

ASHOK KUMAR

v.

STATE (DELHI ADMINISTRATION)

March 7, 1977

[P. K. GOSWAMI AND P. S. KAILASAM, JJ.]

Code of Criminal Procedure.—S. 288—Scope of—Evidence of witnesses recorded in committing court—If could be transferred to Session Courts—If substantive evidence.

The appellant was convicted under s. 302/34, Indian Penal Code and sentenced. Statements of two witnesses recorded in the committing court were transferred to the record during trial under s. 288 Cr. P.C. and the trial court treated the evidence of these witnesses as substantive evidence. The High Court accepted the testimony of the witnesses before the committing Court.

In appeal it was contended that the statements of witnesses in the committing court transferred under s. 288 were inadmissible in evidence and should not be acted upon, since no specific portion of their contradictory statements had been put to them in cross-examination.

Dismissing the appeal,

HELD: There is no legal infirmity about the transfer of deposition of the witnesses to the record of the Sessions Court under s. 288 Cr. P.C. It was a legitimate use of discretion by the Sessions Judge. Evidence recorded in the committing court is substantive evidence in this case and is admissible. [147 E-F]

Section 288 Cr. P.C. which provides for transfer of evidence recorded in the committing court under certain circumstances is subject *inter alia* to the provisions of s. 145 of the Evidence Act. Provisions of the latter section have been substantially complied with in this case. [147 E]

In the instant case after drawing the attention of the witnesses to their contradictory statements recorded by the police, the statements recorded by the committing Magistrate were read out to the witnesses who did not deny to have made them but only explained that they had deposed in that manner under threat and pressure from the police. [147 D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 246 of 1976.

(Appeal by Special Leave from the Judgment and Order dated 5-12-1975 of the Delhi High Court in Criminal Appeal No. 111 of 1974).

R. L. Kohli and R. C. Kohli, for the appellant.

G. L. Sanghi and M. N. Shroff, for the respondent.

The Judgment of the Court was delivered by

GOSWAMI, J.—This appeal by special leave is directed against the judgment of the Delhi High Court confirming the conviction of the appellant under section 302/34, Indian Penal Code, and sentence of imprisonment for life.

A Ashok Kumar aged about 17 years and his younger brother, Vijay Kumar, below the age of 16 years were chargesheeted for an offence under section 302/34 IPC for causing the death of Rajinder Kumar aged about 23 years. Vijay Kumar was sent for trial under the Children Act, 1960, and is not, therefore, before us.

B In June 1971 Jai Bhagwan, father of the accused, had complained to the police against the deceased, Rajinder Kumar, alleging that he had kidnapped his daughter, Saroj Kumari. It is said that Saroj Kumari was recovered from the company of Rajinder Kumar at Ahmedabad and Rajinder Kumar was charged for offences under sections 366 and 376, Indian Penal Code, and the case was pending on the date of occurrence.

C The prosecution case is that on May 22, 1973, Hukum Chand (PW 1), father of the deceased, Rajinder Kumar, was coming back from the Fountain in Chandni Chowk on H. C. Road and took a turn towards right leading to Mor Sarai when he saw the accused, Ashok Kumar, and his brother, Vijay Kumar, having surrounded his son Rajinder Kumar. He also saw that Ashok Kumar caught hold of the hand of Rajinder Kumar while his younger brother stood behind him in front of the gate of Mor Sarai. Having seen this he walked quickly and when he was at a distance of four or five paces from them he heard Ashok Kumar and his brother, Vijay Kumar, telling Rajinder Kumar that they would avenge the kidnapping of their sister no matter whether the court might punish him or not. Hukum Chand then saw both the brothers taking out their knives.

D Accused Ashok Kumar struck a blow on the left cheek of Rajinder Kumar. Vijay Kumar struck one blow on Rajinder Kumar which was warded off by him as a result of which his right forearm was struck by the knife on the back of his palm. Rajinder Kumar tried to run away but was pursued by the two brothers and was overpowered. They then gave several blows on the back of his waist, on left abdomen and on the right thigh. As a result of these blows Rajinder Kumar fell down on the footpath on the side of the quarters of Mor Sarai. Accused Ashok Kumar ran away towards the station along with his brother. Hukum Chand sent for a taxi and took Rajinder Kumar in it to the Irwin Hospital where he was examined by Dr. U. Kaul (PW 12) who found the following injuries on his person :—

- E**
- F**
- G**
1. Stab wound 4" x 2" left inter scapular region with surrounding surgical emphysema.
 2. Stab left lumber region 2" x 2".
 3. Stab left thigh 2" x 1".
 4. Stab left cheek 2" x 2".
 5. Stab left hand 4" x 1" on the dorsum.

