BOMBAY HIGH COURT

Emperor

Vs

Ismail Khadirsab

(Fawcett and Mirza, JJ.)

19.01.1928

JUDGMENT

Fawcett, J.

1. The accused in this case was charged with having murdered his wife at Gersappa in the Kanara District either on March 31, 1927, or during the early morning of -April 1. It is common ground that his wife was sleeping with him in the verandah of the accused's house, and that next day her body was found in the river adjoining the accused's house with a wound upon the throat, which is described as a gaping flesh wound four inches long, and one inch wide and about half an inch deep in the lower half of the wound, while superficial in the upper half. The accused went and gave information in the morning about his wife being missing to two police-officers in the village. But although they then went and saw the body, it was not actually taken out till after 4 p. m. that same day, because they waited until the police patil of a neighbouring village came. After the Panchnama had been drawn up, the body was sent to Honavar in order that the post-mortem examination might be made. That was made between 3 and 5 P.M. next day. The Medical Officer was of opinion that death was not due to drowning, but he could not give a definite opinion as to the cause of death owing to decomposition of the corpse. The Sub-Inspector arrived on the evening of the 2nd, and commenced his investigation on the 3rd with a panch. He found blood marks on the river bank which were traced up a cattle path to the accused's house. There blood marks were found on the entrance posts of the compound and inside the house. A blood-stained koita was also found and attached. After further investigation the accused was arrested on April 5. He has been acquitted by the Sessions Judge, who agrees with the unanimous opinion of the four assessors. The Local Government appeal from this acquittal.

2. The case of the accused is that he woke on the morning of April 1 and found his wife missing, and after going to do some business he felt some suspicion about her absence, so he went to the spot at the river where she usually washed her clothes. He says he went alone and found certain saris in wet condition on a stone on the bank, which he recognised as his. He returned home and

informed the witness Sherif Hassan Kolkar about what had happened. Then he, Sherif Hassan Kolkar and the Kazi went to the river and saw the dead body of his wife floating on the river, whereupon he informed the police about it. He admits that the police attached certain blood-stained articles in his house, but says that he did not know anything about them. On the other hand, the case for the prosecution is that there was quarrelling between the accused and his wife for a few days before this occurrence, and the prosecution rely upon this and other circumstantial evidence as proving the accused's guilt under Section 102, Indian Penal Code.

3. This other evidence can be classified as (1) incriminating conduct in his fabricating evidence that the woman had been washing cloth s and so might have slipped or been pushed into the river, and: in his giving false information to the police that his wife was missing, without adding that he had seen her body; (2) the evidence of two witnesses as to their having seen him in the vicinity of the river on the morning of April 1, especially the evidence of one of them that he saw a load being carried by three men down to the river at about 4 A.M., and though he did not recognise them one of them went back towards the accus-ed's house; (3) the evidence about the blood stains that I have already mentioned; and (4) the evidence as to the wound on the deceased's throat and the opinion of the Medical Officer that her death was not due to drowning.

4. [After discussing the evidence in detail the judgment proceeds:] Summing up all the evidence against the accused, it still seems to me that there is not enough to make it safe for us on purely circumstantial evidence to upset the acquittal of the accused. There is no doubt a case of very strong suspicion against him, because he was sleeping with the deceased, and there is evidence of her death having occurred at his house, and proof that he fabricated evidence in order to try and throw off suspicion from himself. Still the ordinary rule in a case of circumstantial evidence is that, in order to justify a conviction, it should be incompatible with any reasonable hypothesis than that of the accused's guilt: and I am not prepared to say that the evidence in this case suffices to satisfy that rule. I think that there is, as the Sessions Judge says, a reasonable doubt, the benefit of which should be given to the accused. Therefore, I would not allow this appeal in regard to the charge of murder.

5. On the other hand, there is evidence which has been accepted by the Sessions Judge, and which I also accept, that the accused placed wet clothes on the river bank in order to support the theory that his wife had been washing clothes there, a theory which is opposed to other evidence that the place was entirely unsuitable for washing clothes. And the question arises whether the accused should not have been convicted by the Sessions Judge of fabricating false evidence under Section 193, Indian Penal Code. Under the definition of "fabricating false evidence" it is not necessary that the evidence should be intended to be used in a judicial proceeding. It is sufficient if it is to be used to influence a public servant in any proceeding taken by law before

him. And the question arises whether the evidence was not intended to appear in the police investigation into the deceased's death, in order that the police-officer in charge of the investigation should form an erroneous opinion regarding a material circumstance in the case. The Privy Council in Begu v. Emperor has ruled that, under Section 237, Criminal Procedure Code, the accused can be convicted of causing disappearance of evidence under Section 201, Indian penal Code, although he has not been charged with that offence, but only with murder under Section 302, Indian Penal Code. There is some analogy between that particular case and the case we have now before us. The point has not, however, been considered in the arguments, and, therefore. I would adjourn this case for argument as to whether or not there should be a conviction of the accused under Section 193, Indian Penal Code, by this Court, in exercise of its powers under Section 423(1)(a), Criminal Procedure Code.

