# Chotkan Vs State and Others

**Court:** Allahabad High Court

**Date of Decision:** March 1, 1960

**Acts Referred:** Evidence Act, 1872 â€" Section 132
Penal Code, 1860 (IPC) â€" Section 179, 499, 500

**Citation:** AIR 1960 All 606 : (1960) 30 AWR 543 : (1960) CriLJ 1285

**Hon'ble Judges:** M.C. Desai, J; J.N. Takru, J

**Bench:** Division Bench

**Advocate:** Syed Sadiq Ali, for the Appellant; R.B. Misra and Kishan Pal Singh, for the Respondent

**Final Decision:** Dismissed

## Judgement

Desai, J.
This is an appeal by special leave u/s 417(3) Cr. P. C., by a complainant from a judgment of an Additional Sessions Judge,

Gorakhpur, dismissing, on appeal, his complaint against the respondents for the offence of Section 500, I. P. C., and acquitting them. The material

facts are as follows:

Najmun Nisa, wife of Budhu respondent, obtained a decree for divorce from a Civil Court and Budhu preferred an appeal. During the pendency

of the appeal she lived with her parents in Gorakhpur. Chotkan appellant knew her parents and used to help them by lending money. On 8-4-1958

Budhu respondent filed a complaint u/s 498, I. P. C., against Chotkan and others during the pendency of his appeal against the divorce decree. In

the complaint he alleged that Najmun Nisa was enticed away by the appellant under her parent''s and brother''s abetment and was detaining her in

order to commit adultery with her.

An inquiry u/s 202, Cr. P. C., was held by a first class Magistrate, Sri Sajid AH, and Budhu examined himself and Gobri and Ramzan

respondents. Budhu in his deposition deposed that Najmun Nisa''s parents and brother made her over to the appellant for illicit intercourse, while

Gobri and Ramzan deposed that though she was unwilling to go with the appellant she was forced to do so by her parents and brother and that the

appellant caught her hand and seated her in a rickshaw and took her away. The Magistrate dismissed the complaint. Thereafter the complaint

giving rise to this appeal was filed by the appellant charging the respondents with committing the offence of Section 500, I. P. C., by making

statements defamatory to him in their depositions in the inquiry u/s 202, Cr. P. C.

2. The appellant examined himself, Rahim, brother of Najmun Nisa, and other witnesses who deposed that the allegations made by the

respondents against the appellant in their depositions were false and harmed the reputation of the appellant. The respondents, who pleaded not

guilty, admitted having made the statements but denied that they committed the offence of Section 500, I. P. C., by making them and claimed the

privilege u/s 132, Evidence Act. The trial Court convicted the respondents holding that the statements made by the respondents in their depositions

were defamatory and did not come within any of the exceptions to Section 499, I. P. C., and that they were not entitled to the privilege u/s 132,

Evidence Act.

3. On appeal the learned Sessions Judge acquitted the respondents on the sole ground that a person who makes a defamatory statement as a

witness in answer to a relevant question cannot be prosecuted u/s 500, I. P. C., because it would be against public policy to allow him to be

prosecuted.

4. ""Defamation"" is defined in Section 499, I. P. C., to mean making or publishing, by words, any imputation concerning any person intending to

harm or knowing or having reason to believe that it would harm his reputation. Any person who defames another is punishable u/s 500, I. P. C.

Certain imputations are excluded from the definition of defamation and they are all enumerated in the 10 exceptions to Section 499. The only

exception relevant in the present case is No. 8 -- it is not defamation to prefer in good faith an accusation against any person to any of those who

have lawful authority over him with respect to the subject-matter of the accusation. The Magistrate. Sri Sajid Ali, had lawful authority over the

appellant (and others) with respect to his enticing away Najmun Nisa for illicit intercourse, because he had jurisdiction to punish him for doing so.

The respondents are proved to have made accusations against him to the Magistrate.

