APPELLATE CRIMINAL.

Before Rankin and Duval Jj.

AZIMUDDY

v.

EMPEROR.*

1926

Aug 16.

Statements to the Police—Admissibility of statements by witnesses—Applicability of ss. 161 and 162 of the Criminal Procedure Code to statements by the accused—Oral and recorded statements of witnesses—Admissibility of first information and counter—First information—Charges of several offences in one head—Re-trial—Criminal Procedure Code (Act V of 1898), ss. 154, 161, 162 and 233—Admissions and Confessions—Statements leading to discovery, admissibility of—Evidence Act (I of 1872), ss. 17, 18 and 27.

Section 161 of the Criminal Procedure Code applies only to witnesses and not to the accused persons under trial.

Queen-Empress v. *Jadub Das* (1) followed.

Section 162 of the Code applies similarly to witnesses, and not to the accused under trial.

King-Emperor v. Maung Tha Din (2), *Ramun* v. *Crown* (3), *and Jagwa Dhanuk v. King-Emperor* (4), followed.

Under s. 162, if a statement is not recorded, it cannot be used in any circumstances, or for either side or for any purpose.

King-Emperor v. *Maung Tha Din* (2), *Rakha* v. *Crown* (5), and *Emperor* v. *Vithu Bala Kharat* (6), followed.

If the statement has been recorded, it can be used only for one purpose, that is, by the defence. Provided that the person who made it is a prosecution witness, the defence may apply for a copy of it, and if proved, it may be used under s. 145 of the Evidence Act to contradict the witness.

* Criminal Appeal No. 284 of 1926, against the order of R. E. Jack, Sessions Judge of the Assam Valley Districts, dated March 24, 1926.

(1) (1899) I. L. R. 27 Calc. 295.
(2) (1926) I. L. R. 4 Rang. 72.
(3) (1926) I. L. R. 7 Lah. 84.
(4) (1925) I. L. R. 5 Pat. 63, 77.
(5) (1925) I. L. R. 6 Lah. 171.
(6) (1924) 26 Bom. L. R. 965.

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A first information, under s. 154 of the Code, is not a statement within s. 162. If after a first information against the accused, a counter-information is laid against the informant or his party by a member of the accused's party, the latter falls under s. 154, and not s. 162 and may be admissible. Its admissibility depends on the circumstances, and must be decided under the Evidence Act. But the police cannot treat a statement as an information unless it is really received as such, and is properly within s. 154.

A first information does not prove itself: it has to be tendered under some section of the Evidence Act. The usual course is for the prosecution to tender it under s. 157 of the Act to corroborate the informant, and the defence can prove it to impeach his credit under s. 155, or to contradict him under s. 145 of the Act. It is admissible also in proper cases under ss. 8 and 32 (*1*) of the Act.

Section 162 of the Code does not repeal s. 27 of the Evidence Act, or render inadmissible statements relevant under the latter section.

Statements by the accused are admissions under ss. 17 and 18 of the Evidence Act, and *prima facie* evidence against the maker, but not in his favour. "*Confessions*" are a sub-species of "*statements*", and a species of admissions.

A single head of charge under ss. 302/149, in respect of three persons killed in the same transaction, is illegal. The High Court thought it unsafe to uphold the conviction thereunder without going through all the facts to arrive at new findings for itself.

Radha Nath Karmakar v. *Emperor* (1) followed.

Re-trial of two of the appellants not directed in the circumstances after a long lapse of time and two previous trials.

THE seven appellants were tried before the Sessions Judge of the Assam Valley Districts with a jury. They were all found guilty under sections 148, 302/149 of the Penal Code, three also under section 302, and two under s. 324. The charge under sections 302/149 was in one head, and referred to the murder of three persons in the same transaction. The appellants were convicted and sentenced, on the 24th March 1926, to transportation for life. The prosecution case was that, on the 7th March 1925, between 8 and 9 A.M. one Kimu and his son, with one Abdul Barik, were erecting a

(1) (1922) I. L. R. 50 Calc. 94.

house on the south-east corner of their *patta* land. The appellants came up armed with spears and *lathis* and ordered its demolition. Kimu thereupon called some *matbars* who remonstrated with the accused. An altercation ensued, and Azimuddy killed Alimuddi with a spear. Kalimuddin ran up to his assistance and was killed by the appellant Sayed Ali. The appellant Johiruddy speared Mokim, Rahimuddy speared Yaruddin, and Basir Haji cut Mukdum with a *ram dao*. The case for the defence was that the accused were proceeding to erect a hut on their *khas* land, and that the complainant's party attacked them there.

