APPELLATE CRIMINAL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Lumsden.

1923

June 12.

KING-EMPEROR—*Appellant*,

versus

KHANU—*Respondent.*

Criminal Appeal No. 343 of 192

Prisons Act, IX of 1894, section 3 (1), (2) and section 42—Judicial lock-up—whether a "prison"—Under-trial prisoner—whether a "prisoner"—Constable on duty at lock-up preventing accused from communicating with the prisoner—whether acting in lawful discharge of his duty—Indian Penal Code, section 353.

On the 7th November 1922, a constable was on duty at the judicial lock-up situated in Sargodha and while he was patrolling, the accused came up and entered into a conversation with certain under-trial prisoners who were detained in the lock-up. The constable prevented the accused from talking with the prisoners. Thereupon the accused not only abused the constable but also threw his shoe at him. Upon these facts the trial Magistrate convicted the accused of an offence under section 353, Indian Penal Code, and the Sessions Judge on appeal altered the conviction to one under section 352.

Held, that a judicial lock-up used for the detention of under-trial prisoners is a "prison" within the meaning of that expression used in the Prisons Act, *vide* sub-section (1) of section 3 of the Act.

Held also, that a person committed to custody in pursuance of a warrant or an order of a Court exercising criminal jurisdiction, though not convicted, is a criminal "prisoner" within the meaning of sub-section (2) of section 3 of the Act.

Held further, that the respondent in communicating with the prisoners in the lock-up committed an offence under section 42 of the Act, and that the constable who was employed to guard the lock-up was acting in the lawful discharge of his duty in trying to prevent the respondent from communicating with the prisoners and was consequently acting in the lawful discharge of his duty when he was assaulted by the respondent. The latter was therefore guilty of an offence under section 353 of the Penal Code.

Appeal from the order of Khan Bahadur Munshi *Rahim Bakhsh, Sessions Judge, Shahpur, at Sargodha.*

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dated the 13th December 1922, modifying that of Sayad *Qasam Ali Shah, Magistrate, 1st Class, Sargodha, dated the 27th November 1922, convicting the respondent.*

DALIP SINGH, Assistant Legal Remembrancer, for Appellant.

NEMO, for Respondent.

The judgment of the Court was delivered by—

SIR SHADI LAL C. J.—The facts, which are relevant to the question of law involved in this appeal, lie within a narrow compass. On the 7th November 1922 a constable named Lutaf was on duty at the judicial lock-up situated in Sargodha, and while he was patrolling, the respondent Khanun came up and entered into a conversation with certain under-trial prisoners who were detained in the lock-up. The constable prevented the respondent from talking with the prisoners. Thereupon the respondent not only abused the constable but also threw his shoe at him. Upon these facts the Magistrate convicted Khanun of an offence under section 353, Indian Penal Code, but on appeal the Sessions Judge has acquitted him of that offence and has convicted him under section 352, Indian Penal Code, instead, holding that the constable was not at the time of the assault acting in the discharge of his duty as a public servant.

We find it difficult to follow the judgment of the learned Sessions Judge. He concedes that communication with under-trial prisoners

"while confined in a prison or outside a prison when they are in control of an officer belonging to the prison"

is prohibited; but he thinks that a judicial lock-up is not a prison and that a constable, while he is on duty at the lock-up, cannot be deemed to be a public servant acting in the lawful discharge of his duty as such public servant. Now, the word "prison" as defined in section 3 (1) of the Prisons Act (IX of 1894) means—

"any Jail or place used permanently or temporarily, under the general or special orders of a Local Government, for the detention of prisoners, and includes all lands and buildings

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appurtenant thereto, but does not include (a) any place for the confinement of prisoners who are exclusively in the custody of the police ...."

It is clear that an under-trial prisoner is not a prisoner who is exclusively in the custody of the police, and that a judicial lock-up used for the detention of under-trial prisoners cannot be excluded from the category of a prison if it otherwise fulfils the requirements of the definition.

The vital question is whether an under-trial prisoner is a 'prisoner,' and that question must be answered in the affirmative. A perusal of sub-sections (2), (3) and (4) of section 3 makes it absolutely clear that prisoners are divided into two classes (a) civil prisoners; and (b) criminal prisoners; and that the latter are again sub-divided into "convicted criminal prisoners" and "unconvicted criminal prisoners." Indeed, Chapter VI of the Act refers to unconvicted criminal prisoners expressly, and there can, therefore, be no doubt that a criminal prisoner is not necessarily one who has been convicted by a Court of law. A person committed to custody in pursuance of a warrant or an order of a Court exercising criminal jurisdiction, though not convicted, is a criminal prisoner within the meaning of sub-section (2) of section 3, and a place used for the detention of such a prisoner is a prison. We must, therefore, hold that a judicial lock-up is a 'prison' within the meaning of that expression used in the Prisons Act.

Now, section 42 of the aforesaid Act provides that a person, who communicates or attempts to communicate with any prisoner commits an offence punishable with imprisonment or fine. The constable, who was employed to guard the lock-up, was authorised to prevent the commission of an offence under section 42, and he was consequently acting in the lawful discharge of his duty when he was assaulted by the accused.

The offence committed by the respondent fulfils all the requirements of section 353, Indian Penal Code, and we accordingly accept the appeal and, setting aside the judgment of the Sessions Judge, convict the respondent of an offence under section 353, Indian Penal

Code. We, however, maintain the sentence imposed by the learned Judge, because the learned counsel for the Crown admits that the reason why the Local Government invoked the jurisdiction of this Court was to obtain an authoritative pronouncement on the question of law and not to seek an enhancement of the sentence.

A. N. C.

Appeal accepted.

APPELLATE CRIMINAL.

Before Mr. Justice Broadway and Mr. Justice Fforde.

AUTAR SINGH—*Appellant*

1923

versus

June 13.

THE CROWN—*Respondent.*

Criminal Appeal No. 419 of 1923.

Indian Evidence Act, I of 1872, sections 6, 8, 32 (1)—Dying declaration—statements made by deceased to witnesses sometime prior to the happening of the event which resulted in her death—whether admissible in evidence.

The appellant was charged with, and convicted of, the murder of his wife and the prosecution produced 2 witnesses B. S. and G. S. who gave evidence of certain statements alleged to have been made by the deceased about 8 or 9 months and 10 days, respectively, prior to the event which resulted in her death.

Held, that the statements made by a person who is dead could only be admitted if they could be shown to come within the provisions of section 32 (1) of the Indian Evidence Act, which sub-section applies to the class of statements known as dying declarations, *i.e.*, statements made by a dying person as to the injuries which have brought him or her to that condition or the circumstances under which those injuries came to be inflicted. The evidence concerning statements made by the deceased in this case was therefore inadmissible under section 32 (1) nor could it be admitted under either section 6 or section 8 of the Act.

The commentary in regard to the value of dying declarations in India contained in Mr. Justice Stephen's History of Criminal Law in England, referred to.