

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty

RAM KUMAR (APPELLANT) *v.* KING-EMPEROR
(COMPLAINANT-RESPONDENT)*

1936
September 23

Evidence—Witness un-cross-examined or his cross-examination remaining unfinished—Evidence, whether legal and whether can be the basis of judicial pronouncement.

Held, that the testimony of a witness is not legal evidence unless it is subject to cross-examination; and where no opportunity has been given to the appellant's counsel to test the veracity of the principal prosecution witness or where owing to the refractory attitude of the witness the court is constrained to terminate all of a sudden and prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony and cannot be the basis of a judicial pronouncement.

Mr. K. P. Misra, for the appellant.

The Assistant Government Advocate (Mr. H. K. Ghose), for the Crown.

NANAVUTTY, J.:—This is an appeal filed by Ram Kumar Brahman, aged 50 years, against a judgment of the learned Sessions Judge of Rae Bareli, convicting him of an offence under section 376 of the Indian Penal Code and sentencing him to five years' rigorous imprisonment and to undergo 15 stripes.

The learned Sessions Judge has also made a reference (Criminal Reference No. 37 of 1936), recommending that the sentence of whipping passed by him upon the accused Ram Kumar be set aside in view of the provisions of section 393 of the Code of Criminal Procedure.

I have heard the learned counsel for the appellant as also the learned Assistant Government Advocate and have examined the evidence on the record.

*Criminal Appeal No. 301 of 1936, against the order of Mr. K. N. Wanchoo, I.C.S., Sessions Judge of Rae Bareli, dated the 27th of July, 1936.

1936

RAM
KUMAR
v.
KING-
EMPEROR

Nanamully,
J.

The story of the prosecution is briefly as follows:

The appellant Ram Kumar is a teacher in a primary school in village Dipamau in the district of Rae Bareli. Musammatt Sankathia a girl of eight years, was studying in this primary school. At about mid-day on the 12th of March, 1936, when all the boys and girls at this school were allowed to go home to have their meals, Musammatt Sankathia was detained by the schoolmaster, the appellant Ram Kumar, on the pretext of getting some papers from a room. When Musammatt Sankathia went to the room to carry out the order, the schoolmaster followed her into that room and closed the door, and caught hold of the girl and lifted her on his hip (*kamar par baitha liya*) and then having spread a mat on the ground he laid her on it and removed the *dhoti* from her person and opening out his own *dhoti* he began to have sexual intercourse with her. The girl cried out with pain and blood flowed from her private parts. Ram Kumar then got up, removed the *dhoti* from the girl's person and gave her an *angauchha* and a *langot* to wear and he then washed the *dhoti* of the girl in the room with some water in an earthen *gagra* which was there. Then he took the girl's *dhoti* and went out of the room and chained the door from outside. He came back shortly afterwards and took back his own *angauchha* and *langot* which he had given the girl to wear and made her put on some *basta* cloth and her own *dhoti*. Then he asked her to go away and to tell nobody about the occurrence or he would beat her severely. Musammatt Sankathia then went out crying and she went to the door of Musammatt Mendia Pasin. The latter asked her what had happened and she told her that Panditji, meaning the appellant Ram Kumar, had raped her. Just then her uncle Ram Prasad came up and carried her home and next day she was taken to police station Dalmau which is six miles to the north-west of village Dipamau, and

there she made a report at mid-day on the 13th of March, 1936. The delay in making the report was noted by the thana munshi.

Musammat Sankathia was sent to the hospital for medical examination and Dr. N. N. Joshi, Civil Surgeon of Rae Bareli, examined her on the 16th of March, 1936. He was of opinion that she was eight years of age and he found the following injuries on her person:

(1) A bruise $1\frac{1}{2}'' \times 2''$ over the vulva. The labia majora and the labia minora were both bruised on both sides.

(2) There was congestion all round the vagina.

(3) The hymen was ruptured completely.

(4) The posterior commissure was ruptured, and there was a wound $\frac{3}{4}'' \times \frac{1}{4}'' \times \frac{1}{4}''$ over its middle.

(5) There were a few abrasions over the buttocks.

In the opinion of the Civil Surgeon the injuries were five days old and were caused by the penetration of a fully developed male organ or any hard substance resembling a male organ.

The Civil Surgeon also examined the appellant Ram Kumar on the 8th of April, 1936, and found that there were no marks of injuries on his penis or on any other part adjoining it. He also found that the appellant Ram Kumar was suffering from double hydrocele. He was further of opinion that the injuries found on the person of Musammat Sankathia showed that the man who had raped her must necessarily be a strong man of virile powers. In answer to certain questions the Civil Surgeon deposed that the accused, though suffering from double hydrocele, was theoretically capable of having an erection of his male organ sufficiently strong to have sexual connection with a woman and that the length of the male organ of Ram Kumar while in repose was $2\frac{1}{4}$ inches. In answer to another question he stated that the vagina of Musammat Sankathia on the 29th May, 1936, was $1\frac{3}{4}$ inches. He further deposed that the appellant Ram Kumar was

1936

 RAM
KUMAR
v.
KING-
EMPEROR

Nanavutti,
J.