It is not the case for the prosecution that they intended to harm the appellant''s reputation and in any case there is nothing to suggest that they had

any such intention; the case, however, is that they knew or had reason to believe that the accusations would harm the appellant''s reputation. There

is direct evidence that they did harm his reputation and the accusations were of such a nature as to make it evident that the respondents knew or

have had reason to believe that they would harm his reputation.

The accusations, therefore, amounted to defamation unless they came within the eighth exception. The eighth exception would exclude them from

the definition if, and only if, they were preferred in good faith. The learned Sessions Judge has not gone into the question of the respondent''s good

faith at all and has not held that the accusations did not amount to defamation because of the eighth exception. On the other hand he has assumed

that they amount to defamation punishable u/s 500 but acquitted the respondents on the ground of public policy or privilege.

He has not referred to Section 132, Evidence Act, but presumably has given them the benefit of its provision. There is no law, other than that

contained in Section 132, on which they could have relied for being acquitted in spite of their accusations amounting to defamation. Section 132,

so far as it is material in the present case, reads as follows:

A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any ..... criminal proceeding. upon

ground that the answer to such question .... will expose, or tend directly or indirectly to expose, such witness to a penalty ... of any kind.

Provided that no such answer, which a witness shall be compelled to give shall subject him to any .....prosecution, or be proved against him in any

criminal proceeding, except a prosecution for giving false evidence by such answer.

The proviso means that if the respondents were compelled to give answers containing the accusations against the appellant, which exposed them to

the penalty prescribed in Section 500, they could not be prosecuted for the offence of Section 500 and the accusations contained in their answers

could not be proved at all even if they were prosecuted for the offence of Section 500.

It is necessary here to note the distinction between the eighth exception to Section 499 and the provision to Section 132; the former excludes a

statement from the definition of defamation altogether, whereas the latter excludes prosecution for defamation and bars proof of the accusation in a

trial for defamation. If an accusation does not amount to defamation at all. for instance an accusation covered by the eighth exception, the person

making it is not guilty at all & there is no question of his being prosecuted for defamation and of the accusation being proved against him in a trial

for defamation. Since he is not guilty of defamation, even if he is prosecuted and even if the accusation is allowed to be proved against him at the

trial, he will be acquitted. The proviso assumes that the accusation contained in the answer is punishable as defamation u/s 500, but protects the

witness from prosecution and from the accusation being proved in the prosecution. If the accusation is not allowed to be proved at all, the

prosecution is doomed to fail. Consequently in order to consider whether the proviso is applicable or not, it is irrelevant to consider whether the

answer contains defamation punishable u/s 500 or not.

5. Since the learned Sessions Judge has given the respondents the benefit of the proviso, I proceed on the assumption that the accusations

contained in the answers given by the respondents to the Magistrate were not made in good faith, and were punishable as defamation u/s 500.

6. Whether the respondents are entitled to the benefit of the proviso depends, in this case, wholly upon whether they can be said to have been

compelled to give the answers containing the accusations or not. As far as the facts are concerned, all that appears to have happened in the Court

of the Magistrate, Sri Sajid Ali, is that the respondents were sworn as witnesses for the complainant and gave the answers in examination-in-chief

without any protest or hesitation and without begging to be excused from answering the questions put to them.

On the questions being put to them they straightway answered them. As far as Budhu respondent is concerned the questions were put to him by his

own counsel, presumably on the instructions given by himself. As regards the other respondents, there was no privity between them and the

counsel putting questions to them in the examination in chief; still they answered the questions without any pressure, insistence or goading from the

Magistrate. They appear to have gone to the Court prepared to answer the questions and answered them unhesitatingly. In the circumstances I

hold that they cannot be said to have been compelled to give the answers and are not entitled to the benefit of the proviso.

