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Sheo Raj Vs. State

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Court : Allahabad

Decided On : Oct-08-1963

Reported in : AIR1964All290; 1964CriLJ1

Judge : M.C. Desai, C.J., ;J. Sahai and ;B.D. Gupta, JJ.

Acts : Evidence Act, 1872 - Sections 4, 5 and 80; Code of Criminal Procedure (CrPC) , 1898 - Sections 164

Appeal No. : Criminal Appeal Nos. 765 and 766 of 1962 and Criminal Revn. No. 1291 of 1963

Appellant : Sheo Raj

Respondent : State

Advocate for Def. : J.R. Bhatta, Dy. Govt. Adv.

Advocate for Pet/Ap. : P.C. Chaturvedi, Adv.

Judgement :

Desai, C.J.

1. This case has been laid before this Bench for decision of the question whether 'the memorandum of identification proceedings held by a Magistrate acting under Section 164, Cr. P. C. is admissible without proof'. The question arose before Kailash Prasad, J., during the hearing of the appeal and he referred it to a Full

Bench because of a conflict between Asharfi v. State 0043/1961 : AIR1961 All153 and the State v. Chandrapal Govt. Appeal No. 1931 of 1961, DA 18-8-1962 (All). In the latter case Uniyal and Gyanendra Kumar, JJ., without noticing the decision in Asharfi's case 0043/1961 : AIR1961 All153 held, contrary to what was held in that case, that Section 80 of the Indian Evidence Act does not apply to a memorandum of identification proceedings prepared by a Magistrate and that it cannot be presumed to be genuine and must be proved to be so by evidence. Criminal Appeal No. 766 of 1962 is connected with this appeal. In Criminal Revision No. 1291 of 1963 the only question raised on behalf of the applicant was whether a memorandum of identification proceedings was admissible in evidence on being presumed to be genuine under Section 80 of the Evidence Act and our brother Bishambhar Dayal doubting the correctness of 0043/1961 : AIR1961 All153 referred the case to a larger Bench, Criminal Appeal No. 1889 of 1963 being with Criminal Revision No. 1291 of 1963 has been referred to a larger Bench alone with it.

(1a) Section 80 of the Evidence Act reads as follows:--

'Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence.........given by a witness in a judicial proceeding or before any officer authorised by Law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to he signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.' There are bewildering numbers of 'and' and 'or', but the section can be split up into two parts, one relating to a record or memorandum of evidence whether given in a judicial proceeding or before an officer authorised by law to take such evidence and the other relating to a statement or confession by a prisioner or accused person. A record or memorandum of evidence or a statement or confession can be presumed to be genuine if it is taken in accordance with law and purports to be signed by a Judge, Magistrate or an officer authorised by law to take such evidence. In these cases we are concerned with

documents purporting to be memoranda of statements made by persons to Magistrates to the effect that they would identify the persons who committed certain offences and of their pointing out certain persons as the offenders.

The memoranda show that the persons pointed out the offenders when standing mixed with other persons in what is known as identification parade; they simply pointed them out and did not orally state that they were the persons who committed the offences. But a statement can be made by signs also and their pointing out certain persons after saying orally that they would point out the offenders amounts to their saying that the persons pointed out were the offenders. In effect, therefore, the memoranda are of statements made by persons before Magistrate to the effect that certain persons had committed certain offences. If Section 80 applies to them it applies to them only on the ground that they are memoranda of evidence given by witnesses in judicial proceedings or before officers authorised by law to take such evidence. They are not statements or confessions by prisoners or accused persons. It was not contended before us that tha words 'by any prisoner or accused person' occurring in Section 80 govern only the word 'confession' and not also the word 'statement'. The documents purport to be statements, but not of prisoners or accused persons. The words 'by any prisoner or accused person' govern also the word 'statement', because if they governed only the word 'confession' the word 'statement' would be left all alone and would be too vague to make any sense.

Further the fact that the article 'a' is not repeated before the word 'confession' indicates that the phrase 'a statement or confession' is to be taken as one indivisible phrase and that the words 'by any prisoner or accused person', which immediately follow it, must govern the whole of it and not a part of it. The only way in which the four phrases, 'a statement by any prisoner', 'a statement by any accused person', 'a confession by any prisoner' and 'a confession by any accused person' can be joined together in a concise phrase is the way employed in Section 80. This view finds support in Ram Sanehi v. State : AIR1963 All308 .

2. In order that the memoranda under consideration may be governed by Section 80 they must fulfil the following three requirements:

(1) they are memoranda of evidence,

(2) the evidence was given by a witness, and

(3) it was given in a judicial proceeding, or before an officer authorised by law to take it.

