Ram Chander vs State Of Haryana on 25 February, 1981

Equivalent citations: 1981 AIR 1036, 1981 SCR (3) 12, AIR 1981 SUPREME COURT 1036, 1981 (3) SCC 191, 1981 CRIAPPR(SC) 158, 1981 SCC(CRI) 683, 1981 BBCJ 66, (1981) SC CR R 295, (1981) 2 APLJ 1, (1981) CHANDCRIC 84, (1981) CURLJ(CCR) 84

Author: O. Chinnappa Reddy

Bench: O. Chinnappa Reddy, Baharul Islam

PETITIONER:
RAM CHANDER

Vs.

RESPONDENT:
STATE OF HARYANA

DATE OF JUDGMENT25/02/1981

BENCH:
REDDY, O. CHINNAPPA (J)
BENCH:
REDDY, O. CHINNAPPA (J)
ISLAM, BAHARUL (J)

CITATION:
1981 AIR 1036 1981 SCR (3) 12
1981 SCC (3) 191 1981 SCALE (1)428

ACT:
Role of a Judge trying a criminal case explained-Evidence Act, section 165 read with section 172(2) of the Code of Criminal Procedure, whether a Judge in a criminal case may put any question to the witness and if so what are its limitations-Evidence Act, section 11, scope of.

HEADNOTE:
The appellant Ram Chander and Mange were tried by the learned Additional Sessions Judge, Jind, for the murder of Dunni. Both were convicted under section 302 read with section 34 Indian Penal Code and sentenced to imprisonment for life. On appeal the High Court acquitted Mange but confirmed the conviction and sentence of Ram Chander. In appeal by special leave it was contended that the conviction

and sentence were vitiated as the principle of fair trial was abandoned by the Sessions Judge who rebuked the witnesses and threatened them with prosecution for perjury and based his conviction on such extorted evidence.

Allowing the appeal, the Court

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HELD: 1: 1. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. The Court has wide powers and must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It is the duty of a judge to discover the truth and for that purpose he may "ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant". But this he must do, without unduly trespassing upon the functions of the public prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten, coerce, confuse, intimidate or bully witnesses. He must take the prosecution and the defence with him. The Court. the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The judge, "like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and old." [14 B, F, D; 15E-F]

Sessions Judge, Nellore v. Intna Ramana Reddy and Anr., I.L.R. 1972 AP 683, approved.

Jones v. National Coal Board, [1957] 2 All E.R. 155, quoted with approval.

1: 2. In the instant case, the questions put by the learned Sessions Judge, particularly the threats held out to the witnesses that if they changed their statements they would involve themselves in prosecution for perjury were certainly intimidating, coming as they did from the presiding judge. In an effort to compel

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the witnesses to speak what he thought must be truth, the learned Sessions Judge, very wrongly, firmly rebuked them and virtually threatened them with prosecutions for perjury. He left his seat and entered the ring. The principle of "fair trial" was abandoned. [19 F-H]

2. The Evidence Act contains detailed provisions dealing with statements of persons who cannot be called as witnesses and former statements of persons who are called as witnesses. These provisions would appear to become redundant if the evidence of a witness is to be tested and accepted or rejected with reference to the former statement of another witness on the ground that such former statement renders the evidence highly probable or improbable. Even assuming that

under certain circumstances it is permissible to use the first information report under the first part of section 11 there is in the present case no question of invoking the first part of section 11 which is inapplicable since the first information report is now not sought to be used as being inconsistent with the prosecution case. Nor can first information report be used by resort to the second part of section 11. [20 H-21 A; 20 F-G]

Ram Kumar Pande v. The State of Madhya Pradesh, [1975] 3 S.C.R. 519 @ 522, discussed.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.390/75.

Appeal by special leave from the Judgment and Order dated 2.7.1975 of Punjab & Haryana High Court in Cr. A. No. 1554/74.

Kapil Sibal, Subhash Sharma and Ravindra Bana for the Appellant.