7. 1 am unable to accept the view that the compulsion referred to in the proviso includes the compulsion by the general or common law of the land

and that there need not be special compulsion by the presiding officer of the Court, In the first place there is no law which affirmatively compels a

witness to answer questions put to him in the witness-box. A person who being legally bound to state the truth on any subject to a presiding officer

of a Court refuses to answer any question demanded of him is punishable u/s 179, I. P. C., and he may be summarily tried and punished u/s 480,

Cr. P. C

The fear of punishment u/s 179 does compel a witness to answer questions, but this is a compulsion which acts against every witness and is

inherent in the very idea of a person''s being a witness. There cannot be a witness who is not so compelled; when still Section 132 refers to a

witness being compelled to answer a certain question, it evidently refers to some other compulsion, e. g. compulsion with special reference to the

question.

7a. Secondly there is a duty (called ""testimonial duty,"" by Wigmore) in every man to give evidence arising out of the right of the public to every

man"s evidence; this duty has been recognised for more than three centuries. ""A person, by virtue of his very existence in civilized society, owes a

duty to the community to disclose for the purposes of justice all that is in his control which can serve the ascertainment of the truth."" See Wigmore

on Evidence, 3rd edition, paragraphs 2192 and 2194. It was pointed out in Blackmer v. United States, (1931) 284 US 421: 76 LEd 375 that it is

the duty of a citizen to support the administration of justice by giving evidence.

Thus giving evidence is a matter of duty and not of compulsion and the duty cannot be treated as a compulsion within the meaning of the proviso.

Compulsion may have to be resorted to for forcing a person to perform his duty, but the duty itself is not compulsion. Further, our law regarding

witnesses and their duties and liabilities is all codified, and compulsion must be. whether directly or indirectly, by a statutory provision.

8. The testimonial duty falls into two parts, (1) the objective part, viz. to attend when summoned and to make answer and (2) the subjective part,

viz. to let his answers correctly reveal his actual mental operations, i. e. his knowledge or belief. The objective duty is performed by the witness"s

coming and answering and the subjective duty, by giving answers that are not false. A witness is excused from performing the objective and

subjective parts in certain circumstances.

The grounds for exemption from the testimonial duty are entirely extrinsic to the purpose of ascertaining the facts under investigation in the trial.

They are Based on a policy of dispensing with the compulsion of attendance and disclosure wherever it is not necessary, or is more

disadvantageous in respect to other interests of the community"" (ibid, para 2196). All privileges of exemption from the duty are exceptional and

there must be good reason plainly shown for their existence (ibid, para 2192). Consequently ""the claim of privilege can be made solely by the

witness himself; the privilege is purely personal"" (ibid, paragraph 2196). It is for him to elect whether to fulfill his duty without objection or to

exercise the privilege which the law concedes to him. We are however, not concerned with any privilege; Section 132, far from conferring any

privilege upon a witness, denies the existence of a certain privilege. The respondents did not claim any privilege when they were asked the

question; they answered them readily and now the question is whether they can ba punished for making defamatory statements in reply, a question

different from that of a privilege.

9. The occasion for not excusing a witness from answering a question, the answer to which will expose him to a penalty, can arise only when a

witness begs to be excused from answering it; if he answers it the question of his being excused from answering it simply cannot arise. The main

provision lays down that if a witness begs to be excused from answering a question on the particular ground, his prayer shall be rejected. The

proviso comes into operation after the prayer of the witness to be excused is rejected and he is made to answer the question; that is the occasion

when he can be said to be compelled to answer it. The compulsion contemplated by the proviso must arise out of the refusal of his prayer to be

excused. The proviso states what would be the consequence of the witness''s not being excused; if he answers the question even though it will

expose him to a penalty without any protest or hesitation or prior refusal to answer it, he is not compelled and the consequence laid down in the

provision will not arise. How a witness''s prayer to be excused from answering a question is rejected or how he is compelled to answer it is an

altogether different question; he may be compelled in more than one way but he must be compelled by the presiding officer by or after rejecting his

prayer to be excused. He may make the prayer to be excused expressly or impliedly, he may refuse to answer the question or he may beg to be

excused from answering it or he may remain silent or he may protest against being placed in an incriminating situation; but if he is ordered by the

presiding officer to answer the question or told that he is bound to answer or that his prayer is rejected, it amounts to his being compelled to

answer it.

