1893

BAIKANTA NATH MITTRA v. AUGHORE NATH BOSE.

property except that mentioned in the application of 27th May 1889. We make no order as to costs in this Court.

Appeal allowed in part.

T. A. P.

APPELLATE CRIMINAL.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

1893
Aug. 28.

MOHER SHEIKH AND OTHERS *v.* QUEEN-EMPRESS.*

Evidence—Statement as complainant while in custody as an accused person—Depositions in counter case—Compelling witness to answer questions—Evidence Act (I of 1872), ss. 129, 130, 131, 132—Rights of true owners against person in wrongful possession—Affray, evidence as to nature of.

If a person while in custody as an accused gives information to the police as complainant in another case, his statements as such informant cannot be used as evidence against him on his trial.

The depositions of witnesses given in a counter case may be used as evidence against them on their trial as accused persons, but such depositions could only be evidence against the persons making them: *Queen* v. *Gopal Doss* (1) and *Queen-Empress* v. *Ganu Sonba* (2) followed.

The mere subpœnaing of a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words "shall be compelled to give" in s. 132, Evidence Act, apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question. The wording of ss. 129, 130, 131, 132, and 148, Evidence Act, compared and discussed.

When a party is in possession for four or five days, though it may be in wrongful possession, another party, although claiming to be the rightful owner, is not entitled to go in force to turn him out, much less is he entitled to take armed men with him for that purpose.

In an affray specific evidence as to the acts of each fighter cannot be expected, but only general evidence as to the accused taking part in it, and persons who, as in this case, punted the boats on which the fight took place, and in whose interests the fight on the boats took place, were held to be just as blameworthy as the men who struck the blows.

* Criminal Appeal No. 626 of 1893, against the order passed by J. F. Bradbury, Esq., Sessions Judge of Pubna, dated the 11th of August 1893.

(1) I. L. R., 3 Mad., 271. (2) I. L. R., 12 Bom., 440.

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

THE facts of this case are sufficiently stated in the judgment.

Mr. *W. Jackson*, Mr. *A. Chaudhuri* and Mr. *K. N. Chaudhuri* for the appellants.

The *Officiating Deputy Legal Remembrancer* (Mr. *Leith*) for the Crown.

Mr. *Jackson*.—The Sessions Judge has improperly admitted the first information in the counter case given by one of the accused, Kailash Haldar, against all the other accused. It is not evidence even against Kailash, as that information was given after Kailash had been arrested on a charge of rioting, and he made the statement while in police custody. It is on no better footing than the statement made by an accused person to a police officer while in custody, and therefore clearly not evidence at all. Objection on both these grounds was taken by Counsel in the Lower Court but overruled. The accused have been prejudiced by the admission of this document in evidence, as the Sessions Judge has drawn inferences from it against the accused.

The Sessions Judge has also improperly admitted in evidence the depositions of Kailash and Bhagaban given by them in the counter case as evidence against all the accused. They can under no circumstances be treated as evidence against the accused other than Kailash and Bhagaban. Even against [illegible] they cannot be received as evidence. The Sessions [illegible] as in the case of *Queen* v. *Gopal Doss* (1), *Queen-Empress* [illegible] different [illegible] (2), and *Queen-Empress* v. *Ganu Sonba* (3). The Sessions Judge also relies upon two of his own cases which came up on appeal here, and he says that although the appeals were argued by learned pleaders, no objection seems to have been taken to such depositions being received in evidence. The records of those cases do not show that the point was raised, and the judgments of this Court on appeal make no mention of such a point having at any time been taken. There are no decided cases of this Court one way or the other. The majority of the Madras High Court in *Queen* v. *Gopal Doss* (1) have held that where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made, such a statement, if relevant, may be

(1) I. L. R., 3 Mad., 271. (2) I. L. R., 15 Mad., 63.
(3) I. L. R., 12 Bom., 440.

