Mohammad Farooq vs Rex Through Tufail Ahmad on 20 February, 1950

Equivalent citations: AIR1950ALL501

ORDER

Desai, J.

1.This is an application in revision against an order of the Sessions Judge, Allahabad, upholding an order of a first class Magistrate lodging a complaint against the applicant under Section 193, Penal Code.

2 In 1948, Abdul Hakim filed a complaint under Section 323, Penal Code against the applicant Mohammad Farooq and others. During its pendency, Abdul Hakim, the applicant and the other accused of that case executed an agreement, dated 6th May 1943, referring the dispute between them to Maulvi Tufail Ahmad for arbitration. The arbitrator heard the parties and gave a written award dated 18th May 1943. It is signed by Abdul Hakim, the applicant and the other accused of that case. The award was acted upon and Abdul Hakim got his complaint dismissed.

3. In 1948 the police prosecuted the applicant and six others in a criminal Court. The applicant in reply instituted a complaint under Sections 147, 323, etc., Penal Code against Abdul Hakim, Tufail Ahmad and others. This Tufail Ahmad is different from the arbitrator Maulvi Tufail Ahmad. In order to avoid confusion, I would refer to Maulvi Tufail Ahmad as the arbitrator and this Tufail Ahmad, simply as Tufail Ahmad. The applicant was examined as a prosecution witness in the complaint filed by him against Abdul Hakim, etc. In the course of his deposition he made a certain statement on 31st December 1948, which Abdul Hakim considered to be false. Both the cases ended in acquittal.

4. On and February 1949, Abdul Hakim made an application before the Court which tried the cases to draw up proceedings under Section 476, Criminal P. C. against the applicant for committing perjury on 31st December 1948. The applicant was summoned by the Court and filed a written statement denying that there was any falsehood in his deposition. The Court finding that he had committed perjury and that it was necessary in the interest of justice to have an enquiry made into the offence committed by him, ordered a complaint for the offence under Section 193, Penal Code to be lodged against him. That order has been upheld by the learned Sessions Judge.

5. The perjury is said to have been committed by the applicant during his cross-examination. The statement alleged to be perjured is as follows :

"Mujh se Abdul Hakim se khana peena hai. In se mujh se kabhi muqaddame bazi nahin hui. Mujh se 1943 me marpit nahin hui. Tufail Ahmad ko maih ne salis nahin muqarrar kiya na maih ne kisi kaghas par daskhat kiya tha.

On getting this reply, the cross examiner put before him the arbitrator's award dated 13th May 1943, marked EX. D-2 and asked him about his signature on it. He replied, "Salisnama 13th May 1943 par mere dastkhat nahin hain." What he has called salisnama is really the award. 'Salisnama' correctly means 'an agreement to refer,' but the word is erroneously used for "an award" by some persons. The wrong use of the word in the reply of the applicant and also probably in the question put in cross-examination is of no consequence. It is clear that the answers given by the applicant were false. (After discussing the evidence His Lordship proceeded:) An offence under Section 193 is prima facie made out It is admitted that the deposition of the applicant was not read over to him on 31st December 1948. There is the usual endorsement on it "Sun kar samarthan kiya" but it is admittedly false. There is also the applicant's signature in Urdu, The deposition is in Hindi. It was argued that no prosecution for perjury could be ordered when the deposition was not read over.

6. Under Section 360, Criminal P. C., it is obligatory for a Court to read over the deposition to each witness as his examination is over. If a deposition contains a false statement, the deponent is guilty of perjury. The contention of the applicant, therefore, amounts to this that if a deposition is not read over it cannot be held to be false. On no other basis can it be said that if a deposition is not read over the witness, he cannot be found guilty of perjury. I find it difficult to accept the proposition that if a deposition is not read over it cannot be found to be false. Whether it is false or not does not depend upon whether it was read over to the witness or not. It depends upon whether the facts alleged to exist or to have existed in the deposition existed or not. If they did not exist the deposition is false and remains false, notwithstanding its not being read over to the witness. The provisions of the Penal Code relating to punishment for perjury do not pay and regard to the question whether the deposition was read over or not.