10. The words used in the proviso are ""be compelled"" and not ""be bound by law."" This means that the compulsion emanates from the presiding

officer and not by operation of any law. The word ""compelled"" is inappropriate with reference to a witness who answers a question because he is

bound by law (e. g. the law contained in Section 179, I. P. C.) to answer it. Further the word ""shall"" shows that the compulsion is to be used in the

particular case ( i.e. by the presiding officer) and is not an existing compulsion arising out of law.

In Elavarthi Peddabba Reddi Vs. Iyyala Varada Reddi, Devadoss J. said at p. 239 that ""compelled"" means forcing or insisting upon a witness to

answer the question. Later he observed that ""where the Court makes a witness understand that he has no option but to answer, the proviso would

apply whether the witness asks for protection or not. but to hold that the ordinary obligation of a witness is to answer all questions is to make the

proviso meaningless."" If no force or insistence by the presiding officer were required at all, the proviso would have used the word ""gives"" instead of

the words ""shall be compelled to give,"" as was done in the American Statute. 18 USC 3486, to which reference will be made later.

11. Edge, C. J., said in Queen-Empress v. Moss ILR All 88 : """'Compelled'' in Section 132 .... 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."" He pointed out that in interpreting the word we must not overlook the words ""shall not be excused

occurring earlier. In Kashi Ram Vs. Emperor, , Dalai J. maintained the conviction u/s 500 of a plaintiff in a suit, who as a witness examined by his

own counsel made an answer defamatory to another person.

The answer given by him was held to be a voluntary answer notwithstanding the testimonial duty. This case and Emperor Vs. Banarsi, show that

whether a witness is compelled or not is a question of fact depending upon the circumstances and not of law. A Full Bench of the Madras High

Court considered the proviso in Queen v. Copal Doss ILR Mad 271.

Turner C. J. pointed out that the words ""shall be compelled"" are the correlative of the words ""shall be excused"" occurring in the main provision

and presuppose the testimonial duty and ""suggest that the witness has objected to the question, and has sought and been refused excuse and even

constrained to answer"" (276). At p. 277 the learned Chief Justice pointed out the distinction between ""be compelled"" and ""is bound."" A Full Bench

of the Bombay High Court in Bai Shanta Vs. Umrao Amir Malek, held that a witness is not entitled to the benefit of the proviso if he did not object

to answering the question.

Monir in his Law of Evidence, 4th edition, p. 830, supports this view. In R. v. Boyes (1861) B 1. and Section 311: 121 ER 730 the Court had to

consider a witness''s privilege of silence, which is referred to in Section 132. Cockburn C. J. observed that it is for the Court to decide whether

there is a reasonable ground to apprehend danger to the witness from his being ""compelled to answer"" and that the presiding officer is ""bound to

insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril.

These observations show that the witness must claim the privilege of silence and that compulsion arises when the privilege is denied and the

presiding officer insists upon his answering the question. In AIR 1933 370 (Oudh) and AIR 1934 386 (Oudh) a witness was held to be not entitled

to the benefit of the proviso if he had not objected to the question.

12. This view is supported by Rogers v. United States (1950) 340 US 367 : 95 LEd 344, where Vinson C. J. laid down: ""If the petitioner desired

the protection of the privilege against self-incrimination, she was required to claim it. The privilege "is deemed waived unless invoked." ..... the

privilege against self-incrimination "is solely for the benefit of the witness" ""I do not think there is anything contrary to this in Adams v. Maryland

(1957) 347 US 179 : 98 LEd 608 where Black J. said at page 181:

No language of the Act requires such a claim in order for a witness to feel secure that his testimony will not be used to convict him or crime.

Indeed, a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection.

The Fifth Amendment takes care of that without a Statute.

He was considering the provisions of a statute which was not worded in the same way as Section 132. Evidence Act, is. That statute is 18 U. S. C

3486, laying down that no testimony given by a witness ""shall be used as evidence in any criminal proceeding against him in any Court."" The words

shall not be excused"" and the words ""shall be compelled to give"" are missing from it. Black J. pointed out that the case of a person who voluntarily

appears and makes a statement with permission of the Court is different and that in the case before him the testimony which was sought to be used

against the witness had been brought out by repeated questions. His case was clearly within the provision in the statute.