K.G. Bhagat and R. N. Poddar for the Respondent. The Judgment of the Court was delivered by CHINNAPPA REDDY, J. What is the true role of a judge trying a criminal case ? Is he to assume the true role of a referee in a football match or an umpire in a cricket match, occasionally answering, as Pollock and Maitland(1) point out, the question 'How is that', or, is he to, in the words of Lord Kenning 'drop the mantle of a judge and assume the role of an advocate ?(2) Is he to be a spectator or a participant at the trial ? Is passivity or activity to mark his attitude ? If he desires to question any of the witnesses, how far can he go ? Can he put on the gloves and 'have a go' at the witness who he suspects is lying or is he to be soft and suave ? These are some of the questions which we are compelled to ask ourselves in this appeal on account of the manner in which the judge who tried the case put questions to some of the witnesses.

The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive element entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past.

> "Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may 'ask any question he pleases, in any

> form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172 (2) of the Code of Criminal Procedure enables the Court to send for the police diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial." (1) With such wide powers, the Court must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It must, of course, not assume the role of a prosecutor in putting questions. The functions of the counsel, particularly those of the Public Prosecutor, are not to be usurped by the judge, by descending into the arena, as it were. Any questions put by the judge must be so as not to frighten, coerce, confuse or intimidate the witnesses. The danger inherent in a judge adopting a much too stern an attitude towards witnesses has been explained by Lord Justice Birkett:
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> "People accustomed to the procedure of the Court are likely to be over-awed or frightened, or confused, or distressed when under the ordeal of prolonged questioning from the presiding Judge. Moreover, when the questioning takes on a sarcastic or ironic tone as it is apt to do, or when it takes on a hostile note as is sometimes almost inevitable, the danger is not only that witnesses will be unable to present the evidence they may wish, but the parties may begin to think, quite wrongly it may be, that the judge is not holding the scales of justice quite eventually"(1) In Jones v. National Coal Board Lord Justice Denning observed:
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> "The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been over looked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the judge and assumes the role of an advocate; and the change does not become him well."

We may go further than Lord Denning and say that it is the duty of a judge to discover the truth and for that purpose he may "ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant" (Sec. 165 Evidence Act). But this he must do, without unduly trespassing upon the functions of the public prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. The Court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The judge, 'like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and old'.

Let us now take a look at the facts of the case before us. Ram Chander and Mange were tried by the learned Additional Sessions Judge, Jind, for the murder of Dunni. Both were convicted under Sec. 302 read with Sec. 34 Indian Penal Code and sentenced to imprisonment for life. On appeal the

High Court acquitted Mange but confirmed the conviction of Ram Chander. The prosecution case was that on February 14, 1974, at about 11 a.m. Dunni was proceeding from his field towards the village, Sucha Khera and was passing near the field of Ram Chander and Mange when he was attacked by them with Jatus (wooden pegs fixed to a cart). They inflicted several injuries on Dunni. Mewa (P.W.9) who was working in his field tried to rescue Ram Chander. He was given a lathi blow on his head. On hearing the alarm raised by Dunni, Hari Chand (P.W.8) and Jiwana (P.W.2) and others came there and witnessed the occurrence. The assailants ran away. Jiwana the Lambardar proceeded to the village to inform the relatives of Dunni. On the way he met Dhan Singh (P.W. 10), and told him about the occurrence. Jiwana thereafter went to the Police Station at Narwana and lodged the First Information Report at about 5.15 p.m. The Sub Inspector of Police went to the village. He held the inquest and sent the dead body for post mortem examination. He looked for Mewa and Hari Chand. Both of them were not available in the village. A constable was sent to fetch them from Sucha Khera. Neither of them was brought that night. Next morning he was able to examine Mewa but Hari Chand was not to be found. Hari Chand was finally examined on 16th. The Doctor who conducted the autopsy found thirteen injuries on the body of Dunni. There were fractures of the left partial, frontal and occipital bones. According to the Doctor that was due to "compression of brain with multiple fractures of skull". On February 15, 1974, at about 4 P.M. the Doctor also examined Mewa and found on the right side of his head an abrasion 1" x 1/4".

In support of its case the prosecution examined P.Ws. 2, 8 and 9 as eye witnesses to the occurrence. P.W. 10 was examined to speak to the information alleged to have been given to him by P.Ws. 2 and 8 that the deceased had been beaten by the two accused persons. P.W. 2 did not support the prosecution case and was declared hostile. P.Ws. 8 and 9, the remaining eyewitnesses seemingly supported the prosecution case in varying degrees in the examination-in- chief, but they made some damaging admissions in cross- examination. P.W. 9 even in examination-in-chief stated that Mange was not armed with any weapon though he was present alongwith Ram Chander. The learned Sessions Judge convicted both Ram Chander and Mange but having regard to the evidence of P.W. 9 the High Court acquitted Mange and confirmed the conviction of Ram Chander.

