APPELLATE CRIMINAL.

Before Mr. Justice Baguley.

RASOOL BHAI *v.* LALL KHAN.*

1938

Dec. 23.

Defamation—Statement by witness in Court—No absolute privilege—Evidence Act, s. 132, protection under—Manner of obtaining protection—Compulsion on witness by Court to answer—Qualified privilege of witness—Penal Code, s. 499, Exception 9—Answering questions put by Court or Public Prosecutor—Presumption in favour of witness—Plaintiff's or prosecutor's character—Necessity of his cross-examination.

The Penal Code contains no exception in favour of statements made in evidence in Court to give them absolute privilege, but s. 132 of the Evidence Act, if it applies, gives complete protection against criminal prosecution.

The protection given by s. 132 must be claimed directly or indirectly in some way or another. If a witness objects to answer any particular question on the ground that a true answer to it would render him liable to legal consequences and he is told by the Court to answer, he is completely protected. It is, however, not necessary that the compulsion must be in any set form of words or that the asking for protection should be in a particular form. Hesitation on the part of the witness to answer a question and the Court's direction to answer that question or a direction to answer all questions without exception, would amount to compulsion.

Elavarthi Reddi v. *Iyyala Reddi*, I.L.R. 52 Mad. 432, followed.

Bai Shanta v. *Umrao Amir Malik*, I.L.R. 50 Bom. 162; *Emperor* v. *Banarsi*, I.L.R. 46 All. 254, referred to.

Pronouncement of the Privy Council as to the privilege of a witness in *Baboo Gunnesh Dutt* v. *Chowdry*, 17 W.R. 283, discussed, and *Satish Chandra* v. *De*, I.L.R. 45 Cal. 388, referred to.

In re P. Venkata Reddy, I.L.R. 36 Mad. 216, dissented from.

A witness who answers questions put to him by a magistrate or a public prosecutor and not by his own instructed advocate may be *prima facie* presumed to do so *bona fide* in the protection of his own interest and to come under the protection of Exception 9 of s. 499 of the Penal Code, if his answers are defamatory.

King-Emperor v. *U Damapala*, I.L.R. 14 Ran. 666; *Sayed Ally* v. *King-Emperor*, 4 B.L.J. 181, referred to.

Where a person is sued or prosecuted for defamatory statements made by him in the course of his evidence in a case it is necessary that the plaintiff or prosecutor should go into the witness box and submit to a searching cross-examination. His character, in most cases, requires to be meticulously gone into.

Foucar for the appellant.

Auzam for the respondent.

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* Criminal Appeal No. 1019 of 1938 from the order of the 2nd Additional Magistrate (1) of Rangoon in Criminal Trial No. 381 of 1938.

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BAGULEY, J.—The appellant has been convicted under section 500 of the Penal Code and sentenced to pay a fine of Rs. 100 for defaming the complainant, Lall Khan. The defamation complained of was contained in statements which the accused made when examined as a witness in a certain criminal case (Criminal Regular Trial No. 419 of 1937, 5th Additional Magistrate, Rangoon). In that case the accused was the complainant.

A gang of men were sent up for trial on a charge of dacoity, the facts being that the present appellant had a hotel or restaurant and this gang of men with others came to the hotel and all of a sudden began smashing everything within reach, assaulted the servants and in the end carried off money out of the till.

The present accused, after stating what he knew of the actual facts, was, it appears, asked if he could give any reason for the extraordinary conduct of the gang and he then came out with the statements for which he is now being prosecuted. These statements are, *per se*, undoubtedly defamatory of the present complainant, Lall Khan.

It is not easy to find out the exact position in which witnesses are with regard to the statements which they make when giving evidence in Court. There can be no doubt that if they object to answering any particular question on the ground that a true answer to it may render them liable to legal consequences and they are then told by the Court to answer, their protection under s. 132 of the Evidence Act is complete. The Evidence Act is an Act dealing with a particular matter and it was passed in 1872, 12 years after the Indian Penal Code was passed. The Penal Code deals with defamation in general and, therefore, a special Act with regard to the special class of defamation arising out of depositions made in Court by witnesses would certainly override its

provisions. The Penal Code contains no exception in favour of statements made in evidence in Court to give them absolute privilege, but there can be no doubt that s. 132 of the Evidence Act, if it applies, gives complete protection against criminal prosecution. It seems, however, to be the view of all the High Courts that the protection given by s. 132 must be claimed directly or indirectly in some way or another.