13. The contrary view has been expressed by this Court in some cases. In Ganga Sahai Vs. Emperor through Tarif, Walsh J. observed that

ordering a witness to answer the question which he begs to be excused from answering, is not the only instance of compelling a witness and that he

may be compelled ""by the situation in which he finds himself and the force of circumstances, and indeed by the rule of ordinary decency and the

respect which he owes to the Court"" (259). With great respect it is difficult to accept that a witness, who refrains from praying to be excused

because being well aware of the law he knows that the prayer would be futile and answers the question, is ""compelled,"" to answer. In Chatur Singh

and Others Vs. Emperor, Tudball J. said that a witness can be under the direct compulsion of the law; with great respect I disagree.

14. It has been held in some cases that when a witness answers a relevant question put to him it is the case of his being ""compelled"" to answer it

and that if he answers an irrelevant question without protest he cannot be said to have been compelled. Tudball J. in the case of Chatur Singh and

Others Vs. Emperor, said at pp. 94-95 (of ILR All): (at p. 363 of AIR):

The accused persons in the present case were compelled within the meaning of the law to answer the questions put to them when they entered the

witness-box. A voluntary statement by a witness may stand on a totally different footing to an answer given by him as a witness on oath to a

question put to him either by the Court or counsel on either side, specially when the question is on a point which is relevant to the case.

In the case of Kashi Ram Vs. Emperor, Dalai J. gave the irrelevancy of the question as one ground for holding that the witness was not

compelled"" when he answered it. The learned Judge did not explain how the compulsion on a witness to answer a question arises out of its being a

relevant question. A witness who answers an irrelevant question may not be said to have been compelled to answer it but the converse is not

necessarily true.

I have said earlier that the privilege of a witness is a matter extrinsic to the merits of the case and has nothing to do with the relevancy of the

question put to him. Whether a question is relevant or not is a matter between the parties and the Court; the witness is not concerned with the

question. Once he is placed in the witness-box he is bound to answer all questions put to him; it is not for him to judge whether any question is

relevant or not.

""The witness has no privilege to refuse to disclose matters irrelevant to the issue in hand;"" the reasons given by Wigmore in paragraph 2210 are

that ""irrelevancy relates to the scope of investigation and, therefore, is a concern of the parties alone.

there is in the mere circumstance of irrelevancy nothing which creates for the witness a detriment or inconvenience such as should suffice to

override his general duty to disclose what the Court requires and the recognition of such a privilege would add innumerable opportunities to make

a claim of privilege and complicate a trial.

It will not do to permit a witness to judge what questions he shall answer and what not; unless the questions are such as by law he is not bound to

answer, he must answer all."" ""So far as the witness himself is concerned, he may lawfully be required to answer any questions which it is not his

personal privilege to refuse to answer..... All evidence which is not of this character the witness may lawfully be compelled to give, even though it

may not prove to be relevant and competent in the particular cause in which it is sought to be obtained. The objection to the relevancy or

competency of evidence is for the parties litigant to make, and not for the witness.

See Wigmore, paragraph 2210, at p. 150.

"""The Right of objection and exclusion belongs to the parties, not to the witness;

per Roberts J. in Bevan v. Krieger (1932) 289 U. S. 459 : 77 LEd 1316.

If the presiding officer permits a question the witness is bound to answer it regardless of its relevancy; his judgment as to its relevancy does not

supersede that of the presiding officer. Since he is bound to answer all questions that are permitted to be put by the presiding officer, there is equal

compulsion or obligation when he answers all and it cannot be said that there is compulsion in respect of relevant questions and absence of

compulsion or voluntariness in respect of irrelevant questions.

