AIR 1926 Bom 144

Bombay High Court

Case No: None

Emperor		APPELLANT
	Vs	
Kazi Dawood Kazi		RESPONDENT

Date of Decision: July 18, 1925

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 342
- Evidence Act, 1872 - Section 132

Citation: AIR 1926 Bom 144

Hon'ble Judges: Taraporewala, J

Bench: Division Bench

Judgement

Taraporewala, J.
Mr. Gupte tenders the statement on oath of the accused Kazi Dawood Kazi made before the witness, Mr. B.N. Athavle, as Coroner, at the inquest held by him on the body of Rahimatbi, wife of the accused.

2. Mr. Velinker for the accused objected to the statement being admitted in evidence on the ground that the proceedings before the Coroner were not criminal proceedings within the meaning of Section 132 of the Indian Evidence Act and that Section 132 therefore did not apply, and that the general rule in England, namely, that the witness need not answer any question, the tendency of which is to expose the witness to any criminal charge, penalty or forfeiture, should be applied, and that the answers of the witness to questions by the Coroner the tendency of which was to expose the witness to the charge of abetment of the suicide of his wife should not be allowed to be used in this case.

3. In several modern statutes in England a witness is compelled to answer even questions the tendency of which is to expose a witness to a criminal charge, penalty or forfeiture, but provision is made in all those statutes for indemnifying the witness from the result of giving such answers. Mr. Velinker has tried to take this matter out of the

provisions of Section 132 of the Indian Evidence Act because he feels that, so far as this Court is concerned, it is bound by the judgment of the appeal Court in Queen-Empress v. Ganu Sonba [1888] 12 Bom. 440 where Mr. Bayley (Acting Chief Justice) and Mr. Justice Parsons held (Mr. Justice Birdwood dissenting) that Section 132 makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only, and that protection is afforded only to answers which the witness had objected to give or which he had asked to be, excused from giving, and which he had been compelled by the Court to give.

4. In his deposition before the Coroner, which is tendered in evidence in this case, the accused did not object to give any of the answers and did not ask to be excused from giving any of the answers which he has given. On the authority of Queen-Empress v. Ganu Sonba [1888] 12 Bom. 440 therefore, the accused would not be entitled to protection in this case u/s 132 of the Indian Evidence Act.

5. Although the decision in Queen-Empress v. Ganu Sonba [1888] 12 Bom. 440 is binding on me, I must state that, so far as my own opinion goes, I agree with the dissenting judgment of Mr. Justice Birdwood and with the reasoning given by him in his judgment. In this country it is all the more essential for the protection of illiterate witnesses that, although in the interest of justice they should be compelled to answer all questions, even when they have a tendency to incriminate the witness so far as such questions are relevant to the matters in issue in the proceeding in which the witness is examined, it is at the same time just and necessary that the witness should be protected from the consequences of giving such answers. Mr. Justice Parsons and Mr. Justice Bayley took a narrower view, following the authority of the judgment of three Judges of the Full Bench as against the remaining two dissenting in Queen v. Gopal Doss [1881] 3 Mad. 271 . They lay stress on the words used in the proviso "be compelled to" and say that if protection was to be allowed in every case in which a witness gives an answer, those words would be quite superfluous. The said construction of Section 132 was followed by the Allahabad High Court till 1920 when Mr. Justice Tudball held in Emperor v. Ghatur Singh [1920] 43 All. 92 that although a voluntary statement made by a witness might stand on a different footing, an answer given by a witness in a criminal case on oath to a question put to him either by the Court or by counsel on either side, especially when the question was on a point which was relevant to the case, was within the protection afforded by Section 132 of the Indian Evidence Act, 1872, whether or not the witness had objected to the question asked him. Mr. Justice Tudball observes in his judgment (p. 95) : "It would be too much to ask of an ordinary layman that he should know all the terms of Section 132 of the Indian Evidence Act and that he should be prepared to protest against every question put to him in order to protect himself under that section. I think, if a commonsense meaning be given to the word "compelled" in Section 132, it is clear that in the present case these five persons were compelled to answer. They were under the direct compulsion of the law and of the Court, and in my opinion they were protected by

that section."

