

In Re: Sheik Kalesha

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Court : Chennai

Decided On : Jun-16-1931

Reported in : (1932)62MLJ71

Appellant : In Re: Sheik Kalesha

Judgement :

Jackson, J.

1. The accused has been sentenced to death for murdering a boy G. Ramanatham, the offence punishable under Section 302, Indian Penal Code.
2. The facts which are very few are summarised in para. 38 of the judgment. The boy disappeared by 6 p.m. Next morning he was found murdered and stripped of his ornaments. He was last seen alive at 5 p.m. that evening. Then he was seen going into a shed with accused. Next day accused took the police to where the jewels were buried.
3. The fact that he went into the shed is not proved beyond suspicion. A little girl aged 9, P.W. 4, who was taking a morbid interest in the case, for she not only went to see the corpse but identified it, says that she saw the boy enticed into the shed by the offer of a doll which later she changes to the; offer of a pomegranate. If she is speaking plain truth and not drawing upon her imagination she should know if it was a doll or a pomegranate; and it is quite possible that she is telling the Court not what she saw, but what she thinks she must have seen; a common and

dangerous type of witness in criminal trials.

4. So the only fact proved beyond all doubt is that the accused took the police to where the jewels were hidden next day, and if he cannot explain his knowledge, a presumption of guilt lies against him. At the trial he denied that he had ever shown the jewels to the police. And here there arises a point of much interest and difficulty. At the time of the discovery of the jewels the accused made a long statement to certain neighbours Ex. K. The Sub-Inspector was present and is one of the signatories, so that it is undoubtedly a statement made to a police officer in the course of his investigation.

5. This is one of those items of evidence which the legislature has laid down shall not be used by Courts of Law except in the special manner provided in Section 162, Criminal Procedure Code. Mr. Jayarama Aiyar who appears for the accused says that it is a document which materially assists his client's defence, and wishes to bring it upon the record. Is this prevented by Section 162

6. This question has been considered in Calcutta where it is held in *Azimaddy v. Emperor* (1926) 44 C.L.J. 253 that a statement made by an accused to a police officer may be proved against him (and presumably a fortiori for him) provided that it is not a confession. This decision is based on various lines of thought. In *King-Emperor v. Mating Tha Din* I.L.R. (1926) Rang.72 (F.B.) Duckworth, J., expressed the opinion that sections 160, 161 and 162 only refer to witnesses and not to an accused person. The Chief Justice apparently held the same view though he preferred to base his judgment on other grounds. He refers to the authority of *Jagwa Dhanuk v. King-Emperor* I.L.R. (1925) Pat. 63, where it is also held that Section 162 does not apply to accused persons, partly because otherwise the special provision in Section 27, Indian Evidence Act, would be repealed, and partly because the Court would be deprived of valuable material for testing the truth of the case.

7. This latter reason has little force because the whole object of Section 162, Criminal Procedure Code and the kindred Section 25, Indian Evidence Act, is to deprive the Court of material. If anything in the statutes depriving the Courts of what otherwise might prove to be valuable material is to be treated as a dead

letter, Section 25 and Section 162 might both be ignored. With all respect it seems useless for the Courts to try to reconstruct the statutes on such lines of logic and common sense which might have commended themselves to the legislature. The Court's sole function is to interpret the language which the legislature has employed. As pointed out by Heald, J., in *King-Emperor v. Maung Tha Din* I.L.R. (1926) Rang.72 (F.B.) very probably the intention and the language do not coincide, but the Courts are only concerned with the language. Rankin, C.J., in *Azimaddy v. Emperor* (1926) 44 C.L.J. 253 accepts this position and interprets 'any person' in Section 162 as meaning *quavis ex populo*. But it is not very clear why 'any one you like out of the people' is a phrase which excludes an accused person. His Lordship proceeds (p. 258) that it would require express and compelling language to deprive an accused of what is so often the mainstay of a good defence, the right to show that immediately he was challenged he gave an explanation. But this is to restate the problem. Is the language of Section 162 express and compelling, or what is there about its language to justify the view that it is not express or compelling? 'No statement by any person to a police officer shall be used,' is surely as express and compelling language as could be found, and the difficulty lies not in its plain interpretation, so much as in the fact that its plain interpretation leads to absurdity. But then as I ventured to point out in *Thimmappa v. Thimmappa* I.L.R. (1928) M. 967 : 55 M.L.J. 351 (F.B.) the whole provision involves absurdity. It must be borne in mind that Criminal Procedure is not devised on behalf of the prosecution, or on behalf of the accused, but on behalf of justice; and anything that derogates from the proper claims of justice is inherently absurd. It is just as absurd to prevent the prosecution from exhibiting a confession, as to prevent the accused from exhibiting an admission; and if the statute were to be overridden to admit admissions merely to prevent absurdity, it might equally well be overridden to admit confessions. So this line of thought that language must be compelling is not perhaps very helpful.

