APPELLATE CRIMINAL.

Before Suhrawardy and Duval JJ

1926

May 17.

EMPEROR

v.

ASERUDDIN.*

Witness—Statement of defence witnesses to the police during investigation into an offence—Admissibility—Right of private defence of the person—Misdirection—Criminal Procedure Code (Act V of 1898), ss. 161, 162 and 297.

The evidence of a witness that he did not make any statement to the police is not within the prohibition contained in s. 162 of the Criminal Procedure Code. The absence of a statement is not a "*statement*" under the section.

Emperor v. *Nagendra Nath* (1) approved.

It is doubtful whether a statement to the investigating police officer by a witness, examined under s. 161 of the Code, that he knew nothing about the occurrence is not a "*statement*" within s. 162.

The omission to place clearly before the jury the law as to the right of private defence of the person, as bearing on the facts set up, and to direct their attention to the point whether, and how far, the accused was justified in attacking the deceased, in order to prevent injury to himself, was *held* to be a serious misdirection vitiating the trial.

THE appellant was tried before the Sessions Judge of Dinajpur and a Jury charged, under ss. 304 and 326 of the Indian Penal Code, with wounding one Rahimuddin; and, under s. 326, with causing hurt to Aseruddin. He was convicted under s. 326, with respect to each of the two persons, and sentenced, on the 18th November 1925, to seven years' and three years' rigorous imprisonment, respectively, the sentences running concurrently.

* Criminal Appeal No. 6 of 1926, against the order of D. Vaughan Stevens, Sessions Judge of Dinajpur, dated Nov. 18, 1925.

(1) Reference No. 5, and Cr. App. No. 510 of 1925, decided Oct. 8, 1925.

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The facts shortly were that, on the 6th September 1925, one Sader Ali went with some labourers on certain land, alleged to have been purchased by him, to transplant paddy growing thereon. The appellant came up with some others, and protested. He claimed the land as his, and thereupon cut the strings of one of the ploughs. Rahimuddin mended the strings and began ploughing. The appellant caught his *penta* and threatened to strike him. Rahimuddin then seized him by the neck, whereupon the appellant stabbed him with a knife. Aseruddin interposed and was struck with the knife. Rahimuddin died on the spot.

At the trial certain questions were put to two defence witnesses in cross-examination. The answers are set out in the judgment of the High Court.

Babu Debendra Narain Bhattacharjee, for the appellant.

The Deputy Legal Remembrancer (*Mr. Khundkar*), for the Crown.

SUHRAWARDY AND DUVAL JJ. In this case the accused Aseruddin, *alias* Botu, has been convicted under section 326 of the Indian Penal Code on two charges; first, for causing grievous hurt with a dangerous weapon to one Rahimuddin, and secondly, for causing the same offence upon one Aseruddin; and sentenced to 7 years' rigorous imprisonment on the first count, and to 3 years' rigorous imprisonment on the second—the sentences to run concurrently. The case for the prosecution is that there was some dispute with regard to possession of a piece of land. The complainant was in possession of the land, and as he was late in transplanting crop, he called in a number of friends and dependents to help him in the matter on the 16th September 1925. On that date he went

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with a large number of men and started transplanting paddy. About three bighas of land lay to the west of a path, and when the men came to that part the accused Botu with his brother, Anaruddin, and one Moji came on to the land and protested saying that it was his. Botu cut the strings of the foremost plough when Rahimuddin came and mended it, and started ploughing again. Botu caught his *penta* and threatened to strike Rahim. Rahim seized Botu by the neck, Botu seized Rahim by the neck with his left hand, and then taking the knife into his right hand stabbed Rahim until the latter fell down. Aseruddin seized the knife at which Botu struck him with the knife under the right armpit. On these facts the accused was charged under sections 304 and 326 of the Indian Penal Code. The majority of the Jury found him not guilty under section 304 of the Indian Penal Code and convicted him under section 326 on the first count, and on the second charge by a majority of four found him guilty under section 326 for causing grievous hurt to Aseruddin.

Two points have been taken on behalf of the appellant—(i) that some statements made by the defence witnesses to the police were admitted in violation of the provisions of section 162 of the Criminal Procedure Code. With reference to this point, the facts are that two witnesses were examined on behalf of the accused. The first witness was Bibijan, who was set up by the accused as the owner of the land from whom he had taken settlement of it. In her evidence she stated—"The Sub-Inspector ques-"tioned me. I told him I knew nothing." The second witness was Sharitulla Sarkar who said—"I "deposed to the Sub-Inspector. I started to tell him "about the possession but he said he did not want "that, so I did not tell him any more." With regard

to the statement made by the first witness it is not the accused's case that she saw the occurrence, or that she knew anything about it. She merely told the police that she knew nothing about the occurrence. Even if this evidence is inadmissible, it does not in any way prejudice the accused. With regard to the statement made by the second witness, his statement is similarly innocuous He said that he was not allowed by the Sub-Inspector to say what he intended to say, and he denied that he said that he knew nothing.