6. In a later case in Allahabad, Emperor v. Banarsi AIR 1924 All. 381 Mr. Justice Walsh and Mr. Justice Eyves held that whether or not a witness was compelled within the meaning of Section 132 of the Indian Evidence Act, 1872, to answer any particular question put to him while in the witness box was in each case a question of fact, although it might be said that in the case of an ordinary layman unacquainted with the technical terms of this section, he was compelled to answer on oath questions put either by the Court or by counsel, especially when they were relevant to the case. They uphold Mr. Justice Tudball''s view.

7. In my opinion, the statement of the accused which is tendered to the Court, is inadmissible on another ground, even if it is held to come within Section 132 of the Indian Evidence Act, on which point I express no opinion. The statement was made on oath before the Coroner at the inquest held by him on the body of Rahimatbi, and in that very inquest, as a result of the inquiry, the jurors found that the death of the said Rahimatbi was caused by opium poisoning which the deceased voluntarily administered to herself under circumstances which indicated that her husband, the witness Kazi Dawood Kazi Ali, abetted her in administering the poison to herself in that, although he was cognizant of the fact that the deceased who had opium in her possession wanted to eat it, he illegally omitted to prevent her from doing so. The evidence of the accused was taken on oath in the very matter in which he is now charged. The accused was, therefore, really not a witness in that matter but an accused person before the Coroner. No doubt, when the oath was administered to the accused in that inquiry, the coroner did not know what evidence the accused was going to give and whether such evidence would result in incriminating the witness in the very matter in which the Coroner was holding the inquest. But it appears that after the evidence was given, the Coroner came to the conclusion that the answers given by the accused incriminated him as an abettor in the suicide of his wife, and he actually put it to the jury and asked them to give their verdict on the point and the jury unanimously gave their verdict in accordance with the opinion of the Coroner. In my opinion it is repugnant to all principles of criminal law as administered in this country to compel a person to give evidence in the very matter in which he is accused, or is liable to be accused, and then to base the charge on such evidence, and at the trial of the accused to use such evidence given on oath as a statement tending to prove the guilt of the accused. If any such practice was allowed, it would be very easy in the Presidency towns of Bombay, Calcutta and Madras, where Coroner''s inquests are always held in the first instance in the case of death of any person dying under suspicious circumstances, to put the accused person on oath and compel him to give evidence Under the powers vested in the Coroner under the Coroner''s Act, and. on such evidence find that the accused person was implicated in the crime as the principal offender or abettor or otherwise.

8. It was stated to me by the Coroner that if he had the slightest idea that an offence had been committed by the accused in the matter of the death of Bai Rahimatbi, he would not

have administered the oath to the accused, and if the accused then had wished to make any statement he would have told him that ho was not bound to make any statement and that any statement made by him would be used against him in other proceedings. To my mind, it would be a travesty of the principles of our jurisprudence if it was held that on the excuse that either the police or the Coroner or the persons in authority had no idea that the said person would be implicated in the crime which was inquired into, such authority should be free Co administer an oath to the accused and take his evidence thus by compulsion and that such evidence could thereafter be admitted and used at his trial for the offence as a statement incriminating the accused.

9. It is provided by Section 342 of the Criminal Procedure Code that no oath shall be administered to the accused, and the meaning of the word "accused" has been discussed in various cases.

