Queen-empress Vs. Mannu

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Court : Allahabad

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Judge : John Edge, Kt., C.J.,; Knox,; Blair,; Banerji,; Burkitt and; Aikman, JJ.

Appellant : Queen-empress

Respondent : Mannu

Judgement :

John Edge, Kt., C.J.

1. This case raises not only the question as to whether the appellant was or was not guilty of the offence of which he was convicted; but important questions as to the use which may or may not legally be made of diaries made by Police officers under Section 172 of the Code of Criminal Procedure, and as to what those diaries may contain. I propose first to consider the latter questions.

2. In the course of the arguments before us the following cases were cited: Reg. v. Uttamchand Kapurchand 11 Bom. H.C. Rep. 120; The Empress v. Kali Churn Chunari I.L.R. 8 Cal. 154; The Empress v. Jhubboo Mahton I.L.R. 8 Cal. 739; Queen-Empress v. Sitaram Vithal I.L.R. 11 Bom. 657; Bikao Khan v. The Queen-Empress I.L.R. 16 Cal. 610; Queen-Empress, v. Madho I.L.R. 15 All. 25; Sheru Sha v. The Queen-Empress I.L.R. 20 Cal. 642; Queen-Empress v. Nasir-ud-din I.L.R. 16 All. 207; Queen-Empress v. Taj Khan, I.L.R. 17 All. 57; Queen-Empress

v. Nand Lal Weekly Notes, 1894, p. 155; Kallu v. Queen-Empress 29 Panj. Rec. Cr. J. 55, and Queen-Empress v. Rudr Singh Weekly Notes 1896 p 193. Regulation XX of 1817; Act No. XXV of 1861; Act No. X of 1872; Act No. X of 1882; Act No. I of 1872; Field's edition of the Indian Evidence Act, 1872; Taylor on Evidence, and The Queen v. Lillyman L.R. 1896, 2 Q.B. 167, were also referred to.

3. Section 172 of the Code of Criminal Procedure is as follows: 'Every Police officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

4. 'Any Criminal Court may send for the Police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the Police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such Police officer, the provisions of the Indian Evidence Act, 1872, Section 161 or Section 145, as the case may be, shall apply.'

5. It is within the experience of every Judge of this Court that much misconception exists in these Provinces as to the use which can be made by a Court or by an accused person or his agents of the diaries which are kept by Police officers under Section 172 of the Code of Criminal Procedure, and which in these Provinces are known as special diaries. It is within our judicial knowledge that some Sessions Judges and some Magistrates have decided criminal cases by conviction or by acquittal of the accused on statements which are found in the special diary relating to the case, and have done so without having asked the Police officer who made the special diary or any witness in the case one word as to the truth of these statements, and consequently without having afforded to the prosecution or the accused, as the case was, any opportunity of explaining or of contradicting such statements. Such a use of a special diary by a Court is entirely illegal. I have met

with cases which were decided exclusively upon the entries contained in special diaries and not upon any evidence which was before the Court. A Criminal Court is entitled to 'send for the Police diaries of a case under inquiry or trial before it, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.' Such Criminal Court may permit the Police officer who made the special diary to look at it for the purpose of refreshing his memory or may use the special diary for the purpose of contradicting such Police officer. Where the Police officer who made the special diary is allowed to refresh his memory and does look at an entry in the Diary for the purpose of refreshing his memory, the provisions of Section 161 of the Indian Evidence Act, 1872, apply, and the accused or his agent is entitled to see such entry in the special diary and to cross-examine such Police officer thereupon. There is no provision in Section 172 of the Code of Criminal Procedure enabling any person other than the Police officer who made the special diary to refresh his memory by looking at the special diary, and the necessary implication is that a special diary cannot be used to enable any witness other than the Police officer who made the special diary to refresh his memory by looking at it. This is in truth a general principle of law. The Criminal Court, but not an accused person or his agent, unless the Police officer has been allowed to look at the diary in order to refresh his memory, can use the special diary for the purpose of contradicting the Police officer who made it, but before doing so the Court must comply with the specific enactment of Section 145 of the Indian Evidence Act, 1872, and call the attention of the Police officer to such parts of the special diary as are to be used for the purpose of contradicting him, otherwise such a use of the special diary would be illegal. There is no provision in Section 172 of the Code of Criminal Procedure enabling the Court, the prosecution or the accused to use the special diary for the purpose of contradicting any witness other than the Police officer who made it, and the necessary implication is that the special diary cannot be used to contradict any witness other than the Police officer who made it. Section 145 of the Indian Evidence Act, 1872, does not either extend or control the provisions of Section 172.of the Code of Criminal Procedure. It is only if the Court uses the special diary for the purpose of contradicting the Police officer who made it that Section 145 of the Indian Evidence Act, 1872, applies, and in such case it applies for that purpose only, and not for the purpose of enabling the Court or a

party to contradict any other witness in the case, or to show it or any part of its contents to any other witness. No reading of Section 172 of the Code of Criminal Procedure consistent with the rules of construction and a knowledge of the English language is possible by which the special diary is to be used to contradict any person except the Police officer who made it. It is not enacted in Section 172 of the Code of Criminal Procedure by reference to Section 145 of the Indian Evidence Act, 1872, or otherwise that if the special diary is used by the Court to contradict the Police officer who made it, it may thereupon or thereafter be used to contradict any other witness in the case.

6. The power of the Criminal Court to use the special diary is not limited to the use of it for the purpose of enabling the Police officer who made it to refresh his memory or for the purpose of contradicting him. The Court may also use the special diary not as evidence of any date, fact or statement referred to in it, but as containing indications of sources and lines of inquiry and as suggesting the names of persons whose evidence may be material for the purpose of doing justice between the Crown and the accused. Should the Court consider that any date, fact or statement referred to in the special diary is or may be material, it cannot legally accept the special diary as evidence, in any sense, of such date, fact or statement, and must in law, before allowing any date, fact or statement referred to in the special diary to influence its mind, have such date, fact or statement established by legal evidence. It is the Court which is entitled to use the special diary for the purpose of seeking for sources and lines of inquiry and for the names of persons who may be in a position to give material evidence. Neither the accused nor his agent is entitled under Section 172 of the Code of Criminal Procedure to see the special diary for any purpose unless it has been used by the Court for enabling the Police officer who made it to refresh his memory or for the purpose of contradicting him.