It was argued by Shri Kapil Sibal, learned Counsel for the appellant that in view of the several statements made by P.Ws. 8 and 9 in their cross examination, their evidence should not have been accepted by the Courts below. Shri Sibal also submitted that the accused did not have a fair trial as the learned Sessions Judge particularly assumed the role of a Prosecutor.

Hari Chand, P.W. 8 said in his examination-in-chief that when he was working in his field he heard a noise from the side of the field of Mange. He and Jiwana (P.W. 2) went in that direction. From a distance they saw Mange and Ram Chander giving blows to Dunni with dandas. By the time they went near, Ram Chander and Mange ran away. They saw Mange tying a piece of cloth round the head of Dunni. Dunni was bleeding and was hardly able to breathe. They went to the village to inform the people about the occurrence. On the way they met P.W. 10 and told him about Dunni. having been beaten by the two accused. Later that day he went to Sucha Khera for official work. The police examined him on 16.2.74. We have already referred to the circumstance that he was not available for examination by the Police on 14th and 15th. He sought to explain his absence from the village by stating that he went to Sucha Khera in connection with his official work. In

cross-examination he admitted that he did not mention this fact in the Roznamcha (daily diary). He also admitted that the village Sucha Khera was not within his jurisdiction. He further admitted that the notice for serving which he went to Sucha Khera was with regard to water shoot No. 14750 at Sucha Khera. In answer to a question whether he only saw the accused running away or doing something else, he categorically stated that he did not see those persons causing injuries but only saw them running away. Thereupon the Sessions Judge told him that in his examination-in-chief he had said that he had seen Mange and Ram Chander causing injuries and that if he made inconsistent statements on material points he could be prosecuted for perjury. The Sessions Judge has made a note to this effect in the deposition itself. In answer to a further question P.W. 8 stated that when they were running away their backs were towards him. The Sessions Judge once again repeated the warning which he had given earlier. The Sessions note with regard to the first warning is in the following words:

> "The witness has been explained right here his statement which has gone on record and he has been told that in examination-in-chief he has said that he had seen Mange and Ram Chander causing injuries. He had also been informed that a person can be prosecuted for perjury if on material points in-consistent statements are made."

The second warning which was given by the learned Sessions Judge has been recorded by the learned Sessions Judge in the following words:

> "As was pointed out to you yesterday also, it is once more pointed out to you that in examination-in- chief yesterday, you clearly stated before the Court that you saw Ram Chander and Mange causing injuries to Dunni. Later on in cross-examination by Shri Shamsher Singh you said that you saw the accused persons running away. You have already been warned about the consequences of inconsistent replies. Without fear or favour tell the Court, which of the two statements is correct and whether you saw Mange and Ram Chander causing injuries to Dunni or not."

To this question the answer of the witness was that when he was at some distance he saw them causing injuries but by the time he went near they had run away. P. W. 9 stated even in his chief examination that when he saw Mange and Ram Chander, they were running in the direction of Denuda. Ram Chander had a danda. Mange was empty handed. They started beating a person who was coming from Denuda side. He tried to rescue, the person. He was given a blow on his head with a stick. He felt giddy and sat down. He did not know what happened afterwards because he was feeling faint. He came to his senses when Lambardar and Patwari came there. Then he went to his village. He stated in cross- examination that on 15th he was called by the Police and taken to the field and from the field he was taken to Narwana where he was kept in the Police Station upto 16th. He was allowed to go away after his statement was recorded by the Magistrate under S. 164 Cr. Procedure Code. Jiwana was also there at that time. When he was asked whether the statement which he made to the Magistrate was tutored his reply was "Yes, the statement was told". Later again he said "I gave the statement as told by the police." He stated that he was not beaten but only threatened. He further stated that the day before he gave evidence in Court he was threatened by the Police that if he did not give the statement he would himself be involved in a case. He also said that

he wanted to say whatever he actually saw but the police did not agree and said that he must give the entire statement as mentioned by them. During the course of the cross-examination of the witness the learned Sessions Judge made two notes which may be extracted here. The first note runs:

> "This time the witness says that the police said that the police will make a case against him. Previously the witness was not prepared to go to that extent. I wonder whether the witness understands the difference between two things namely that the Police will make a case against him and between this that if he changed his statement he will involve himself in a case. The matter to be appreciated at appropriate stage.
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> The second note is as follows:
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> "I will examine the witness through Court questions as to which part of the statement he admits to be correct without fear of the police. The learned defence counsel may proceed further to build up his defence."