10. The question has arisen in cases where there were several accused and it was sought to examine one accused on oath as against or in favour of the other accused. It has been held that where the accused are tried jointly one accused cannot be turned into a witness as against the other accused and that the prohibition of Section 342 is absolute, but it has also been held that where the accused persons are tried separately, one accused may be examined: as a witness as against or in favour of the other accused in such separate trial; but the object of the examination of the accused on oath in such a case is not to obtain the statement of the accused against himself. This point is made clear by Mr. Justice Candy in Empress v. Durant [1898] 23 Bom. 213. In that case Durant, a European subject, was charged together with others, who were natives of India, under Sections 384, 385 and 889 of the Indian Penal Code, with conspiring to commit extortion. Durant claimed to be tried by a mixed jury u/s 450 of the Criminal Procedure Code (Act V of 1898). The other accused, who were natives of India, claimed to be tried separately u/s 452. The trial of Durant, then proceeded, and at the close of the case for the prosecution, he proposed to call as his witnesses the persons who had been charged with him and who were awaiting their trial. They objected to be called. Mr. Justice Candy held that the accused was entitled to call the persons who had been charged with him and who were awaiting trial as his witnesses and to examine them on oath. He held that the word "accused" in Clause 4 of Section 342 of the Criminal Procedure Code meant the accused then under trial, and under examination by the Court. Mr. Justice Candy puts an extreme case to test the meaning of the word "accused" in Section 342, Sub-clause 4, as follows (p. 219) : "I may be trying a murder case in this High Court,, and an important witness, either for the Crown or for the defence, may be an accused person who has pleaded to a charge of house breaking, and whose trial is to come on directly after the murder case. It would be absurd to say that no oath shall be administered to that accused person when he is tendered as a witness in the murder case. As the Judge said in Empress of India v. Asghar Ali [1879] 2 260 an accused person cannot be put on his oath or examined as a witness in the case in which he is accused." The learned Judge then goes on to consider the difficulty which might arise from the provisions of Section 132 of the Indian Evidence

Act so far as the answers of those persons might be sought to he used against them in their trial. He says (p. 220 of 23B.) : "The only difficulty in my mind arises from the provisions of Section 132 of the Indian Evidence Act. As shown above in Bradlaugh"s case, Coleridge, C.J., said that he would not allow questions to be asked or answered which might have the effect of incriminating the witness. That course is not open to this Court; for by Section 132 of the Indian Evidence Act a witness is not excused from answering any question as to any matter relevant to the matter in issue in any civil or criminal proceeding upon the ground that the answer of such question will criminate, or may tend directly or indirectly to criminate such witness. When an accused person is making a statement u/s 342 of the Code of Criminal Procedure, he can refuse to answer any question. As a witness he is not excused from answering any question as to any matter relevant to the matter in issue. There is, however, an important proviso to Section 132 of the Indian Evidence Act, viz., that no such answer which a witness shall be compelled to give shall be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. As then the jury now trying Durant, and hearing his witnesses examined and cross-examined, will not be the jury which will have to decide as to the guilt or innocence of such of those witnesses as may be subsequently put on their trial, and as the answers which those witnesses may be now compelled to give cannot be proved against them in the subsequent trial, (sic) rule that the witnesses now called by Durant on his behalf can be duly examined cross examined on oath." Mr. Justice Candy here clearly indicates that if the difficulty indicated by him as arising from the provisions of Section 132 of the Indian Evidence Act could not have been got over, he would not have allowed Durant to tender the other accused persons as witnesses on his behalf and to examine them on oath.

11. In a case where an accused person is put on oath for the purposes of assisting the defence of another accused the evidence of such accused person could under no circumstances be tenderable as against him u/s 132 so as to incriminate him, and if such a case had been before-Justices Bayley and Parsons, I should think these Judges would have held that, the answers given by the accused person in a trial of another accused separately in the matter of the same offence, could not; be used against the accused in his trials, even though he did not formally raise am objection to give the answers. In my opinion the very act of putting an accused person on oath in such a case means compulsion and the case stands on an entirely different footing from cases where the very offence is not being tried but where the matter in issue is something quite different either in a civil or criminal proceeding, and where the witness in answer to questions which are relevant to the matters in issue makes the statement which incriminates him as to some other act of his own which has got nothing to do with the matters in issue to be decided in that proceeding either civil or criminal. But where the man is examined in the inquiry of the very offence with which he is subsequently charged, the matter stands on an entirely different footing.