7. It has, however, been contended before us here, and there is authority for the contention, that if the special diary contains any statement made by any person who was examined by the Police officer who was making, under chapter XIV of the Code of Criminal Procedure, an investigation in the case, the privilege provided for the special diary by Section 172 of that Code is gone, and that the accused or his

agent is entitled to see the entry of such statement in the special diary. That is, in my opinion, an unsound proposition. It is unsound as being contrary to the express enactment of Section 172 of the Code of Criminal Procedure, and it is unsound as being contrary to public policy. Section 172 of the Code of Criminal Procedure provides for the two events, on the happening of either of which the accused or his agent is entitled to see the special diary: and it enacts that, except on the happening of one of those events, 'neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court.' In my opinion the plain meaning of Section 172 is that the special diary, no matter what it may contain, is absolutely privileged, unless it is used to enable the Police officer who made it to refresh his memory or is used for the purpose of contradicting him. In face of the fact that the Legislature has thought it right to enact that there shall be two exceptions to the privilege accorded to the special diary, I cannot as a lawyer read a third exception into the section, and I have no power to legislate. The privilege attaching to the special diary is a privilege conferred upon the special diary, not by Judges, but by the Legislature, and must be maintained by Courts of justice in its integrity whether or not Judges consider that it is reasonable that to the special diary and its contents should be accorded such privilege. It is a privilege which cannot depend upon the question as to whether the Police officer who made the special diary did or did not insert in the special diary extraneous matter, nor can it depend upon the question as to whether or not the Police officer made the special diary in the particular form which is approved of by the Court.

8. It must not be assumed from what I have said that I consider that it is unreasonable that the special diary and its contents should be privileged from inspection by an accused person or his agent. In fact I consider that there are sound reasons of public policy why the fullest protection from inspection by any one other than the Judge or the Magistrate before whom the case is should be accorded to the special diary, and to everything which is contained in it. It is of vital interest to the public that the commission of crimes should be repressed, and that those who commit criminal offences should be detected and should be brought to justice. It is also of vital interest to the public that innocent persons should not be convicted. Any one of the public may be the victim of a crime, or may be unjustly

charged with the commission of a crime. The early stages of the investigation which follows on the commission of a crime must necessarily in the vast majority of cases be left to the Police, and until the honesty, the capacity, the discretion and the judgment of the Police can be thoroughly trusted, it is necessary for the protection of the public against criminals, for the vindication of the law, and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information, true, false, or misleading, which was obtained from day to day by the Police officer who was investigating the case, and what were the lines of investigation upon which such Police officer acted. A properly kept special diary would afford such information, and such information would enable the Magistrate or Judge to determine whether persons referred to in the special diary, but not sent up as witnesses by the Police, should be summoned to give evidence in the interests of the prosecution or of the accused. It must be always remembered that it is the duty of the Magistrate or of the Judge before whom a criminal case is, to ascertain if possible on which side the truth is, and to decide accordingly. It must happen that a Police officer, who is investigating a criminal case, receives some true information, some false information, and some misleading information, and it must happen that such Police officer forms, no doubt sometimes prematurely, a theory about the case, to which having committed himself he probably adheres. An ordinary knowledge of the infirmities of human nature and a knowledge of what does in fact take place in some cases teach us that in many cases the inclination of a Police officer, who in his early investigation of a criminal case has committed himself honestly or dishonestly to a theory as to the case, is to work the case so as to support that theory, whether the vindication of justice is to be the result or not. It is consequently essential that the Magistrate or the Judge, who has to hold the scales of justice evenly between the Crown and the accused, should have some means of ascertaining what was the information obtained by the Police officer each day in the course of the investigation and what ware the lines upon which the investigation proceeded. It is also necessary in the interests of the public that Magistrates of Districts and District Superintendents of Police should have some means of informing themselves of the proceedings of the Police within their

districts in the investigation of crimes and of ascertaining what information, whether derived from personal observation or from statements made to the Police officer making an investigation under chapter XIV of the Code of Criminal Procedure, such Police officer has obtained. The Legislature of India has done all that can be done by way of enactment to provide such a means and source of information for the Magistrate and the Judge, and the Local Government of these Provinces and of Oudh, by requiring that a counterpart of the special diary for each day shall each day be sent to the Magistrate of the District, has done all that it can do to safeguard the daily entries in the special diary from being subsequently suppressed or from being tampered with. But I regret to say that some Sessions Judges by their procedure and by their misunderstanding of the use which may legally be made of special diaries have done much to frustrate the intention of the Legislature, and unintentionally to encourage the Police to evade the law and to keep out of the special diaries, and to suppress information which, rightly or wrongly, the Police officer considers to be opposed to the theory which he has adopted and upon which he has conducted his investigation. Where statements made under Section 161 of the Code to a Police officer are reduced into writing elsewhere than in the special diary, they are liable to be suppressed or to be tampered with. Quite recently, and since the argument in this case was concluded, an appeal against a conviction came before me in a case in which a statement made under Section 161 to a Police officer and reduced into writing by him, but not in the special diary, was subsequently tampered with by inserting in it false matter incriminating a man who was subsequently put upon his trial and was properly acquitted. For the results which ensue, and which are to be seen in miscarriages of justice, the Police are not in my opinion solely to blame. The result is that true cases fail and, I fear, false cases sometimes succeed. If the special diary or anything which it contains is to be subject to the inspection of an accused person or of his agent, it is hopeless to expect that the Police officer making the investigation will insert in it information obtained by him, but which, rightly or wrongly, although honestly, he believes to be injurious to the case for the prosecution, or to be misleading or to be false. Further, so long as Magistrates and Judges allow their minds to be influenced by, and decide cases upon, information contained in special diaries which has not been established by legal evidence and

has not been tested and sifted by the examination of witnesses, it is hopeless to expect that Police officers will resist the temptation to keep out of the Special diaries information which, if inserted in them, would, in the opinion of such Police officer, be likely to mislead the Magistrate or the Judge. Such information may be suppressed with the honest intention of procuring the conviction of an accused person whom the Police officer believes to be guilty, or it may be suppressed with the dishonest intention of shielding a guilty person or of procuring the conviction of an innocent person. The considerations to which I have referred have led me to the conclusion that it is a matter of public policy that the limited privilege and protection from inspection which the Legislature has accorded to special diaries should not be curtailed or encroached upon, and that all statements made under Section 161 of the Code of Criminal Procedure to a Police officer and reduced into writing by him should be reduced into writing in the special diary and not elsewhere.

