

Rau Bhagwanta Nargude and Another

Vs

State of Maharashtra

Criminal Appeal No. 189 of 1973

(CJI Y. V. Chandrachud, R. S. Sarkaria, O. Chinnappa Reddy JJ)

07.09.1978

JUDGMENT

JASWANT SINGH, J. -

1. This appeal by special leave is directed against an order dated September 29, 1975 of the Punjab and Haryana High court at Chandigarh directing prosecution of the appellant for an offence under Section 193 of the Indian Penal Code and asking the Registrar of the Court to lodge a complaint in respect of the aforesaid offence in the court of competent jurisdiction.

2. The circumstances giving rise to this appeal are : On the basis of recovery of the dead body of a minor girl of fourteen or fifteen years of age named Kaushalya Devi from the residential house of one Bhajan Lal aged 35 years, resident of Abohar (hereinafter referred to as 'the accused') on the night between the 14th and 15th of March, 1973 when his wife and children were away, the accused was tried for the murder of and rape on the said girl. To start with, the police did not effect the arrest of the accused who from the evidence recorded in the case appeared to be a big landlord. Later on, however, on the statement of the father of the deceased girl, a case was registered against the accused and he was taken into custody at 1.00 p.m. on March 15, 1973. Dr. C. D. Ohri who conducted the Post-mortem examination of the dead body of Kaushalya Devi, deceased, opined on the basis of the observations made by him that the death of the deceased had occurred as a result of asphyxia due to constriction of the neck which was ante-mortem and sufficient in the ordinary course of nature to cause death. The doctor further opined that the deceased had been raped and the person committing the rape on her was bound to receive some scratches on his glans penis.

Accordingly at about 5.50 p.m. on March 15, 1973, the police produced the accused before Dr. P. K. Mittal, Medical Officers, Nehru Municipal hospital, Abohar, and requested him to opine as to : (1) the nature of injuries on the person of the accused, (2) the accused's potency to perform the sexual intercourse, and (3) whether the accused had performed sexual intercourse during the last 24-48 hours. As according to the Government instructions in force at the relevant time, the medico-legal cases were to be examined by two doctor. Dr. P. K. Mittal examined the accused in the presence of Dr. Mrs. L. K. Grewal, who was also attached to his hospital, and found the following injuries on his person.

1. Circular bruise 2 1/2 cm. in diameter present on the back of right arm 3 cm. lateral to the axillary fold and 14 cm. below the top of right shoulder joint, the circle being of upper lower arches with healthy central area. In each arch there are separate specs of reddish violet bruises suggestive of teeth marks.

2. Two cm. in diameter rounded bluish red bruise which is comparatively much

fainter, present laterally to bruise 1. It is uniform in appearance all over.

3. In the opinion of both the doctors, injury 1 was the result of teeth bite but as regards injury 2, the doctors expressed their inability to give any definite opinion. On examination of the private parts of the accused, the doctors found that he was potent and capable of performing sexual intercourse. During the course of the said examination, the doctors also observed the whole of the glans penis and corona of the accused covered with a thick layer of yellowish material which smelt like smegma. They, therefore, advised a thorough chemical and microscopic examination of the yellowish material to find out if it was a layer of smegma or not to enable them to answer the third query made by the police and vide their letter 426 dated March 15, 1973 referred the accused to the appellant who was posted as Chief Medical Officer, Ferozepur. In their aforesaid forwarding letter, the doctors stated that they had not at all disturbed the layer of smegma and had tried to take no sample so that the chief Medical Officer "would examine the case in its original condition and order the sample of smegma to be taken and sent for chemical examination if he felt like doing so". The police, was not, however able to take the accused to Ferozepur before the morning of March 17, 1973. Even on that day, it was only at six in the evening that the police could contact the appellant as he was stated to be away on an official errand. On the aforesaid docket and the connected papers being put up before him, the appellant wrote back to Dr. P. K. Mittal saying that no special opinion by him was necessary and that he (Dr. Mittal) might send without any further delay the scrapping of the yellowish material mentioned by him from the genitals to the Chemical Examiner, Punjab for opinion. The communication addressed by the appellant to Dr. P. K. Mittal ran as under :

