REVISIONAL CRIMINAL.

1918
January, 5.

Before Mr Justice Piggott.

KALLU *v.* SITAL*

Act No. I of 1872 (*Indian Evidence Act*), *section* 132—*Act No. XLV of* 1860 (*Indian Penal Code*), *section* 499—*Witness—How far a statement made by a witness in giving evidence is privileged.*

A person who whilst giving evidence as a witness in court has made a statement which *prima facie* amounts to defamation under section 499 of the Indian Penal Code may plead one or other of the exceptions to that section, or he may claim the protection of the proviso to section 132 of the Indian Evidence Act, 1872; but in the latter case he must show that he was *compelled* to make the statement alleged to be defamatory in the sense that he had asked to be excused from answering the question which led up to it and the court had obliged him to answer it. *Queen* v. *Gopal Doss* (1), *Queen Empress* v. *Moss* (2) and *Emperor* v. *Ganga Prasad* (3) referred to.

THE facts of the case fully appear from the following judgement of the Sessions Judge.

This is an application in revision. It raises a point of law of very considerable difficulty. One Sarju made a report to the police in which he charged one Sital with theft. The case was investigated and Sarju's report was found to be false. Sarju was prosecuted under section 182 for his report, and Sital was examined as a witness. His deposition is in the usual narrative form. The questions are not recorded. The relevant portion of it is as follows:—"I did not steal the Ex. C Sarju bears enmity to me because we had a quarrel with each other about the middle common wall of the courtyard. I had illicit connection with Sarju's aunt Musammat Chhotki. The accused and Mukhiya Sita Ram, when they came to know of it, were grieved. Sita Ram has come to court to-day and is outside. Sita Ram is a *biradri* of the accused and he, therefore, told me not to go to Musammat Chhotki. I listened to him and gave up visiting Musammat Chhotki. Even then he was not pleased with me as I had secret connection with Chhotki." The fact that Sital had made these statements about himself and Musammat Chhotki became known to the *biradri*. The parties are *Kachhis*, and a *panchayat* was called, in which Sital was asked whether he had made these statements in court, to which he replied that he had; and whether they were true; he replied that they were true. Kallu, the husband of Chhotki, then made a complaint against Sarju for defamation. The learned Magistrate took the evidence for the prosecution and then discharged the accused. Kallu has made the present application in revision against that order of discharge.

* Criminal Revision No. 728 of 1917, from an order of F. D. Simpson, Sessions Judge of Allahabad, dated the 9th of July, 1917.

(1) (1881) I.L.R., 3 Mad., 271. (2) (1893) I.L.R., 16 All., 88.
(3) (1907) I.L.R., 29 All., 685.

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The first question is whether a witness can be prosecuted at all for a defamatory statement which he makes in court. It is settled law in England that he cannot. But the Indian law on the subject is contained in the Penal Code. Section 499 lays down a law of defamation which differs on many important points from the English Law on the subject. It was framed with great care and no less than ten exceptions are enumerated. It seems quite plain that if the Legislature had intended to embody the English Law on the subject, they would have done so in a special exception to section 499. For this Court, the matter is concluded by authority in *Ganga Prasad's* (1) case. It was held by two Judges against the third that such a prosecution lies. The decisions to the contrary were considered and dissented from. Therefore the present prosecution lies.

The next question is whether Sital is entitled to plead the bar of section 132 of the Evidence Act. Section 132 runs as follows :—"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any Civil or Criminal proceeding, upon the ground that the answer to such question will criminate or may tend, directly or indirectly, to criminate such witness, or that it will expose or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.

"Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

The meaning of the word 'compelled' has been the subject of some difference of opinion; but it was held in *Moss'* case, that "compelled" only applies where the court has compelled a witness to answer a question, and not to a case in which the witness has not asked to be excused from answering a question, but gives his answer without any claim to have himself excused. This was the decision of a High Court Judge So far as I know it has not been overruled. In the present case the witness did not object to the question. So section 132 will not avail him.