9. As I understand it, the view which has been entertained by some Judges elsewhere is that a Police officer who is investigating a criminal case has no power to obtain from any person any statement relating to the commission of the offence except under Section 161 of the Code of Criminal procedure, and that if such Police officer does obtain any such statement and voluntarily reduces it into writing, the accused or his agent is entitled to see the writing whether it be contained in or forms part of the special diary or not. Indeed the contention for the appellant in this case went further. It was contended that if such Police officer inserted in the special diary in any guise even a mere summary of what a person examined by him had stated the accused or his agent was entitled to see such summary. It was frankly admitted that, if that contention was well founded and the privilege of special diaries was to be maintained, all allusion to persons from whom the Police officer had received information should be confined to a mere statement that the Police officer had examined, for example, A, B, C, and D, or possibly should be confined to a mere statement, for example, that the Police officer had examined A, B, C, and D, that it appeared that X had murdered Y. Neither of such entries would contain any information of any practical use to the Magistrate or the Judge, and the latter of such statements, although it might express the honest conclusion of the Police officer might be entirely misleading. It frequently happens

that a Police officer examines 40, 50 or more persons in the course of an investigation: some, indeed many, of such persons, may have no evidence to give, others may be in a position to give material evidence but may deny all knowledge of what occurred, others may be able to speak merely from hearsay, others may have been eye-witnesses and may speak the truth, whilst others may wilfully give false or misleading information. A mere schedule of the names and addresses of the persons whom the Police officer had examined could not afford to the Magistrate or to the Judge the slightest indication as to which of the above categories included the several persons examined by the Police-officer, and in most cases it would be impracticable and a mere waste of public time for the Magistrate or the Judge to summon and examine all the persons whose names were included in the schedule. An entry that the Police officer had examined A, B, C, D, and E and that it appeared that X had murdered Y might be true as expressing the opinion of the Police officer, but it would afford no indication of the reason why, for example C, D, and B had not been sent up as witnesses, although the fact might be that C had given private information on condition that his name should not be disclosed as that of an informer, that D knew absolutely nothing about the matter, and that E had made a palpably false statement. It is obvious to my mind that a special diary to be of any practical use to a Magistrate or a Judge must contain much more information as to what was stated by the persons who were examined by the Police officer, and if it is to contain further information, I cannot conceive any good reason why it should not contain a full reproduction of the statements made by the persons examined.

10. A Police officer is not compelled to reduce to writing any statement made to him by a person whom he examines: he is, however, compelled to insert in the privileged special diary 'a statement of the circumstances ascertained through his investigation.' It would be no evasion of the law as enacted by the Legislature for such Police officer to enter in the following manner in the special diary the statements made to him by persons whom he had examined: 'On the 12th of August I examined A, B, C, D, and E. The following is a statement of the circumstances ascertained through my investigation: A, at 10 o'clock A.M., on August 11th saw X kill Y with an axe. B, when returning from his paddy-field to the village at 9-45 A.M., the same day, heard X using threatening language to Y. X

admitted to C at 11 A.M., the same day that he had killed Y on account of a dispute as to a field. X had borrowed the axe from D at 7 o'clock that morning to cut wood. E states that he saw A murder Y at 9 o'clock on the evening of the 10th of August. That statement is false: it can be proved that E was in custody 20 miles away on the 9th and 10th, and was not released until the morning of the 11th of August.' The skeleton entry which I have given as an illustration could be enlarged by the Police officer so as to give the statements of A, B, C, D, and E in full, and still be merely 'a statement of the circumstances ascertained through his investigation,' and could in no possible view of the law be treated as an evasion of the law, such a statement would in my opinion be in compliance with Section 172. What possible difference in principle can there be between a statement so made and a statement giving in direct narrative form what A, B, C, D, and E had said respectively in answer to the inquiries of the Police officer? I can see none.

11. Section 172 of the Code of Criminal Procedure is not the only section in that Code which, carefully read, shows that the special diary should contain at least a precis or a summary of the statements made to the Police officer making an investigation in a criminal case. The police are not permitted to detain an accused person in custody longer than 24 hours. It is by Section 167 of Code of Criminal Procedure enacted that 'whenever it appears that any investigation under this chapter cannot be completed within the period of 24 hours fixed by Section 61, and there are grounds for believing that the accusation is well-grounded, the officer in charge of the Police station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to each Magistrate.' 'The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.' 'A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.' 'If such order be given by a Magistrate other than the District Magistrate or Sub-Divisional Magistrate, he shall forward a copy of his order, with

his reasons for making it, to the Magistrate to whom he is immediately subordinate.'

12. If the entries in the special diary are not to contain the statements or even summaries of the statements of the persons who have been examined by the Police officer making the investigation, what information will 'a copy of the entries in the diary' afford to the Magistrate upon which he can decide whether or not he should authorize the detention of the accused person in custody, or upon which he could form an opinion as to whether or not further detention was unnecessary. It is upon these entries in the special diary that the Magistrate is to decide and to form his opinion as to whether or not the accused person is to be detained in custody. There is not one word in Section 167 to suggest that any statement reduced into writing elsewhere than in the special diary is to be forwarded to the Magistrate.

13. If the special diary is to be of any practical use in aiding a Magistrate or Criminal Court in a criminal inquiry or trial, or is to be of any use in enabling a Magistrate to decide, under Section 167 of the Code of Criminal Procedure, as to whether an accused person should or should not be detained in custody, the special diary must contain at least a summary of the statements made by the persons who had been examined under Section 161 of the Code by the Police officer making the investigation. Pew people would, I imagine, suggest that a mere summary of a person's statement could be regarded by a Magistrate or by a Judge as affording as satisfactory or as complete a source of information as the unabridged statement of such person would afford. The summary would merely represent what the Police officer considered to be the effect of the person's statement to him. The unabridged statement, if correctly taken down, would give what the person making the statement had in fact said. Common sense suggests that when the Legislature enacted in Section 172 that the special diary might be used by a Magistrate or by a Judge in an inquiry or in a trial in a criminal case, and enacted in Section 167 that 'a copy of the entries' in the special diary should be sent to the Magistrate who had to decide whether or not an accused person should be detained in custody, the Legislature intended that the information to be afforded by the special diary should be as complete as possible, so far as the purposes for which the special diary might be lawfully used were concerned. And

this, in my opinion, compels the conclusion that the Police officer who is making an investigation under Chapter XIV of the Code of Criminal Procedure may lawfully reduce to writing in the special diary the full and unabridged statement made to him by a parson whom he is examining or has examined under Section 161 of the Code. A consideration of Section 172 of the Code, in my opinion, compels the conclusion that the special diary, including every entry in it, is absolutely privileged from inspection by an accused person or his agent unless the special diary is used by the Police officer who made it to refresh his memory, or is used by the Court to contradict the Police officer who made the special diary. A consideration of the principles of public policy leads me to the same conclusion. From Section 39 of the Indian Evidence Act, 1872, may be inferred how much--and how much only--of the special diary may be seen by an accused person or his agent when the special diary is used to refresh his memory by the Police officer who made it or is used by the Court to contradict such officer. In such case the accused person or his agent is in law entitled to see only the particular entry used and so much of the. special diary as is in the opinion of the Court necessary in that particular matter to the full understanding of the particular entry so used, and no more. In such cases the Court must be careful to see that the discretion entrusted to it in deciding what may or may not be seen by the accused or his agent is not abused remembering that the discretion is to be a judicial discretion, and is not to be influenced by a mere arbitrary fancy.

14. In no case is an accused person or his agent entitled, in my opinion, to a copy of the special diary or of any part of it. The special diary is, except in the two events to which I have referred, privileged from inspection by an accused person and his agent, and on the happening of one of those events the sole right conceded by the Legislature to an accused person and his agent is the limited right of inspection which I have mentioned.

