

Bakir Saheb Amir Saheb Vs Emperor

None

Court: Bombay High Court

Date of Decision: Feb. 18, 1916

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) " Section 477#Evidence Act, 1872 " Section 33

Citation: AIR 1916 Bom 218 : 34 Ind. Cas. 969

Hon'ble Judges: Shah, J; Batchelor, J

Bench: Division Bench

Judgement

Batchelor, J.

The first point taken in this appeal is a question of law which arises in this way;--

The appellant, Bakir, has been convicted of making a false charge against one Aliser. The appellant had alleged that this Aliser had stolen a

thousand rupee note from him. Aliser was convicted by the Magistrate in regard to this theft, but the conviction was set aside on appeal by the

learned Sessions Judge. After setting aside the conviction, the Sessions Judge entered upon an inquiry for the purpose of ascertaining whether such

proceedings as these should not be instituted against the then complainant, Bakir. Ultimately the Sessions Judge ordered Bakir to be committed for

trial on the charge of making a false charge of theft. In the inquiry which preceded the commitment, the learned Judge took the statement of Aliser

among others. Aliser has now disappeared, and his evidence could not be obtained in the Court of Session. Therefore, the learned Assistant

Judge, by whom this trial was conducted, allowed upon the record the statement which Aliser had made to the Sessions Judge in the inquiry

preceding the commitment of Bakir. As Aliser is a very important witness, it is desirable to decide in limine whether this admission of his earlier

statement is in conformity with law or not.

2. Mr. Binning, contending for the negative, refers to Section 33 of the Indian Evidence Act, under which alone the statement could be admissible:

and contends that one necessary condition laid down by Section 33 is not in this case satisfied; that is to say, in this case, Mr. Binning argues that

the present appellant, Bakir, had not the right to cross-examine Aliser in the inquiry before the Sessions Judge. Admittedly, unless Bakir had that

right, Aliser's previous statement, which has gone upon the record, must be excluded. In my opinion Mr. Binning's objection is well founded.

3. Some attempt was made to suggest that the inquiry held by the learned Sessions Judge might be attributed to Section 477 of the Criminal

Procedure Code, so that the preceding inquiry should be regarded as a proceeding resulting in commitment with the result that all the usual

requirements which are needed in inquiries terminating in a commitment should be observed. It appears to me, however, impossible to ascribe the

inquiry to any section but Section 476. That is the section which the learned Sessions Judge himself quotes, and that section authorizes precisely

the kind of inquiry which this is. Section 477, moreover, makes no reference to any inquiry at all. If, then, the inquiry must be held to have been

made u/s 476, it seems to me that the appellant, Bakir, had no right to cross-examine the then witness, Aliser. Certainly no such right is conferred

by the section. Indeed, the section goes so far as to say that the inquiry is merely discretionary, for it may or may not be made; in other words, it

was perfectly competent to the Sessions Judge to make the order which he finally did make without taking any evidence at all; and if he chose to

take evidence, it appears to me that it was entirely within his discretion to say when and where that evidence should stop. I regard Section 476 as

giving the widest discretionary powers to the criminal Court and as deliberately refraining from imposing any special formalities to hamper the

discretion of the Court. The wisdom of that is obvious, because it is clear that grave danger of prejudice would be incurred if the informal inquiry

contemplated in Section 476 were to be expanded and formalized into an investigation which would be practically a trial.

4. The view which I take seems to me to receive countenance from the decisions of this Court in *Safurabai v. Abdullahbai* 4 Ind. Cas. 273 : 11

Bom. L.R. 1164 : 10 Cri. L.J. 539 and *In Re: Karvirappa* 16 Ind. Cas. 497 : 14 Bom. L.R. 587 : 13 Cri. L.J. 689 : 1 Bom. Cr.C. 154.

5. It may be added that the principle or reason of the thing is in favour of Mr. Binning, since the general rule undoubtedly requires that a witness

should be produced if his evidence is to go upon the record, and the particular exceptions allowed by Section 33 are not, in my opinion, to be

extended without very good cause.

6. [After discussing the evidence his Lordship proceeded to observe as follows:]

On the whole, therefore, it appears to me that this conviction must be reversed, both because the direct positive evidence in its favour is too slight

and fragmentary and because such corroboration as the circumstances afford is insufficient to justify a conclusion of the appellant's guilt.

7. I would, therefore, allow the appeal, reverse the conviction and sentence and direct that the accused be acquitted and discharged.

Shah, J.

8. I agree that the statement of Aliser taken in the course of the inquiry before the Sessions Judge, which resulted in the commitment of the present

appellant, is inadmissible in evidence. Its admissibility depends upon the answer to be given to the question, whether the present appellant had the

right to cross-examine the witness within the meaning of the proviso to Section 33 of the Indian Evidence Act when his statement was recorded by

the Sessions Judge. In my opinion, in those proceedings, the present appellant had not the right to cross-examine Aliser. Those proceedings were

taken u/s 476 and the order was made u/s 477. The inquiry held on that occasion must, in my opinion, be referred to Section 476. The order of

commitment, no doubt, is made u/s 477 of the Criminal Procedure Code, which makes no provision for any inquiry; and the learned Sessions

Judge has stated in the beginning of his order that the inquiry was made u/s 476 with a view to see whether an order u/s 477 could be made. It

seems to me that the scope of the inquiry u/s 476 depends upon the discretion of the Court. It is optional to the Court to make a preliminary

inquiry, and the nature of that inquiry must be determined with reference to the circumstances of each case. Under these circumstances it seems to

me that even if a witness be examined in the course of such an inquiry, it cannot be said that it is the right of the person, against whom the inquiry is

being made, to cross-examine the witness. Of course, ordinarily a witness would be allowed to be cross-examined, and I do not for a moment

suggest that it would be anything but proper for the Court to allow a witness to be cross-examined by the adverse party. But the question as to

whether the person against whom the inquiry is proceeding, has the right to cross-examine a witness is quite different. There is nothing either in

Section 476 or Section 477 to suggest that the person concerned has any such right.

9. I only desire to say a word as to the observations in the judgment of this Court in the application made by the present appellant against the order

of commitment, upon which the learned Government Pleader has relied. It is argued by him that the judgment shows that the inquiry held in this

case must be deemed to have been held u/s 477 and that it could not now be properly treated as an inquiry u/s 476. In the first place, it seems to

me that the observations do not support his contention. They were made with reference to the argument then advanced on behalf of the applicant

that the inquiry was not u/s 476 but must be referred to Section 477, and that there being no provision in Section 477 with regard to any inquiry,

the whole inquiry was illegal. It was not necessary then to decide whether the proceedings held by the Sessions Judge were in fact u/s 476 of the

Criminal Procedure Code. Secondly, if the inquiry cannot be properly treated as having been made u/s 476, it is clear that there is nothing in

Section 477 to regulate the inquiry which results in an order of commitment under that section, and to support the contention that the party against

whom the inquiry is held has a right to cross-examine any witness examined in the course of that inquiry.

10. I agree generally with the reasons given by my learned brother for the conclusion that the conviction and sentence must be set aside.

11. On a careful consideration of the arguments on both sides, the conclusion that I have come to is that though there is no reason to doubt the

correctness of the acquittal of Aliser, there is not sufficient material on the record to justify an inference as to the guilt of the present appellant on

either charge.

12. It seems to me that there is room for a reasonable doubt as to the guilt of the appellant and the benefit of that doubt must be given to him.