A first information was lodged against the appellants, at 12-30 P.M., by Abdul Basir P W 1. At 2-30 P.M., on the same day, the first appellant, A imuddy, laid a counter-information against the complainant's party, at another *thana*.

The appellants appealed to the High Court against their convictions and sentences.

Babu Debendra Narain Bhattacharjee, for the appellants. The counter-information of Azimuddy at the *thana*, after the first information against the appellants was lodged, and the statements of one of them to the investigating police officer, when pointing out the scene of the occurrence was wrongly admitted under s. 162 of the Code. "*Any person*" in s. 162 includes the accused. There is no limitation, in ss. 161 and 162, of "persons" to witnesses. The marginal note to s. 161 refers to "witnesses", but cannot override the clear words of the section. The object of s. 162 is to prevent garbled versions by the police of the statements made to them. The counter-information was laid, and the statement of the appellant as to the place of occurrence was made, during the police investigation. The fact of the

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information having been signed does not take it out of the purview of s. 162 or bring it under s. 154 only. Refers to *Cr. Rev. 184 of 1926* decided on 5th March 1926 by C. C. Ghose and Duval JJ. There was misdirection in the charge to the jury regarding the previous attempts to interfere with the lands of others. A single charge relating to the murder of three persons is bad. Refers to *Radha Nath Karmakar* v. *Emperor* (1).

Babu Satindra Nath Mukerji, for the Crown. Section 162 refers only to witnesses, and not to the accused. This is clear from the first proviso which refers only to witnesses. I rely on *Bawa Rowther* v. *Emperor* (2), *Umer Duraz Munshi* v. *Emperor* (3) *King-Emperor* v. *Maung Tha Din* (4), and Woodroffe's Criminal Procedure Code. The decisions of this Court were in cases heard *exparte*.

Babu Debendra Narain Bhattacharjee replied.

RANKIN J. In this case there are five appellants. They have been convicted by the learned Sessions Judge of the Assam Valley Districts sitting with a Jury of seven. There had been a previous trial, and the case was sent back by this Court to be retried. The Jury on this occasion were unanimous.

They have found all the appellants guilty under s. 302 read with s. 149 of the Indian Penal Code. Three of them have also been found guilty under s. 302 by itself, while the other two have been found guilty under s. 324.

The fifth appellant, Basir Haji, is the father of appellants (1), (3) and (4), Azimuddy, Johiruddy and Rahimuddy. The second appellant Sayed Ali is a friend and neighbour.

(1) (1922) I. L. R. 50 Calc. 94.
(2) (1924) 26 Cr. L. J. 321.
(3) (1924) 26 Cr. L. J. 778.
(4) (1926) I. L. R 4 Rang. 72.

The occurrence took place between 8 and 9 A.M. on the 7th March 1925. According to the prosecution it took place at the south-east corner of the *patta* land of one Kimu where it abuts upon some *khas* land of which Basir and Sayed Ali were wanting to get settlement from Government. According to the defence it took place to begin with on the east of Kimu's land and upon the adjacent plot of *khas* land marked "*N*" upon the plan. The prosecution story is that Kimu was erecting a hut at the south-east corner of his own land when the accused with others came armed with spears and *lathis* to prevent this, and that, when he called certain people who were in the field, an altercation commenced, and the accused proceeded to attack Kimu's party. Three people were killed undoubtedly and others injured.

The case for the defence is that the accused were proceeding to erect a hut on the *khas* land, and that the complainant's party attacked them.

The individual acts of each accused are not really in doubt. The first appellant killed a man called Alimuddi with a spear. The second appellant killed Kalimuddin, and the third killed Mokim in the like manner. The fourth appellant, a lad of about 18 years, struck Yaruddin with a spear in the buttock. Basir who was armed with a *ram dao* struck Mukdum and cut his arm. The injuries of Yaruddin and Mukdum amounted only to simple hurt.

Three passages in the summing up are objected to by the learned vakil for the appellants, and as the first two of these raise questions under s. 162 of the Criminal Procedure Code, I will deal with them first.

The occurrence having taken place about 9 A.M., the first information was given at the *thana* some five miles away, at 12-30 P.M. by Abdul Basir P. W. 1.

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persons does abridge certain rights of an accused in the matter of evidence, it would seem to require express and compelling language to deprive an accused of what is so often the mainstay of a good defence, the right to show that the moment he was challenged he gave the explanation on which he still relies. It is difficult to believe in this as an amendment designed in the interest of accused persons; while on the contrary view, it is comparatively easy to see that the rights of accused persons have been no further abridged than may well have been thought necessary for the purpose above-mentioned. As this question has been thrashed out in the cases to which I have referred, I prefer to put any further observations in the form of a statement of the law as I understand it.