15. The Legislature must have had some object in view in according to special diaries a protection, except in two events, from inspection by an accused person or his agent. It could not have been the intention of the Legislature that such object should be obtained only when it should appear to the Magistrate or to the Judge concerned with the particular case that the Police officer had kept his special diary

in the manner approved of for the time being by such Magistrate or Judge, and should be defeated if the special diary happened to have been kept in a manner which did not meet with the approval of the particular Magistrate or Judge. One main object of all legislation is to ensure uniformity in the law and its application, and not to ensure the confusion which would result from leaving judicial officers a freehand to follow the bent of their individual fancies as to what the law ought to be or ought not to be. It appears to me that when Judges attempt to construe Section 172 of the Coda of Criminal Procedure and decide that a statement made under Section 161 of that Code to a Police officer and reduced by him into writing in the special diary is not, and is not to be deemed to be part of the special diary, it is the duty of such Judges to explain precisely and clearly how a Police officer making an investigation under Chapter XIV of the Code of Criminal Procedure is to comply with the requirements of Section 172, and to make his special diary, so that it may be in accordance with the provisions of Section 172, and that it may be of any practical use to a Magistrate under Section 167 or to a Court under Section 172 of the Code, and still maintain the privilege which is accorded to it by the Legislature and particularly to explain in what form the statement of the 'circumstances ascertained through his investigation' is to be entered, and to what extent, if at all, and in what form, such 'statement of the circumstances ascertained through his investigation' may include statements made to him under Section 161. I maintain without hesitation that no such explanation can be given which will be consistent with a decision according to which a statement made under Section 161 to the Police officers and reduced into writing in the special diary is not to be deemed to be part of the diary. When Judges have to construe an Act of the Legislature it is their duty so to construe it, if it be possible, as to make the provisions of the Act consistent with each other, to give effect, not to their own ideas as to what ought to be the law, but to the expressed intention of the Legislature, and not to construe it, as in this case, so as to make the protection accorded by the Legislature to special diaries depend upon the capacity, capability, ignorance or negligence of a Police officer or upon the idiosyncrasies of a Magistrate or a Judge. It is the duty of Judges when construing an Act of the Legislature to attempt to ascertain what was the intention of the Legislature, and to give effect to it, and not to seek for some pretext for defeating an intention of the Legislature which does not meet with their

approval.

16. Those who recognise the self-evident truth of the proposition that the intention of the Legislature was that it is only on the happening of one or other of the two events especially provided for in Section 172 of the Code of Criminal Procedure that the special diary or any part of it should be open to the inspection of an accused person or of his agent, but are desirous, whatever may have been the intention of the Legislature, that accused persons and their agents should have inspection of statements made under Section 161 of the Code to a Police officer and reduced by him into writing in the special diary are forced to adopt the contention that such a statement does not form part of the special diary, although it happens to be entered in it. There are no doubt some decisions to support that contention; but those decisions are not binding upon this Bench, and it was in fact partly in consequence of one of those decisions that this case was referred to the Full Bench, not to decide whether this Full Bench is bound by it (it could not be suggested that it is), but to ascertain how far, if at all, that decision was a correct exposition of the law to be followed in these Provinces. It has not been pointed out to us that in any of the decisions to which I am referring, and which we are invited to follow because they were decisions of High Courts, any of the questions which it is necessary to consider to enable us to arrive at a correct construction of Section 172 of the Code of Criminal Procedure and to ascertain what was the intention of the Legislature were considered. In the Indian Law Reports (8 Calcutta) there are two conflicting decisions bearing on this subject, the earliest of which, in my opinion, is correct and is consistent with sound principles, that decision was ignored and the other decision in that volume was followed in the Calcutta Court. On the other hand, amongst others, the able, weighty and instructive Judgment of Sir Meredyth Plowden and Mr. Justice Roe in Kallu and Ors. v. Queen-Empress 29 Panj. Rec. Cr. J. 55, deserves careful consideration. A decision is valuable or the reverse in proportion to the consideration which was given to the questions involved in it and to the reasons expressed for the conclusion arrived at by the Judge or Judges who were parties to it. The practical question is--has the Legislature, which has enacted that special diaries shall be kept and has accorded to those diaries limited protection for inspection by an accused person or his agent, anywhere enacted that when a Police officer making an investigation under

Chapter XIV of the Code of Criminal Procedure voluntarily--there is no compulsion--reduces into writing under Section 161 of that Code a statement made to him, he shall not make such reduction into writing in the special diary or shall make it elsewhere? Unless the Legislature has so enacted, there is no foundation in law for the proposition that such a statement when entered in the special diary is not part of the special diary or must not be treated as part of the special diary. In fact the Legislature has nowhere enacted that any statement made to such Police officer under Section 161 of the Code of Criminal Procedure shall not be reduced into writing in the special diary, or when reduced into writing shall not be or be deemel to be part of the special diary. On the contrary the Legislature has in my opinion plainly indicated by Section 167 and Section 172 of that Code that such statement if material, or so much of it as is material, shall appear in the special diary, and shall form part of it. The Legislature has--and I think wisely--not conferred upon Judges power to make rules for the making of special diaries, or as to what is and is not to be entered in them or to form part of them. Judges have no power to legislate, except the quasi Legislative power of making rules in certain cases; and it appears to me that were we to decide that statements made to Police officers under Section 161 of the Code of Criminal Procedure shall not be entered in the special diaries, or if entered in them shall not be deemed to be parts of the special diaries, we should be attempting to usurp the functions of the Legislature, and therein would be forgetting our duties as Judges--duties which it appears to me are better understood on the Bench in England than they are here.

17. It was contended by Mr. Dwarka Nath Banerji that 'natural justice' requires that when a Police officer reduces, under Section 161 of the Code, into writing the statement of any person, the accused should be allowed to see the statement so taken down. No doubt it would be convenient for an accused person to be pub in possession of all the information as to the case which a Police officer had obtained. It would be particularly convenient and useful, for example, that an accused person should know beforehand what line of defence he had better adopt, and whether or not it would be reasonably safe to try on a false alibi, without incurring the risk of the prosecution being in a position to call and calling rebutting evidence. An accused person can in England obtain a copy of any

deposition taken in his case before a Magistrate: an accused person has the same privilege here. In England if the prosecution intends to call at a trial at Assizes or at Quarter Sessions as a witness to facts in support of the direct case for the prosecution a person who has not been called before the committing Magistrate, it is tb.fi customary, but not the obligatory, practice for the prosecuting solicitor to give to the accused or to his solicitor a short summary of what such person is expected to depose to, but no such practice existed with regard to rebutting evidence, although the prosecution might be prepared with such rebutting evidence before the trial. In my opinion Her Majesty's Judges in England are fully as anxious as are Her Majesty's Judges in India that accused persons should have a fair trial and should be afforded every legitimate opportunity for, and means of, defending themselves; bat I never heard it suggested in England that the prosecution should prepare the brief for the defence, or should supply the defence with a copy, or a summary, of the evidence of a person from whom the police had obtained information which was considered to be unreliable or immaterial and which consequently the prosecution did not propose to put before the Court, or should supply the defence with any information which had been obtained for the purpose of proving, if the necessity should arise, a rebutting case. I confess that I regard with extreme suspicion an argument based on 'natural justice.' When 'natural justice' is appealed to in support of an argument, I generally find that the argument cannot be supported, and that the 'natural justice' argument is an argument which is employed to divert a Judge's attention from the true principles to be applied, and to lead him into following some bent or bias of his own mind. Men hold different opinions as to what is natural justice. Many communists honestly believe that 'natural justice' requires that there should be an equal division of all personal property amongst the people; other people honestly believe that the personal property which a man by his own brains and exertion has acquired he should be allowed to keep for his own enjoyment.