The test of relevancy that is applied by some courts is, I say with respect, not the correct test. The test was rejected by Walsh J. in the case of

Ganga Sahai Vs. Emperor through Tarif, ; he held that the witness had been compelled even though the question was irrelevant, (the finding of

compulsion was given, as he himself said, on exceptional circumstances), A volunteered statement, that is a statement made by a witness not in

direct answer to a question put to him, is not a statement which he can be said to have been compelled to make; it does not follow, however, that

every other statement stands on a different footing.

Even though a witness makes a statement in direct answer to a question it can be said that he is not compelled to make it. In Seaman v. Nether-

clift (1875) 1 C. P. D. 540, even a volunteered statement was held to be privileged and to be immune from being the subject of prosecution for

defamation. The decision was confirmed in Seaman v. Netherclift (1876) 2 C.P.D. 53, where it was observed that the volunteered statement does

not altogether dehors the character of the witness and, therefore, not within the privilege. This means that whether a witness is protected against

prosecution or not does not depend upon whether he made the statement as a volunteer or in direct answer to a question put to him.

15. There is no justification for saying that a witness is compelled to make a statement merely because he places himself in the witness-box. It a

witness voluntarily enters the witness-box in order to make a statement, it would be contrary to reason to say that he is still compelled to make it.

He might be a party itself or he might have induced a party to examine him as his witness or he might have instructed the counsel to examine him on

certain matters; I do not know how still he can be said to have been compelled to give the answers.

16. There is no question of public policy here; we are governed by statutory law. Public policy is a matter for the legislature and is relevant in a

Court only when discretion is involved or when 3 question of a contract being void on account of being against the public policy is involved.

Whatever public policy is involved behind permitting or not permitting a witness to be prosecuted for giving a defamatory answer as a witness is

contained in the eighth exception to Section 499 and in Section 132. Public policy certainly does not require that a witness should be free to make

an unwarranted defamatory statement in respect to another person, a witness must be free to speak the truth, however defamatory it may be to

another person, but cannot claim the same freedom in respect of an untrue or mala fide statement. Still Section 132 gives him some protection; it is

more than he deserves.

If he desires to make an untrue or mala fide defamatory statement in respect to another person, he should first pray to be excused from answering

the question and thus put himself in the position of being compelled to answer it. The learned Sessions Judge instead of considering the English law

or public policy should have realised that the only questions before him were, (1) whether the statements made by the respondents amounted to

defamation punishable u/s 500 and (2) whether they were exempt from being prosecuted and the statements were exempt from being proved in

evidence against them, under the proviso to Section 132. ] respectfully agree with Aikman J. when he said in Emperor v. Ganga Prasad ILR All

685:

A large number of Judges, following the law as it exists in England, have held that witnesses cannot be prosecuted for defamatory statements

made by them in giving evidence. In some cases the language used would indicate that in the opinion of the Judges, the immunity of a witness is

absolute; in other cases it has been held that the statement of a witness are privileged only if relevant to the issue under inquiry. In many of these

cases the learned Judges have put forward in support of their views considerations of public policy as affecting the public and the administration of

justice. Such considerations, it seems to me, might well be adduced as arguments to induce the Legislature to mend the law, but when the law of

offences has been codified as it has in this country, they are in my judgment entirely out of place in construing the language of the Act.

Reference may also be made to Dinshaw Edalji v. Jehangir Cowasji. ILR 47 Bom 15 : (AIR 1922 Bom 381).

17. We are concerned in the case with criminal liability for defamation and not with civil liability. It is, therefore, unnecessary to consider Royal

Acquarium and Summer and Winter Society Ltd. v. Parkinsop (1892) 1 QB 431 and Chunni Lal Vs. Narsingh Das,

18. I hold that the respondents were not en titled to the protection of the proviso and they can be prosecuted for defamation and the accusations

made by them in their depositions can be proved against them. Their acquittal is illegal and is set aside. Since the learned Sessions Judge has not

gone into the question whether they acted bona fide in making the accusations and consequently are entitled to the benefit of the eighth exception,

the matter is remanded to him for further hearing. He shall rehear the appeal and dispose of it in the light of what I have said above.