I now reach the difficult point in the case. If section 499 applies to witness, then a witness can only defend himself by bringing himself within one of the exceptions and the exception pleaded in the present case is the 9th. This will, as a rule, be the section which the witness will have to set up. "It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person or for the public good."

Now the person who pleads an exception has thrown on him the burden of bringing himself within it. This is laid down in section 105 of the Evidence Act. "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such

(1) (1907) I. L. R., 29 All., 685.

circumstances." Therefore it is necessary for a witness to prove that he made the imputation in good faith. Now in such a case as the present, it is clear that there can be no good faith unless the imputations are true. It might appear, therefore, at first sight that it is thrown on the witness to prove that the imputation is true. But this cannot be the intention of the Legislature. It would throw an intolerable burden on a witness. A witness is brought to court on summons, possibly against his will. He is then compelled to take an oath that he will speak the truth and the whole truth. Then a question is put to him. Let us say, that the question is, "Have you had illicit intercourse with *B*'s wife?" He replies truly that he has. B proceeds to prosecute him, and it is thrown affirmatively on the witness to prove to the satisfaction of the court that he has had intercourse with *B*'s wife, it may be quite impossible for him to do so. *B*'s wife may not choose to admit her own dishonour. The witness may have taken particular pains that there should be no evidence in existence of the intrigue. Therefore I am prepared to hold that a person accused of an offence under section 499 who proves affirmatively that the imputation was made in the course of a deposition in court and that it was relevant to the matter in hand, has proved enough. The court will then go on and presume that the imputation was made in good faith, although it will not make the same presumption when the imputation was made out of court. It will then be for the other side to prove that the statement was untrue and therefore could not have been made in good faith. I have been able to find no authority for the proposition; but I think the language of the Code will bear such a construction and that the result of the opposite view is a *reductio ad absurdum*. If this principle is applied, the order of discharge appears to be right. The prosecution has not proved that the statement of Sital Din was false, and therefore I presume that it was made in good faith. It was certainly relevant to the case and made in protection of his interest. The subsequent statement made before the *panchayat* was a necessary result of the deposition. He was asked if he had made the deposition. He could not but admit that he had. He was asked if it was true. He could not but say it was. The application in revision is therefore dismissed.

The complainant Kallu applied in revision to the High Court.

Babu *Piari Lal Banerji*, for the applicant.

Mr. *R. K. Sorabji* for the opposite party.

PIGGOTT, J.—The circumstances out of which this application for revision arises are as follows. One Sarju made a report to the police in which he alleged that Sital, who is the respondent to the present application, had committed theft. Upon investigation this report was found to be false and a prosecution was instituted against Sarju, under section 182 of the Indian Penal Code, for having given false information to a public servant. Sital appeared as a witness for the prosecution in this

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case. He began by deposing that he had not committed the theft of which Sarju had accused him. The next question put to him must have been :—" Why then did Sarju make this false report against you "? He replied that Sarju bore him enmity and went on to explain the grounds of that enmity. He said, first, that there had been a quarrel between them about a partition-wall between their courtyards. Apparently he felt it necessary to explain further, though it is impossible to say whether or not this explanation was added in reply to a direct question. He said that there had been for some time an intrigue between himself and an aunt of Sarju named Musammat Chhotki. It appears that this Chhotki is a married woman, and the result of the statement made by Sital in court was to bring social discredit on Kallu, the husband of the said Chhotki. It is in evidence that proceedings were taken by a *panchayat* of the brotherhood to which Kallu and Sital both belonged. It is quite clear, therefore, and is not denied, that Sital's statement with regard to his intrigue with Musammat Chhotki was defematory of Kallu within the meaning of section 499 of the Indian Penal Code. It is also quite impossible to hold that at the time when he made this statement Sital had no reason to believe that this imputation would be harmful to the reputation of Kallu. It may be that, before this matter can be completely disposed of, the trial court will have to direct its mind to the question whether Sital made this statement intending to harm Kallu's reputation, or whether the harm thus resulting to Kaull's reputation was present to his mind when he made the statement, so that he could be said to have made the same " knowing that it was likely " to do harm. These considerations would be relevant on the question of sentence. But at the very lowest it cannot be denied that Sital had reason to believe that the imputation would do harm. If Kallu had believed the assertion made by Sital as to the unchastity of Musammat Chhotki to be true, he could have prosecuted him on his own admission for having committed an offence punishable under section 497 of the Indian Penal Code. Apparently Kallu believes that imputation to be false; he has accordingly instituted a prosecution against Sital for the offence of defamation punishable under section 499 of the Indian Penal Code. The

