Supreme Court of India
B.K. Pal Chaudhry vs The State Of Assam on 7 October, 1959
Equivalent citations: AIR 1960 SC 133, 1960 CriLJ 174, (1960) IIMLJ 69 SC, 1960 1 SCR 945
Author: Sarkar
Bench: A Sarkar, M Hidayatullah, S Das
JUDGMENT Sarkar, J.

1. The appellant is a medical doctor and at the material time, he was the Civil Surgeon of Dibrugarh. He was a witness in a criminal case being G. P. Case No. 654/54 in which three persons were charged inter alia under s. 376 of the Indian Penal Code with the offence of rape. The case was tried with the aid of a jury and resulted in a verdict of acquittal in respect of that charge. There was an appeal to the High Court of Assam against the acquittal which was allowed and two of the accused persons were convicted.

2. The offence was said to have been committed on a minor girl named Roheswari Chetia sometime in the afternoon of March 19, 1954. The same day at 6 p.m., she was examined by Dr. Dhanbir Pait, the doctor in charge of Moran Dispensary, near which the offence was alleged to have been committed. It appears that the police produced her for another medical examination at the District town of Dibrugarh the next day and she was then examined by Dr. Mahibulla who was an assistant to the appellant, the Civil Surgeon. Thereafter, the policy on March 21, 1954, produced the girl before the appellant for a further medical examination and she was examined by him on that date. With the reasons for these repeated medical examination we are not concerned in this case.

3. Doctor Pait was called as prosecution witness at the hearing of the case while the appellant and Dr. Mahibulla were called by the accused as defence witnesses. Dr. Pait in his evidence was clear that the girl had been raped. He said that he found two circular teeth marks on her cheeks and a reddish circular mark on her left breast. He also said that he found the hymen ruptured and gave other details in support of his opinion that girl had been ravished. In his opinion, the hymen appeared to have been ruptured the same day that he examined the girl. Dr. Mahibulla's evidence was that the hymen was ruptured but the rupture had taken place nine or ten days before the incident and was not a recent one. The appellant in his evidence stated that the marks on the cheeks of the girl appeared to be insect bite and that hymen was not ruptured. He found no evidence of rape on her person. There was thus direct contradiction between the evidence of the doctor called by the prosecution and the doctors called by the defence, on the question of the rupture of the hymen.

4. As we have earlier stated, the High Court allowed the appeal against acquittal in the view that the commission of the offence of rape had been established by the evidence of the doctor called by the prosecution and other evidence led by it. It is not necessary to refer for the purposes of this appeal to the other evidence produced. The appeal to the High Court was heard by Sarjoo Prosad, C.J., and Deka, J. After allowing the appeal and convicting the two accused, these learned Judges on the same day, passed on order in the terms set out below, directing the issue of a notice to the appellant.

5. 31-7-1958. Issue notice on Dr. B. K. Pal Chaudhury (D.W. 2), Retired Civil Surgeon, Dibrugarh to show cause why he should not be prosecuted under s. 193 I.P.C. for giving false evidence in

connection with G.P. Case No. 654/54, (Lakhimpur, Case No. 72 of 1955) - The State v. Mahendra Nath Barua and Others.

6. The notice was thereafter duly issued and served on the appellant. Pursuant to the notice the appellant showed cause, but this time the matter was heard by Deka and Mahrotra JJ. These learned Judges came to the conclusion that it was a fit case in which a complaint should be made against the appellant for an offence punishable under s. 193 of the Indian Penal Code and directed and Registrar of the High Court to lodge the compliant in the Court of the Deputy Commissioner, Lakhimpur. It is against this order directing the making of the compliant, that the present appeal was filed.

7. Sections 476 to 479A of the Code of Criminal Procedure deal with complaints to be made for the offence of giving false evidence as defined by s. 193 of the Indian Penal Code and for other offences mentioned therein. Section 479A was introduced into the Code of Criminal Procedure by the Code of Criminal Procedure (Amendment) Act, 1955. Sub-section (6) of this section is in these terms :

S. 479A(6) - No proceedings shall be taken under sections 476 to 479 inclusive for the prosecution of a person for giving or fabricating false evidence, if in respect of such a person proceedings may be taken under this section.

8. Now, the present case was one in which the proceedings were directed to be taken for giving false evidence and the learned Advocates, appearing for the parties to this appeal, agreed that sub-section (6) of s. 479A makes ss. 476 to 479 inapplicable to it. In that view of the matter, we think it unnecessary to consider these sections.

9. Section 479A(1), so far as it is material to the present case, is in these terms :

"When any . . . Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceedings . . . and that, for the eradication of the evils of perjury . . . and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reason therefore and may, if it so thinks fit, after giving the witness an opportunity of beaning heard, make a complaint thereof."

10. Sub-section (5) of this section runs as follows :

"In any case, where an appeal has been preferred from any decision of a Civil, Revenue or Criminal Court but no complaint has been made under sub-section (1), the power conferred on such Civil, Revenue or Criminal Court under the said sub-section may be exercised by the Appellate Court; and where the Appellate Court makes such complaint, the provisions of sub-section (1) shall apply accordingly, but no such order shall be made, without giving the person affected thereby an opportunity of being heard."