#FromFromDr. S. P. KOHLI,Chief Medical Officer, Ferozepur.ToDr. P. K. Mittal, PCMs-II,Medical Officer Incharge,Nehru Memorial Hospital,Abohar.Memo. No. NL/Special-1 Dated 17-3-73Subject : Medical legal examination of Bhajan Lal accused in rape and murder case.##

Regarding point 3 no special opinion by the undersign is necessary. You may send the scrapping of the yellowish material from the genitals mentioned by you to the Chemical Examiner, Punjab for opinion.

You have already been telephonically instructed through the S.H.O. Police station, Abohar City on 15-3-73 at 6 p.m. to do the needful. Further delay in the case must be avoided.

Report per return after compliance of order. The full case of the accused is returned herewith.

#Detail attached (3) three only. Sd/- S. P. Kohli, Chief Medical Officer, Ferozepur.Received copy Seen at 6.00 p.m.Sd/ Sd/- S. P. Kohli,H.C. No. 1121 17-3-73.dated 17-3-73.##

4. On receipt of the aforesaid communication from the appellant, Dr. Mittal carried out the instructions contained therein but not without a certain amount of resentment as appears from the letter Ex. CW 1/3 which runs as follow :

#FromThe Incharge, Nehru Memorial Hospital,Abohar.ToThe Chief Medical Officer,

Ferozepur.No.6 Dated 18-3-73##

Subject : Medical Examination of Bhajan Lal accused

Dear Sir,

Reference your letter No. NL-SPL/1973 dated 17-3-73

The accused shri. Bhajan Lal was presented to on 18-3-73 at 9.50 a.m. and I have done the needful as per instruction given by you.

I had referred the case to your goodself for final opinion as the Lady Doctor refused to give any opinion on the plea that she was not familiar with the appearance and smell of smegma and as for government instructions where two Doctors are unable to agree on one point the case is to be referred to Chief Medical Officer of the District for final opinion. Your goodself verified the same on phone from the lady Doctor. I did not remember any instructions for taking the smear through the S.H.O. Police and neither your goodself remembered the same on your visit to this Hospital on 16-3-73 and 17-3-73 in connection with the same case.

Today again Lady Doctor is on leave and I am alone in the Hospital but still I am doing the needful under your instructions and to avoid any delay on my part. This is for your information please.

Sd/- P. K. Mittal, 18-3-73.##

5. The Chemical Examiner, Punjab as well as the Professor of Pathology, Medical Collage, Patiala, whose opinion was sought by Dr. P. K. Mittal expressed their inability to carry out any test or smegma as they had no arrangement for the same. The Additional Sessions Judge, Ferozepur who tried the accused sentenced him to death under section 302 of the Indian Penal Code for the murder of Kaushalya devi subject to confirmation by the High Court and to imprisonment for life under Section 376 of the Indian Penal Code for committing rape on her but acquitted the other four persons who stood their trial jointly with the accused. The murder reference and the appeal preferred by the accused against his convictions and sentences were heard by a division bench of the High Court. During the arguments before the High Court, counsel appearing for the accused vehemently contended that the appellant had failed to examine the glans penis of the accused regarding the presence or otherwise of smegma and also if both the doctors failed to examine the glans penis of the accused with a view to find out whether there were any injuries thereon or not, the accused was entitled to the benefit of doubt. On this argument being raise, the learned Judges constituting the Division Bench felt that it was necessary in the interest of justice to examine the appellant who was working as civil Surgeon, Ferozepur as in their view, the presence or absence of smegma on the glans penis of the accused was quite vital from the view point of the defence as well as from that of the prosecution. They, therefore, summoned the appellant as a court witness and recorded his statement. At the conclusion of the examination of the appellant, the learned Judges constituting the Bench felt that the appellant had intentionally made a false statement with a view to shield his own guilt and to help the accused. They accordingly ordered the prosecution of the appellant under Section 193 of the Indian Penal Code as stated above.