Mirza, J.

6. I agree.

7. The case was accordingly further argued, on January 23, 1928, when the following judgment was delivered.

Fawcett, J.

8. We have heard the Government Pleader and Mr. Manerikar for the accused, The first question is whether we have power to convict the accused of an offence under Section 193 of the Indian Penal Code, although he was not charged with that offence in the trial in the Sessions Court.

9. The first issue under this head is whether Clause (a) of Sub-section (1) of Section 423 of the Criminal Procedure Code merely authorizes an appellate Court to find the accused guilty of the offence, with which he was charged and for which he was tried but of which he was acquitted, or whether it empowers an appellate Court to convict an accused of some other offence. No doubt, as remarked in Boy's Code of Criminal Procedure, Vol. II, p. 563, the words "find him guilty" may be said to most naturally mean "find him guilty of the offence, the acquittal in regard to which is being reversed." But the learned author goes on to say : "is there any reason why the same principles should not be applied here as apply to appeals by a convict? "Under Clause (b) of Sub-section (1) the appellate Court can "alter the finding", that is, alter the conviction under a certain section to one under another, and of course for that purpose it may avail itself of the provisions of Section 237 of the Criminal Procedure Code. If we adopt the first of these two alternative constructions, the strict result will be that an appellate Court, on an appeal from an acquittal by the Local Government, cannot even convict an accused of a minor offence covered by the offence, with which the accused was charged. I refer, of course, to a case falling under

Sub-section (1) of Section 238 of the Criminal A-Procedure Code, It would involve that a person who had been charged with, but acquitted of, murder could not, on appeal by the Local Government, be convicted of the offence of voluntary causing grievous hurt by a cutting instrument, or culpable homicide not amounting to murder. So far as I am aware, it has never been held that the appellate Court in an appeal under Section 417 is barred from convicting an accused of such a minor offence; it would obviously be embarrassing to the administration of justice, if the Court was forced to a conclusion of that kind. If, then, an appellate Court can convict an accused of an offence other than that in regard to which he has been acquitted in a case falling under Section 238, I can see no logical reason why he cannot also be convicted of another offence, in a case falling under the provisions of Section 237. Both sections are on the same footing, and I do not think that the first construction I have mentioned is a correct one to apply to this Clause (a). Apparently, there is no specific authority on this point; but certainly so far as regards the applicability of Section 238, I chink the practice has been all along in favour of the second construction. I agree with the view taken in *Kouromal v. Emperor*[1] "it must be presumed that the Appellate Court under Section 423 would at least have the power of the Original Court which tried the case under Section 237 provided no prejudice was given to the defence".

10. The next point is whether this Court can convict the accused of the alleged offence under Section 193 of the Indian Penal Code, in view of the fact that the opinion of the assessors has not been taken as to it. In Emperor v. Appaya Baslingappa it was held that the Sessions Judge could not convict an accused, who was charged with abetment of murder, of an offence under Section 201 of the Indian Penal Code, viz., causing the disappearance of evidence of the murder; and this ruling was mainly based upon the provisions of Section 30y of the Criminal Procedure Code which require the Sessions Court to take the opinion of the assessors and record such opinion. It is said by Marten J. (p. 1320):

In the view I take, it in imperative for the judge to take the opinion of the assessors on the charge it is proposed to convict the accused on. It is not I think, open to the Judge to put merely the charge of murder to the assessors and when they have given their opinion on that charge and that charge only, they on his own motion and without asking any further opinion of the assessors, to find the accused guilty of something quite different.

11. Those remarks are, obviously, entitled to great weight; but they were made in 1923, and since then we have the decision of the Privy Council in Begu v. Emperor where their Lordships upheld the action of a Sessions Judge in convicting the accused of an offence under Section 201 of the Indian Penal Code, although the only charge against them was one of murder under Section 302 of the Indian Penal Code. No doubt, the objection about the opinion of the assessors not being

taken may not have been urged before their Lordships, and may not have been present to their Lordships' minds, when they delivered their judgment. But, on the other hand, I do not think that this Court is entitled to say that a point of that importance was overlooked, especially as an objection was raised before their Lordships in regard to the opinion of the assessors not being properly taken and recorded under Section 309 of the Criminal Procedure Code. In *Mata Prasad v. Nageshar Sahai*[2] their Lordships laid down that it is not open to the Courts in India to question any principle enunciated by the Privy Council. Therefore, in my opinion, the decision in *Emperor v. Appaya Baslingappa*[3] can no longer be taken as good law.

