Ramesh Chandra Das Vs Emperor

None

Court: Calcutta High Court

Date of Decision: March 10, 1919

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 18 Rule 5#Evidence Act, 1872 â€" Section 80#Penal Code, 1860 (IPC) â€" Section 193

Citation: (1919) ILR (Cal) 895

Hon'ble Judges: Shams-ul-Huda, J; Richardson, J

Bench: Division Bench

Judgement

Richardson, J.
The appellant, Ramesh Chandra Das, was tried by the Sessions Judge of Chittagong and a jury on three charges of perjury

framed u/s 193 of the Penal Code, The jury returned a verdict of guilty, and the Sessions Judge sentenced the appellant on each charge to three

years" rigorous imprisonment, directing at the same time that the sentences should run concurrently.

2. The charges relate to a will bearing the date the 19th August, 1913, alleged to have been executed by the late Dr. Rajani Kanta Das Gupta who

died on the 28th August 1913. He left him surviving five daughters and two brothers, Ramesh Chandra Das, the appellant, and Mahendra Lal Das,

a pleader, who died on the 8th April, 1914. of the daughters, the eldest only was married at the time of her father"s death; three have since been

married and the youngest is still unmarried.

3. The valuation of the estate of the deceased accepted by the Collector for purposes of duty was Rs. 32,715, from which Rs. 4,250 must be

deducted on account of debts. According to the terms of the will, which is a short and simple document, the testator bequeathed to his three

nephews all the moveable, and Immovable properties which he had, and appointed his brothers to make management as their guardians. The

bequest to the nephews is subject to a direction that his brothers should marry his four unmarried daughters to suitable bridegrooms by ""spending

ten to twelve thousand rupees."" The testator further directed that his eldest daughter should receive Rs. 2,000 out of a sum of Rs. 6,000 owing to

him by her father-in-law, and that his wife should receive Rs. 2,000 out of his estate and also expenses for spiritual acts and travelling to holy-

places.

4. On the 8th November 1913, an application was made in the name of the testator''s widow, Durgesha Nandini, for letters of administration with

copy of this will annexed, and letters were subsequently granted. On the 6th January 1915 the testator''s second daughter applied for their

revocation, and they were revoked, on the 23rd September 1915. In the course of the latter proceedings the appellant gave evidence in support of

the will. According to the case for the prosecution the will is a forgery and the appellant committed perjury. The three statements in respect of

which perjury is specifically assigned, occur in his deposition as recorded by the Court.

5. The learned Counsel for the appellant contends, in the first instance, as to the deposition of the appellant recorded in the Court of Probate, that

the requirements of the law were not complied with, and that in consequence, the deposition is not admissible in evidence, and there is no legal

foundation for the charges of perjury.

6. The point turns on Rule 5 of Order XVIII of the Civil Procedure Code. The rule, so far as it need be quoted, is as follows: Ã¯Â¿Â½In cases in which

an, appeal is allowed, the evidence of each witness shall be taken down in writing, in the language of the Court, by... the Judge, not ordinarily in the

form of question and answer, but in that of a narrative, and, when completed shall be read over in the presence of the Judge and of the witness,

and the Judge, shall, if necessary, correct the same and shall sign it."" In the present case, the evidence was taken down by the Judge in English, the

language of the Court, and was signed by the Judge, but, inasmuch as the appellant understood English, his evidence was not read over to him. He

read it over himself, and at the end there is the following note initialled by the Judge: ""Read over by witness himself and admitted to be correct.

There is also a signature which may be that of the appellant. It is said that the signature is not proved. The reason is that the contention I am dealing

with was not put forward at the trial. But as the rule does not require a witness to sign his evidence, it is entirely immaterial whether the signature is

or is not that of the appellant.

7. The whole irregularity, if there was an irregularity, consists in this that the deposition was read over by the witness instead of being read over to

him, as, it is said, the rule requires. The rule does not say ""read over to the witness,"" but if that be assumed to be its natural meaning, even so, in my

opinion, a reading over by the witness would be a substantial compliance with it.