It is not in dispute that if these requirements are fulfilled the other requirements that the evidence was taken in accordance with law and that the memoranda purport to be signed by a Magistrate or an officer authorised by law to take the evidence are also fulfilled.

3. Generally while the police investigate art offence committed by unknown persons and arrest persons suspected of having committed it they get identification proceedings held so that the eye-witnesses are confronted with them. Only the eye-witnesses can say whether they committed the offence or not and in order to make their statements acceptable as true the suspects are mixed up with other persons and the eye-witnesses are asked whether they can point out any of the offenders among them. These proceedings are known as identification proceedings and the police get them conducted before a Magistrate so that whatever statements are made by the eye-witnesses and are recorded by the Magistrate can be placed before the Court when the suspects are placed on trial. Generally identification proceedings are held while the police are still investigating the offence: i.e. before they send a report under Section 173, Cr. P. C. to a Magistrate on the basis of which he can under Section 190 of the Code take cognizance of the offence. A statement made by a person to a police officer in the course of an investigation cannot be used for any purpose at any enquiry or trial in respect of the offence under investigation (except for contradicting him), vide Section 162; it is open to any person to make a statement cr confession before a Magistrate (of a certain class) in the course of an investigation, or at any time thereafter, but before the commencement of an enquiry or trial and the statement or confession will be recorded by the Magistrate under Section 164 and is not subject to the bar imposed by Section 162. Such a statement, being a previous statement, may be used only to contradict the person when he appears as a witness at the enquiry or trial of the offence or to corroborate him.

A statement made by a person before a Magistrate of the required class holding an identification proceeding and recorded by him is a statement governed by Section 164: there is no dispute on this point. It is to be noted that Section 164 simply mentions 'any statement or confession made to him in the course of an investigation' and not 'any statement or confession made to him in the course of art investigation by any witness or accused person'. It does not state whose statement or confession is to be recorded by him. Actually at this stage, whan the offence is still under investigation, there are no witnesses and no accused persons (except in the sense of persons against whom a charge of having committed the offence is levelled and is under investigation), it is only after the investigation has been completed that the police can decide who is to be the accused cf the offence before a Magistrate and who are to be the witnesses in the case. Till then there can be no decision about the status of a person as an accused person or as a witness and all persons examined by the police during the investigation are mere interrogatories or informants or statement-makers.

The provisions in the Code relating to investigation do not refer to any person as a witness. Though 'witness' is not defined in the Evidence Act, Sections 118, 119 and 120 of it make it clear that a witness is a person, who testifies before a Court. Under Section 59 all facts may be proved by oral evidence and 'oral evidence' is defined in Section 3 to mean and include all statements made by witnesses before a Court. The definition of 'proved' shows that the question of proof of a fact arises only before a Court, so long as there is no Court there is no question of a fact being proved and consequently no question of oral evidence and witnesses. Evidence can be given only in respect of the existence or non-existence of a fact in issue or a relevant fact, vide Section 5. Which is a fact in issue or a relevant fact is a matter that arises only before a Court because only before a Court there can arise the question whether a certain fact is proved or not. These provisions of the Evidence Act make it clear that no person can claim the status of a witness except in relation to a proceeding before a Court. It follows that while an offence is still under investigation there is nobody who can be called 'witness' and there is no statement that can be called 'evidence',

4. At the moment when a Magistrate records a statement under Section 164, Cr. P. C. there is no matter of fact under enquiry before him; the offence is still under investigation and the Magistrate may not be even a Magistrate entitled to take cognizance, of the offence. Since there is no matter of fact under enquiry before him, there is no question of his permitting or requiring a statement to be made before him by a witness and, therefore, there is no possibility of the statement made to him being 'evidence', see the definition of 'oral evidence' in Section 3. He may be a Court as defined in Section 3, but what he records is not 'evidence'. Every statement that is made to a Magistrate is not 'oral evidence' and does not became a record of evidence when reduced to writing. Since he has not to give any finding he does not record a statement to enable, him to arrive at any finding. Such a statement can be used, if at all, only when somebody is put on trial before a Court for committing the offence investigated by the police and the maker of the statement is examined as a witness, and that too only for contradicting him under Section 145 or corroborating him under Section 157 of the Evidence Act. There can be no controversy on this point; still Nazir Ahmad v. King Emperor , Brij Bhushan v. Emperor and Bhuboni Sahu v. The King , may be cited in support.

Even when it is used at the trial it does not become 'evidence' because it is not used to prove of disprove any fact in issue or relevant fact. That the witness had made a previous statement either corroborating or contradicting the evidence given by him in Court is neither a fact in issue nor even a relevant fact. The only possible section under which it can be said to be a relevant fact is Section 11, but the fact that he made a previous statement, even if conflicting with the evidence given in Court, cannot be said to be inconsistent with any fact in issue or relevant fact and the fact of making a previous statement whether conflicting or corroborating the evidence given in Court cannot be said to make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. I may refer to what I said in the State v. Jagdeo 1955 All L J 380, regarding Section 11 not being applicable to the making of a statement. When it is used at the trial far either of the purposes mentioned above it does not become evidence at the trial and much more less is it evidence at the time when it is made and is recorded by a Magistrate.