12. It was contended before me that under the Coroners Act, the Coroner is empowered to examine any person as to the circumstances and cause of death of the person into which the Coroner is holding, an inquiry. u/s 17 of the Coroner''s Act, 1871, as amended up to date, any person disobeying the summons of the Coroner to appear before him shall be deemed to have committed an offence u/s 174, Section 175 or Section 176 of (the Indian Penal Code. Section 19 provides : "All evidence given under the Act shall be on oath, and the Coroner shall be bound to receive evidence on behalf of the party (if any) accused of causing the death of the deceased person." Section 20 provides that the material parts of the evidence shall be committed to writing by the Coroner, and the same shall be read or caused to be read to the witness and that the witness signature should be taken thereto; and further provides that any witness-refusing to sign shall be taken to have committed an offence u/s 180 of the Indian Penal Code. It is further provided by this section that for the purposes of Section 26 of the Indian Evidence Act, 1872, which relates to confessions by the accused while in custody of the police, a Coroner shall be deemed to be a Magistrate. Section 25 provides, that when the jury or a majority of the jury find that the death of the deceased person was occasioned by an act which amounts to an offence under any law in force in British India, the Coroner shall immediately after 4he inquest forward a copy of the inquisition, together with the names and addresses of the witnesses, to the Commissioner of Police.

13. It was contended before me that under the provisions of the Coroner''s Act, the Coroner has a right to summon as a witness and examine even a party accused of being implicated in an offence in the matter of the inquiry held by him. In my opinion, the contention is against the spirit of the Act and the principles of our jurisprudence governing criminal proceedings. When an inquest is held by the police in towns other than the Presidency towns u/s 174 of the Criminal Procedure Code, it is provided by Section 175 that the police officer proceeding u/s 174 may, by an order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions other than the questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture. Section 161 of the Criminal Procedure Code provides : "Any police officer making an investigation under this chapter or any police officer not below such rank as the Local Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall he bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to & penalty or forfeiture.

14. Thus in an investigation by a police officer, a witness before such officer is not bound to answer any question the answer to which would have a tendency to expose him to a criminal charge or a penalty or a forfeiture. A similar provision is not to be found in the

Coroner''s Act. By that Act, the Coroner is given the authority to administer oath and examine per sons who appear to be acquainted with the facts of the case. The wording of Section 19 of that Act, however, makes it clear that the party accused is not to be included in the term "witness" as the section says that the Coroner shall be bound to receive evidence on behalf of such party. In my opinion the whole spirit of the Coroner''s Act is that all persons acquainted with the circumstances and cause of the death of a deceased person, excepting persons implicated in a crime in respect of such death, shall be examined as witnesses on oath by the Coroner and that any person who is suspected of being so implicated shall not be examined. If by an inadvertence any such person is put on oath and examined, in my opinion, such a statement, immediately it is found that the person is in the position of the accused, should be struck off the record and the person told that he is in the position of an accused person and if he wishes to make a statement lie might, and that otherwise he is not bound to make any statement at all. In my opinion, it would be wrong of a Coroner to examine an accused person on the ground that he did not know that the person was the accused person and thereafter use that evidence, and on such evidence come to the con-elusion that that person is guilty of an offence in respect of the death of the deceased person. The Coroner ought not to put such a statement to the jury after he finds that the person is really an accused person. It is the duty of the prosecution to prove their case and the accused need not make any statement. It would be unjust if the Coroner, on the excuse of the ignorance of the fact that the party examined is the accused person, is allowed to give oath to such a person and to, compel him to give evidence and thereafter on that very evidence to ask the jury to come to a conclusion that that person is guilty of the offence in respect of the death of the deceased person into which the Coroner is making an inquiry.

15. Under such circumstances, there is no doubt in my mind that, whatever may be the duty of the Coroner on his finding that the person who is examined on oath is really the accused person in the matter, the Court ought not to allow such a statement to be admitted in evidence against the accused.

16. I was told that in taking confessions of the accused persons the Coroner is not bound by the provisions of the Criminal Procedure Code as to taking of confessions before Magistrates of persons in police custody. However that may be, the Coroner is not like an ordinary individual but a person in authority with certain powers vested in him under statute, and the statement made to him is not like a statement made to a private individual but a statement made to him as an officer investigating into the circumstances and the cause of the death of the person dying in suspicious circumstances. The statement before the Coroner in this case cannot be admitted as a confession as it is a statement on oath. A confession must be voluntary and a person who is summoned to give evidence and who is put on oath, and who answers questions or makes a statement under the compulsion of his oath, cannot be said to have made a voluntary statement.

17. Under the aforesaid circumstances, I hold that the statement is inadmissible in evidence as against the accused, I, therefore, disallow it.