18. Probably there is no Sessions Judge in these Provinces who, as a Magistrate, was observant of what takes place at a police investigation who will not recognise the truth of the description which is contained in the following passage which I quote from a Judgment which was delivered in The Queen-Empress v. Nasir-ud-din I.L.R. 16 All. 207, by my brother Knox, and was concurred in by my brother

Burkitt. The passage is as follows: 'Still more extraordinary is a permission given before the case came on for trial by which the accused were granted copies of statements recorded by the Police during the investigation. Such statements are recorded by Police officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at that stage, and omit many matters equally material, and, it may be, of supreme importance as the case develops. Besides that, in the most cases they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from by standers. Over and above all, they cannot be in any sense termed depositions, for they are not prepared in the way of a deposition, they are not read over to, nor are they signed by, the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said. The law has safeguarded the use of them, and it never can have been the intention of the Legislature that, as in this case, copies of them should have been without question and as a matter of course made over to the accused or their counsel.' And yet it is of such statements, reduced into writing under such circumstances, that it is contended that the accused and his agent should have inspection and should have copies. One can easily understand how such copies would be paraded before a jury as having been furnished by the prosecution as correct representations of what witnesses had said to the Police' officer, and what might be the effect on the jury. Most Sessions Judges would be able to understand the position; but it may be doubted whether the ordinary jurors in these Provinces would. Whether more confidence can be reposed in jurors elsewhere I am not in a position to say.

19. Before concluding this judgment I must again point out that it is the absolute duty of Judges and Magistrates to entirely disregard all statements and entries in special diaries as being in any sense legal evidence for any purpose, except for the one solitary purpose of contradicting the Police officer who made the special diary when they do afford such a, contradiction; and even in that case they are not evidence of anything except that such Police officer made the particular entry which is at variance with his subsequently given evidence; they are not evidence that what is stated in the entry was true or correctly represents what was said or

done.

20. As the Courts have, owing to the illegal use by some Magistrates and Sessions Judges of special diaries, been deprived to some extent in many cases of the valuable assistance which it was intended by the Legislature that a special diary should afford to competent Magistrates or to competent Judges in enabling them to obtain clues to evidence which is not before them, and which it is desirable in the interests of justice should be obtained and recorded, it is advisable to say that Magistrates and Sessions Judges who in the future abuse their right to have the special diaries before them or who make an illegal use of the special diaries, will, in these Provinces, be reported to the Local Government as persons who are unfit to hold responsible judicial posts. Magistrates and Sessions Judges should remember that they hold responsible offices of great trust under the Government, that they receive their salaries as the consideration for the honest performance of the duties imposed upon them, and that their appointments to such offices do not confer upon them a right to apply as law that which has no other basis than their own fancy as to what the law ought to be. If the conscience of a Magistrate or of a Judge-forbids him to apply the law as it is or to make himself to the best of his ability acquainted with the law or procedure to be applied in a case before him, that same conscience should suggest to him that he should vacate his office-and seek a livelihood in some other walk of life. I have been compelled to make these observations by my recollection of the illegal procedure of more than one Sessions Judge.

21. As to the merits of the appeal before us, I am of opinion that there is a reasonable doubt of the guilt of the appellant. I would allow the appeal, and acquitting the appellant direct that the appellant be at once discharged.

22. On behalf of the Court must express to Mr. Dwarka Nath Banerji our thanks for the very able argument which be has addressed to us on behalf of the appellant, he having appeared on behalf of the appellant at the request of the Court.

Blair, J.

23. I entirely concur in the order proposed by the Chief Justice and have nothing to add to the conclusions upon the matters referred to us at which he has arrived, or to the reasoning by which those conclusions are supported. But I desire to add a word to prevent possible misconstruction in the future. It has been shown, I think, conclusively by the judgment of the Chief Justice that statements taken down under Section 161 of the Code of Criminal Procedure are within the true intent and meaning of Section 172 of the same Act included in the category of the matters which an investigating Police officer should under the provisions of that section insert in the diary. But it must not be inferred that in my opinion such latter section contains an exhaustive list of the matters which may with propriety be so entered. There is much which may tend to the furtherance of the objects for which the diary has been instituted which would not fall within the language of that section, but which may with great advantage be entered in the diary, and when so entered would in my judgment be within the exemption from exposure extended to the diary by law. I know no canon of construction which justifies a narrower and more restrictive interpretation of Section 172, nor am I aware of any authority by which a document protected from disclosure for reasons of public policy, can be divested of such protection simply because' it may contain redundant or irrelevant matter.

Knox, J.

24. I have read and carefully considered the judgment just delivered by the learned Chief Justice. I have only to say that 1 concur fully in every word that is laid down therein and in the reason by which those results have been arrived at.

25. The views just expressed concerning the use of Police diaries are substantially the views that I have held for years past, and I have heard nothing in the very careful and able argument of this case addressed to us by Mr. D. Banerji, which leads me to hold otherwise now. I have also read what my brother Burkitt has written and agree with what he is about to say.

26. I would allow the appeal.

Burkitt, J.

27. I fully concur in the exhaustive exposition of the law as to the preparation of Police special diaries and their protection from inspection which has just been pronounced by the learned Chief Justice. I have nothing to add to what has been so dearly laid down in that judgment. All I desire to say respecting it is that to me there is nothing new in the principles and the rules of law therein enunciated. For more than thirty years, as a Subordinate Magistrate, a Magistrate of a district, and a Sessions Judge successively, in these Provinces and latterly as a Judge of the final Court of appeal in another Province, and now as a Judge of this High Court, I have always understood the law as to special diaries to be that which it has now been declared to be by the learned Chief Justice, and I invariably acted upon that view. Indeed until quite recently I did not imagine that the matter was one as to which, in these Provinces at least, there was any diversity of opinion.