The investigation may end in, what is called a final report, which may be accepted by the Court, and nobody may be placed on trial at all, in which case the statement becomes completely useless as if it did not exist, without any act being done by the maker or the Magistrate. This itself shows that it is not evidence at the stage when it is made; evidence cannot become as good as non-existent without any act by the person creating it. The status of a statement recorded under Section 164 is no better than, or different from, that of a mortgage or sale deed. Even though the mortgage or sale deed is the only means of proving the mortgage or sale it is not evidence at the moment it is executed. Merely because it may be used as evidence later when a Court has to inquire into whether there was a mortgage or sale or not, at the time of its execution it is not evidence and cannot be said to be a memorandum of evidence. Exactly in the same way a record of a statement made under Section 164 is not a record of evidence merely because it might be used for a certain purpose in a trial before a Court. A memorandum of evidence within the meaning of Section 80 is a memorandum of a statement made as evidence, i.e. a deposition before a Court for the purpose of proving or disproving a fact in issue or a relevant fact.

5. In Queen Empress v. Alagu Kone, ILR 16 Mad 421, Collins C. J. and Parkar J. observed at page 422 that

'the statement itself was one which the law (Section 164, Cr. P. C.), permitted to be made before the Court by a witness, and is, therefore, evidence within the definition of Section 3 of the Indian Evidence Act. The person making it was a witness within the meaning of Section 5 of the Oaths Act, and therefore one to whom an oath or affirmation might be administered'.

With great respect I am unable to agree. In Bashiruddin v. Emperor : AIR1932 All327 , Niamatullah J. referred to the use to which a 164-statement can be put but did not say that it is used as evidence; far less did he say that it is recorded as evidence or is a record of a statement given in evidence. Similarly in the case of Bhuboni Sahu , their Lordships of the Judicial Committee did not say that when a statement is used in a trial it is used as evidence. In Purshottam Ishwar v. Emperor, ILR 45 Bom 834 : (AIR 1921 Bom 3), a Full Bench of the Bombay High

Court held that a statement recorded under Section 164 is not evidence in a stage of a judicial proceeding and this was approved by Uniyal and Gyanendra Kumar, JJ., in : AIR1963 All308 . Therefore, the first requirement is not fulfilled.

6. The second requirement also is not fulfilled. I have shown that at the time when a Magistrate records a statement under Section 164 the maker of the statement has no status of a witnesses. What Section 80 requires is that the person must have been a witness at the time when presumed to be genuine. It is not enough that the person became a witness at a later stage; evidently if he was examined as a witness at the trial there would be no necessity of relying upon Section 80 for presuming its genuineness. Section 80 is meant to be used when a memorandum of evidence is produced without the person, who gave the evidence being examined as a witness at the trial; it follows that the status of a witness must have been possessed by the person at the time when he gave the evidence the memorandum of which is produced. The plain meaning of 'a record or memorandum of the evidence given by a witness' is a record or memorandum of the evidence given by a person in the capacity of a witness. The further qualification that it must have been given in a judicial proceeding or before an officer authorized by law to take such evidence confirms that the person must have been a witness at the moment of giving the evidence. if the recorded evidence was given in a judicial proceeding it must naturally have been given by a person in the capacity of a witness. With great respect to the learned judges I do not agree with their statement in the case of Alagu Kone, ILR 16 Mad 421, that the maker of a statement recorded under Section 164 is a witness.

7. The third requirement has two alternatives. One alternative is that the evidence must have been given before an officer authorized by law to take it. A Magistrate is certainly authorized by law to take evidence but only in a case of which he has taken cognizance; he is not authorized by law to take evidence in a case pending before another Magistrate or in a case that has already been decided by himself or another Magistrate or in a case that has not yet reached a Court. He is not authorised by law to record evidence of any person in any matter and in any circumstance. A Magistrate recording a statement under Section 164 is not authorized by law to take evidence for the simple reason that he is not charged

with the dirty of deciding any case and there is no matter to be proved or disproved before him. The other alternative is that the evidence must have been given in a judicial proceeding. When a Magistrate records a statement under Section 164 there are only two proceedings in which it can possibly be said to have been recorded, (1) the investigation by the police and (2) the proceeding of recording the statement itself.