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

used against him on his trial on a criminal charge. This has been followed by the Bombay High Court in *Queen-Empress* v. *Ganu Sonba* (1), and again by the Madras Court. The governing words in the judgment of the Madras Court in *Queen* v. *Gopal Doss* (2) are "statement made voluntarily and without compulsion," and the majority of the Court say that if a witness does not desire to have his answers used against him on a subsequent criminal charge he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled. It seems absurd that an accused person should be required to go through the solemn farce of objecting to answer, knowing full well that his objection must be overruled by the Judge, who has under the Evidence Act no power to allow the objection. I adopt the judgment of Mr. Justice Muthusami Ayyar in *Queen* v. *Gopal Doss* as my argument on this point. The Bombay Court has followed the Madras case, but one of the Judges dissented from the judgment of the majority and followed Mr. Justice Muthusami Ayyar. The Bombay case was not argued at the bar. The later Madras case merely followed the ruling of the earlier Madras Full Bench. Even those cases are distinguishable. Those cases arise out of proceedings where persons may or may not have chosen to give th[illegible]oes not compel. They were under no compulsion to give their eviden[illegible]rticular q[illegible]ase Kailash and Bhagaban were called by the Crown as witnesses in the counter case of rioting. They could not refuse to give evidence.

If evidence has been improperly admitted and rejected by the Appellate Court as such, the Appellate Court cannot determine the appeal upon the remainder of the evidence. Section 167 of the Evidence Act does not sanction the rulings to the contrary in *The Queen* v. *Hurribole Chunder Ghose* (3) and other cases there referred to.

There seems to be an impression that *Ganouri Lal Dass* v. *Queen-Empress* (4) has repealed the law regarding the right of private defence. That case decides no principles.

The *Officiating Deputy Legal Remembrancer* for the Crown.—The Madras case, *Queen* v. *Gopal Doss*, lays down the law correctly.

(1) I. L. R., 12 Bom., 440.
(2) I. L. R., 3 Mad., 271.
(3) I. L. R., 1 Calc., 207.
(4) I. L. R., 16 Calc., 206.

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

Section 132 of the Evidence Act is not capable of any other construction than that given to it by the Madras Court. Compulsion in that section applies to pressure put upon the witness after he is in the box and when he asks to be excused from answering a question.

Mr. *A. Chaudhuri* replied.

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

In this case the 1st appellant, Moher Sheikh, has been convicted of murder and sentenced to transportation for life; and the other appellants have been convicted of rioting and each sentenced to two years' rigorous imprisonment.

The case has been argued at great length both on the facts and on certain points of law which are said to arise in the case.

The Lower Court has accepted in evidence three documents which were objected to at the trial by Counsel for the accused. This objection has been repeated before us.

The three documents consist of an information given to the police by the accused, Kailash Haldar, and depositions given in a counter case by the appellants, Kailash Haldar and Bhagaban Haldar.

There is no doubt that the information given by Kailash is not evidence, as it was given while he was in the custody of the police. The depositions stand on a different footing. We heard out the arguments as to admissibility, but thought it fair that we should not determine the question or look at the depositions until we had made up our minds whether the evidence apart from those depositions justified a conviction. Of course those depositions could at the highest only be evidence against the persons making them. We now proceed to consider the case apart from the information and depositions which have been considered by the Lower Court and by the assessors.

The story as told by the prosecution would, if believed, show that one of those fights or rather battles as to the possession of land which are now so common in this province, had taken place, and that, as so frequently happens, one of the combatants had met with his death. It is beyond question that there is a dispute as to the right of fishing in a *bhil* called the Ghughudoho *bhil*.

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

The rival claimants belong respectively to the parties of one Mohesh Kundu and one Haidor Jan Chowdhry.

In this *bhil* there are three *khathas*: a *khatha* is a portion of the *bhil* in which leaves and branches of trees are strewn so as to attract the fish. This part is enclosed with nets. The nets are gradually constricted and the branches taken out, so the fish are caught. There can be little doubt but that the affray, or whatever term may be most appropriate to the occurrences which have given rise to the inquiry, took place with regard to the Ghughudoho *khatha*. This *khatha* had been unquestionably fished by Kailash and Bhagaban, two of the appellants before us, and their partners through the whole of 1299, and at least until the Friday before the occurrence, *i.e.*, the 30th Bysakh or the 12th May last. The other two *khathas* were fished by the other party. The occurrence took place on the 16th May.

The question of possession only becomes most material when one has to see whether the acts, if any, of the accused persons are justified by a right of private defence. To some extent perhaps it may be of assistance in determining the question as to what was actually done.