H Constable, Vijay Kumar, (PW 7) who was on duty at the Irwin Hospital informed the Police Station, Kotwali, about the admission of Rajinder Kumar in the Hospital. Constable, Ram Saran (PW

14) made an entry in the daily diary about the report received from the Irwin Hospital. He sent a copy of this report to S. I. Dewan Singh (PW 20) who proceeded to the Hospital. When PW 20 arrived Rajinder Kumar was not in a position to make a statement and he recorded the statement of Hukam Chand (Ex. PW 1/A) at about 8.40 P.M. which is the first information report registered under section 307/34 IPC. According to the Doctor the punctured injury at the left inter scapular region was sufficient to cause his death in the ordinary course of nature. On the death of Rajinder Kumar at 11.35 P.M., the same night, the section under which the case was registered was altered to section 302 IPC and investigation proceeded accordingly. Names of Ashok Kumar and Vijay Kumar appeared in the first information report, as the assailants. The first information report also disclosed that there was another person, Mohar Singh (PW 2) with Hukam Chand. The accused, Ashok Kumar, was arrested on May 25, 1973, near Jat Dharamshala in Jamuna Bazar. It is said that on the following day Ashok Kumar made a statement before Inspector Sardar Singh, Station House Officer, P. S. Kotwali, Delhi (PW 21) in pursuance of which on May 28, 1973, a blood stained knife (Ex. P-7) was recovered. Evidence was also led by the prosecution to prove recovery of a shirt and pantaloons having stains of blood although these had already been washed from the person of the accused, Ashok Kumar, when he was arrested on May 25, 1973. The serological report showed the origin of these stains as human blood. At the trial not only Hukam Chand gave evidence as an eye witness, but Mohar Singh (PW 2), Rajinder Kumar Jain (PW 3) and Puran Singh (PW 4) were also produced as eye witnesses. While PW 1, Hukam Chand, continued to tell his melancholy story, PWs 3 and 4 did not support the prosecution and were accordingly declared hostile. It was shown in the course of their cross-examination that they had earlier during the investigation made statements as eye witnesses to the occurrence. The statements of PWs 3 and 4 which were recorded in the committing court were transferred to the record during the trial under section 288, Criminal Procedure Code. In the committing court these witnesses had stated that they had seen the accused assaulting the deceased with a knife. P.W. 2, Mohar Singh, was not examined before the committing court.

The accused denied the charge and stated that he was arrested by the police in Agra on May 24, 1973, and not on the following day at Jat Dharamshala as alleged by the prosecution. After examining the evidence of the defence witnesses as well as the station diary entries about the departure of the Head Constable, Manohar Lal and Constable Balbir Singh, to outside districts the Sessions Judge held that it was "not at all improbable" that the two policemen accompanied by Jai Bhagwan went to Agra and brought the accused from there. The Sessions Judge also did not rely upon the disclosure statement made by the accused and also ignored the recovery of the knife as being in pursuance of that disclosure statement.

A The Sessions Judge observed that it was very unusual in a murder case that recovery of the offending weapon was so belated.

The trial court convicted the accused on the testimony of Hukam Chand (PW 1) and accepted the evidence of PWs 3 and 4 recorded in the committing court. Referring to PWs 3 and 4, the trial court observed as follows :—

B

“I treat the evidence of PW 3 Rajinder Kumar Jain and PW 4 Puran as substantive evidence under section 288 Cr. P. C. I find abundant corroboration thereof in the testimony of PW 1 Hukam Chand. This evidence treated as substantive evidence under section 288 Cr. P. C. taken into consideration with the testimony of PW 1 Hukam Chand provides a complete picture by ocular evidence of what happened to the victim Rajinder Kumar on that fateful evening at the hands of Ashok accused and his brother Vijay. I accept this part of the testimony”.