The investigation by the police is not a judicial proceeding. 'Judicial proceeding' is not defined in the Evidence Act, but since via are concerned with a statementrecorded under the Cr. P. C. the question whether itwas recorded in a judicial proceeding or not must be decided in the light of the definition given in the Code. 'Judicial proceeding' is defined in Section 4(1)(m) to mean 'any proceeding in the course of which evidence is or may be legally taken on oath'. If evidence may be legally taken on oath it is enough even though evidence is actually not taken on oath. An investigation is a judicial proceeding only if it can be predicated that in the course of it evidence may be legally taken on oath. 'In the course of which' means 'in the carrying out of which' or 'in the conducting of which' and not 'during the pendency of which'. Anything that is done while a proceeding is pending is not necessarily done in the course of it; if it is not a part of it or is done by one not connected with it, it is not done in the course of it even though it is done during its pendency. In the course of an investigation no evidence can be legally taken on oath by anybody concerned in the investigation.

The police have no power to administer oath. As I explained earlier, there is no question of evidence being taken in the course of an investigation. If a Magistrate does something while an investigation is pending it is not done in the course of it. An investigation which would not be a judicial proceeding if a Magistrate did not do something during its pendency does not become one simply because he does something, such as recording a statement under Section 164. Since an investigation is to be done solely by the police nothing that he does during its pendency becomes a part of it and can be said to have been done in the course of it. Consequently even if a Magistrate can legally administer oath to a person before recording his statement under Section 164 the investigation does not become a judicial proceeding.

8. Which evidence can be legally taken on oath is laid down in the Indian Oaths Act. All courts having by law authority to receive evidence are authorized by Section 4 of it to administer oath in the exercise of the powers conferred upon them and by Section 5 oaths are to be made by witnesses, e.g. persons who may lawfully be examined or give or be required to give, evidence by or before any court. While an investigation is pending no authority has been conferred by any law upon any court to receive evidence and consequently no oath can be administered by any court. Then, as I explained earlier, there are no persons who may lawfully be examined or give or be required to give evidence before a court. A statement made under Section 164 is made voluntarily by him; he cannot be asked to make it. He may refuse to be examined or to make a statement before a Magistrate. Consequently a Magistrate has no jurisdiction to administer oath to a person before recording his statement under Section 164. Even if he administers oath before doing so the investigation does not become a judicial proceeding because the statement is not legally taken on oath.

The words 'legally taken on oath' in the definition am to be read not only with the immediately preceding words 'may be' but also with the word 'Is'. in Suppa Tevan v. Emperor, 3 Cri U 370 (Mad). Boddam and Moore, JJ., said that 'an investigation under Ch. XIV..................is a stage of a judicial proceeding' and that a Magistrate recording a statement under Section 164, Cr. P. C., is authorized to administer oath to the maker. No reasons have been given for the view that an investigation is a stage of judicial proceeding, and for the second view the learned Judges merely relied upon the decision in Alagu Kone, ILR 16 Mad 421. In Emperor v. Vishwanath Krishna Sathe, 8 Bom L R 589 Aston and Heaton, JJ., followed ILR 16 Mad 421 without any discussion. The learned Judges, however, made one thing clear and it is that the statement of a person who was not accused of the offence at the time when he made the statement, does not become a statement of an accused person because he is charged with the offence as the result of the investigation. In Public Prosecutor v. Nagalinga Reddy : AIR 1959 AP250 , Basi Reddy took the same view as was taken in the case of Suppa Tevan, 3 Cri LJ 370 (Mad), because he was bound by it. With great respect I am unable to agree with these decisions, in Nazir Ahmad's case the Judicial Committee pointed out that a Magistrate acting under Section 164 is not acting as a court; it necessarily follows

that there is no judicial proceeding.

9. The other possible proceeding is the proceeding of recording the statement itself. It is impossible to speak of the statement being recorded in this proceeding; a statement cannot be said to be recorded in a proceeding consisting solely of the recording of that very statement. The definition of judicial proceeding indicates that the recording of the statement itself is distinct from the proceeding in the course of which it is recorded. A judicial proceeding cannot consist of the recording of a statement on oath itself.

10. Thus I find that the statement made by a person under Section 164 cannot be said to be made in a judicial proceeding. Section 80, Evidence Act, is, therefore, not applicable to it. Since a memorandum of identification proceedings prepared by a Magistrate is no letter than a statement recorded by him under Section 164 Cr. P. C. it cannot be presumed to be genuine under Section 80. In Queen Empress v. Sundar Singh, ILR 12 All 595 and Guja Majhi v. Emperor AIR 1917 Pat 247 a confession recorded under Section 164 by a Magistrate was presumed to be genuine under Section 80. Section 80, which is applicant to a confession recorded by a Magistrate under Section 164 of the Code cannot be held applicable to a statement not made by an accused person simply because it is also recorded by a Magistrate under Section 164. Section 80 applies to a confession because it is expressly mentioned in it. it cannot apply to a statement of a person other than an accused person recorded under Section 164 because neither is it expressly mentioned in Section 80 nor is it covered, as explained above, by the words 'a record or memorandum..............to take such evidence'.