8. The question was very pertinently put in the course of the argument, whether, if the Judge had himself read over the deposition to the witness,

instead of having it read over in his presence by a clerk, that would also have been an irregularity which made the deposition worthless and

deprived it of all value and authority as a deposition. Learned counsel said that his argument would carry him to that length.

9. The practice is common, when a witness understands English, to hand his deposition to him to read over. In my opinion, however strictly the rule

be construed, the practice is a sufficient compliance therewith for all purposes, and a deposition so read over by the witness proves itself under the

provisions of Section 80 of the Evidence Act.

10. According to Section 80, so far as it is now material, Ã¯Â¿Â½whenever any document is produced before any Court purporting to be a record or

memorandum of the evidence... given by a witness in a judicial proceeding... taken in accordance with law, and purporting to be signed by any

Judge or Magistrate, the Court shall presume that the document is genuine, that any statements as to the circumstances under which it was taken

purporting to be made by the person signing it, are true, and that, such evidence... was duly taken.

11. Now apply that to the appellant''s deposition. The deposition certainly purports to be a record of the evidence given by the appellant in a

judicial proceeding. It also purports to be signed by the Judge. The question is whether the deposition purports to be a record of evidence taken in

accordance with law. In my opinion, that question should be answered in the affirmative. I doubt very much whether the words ""taken in

accordance with law"" have any reference to the reading over of his evidence by the witness or to the witness. The essential requirements appear to

be that the witness should be duly sworn and examined, and that the deposition should be signed by the Judge. So much the appellant''s deposition

purports to show. There is nothing in the CPC which requires the Judge to certify at the end of a deposition that it was read over to or by the

witness. Here if the Judge had made no note, the deposition would clearly have been entitled to the benefit of the presumption created by Section

80, and the making of the note does not appear to me to alter, the position. Whatever may be the precise content of the words ""taken in

accordance with law,"" whether they do or do not refer to, the reading over of the deposition, I think that a substantial compliance with Rule 5 in

that respect is sufficient.

12. It is not the appellant''s case that he did not say in the Probate Court what he is recorded as having said. The point is entirely technical.

Learned counsel, however, is quite entitled to take such a point in his client''s interests. He says that he is supported by the authorities and I have to

deal with them.

13. In the case of Elahi Baksh Kazi v. Emperor ILR (1918) 45 Calc. 825, I suggested, with the concurrence of Beachcroft J., that a deposition

not taken, in accordance with law might be provable otherwise than by the aid of Section 80 of the Evidence Act. It is not necessary to consider

that suggestion here or to quarrel with the rule laid down in the class of cases to which the present belongs. Where a prosecution for perjury is

based on a deposition, the authorities go this length that if the deposition is not taken ""in accordance with'' law, within the meaning of Section 80, it

is altogether inadmissible in evidence and the accused is entitled to an acquittal. If that be the rule, it has still to be applied to the particular

circumstances and, in my opinion, the authorities when examined do not compel me to hold that the appellant''s deposition in the present-case is

not admissible in evidence.

14. In Empress v. Mayadeb Gossami ILR (1881) 6 Calc. 762, the Judge did not even sign the deposition. The signing of the deposition by the

Judge is made essential to the application of Section 80 by the section itself.

15. The case of Kamatchinathan Chetty v. Emperor ILR (1904) 28 Mad. 308 was decided by a single Judge. The decision was followed in

Mohendra Nath Misser v. Emperor 12 C.W.N. 845, but that case turned On the provisions of Section 360 of the Criminal Procedure Code Both

these cases, moreover, were distinguished in the case of Rakhal Chandra Laha v. Emperor ILR (1909) 36 Calc. 808 which came before Jenkins

C.J. and Mookerjee J.

16. In Jyotish Chandra Mukerjee v. Emperor ILR (1909) 36 Calc. 955, certain observations were made with reference to Section 360 of the

Criminal Procedure Code. That was not a prosecution for perjury. The appellant there had been convicted u/s 409 of the Penal Code. The learned

Judges animadverted on the fact that at the trial the provisions of Section 360 had not been precisely followed. They, nevertheless, held that in the

circumstances the omission was not fatal to the validity of the trial.