One of the most important questions argued in this case is whether Harmohan Haldar, who met his death in this encounter, died from a spear wound, or whether he died from drowning. The defence suggests now that Harmohan died from drowning, and that the wound was inflicted on his body after death. There can be no doubt that this wound was inflicted before Harmohan's body was brought to land. The learned Judge in the Court below has repudiated the expert testimony of the Civil Surgeon. It may perhaps have been to some extent unfortunate that this gentleman had had so little experience; but looking at his evidence and giving effect to every portion of it, looking also at the evidence of the Hospital Assistant, who is by no means wanting in experience, and at the other evidence in the case, we think it is clear that Harmohan met his death by the spear wound and not by drowning. Looking at the evidence of the Civil Surgeon in the way most favourable to the accused, it merely shows that the appearances were consistent with death either from the spear wound or from drowning. Unquestionably the spear wound was

severe enough to cause death, and no man with such a wound could have survived. It does sometimes happen that wounds of this kind are made after death for the purpose of incriminating innocent persons, but there is no reason to suppose that that is the case here.

We cannot guess when and how the man was drowned. He was one of the complainant's party. If he had been apparently drowned, he would probably have been brought ashore, and not struck in a vital part with a spear. The time within which all this took place was too short for anything of the kind to be done. The complainant's party were too much occupied in capturing their adversaries to concoct a case of this kind. We find it impossible even to guess how, when, or where the man was drowned. The case as to drowning seems to have been made up for the purposes of the defence. It is so vague and baseless that we decline to rely on it, and we hold that Harmohan died from the spear wound.

The real question of fact in this case is what was done by the appellants. We have only one story before us. We must decide whether it is credible, or whether there are any suspicious circumstances attaching to it.

The evidence has been very carefully discussed before us, but we think it is in main true.

We think it clear that the comp[illegible]'s party were in possession of the *khatha* from the Friday to [illegible]day. The evidence as to this is entirely one-sided, and we [illegible] that cross-examination of the witnesses suggests any other case. It is equally clear that the party of the accused went to this *khatha* when the complainant's party were fishing. These two parties had long been at variance, and it cannot be that the complainant's party being in possession, the accused went there for any other purpose than to turn them out. That they were there then is shown by the fact of their arrest. There was no question of a right of private defence in this case. The other side were in possession though it may have been a wrongful possession. The appellants were not entitled to go in force to turn them out. Much less were they entitled to take a spearman with them for the purpose. It was argued very strenuously before us that, except so far as Moher was concerned, there

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

was no evidence to show that the appellants took any part in the riot.

Bhagaban and Kailash, according to the evidence, punted one of the boats. There is general evidence as to the accused taking part in this riot. One does not expect in an affray of this kind to find specific evidence as to the acts of each fighter. The men who punted are just as blameworthy as the men who struck the blows, and it must be remembered that Bhagaban and Kailash were practically the leaders of the party.

The action of the others was on their behalf. There is some evidence that Moshim was captured on the land. Aditya Chunder Bagchi says:—"Moshim I saw on the bank; he was brought from the north, but I *forget* by whom. I *forget if* any one else was seized on land."

But, on the other hand, there is abundant evidence that Moshim was captured on the *bhil*, and this is believed by the Judge and the assessors. We do not think that upon the evidence Moshim's case differs from that of the others. The assessors are not satisfied that Moher was responsible for the death of Harmohan. There seems to be a mass of evidence upon the subject, which was really the most important incident in the fight, and we cannot see the slightest reason for disbelieving the story that Moher speared Harmohan. Without looking at the depositions and the information admitted by the Judge, we think that the evidence on the record justified the conviction, and we dismiss the appeal of all the prisoners.

Although in the view which we take of the evidence it is not absolutely necessary for us to determine the question of the admissibility of the depositions, we think it desirable that we should express the opinion which we have formed after having had the matter fully argued on both sides.

The documents were admitted by the Judge of the Court below, and so it would have been difficult for us to have heard this case without having had the question argued. Besides, we do not wish to leave the Judge in uncertainty on this question. It is one which must necessarily arise in many cases before him, and appears to have recently arisen in other cases which he has tried. Pubna, the district from which this appeal comes, is prolific

of riots and affrays, which invariably result in criminal charges and counter-charges, and in such cases this question may often arise. We therefore desire to express the opinion which we have formed, namely, that the Judge was right in admitting these depositions as evidence against the persons making them. Kailash and Bhagaban were called and examined as witnesses in the counter case arising out of this same riot. It does not appear that they objected to answer any of the questions put to them.