In *Bai Shanta* v. *Umrao Amir Malik and others* (1) a Full Bench of the Bombay High Court held that

"Relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding cannot be held to be protected by the proviso to s. 132 of the Indian Evidence Act, in cases where the witness has not objected to answering the question put to him."

In *Emperor* v. *Banarsi* (2) a Bench of the Allahabad High Court held that :

"Whether or not a witness is 'compelled' within the meaning of s. 132 of the Indian Evidence Act, 1872, to answer any particular question put to him while in the witness-box is in each case a question of fact, although it may be said that in the case of an ordinary layman unacquainted with the technical terms of this section, he is 'compelled' to answer on oath questions put either by the Court or by counsel."

This Bench overruled an earlier decision of a single Judge of that Court to the effect that protection need not be claimed

In *Elavarthi Peddabba Reddi* v. *Iyyala Varada Reddi* (3) a Bench of the Madras High Court held that :

"A witness who answers a question or questions put to him by counsel without seeking the protection of s. 132 of the Indian Evidence Act is not entitled to that protection."

(1) (1925) I.L.R. 50 Bom. 162. (2) (1923) I.L.R. 46 All. 254.
(3) (1928) I.L.R. 52 Mad. 432.

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This Bench was prepared to take a view very much in favour of the witness and to extend the protection widely. They did not consider it necessary for the witness to refuse to answer and claim protection in so many words. On page 437 of the Report occurs the passage :

> " The proviso protects him from arrest or prosecution or proof of the statement in criminal proceedings against him except as to perjury. The compulsion contemplated in s. 132 is something more than being put into the box and being sworn to give evidence ; the compulsion may be express or implied. It is not necessary that the compulsion must be in any set form of words or that the asking for protection should be in a particular form. If the witness is made to understand that he must answer all questions without exception, it would amount to compulsion . . . If he hesitates to answer and the Court tells him he must answer the question, I would hold that that hesitation and the direction of the Court to the witness to answer would bring the witness within the proviso."

I do not think it would be safe to extend the protection under s. 132 further than the Madras Bench was prepared to extend it. The view which that Bench took of the section I should term, with respect, a reasonable one. In the present case there is no suggestion that there was any claim to protection made or hesitation on the part of the witness in answering the questions which would bring into effect the provisions of s. 132.

There is another point that must here be dealt with. There is a pronouncement of the Privy Council to be found in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdry and others* (1) in which there is what appears to be a very definite principle laid down. That was a case in which a suit for damages for defamation was brought arising out of statements made in judicial proceedings. This would, of course, be governed by

(1) 17 W.R. 283.

the law of torts which, in this country, is the same as the law in England, the law of torts not having been codified in any way. There is, however, a clear and unequivocal statement in the judgment, which is based upon grounds of public policy,

"that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."

This statement would appear to override to a certain extent the Penal Code with regard to the law of defamation. It would give absolute privilege to witnesses who make statements on oath in Court and free them from liability to any judicial proceedings except a prosecution for perjury. This principle, however, has not been followed in its entirety in India. It was referred to by a special Bench of the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Doyal De* (1). The judgment was one by Mookerjee A.C.J. on pages 409 and 410 and this pronouncement was, if I may say so, ignored. After setting out the passage I have already quoted, the judgment goes on to say :

"This, in the absence of legislation on the subject of civil wrongs, is, if we may say so without impropriety, a perfectly legitimate process ; but if we were to read into the provisions of the Indian Penal Code an exception which finds no place therein . . . . . the operation would in essence be legislation in the guise of judicial interpretation."

The case of *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdry and others* (2) was decided on 25th January 1872 and I am unable to trace the date of the facts which formed the basis of it. The same case had been before the Courts for a long time and there is

(1) (1920) I.L.R. 48 Cal. 388. (2) 17 W.R. 283.