The question which has been raised before us is whether the statement made before the police that the witness did not say anything to the police about the occurrence is a statement within the meaning of section 162 of the Criminal Procedure Code.

If we accept the contention of the petitioner the result will be that the absence of a statement will be equivalent to a statement. Section 162 says that no statement made by any person to a police officer in the course of an investigation shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof be used for any purpose save as therein provided. For the application of this section there must be a statement which is capable of being recorded, and reduced into writing and, therefore, if a witness says "I did not "make any statement to the police", it cannot be a statement under section 162 of the Criminal Procedure Code. The same view has recently been taken in the unreported case of *Emperor* v. *Nagendra Nath* alias *Dadhiram Nath* (*Reference No. 5*, and *Appeal No. 510 of 1925*), decided on the 8th October 1925, in which it is said—"A question was put to one of the "defence witnesses as to whether he had made a certain "statement to the police when he was examined under "section 161 of the Criminal Procedure Code. It is

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'contended that, having regard to the provisions of "section 162 of the Criminal Procedure Code, the "statement made to the police officer under sec- "tion 161 could not be used for any purpose. But all "that was put to the witness was whether he had "made such a statement to the police, and his answer "was that he did not remember. It is not proved that "the statement was actually made to the police, and "the mere fact that a question was put to the witness "asking him whether he had made a particular "statement to the police did not vitiate the trial as it "is not proved that such a statement was actually "made to the police under section 161 of the Criminal "Procedure Code." It is, however, doubtful if a witness makes a statement to the police under section 161 that he knew nothing about the occurrence is not a statement within the meaning of section 161 of the Criminal Procedure Code. We need not pursue this matter further in the view that we have taken with regard to the second objection made on behalf of the accused.

It is said that the learned Judge's charge to the Jury is defective inasmuch as he had not laid before the Jury the law with regard to the right of private defence that arises in this case on the admitted and proved facts. We have said that the prosecution case was that the deceased Rahimuddin was the first to catch hold of the accused by the neck. There is no evidence before us as to how and with what force the attack was made by the deceased and whether it was such as to raise an apprehension in the mind of the accused of grievous hurt. These are matters which should be considered by the Jury. It is said that thereupon the accused brought out his knife and gave a few strokes with it to the deceased. The question that arises on these facts is whether the accused had

any right of private defence and if so, how far it extended. The learned Judge in explaining the law referred to relevant sections, as it appears from his written charge, relating to the right of private defence. He made the following observation : "If these facts "are correct", (that the accused was defending his own property), "then the prosecution party were "committing criminal trespass and the accused had a "right to defend his property and, if attacked, his "person, but he had no right to cause death unless you "think that there was a reasonable apprehension that "he would otherwise suffer death or grievous hurt." It may be stated here that the learned Judge was of opinion that the property was probably in the possession of the accused. He did not however, specifically put the case of defence of person based on the facts alleged by the prosecution before the Jury. But this statement of law as appears from the charge which contains only the heads of what it really was orally delivered might have been sufficient. But the learned Judge in the concluding portion of his charge made the following observation : "There is nothing to "show that he was ever called on to defend his person "before he killed Rahimuddin and wounded "Aseruddin." This, in our opinion, is a clear misstatement of facts. We have stated that the case for the prosecution was that it was the deceased who first caught hold of the accused by the neck ; and the question whether the accused was justified in defending his person to the extent of causing grievous hurt to the deceased was a question of fact which should have been left to the Jury. The statement "that there "is nothing to show that he was ever called on to "defend his person" is also incorrect from another point of view. There is some evidence on the point adduced by the accused. Whether it was sufficient for

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the purpose of proving his case is a matter for the consideration of the Jury. It is, therefore, not correct to say that there is nothing to show that the accused had any occasion to exercise the right of private defence of person. According to the prosecution story the deceased caught the accused first by the neck, and according to the defence it was the deceased who actually gave the first blow. In this view we cannot say how far the last sentence in the Judge's charge to the Jury influenced the Jury in the verdict they returned, though the Judge wound up the charge by observing "the only question in this case would "be whether the accused exceeded the right of self-"defence." The law as bearing on the facts set up had not been clearly placed before the Jury, and their attention was not directed to find as to whether the accused was, and, if so, how far, justified, in preventing injury to himself, in attacking the deceased. In this view we think that the charge as delivered by the Judge contains serious misdirection, and the conviction of, and the sentence passed on, the accused should be set aside, and we direct that he be re-tried according to law. The accused will remain in custody until further orders of the Sessions Judge.

E. H. M.