Thereafter the learned Sessions Judge himself put some questions to the witness. The witness said that he did not tell the Magistrate that he was making the statement under the pressure of the Police. The learned Sessions Judge then put him the following question: "You have said that even before me you are making a statement under the pressure of the police. Please state whether you mean it. and you were giving the statement under pressure of the police." The answer was that "I am giving the statement freely." The learned Sessions Judge put him a few more questions one of which was whether he was honestly stating that Mange was bare headed and Ram Chander had a dunda. The witness answered that he said so honestly.

The questions put by the learned Sessions Judge, particularly the threats held out to the witnesses that if they changed their statements they would involve themselves in prosecutions for perjury were certainly intimidating, coming as they did from the presiding judge. The learned Sessions Judge appeared to have become irate that the witnesses were not sticking to the statements made by them under sections 161 and 164 and were probably giving false evidence before him. In an effort to compel them to speak what he thought must be the truth, the learned Sessions Judge, very wrongly, in our opinion, firmly rebuked them and virtually threatened them with prosecutions for perjury. He left his seat and entered the ring, we may say. The principle of 'fair trial' was abandoned. We find it impossible to justify the attitude adopted by the Sessions Judge and we also find it impossible to accept any portion of the evidence of P.Ws 8 and 9, the two alleged eye witnesses.

Shri Bhagat very ingeniously argued that the evidence of P.Ws 8 and 9 could yet be acted upon to the extent their evidence was substantiated by the first information report given by P.W.2. When we pointed out that neither PW 8 nor PW9 was the author of the first information report and, therefore, the report could not be used to corroborate their evidence, Shri Bhagat suggested that we could do so by invoking the provisions of Section 11 of the Evidence Act. He relied upon the following observations of Beg J. in Ram Kumar Pande v. The State of Madhya Pradesh: (1) "No doubt, an F.I.R. is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, in this case, it had been made by the father of the murdered boy to whom all the

important facts of the occurrence, so far as they were known up to 9.15 p.m. on 23-3-1970, were bound to have been communicated. If his daughters had seen the appellant inflicting a blow of Harbinder Singh, the father would certainly have mentioned it in the F.I.R. We think that omissions of such important facts, affecting the probabilities, of the case, are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case".

Beg, J, apparently had the first part of Section 11 in mind and thought that the presence of the daughters at the scene was inconsistent with the failure of the father to refer to their presence in the first information report having regard to the circumstances under which the report must have been made. Even assuming that under certain circumstances it is permissible to use the first information report under the first part of Section 11 (we say nothing about the correctness of the view), there is in the present case no question of invoking the first part of Section 11, which is inapplicable since the first information report is now not sought to be used as being inconsistent with the prosecution case. Nor do we think that the first information report can be used by resort to the second part of section 11, The Evidence Act contains detailed provisions dealing with statements of persons who cannot be called as witnesses and former statements of persons who are called as witnesses. These provisions would appear to become redundant if the evidence of a witness is to be tested and accepted or rejected with reference to the former statement of another witness, on the ground that such former statement renders the evidence highly probable or improbable. We can do no better than to refer to Stephen, the framer of the Section who said: "It may possibly be argued that the effect of the second paragraph of Section 11 would be to admit proof of such facts as these (viz. statements as to facts by persons not called as witness; transactions similar to but unconnected with the facts in issue; opinions formed by persons as to facts in issue or relevant facts). It may, for instance, be said: A (not called as a witness) was heard to declare that he had seen B commit a crime. This makes highly probable that B did commit that crime. Therefore A's declaration is a relevant fact under Section 11 this was not the intention of the section as is shown by the elaborate provision contained in the following part of Chapter 11 (Sections 31 to 39) as the particular classes of statements, which are regarded as relevant facts either because the circumstances under which they are made invest them with importance, or because no better evidence can be got. The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved". We, therefore, do not think that section 11 may be invoked in the present case, in the manner suggested by the learned counsel. In the result we accept the appeal, set aside the conviction and sentence and direct the appellant to be set at liberty forthwith.

V.D.K. Appeal allowed.