Bombay High Court
Shyama Rajaram Pardhan And Anr. vs Emperor on 10 September, 1948
Equivalent citations: 1949 CriLJ 669
Bench: Hemeon, Padhye
JUDGMENT

1. The appellant, Shyama was convicted and sentenced to death under Section 302 and to undergo 5 years rigorous imprisonment under Section 392, Penal Code, by the Additional Sessions Judge, Wardha, who convicted and sentenced his co-appellant Mt. Sita to undergo 9 months rigorous imprisonment under 8.411, ibid. With this appeal will be considered the reference made under Section 374, Criminal P, 0., for the confirmation of the death sentenoe passed on Shyama.

2. The prosecution case was, briefly stated, as follows. The deceased Mt. Mahagi, who lived at Madni with her grandson Balkrishna (p, w. 23), worked as a day labourer and used to collect head-loads of firewood from the village waste along the sides of the nala which passes between Madni and Amgaon where the appellants, who were also labourers, resided. She used to wear the silver sari (Art. c) and coarse silver patlyas (Art. d) and was wearing them on 10th February 1948 when the appellant Shyama called her to the village waste to carry firewood from there.

3. She was not seen alive again and when attempts to find her proved infructuous, the hot-war Rameshwar (p. w. 4) made the report, Ex. p-l, at the Eharangana police station on 12th February 1948 to Prabhudayal, (p. w. 13), Head Constable, who deputed Altaf Hussain (p. W. 12), Head Constable, to make enquiries in the matter. His efforts as well as those, of Prabhudayal on 18th and 14th February 1948 were infructaous; and Kewalkrishna Sharma (p. w. 27), Sub-Ins-peotor, who had previously been ill, assumed charge of the investigation on the evening of 16th February 1948 at Madni.

4. Suspicion rested on the appellant Shyajna and, on the morning of 18th February 1948,' he gave the information contained in the memoran. dum, Ex. p-2, in the presence of the attesting witnesses Gopalrao (p. W. 5) and Govindrao (p, W. 24). Thereafter, the appellant took the Sub-Inspector and the witnesses to the nala where he showed them the corpse of a woman which was floating under twigs. The corpse was identified by Balkriahna (p, W. 23) and Mt. Radhi (p. W. 26) as that of Mahagi and it was noticed that although she was wearing the patlyas (Article D) on her wrists, the silver sari (Art. o) was miss-ing from her neck.

5. After the inquest had been held, the corpse was sent to Wardha where the authopsy was carried out by Shri S. V. Kale (P. W. 10), Civil Surgeon, who was not in a position to give a definite opinion concerning the cause of death because of the advanced stage of decomposition of the corpse, but he noticed that there was an ante-mortem stab wound below the 12th right rib as well as an opening in the skin about the right clavicle.

6. Meanwhile, Maruti (p, W. 7) produced the stone (Art. h) from a place in the nala pointed out by the appellant. When the latter was questioned next morning with regard to the silver sari (Article c), he took the police party to a point in the nala not far from the place where the corpse had been

found, but efforts to find the ornament were unsuccessful. Attempts to find it in the appellants' houses were also vain, but in the course of the evening, the appellant Sita gave the information contained in the memorandum, Ex. p-7. In pursuance of that statement, she caused the production of the silver sari (Art. c) from a place in the nala and it was seized. Thereafter, the apear (Art. I) was produced at the instance of the appellant Shyrna from the nala in accordance with the information given by him in the memorandum, Ex. P-8.

7. The silver sari (Art. c) was duly identified as Mahagi'a property and sent with Mahagi's lugada, Article A, and choli, Article B, and the spear, Article I, to the Chemical Examiner who found that Arts. A and B were bloodstained and that Article I gave the benzidine test for blood. He did not examine Article C as the stains on it were few and minute in size. The Imperial Serologist found that Article 1 was not blood-stained and that by reason of disintegration the origin of the bloodstains on Arts A-c could not be determined.

8. The appellant Shyama in examination disclaimed responsibility for Mahagi's death and denied that he had discovered her corpse, stone or spear. He attributed his incrimination to Gulabrao (P. W. 22), mukaddam, who was inimical to his father; and in defence added that the police had harassed him during the investigation. Hb adduced no evidence and part of his plea was that the injuries on Mahagi's corpse were not sufficient to cause death.

9. The appellant Sita denied that she made the statement contained in Ex. P-7 or that she had discovered the sari, Article 0, from the nala water. She also declared that she had not been given that ornament by Shyama and that there was no connection between them. She adduced no evidence and in defence claimed that even if ehe had led to the discovery of Article 0, she had no knowledge that it was stolen property.

10. That Mahagi met a violent death was clear from the Chemical Examiner's report and from the evidence of Shri S. V. Kale that there was an ante-mortem stab wound below the 12th right rib. This ruled out the possibility that her death was caused by a wild animal or reptile and there was also the cogent f Act. that the silver sari had been removed from her neck.