17. The case again of Emperor v. Jogendra Nath Ghose ILR (1914.) 42 Calc 240 was decided with special reference to the provisions of Section

360 of the Criminal Procedure Code. The learned Judges purported to follow the cases of Mohendra Nath Misser v. Emperor 12 C.W.N. 845

and Jyotish Chandra Mukerjee, v. Emperor (1909) ILR 30 Calc. 955. The case of Mohendra Nath Misser v. Emperor 12 C.W.N. 845, as I have

said, was based on the case of Kamatchinathan v. Emperor ILR (1904) 28 Mad. 308, but a different view of the law has recently been taken in

the, Madras Court: Bogra v. Emperor ILR (1910) 34 Mad.. 141 and Meango v. Baviah (1918) Mad. W.N. 237.

18. The authorities, as it appears, to me, do not preclude me from holding in the present case that the appellant''s deposition was taken in

accordance with law I hold, therefore, that this contention fails.

19. It was next contended that the trial is vitiated by misreception of evidence and misdirection, and here learned Counsel is on firmer ground. I will

deal with the points raised seratim.

(i) The valuation of the estate was a question of some materiality, and it was dealt with by the learned Sessions. Judge in the course of his charge.

He said:--"" On the face of it, it is a will largely disinheriting deceased"s daughter in favour of his nephews. The learned pleader for the defence has

just given an explanation, of this with reference to facts and figures according to which it is urged that the will was of no importance from the point

of view of the nephews as they stood only to get a few thousand rupees from it whereas by far the greater amount of the assets would go to the

widow and. daughters."" The argument for the defence is quite fairly stated in that passage hut the, Judge went on to say:--""it is, however, for the

jury to consider whether the valuation accepted by the Collector represented the real value of the estate."" Now there was no evidence that the

value of (he estate exceeded the valuation accepted by the Collector, and learned Counsel, perhaps with some justice complained that the learned

Judge, using the words he did, invited the jury to enter upon a mere speculation.

(ii) There was important evidence given as to a conversation which took place at the cremation ground after the deceased had been Cremated. It is

said that the appellant was asked whether the deceased, had left a will and replied in the negative. For the defence comment was made on the fact

that some of the witnesses said, to have been present at this conversation were not called. The Judge deals with the comment in this way. ""There is

a further argument that other respectable gentlemen, such as one Bibhuti Babu and Chandra Sekhar Babu, who were admittedly at the place, were

not called, and it is urged that they have been kept back deliberately as they would not have deposed in favour of the prosecution. Another

alternative, however, is that the prosecution was not aware that they knew anything until this was elicited in cross-examination."" It is said, again,

with some force, that the last sentence is misleading because the names of the absent witnesses transpired before the committing Magistrate, and

because the prosecution should in any case have ascertained exactly who were present at a conversation so important.

(iii) If the two objections to the charge with which I have dealt had stood alone, it may well be that we should not have considered ourselves

justified on these grounds in setting aside the verdict of the jury, bat a much more serious complaint has still to be dealt with. The nature of the

complaint will appear fro in the following passage of the charge. ""It is unfortunate that a certain amount of evidence found now to be irrelevant has

had to be introduced owing to the fact principally that witness Atal Sen, who was expected to appear, could not be produced, and also, that it was

not known what statements another important witness, Durgesha Nandini, would make. In this connection the petition filed for the defence on the

13th December was put to the jury, and as requested therein they were directed to put out of their minds entirely any statements alleged to have

been made by Atal Sen, Mahendra Das and Durgesha Nandini, and it was pointed out that the only relevancy of the evidence of witnesses who

depose that Durgesha Nandini. made certain statements could be to show that she made one set of statements at one time and another at another,

and was, therefore, an unreliable witness. The evidence also as regards the alleged conversation between Khitish Babu and Kali Sankar Babu

should be discarded,

20. It is always dangerous to give in advance evidence the admissibility of which depends on what other witnesses may say when and if they go

into the witness box. The Court should be very cautious in allowing such evidence to be given specially in a trial by jury The evidence mistakenly

admitted in the present case was of a very material character. Take the statement made by the witness Netra Ranjan Roy in examination in-chief:--

Atal Sen is my uncle, cousin of my father. Within three or four days of Rajani Babu''s death, Atal Babu came to our house and said to Khirod

Babu that attempts were made, to forge a will of Rajani Babu, so he had better warn the widow and daughters to take care of cash, etc."" Atal Sen

was never called, and the evidence as it stands is mere hearsay of the worst character. There are other instances which I need not refer to in detail.

