Shankar Lal And Ors. vs The State on 30 July, 1954

Equivalent citations: AIR1954ALL779, AIR 1954 ALLAHABAD 779

JUDGMENT

Brij Mohan Lal, J.

1. This is an appeal by four persons, viz., Shankar Lal, Narain, Ram Sarup and Tulshi, who have been convicted by the learned Addl. Sessions Judge of Kanpur under Section 302, Penal Code. They have been sentenced to undergo transportation, for life and to pay a fine of rupees one hundred each. The first three appellants are brothers while the fourth is their servant. They have been found guilty of having committed the murder of one Janki on 7-3-1952.

2. The prosecution version is that about twenty days before the incident Janki's wife Shrimati Jai Devi was molested by Shankar Lal and Tulshi while she was in the 'Har'. She complained to her husband in the evening. The latter, accompanied by his brother Mewa Lal, went to Shankar Lal and Tulshi to protest against their misbehaviour towards his wife. Both Shankar Lal and Tulshi denied the charge. Narain and Ram Sarup, the other two appellants, also arrived and an altercation took place between the appellants on the one hand and Janki and Mewa on the other. Nothing serious happened at that time although the appellants are said to have held out a threat to Janki and Mewa Lal to deal with them in near future.

3. The prosecution story goes on to say that on the 7-3-1952 Janki was returning home from his field with a bundle of Matar on his head and Mewa Lal was following him at a distance of 15 to 20 paces. It is alleged that the appellants were lying in ambush and as soon as Janki reached Raghubar's field they came out of their place of hiding and attacked him, Shankar Lal is said to have been armed with a 'Kanta' and the remaining three appellants with axes. Janki died on the spot.

4. The incident is said to have taken place at about 5.30 in the evening. A report was lodged by Mewa Lal in police station Sikandra which is situate at a distance of five miles from the place of occurrence at 7 P. M. At that time the Station Officer Dhanpal Singh was absent from the police station. Ranjit Singh, the Second Officer, reached the place of occurrence at 9.30 P. M. and started investigation. Dhanpal Singh reached the village next day, i. e., on. 8-3-1952 at 8 P. M. and took up investigation himself. He examined a number of witnesses and later on got the statements of five witnesses, viz., Shrimati Jai Devi, Dharam Das, Dulare, Devi Prasad and Bachchi Lal recorded under Section 164, Cr. P. C., by one Mr. Bhatnagar, a Magistrate on 14-3-1952. On 30-3-1952 he submitted a charge-sheet.

5. The appellants have denied having made the assault. Their learned counsel has argued not only that the prosecution has failed to establish its case on merits but has also raised a point of law, viz., that copies of statements recorded by Mr. Bhatnagar under Section 164, Cr. P. C., were not delivered

to his clients and they were thus deprived of the very valuable right of cross-examining the prosecution witnesses with reference to their previous statements and of contradicting them, if possible.

6. It appears that on two different occasions petitions were made by the accused for being supplied with copies of those statements but the statements could not be found. It is provided by Section 164 (2), Cr. P. C., that such statements shall after being recorded, "be forwarded to the Magistrate by whom the case is to be inquired into or tried." This statutory duty was not performed by Mr. Bhatnagar. Dhanpal Singh S. O. made a petition through S. M. Singh, Assistant Public Prosecutor, to the learned Magistrate (Mr. Bhatnagar) for copies of the statements made by the witnesses under Section 164, Cr. P. C. The Magistrate replied that copies would be given if found. As a matter of fact, they have not been traced to this day. Nobody knows what has happened to them. The fact, however remains that those statements never reached the Committing Magistrate's Court and the appellants have not been able to find out the contents thereof.

7. In our opinion the learned counsel for the appellants is perfectly correct in contending that he had a right to cross-examine the witnesses with reference to those previous statements. Section 145, Evidence Act (1 of 1872), gives a party a right to cross-examine a witness with reference to his previous statements made by him in writing or reduced to writing and imposes a duty on the cross-examiner, in case he intends to contradict him with such previous statements, to draw the attention of the witness to such portions thereof as are to be used for the purpose of contradiction. Section 155 (3) permits a cross-examiner to impeach the credit of a witness by proving a former statement inconsistent with any part of his evidence. Thus it is apparent that it was a legitimate right of the appellants to defend themselves by proving, if they could, that the prosecution witnesses on the basis of whose statements the charge of murder was sought to be proved against them had made different statements on previous occasions. By denying the copies of previous statements this previous right has been taken away from them. They have thus, to a great extent, been handicapped in their defence.

8. So important is this right that it has been. recognised by the Legislature also and has been preserved by the express provisions of Section 162, Cr. P. C. While it was thought fit to render statements made by witnesses during investigation and recorded under Section 162, Cr. P. C., inadmissible "for any purpose" it was considered expedient to make an exception in favour of the accused and to permit him to make use of such statements for the purpose of contradicting the prosecution witnesses. It is significant that no right has been conferred on the prosecution to make a similar use of these statements it the witness appears for the defence, but the accused's right has not been taken away from him. In the circumstances the importance of such a right for the accused cannot be too strongly emphasized.