28. There is one matter not touched on in the judgment as to which I desire to say a few words. The remarks I am about to make have the concurrence of all the members of this Bench. It has come to my notice, and to that of other members of the Bench, that some Sessions Judges in these Provinces have taken it upon themselves to issue a general order directing the Police diaries in every case committed for trial to the Court of Session and of every criminal appeal to be transmitted to them simultaneously with the Magistrate's records of the cases. It is hardly necessary for me to point out that such an order is illegal. The law nowhere empowers a Sessions Judge to issue such a general order. It authorizes him to send for the diaries of a case under trial before him, if he thinks it necessary in that case to peruse the diaries; but the order must be one ad hoc, confined to a case actually pending before the Sessions Judge, and not a general order as to all cases. Such a general order is not warranted by law, and the Police authorities would be justified in refusing to obey it.

29. As to the appeal in which this reference has arisen, I would concur in acquitting and in directing the release of the appellant.

Aikman, J.

30. I have had the privilege of reading the able and exhaustive judgment of the learned Chief Justice in this case.

31. I entirely concur in his remarks regarding the misuse which is too often made of Police diaries by Courts. I also agree in the opinion he has expressed in regard to the extent to which accused persons or their agents are entitled to have recourse to Police diaries which have been used by a Police officer to refresh his memory, or by a Court for the purpose of contradicting the Police officer. I also agree in thinking that neither the accused nor his agents is entitled as of right to have copies of statements of witnesses which have been recorded by the Police.

32. The main question, however, which was discussed at the bar when this appeal was argued was whether the accused or his agents are entitled to see statements, recorded by the Police, of witnesses who are called for the prosecution.

33. That this is a question of no small difficulty is evident from the contradictory answers which have been given to it by learned Judges who have considered it. As instances of these contradictory views I may refer to the judgment of Trevelyan and Rampini, JJ., in the case Sheru Sha v. The Queen-Empress I.L.R. 20 Cal. 642, and the judgment of Sir Meredyth Plowden in the case of Kallu v. Queen-Empress 29 Panj. Rec. Cr. J. 55.

34. I must admit that I have been impressed with much of the reasoning of the learned Chief Justice and of Sir Meredyth Plowden in the case just mentioned. But after long and anxious consideration I find myself compelled to adhere to the opinion at which, in concurrence with Mr. Justice Blenner-Hassett I arrived in the case Queen-Empress v. Rudr Sing Weekly Notes, 1896, p. 193, in which we held that an accused person is entitled to see previous statements of witnesses called to give evidence against him which have been recorded by the Police in the course of the investigation. Following the Calcutta case quoted above, we held that it made no difference to the accused's right whether the statements were recorded separately from the diary, or were included in it.

35. From the fact that learned Judges have arrived at diametrically opposite conclusions on the question at issue, it must, I think, be admitted that the intention

of the Legislature has not been so clearly expressed as to put the matter beyond doubt. This being so, I think it is open to a Judge to consider whether a priori there is any reason why the Legislature should make these statements privileged.

36. 'The object of a trial in every case 'said Mr. Justice Nanabhai Haridas in the case Reg. v. Uttamchand Kapurchand 11 Bom. H.C. Rep. 120, 'is to ascertain the truth in respect of the charge made. For this purpose it is necessary that the Court should be in a position to estimate at its true worth the evidence given by each witness, and nothing that is calculated to assist it in doing so ought to be excluded, unless for reasons of public policy, the law expressly requires its exclusion.'

37. Now, an accused is entitled to show the Court, if he can, that the witnesses who are giving evidence against him are unworthy of credit. One of the ways in which the law allows the credit of a witness to be impeached is 'by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted' [vide Section 155(3) of the Evidence Act.] It requires no argument to show that if a witness who is giving evidence against an accused person is proved to have made statements differing materially from the evidence he gives in Court, the value of his testimony is seriously impaired, for it is clear that either he or his memory is not to be trusted. It appears to me, then, to be a priori improbable that the Legislature would throw any obstacle in the way of an accused person showing that a witness who is called for the prosecution, has previously told a materially different story.

38. Suppose the following case, which is not an exaggerated instance of the discrepancies sometimes found between evidence given in Court and statements made to the Police. A prisoner named Ram Bakhsh is on his trial for murder. The brother of the deceased is called as a witness for the prosecution and deposes that in the early morning, as he was returning from watching his fields to the house in which he and his brother lived, he saw the prisoner rush out of the house, and when he entered it found his brother lying on his bed with his throat cut. In the possession of the Police is a statement of this witness, recorded at the outset of the investigation to the following effect: 'I was watching my field in the early morning when my nephew came running from the village crying, and told me his

father (my brother) had been murdered. I at once went home and found my brother lying on his bed with his throat cut. I suspect Ram Bakhsh of having committed the murder, as my brother and he had a quarrel two days previously.' If there is in the possession of the prosecution or of the Police, which comes to the same thing, such a statement, is there any reason why it should be withheld from the accused or his advisers? I must confess I see none. Of course if the Legislature has declared clearly that it shall be withheld, there is an end of the matter. I am for the present only discussing the question whether it is likely that the Legislature should forbid the inspection by the accused of statements of witnesses, previously recorded by the Police, when these witnesses are giving evidence in Court for the prosecution. It must be remembered that even if the accused is allowed to see these previous statements, and if a different story is told therein from that deposed to by the witnesses in Court, this will not of itself benefit him, for it is only by proof of previous inconsistent statements that the credit of a witness can be shaken, and the production of these statements is no proof that the witnesses said what is recorded in them. That has to be proved by the evidence of persons who heard the witnesses make those-statements. I would also remark here that, even if the Police have made no record of previous statements of the witnesses for the prosecution, or if a. record was made and it be held that an accused is not entitled to see that record, that will not prevent the accused from proving aliunde, if he can, that a witness has made a statement which is inconsistent with the evidence he is giving in Court. If, however, the accused or his agent be allowed to see what a witness for the prosecution is recorded to have previously said to the Police, this may materially aid him in his endeavour to prove that the witness is untrustworthy; and I see no reason why this assistance should be withheld from him.

39. I am clearly of opinion that there is no bar whatever to the accused seeing previous statements of witnesses called for the prosecution recorded by the-Police under Section 161 of the Code of Criminal Procedure, and not incorporated in the diary. The most difficult question is whether statements of such witnesses can be seen when incorporated in the diary.

40. The learned Chief Justice has demonstrated that the diary was never intended to be a bald record of the investigating officer's movements and of the names of the witnesses he has examined. I am quite unable to go the length contended for by the learned Counsel who argued the case on behalf of the appellant, and hold that even a summary of facts ascertained by the investigating officer from the examination of a number of witnesses is not protected. But I regret I am equally unable to concur with the learned Chief Justice in holding that the special diary 'no matter what it may contain' is absolutely privileged, unless under the circumstances stated in the concluding portion of Section 172.

41. According to Section 172 the diary over which the cloak of privilege is thrown by the section is to contain a record of the proceedings of the investigating officer. Amongst the things to be entered by him in his diary is 'a statement of the circumstances ascertained through his investigation.' It may in some cases be difficult to draw the line between what is 'a statement of the circumstances ascertained through the investigation' and the statement of a witness recorded by the Police officer in his diary. But I think that, as a rule, a Court would have no difficulty in saying what was the statement of a witness and what was a statement by the Police officer of circumstances ascertained through his investigation. The latter would be privileged; the former, I hold, would not be.

