of the Grown that although this is not a

proper charge this has not in fact occasioned a failure of justice, because, if the evidence on behalf of the prosecution as to the first act of rape in the field at Dasmari was believed by the jury, both of the accused persons might be convicted of the offence. It is possible that this is so; but having regard to the other questions on which we consider this trial has been vitiated we think that in the subsequent trial this error in the charge should be set right. Although both of the accused persons might have been jointly charged with both the offences which were committed at Dasmari, if it is intended to prosecute Belat Ali with regard to the offences that he was accused of having committed elsewhere there should be separate charges with regard to those offences. While dealing with this matter we may also point out that in his charge to the jury with reference to the offence u/s 366, Indian Penal Code, the learned Judge has stated this: "You shall have to see (a) if the woman Benodini was by force compelled to leave her house and to go to the various places. In our opinion it is not necessary for the prosecution to establish that she was by force compelled to leave not only her house but compelled to go to various places in order to sustain the first charge on which the accused were tried.

3. The principal question on which we hold that the trial has been vitiated is of erroneous admission of evidence. The first is that evidence has been admitted as to what Benodini has stated to the investigating police officer and her pointing out the places where she was taken. The statement of another witness, that is, the mother-in-law of Benodini before the police has also been put in evidence. We should point outs that u/s 162, Criminal P.C., no statement or any record thereof whether in a police diary or otherwise or any part of such statement made by any person to a police officer in the course of an investigation under Chapter XIV of the Code of Criminal P.C., is admissible as evidence except as provided in the second paragraph of that section. It was urged on behalf of the Crown that the statements that were put in evidence were not corroborative of the fact sworn to by the witnesses in the box, but were practically harmless and could not affect the decision as regards the main story of the offences. It is difficult for us to say how it worked on the minds of the jury, and the law forbids such evidence being introduced in the manner it has been done. In this particular case the statements that were made by the witness to the police officer and the fact of pointing out the places to him ought to have been kept back from the jury, as such facts were not brought out in evidence on behalf of the defence as provided by S. 162 of the Cede. A still more objectionable thing happened in allowing the evidence of the statements of Belat Ali while in custody of the police officer, and of his having pointed out the place where he had taken the woman during the course of the night in which the offence is alleged to have been committed. Although the learned Judge has stated in the last part of his charge that the jury should reject the evidence as regards the part taken by Belat Ali in pointing out the places, the mischief of introducing inadmissible evidence had already been done. It seems that the learned Judge allowed this evidence to be introduced on the ground that it was the conduct of the accused

influenced by a fact in issue. It can hardly be said that the statements of the accused were admissible as his conduct. These statements were certainly of an incriminating nature and were not admissible under the law.

4. The next objection which is also of substance is that when search was made for Belat Ali two persons Kafil and Suklal, were alleged to have said that Belat Ali was absent from home on the night of the occurrence. These two persons have not been examined in Court, but their allegations about the absence of Belat Ali were allowed to go in. Those statements were certainly inadmissible. The learned Judge only refers to that fact while dealing with the arguments on behalf of the defence.

5. On this ground of wrong admission of evidence we must set aside the conviction and sentence and send the case back for retrial according to law. While doing so we desire to make certain observations with regard to the nature of the statement made by Belat Ali to the Magistrate by way of confession. This statement is not really a confession, because, so far as it goes it is self-exculpatory. The learned Judge was therefore wrong in using the expression that it was a confession.

6. The next point is that the learned Judge begins by saying that on a question of rape the character of the woman is not relevant. It seems to us that what the learned Judge means, as he says Subsequently, is that even a woman of immoral character may be the subject of rape. In such care evidence as regards the general immoral character of the woman is relevant evidence as enacted in Section 155(f) of the Evidence Act. We noticed that the learned Judge admitted evidence which suggested that the woman concerned in this case was of bad character and he dealt with this matter in his charge. We are of opinion therefore that the learned Judge was quite aware of the provisions of the law, but the use of the expression that the character of the woman is not relevant is somewhat misleading.

7. The result is that we set aside the conviction and sentence passed on the appellants and send the case back for retrial. The accused will be tried on the following charges: on one charge against both the accused u/s 366 Indian Penal Code as framed; one charge against the Accused No. 1 Keramat Mandal, for committing rape on Benodini at Dasmari; a separate charge against Belat Ali for committing rape on Bonodini at Dasmari; and if the prosecution so desires a separate charge of rape against Belat Ali for what has been alleged to have taken place subsequent to Benodini being taken away from the field at Dasmari.