1936

RAM
KUMAR
v.
KING-
EMPEROR

Namavully,
J.

capable of having seminal discharges but that the erection of his penis was slight and feeble.

It is clear from the medical evidence that the appellant Ram Kumar, who is a married man aged 50 with wife and children and suffering from double hydrocele, could hardly have caused the very serious and extensive injuries which were found on the person of Musammat Sankathia. As observed by the Civil Surgeon, the injuries on the person of Musammat Sankathia, if the result of rape, must necessarily have been caused by a healthy man of strong sexual and virile powers. Although the Civil Surgeon had to admit the theoretical possibility of the accused being physically capable of committing rape on Musammat Sankathia, the trend of his evidence goes clearly to show that it was hardly likely that the appellant Ram Kumar was the man who actually committed rape on the girl.

I come next to discuss the direct evidence, which goes to incriminate the appellant Ram Kumar in respect of the charge of rape brought against him. The sole evidence in this case to prove the charge of rape against the appellant Ram Kumar is the testimony of Musammat Sankathia, P. W. 7. The evidence of this witness is most unsatisfactory. The witness was obstinate and refused to answer questions in cross-examination. The learned Sessions Judge has appended a note to the evidence of this girl. I quote the following abstract from that note:

“It is no use wasting (time) by taking down questions and noting that the witness does not answer them, for that is what she is doing to most questions that have any importance. She has either been told by somebody not to reply to questions in her cross-examination (though she was difficult even in examination-in-chief) or she does not know anything herself and has repeated only that much which she was made to learn by heart. Under these circumstances it is no use continuing her examination any further. I, therefore, order the cross-examination to stop. The witness will be discharged.”

1936

 RAM
KUMAR
v.
KING-
EMPEROR

In a further note appended to the deposition of this witness the Sessions Judge makes the following observations:

“The girl looks bright and it looks rather odd that she is not answering questions in cross-examination. Her silence appears rather deliberate.”

Nanavally,
J.

I am at a loss to understand how after making these observations on the demeanour and conduct of the prosecutrix the learned Sessions Judge thought fit to convict an old and respectable married man with wife and children on the sole testimony of a child of eight years, whom the learned Sessions Judge has himself condemned in no measured language. The testimony of a witness is not legal evidence unless it is subject to cross-examination; and where as in this case no opportunity has been given to the appellant's counsel to test the veracity of the principal prosecution witness or where owing to the refractory attitude of the witness the court is constrained to terminate all of a sudden and prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony and cannot be the basis of a judicial pronouncement.

The evidence of P. W. 6 Ram Prasad Barhai, the uncle of Musammat Sankathia, is as unsatisfactory as that of Musammat Sankathia herself. He accompanied Musammat Sankathia to the thana, but he was careful not to sign the first information report. He left it for Musammat Sankathia, a girl of eight, to do that. Even the fact, that Ram Prasad accompanied Musammat Sankathia to police station Dalmau at the time when the latter made her report at that thana was not noted in the first information report, although Ram Prasad's signature was taken on the list of blood-stained clothes removed at the thana from the person of Musammat Sankathia. There is no explanation given by Ram Prasad as to why, after he had learnt from his niece that the appellant Ram Kumar had raped her, he did not there and then take the headmaster of the school

1936

RAM
KUMAR
v.
KING-
EMPEROR

Nanavally,
J.

to task. He has deposed in cross-examination that he suspected that Ram Kumar had raped his niece. If this had been a true case, the first thing that Ram Prasad would have done would have been to take the chaukidar and the mukhia and go straight to the school and get the appellant Ram Kumar arrested and taken to the thana. His pretence that the girl needed his help is on the face of it absurd. The girl needed the attention of a woman and not of a man. He has also deposed that he met the chaukidar at 3.30 p.m., on the afternoon of the 12th of March, 1936, and that he met the mukhia half an hour earlier, that is to say at 3 p.m., but neither the chaukidar nor the mukhia went to the thana to make a report of the alleged occurrence of rape. In cross-examination this witness admits that a panchayat had been convened which condemned him to feast the men of his *biradari* and he had to give a feast to about 150 Barhais in order to get himself readmitted into his caste. He pretends that he did not know that the accused Ram Kumar gave evidence before the panches against him, but his alleged ignorance is itself to my mind proof that Ram Kumar must have given evidence against him, and that explains why the present charge has been brought against the appellant Ram Kumar.

