

Aseruddln Vs. Emperor

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Court : Kolkata

Decided On : May-17-1926

Reported in : AIR1927Cal257

Appellant : Aseruddin

Respondent : Emperor

Judgement :

1. In this case the accused Aseruddin, alias Botu, has been convicted under Section 326 of the Indian Penal Code on two charges,; first, for causing grievous hurt with a dangerous weapon to one Rahimuddin, and secondly, for causing the same offence upon one Aseruddin, and sentenced to seven years rigorous imprisonment on the first count, and to three years rigorous imprisonment on the second, the sentences to run concurrently. The case for the prosecution is that there was some dispute with regard to possession of a piece of land. The complainant was in possession of the land, and as he was late in transplanting the crop, he called in a number of friends and dependents to help him in the matter on the 16th September 1925. On that date he went with a large number of men and started transplanting paddy. About three bighas of land lay to the west of a path, and when the men came to that part the accused Botu, with his brother Anaruddin and one Moji, came on to the land and protest edsaying that it was his. Botu cut the strings of the foremost plough when Rahimuddin came and mended it, and started ploughing again. Botu caught his penta and threatened to strike Rahim. Rahim seized Botu by the neck; Botu seized Rahim by the neck with his left hand,

and then taking the knife into his right hand stabbed Rahim until the latter fell down. Aseruddin seized the knife, at which Botu struck him with the knife under the right armpit. On these facts the accused was charged under Sections 304 and 326 of the Indian Penal Code. The majority of the jury found him not guilty under Section 304 of the Indian Penal Code and convicted him under Section 326 on the first count; and on the second charge, by a majority of four, found him guilty under Section 326 for causing grievous hurt to Asoruddin.

2. Two points have been taken on behalf of the appellant : (i) that some statements made by the defence witnesses to the police were admitted in violation of the provisions of Section 162 of the Criminal Procedure Code. With reference to this point, the facts are that two witnesses were examined on behalf of the accused. The first witness was Bibijan, who was set up by the accused as the owner of the land from whom he had taken settlement of it. In her evidence she stated : 'The Sub-Inspector questioned me. I told him, I knew nothing.' The second witness was Sharitulla Sarkar who said:

I deposed to the Sub-Inspector. I started to tell him about the possession, but he said he did not want that, so I did not tell him any more.

3. With regard to the statement made by the first witness it is not the accused's case that she saw the occurrence, or that she knew anything about it. She merely told the police that she knew nothing about the occurrence. Even if this evidence is inadmissible, it does not in any way prejudice the accused. With regard to the statement made by the second witness, his statement is similarly innocuous. He said that he was not allowed by the Sub-Inspector to say what he tended to say, and he denied that he said that he knew nothing.

4. The question which has been raised before us is whether the statement made before the police, that the witness did not say anything to the police about the occurrence, is a statement within the meaning of Section 162 of the Criminal Procedure Code.

5. If we accept the contention of the petitioner the result will be that the absence of a statement will be equivalent to a statement. Section 162 says that no statement

made by any person to a police officer in the course of an investigation shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof be used for any purpose save as therein provided. For the application of this section there must be a statement which is capable of being recorded and reduced to writing and, therefore, if a witness says : 'I did not make any statement to the police,' it cannot be a statement under Section 162 of the Criminal Procedure Code. The same view has recently been taken in the unreported case of Emperor v. Nagendra Nath alias Dadhiram Nath (Reference No. 5, and Appeal No. 510 of 1925), decided on the 8th October 1925, in which it is said:

A question was put to one of the defence witnesses as to whether he had made a certain statement to the police when he was examined under Section 161 of the Criminal Procedure Code. It is contended that, having regard to the provisions of Section 162 of the Criminal Procedure Code, the statement made to the police officer under Section 101 could not be used for any purpose. But all that was put to the witness was whether he had made such a statement to the police, and his answer was that he did not remember. It is not proved that the statement was actually made to the police, and the mere fact that a question was put to the witness asking him whether he had made? A particular statement to the police did not vitiate the trial as it is not proved that such a statement was actually made to the police under Section 161 of the Criminal Procedure Code.

6. It is, however, doubtful if a witness makes a statement to the police under Section 161 that he knew nothing about that occurrence is not a statement within the meaning of Section 161 of the Criminal Procedure Code. We need not pursue this matter further in the view that we have taken with regard to the second objection made on behalf of the accused.

7. It is said that the learned Judge's charge to the jury is defective inasmuch as he had not laid before the jury the law with regard to the right of private-defence that arises in this case on the admitted and proved facts. We have said that the prosecution case was that the deceased Rahimuddin was the first to catch hold of the accused by the neck. There is no evidence before us as to how and with what

force the attack was made by the deceased, and whether it was such as to raise an apprehension in the mind of the accused of grievous hurt. These are matters which should be considered by the jury. It is said that thereupon the accused brought out his knife and gave a few strokes with it to the deceased. The question that arises on these facts is whether the accused had any right of private defence, and if so, how far it extended. The learned Judge, in explaining the law, referred to relevant sections, as it appears from his written charge, relating to the right of private defence. He made the following observation : 'If these facts are correct' (that the accused was defending his own property),

then the prosecution party were committing criminal trespass and the accused had a right to defend his property and, if attacked, his person, but he had no right to cause death unless you think that there was a reasonable apprehension that he would otherwise suffer death or grievous hurt.

8. It may be stated here that the learned Judge was of opinion that the property was probably in the possession of the accused. He did not, however, specifically put the case of defence of person based on the facts alleged by the prosecution before the jury. But this statement of law, as appears from the charge which contains only the heads of what it really was orally delivered might have been sufficient. But the learned Judge, in the concluding portion of his charge, made the following observation:

There is nothing to show that he was ever called on to defend his person before he killed Rahimuddin and wounded Aseruddin.

9. This, in our opinion, is a clear misstatement of facts. We have stated that the case for the prosecution was that it was the deceased who first caught hold of the accused by the neck; and the question whether the accused was justified in defending his person to the extent of causing grievous hurt to the deceased was a question of fact which should have been left to the jury. The statement

that there is nothing to show that lie was ever called on to defend his person

is also incorrect from another point of view. There is some evidence on the point adduced by the accused. Whether it was sufficient for the purpose of proving his case is a matter for the consideration of the jury. It is, therefore, not correct to say that there is nothing to show that the accused had any occasion to exercise the right of private defence of person. According to the prosecution story the deceased caught the accused first by the neck, and according to the defence it was the deceased who actually gave the first blow. In this view we cannot say how far the last sentence in the Judge's charge to the jury influenced the jury in the verdict they returned, though the Judge wound up the charge by observing:

The only question in this case would be whether the accused exceeded the right of self-defence.

10. The law, as bearing on the facts set up had not been clearly placed before the jury, and their attention was not directed to find as to whether the accused was, and, if so, how far, justified in preventing injury to himself in attacking the deceased. In this view we think that the charge, as delivered by the Judge, contains serious misdirection and the conviction of, and the sentence passed on, the accused should be set aside, and we direct that he be re-tried according to law. The accused will remain in custody until further orders of the Sessions Judge.

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