12. Then, Mr. Manerikar has quite rightly drawn our attention to the remark of Mr. Justice Ranade in *Queen-Empress v. Karigowda*[4] where he says (p. 68) :The High Court, exercising its jurisdiction in the matter of appeals against acquittals, should confine its exercise to the particular acquittal complained of by Government.

13. In that case, there had been another acquittal, i. e., on a charge of an offence under Section 211 of the Indian Penal Code, and in the arguments on appeal it was sought to question the propriety of that acquittal, but Mr. Justice Ranade held that, as Government had only appealed from the other acquittal under Section 500 of the Indian Penal Code, this Court ought not to go into the acquittal under Section 211 of the Indian Penal Code. That, no doubt, is an authority for the view that this Court should hesitate before raising a point that has not actually been taken in the appeal by Government. But, as has often been pointed out, no Bench of this Court has power to bind all other Benches in future proceedings as to the practice to be adopted in all cases that may come before them. This is purely a point of practice, and, therefore, I do not consider that this particular remark suffices to prevent us considering whether in the interests of justice we should exercise our power of convicting the accused of another offence, if we have that power.

14. A further point arises whether the provisions of Section 195, Sub-section (1), Clause (b), prevent us from exercising jurisdiction in regard to the alleged offence under Section 193 of the Indian Penal Code. The answer, I think, is clearly in the negative, because the alleged fabrication of evidence in this particular case was not with the intention of that false evidence being used in a Court of law, but with the intention of its influencing the police in the investigation into the circumstances under which the accused's wife had met her death; and the mere fact that the question might possibly arise in a Court of law in some future proceedings would not bring the case within the scope of this Clause (b). In support of the latter statement I may refer to the ruling of this Court in In re *Govind Pandurang* [5]

15. I think, therefore, that there is no impediment to our following what has been held to be a proper procedure in the Privy Council case of Begu v. Emperor . The only difference is that in Begu's case there was a conviction by the Sessions Judge, which was upheld by the High Court

on appeal. But in the present case the Sessions Judge did, in fact, expressly hold that the evidence of the Kazi and Sharif Hassan showed that the accused placed wet clothes on the river bank in order to support the theory that his wife had been washing clothes there, and the evidence about it had been one of the points that was discussed as is shown by the Sessions Judge's notes of the arguments for the prosecution and for the defense. In fact, the prosecution relied upon this particular evidence as a ground for saying that the accused was shown to have committed the murder of his wife, and it was an important question in the trial. The assessors, no doubt, did not refer to this particular piece of evidence, but it was before them; and, as I have already pointed out, the fact that their opinions in regard to it ware not taken is not an objection that can be considered a bar to a conviction by this Court.

16. If I thought for one moment that the accused would be prejudiced, I certainly would not exercise the power of ourselves convicting him, but direct a re-trial in regard to this offence. But, in my opinion, there can be no possible question of prejudice, The accused was asked about the evidence of these two witnesses, and he made a statement as to the clothes being seen by him on the river bank, and impeaching the testimony of the Kazi and Sharif Hassan against him. It would, in my opinion, be an unwarrantable waste of time if a fresh trial was ordered, in view of the fact that the accused at the trial knew of this accusation against him and had full opportunity of meeting it, and in view of the fact that the Sessions Judge held it was proved against him. Had his attention been called to Begu s case and the applicability of Section 193, Indian Penal Code, he might have convicted the accused under that section.

17. Coming to the merits, in ray opinion, the evidence clearly proves that the accused himself placed the clothes where they were afterwards found, in order to mislead the police, to whom he was about to report the fact of his wife being missing, into the opinion that she had been washing clothes at the river bank. The police had power to investigate the circumstances of the woman's death and the possibility of some offence having been committed in regard to her death, especially in view of the wound on her throat, under Sections 154 and 174 of the Criminal Procedure Code; and it is obvious that the accused's intention was that the circumstance of the clothes being upon the bank should cause the officer in charge of the police investigation to form the opinion upon that circumstance that she had been washing clothes there. That would be an erroneous opinion on the facts that the Sessions Judge and we have found; and it would be an opinion touching a point material to the result of such proceedings, because it was distinctly material to know whether the deceased had been present on the bank of the river washing clothes and so might have fallen into the river, in deciding whether her death was accidental or due to violence. The ingredients necessary for an offence of fabricating false evidence are all here, and the case falls under the second clause of Section 193 of the Indian Penal Code. I would convict, therefore, the accused of an offence under that part of Section 193 of the Indian Penal Code and

sentence him to one year's rigorous imprisonment.

Cases Referred.

1(1924) 25 Cr. L.J. 1057 that (p. 1059)
2(1925) 28 Bom. L.R. 1110, s. c. L.R. 52 I.A. 398
3(1923) I.L.R. 1318
4(1894) I.L.R. 19 Bom. 51
5(1920) I.L.R. 45 Bom. 668, s. c. 22 Bom. L, R. 1239