C

With regard to the evidence of PW 1 the trial court observed as follows :—

D

“In the case before me Hukam Chand is a father of the deceased. He admits the enmity on the part of the accused towards the deceased. He mentioned the name of the accused in the FIR and gave complete sequence of events. He did not lose any time. He had no time to manufacture things so as to be incorporated in the report. This is a strong circumstance in favour of the prosecution in this case”.

E

The High Court, as stated earlier, confirmed the conviction by accepting the testimony of Hukam Chand as well as the statements made by PWs 3 and 4 before the committing court in which they had clearly supported the prosecution case.

F

Since the accused had opportunity to cross examine the PWs 3 and 4 in the committing court the fact that he had not actually cross-examined these witnesses is of no consequence. Apart from that during the Sessions trial their explanation was that they had made the statements before the committing court under the threat of the police. This explanation had been rejected by both the courts.

G

Mr. Kohli submits that PWs 3 and 4 were not mentioned in the first information report although PW 1 mentioned, therein, at three places about the presence of Mohar Singh (PW 2) who was not even examined before the committing court. Since PW 2 denied having seen the occurrence, his evidence is of no assistance and the fact that he was contradicted by his previous statement made before the police only dubs him as an unreliable witness.

H

So far as PWs 3 and 4 are concerned, we do not see much force in the contention that their names were not mentioned in the first information report. It is possible that even if they had seen the occurrence from some other point, PW 1 hastening away to the Hospital might not have noticed them. Besides, when S. I. Diwan Singh (PW 20) went to the place of occurrence with PW 1 (Hukam Chand) at about 9.45 P.M. the same night he found a large crowd there. PW 20 stated that he recorded at that time the statements of Mohar Singh (PW 2), Rajinder Kumar Jain (PW 3) and Puran Singh (PW 4). The omission of the names of PWs 3 and 4 in the first information report lodged at 8.45 P.M. cannot, therefore, be of much significance to reject their testimony on that score.

Next, Mr. Kohli submits that the statements of PWs 3 and 4 recorded in the committing court and transferred under section 288, Criminal Procedure Code, is inadmissible and should not be acted upon, since no specific portion of their contradictory statements had been put to them in the course of their cross-examination by the public prosecutor. We find that after drawing the attention of these two witnesses to their contradictory statements recorded by the police with regard to their having seen the assault which they denied, the entire respective statements recorded by the committing magistrate in Hindi were read out to the witness who did not deny to have made the same but only explained that they had deposed in that manner under threat and pressure from the police.

Section 288, Criminal Procedure Code, which provides for transfer of evidence recorded in the committing court under certain circumstances, is subject, *inter alia*, to the provisions of section 145 of the Evidence Act, and the provisions of the latter section have been substantially complied with in this case. Under the circumstances there is no legal infirmity about the transfer of the deposition of the two witnesses to the record of the Sessions Court under section 288, Criminal Procedure Code, and it was a legitimate use of discretion by the Sessions Judge in adopting this course. Their evidence recorded in the committing court is substantive evidence in this case and is clearly admissible.

Rajinder Kumar Jain (PW 3) had written an inland letter which the Inspector General of Police received on January 18, 1974, complaining about the police torture in threatening him to give evidence in the court. He was examined before the Sessions Judge on January 19, 1974, when he, for the first time, denied in court to have seen the occurrence. He had been examined in the committing court on November 21, 1973, about six months after the occurrence when he had made no complaint about police torture and gave evidence as an eye witness to the occurrence. The trial court was, therefore, perfectly justified in not accepting the belated explanation of PWs 3 and 4 about police threat under which alone they stated that they had supported the prosecution case.

- A** Although the High Court was not prepared to accept the defence case about the arrest of the accused in Agra, it is not necessary to pursue the matter further. It is also not necessary to deal with the recovery of the knife and the blood stained clothes about which the High Court was not prepared to accept the reasons given by the Sessions Judge for discarding that evidence. We agree with the Sessions Judge that it was unusual for the police to delay recovery
- B** of the blood-stained knife in a murder case. But since the two courts have relied upon the evidence of the three eye witnesses, it is not necessary to consider whether the High Court was right in differing from the views of the trial court in the matter of the recovery of the knife and the clothes.

- C** After having perused the entire evidence, we see no reason to interfere with the conviction in this case. In the result the appeal is dismissed.

P.B.R.

Appeal dismissed.