7. The sole object behind the provision under Section 360, Criminal P. C., is to have an accurate record of toe deposition : see Kartar Singh v. Emperor, 18 Cr, L. J. 607 : (A.I.R. (4) 1917 Lah. 192); Abdul Rahman v. Emperor, 28 Cr. L. J. 259 : (A.I.R. (14) 1927 P. C. 44); Abdul Rahman v. King-Emperor, A.I.R. (13) 1926 Rang. 53: (27 Cr. L. J. 669) and Nelluri Chenchiah v. Emperor, 42 Mad. 561: (A.I.R. (6) 1919 Mad. 45 : 20 Cr. L. J. 379). In Kartar Singh's case (18 Cr. L. J. 607: A.I.R. (4) 1917 Lah. 192) it was stated that the object is not only to ensure correctness but also to furnish locus panitentia to the witness. It is stated in Section 360, Criminal P. C., that the statement will be corrected if necessary after it is read over and that if the witness denies the correctness of any statement, the Court instead of correcting it may make a memorandum regarding the objection of the witness and add such remarks as it considers necessary. So even if a witness out of penitence resiles from the false recorded deposition and makes the true deposition, the false deposition may still remain on the record. What was stated in Kartar Singh's case, (18 Cr. L. J. 607: A. I. R. (4) 1917 Lah. 192) must be held as overruled by Lord Phillipmore observations in F. M, Abdul Rahman's case, (28 Cr. L. J. 259; A.I.R. (14) 1927 P.C. 44) that the object is "to obtain an accurate record from

the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his advocate to suggest corrections..... 'The Primary object is to fix the witness and to enable him to protect himself against any inaccuracy in the words taken down from his lips' (p. 282)."

In the present case no question of locus panitentia arises. The applicant is not penitent even now. It is most unlikely that he would have been penitent at the time of hearing his deposition read over and would have got it corrected. Penitence implies admission of falsehood. Here the applicant denies that there is any falsehood in his deposition.

8. As regards correctness, it is not disputed at all that the deposition was correctly recorded. It is not the case of the applicant that he made a different statement in his deposition. On the other hand, he stands by what is recorded and maintains that he did not believe it to be untrue. In re Bogra, 11 Cr. L. J. 492 : (7 I. C. 414 (Mad.)) Miller J. stated :

> "I cannot see any reason why a deposition irregularly recorded is necessarily to be treated as a nullity for all purposes even as against the man who made it and who has admitted, that it represents what he said. It, of course, may be open to him to prove that the record was incorrectly made; bat that is not suggested in the present case."

In 'Sheoshankar v. Emperor, A. I. R. (27) 1940 Nag. 410: (41 Cr. L. J. 697) it was not alleged by the accused, who was prosecuted for perjury, that the record of his deposition was inaccurate and consequently the irregularity of not reading it over to him as a witness was condoned. In Jiwan Singh v. Sheodan Singh, 28 Cr. L. J. 514: A.I.R. (14) 1927 ALL. 764) a Bench of this Court refused to set aside conviction for perjury when the deposition was not read over in the original case, observing that not reading over the deposition was only an irregularity and that it could only affect the weight to be attached to the record of the deposition against him on the charge of perjury. When the only object of reading over the deposition is to guarantee its correctness, and when it is admitted by the applicant that the record of his deposition is correct and that he did make the impugned statement, the irregularity loses all relevancy. In Mirabux v. Emperor, A. I. R. (10) 1923 Nag. 39: (23 Cr. L. J. 500) there was non-compliance with the provision of Order 18, Rules 5 and 6, Civil P. C., and yet it was held that this did not render the deposition inadmissible at a subsequent trial of the deponent for perjury, that the deposition could be proved in some other way if it could not be presumed to be correct under Section 80, Evidence Act, and that Section 91, Evidence Act, did not make it inadmissible in evidence.

9. In several cases, particularly decided by the Calcutta and the Madras High Courts, it has been held that if a deposition is not read over to the witness, it cannot be said to be a deposition duly recorded and no presumption of its accuracy would arise as it would otherwise under Section 30, Evidence Act, and that Section 91, Evidence Act, would prevent any other evidence of its correctness being given: see for example, Kadir Palkiri v. Emperor, 18 Cr. L. J. 966; (A. I. R. (5) 1918 L.B. 129); Empress v. Mayadeb, 6 Cal. 762: (8 C. L. R. 292); Kamatchinathan v. Emperor, 28 Mad. 308: (2 Cr. L. J. 766); Emperor v. Nabab Ali, 51 Cal. 236: (A.I.R. (11) 1924 Cal. 705: 25 Cr. L. J. 1027) and Mohendra Nath v. Emperor, 12 C. W. N. 845: (8 Cr. L. J. 116) I respectfully disagree from this view.