The first information report against the accused is clearly not a statement within the contemplation of section 162, because it is not made in the course of an investigation. Again section 154 requires it to be signed: whereas statements within section 162 are forbidden to be signed even when recorded in writing. It is usually put in by the prosecution which in any ordinary case has a duty to put it in. But, however important first informations may be, they do not prove themselves, and have to be tendered under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant, and for the first information to be tendered as corroboration under s. 157; but it could also be tendered in a proper case under s. 32(*1*), as a declaration as to the cause of the informant's death, or as part of the informant's conduct (of the *res gestae*) under s. 8. Theoretically, the defence could prove the information to impeach the informant's credit under s. 155, or to contradict him under s. 145.

Statements made by third parties to the police, in the course of their investigation, stand under the Evidence Act as follows: They can be used as corroboration under s. 157, or in contradiction under s. 145, or to impeach credit under s. 155, provided the person who made the statement is called as a witness. This would apply to the prosecution and to the defence indifferently under the Evidence Act. But s. 162 of the Criminal Procedure Code enacts *first* that, if such a statement is not recorded in writing, it cannot be used in evidence in any circumstances, or for either side or for any purpose. This view of the section has been dissented from in one case at least in Madras*, but it is in my opinion right, and it has been adopted by at least three High Courts (*King-Emperor* v. *Maung Tha Din* (1) *Rakha* v. *Crown* (2), *Emperor* v. *Vithu Balu Kharat* (3)

Secondly, if such a statement has been recorded in writing, then it cannot be used for any purpose but one, and that by the defence. Provided that the person who made it is called as a witness for the prosecution, the defence may apply for a copy of the statement, and if it be proved, may use it under section 145 of the Evidence Act to contradict that witness.

Two over-riding considerations have to be noticed, in connection with section 162, (*1*) that the section does not affect any statement as to the cause of death under section 32(*1*) of the Evidence Act; (*2*) that the section is dealing with "statements" not with conduct, in the sense of section 8, but with mere statements.

* See *Grandhe Venkatasubbiah* v. *King-Emperor* (1924) I. L. R. 48 Mad. 640.

(1) (1926) I L R. 4 Rang. 72. (2) (1925) I. L. R. 6 Lah. 171.
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It sometimes happens that after the first information has been laid against the accused, a counter-information is laid against the complainant or his party by a member of the accused's party who is not himself an accused. As this comes under section 154 and must be reduced to writing and signed, it cannot, in my opinion come, within section 162. Whether it is admissible at the trial of the accused will depend upon the circumstances, and must be decided under the Evidence Act. The police cannot, of course, treat statements as informations unless they are really received as such, and come truly and properly within section 154.

Statements made by an accused belong to a class which the Evidence Act calls "admissions" (sections 17, 18), and *primâ facie* they are evidence against the maker but not in his favour. "Confessions" are a sub-species of "statements", and a species of admissions. Sections 24, 25 and 26 of the Evidence Act provide that in criminal cases confessions are irrelevant if they are induced by threat or promise, and are inadmissible as against the accused if made to a police officer, or if made while the accused is in custody (unless made in the presence of a Magistrate). As s. 162 of the Criminal Procedure Code is only concerned with statements made to a police officer, I need only observe here that broadly speaking a statement made by an accused to a police officer may be proved against him under the Evidence Act if it is not a confession; and even if it is a part of a confession, it is admissible under s. 27 if a fact is deposed to as discovered in consequence of the information. In my opinion s. 162 of the Criminal Procedure Code does not disturb this position.

In the present case, the two objections which I have referred to as made against the summing up of

the learned Judge are not sustainable on this construction of s. 162. Both statements are statements by an accused: neither is a confession or part of a confession; and one is an information recorded under s. 154.