11. Nor was it suggested before us that she bad died by other than human agency.

12. We pause here to examine an interesting legal point which was superficially dealt with by the trial Court. The investigating Sub-Inspector questioned several persons on 17th February 1948 and thereafter, but did not record what each of them said and contented himself: by recording the fact that he had questioned them and by making a digest of what he had learned from them all. This wa3 a contravention of the provisions of Sub-section (8) of Section 161, Criminal P. 0., as amended by the Code of Criminal Procedure (Amendment) Act, 1945 (II [2] of 1945); and it was urged by the appellants' learned Counsel that the testimony of the following 10 witnesses of the aforesaid 18 persons could not be used against the appellants : l) Mt. Bhagi (p. w. l), (2) Ganpat (p. w. 2), (3) Jago (p.w. 3), U) Gopalrao (p. W. 6), (5) Mt. Soni (P. w. 9), (6) Gulabrao (p. w. 22), (7) Govindrao (p. w. 24), (8) Mt. Soni (p. w. 25), (9)Mt. Madhi (p. w. 26), (10) Mt. Bhaga (p. w. 29).

13. It was not the stand of the appellants' learned Counsel that the evidence of these witnesses was inadmissible. His case was that it should not be taken into consideration against the appellants for the reason that they were deprived by the investigating officer's omission of an extremely valuable right and were thereby materially prejudiced. In Emperor v. Vishwa-nath I. L, R. (1937) Nag, 178 : A.I.R. (26) 1936 Nag. 249 : 88 Or. L. J. 936, be se J. (now C. J.) had pointed out that the denial to accused of his right of production of statements made by prosecution witnesses to the police and reduced to writing ordinarily constituted an incurable illegality as the extent of the prejudice caused could not be gauged.

14. In Baliram v. King-Emperor I. L. R. (1945) Nag. 151 : A. I. R. (32) 1945 Nag. 1 : 46 Or. L, J. 448 and Maganlal v. King-Emper or I. L. R. (1946) Nag. 126 : A. I. R. (33) 1946 Nag. 173 : 47 Cr. L. j. 851, a Division Bench of which one of us was a member held that where an accused was deprived of his statutory rights of cross-examination and denied the opportunity of effectively destroying the testimony of prose, caution witnesses the evidence of such witnesses was not admissible. In the later of these two cases it was made clear that although the witnesses were competent witnesses in virtue of Section 118, Evidence Act, the admissibility of their evidence was not solely dependent on their competency as witnesses.

15. Another Division Bench of this Court referred to these two oases and made the following observations at p. 115 in Maroti v. King. Emperor I. L. R. (1948) Nag. 110 : A. I. R. (86) 1948 Nag. 74 : 49 cr. L. J. 68:

While, with due respect, we doubt whether the evidence of witnesses in Court becomes inadmissible as a result of the deprivation of the right of cross-examination inherent in Section 162, Criminal P. C, we are in agreement with the Division Bench that where there is prejudice to the accused the testimony of such witnesses mast be received with extreme caution, and the Court would be entitled in a suitable case even to ignore altogether ouch evidence. Every case will have to be de-, cided on ita own facts. While in the present case we do' not propose to base our conclusion on the inadmissi-bllity of the evidence of these witnesses, we are satisfied, however, that the evidence of witnesses whose statements were recorded by the police suffers a great deal because of the loss of the statements. We consider that we should not act upon the evidence of these witnesses. This is what was laid down in three oaBes of this Court and is the only reasonable course to follow.

16. Sen J. in Kisan Singh v. King-Emperor cri. Revn. No. 124 of 1948, d/- 26th August 1948, relied on the aforesaid four cases of this Court and held that where accused were not supplied with copies of statements made by prosecution witnesses and recorded on loose sheets of paper, the accused were deprived of the rights of effective cross-examination and prejudiced to an extent impossible to gauge, that there was a failure of justice and that the trial was vitiated.

17. this did not signify that every trial in which the statements of the prosecution witnesses to the police are not produced or if produced are, as in the case before us, of no value is necessarily vitiated. Sen J. 's finding strictly related to the case before him and that case differed from the present one in that here the statements of witnesses other than the ten to whom we have referred were available to the defence. While then we have no hesitation in disregarding the evidence of the

ten witnesses, we see no reason why the evidence of other witnesses should be ignored on that count alone. At the same time, we are of the view that the evidence of these other .witnesses should be received with caution because of the possibility that if copies of the separate statements of the ten witnesses to the police had been available for purposes of cross-examination, they might have damaged the prosecution ease irreparably.