The question depends upon the construction of section 132 of the Evidence Act, which is 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 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."

One of the most elementary principles of the construction of statutes is that, if possible, effect should be given to every word. The whole question resolves itself into the meaning which must be given to the words "which a witness shall be compelled to give." The Counsel for the defence argues that those words are either surplusage or apply to every case where the witness is subpœnaed to give evidence or gives evidence otherwise than voluntarily. The Counsel for the prosecution contends that it applies to pressure put upon the witness after he is in the box and when he asks to be excused from answering a question.

The same question was fully considered by a Full Bench of the Madras High Court in a case of the *Queen* v. *Gopal Doss* (1). There three Judges held that it was admissible and two that it was not.

In a Bombay case, which was, however, not argued, two Judges held that it was admissible, and one that it was not; *Queen-Empress* v. *Ganu Sonba* (2).

(1) I. L. R., 3 Mad., 21 (2) I. L. R., 12 Bom., 440.

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

We think we are bound, if we can, to give some meaning to the words referred to, and not to treat them as surplusage. The mere subpœnaing of a witness or ordering him to go into the witness-box does not, we think, compel him to give any particular answer or to answer any particular question. We are entitled to look at other sections of the Evidence Act to see what "compelling a witness to give an answer" means.

In section 148 it is clear that the same words can only bear the meaning which the Counsel for the prosecution seeks to put upon section 132. In section 129 "compelled" cannot mean "subpœnaed," and it uses the words "compelled to disclose" with reference to the case when a man has offered himself as a witness, and must refer to some force put upon the witness after he is in the witness-box. The provisions of sections 130 and 131 are also clear on this point. There is nothing to prevent a person being subpœnaed to produce title deeds or other documents which he would be entitled to refuse to produce. It is for him to claim his privilege when asked in Court to produce them.

In no view do we think can we give any effect to the word "compelled" in section 132 without adopting the argument of the prosecution. Even a volunteering witness is under the obligation of law to answer legal questions, and in one sense every answer can be said to be an answer which a witness is compelled to give, but the words cannot have been used in this sense in the section; the idea would have been expressed as well by the word "answer."

The most potent argument against the construction which we are placing upon this section was pressed upon us with great force by learned Counsel for the accused, and is best expressed in the words of Mr. Justice Muthusami Ayyar at p. 284, I. L. R., 3 Madras—"It seems to me incongruous that the Legislature should have directed the Judge *never* to excuse a witness from answering a criminative question relevant to the matter in issue, and at the same time commanded the witness to ask the Judge to excuse him from answering such a question."

But we do not think that, as has been argued, the Judge has nothing to do in the matter at all, and that it is a mere empty farce for the witness to object to answer, for the Judge has to decide whether the question is relevant to the matter in issue, and

upon that determination partly depends the obligation to answer. We prefer the decisions of the majority in the two High Courts, and hold that the depositions were admissible.

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

Mr. Jackson for the accused wishes us to note that he argued that under section 167 of the Indian Evidence Act we have no power to deal with the case on the evidence apart from the depositions, but we are not prepared to accept this argument.

Appeal dismissed.

J. V. W.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

RAM CHAND CHATTERJEE (PETITIONER) *v.* HANIF SHEIKH (OPPOSITE PARTY).*

1893 *Nov.* 17.

Witness—Examination of witnesses—Cross-examination—Right of co-accused to cross-examine witness called by another co-accused for defence where their cases are adverse—Evidence Act (I of 1872), s. 137.

One accused person may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first.

The petitioner Ram Chand Chatterjee was employed as a mohurir or Head Assistant in the Moheshpore Silk Factory belonging to Messrs. Lewis, Payne and Company, and he was charged under s. 381 of the Penal Code with the theft from the godowns of the factory of a quantity of *chassams* (cocoons), which he was observed by the complainant Hanif Sheikh, a sirdar on the factory, to deliver to one Natoo Behari Chatterjee, who was at the same time charged under s. 411 of the Penal Code with dishonestly receiving the stolen property, knowing it to

* Criminal Revision, No. 635 of 1893, against the order passed by R. H. Anderson, Esq., Officiating Sessions Judge of Murshidabad, dated the 13th September 1893, affirming the order of Babu Nogendro Nath Pal Chowdhry, Deputy Magistrate of Berhampore, dated the 26th of August 1893.