If the deposition of a witness is not read over to him it means that it was not duly recorded. Under Section 80, Evidence Act, if a deposition is duly recorded, it is presumed to be correctly recorded and there arises no necessity of producing evidence to prove that it was made by the witness and was recorded by the Magistrate or his clerk. If it is not duly recorded, the only effect is that it cannot be presumed to have been correctly recorded and some evidence would have to be produced to prove it. But it is quite a different thing to say that it would be inadmissible in evidence. The Magistrate or his clerk who took down the deposition could be examined as a witness during the trial to prove that the accused made the deposition as recorded. The stage foe producing such evidence has not come yet. When it comes on the applicant's being put on trial, it will be for the prosecution to consider whether to produce any evidence to prove that the applicant made the deposition as recorded. It may even rely upon the applicant's admission that he made the deposition as recorded and dispense with tie production of the Magistrate or his clerk as a witness. Any how, this is not a matter with which I would be concerned at present. What I am concerned with is the existence of evidence and not its production is Section 476 proceedings.

10. The deposition is to be produced in evidence against the applicant during his trial not for the purpose of proving its truth--as a matter of fact the prosecution would strive to prove that it was false--but for the purpose of proving that he made it. Section 91, Evidence Act deals with the production of a document to prove the truth of its contents and not to prove its existence. If the prosecution had to prove that the deposition made by the witness is correct, it would have to produce the deposition and Section 91 would bar any other evidence. But when the prosecution has simply to prove that the witness made the deposition, there is nothing in Section 91 to prevent this fact being proved without producing the deposition itself. This view is in conformity with the view expressed in Elahi Bux v. Emperor, 45 Cal. 825 : (A. I. R. (5) 1918 Cal. 289 : 19 Cr. L. J. 498), Tun Ya v. Emperor, 20 Cr. L. J. 506 : (A. I. R. (6) 1919 L. B. 129) which disapproved of Kadir Pakiri v. Emperor, 18 Cr. L. J. 966 : (A. I. R. (6) 1918 L. B. 129) and followed In re Bogra, 11 Cr. L. J. 482 : (7 I. C. 414 (Mad)); Pitumal v. Emperor, A. I. R. (8) 1921 Sind 16: (18 S.L.R. 342) and Sheoshankar v. Emperor, A. I. R. (27) 1940 Nag. 410 : (41 Cr.L.J. 697). In the case of Elahi Bux, 45 Cal. 825 : A. I. R. (5) 1918 Cal. 289) Richardson J., with whom Beachcroft J. agreed, stated at page 832. "As at present advised, I cannot see any reason why, even in a prosecution for perjury, failure to comply with the provisions of Rules. 5 and 6 of Order 18 should render the deposition entirely inadmissible in evidence or, any, if Section 80 cannot be called in aid, the deposition should not be proved, for instance, by the Judge who took it down, or by the admission of the deponent. If it can be proved in some such way, Section 91 will have no application."

11. If a deposition is not read over to the witness, it is only an irregularity according to the criminal as well as civil law, and the irregularity does not vitiate the conviction or the decree. The Calcutta High Court set aside the conviction on the ground of this irregularity in Haronath Malo v. Sonai Mia, 28 C. W. N. 119: (A. I. R. (11) 1924 Cal. 182 : 25 Cr L J. 289) and Emperor v. Ujagar Singh, 49 C. W. N. 284 : (A. I. R. (36) 1949 Cal. 302). The former was a case prior to the case of Abdul Rahman v. Emperor, 28 Cr.L.J. 259 : (A. I. R. (14) 1927 P.C. 44) and the latter, though subsequent to the case of Abdul Rahman v. Emperor, 28 Cr. L. J. 269: (A. I. R. (14) 1927 P.C. 44) makes no mention of it. In Ram Narain v. Dhondrai, 23 Cr. L. J. 125 : (A. I. R. (9) 1922 Pat. 371), the High Court of Patna refused to set aside the final order in a case under Section 146, Criminal P. C., merely on the ground