42. It never could be contended that an accused or his agent is entitled to ransack a special diary on the chance of discovering something that might tell in his favour. It is perfectly right, said Eyre, C.J., in a case cited by Field in his Law of Evidence (5th edition, p. 580) 'that all opportunities should be afforded to discuss the truth of evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which the detection is made should not be unnecessarily disclosed.' I do not see how this rule would be offended against by allowing a prisoner to see previous statements of witnesses who are actually giving evidence against him in Court. If, then, there is in the diary what is, in the opinion of the Court, the record of a statement made to the Police by a witness who gives evidence in Court, then in my humble opinion the Court should allow the accused or his agent to see that record, taking the necessary

precautions that no other part of the diary is disclosed. If such statements were intended by the Legislature to form part of the diary, no doubt they are privileged. But it is not clear to me that that was the intention of the Legislature. The provisions of the law in regard to the recording of statements of witnesses by the Police are to be found in Sections 161 and 162 of the Code of Criminal Procedure. It is not until we come to Section 172 of that Code that we find the enactment of the Legislature in regard to what the diary is to contain, and in regard to the privilege which a diary framed in the manner described in the first paragraph of that section enjoys. Had the Legislature intended that the record of the statements of witnesses, which, according to Section 161, a Police officer may make if he chooses, was to form a part of the diary it would, I think, have expressed this intention. The fact that it has not is to my mind an indication that the view of Mr. Justice Field Expressed in the case of Jhubboo Mohton I.L.R. 8 Cal. 739, at pp. 742, 743, is right, namely, that the particulars required to be entered in the diary do not include statements of witnesses recorded under Section 161. Consequently these statements are not, to use the expression of Mr. Justice Field, 'an integral portion of the diary,' and are not in my view protected by the second paragraph of Section 172. That protection was necessary, inasmuch as a diary framed as prescribed in the first paragraph of the section might contain information which it would be contrary to public policy to disclose. But how it would be contrary to public policy to disclose what a witness who is giving evidence in Court had previously said to the Police in regard to the charge under investigation, I fail to see. Such a disclosure might militate against the securing of a conviction. But if a witness has made inconsistent statements it is in the interest of justice, and therefore of the highest public policy, that this should be known. It must not be forgotten that the Legislature has declared that a person examined by a Police officer who is investigating a case 'shall be bound to answer truly all questions relating to such case put to him by such officer,' save when the answer would tend to expose him to a criminal charge or to a penalty or forfeiture.

43. The provisions of Section 145 of the Evidence Act are in my opinion material in considering the question under discussion. That section runs as follows: A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being

shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. It has already been mentioned that one of the modes in which according to the Evidence Act the credit of a witness may be impeached is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; and, as we have just seen, Section 145 gives the right to cross-examine a witness on previous statements made by him and reduced into writing when these previous statements are relevant to the matter in issue. The Evidence Act (No. I of 1872) was passed before the Code of Criminal Procedure of 1872. It seems to me that if the Legislature had intended that accused persons should have no right to see previous statements of witnesses who give evidence against them so as to be able to cross-examine on them as provided in Section 145 of the Evidence Act, it would have clearly declared such statements to be privileged, either in Act No. X of 1872 or Act No. X of 1882 or Act No. X of 1886.

44. The last Act contained a section dealing specially with statements of persons made to Police officer during the course of an investigation. Section 162 of Act No. X of 1882 had declared that such statements if reduced into writing were not to be used as evidence. Act No. X of 1886 qualified this by enacting that such statements if reduced to writing were not to be used as evidence against the accused. It has been held that these statements may be used in evidence on behalf of the accused; why then should he not be allowed to see them if reduced into writing by the Police

45. But though I hold that an accused should be allowed to see what has been said previously in regard to the case under trial or inquiry, by a witness who is giving evidence against him in Court, it has to be remembered that the mere production of a statement recorded by the Police inconsistent with evidence given in Court does not impeach a witness' credit. It has to be proved to the satisfaction of the Court that the witness did in point of fact make previously a statement inconsistent with his evidence given in Court. I am glad that the Chief Justice has given prominence to the remarks of my brother Knox in the case Queen-Empress v. Nasir-nd-din I.L.R. 16 All. 207, as to the manner in which statements of

witnesses are often recorded by investigating Police officers. We know that mistakes sometimes creep into the record of the evidence of a witness given in Court. This liability to mistake is intensified when the witness' statement is recorded amidst all the difficulties so well described by my brother Knox, eve a where the investigating officer honestly desires to take down what the witness says, and has no desire to make the witness' statement fit into any pre-conceived theory of his own. When the writer of a statement recorded under Section 161 of the Code of Criminal Procedure is called to prove it, he will naturally stick to what he has written, and assert that the witness did make the statement as recorded. But when a witness denies that he made a statement which is materially inconsistent with the evidence he gives in Court, the Court, before it allows its opinion as to the witness' credibility to be affected, must, I repeat, be satisfied that the witness did in fact make the previous inconsistent statement. When the Court is so satisfied, it must give effect to its opinion. All Criminal Courts in this country know that the case against an accused person is frequently shaken by proof that the witnesses who implicate him in Court have done so as an afterthought. See, for example, the observations of the learned Chief Justice and my brother Banerji at page 61 in their judgment in the case Queen-Empress v. Taj Khan I.L.R. 17 All. 57. I have had long experience of the Criminal Courts in this country, and I have no hesitation in saying that many innocent persons would be convicted were it not for proof that the witnesses who implicate them in Court told quite a different story at first. I should on this account be very unwilling to throw any obstacle in the way of an accused or his advisers seeing the record of a previous statement made by a witness for the prosecution, unless there is a dear enactment by the Legislature that the accused shall not see it. And I am unable to find any such clear enactment in the law. The caution with which evidence must be received as to a previous contradictory statement alleged to have been made to the Police does not in my opinion affect the principle as to the accused's right to see the record of the previous statement. But whether or not it be held that an accused is entitled to see the record of previous statements made by witnesses who are giving evidence against him, there is no doubt that the Court can see them. In his judgment in the case Kallu v. The Queen-Empress, referred to above, Sir Meeedyth Plowden observes that it is competent for the accused 'to move the Court, which is

presumably impartial and end eavouring to ascertain the truth, to refer to the statements attributed in the diaries to a witness before the Court, and it is open to the Court, if need be, to cross-examine the witness after reference thereto.' With this observation I entirely agree. The Court can cross-examine the witness as to his statement recorded in the diary before the statement is proved, but of course it cannot hold the witness to be contradicted by anything in the statement, until it be proved that the witness made the statement. If Courts took advantage of the right given them by law to use Police diaries to and them in trials and inquiries, and so cleared up all material contradictions appearing between the statements recorded in those diaries and the evidence given in Court, the privilege of seeing the statements would not be of so much moment to the accused or his advisers. But a Court may be pressed for time, or may fail to appreciate the bearing of the statements in favour of the accused, as was the case in Sheru Sha v. The Queen-Empress, I.L.R. 20 Cal. 642, at p. 649. I think, therefore, that the privilege of seeing the previous statements of witnesses is one which should not be withheld from the accused unless it is quire clear that the Legislature intended it to be withheld, and to my mind it is not clear that this was the intention of the Legislature.

