

## CRIMINAL REVISION.

*Before Patterson and Guha J.J.*

KERAT ALI

v.

EMPEROR.\*

1934

May 11.

*Statement—Statement to an excise officer, if admissible to contradict a witness—  
Code of Criminal Procedure (Act V of 1898), s. 162.*

Although a statement of a confessional nature made to an excise officer is inadmissible as a piece of substantive evidence against an accused person, it is permissible to use it under section 155 of the Indian Evidence Act to contradict the maker thereof when called as a defence witness.

Section 162 of the Code of Criminal Procedure is not applicable to a statement made to an excise officer in a case under the Opium Act.

### CRIMINAL REVISION.

The material facts and arguments appear in the judgment.

*A. K. Fazlul Huq and Hamidul Huq Chaudhuri* for the petitioner.

The *Deputy Legal Remembrancer, Khundkar*, for the Crown.

PATTERSON, J. The petitioner, Kerat Ali, was arrested at Sitakund railway station on the 31st December, 1932, along with three other persons named Abdul Jalil, Azahar and Badu Miya. Two seers of opium were found on the person of each of the petitioner's three companions, and another two seers of opium, wrapped up in a quilt, were found on the rack in the compartment in which they all four had been travelling. All four were sent up for trial under the Opium Act. Abdul Jalil, Azahar and Badu Miya pleaded guilty, and were convicted and sentenced. The petitioner pleaded not guilty and

\*Criminal Revision, No. 938 of 1933, against the order of A. deC. Williams, Sessions Judge of Chittagong, dated July 7, 1933, modifying the order of Salamatulla Chaudhuri, First Class Magistrate of Chittagong, dated May 25, 1933.

1934

*Kerat Ali*

v.

*Emperor.**Patterson J.*

was tried separately on the allegation that the two seers of opium wrapped up in a quilt that were found on the rack had been in his possession. He was convicted by a Deputy Magistrate of Chittagong under section 9(c) of the Opium Act and was sentenced to six months' rigorous imprisonment and to pay a fine of Rs. 300 and, in default, to undergo a further period of four months' rigorous imprisonment. On appeal, the magistrate's findings of fact were affirmed, but the conviction was altered to one under section 9 (a) of the Opium Act, while the sentence was modified to this extent that the term of imprisonment in default of payment of fine was reduced to one month's rigorous imprisonment.

The present Rule is directed against the conviction and sentence, the main contention that has been urged on behalf of the petitioner being that a certain statement that is said to have been made to the investigating excise officer by the petitioner's companion, Badu Miya, after his arrest, has been wrongly admitted in evidence. Badu Miya was, after he had been convicted and sentenced, examined as a defence witness on behalf of the present petitioner. In his examination-in-chief he stated that the quilt and the opium that was found in it belonged to him, and that he had made a statement to this effect to the investigating excise officer. The excise officer was then recalled and examined further, and Badu Miya's statement, as recorded by him, was tendered and received in evidence. In this statement Badu Miya implicates not only himself but also his three companions,—and especially the present petitioner, Kerat Ali,—as participators in an attempt to smuggle the opium found concealed on their persons and wrapped up in the quilt, into Burma, and it is undoubtedly in the nature of a confession. That being so, it would clearly have been inadmissible as a piece of substantive evidence as against its maker,—a Full Bench of this Court

having recently held that an excise officer is a police officer within the meaning of section 25 of the Indian Evidence Act: *Vide Ameen Sharif v. Emperor* (1). From this it follows that the statement in question would have been inadmissible as a piece of substantive evidence as against the present petitioner, even if the latter had been tried along with Badu Miya: and, a *fortiori*, that it was inadmissible as a piece of substantive evidence in the present proceedings. The magistrate appears to have regarded Badu Miya's statement to the investigating excise officer as being admissible in evidence in its entirety, and to have relied on some of the allegations contained therein in support of his finding regarding the possession by the petitioner of the opium in question. The learned Sessions Judge, on the other hand, has dealt with Badu Miya's statement to the investigating excise officer on the footing that it was admissible for the purpose of impeaching his credit in respect of the later statement made by him in his evidence in court. It really comes down to this, that Badu Miya's statement to the investigating excise officer has been used merely for the purpose of supporting the evidence given by the latter to the effect that Badu Miya did not tell him after his arrest that the opium in question belonged to him alone, as stated by him in his evidence, and of contradicting Badu Miya himself. I am clearly of opinion that this was permissible under the provisions of section 155 of the Indian Evidence Act.

1934  
Kerat Ali  
v.  
Emperor.  
Patterson J.

It has, however, been suggested that even if section 25 of the Indian Evidence Act be no bar to Badu Miya's statement being used for the purpose indicated above, section 162 of the Code of Criminal Procedure, operates as a bar to its being so used. This involves the assumption that an excise officer is to be regarded as a police officer for the purposes of

(1) (1934) I. L. R. 61 Calc. 607.

1934

*Kerat Ali*  
v.  
*Emperor.*  
*Patterson J.*

section 162 of the Code of Criminal Procedure, an assumption which is not supported by the recent Full Bench decision, or by any other authority of which I am aware. It is true that sections 160 to 171 of the Code of Criminal Procedure are made applicable by section 74 of the Excise Act to the proceedings of excise officers when investigating offences punishable under that Act, but there is no corresponding provision in the Opium Act, so the argument based on the provisions of section 74 of the Excise Act has no application to the present case.

Apart from the above considerations, it seems to me that even if Badu Miya's statement to the investigating excise officer be left out of account altogether, the evidence given by him in court to the effect that the opium in question belonged to him alone, is quite unworthy of credit. His own evidence, when viewed in the light of the surrounding circumstances, makes it abundantly clear that he and his three companions, including the present petitioner, were acting in concert throughout, and there is direct evidence, which has been believed by both the courts below, to show that, at any rate, at one stage of the journey, the petitioner was in actual physical possession of the opium in question.

I would, accordingly, order that the Rule be discharged and that the petitioner should surrender to his bail and serve out the remainder of his sentence.

GUHA J. I agree.

*Rule discharged.*

A. C. R. C.