Magistrate who tried the case seems to have thought that he had only to consider whether the imputation made by Sital against the chastity of Kallu's wife had been made maliciously and, as he says, "merely with a view to disgrace Kallu," or whether it was made as a necessary part of the narrative which Sital had to lay before the court in the course of his deposition. Holding it not to be proved that the imputation had been made "with intent to cause disgrace," the Magistrate passed an order of discharge. Kallu brought the matter before the Sessions Judge, asking that court to set aside the order of discharge and to direct further inquiry. The learned Sessions Judge has disposed of the matter in an elaborate order in which he has discussed the previous decisions of this Court bearing on the question of law involved. The conclusion which he comes to is that, if a witness makes a statement in the course of a deposition in court, and the statement is one relevant to the matter in hand, the court will presume the said statement "to have been made in good faith for the protection of the interests of the person making it," within the meaning of Exception 9 to section 499 of the Indian Penal Code. I do not myself think that this is a sound proposition of law, and I am quite certain that it is not to be reconciled with the decision of the majority of a Full Bench of this Court in the case of *Emperor* v. *Ganga Prasad* (1). I do not altogether agree with the learned Sessions Judge when he says that the ninth Exception to section 499 of the Indian Penal Code is the only one to which a witness could apply for protection in respect of a defamatory statement made by him under the sanction of the oath in the course of a judicial proceeding. The ninth Exception is intended primarily to apply to statements which the accused cannot prove to have been true in fact, or which are mere expressions of opinion, or otherwise of such a nature that the question whether they are or are not true in fact does not arise. Ordinarily, the first Exception would apply to statements made by the witnesses in the course of judicial proceedings, provided those statements are true. They must be true in fact in order to come under the first Exception at all; and if they are true in fact and also relevant to the matter under investigation, it is

(1) (1907) I.L.R., 29, All., 685.

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obviously for the public good that they should be made. In the present case these considerations are not of great importance; because, as the learned Sessions Judge himself rightly points out, Sital's allegation against the chastity of Musammat Chhotki could not have been made in good faith unless it was in fact true. If there were no other provision of the law to be considered except section 499 of the Indian Penal Code, the position of a witness in respect of offences under that section would be a difficult one. He would be liable to prosecution with regard to any statement made by him of a defamatory nature and, on such prosecution being instituted, the provisions of section 105 of the Indian Evidence Act would throw upon him the burden of proving that the statements were in fact true. The Legislature, however, seems to me to have fully realized this difficulty and to have made adequate provision for the same by means of section 132 of the Indian Evidence Act. To my mind the real question in this case is one of the interpretation of that section and its application to the facts of this case. A witness giving evidence in a judicial proceeding is under an obligation by law to state nothing which is not true, and, by reason of the oath or solemn affirmation taken by him in the presence of the court, to state, not merely the truth, but the whole truth touching the matter in question before the court. Now under section 134 of the Indian Evidence Act no answer which a witness is compelled to give, when giving evidence as to any matter relevant to the matter in issue in any suit, or in any Civil or Criminal proceeding, can subject him to any arrest or prosecution, or be proved against him in any Criminal proceeding, except on a prosecution for giving false evidence by such answer. A witness who has made a statement in the course of his deposition defamatory of another person, if he can claim the protection of this section, is absolutely safe so long as he has told the truth, If he has said what is not true, he can be prosecuted for giving false evidence; and even as regards the institution of such prosecution he is under the protection of the court before which his evidence was given. He cannot be prosecuted without the sanction of that court. Now, if it could be argued that the defamatory statement in this case was one which Sital "was compelled" to make, within the