21. As to the conversation between Khitish Babu and Kali Sankar Babu to which the Sessions Judge refers in the last sentence of the extract from

the charge quoted above, there seems to have been no excuse at all for letting it in. Khitish Babu is Babu Khitish Chandra Sen, a pleader,

practising in the High Court Kali Sankar Babu is Babu Kali Sankar Chakravarti, the Editor of a newspaper. The former was allowed to say in

examination-in-chief After Rajani Babu''s death I met Kali Sankar Babu in Calcutta. There was general talk about the will, and I told him to the

effect that a false will was going to be propounded by Mahendra Babu and Ramesh Babu. Severally I gave information to our friends that the will

to be propounded was a forged one."" Similarly, evidence was admitted from Kali Sankar Babu to this effect:--""I talked with Khitish. Khitish took

me to task saying that I was friend and supporter of Mahendra Babu and Ramesh Babu, and if there was a will it must be forged one as Rajani

Babu did not execute any will.

22. So again the witness, Paresh Chandra Sen, spoke to statement made to him by Mahendra Babu, that is Mahendra Das, the appellant''s

deceased brother, to the effect that Rs. 27,000 would go to his, Mahendra Babu''s sons, and Rs. 27,000 to Rajani Babu''s widow and daughters

out of Rs. 81,000. That was evidence clearly inadmissible, which went to the value of the estate.

23. The evidence to which I have referred is evidence which might have had considerable influence on the minds of the jury. No doubt the learned

Sessions Judge told the jury to put the evidence out of their minds entirely and to discard it. But the evidence was very prejudicial to the appellant,

and,"" whatever directions be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds"" [Rex v. Norton

[1910] 2 K.B. 500].

24. We must take it/therefore, that the jury may have been, and probably were, affected adversely to the appellant by the evidence wrongly

admitted. Upon that footing we have to apply to the case, as best we can, the rule enacted in Section 167 of the Evidence Act. Under that section

the ""improper admission of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the

Court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify

the decision.

25. In other words, if, in the opinion of the Appellate Court there is sufficient legal evidence to justify the decision, then the improper admission of

other evidence is not to be ""ground of itself"" for interference. But when, as here, the trial was by jury, there is another factor to be taken into

account. An appeal has on matter of law only (Section 418, Criminal Procedure Code), and we ought not, therefore, to substitute our own verdict

on the legal evidence for that of the jury. This view of Section 167 has been adopted in this Court: Wafadar Khan v. Queen Empress ILR (1894)

21 Calc. 955, Sadhu Sheikh v. Emperor 4 C.W.N 578.

26. In such cases the true rule would seem to be that the Court should not confirm the conviction of the appellant or regard the legal evidence as

sufficient to justify the decision, unless it is satisfied that the verdict of the jury would have been the same if no evidence had been wrongly

admitted.

27. There is no reason why the same principle should not be applied to the wrongful admission of evidence as to misdirections of law. The cast of

misdirection is governed by the provisions contained in Section 423(2) and Section 537 of the Criminal Procedure Code Those provisions bear a

strong resemblance to the proviso to Section 4(1) of the Criminal Appeal Act of 1907 (7 Ed. VII Clause 23), and the decision of the Court of

Criminal Appeal in England without being binding are, therefore, instructive. Those decisions will be found conveniently collected in Archbold"s

Criminal Pleading Evidence and Practice, 25th Edition, at pp. 322, 324 and 326. The decisions are all the stronger because the Court of Criminal

Appeal has no power to direct a retrial.

28. In the present case it cannot, in my opinion, be properly predicated that the verdict of the jury would have been the same if no evidence had

been wrongly admitted.

29. The result, therefore, is that the conviction and sentence should. be set aside.

30. There remains the question whether a retrial should be directed. This is a matter of discretion and, in view of all that has taken place, we have

decided to make no order. The appellant will be discharged from his bail bond.

Shams-UL-HUDA, J.

31. Concurred.