In Nazir Ahmad's case at page 257 their Lordships of the Judicial Committee denied that 'the only effect of Section 164 is to allow evidence to be put in a form in which it can prove itself under Sections 74 and 80, Evidence Act' and pointed out that the scope and extent of it is far other than that Varma and Rowland, JJ., applied Section 80 to statements of persons other than accused persons recorded under Section 164 in Emperor v. Lalji Rai AIR 1936 Pat 11. The reason given by them is that 'the statements were recorded during an investigation in which oath could be administered to the witnesses by an officer authorized by law for the

purpose' (P. 13); it is difficult to accept this reason. Coldstream J. did the same in Sadulla v. Emperor, AIR 1938 Lah 477; he gave absolutely no reason, did not discuss the provisions of Sections 80, Evidence Act, and 164, Cr P. C., and just said that a record of such a statement is presumed to be genuine. No assistance can be had from this decision. Bennet J. said in Suraj Bali v. Emperor : AIR1934 All340 :

'The Magistrate who recorded the dying declaration was legally authorised to do so, and the inquiry which he was making was an inquiry directed for the purpose of recording that particular statement. Consequently.... ....the dying deposition does amount to evidence within the meaning of Section 80'.

As regard the applicability of Section 80, a statement recorded under Section 164 stands on the same footing as a dying declaration. If the offence is under investigation, the dying declaration would be recorded by a Magistrate under Section 164. So if Section 80 applies to a dying declaration it must also apply to any other statement recorded under Section 164, but I am not at all persuaded to accept that it does apply to a dying declaration. The Magistrate who recorded the dying declaration and did nothing else; certainly did not make any inquiry and much less did he record it for an inquiry. James and Takru, JJ., observed in 0043/1961 : AIR1961 All153 that if a first class Magistrate prepares memorandum of identification proceedings, it is admissible in evidence under Section 80 without proof; the learned Judges did not discuss the relevant provisions or authorities. With great respect I think that their dictum cannot bear scrutiny. The correct law was laid down in the case of Ram Sanehi : AIR1963 All308 and Chandrapal, Govt. Appeal No. 1931 of 1961, D/- 18-8-1962 (All) in which the learned Judges rightly observed that a record of an identification proceeding is not a record of evidence of a witness. I also respectfully agree with the statement of Lindsay and Sulaiman, JJ., in Nagina v. Emperor AIR 1921 All 215 at p. 216 that

'these statements are of course not made on oath, and again, they are made in the course of extra-judicial proceedings'.

The cases of Alagu Kone, ILR 16 Mad 421, Suppa Thevan, 3 Cri LJ 370 (Mad), Nagalinga : AIR 1959 AP250 , Vishwanath Krishna, 8 Bom LR 589, Emperor v.

Parma Nand, 34 Cri LJ 469 (AIR 1933 Lah 321), and Queen Empress v. Khem, ILR 22 All 115 are authorities for the proposition that a person is guilty of perjury if he makes a false statement under Section 164. We are not concerned in the instant case with whether making a false statement is punishable under Section 193, I. P. C., or not, but I must confess that the reasons given in these authorities are inconsistent with the view that I have taken above. If those cases cannot be distinguished and must be either followed or dissented from, I respectfully dissent from them.

11. My answer to the question raised by Kailash Prasad, J., in this case is in the negative. Incidentally, I am surprised that the prosecution did not examine the Magistrate who conducted the identification proceedings and took the risk of relying upon Section 80. Not only was it a risk to rely upon Section 80 but also even if the presumption of genuineness had been applied it would not have served any useful purpose to the, prosecution. A memorandum of identification proceeding contains not only statements of the witnesses to the effect that such and such persons were the offenders but also many other facts, such as that the suspects were put up for identification mixed with so many persons that all precautions were taken, that the witnesses had no opportunity of communicating with one another during the identification, that the suspects were free to occupy any position in the parade, whether a witness pointed out the suspects in the first round or subsequently, the demeanour of witnesses, etc. These facts are not statements and a memorandum of them is not a memorandum to which Section 80 could, on any interpretation, apply and cannot be presumed to be genuine. If they have not been proved by the witnesses, who were present at the identification proceedings, they must be proved by the Magistrate. If Section 80 applied all that would happen is that it would be presumed that the witnesses made the statements that such and such persons committed the offence, but that might not add anything or might not be enough for the prosecution. If the witnesses themselves deposed at the trial that at the identification proceedings they had stated before the Magistrate that the accusad persons were among the offenders the fact of their having made the statements is proved and it would be redundant to rely upon Section 80.