Musammat Mendai Pasin (P. W. 6) deposed that she was the first person to whom the girl Musammat Sankathia told her tale of woe. It is significant to note that the name of this Pasi woman is conspicuous by its absence from the first information report. Had the story told by her been true, it is obvious that Musammat Sankathia would never have omitted to mention her name in the first information report and her uncle Ram Prasad who had accompanied her to the police station would have seen to it that she made mention of that fact. I have, therefore, no hesitation in rejecting the evidence of Musammat Mendai as palpably false. She has admitted in cross-examination that she did not

see the girl Musammat Sankathia coming out of the school compound while she saw the appellant Ram Kumar walking about in the compound of the school about mid-day on the 12th of March, 1936. It is clear, therefore, from the evidence of this witness, if she is to be believed on this point, that Musammat Sankathia did not come out of the school building or compound but that she came from somewhere else after she had been raped by some young man either belonging to the school or not. In this connection it is significant to note that the medical evidence shows that there were a few abrasions over the buttocks of the girl and this clearly shows that she could not have been lying on any mat or carpet as alleged by Musammat Sankathia but that she must have lain in some bush or field outside the school compound at the time when some one had sexual intercourse with her either with or without her consent.

P. W. 10 Gaya Din is a boy of about eight years of age and is a cousin of Musammat Sankathia. He has deposed that he saw the appellant Ram Kumar taking Musammat Sankathia inside the room and closing the door behind him. In cross-examination he has admitted that he told his maternal uncle Ram Prasad P. W. 6 that he had seen the appellant Ram Kumar taking Musammat Sankathia inside the room and had himself gone inside that room and closed the door. P. W. 6 Ram Prasad gives on this point the lie direct to his nephew. He merely deposed that his nephew told him that the appellant Ram Kumar had detained Musammat Sankathia at the school. That was the reason why he deposed that after learning from his nephew that Musammat Sankathia had been detained by the village schoolmaster, he began leisurely to have his bath and take his meal, and it was not till some time in the afternoon that he went to the school to find out why Musammat Sankathia had not come back from the school. If Gaya Din had told his uncle Ram

1936

 RAM
KUMAR
v.
KING-
EMPEROR

Nanacutty,
J.

1936

RAM
KUMAR
v.
KING-
EMPEROR

Nannavutti,
J.

Prasad that the appellant Ram Kumar had closetted himself with the girl inside the room, it is obvious that Ram Prasad would have at once rushed to the school to rescue his niece. I, however, disbelieve the entire story of the girl having been asked by the appellant Ram Kumar to fetch some papers for him and then being shut up in a room inside the school and raped there by the appellant. That is the reason why there are so many serious discrepancies between the evidence of uncle and nephew, apart from the medical evidence, the nature of which largely exonerates the appellant from the heinous charge brought against him.

The evidence of P. W. 9 Ram Ratan Lohar has been rejected by the learned trial Judge, and I, therefore, need not discuss it. In my opinion the evidence of this witness was rightly rejected by the trial Judge.

P. W. 11 Abhailakh Singh has deposed that Ram Prasad, the uncle of Musammat Sankathia, came to his house at about mid-day and told him that his niece had been raped by the appellant Ram Kumar. This evidence is in direct conflict with the evidence of Ram Prasad (P. W. 6), who deposed that he only met the mukhia at 3 p.m. in the afternoon and not at mid-day. He has deposed that the chaukidar would not go to make the report at once because he had some private work of his own and that the mukhia himself did not go to make the report. The evidence of this witness does not advance the case of the prosecution in any way. He is not an eye-witness of the occurrence. He has deposed in cross-examination that the second officer who came to investigate the case did not take possession of the mat or carpet which the appellant is said to have spread out and upon which he is said to have laid Musammat Sankathia before he raped her because according to the second officer there were no blood marks on it.

P. W. 14, S. I. Nurul Hasan, second officer of thana Bachhrawan, has deposed that he saw an *asni*, a *dhoti*

and an *angauchha* in the room of the appellant Ram Kumar but that he did not take them in his possession as they did not appear to bear any blood stains. S. I. Nurul Hasan reached the spot on the 14th of March, 1936, the day after the report was made at police station Dalmau, but S. I. Man Singh, the station officer of Dalmau, reached the spot on the 18th of March, 1936, and he fancied that there were blood stains on the *asni* or mat and he took it as also the *dhoti* and *angauchha* into his possession. The *asni*, *dhoti* and *angauchha* belonging to the appellant Ram Kumar were sent to the Chemical Examiner for report on the 22nd of May, 1936. The Chemical Examiner reported that he found spermatozoa on the *asni*, and he also found remnants of blood stains on the *dhoti* and *angauchha*. In view of the fact that no blood stains and no seminal stains were found by S. I. Nurul Hasan on the *asni*, *dhoti* and *angauchha* belonging to the appellant Ram Kumar when he went to the spot on the 14th of March, 1936, I can attach very little importance to the discovery of the blood stains and seminal stains on these articles by the station officer of Dalmau four days after the search was made by the second officer.