46. In regard to the particular case before us, I have carefully read the evidence, and I concur with the learned Chief Justice in thinking that the guilt of the appellant is not proved beyond reasonable doubt. I therefore concur in the order proposed.

Banerji, J.

47. I, too, regret my inability to concur with the learned Chief Justice on the principal question argued before us, namely, whether an accused person or his agent is entitled to call for and see for the purpose of cross-examining and impeaching the credit of witnesses called for the prosecution, previous statements made by the witnesses to a Police officer and reduced by him into writing, if those statements happen to be embodied in the special diary prepared by the Police officer under Section 172 of the Code of Criminal Procedure, 1882. In my opinion such statements do not form an integral part of the diary, and are not entitled to the privilege given to a diary by Section 172. My reasons for this conclusion are

generally the same as those stated in his judgment by my brother Aikman.

48. Section 161 of the Code of Criminal Procedure empowers a Police officer making an investigation under Chapter XIV to examine orally any person supposed to be acquainted with the facts and circumstances of the case, and to reduce into writing any statement made by the person so examined. Section 162 provides that such statement, unless it be a dying declaration, shall not be used as evidence against the accused. It has been held by this Court in Queen-Empress v. Taj Khan I.L.R. 17 All. 57, that such statement 'when legally brought as evidence before the Court,' by being duly proved can be used in favour of an accused person. This is in consonance with Section 155 of the Evidence Act, according to which one of the means by which the credit of a witness may be impeached is 'proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.' Section 145 of the same Act provides that a witness may be cross-examined as to previous statements made by him, reduced into writing and relevant to the matters in question, 'but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are used for the purpose of contradicting him.' If, therefore, the statement made to a Police officer by a witness for the prosecution has been reduced into writing under Section 161 of the Code of Criminal Procedure, and it is intended to contradict the witness by the writing, the attention of the witness must be called to the portion of the writing by which it is intended to contradict him, before proof of the written statement can be given. This it will be impossible for the accused or his counsel to do, unless he has access to the writing and is allowed to call for and see it. In my opinion there is no reason for holding that a statement of a witness reduced into writing by a Police officer under Section 161 and not embodied in the special diary of that officer is entitled to the privilege of Section 172. I am not aware of any ruling, and none has been cited to us, in which it was held that an accused person or his agent has not the right to call for and see the record of such a statement. Now, did the Legislature intend to deprive an accused person of that right if the statement of a witness reduced into writing under Section 161 is, instead of being kept separate, incorporated in the diary? If the Legislature has in unmistakable language indicated such intention, a Court is bound to give effect to it. The object of the law of procedure including the law of evidence, is or

ought to be, as observed by Sir Barnes Peacock in Queen v. Nabadwip Goswami 1 B.L.R. O. Cr. 15 at p. 22, 'that the innocent shall be protected and the guilty punished?' It is undeniable that an accused person should be afforded every facility consistent with law to establish his innocence. One of the moans by which he may establish his innocence is by proving that the evidence brought forward to prove his guilt is not credible, and the credibility of a witness may be shaken by showing that in material particulars he has departed from a previous statement made by him in respect of the same matter. It is impossible to believe that the Legislature ever intended to deprive an accused person of any of the facilities which he might have for proving his innocence. I cannot conceive that in the case of a statement reduced to writing under Section 161, but not incorporated in the diary, the Legislature should have given an accused person the right which, in my opinion, he undoubtedly has of calling for and seeing that statement for the purpose of discrediting a witness brought forward to prove his guilt, and should have taken away that right if the same statement happened to be embodied in the diary. I am unable to impute such inconsistency to the Legislature. In my opinion it was not the intention of the Legislature that statements reduced into writing by a Police officer under Section 161 should form a part of the diary prescribed in the first paragraph of Section 172; so that the prohibition contained in the second paragraph of that section as to the inspection of a diary by the accused or his agents was not meant to apply to such statements. I am not prepared to go the length of holding that the 'statement of the circumstances ascertained through his investigation' by a Police officer, which he is required by Section 172 to set forth in his diary should not include a summary of what he may have ascertained from persons examined by him. The absence of such a summary from the diary is not likely to enable a Court 'to discover further evidence or possible sources of evidence, which, if brought before the Court, may throw additional light upon the guilt or innocence of the accused.' And this is the purpose for which the diary may, as Mr. Field rightly observes, be legitimately used by a Court (see note to Section 145 of the Evidence Act, 5th Edition, p. 640). There is nothing, however, in Section 172 which authorizes a Police officer to record in his diary the actual statement made by a person examined by him. Such a statement stands on a different footing from what may be called the Police officer's version of what he ascertained

from a witness. And such a statement, whether it has been taken down in the direct form or in the oblique narrative, does not in my opinion form an integral part of the diary, and is not entitled to the privilege conferred on a diary by Section 172. That privilege in my opinion extends only to what may legitimately form the contents of a diary. It may therefore extend to the Police officer's version or summary of the statements made to him, but it does not extend to the statements themselves. In this view one has not to read into the second paragraph of Section 172, an exception which is not provided by that paragraph. That section is not so happily worded as it might have been--otherwise the difficulty which we have now to meet would not have arisen, and the misuse of Police diaries by Courts and Magistrates on which the learned Chief Justice has animadverted would not have taken place. The conclusion at which I have arrived is fortified by the ruling of McDonnell and Field, JJ., in The Empress v Jhubboo Mahton I.L.R. 8 Cal. 739; of Mitter and Macpherson, JJ., in In the matter of Mahomed Ali Hadji v. The Queen-Empress I.L.R. 16 Cal. 612, note; Trevelyan and Hill, JJ., in Bikao Khan v. The Queen-Empress I.L.R. 16 Cal. 110; Trevelyan and Rampini, JJ., in Sheru Sha v. The Queen-Empress I.L.R. 20 Cal. 642, and of my brother Aikman and Mr. Justice Blenner-Hassett in Queen-Empress v. Rudr Singh Weekly Notes, 1896, p. 193. I see no reason for holding that so many learned judges have come to an erroneous conclusion, a conclusion which, in my humble judgment, will further the administration of justice instead of retarding it, and is not inconsistent with anything contained in the Code of Criminal Procedure.

49. As regards the other matters argued before us and dealt with by the learned Chief Justice, I agree with him. I also concur in the order which he proposes to pass in this particular case.

50. This appeal is allowed. The conviction is net aside. The appellant is acquitted, and the Court directs that he be at once released.