A memorandum of evidence can be proved not only by the Magistrate recording it but also by the person giving the evidence and if the person giving the evidence proves it the necessity of examining the Magistrate or of relying upon the presumption of Section 80 is obviated. Further the deposition made by a witness at the trial does not gain materially from the corroboration consisting of the mere previous statement made before the Magistrate conducting the identification proceedings; it would gain if it was also proved that the witness pointed out the accused person when he was mixed with others and without his description being given to him by some one who had seen him earlier. Of course these facts could be proved by the witness himself, but usually this is not done and the prosecution itself undertakes to prove them from the mouth of the Magistrate conducting the identification proceedings. If it has not got them proved by the witness it must examine the Magistrate to prove them if it wants to add to the weight of the deposition of the witness. I am not considering the provisions of Section 35, Evidence Act, which has not been relied upon before us at all and what I have said above is subject to Section 35 being not applicable to the proof of the other facts stated in the memorandum of identification proceedings.

12. The appeal may be returned with the answer in the negative.

Jagdish Sahai, J.

13. I have had the advantage of reading the opinion prepared by my Lord the Chief Justice. I am in respectful agreement with him. However, in view of the importance of the question referred to the Full Bench I think it necessary to incorporate my views in a separate judgment.

14. The question referred to the Full Bench is whether by virtue of the provisions of Section 80 of the Indian Evidence Act (hereinafter referred to as the Act), the identification memorandum, prepared by the Magistrate at the time of holding the test identification in the present case can be read in evidence, presumed to be genuine and any statements made therein be taken to be made or signed by persons purporting to have signed it, without either the Magistrate being produced at the trial to prove what is contained in the identification memorandum, or the

witnesses at the trial who had gone to the test identification parade being asked to state in respect of it. There is no provision either in the Act or the Cr. P. C. or any ether statute which regulates the manner of holding those parades. In our State, the provisions dealing with the identification parades are paragraphs 496 and 497 of the Manual of Government Orders read with Appendix 20 which are only departmental instructions and have no statutory force. This Court in Rule 64 of Ch. VIII of the General Rules (Criminal), has prescribed form No. 34 (H. C. J. XII-68) in which the memorandum of identification proceedings has got to be prepared by a Magistrate.

It is the admitted case of the parties and is also well settled that a statement made by a person sent for identifying a suspect or suspects at a test parade is a statement within the meaning of that word in Section 164 Cr. P. C. The test identification parade in the case before us was held in accordance with the above-mentioned provisions and the memorandum of identification is in form No. 34 (formerly form No. 55). Identification proceedings are generally held during the investigation stage but on rare occasions they are also held in the midst of the trial in court. In the latter class of cases what the witnesses state or point out is a part of evidence recorded during the course of the trial and obviously there is in such a case no necessity to invoke the provisions of Section 80 of the Act. In the present case the identification parade, the memorandum of which has been produced at the trial, was held in the course of extra-judicial proceedings, i. e. during the investigation stage and before the accused persons were sent up for trial by the police under Section 173 Cr. P. C. The evidence relating to identification in jail is relevant under Section 9 of the Act which reads as follows:

'Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a 'fact in issue, or relevant fact, or which establish the identity of anything or person whose identity is relevant', or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.' [Underlined (here in single quotation marks--Ed.) by us.)

The identification proceedings amount simply to this that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are the persons whom they recognised as having been concerned in a crime. The whole object in holding the identification proceedings is to find out whether the suspect is the real offender or not. If the person professing to have witnessed the crime is confronted with the suspect without a proper identification parade being held there would be no guarantee of the truth of the witness saying that the suspect was an offender. In order to have some guarantee of the truth the persons professing to have witnessed a crime are confronted with the suspects not standing alone but mixed with number of persons of similar size and features and if the person professing to have seen the culprits identifies the suspects there is a reasonable guarantee that he actually saw them committing the crime. In the present case the memorandum of identification does not show that the statements attributed to the persons who went to Identify the suspect persons were made on oath. Neither paragraphs 496 and 497 of the Manual of Government Orders nor Rule 64 of Ch. VIII of the General Rules (Criminal) require that the persons going to identify the suspects should be administered oath. In the instant case the Magistrate who conducted the identification proceedings was not examined as a witness nor the persons who had gone to jail at the time of the identification parade and were examined subsequently as witnesses in court have stated anything with regard to what they said there or with regard to what happened there.