9. Had the aforesaid statements been in the possession of some third person it would have been the duty of the accused to summon them from that person in the manner prescribed by law and no blame would have attached to the prosecution if the statements could not be secured. But since the statements were in the custody of the prosecution agency a heavy duty rested on the prosecution to produce them in Court. The statements were recorded in the absence of the appellants and they had

no means of finding out their contents except by calling upon the prosecution to produce them. The duty of the prosecution to produce such statements in Court was laid down in --'Bashir Uddin v. Emperor', AIR 1932 All 327 (A) where Niamatullah J. remarked at p. 329 as follows :

> "An accused is undoubtedly entitled to inspect statements of prosecution witnesses recorded under Section 164, Cr. P. C. Such documents can be used by the prosecution for the purpose of corroborating the witnesses. They can likewise be used by the defence for the purpose of contradicting such witnesses."

Again on the same page one finds the following remarks :

> "A Magistrate is expected to afford all facilities to the accused not only when he is compelled by law to do so but also when he has a discre-tion in the matter and the ends of justice require that the accused should be apprised of what certain prosecution witnesses had previ-
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> ously stated in proceedings under Section 164, Cr. P. C."

10. This duty was not performed by the prosecution in this case and thus the appellants were placed at a great disadvantage. It is true that in the absence of any definite evidence on the point we are not in a position to hold that prosecution had any dishonest motive in not making the statements available to the appellants. Very likely it was an act of sheer negligence to lose those statements. Neither Mr. Bhatnagar nor his Reader has been examined and we are not in a position to know the exact cause of the loss of those statements. The fact, however, remains that the appellants were denied a valuable right conferred on them by law. It is immaterial for their purposes whether this unfortunate result accrued on account of any dishonest motive or sheer negligence on the part of the prosecution.

11. It may be pointed out that the witnesses whose statements have thus been placed beyond the reach of the appellants were four out of the five eye-witnesses examined against them in the Sessions Court, and Shrimati Jai Devi who was the main witness about the event of molestation -- the alleged motive for the crime. All of them were very important witnesses in the case. Without these previous statements the defence could not- effectively cross-examine these witnesses. It is not safe to convict an accused person on the statements of witnesses who have not been effectively and completely cross-examined. We find support for our view from several decided cases in which failure to supply copies of statements made by witnesses under Section 161, Cr. P, C., was held to have vitiated the trial.

12. In the case of -- 'Emperor v. Bansidhar', AIR 1931 All 262 (B) this Court set aside a conviction because copies of statements recorded under Section 161 had not been furnished to the accused. A similar view was taken by the Madras High Court in -- 'Re : Chinna Lingappa AIR 1951 Mad 685 (C)', and in -- 'Re: Latchigadu, AIR 1952 Mad 229 (D)'. Nagpur High Court has also subscribed to the same view in the cases of --'Vishwanath v. Emperor', AIR 1936 Nag 249 (E) and -- 'Baliram Tikamram v. Emperor', AIR 1945 Nag 1 (P). Patna High Court also has laid down the same rule of

law in the cases of -- 'Jhari Gope v. Emperor', AIR 1929 Pat 268 (G), and -- 'Dina-nath Sahai v. Emperor', AIR 1939 Pat 174 (H). The question came up for decision before their Lordships of the Privy Council as recently as in 1946 in the case of -- 'Pulukuri Kotayya v. Emperor', AIR 1947 P. C. 67 (I). Their Lordships also upheld this view and remarked at p. 69 as follows :

> "The right given to an accused person by this section is a very valuable one and provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to guage its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate breakdown of the whole of his evidence : and in the present case it is to be remembered that the accused's contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to Section 162 as a matter of gravity. -- 'AIR 1945 Nag 1 (F)' where the record of statements made by witnesses had been destroyed, and -- 'AIR 1931 All 262 (B)' where the Court had refused to supply to the accused copies of statements made by witnesses to the police, afford instances in which failure to comply with the provisions of Section 162 led to the convictions being quashed. Their Lordships would, however, observe that where, as in these two cases, the statements were never made available to the accused an inference, which is almost irresistible, arises of prejudice to the accused."

13. In the present case also the statements were never supplied at all and the accused were, in our opinion, certainly prejudiced. It is not possible to speculate what discrepancies, if any, those statements contained, but the mere fact that an opportunity of cross-examining the witnesses with reference to those previous statements and of contradicting them, if possible, has been denied to the appellants is an unmistakable proof of prejudice to them.

14. We are alive to the fact that in the aforesaid cases the Courts emphasized the fact that failure to supply copies was a breach of statutory provisions contained in Section 162, Cr. P. C. In the present case also there has been a contravention of a statutory provision inasmuch as the statements recorded under Section 164 were not forwarded to the Committing Magistrate. Had they been sent to his Court as required by law the appellants could obtain copies therefrom. We are, therefore, of the opinion that the principle laid down by the aforesaid authorities applies with equal force to the present case. Loss to the appellants was the same whether it was occasioned by failure to supply copies recorded under Section 161, Cr. P. C., or those recorded under Section 164, Cr. P. O.

15. In the circumstances, the trial was vitiated and the convictions cannot be allowed to stand.

16. It will serve no useful purpose to send back the case for retrial because circumstances are such that even now those statements cannot be found. A search was made for them while the case was pending in the Sessions Court but all attempts to trace them proved futile. In the circumstances any further search will lead to no useful result.

17. In the view which we have taken Of the question of law it is not necessary to record any finding on the question of fact.

18. The appeal is allowed and the conviction and sentences are set aside. The appellants shall be released forthwith unless their detention is required in connection with any other offence. The fine, if realised, shall be refunded.