6. Upon hearing counsel on both sides and examining the record as well as the law bearing on the question in issue, we are satisfied that the impugned order cannot be sustained. The only three matters regarding which the high Court appears to have thought that the appellant made a false statement are as follows :

- (1) that the accused was never referred to or produced before him;
- (2) that he did not pressurise Dr. Mrs. L. K. Grewal to make the endorsement "I agree" on the copy of the medico-legal report, Ex. CW 1/1; and
- (3) that Dr. P. K. Mittal did not tell him on telephone on March 15, 1973 that Dr. Mrs. L. K. Grewal had shown her inability to give her opinion regarding the presence of the smegma on the glans penis of the accused.

7. We shall deal seriatim with each one of the aforesaid portions of the appellant's statement which in the opinion of the High court are the offending portions.

8. Re. Matter No. 1 : Thought it cannot be gainsaid that the appellant was not quite accurate in stating before the High Court that the case of the accused was not referred to him, it cannot be said that he intentionally or deliberately made a false statement in that behalf with view to shield his own guilt or to help the accused as observed by the High Court. The words used by the appellant in answer to the question put to him by the high court taken as a whole make it manifest that what the appellant meant to convey was that the accused was ever physically produced before him. We are fortified in this view by the material on the record which unmistakably reveals that the police never caused the appearance of the accused before the appellant at Ferozepur. In his affidavit dated August 27, 1975 Harjit Singh, Head Constable, has categorically stated that it was he who along with Milkhi Ram and Bahadur Singh, constable, took the accused on the morning of March 17, 1973 from Abohar to Ferozepur as he had been referred to the appellant by Dr. P. K. Mittal. He has further affirmed that on reaching Ferozepur at about 10.00 a.m., he learnt that the appellant was away on tour; that he waited for the appellant and it was on his return from tour that he met him in his office at 6.00 p.m. with the aforesaid letter of reference given to him by Dr. P. K. Mittal; that at the time of his meeting the appellant, the accused was in the custody of the aforesaid two constable in the compound and he did not take him inside the office of the appellant and that S.H.O. Darshan Singh was not with him at the aforesaid time of his interview with the appellant. The statement of Harjit Singh, Head constable is fully corroborated by the following entries in the Rozanmcha of the Police station, City abohar :

#20. Sh. Harjit Singh Arrival/Departure 17-3-73 H.C. City, Abohar accused##

H.C. himself, C. Bahadur Singh 589, Milkhi Ram 378 from P.S. City Abohar proceeded at 7.30 a.m. for medical examination by C.M.O., Ferozepur of Sh. Bhajan Lal accused under Section 302/376, IPC, Case 49/73 under the supervision of Sh. Milkhi Ram.

#53. Darshan Singh SI Departure 17-3-73 At 6.20 a.m. S.H.O. proceeded to Ferozepur with a Lorry Vr. No. 126268-60 for enquiry by SDM Ferozepur.17.
Darshan Singh SI Arrival 18-3-73 Reported back S.H.O. 3.40 p.m. after enquiry done by SDM, Ferozepur.##

9. In face of this strong documentary evidence, it is difficult for us to agree with the High Court that the appellant had intentionally made false statement.

10. Re : Matter No. 2 : There is also no material worth the name to justify the observations made by the High Court that the appellant had pressurised Dr. Mrs. L. K. Grewal 'to add the words "I agree" in the copy of Medico-legal Report, Ex. CW 1/1 after the issue of notice to him. There was, in our opinion, absolutely no reason for the appellant to feel apprehensive so as to impel him to pressurise

Dr. Mrs. L. K. Grewal to make any addition in Ex. CW 1/1 in face of the aforesaid communication 426 dated March 15, 1973 which was jointly addressed to the appellant by Dr. P. K. Mittal and Dr. Mrs. L. K. Grewal. In the said letter, there is not the slightest indication of any disagreement or conflict of opinion between Dr. P. K. Mittal and Dr. Mrs. L. K. Grewal. The fact that there was no disagreement between the two doctors is further borne out by the absence of the words "I agree" (purporting to have been added by Dr. Mrs. L. K. Grewal) in Ex. CW 1/2 as also from the absence of the following words in Exs. CW 1/2 and CW 1/1 which are copies of Ex. CW 1/5.