18. The trial Court placed much reliance on the appellant Shyama's discovery of the corpse, but the learned Government Pleader frankly admitted that he was not in a position to support that finding. The evidence which now remains concerning this discovery emanated from Mukunda (p. w. 6), Maroti (p. W. 7), Balkrishna (P. W. 23) and the Sub-Inspector Kewalkriahna (p. w. 27) and the testimony of Mukunda, Maroti and Bal-brishna showed that the corpse was floating in the nala when Shyama pointed it out. Moreover, the nala is situated in a much-frequented locality and many persons must have seen the corpse before the appellant was conducted to "discover" it.

19. We are also of the view that the memorandum, Ex. r-2, was prepared after the so-called discovery. As it contained Shyama's declaration that he had stabbed Mahagi twice before he had thrown her into deep water, there was definite information concerning the cause of death at about 8 A.M. when it was drawn up and attested by Gopalrao and Govindrao. In spite of this, the report, Ex, P-10, which was sent at 8-45 A. M. on the same day, makes no reference to Shyama'a disclosure. Further, the inquest report, Ex. P-8, shows that the panchas, among whom were Gopalrao and Govindrao, could give no definite opinion concerning the cause of death and at the end of that report the Sub-Inspector himself added the following note:

The dead body has been recovered as per memo, of the confessional statement of Shyama. But it cannot be id to with what instrument he killed her.

It was thus clear that there had, in fact, been no discovery at all of the corpae by the appellant Shyama.

20. The learned Government pleader also-conceded with frankness that this appellant's recovery, such as it was, of the spear, Arti I, was of no great importance, inasmuch as it was not proved to have been his property and the Im. perial Serologist found that it was not bloodstained, The circumstances which surrounded its discovery are also not free from suspicion for the reason that Shyama had stated on 13th February 1948 that he had thrown it into the-nala where the corpse was found, but it was not recovered for two days and the place of its discovery is 109 yards from the plaoe where the corpse had previously been found. It was further significant that the disoovery of this weapon took place two days after the disoovery of the corpse, although, as shown, Shyama had divulged its employment by him and indicated what he had done to it thereafter.

21. We too are satisfied that the discovery of the silver sari, Article c, cannot be used against Shyama, as there is no real reason to suppose that its eventual discovery was the result of in-formation furnished by him. It is true that Atmaram (P. w. 21) averred that Shyama had stated that this ornament was with Sita, but Kewalkrishna himself did not state that he had received any such information from Shyam and the latter's statement, vide Ex. p-2, makes no reference of any kind to

the fact that he had handed it over to Sita. It would, therefore, appear that the discovery of this ornament was entirely due to information given by the appellant Sita.

22. The question then is whether the latter is liable under 8.4li, as held by the trial Court, or under Section 202. Penal Code. At the outset, we feel doubtful whether, as is required by Section 87, Evidence Act, she was in actual or constructive police custody when she actually discovered the sari, She was not questioned until the afternoon of 19th February 1948 when she was requited to appear at the mukaddam's bara. This indicated that she was not in custody of any kind prior to that occasion; and although Bawalkrishna asserted that he had then taken into custody and detained her until she made the statement contained in Ex. p-7 and thereafter, the remarkable thing was that she was not formally arrested until 21st February 1948. After the sari had been discovered it was duly seized at the mukaddam's bara and, according to Kewalkrishna he had not permitted her to return to her house after this; but Atmaram (p. w, 21) specifically stated, vide Ex. p-19, in the committing Court that she had returned to her house after the seizure and the 'Sub-Inspector had gone to Madni.

23. This witness had also stated in the Court of Session that the memorandum, Ex. P. 7, was not recorded before but after the Sub-Inspector and others had returned to the mukaddam's -bara. It is true (hat he varied that account subsequently ; but when regard is had to the fact that Ex. v-'i was made after Shyama'-s alleged discovery of the corpse, the possibility that Ex. P-7 was drawn up after the discovery of the mri oannot be excluded. Moreover, the existence of a liaison between Shyama and Sita was not established and it was, therefore, improbable that he would murder a woman or that Sita would instigate him to do so in order to secure an ornament of the type in question.

24. The material before us would not warrant a conviotion under Section 411, Penal Code, be-pause it did not indicate that Sita knew or had teason to believe that the sari, Article 0, was stolen property. Similarly, Section 202 ibid would not apply, as we are not in a position to hold that she had reason to believe that an offence had been committed. It would appear, on the other hand, from the contents of ex. P-7 that she thought that the sari belonged to Shyama's wife and that when she realized that the police were searching for Mahagi'a sari, she had a suspicion that this sari might be Article C. This was at most a mere apprehension and not a reason to believe that an offence had been committed in respeot of the owner of Article C. Finally, we would point out that the surviving evidence concerning Mahagi's ownership of that ornament was neither conclusive nor reliable.

25. The convictions and sentences of Shyama and Sita, the former's under Sections 802 and 892 and the latter's under Section 411, Penal Code, cannot, therefore, be sustained and they are set aside. We are also of the view, for the reasons given, that neither of these appellants is liable under any other section of the Penal Code.

26. Their appeal succeeds and they shall be set at liberty forthwith.