that the depositions were not read over to the witnesses. In Abdul Rahman's case, (28 Cr. L. J. 259 : A. I. R. (14) 1927 P. C. 44) the Judicial Committee maintained the conviction even though the depositions were read over to some witnesses while the Magistrate was examining other witnesses or handed over to the literate witnesses to be read by themselves. Their Lordships pointed out that this procedure was acquiesced by the counsel of the accused and that no allegation of prejudice or failure of justice was made, In Jiwan Singh v. Sheodan Singh, 28 Cr. L. J. 514 : (A. I. R. (14) 1927 ALL. 764), Bajai v. Ramsarup, 28 Cr. L. J. 596 : (A. I. R. (14) 1927 ALL. 757), Sher Mohammad Khan v. Bihari, 28 Cr. L. J. 606 : (A. I. R. (14) 1927 ALL. 755), Pitumal v. Emperor, (A. I. R. (8) 1921 Sind 16 : 18 S. L. R. 342) and Abdul Rahman v. King-Emperor, (A. I. R. (18) 1926 Rang 53 : 27 Cr. L. J. 669) the convictions were maintained in spite of the irregularity of non-compliance with the provision of Section 360, Criminal P. C. In Fatiar Bap v. Emperor, A. I. R. (14) 1927 Cal. 575 : (28 Cr.L.J. 751) the conviction under Section 323, Penal Code, was maintained in spite of the irregularity.

12. If an irregularity does not make the deposition inadmissible and does not vitiate the order or the decree, it necessarily follows that it does not exonerate the deponent of the charge of perjury. If a third person can be convicted or a decree can be passed against him on the basis of perjured statement, there is no reason why the perjurer cannot be punished, Convictions or orders of prosecution for per. jury were set aside on the ground of this irregularity in Kartar Singh v. Emperor, (18 Cr.L.J. 607 : A. I. R. (4) 1917 Lah. 192), Kadir Pakiri v. Emperor, (18 Cr. L J. 966 : A. I. R. (5) 1918 L. B. 129), Empress v. Maya Deb, (6 Cal, 762 : 8 C. L. R. 292); Nelluri Chenchiah v. Emperor, 42 Mad. 561 : (A. I. R. (6) 1919 Mad. 45 : 20 Cr. L. J. 379) and Kamatchinathan v. Emperor, (28 Mad. 368 : 2 Cr. L J. 756). I have already discussed the reasons given by the Courts. They were mostly decided by the Calcutta and the Madras High Courts prior to the decision of the Judicial Committee in Abdul Rahman v. Emperor, 28 Cr. L. J. 259 : A. I. R. (14) 1927 P. C: 44). There are obiter dicta in Ram Narain Singh v. Dhondrai, (23 Cr. L. J. 125 : A. I. R. (9) 1922 Pat, 371) and Jiwan Singh v. Sheodan Singh, (28 Cr. L. J. 514 : A. I. R. (14) 1927 ALL, 764) which may suggest that the case of a person who is convicted on the basis of a deposition not read over to the witness is different from and, perhaps weaker than, that of the witness when he is put on trial for committing perjury in the course of the deposition. But they do no go to the extent of saying that the witness cannot be convicted. The conviction, or the order of prosecution, for perjury has been maintained in Tun Ya v. Emperor, (20 Cr.L.J. 506 : A.I.R. (6) 1919 L. B. 129); Firoza Jan v. Amir Ali, 24 Cr.L.J. 781 : (A. I. R. (10) 1923 Oudh 119) (in which the perjured statement was made in a civil Court); In re Bogra, (11 Cr. L. J. 482 : 7 I.C. 414 (Mad.)); Elahi Bux v. Emperor, (45 Cal. 825 : A.I.R. (5) 1918 Cal. 289) (which again was a case of perjury in a civil Court), Mirza Bux v. Emperor, (A. I. R. (10) 1923 Nag. 39 = 23; Cr. L. J. 500) which also was a case of perjury in a civil Court and Sheo Shankar v. Emperor, (A. I. R. (27) 1940 Mag, 410 : 41 Cr. L J. 697). In some of these cases, the irregularity was that the depositions of the witnesses were not read over to the witnesses in the presence of the Magistrate to the accused; that, however, does not affect the reasons for maintaining the convictions. I see no reason to set aside the order of prosecution on the ground of the irregularity,.

13. As regards the expediency, I agree with the Courts below that it was expedient, The applicant committed perjury without the slightest regard to the sanctity of oath, He was determined to give false answers and accepted the risk of being punished for perjury. It does not lie in his mouth to say

that he should not be prosecuted. It was contended that the impugned statements were not material in the trial. They were material in order to show the enmity existing between him on the one side and Abdul Haki, Tufail Ahmad etc. on the other. The very-fact that he perjured himself shows that he himself considered them to be material. Quite a lot of public time and energy is wasted by witnesses giving false evidence. In cross-examination, a false answer invites further cross-examination. Many witnesses also seem to be under the impression that they can commit perjury with impunity and that the law against perjury is almost a dead letter. When there is a, clear case of perjury it is expedient in the interest of justice to bring it to Court.

14. I maintain the order passed by the Courts below and dismiss this application,