Since I have no experience of conducting the examination of males in rape cases, I am not familiar either with the appearance or the smell of smegma. Therefore, I cannot give any opinion whether the layer present on the glans penis is smegma or not.

Sd/- L. K. Grewal 15-3-1973.##

11. In view of the foregoing, it is not understandable how the question of disagreement between Dr. P. K. Mittal and Dr. Mrs. L. K. Grewal or of refusal on the part of Dr. Mrs. L. K. Grewal to give any opinion about smegma cropped up subsequently when there was not the slightest whisper about it either in the aforesaid letter dated March 15, 1973 jointly addressed by the said two doctors to the appellant or in Exs. CW 1/1 and CW 1/2. It seems that the question of disagreement between the aforesaid two doctors and of refusal on the part of Dr. Mrs. L. K. Grewal to give opinion about smegma were purposely introduced subsequently by some one other than the appellant with some oblique motive.

12. The remark in the above quoted letter dated March 17, 1973 addressed by the appellant to Dr. P. K. Mittal that the examination of smegma was unnecessary was also not without significance. It is well-known in the medical world that the examination of smegma loses all importance after 24 hours of the performance of the sexual intercourse. The following passage occurring at page 341 in Modi's Medical Jurisprudence and Toxicology is apposite in this connection :

Presence of Smegma as Negating Rape. - (1) In July, 1921, Mt. Ramdevi aged 15 years, made a report that three young men, viz. Panchu, Debi and Jodha had committed rape on her. They were arrested and sent immediately to Modi for examination. None of them had any mark of injury on their genitals or anywhere else on their bodies. The first two had smegma on the glans penis governed by the foreskin; this provide that they could not have had sexual intercourse at least during the last twenty-four hours. The girl was also examined and found to have been used to sexual intercourse, inasmuch as her hymen had old lacerations. She had no mark of injury to her private parts or to any other part of her body. The men were released.

(2) On February 23, 1923, a man complained at the police station that one Dhani had committed rape on his daughter. He was immediately arrested and sent to Modi for medical examination. He found a uniform layer of smegma covering the glans penis, gave an opinion that he could not have had sexual intercourse during the last twenty-four hours. The man was released.

13. It seems that the attention of the learned Judges of the High Court was not drawn to the above quoted passage for, if it had been so, they would have been spared the trouble of dwelling on the matter relating to examination of smegma after two or three days of the occurrence.

14. Re. Matter No. 3 : The observations made and the conclusions arrived at by the High court in regard to this matter are also not warranted by the material on the record. As already shown, there was no question of inability on the part of Dr. Mrs. L. K. Grewal to give her opinion regarding the presence or absence of smegma on the glans penis of the accused on March 15, 1973 when the aforesaid letter of the even date was written by her to the appellant jointly with Dr. P. K. Mittal. Accordingly there was hardly any occasion for Dr. P. K. Mittal to tell the appellant on telephone on March 15, 1973 that Dr. Mrs. L. K. Grewal had shown her inability to give her opinion regarding the presence of smegma on the glans penis of the accused, or for the appellant to verify the matter from Dr. Mrs. L. K. Grewal on telephone as suggested by Dr. P. K. Mittal in his above quoted letter dated March 18, 1973. As observed earlier, the so-called refusal on the part of Dr. Mrs. L. K. Grewal has been introduced by some interested party with an ulterior motive.