meaning of section 132 of the Indian Evidence Act, the present prosecution would necessarily fail, and the order of discharge passed by the Magistrate would be perfectly correct. The question of the meaning of the words "no such answer which a witness is compelled to give," in the latter part of the aforesaid section 132, was considered by a Full Bench of the Madras High Court in the *Queen* v. *Gopal Doss and others* (1) and also by the Chief Justice of this Court in the case of *Queen Empress* v. *Moss and others* (2). In both these cases it was laid down that the protection afforded by section 132 of the Indian Evidence Act must be claimed by the witness before he makes the statement in respect of which a question is subsequently raised. Obviously no form of words can be prescribed in which this claim is to be made; and I conceive that cases may arise in which the courts will be compelled to hold that the claim has been made by implication, or that the witness was placed under practical compulsion to answer certain questions by the mere fact of his appearance in the witness box. Whether this be so or not, I think the principle laid down in these rulings fully applies to the facts of the present case. After Sital had stated that the charge brought against him by Sarju was false and made because of antecedent enmity existing between them, and that this enmity resulted from a quarrel about the partition-wall, he should either have contented himself with that statement, or have claimed protection of the court. It is not obvious on the face of the record as it stands that Sital was under any real necessity to go further. It has been brought to my notice that Kallu was one of the winessess summoned for the defence in the case in which Sarju was on his trial, and it is open to argument whether Sital's conduct in alleging the existence of an intrigue between himself and Musammat Chhotki may not have been, in part at any rate, intended to discount beforehand the value of any evidence which Kallu might give in Sarju's defence. If he really felt that the court could not otherwise properly appreciate the nature of the grudge borne him by Sarju, and the strength of the motives which impelled Sarju to make a false report to his disadvantage, he ought to have claimed the protection of the court. The statement which he

(1) (1880) I.L.R., 3 Mad., 271. (2) (1893) I.L.R., 16 All., 88.

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proceeded to make was one against the character of a woman. It was seriously injurious to that woman's husband, who was not a party to the proceedings then before the court; and one cannot help remarking that it was a statement which a man with any sentiment of honour would have been very reluctant to make. Assuming in Sital's favour that this particular defamatory statement was extracted from him by some further question, I cannot avoid the feeling that it is a statement which he should naturally have shrunk from making. It would have been easy from him to reply that the quarrel about the partition wall was connected with another matter, in respect of which he could not lay the entire facts before the court without making a statement which would criminate him or expose him to prosecution or other penalty. It seems to me at least possible that, if he had said this, the court would not have compelled him to answer the question, unless such answer had been pressed for by Sarju himself in the exercise of his rights as an accused person; and, of course, if Sarju had chosen to press the question, the responsibility for the answer would have rested largely upon him and the witness would have been completely protected by the provisions of the statute law. In my opinion the order of discharge in this case cannot be supported on legal grounds, nor am I prepared to allow that the case is one in which the technicalities of the law should be regarded as bearing hardly upon the accused person. I set aside the order of discharge in this case and send the case back, through the Sessions Judge, to the trial court, directing the Magistrate to proceed with the trial of the case and to dispose of it in the light of principles which I have taken it upon me to lay down. In reply to a suggestion made to me on behalf of the applicant that the case is one which might be more efficiently tried by a Magistrate with a knowledge of the English language, I think it sufficient to say that, while it seems to me right and proper that the case should be sent back to the Magistrate who passed the order of discharge, my order is not to be interpreted as precluding the District Magistrate from exercising his power of transferring the case, if he should see adequate reason to do so.

Order set aside.