

(1893) 08 CAL CK 0019
In the Calcutta High Court

Moher Sheikh and Others

APPELLANT

Vs

Queen-Empress

RESPONDENT

Date of Decision : 28-08-1893

Acts Referred:

Evidence Act, 1872 — Section 129, 130, 131, 132

Citation : (1894) ILR (Cal) 392

Hon'ble Judges : Trevelyan, J; Rampini, J

Bench : Division Bench

Judgement

Trevelyan and Rampini, JJ.—In this case the first 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.

2. 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.

3. 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.

4. 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.

5. 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 upon a different footing. We heard out the arguments as to their 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 persona 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.

6. 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.

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

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

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

14. We think it clear that the complainant's party were in possession of the khatha from the Friday to the Tuesday. The evidence as to this is entirely one-sided, and we cannot find 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 was no evidence to show that the appellants took any part in the riot.

15. 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.

16. 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."

17. 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 Hermohan. 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 smallest reason for disbelieving the story that Moher speared Harmohan. Without looking at the depositions and the information admitted by the Judges, we think that the evidence on the record justified the conviction, and we dismiss the appeal of all the prisoners.

18. 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.

19. 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.

20. 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.

21. 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 subpoenaed 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 question.

22. The same question was fully considered by a Full Bench of the Madras High

Court in a case of the Queen v. Gopal Doss ILR Mad. 271. There three Judges held that it was admissible and two that it was not.

23. 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 ILR 12 Bom. 440.

24. 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 subpoenaing 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.

25. 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 1291 "compelled" cannot mean "subpoenaed," 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 1312 are also clear on this point. There is nothing to prevent a person being subpoenaed 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.

26. 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."

27. 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 ILR Mad 284--" 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."

28. 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.

29. Mr. Jackson for the accused wishes us to note that he argued that u/s 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.

1 Confidential communication with legal advisers.

[Section 129: No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.]

2 Production of documents which another person having possession would be entitled to refuse to produce.

[Section 131: No one shall be compelled to produce documents in his possession which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.]