15. In the instant case all that we have to decide is whether the memorandum of identification in this case in the circumstances mentioned above is admissible in evidence and whether any of the presumptions provided for in Section 80 of the Act could be raised in the present case. Section 80 of the Act reads as follows:

'80.--Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume-

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true; and that such evidence, statement or confession was duly taken.' The documents mentioned in Section 80 of the Act are (1) those purporting to be a record or memorandum of evidence and (2) those purporting to be a statement or confession by any prisoner or accused person. In order to be admissible in evidence the document must also purport to have been signed by any Judge or Magistrate or any such officer as aforesaid. In the present case the memorandum of identification cannot be and is not being used by the State as a statement or confession made by any prisoner or accused person. The question therefore requiring consideration is whether it can be treated to be a record or memorandum of evidence as is urged by the learned Deputy Government Advocate. All documents purporting to be a record or memorandum of evidence would not be covered by Section 80 of the Act. That record or memorandum of the evidence must be one incorporating what a witness has said in a judicial proceeding or before any officer authorised by law to take such evidence. In the present case admittedly the identification memorandum purports to have been signed by a Magistrate who was authorised to hold identification proceedings. It, therefore, fulfils the requirement of Section 80 of the Act to that extent.

16. The first question requiring our attention is whether persons who were examined as witnesses at the trial and who had gone to identify the suspects at the identification parade can be comprehended in the expression 'witness' occurring in Section 80 of the Act for if they were not witnesses at the stage of the identification parade, the memorandum of what they stated and what they pointed out at the identification would not be admissible under that section. Neither the Act nor the Cr. P. C. defines the expression 'witness'. Section 3 of the Act provides that what the witnesses state before a Court in the matter of fact under inquiry is called oral evidence. Section 59 provides that all facts except the contents of document may be proved by oral evidence and Section 60 of the Act provides that oral evidence must, in all cases whatever, be direct. Section 118 of the Act provides that all persons shall be competent to testify except those with regard to whom the court considers that they are prevented from understanding the questions put to them.

Section 119 of the Act is to the effect that a witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs made in open Court. Section 120 of the Act states that in all civil proceedings the parties to the suit, shall be competent witnesses and in criminal proceedings against any person, the husband or wife of such person, respectively shall be a competent witness. From these sections it is apparent that for the purposes of the Act, a witness is a person who testifies before a court. Section 3 says that

'a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.'

This section makes a direct reference to a Court and its language clearly shows that the question of proof-of a fact arises only before a court. So long as there is no court there is no question of a fact being proved and consequently no question of oral evidence and witnesses. Under Section 5 of the Act, evidence can be given only in respect of existence or non-existence of a fact in issue or a relevant fact. The question of a fact in issue or a relevant fact can only arise before a court for it is a court which has to decide whether a certain fact is proved or not. At the investigation stage there is no question of seeing whether a fact is or is not proved but only whether there is some evidence in support of the charge.

17. it would be noticed that Section 160, Cr. P. C. which confers powers on a police officer making an investigation to order in writing requiring 'the attendance before himself of any person .... who from the information given or otherwise appears to be acquainted with the circumstances of the cass ....'does not speak of such person or persons as witnesses but only as persons acquainted with the circumstances of the case. Similarly, in Section 173, Cr. P. C. which provides for a report being submitted by the Investigating Officer for the trial of a person the words used are: 'and the names of the persons who appear to be acquainted with the circumstances of the case', and not witnesses. Similarly, Section 175, Cr. P. C. which confers power on police officers to summon persons

does not speak of witnesses but of 'person who appears to be acquainted with the facts of the case.' What I have stated earlier clearly shows that the word 'witness' is not descriptive of the person who makes his statement during the investigation stage but only of a person who testified in a Court. It is true that in form 34 the persons who come to identify a suspect have been described as witnesses but the form has not been prepared either under the provisions of the Act or that of the Cr. P. C. and it is obvious that the word 'witnesses' occurring in col. 3 of the memorandum of identification in form 34 (old form 55) has been used in a loose sense. Section 164 Cr. P. C. gives the Magistrates specified therein power to record any statement or confession made to them in the course of an investigation under Ch. XIV of that Code, This Chapter occurs in Part V and is headed as 'information to the Police and their powers to investigate' and contains Sections 154 to 176, both inclusive. It would be noticed that Section 164 of the Code does not either use the word 'witness' or the word 'evidence', the words used being statements and confessions'. Confessions obviously mean those statements which incriminate the persons making them. Statements', however, are different from confessions in the sense that they are not incriminatory in nature.

In the Cr. P. C. It is at the stage subsequent to the coming of a case in a Court and after summons has been issued to an accused person to appear before it that the persons who are expected to testify or are to be examined have been described as witnesses. (See Sections 207-A, 208, 211, 216, 217, 219 244 and 256 and 257 etc. Cr. P. C.) in other words, it is clear that the Cr. P. C. does not describe persons who have information in respect of a crime as 'witnesses' during the investigation stage but merely as 'informants'. They become witnesses only after the case has reached the Court. In the present case, admittedly the identification parade was held when the case was still under investigation and before a charge-sheet was submitted by the Police to the Court. Consequently, it is not possible in this case to include persons, who had gone to identify the suspects at the test identification parade, in the expression 'witnesses' as occurring in Section 80 of Act.