11. The appellant's contention is that the terms of this section were not complied with. We think that this contention is justified. The present case is governed by sub-section (5) of s. 479A for here the complaint was not made by the trial Court but by the Appellate Court. Therefore, the terms of both sub-ss. (1) and (5) have to be complied with. The combined effect of these sub-sections is to require the court intending to make a complaint, to record a finding that in its opinion a person appearing as a witness has intentionally given false evidence and that for the eradication of the evils of perjury, and in the interests of justice, it is expedient that such witness should be prosecuted for the offence and to give the witness proposed to be proceeded against, an opportunity of being heard as to whether a complaint should be made or not.

12. It seems to us that none of these conditions of the section was observed by the High Court when it directed the complaint to be made. First there was no finding recorded by it that the appellant had intentionally given any false evidence or that it was expedient to proceed against him for the eradication of the evils of perjury and in the interest of justice. The order which directed the notice to issue - and that seems to be the only order in connection with the matter - does not record any such finding. Nor do we find in the judgment in the main appeal heard by the High Court in the case in which the appellant gave evidence, any such finding.

13. Secondly, it does not seem to us that the High Court gave the appellant a proper hearing to which he was clearly entitled under the terms of sub-section (5) of s. 479A. Deka, J., in the judgment that he delivered, directing the complaint to be made, contended himself by saying that the procedure laid down by s. 479A of the Criminal Procedure Code had been substantially followed except that in order to avoid prejudice to the appellant at the trial to follow the compliant, the reasons for supposing the witness to have perjured had not been elaborately or specifically dealt with. It does not seem to us that this is a satisfactory way of dealing with the question raised.

14. What Mehrotra, J., said, however, is, in our view, clearly erroneous. It appears to have been contended by the learned Advocate for the appellant in the High Court that because the High Court had preferred to accept the testimony of the other doctors, it could not necessarily be said that the evidence of the appellant was false or that he intentionally gave false evidence and it was open to the court on hearing the appellant to come to a different conclusion on these matters. Mehrotra, J., dealing with these contentions said "that these are matters which may be taken into consideration by the Court trying the case but cannot be considered by this Court at this stage. Any observation by this Court on merits is likely to prejudice the trial of the case." He observed that s. 479A was inserted with the object of avoiding further inquiry which inquiry was required by s. 476. There are two further observations made by this learned Judge which are of great materiality in the present appeal and we set them out below :

"The witness is in effect challenging the correctness of the findings of the Bench hearing an appeal that he intentionally made a false evidence. It is not open to this Bench to upset this finding."

"To my mind it is not open to the other Bench to record a finding different from the Bench hearing the appeal on the question of the witness intentionally giving a false evidence."

15. It is obvious from these observations of Mehrotra, J., that he considered himself bound by the findings of the Bench hearing the appeal that the appellant had intentionally given false evidence. We have earlier stated that the Bench hearing the appeal expressed no such finding. However that may be, it seems clear to us that the statute by providing in sub-section (5) of s. 479A, which is the provision governing this case, that no order directing a complaint shall be lodged without giving the person affected thereby an opportunity of being heard, intended that after giving that hearing it would be open to the Court to decide not to make a complaint. Otherwise there would be no sense in directing that a hearing should be given. Now, the Court may, after giving that hearing, decide not to make a compliant either for the reason that the Court was satisfied that no false evidence was given by the witness concerned or that such evidence was not intentionally false, or lastly, that it was not expedient in the interests of justice or to eradicate the evils of perjury, to make the complaint. By stating that it was not open to him "to upset" the finding of the Bench hearing the appeal that false evidence had been intentionally given, Mehrotra, J., really did not give any hearing to the appellant as the sub-section required him to do. He thought that the course adopted by him would be in the best interest of the appellant as it would prevent his case from being prejudiced at the trial upon the complaint. We consider that the ground of prejudice is more fancied than real. The finding required to be made by s. 479A(1) is only of a prima facie nature; it cannot be a finding which would have any force at the trial upon the compliant made pursuant to that finding. Further, this notion of avoiding prejudice would not justify a clear breach of the terms of the section.

16. The order of the High Court cannot be supported even if it is assumed that Deka, J., took a correct view of the matter, for, the other learned Judge clearly took a wrong view and it cannot be said what the decision would have been if he had approached the matter from the correct point of view. We are therefore satisfied that order appealed against had been made in breach of the express provisions of sub-secs. (1) and (5) of s. 479A, and cannot be allowed to stand.

17. It was suggested by the learned Advocate for the respondent, the State of Assam, that we might go into the evidence and make a complaint ourselves. We do not consider it fit to take this course even if it be open to us, as to which we say nothing, for we find it impossible to do so without going into the entire case and all the evidence led, and these are not before us.

18. It was then said that we should remand the case back to the High Court for giving proper hearing to the appellant, but we do not think that we should make that order either. All that has happened is that the High Court has made the order in breach of the section and what we are called upon to do is to set aside that order. What further action can be taken in accordance with law is for the High Court to decide.

19. The result, therefore, is that this order of the High Court is set aside and the appeal is consequently allowed.

20. Appeal allowed.