There is, however, a third objection to the summing up which is well-founded. It appears that a complaint to a Magistrate was put in evidence to show that the accused's party had been trying to interfere with certain land in the possession of Mokim, and there was other evidence that a similar interference with the rights of others had been attempted by the accused in the case of one Monu Fakir. I will not here consider the course of the case so as to enquire whether either or both pieces of evidence were relevant, or were properly admitted at all. There seems in this case to be some reason for saying that they could not have been rejected. But the learned Judge in dealing with that matter says as follows: "This is the information given by Mokim "of an occurrence alleged to have taken place 11 "days before this occurrence (Exh. 4 read). If this "information and the evidence that Monu was driven "out of the plot (*L*) is true, it would show that Basir "Haji's party were capable of taking the aggressive, "though they were numerically weaker, having only "two *baris* containing (according to Kimu) 20 or 30 "houses, while in K'mu's *samaj* there were 25 or 30 "*baris*". Now, it seems to me that it was necessary for the learned Judge, if he let in those two pieces of evidence at all, to explain most carefully to the Jury that the Jury were not entitled to take it that the accused had committed the offence charged, because they had previously been found to have attempted to commit similar offences. The learned Judge has not only given no such direction, but the direction which

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he has given must have been taken by the Jury as intended to be the contrary, for he says that these previous circumstances would show that Baser Haji's party were capable of being the aggressors. This makes it necessary for us to consider carefully the question whether certain of the charges upon which the appellants have been convicted can be sustained. All the accused were found guilty under s. 302 read with s. 149. The common object alleged was to prevent Kimu from erecting a hut upon his own land, or to interfere with his possession. If, therefore, there has been a misdirection going to the question which of these two parties was really the aggressor, that misdirection seems to affect vitally any conviction under section 149.

There is another objection to the conviction under s. 149. Apparently in this part of the world the Courts think no more of killing three men in one charge than the accused persons are supposed to do of killing three men in one fight, and the form of charge which has been employed in this case can only be described as a charge of constructive multiple murder. It is clear that the proper way would be to have had three separate heads of charge, and the law upon this subject was laid down in the case of *Radha Nath Karmakar* v. *Emperor* (1). It is, however, plain that the three murders were all part of the same series of transactions, and it is clear that three separate heads of charge could have been employed in the present case. The decision to which I have just referred was one in which, in similar circumstances, this Court thought it unsafe to proceed upon the basis of section 149, and it appears to me that unless this is a case where the Court will go through all the facts and make a new finding for itself, it is not a case in which

(1) (1922) I. L. R. 50 Calc. 94.

it is possible for the Court to uphold the conviction against all these appellants under s. 302 read with s. 149. I do not think that it is reasonable or right for us to try this case on the paper-book for ourselves as regards that particular point.

Having come to that finding, the next question is as to the consequence of this finding upon the other charges. Three of the accused have been found guilty under s. 302 by itself; but if there be any doubt as to the spot upon which this fight began, it is, at any rate, unsafe to say that those three appellants would not have had some case upon the question of private defence. It is quite clear, on the facts of this case, that they could not justify committing murder in the way they did under any right of private defence, and it is, therefore, certain that they must be convicted under s. 304 (*I*). Their other convictions are set aside. We have considered this matter carefully as regards the sentence, and we are of opinion that it would be unjust to leave the sentence of transportation for life without substantial reduction, and, in our opinion, the proper sentence for us to pass upon those three appellants is the sentence of ten years' rigorous imprisonment under s. 304 (*I*).

That leaves the case of Basir Haji and Rahimuddy who is the youngest of the three sons, apparently in the neighbourhood of 18 years of age. They have been convicted under section 324, and until one settles the question whether there was some right of private defence, it is difficult to say that the infliction of simple hurt may not have been justified. In their cases we are, therefore, faced with the alternatives of sending the case back for re-trial, or setting aside their convictions and refusing to order a re-trial. So far as the youngest son, Rahimuddy, is concerned, as his father and his elder brothers were engaged together

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upon this land dispute, a reasonable knowledge of human nature leads one to suppose that he had not very much chance of keeping out of it. So far as he is concerned, as he only inflicted a simple hurt, I do not find very much difficulty in setting aside the conviction against him and refusing to allow him to be re-tried. I have, however, much more difficulty in the case of the father, Basir Haji, who is very probably, to put it no higher, the main source of all the trouble. It is, however, I think, important to notice that if this case is tried again at this distance of time, and after two previous trials, it is almost inevitable that the third trial would be somewhat unjust. The witnesses must have forgotten much, and the third trial would be, it seems to me, of a very difficult and doubtful nature. If I could have found any logical way of finding him guilty under s. 324, I confess I should not have been particularly sorry; but it seems to me that there is no logical way of finding him guilty under s. 324 except by doing, what I for one to refuse to do, what it would be difficult to do, and what we should have to do in respect of all the appellants, namely, finding for ourselves on the paper-book who was really the aggressive party and on what exact spot. For these reasons, all the convictions of Basir Haji and Rahimuddy will be set aside, and, in the circumstances, we do not order a re-trial.

DUVAL J. I agree.

E. H. M.