P. W. 15 Ram Dayal was examined by the learned Sessions Judge under section 540 of the Code of Criminal Procedure. It is curious that he also did not go and make a report at the thana at once, but, like his brother Ram Prasad, pretended to be looking after his daughter and so he did not make any report at the thana. He has further deposed that he imagined that the mukhia and the chaukidar would get the report made, although the chaukidar had told Ram Prasad plainly that he would not go to the thana as he had to do some private work of his own. He (Ram Dayal) has deposed that he had also gone with his daughter Musammat Sankathia and his brother Ram Prasad to police station Dalmau when the first information report

1936

 RAM
KUMAR
v.
KING-
EMPEROR

Nanavutty,
J.

1936

RAM
KUMAR
v.
KING-
EMPEROR

Nanavutti,
J.

was made, and he stated in cross-examination that it was his brother Ram Prasad who was dictating the report at the police station. His evidence goes to show that he really was not anxious to charge the appellant Ram Kumar but that it was his brother Ram Prasad, who had got the report made against the appellant Ram Kumar on behalf of his daughter Musammat Sankathia.

The appellant no doubt acted very foolishly in running away from the school and pretending that he had become insane, but the conduct of the appellant in behaving in a foolish manner will not go to prove the charge of rape brought against him. The appellant has also foolishly adduced no evidence in his defence, but the shortcomings of the defence will not serve to fill up the gaps in the prosecution story. Upon the evidence on the record I am clearly of opinion that the charge against the appellant Ram Kumar breaks down completely. There is no legal evidence on the record to justify the conviction of the appellant on a charge under section 376 of the Indian Penal Code. It is true that the girl Musammat Sankathia has had sexual intercourse with some one with or without her consent, but the fact that she has had sexual intercourse with some unknown male will not by itself go to prove that the charge which she brought against Ram Kumar is a true one. The medical evidence renders the story of Musammat Sankathia highly improbable. The extensive injuries on her private parts could not have been inflicted by an old man of fifty, whose sexual powers had been enfeebled by the fact of his suffering from double hydrocele. I have very serious doubts in my mind as to the guilt of the accused in respect of the charge brought against him. The delay in making the first information report and the apparent reluctance of the chaukidar and the mukhia of the village to take any steps to incriminate the appellant Ram Kumar also make me hesitate to believe the story told by Musammat Sankathia, and the attitude adopted by

Musammat Sankathia herself in the witness box and the strictures passed by the learned Sessions Judge upon her immediately after he recorded her deposition tend further to increase my doubts as to the truth of the story told by the prosecution witnesses.

For the reasons given above I allow this appeal, set aside the conviction and sentence passed upon the appellant Ram Kumar, acquite him of the offence charged and order his immediate release.

As the appeal has been allowed it is not necessary for me to pass any order upon the criminal reference made by the learned Sessions Judge himself recommending that the sentence of whipping be set aside on the ground that it was in contravention of the provisions of section 393 of the Code of Criminal Procedure. Let the record be returned.

Appeal allowed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge
and Mr. Justice Ziaul Hasan*

HAKIM SYED AZIZUDDIN (PLAINTIFF-APPELLANT) v. MUSAMMAT ARFA BEGAM (DEFENDANT-RESPONDENT)*

1936

September 28

Mortgage—Mesne profits—Mortgage deed providing for redemption on payment of entire mortgage money—Mortgagee delivering possession to mortgagor on payment of portion only and agreeing to payment of balance subsequently—Mortgagee, if entitled to mesne profits after delivery of possession—Evidence Act (I of 1872), section 92—Transfer of Property Act (IV of 1882), section 3—Notice—Section 3 of Transfer of Property Act, whether has retrospective effect.

Where a mortgage-deed provides that redemption would be effected on payment of the "entire mortgage money" by the mortgagor, but the mortgagee makes over possession of the

*Second Civil Appeal No. 366 of 1934, against the decree of Mr. Raghubar Daval, I.C.S., District Judge of Unao, dated the 7th of September, 1934, modifying the decree of Pandit Krishna Nand Pande, Additional Civil Judge of Unao, dated the 9th of December, 1933.

1936
RAM
KUMAR
v.
KING-
EMPEROR

*Nanavathy,
J.*