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a report of it in *Mugnee Ram Chowdhry and others* v. *Gonesh Dutt Singh* (1) and that was an appeal from a decision of the principal Sudder Ameen, dated 24th June 1865, but there is no date in the judgment showing when the actual defamation complained of took place. Knowing how cases do drag on from year to year, it seems to me possible that the defamation may have been committed before the end of 1860 when the Indian Penal Code received the assent of the Governor-General-in-Council.

Be that as it may, there is no doubt that the facts which gave rise to that case took place before the Indian Evidence Act came into force in 1872 and if on principles of public policy there was intended to be some protection given to witnesses outside and beyond the provisions of the Penal Code, now that that protection has been clearly defined in section 132 of the Evidence Act, which is a complete code dealing with the law of Evidence, there can be no further protection given to witnesses outside section 132. For this reason I would hold that in this case the appellant cannot claim any protection under the law relating to evidence. He must stand or fall by the law laid down in the Penal Code.

With respect I am entirely unable to agree with the principle laid down in *In re P. Venkata Reddy* (2), that

> "Although the English doctrine of absolute privilege is not expressly recognized in the section (499 P.C.) it does not necessarily follow that it was the intention of the Legislature to exclude it from the law of this country."

In the present case when formally charged the accused pleaded that the imputations which he made were true. It is, however, quite clear that, in addition

(1) 5 W.R. 134.

(2) (1912) I.L.R. 36 Mad. 216.

to truth, he was pleading that the imputations were made in good faith—for the protection of his interests. This appears in the preliminary judgment, dated 4th February 1938, of the Magistrate who tried the case and also appears in the judgment which is the subject-matter of the present appeal. It is of interest to note that the prosecution in the former case was conducted not by an advocate briefed by Rasool Bhai but by the Public Prosecutor. I mention this because a distinction may be drawn between a witness answering questions put to him by an impartial person like a Magistrate or a Public Prosecutor, and a witness answering questions put to him by an advocate whom he had himself briefed and who may have been instructed with a view to leading him up to the defamatory statement which he wished to make. The Public Prosecutor has been examined as a witness in this case for the defence, and although his memory is, of course, not very distinct on the point he says that when he asked Rasool Bhai if he could account for the brawl Rasool Bhai then began to make the statements complained of and he thinks that the Court put certain questions to him to elicit some portion of the answers recorded, although he could not say which particular statements were made in answer to himself or in answer to the Court or entirely voluntarily. I think it must be held for the purpose of this appeal, as the benefit of any doubt must be given to the accused, that these statements were made in answer to questions put to him by the Magistrate or by the Public Prosecutor. In these circumstances the Public Prosecutor being, as I have said, an impartial official, I think the accused was entitled to the benefit of an initial presumption of good faith as laid down in an unofficially reported case of this Court: *Sayed Ally* v. *King-Emperor* (1). In this case it was pointed out that

(1) 4 B.L.J. 181.

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generally speaking there would be a presumption that what the litigants said was said *bona fide* in the protection of their own interests and that they would therefore be protected by the provisions of the ninth exception to s. 499, Penal Code.

[Discussing the evidence his Lordship said :]

In a case of this kind it is always necessary that the prosecutor or the plaintiff, according to whether the case is a criminal or a civil one, should be ready to go into the witness-box and submit to the most searching cross-examination. In a vast number of these cases the character of the complainant is the thing which requires to be most meticulously gone into. In this case the complainant was very ill-advised in allowing his advocate to interrupt and object to questions, and the Magistrate was ill-advised in allowing these objections. The complainant certainly did not err on the side of over-frankness.

[His Lordship concluded as follows :]

The accused in this case is pleading a defence by way of exception. The burden of proving the exception, therefore, lies upon him. The extent to which he has got to prove it is laid down in *King-Emperor* v. *U Damapala* (1). In view of the initial presumption which arises in the accused's favour as laid down in *Sayed Ally* v. *King-Emperor* (2), the burden of proving that the accused really, honestly and in good faith believed the truth of the accusation which he made, *viz.*, that the complainant instigated this attack on his restaurant, is not a heavy one and, having regard to the unsatisfactory nature of the evidence given by the complainant in the cross-examination, I think there is a definite doubt as to the guilt of the appellant.

(1) (1936) I.L.R. 14 Ran. 666. (2) 4 B.L.J. 181.

I, therefore, set aside the conviction and sentence and acquit him. The fine which has been paid will be refunded.

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