15. The High Court was also in error in adopting a negative approach to the question which it was called upon to determine. Instead of trying to find out whether there was a prima facie case justifying the issue of notice to the appellant, it adopted a negative approach and tried to find out whether there was no prima facie case against the appellant. This would be clear from the following observations made by the High Court at page 40 of the Paper Book :

At this stage, from the material which has been referred to above, it is difficult to hold that there is no prima facie case for coming to the conclusion that Dr. Kohli pressurised Dr. Mrs. Grewal to make the endorsement "I agree" on the copy of the medico-legal report, Ex. CW 1/1.

16. It is true that what the courts have to see before issuing the process against the accused is whether there is evidence in support of the allegations made by the complainant to justify the initiation of proceedings against the accused and not whether the evidence is sufficient to warrant his conviction, but this does not mean that the courts should not prima facie be of the opinion that there are sufficient and reasonable grounds for setting the machinery of criminal law in motion against the accused. The moment this guiding principle is overlooked, the prosecution degenerates itself into persecution which often is fraught with evil consequences. The language in which the above quoted observations of the High Court about the exercise of pressure by the appellant on Dr. Mrs. L. K. Grewal are couched shows that the High Court was itself not prima facie satisfied about the validity of the action that it was taking.

17. All the apart, the impugned order cannot be sustained for another reason. It is now well-settled that prosecution for perjury should be sanctioned by courts only in those cases where it appears to be deliberate and conscious and the conviction is reasonable probable or likely. It is also well-recognised that there must be a prima facie case of deliberate falsehood on a matter of substance and the Court should be satisfied that there is reasonable foundation for the charge. (See Chajoo Ram v. Radhey Shyam ((1971) 1 SCC 774 : 1971 SCC (Cri) 331)). In the present case, as the examination of smegma lost all importance after the lapse of 24 hours of the performance of the alleged sexual intercourse as shown above, the aforesaid statement of the appellant was, in our judgment, not on a matter of substance and the appellant does not appear to have made any false statement with a mala fide intention. In the circumstances, we do not think that any useful purpose will be served by subjecting the appellant to a lengthy, vexatious and expensive trial which is not likely to end in his conviction.

18. For the foregoing reasons, we allow the appeal and set aside the aforesaid order of the High Court.

19. Before parting with the case, we would like to make a few observations with regard to the show-cause notice issued to the appellant. The said notice runs as follows :

IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH Court on its own motion Criminal Misc. No. 1755-M of 1975##

Court on its own motion, Petitioner v. Dr. S. P. Kohli, Civil Surgeon, Ferozepur, Respondent.

Proceedings to show-cause notice taken up by the Court on its own motion, vide order dated 30-4-1975, passed by Hon'ble Mr. Justice B. S. Dhillon and Hon'ble Mr. Justice R. N. Mittal in Criminal Appeal No. 911 of 1974/M. Ref. No. 46 of 1974.

Notice to :

Dr. S. P. Kohli, Civil Surgeon, Ferozepur.

WHILE disposing Criminal Appeal No. 911/74 and M. Ref. No. 46 of 1974, the above proceedings have been taken up by this Court on its own motion against you for making a false statement in this Court. NOTICE is hereby given to you that the case will be laid before this Court on 4-7-1975 (Actual date).

YOU are hereby directed to take the necessary steps to show cause in person or through counsel as to why proceedings under Section 193, IPC shall not be initiated against you :

GIVEN under my hand and the seal of the Court, this 16th day of May, 1975.

By order of the High Court, Sd/- Deputy Supdt., Criminal.##

20. The notice besides being not happily worded is laconic. It does not satisfy the essential requirements of law. Nor does it specify the offending portions in the appellant's lengthy statement which, in the opinion of the High Court were false. In cases of this nature, it is highly desirable and indeed very necessary that the portions of the witness's statement in regard to which he has, in the opinion of the Court, perjured himself, should be specifically set out in or form annexure to the notice issued to the accused so that he is in a position to furnish an adequate and proper reply in regard thereto and be able to meet the charge.

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