8. Then there is another line in *Azimaddy v. Emperor* (1926) 44 C.L.J. 253 strongly relied upon by Mr. Jayarama Aiyar that inasmuch as it has now been held by all the High Courts and by a Full Bench of our Court in *Thimmappa v. Thimmappa* I.L.R. (1928) M. 967 : 55 M.L.J. 351 (F.B.) that the special provision in Section 27, Indian Evidence Act, admitting a confession to the police which leads to a

discovery is not repealed by the general provision in Section 162 forbidding the proof of all statements to the police, therefore the provision in the Indian Evidence Act, sections 17, 18 that a statement which suggests an inference made by a party to the proceeding can be proved, is not repealed by the provision in Section 162 that statements made to the police cannot be proved. *Generalia specialibus non derogant*. But unfortunately the application of this maxim, so useful when Section 27, Indian Evidence Act, was considered leads in precisely the opposite direction when sections 17 and 18, Indian Evidence Act, are considered along with Section 162, Criminal Procedure Code. Because now the *generalia* are embodied in sections 17 and 18, which lay down generally that all admissions can be proved, while the *specialia* are embodied in Section 162 which provides that even though all admissions can be proved statements made by any person to a police officer cannot be used. To sum up: There is no binding authority upon us that an admission to the police is not governed by Section 162, and therefore is admissible. *Thimmappa v. Thimmappa* I.L.R. (1928) M. 967 : 55 M.L.J. 351 (F.B.) has only conformed obiter with the opinion that Section 27, Indian Evidence Act, is unaffected by Section 162, Criminal Procedure Code. There is however authority that Section 162 does not apply to accused persons. *Rannun v. The Crown* I.L.R. (1926) Lah. 84 approved by *Azimaddy v. Emperor* (1926) 44 C.L.J. 253. When that authority is analysed it is found to be based not so much on the plain reading of Section 162, as upon a dislike of what that plain reading involves. Speaking for myself I find no difficulty in the reading, because the language seems to be perfectly plain; and I cannot see that any good object is served by the judiciary attempting to re-adjust the artificial barriers which the legislature has erected in the way of evidence. If the legislature chooses to lay down that any statement recorded by a police officer in the course of his investigation is worthless, save as provided by Section 27, Indian Evidence Act, the Court must treat it as statutorily worthless, though judicially it may amount to evidence of the greatest value.

9. Ex. K is statement made by a person to a police officer in the course of his investigation and therefore it cannot be used. I would add that this case adds an anomaly which I overlooked in my list in *Thimmappa v. Thimmappa* I.L.R. (1928) M. 967 : 55 M.L.J. 351 (F.B.). Here there is an accused who runs grave danger of being hanged because judicially good evidence has been arbitrarily ruled out by

the legislature.

10. The Court is confronted then by the fact that accused discovered the jewels to the police: and offers no better explanation than that the story of the discovery is a lie. Can we in the absence of all other evidence, for the evidence of the little girl is now rejected, convict him of murder on that circumstance alone? We: think not. He may have known where the jewels were hid, without necessarily having committed the murder; and we think it safer to convict him only of the minor offence of causing evidence to disappear under Section 201, Indian Penal Code. Accused is sentenced to 7 years' rigorous imprisonment: he is acquitted of the charge under Section 302, Indian Penal Code.

Cornish, J.

11. I agree that the evidence for the prosecution is not sufficiently free from doubt to support the conviction of murder, but that the appellant should be convicted of an offence under Section 201, Indian Penal Code. With regard to the question whether the appellant is entitled to use in his defence his statement to the police recorded in Ex. K, it appears to me that the question being solely one of procedure, it must be governed by Section 162, Criminal Procedure Code. If he wishes to rely on Ex. K, or some para of it, then I think that Section 162 is in his way.

12. The view in *Azimaddy v. Emperor* (1926) 44 C.L.J. 253 approving of decisions in the Patna, Lahore and Rangoon High Courts, was that Section 162 did not apply to accused persons. With all respect, I do not think that the language of the section sanctions this differentiation. Section 162 is explicit. Firstly, it provides that no statement made by 'any person'--and these words are wide enough to comprehend a person who subsequently becomes the accused--to a police officer in the course of an investigation shall, if reduced into writing, be signed by the person making the statement. Next it provides that no such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, shall be used for 'any purpose' at any inquiry or trial in respect of any offence under investigation where the statement was made. The

words 'any purpose' must include purpose of prosecution or defence. Then comes the exception permitting the accused to obtain a copy of the statement, if it has been reduced into writing, and, if it is duly proved, to use it to contradict the witness who made the statement and who has been called to give evidence for the prosecution.

13. In *Asimaddy v. Emperor* (1926) 44 C.L.J. 253 Rankin, C.J., expressed his unwillingness to hold, in the absence of express and compelling language, that the section was intended to deprive an accused of the right of showing that he put forward his explanation to the police at the earliest opportunity. But could the language of Section 162 be more compelling than it is? Personally, I do not see that the rule puts an accused at a disadvantage. As already observed, the rule is one of procedure. It is aimed at preventing a statement made by the accused to the police at an investigation--and some police officer must be the repository of the statement whether it has or has not been reduced to writing--being produced by the police at the trial except for the limited purpose permitted by the section. But it does not prevent the accused from proving his defence aliunde. His mouth is not sealed at the trial in respect of anything said by him at the police investigation. It is open to the accused, as was pointed out by my learned brother in the course of the arguments, when making his defence to repeat in Court what he has already said to the police at the investigation, and to call witnesses to support his statement. But he cannot call for his statement made at the investigation for the purpose of corroborating or implementing his defence at the trial. In my opinion neither Ex. K nor any extract from his recorded statement was available to the appellant.