It also seems to me that what was done or was stated by the persons who went to identify suspects at the test identification parade cannot be comprehended in the

expression 'evidence' as occurring in Section 80 of the Act. That is clear from the provisions of Sections 3, 59, 60, 118 and 119 of the Act, which I have summarised earlier and which show that what is stated in Court and not what is stated at the investigation stage, is 'evidence' for the purposes of the Act. In , it was held by the Judicial Committee that when a Magistrate records a confession under Section 164, Cr. P. C., he is not acting as a Court. On the assumption that what a person appearing in Court as a witness, stated or pointed out at the identification parade earlier is a statement under Section 164, Cr. P. C., it must still be held that it was not evidence within the meaning of that word as used in Section 80 of the Act. I am also of the opinion that the proceedings of test identification parade in this case, which, admittedly were held during the investigation stage, were not 'judicial proceedings'. The expression 'judicial proceeding' has not been defined in the Act. It has, however, been defined in Section 4(m), Cr. P. C. as follows:

'(m) 'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath:'

The definition is not exhaustive as the use of the word 'includes' itself suggests. Before a proceeding can be held to be 'a judicial proceeding', it must be found that in the course of that proceeding evidence is or may be legally taken on oath. If evidence could not be legally taken on oath, it would not be a 'judicial proceeding'. In the present case, the memorandum of identification does not show that oath was administered to persons who had gone to identify the suspects and it is nobody's case before us that in fact oath was administered to them. The provisions of the Indian Oaths Act do not require oath being administered to a person who goes to identify a suspect or suspects at a test identification parade. Section 4 of the Oaths Act provides that all Courts having by law the authority to receive evidence, can administer oath and Section 5 of that Act provides that oaths are to be made by witnesses, i.e., persons who come to testify before a Court. In the present case, the identification proceedings did not take place before a Court.

Therefore, inasmuch as persons who had gone to identify the suspects at the test identification parade were not in fact and could not in law be administered oath,

what they said or pointed out there would not be in the course of 'judicial proceeding' in which evidence is or may be legally taken on oath. The learned Deputy Government Advocate has not brought to our notice any provision under which oath can be administered to a person who goes to identify a suspect person or persons is a test identification parade held during the investigation stage. He has, however, relied upon ILR 16 Mad 421, where it was held by Collins, C. J. and Parkar, J. that a statement recorded under Section 164, Cr. P. C. had to be made on oath. The only ground on which the learned Judges based their decision was that Section 3 of the Act defined the word 'Court' so as to include all Magistrates. If I may respectfully say so, the learned Judges overlooked the fact that Magistrates, under the Cr. P. C. are required to perform extra-judicial duties also and that when Section 3 of the Act mentions them as Court, it contemplates only their judicial functions and not their extra-judicial capacity.

18. Reliance was next placed on 3 Cri LJ 370 (Mad), where it was held that an investigation under Ch. XIV is a stage of a 'judicial proceeding' and that a Magistrate recording a statement under Section 164, Cr. P. C. can administer oath to the maker of the statement. Boddam and Moore, JJ. who decided this case, have given no reasons for their opinion.

19. In 8 Bom LR 589, Aston and Heaton, JJ. followed the decision in Alagu Kone, ILR 16 Mad 421 and in : AIR 1959 AP250 , Basi Reddy, J. followed the decision in 3 Cri LJ 370 (Mad).

20. In AIR 1936 Pat 11, Varma and Rowland, JJ. held that even though statements under Section 164, Cr. P. C. were recorded during an investigation, oath could be administered to that maker of the statement.

21. For the reasons already given earlier in this judgment, with great respect, I am unable to agree with these decisions and it appears to me that the provisions of Section 80 of the Act are not attracted to the facts of this case.

22. Another reason for coming to the same conclusion is that the scheme of the Cr. P. C. is that whatever is done at the investigation stage is not taken to be a part of 'judicial proceedings'. In the present case, the identification parade took

place during the investigation stage. Section 164, Cr. P. C. does not speak of proceedings but of 'Statements and confessions'. However, even if it be assumed that the identification parade in, this case was field under the provisions of Section 164, Cr. P. C., that would not make it a part of 'judicial proceedings'. That provision itself says that the statement or the confession is to be recorded in the course of an investigation under this Chapter'.

I have already pointed out that Ch. XIV is headed as 'information to the police and their powers to investigate' and falls under Part V. Provisions relating to judicial proceeding start with Part VI of the Code, Chapter XV of that Part is headed as 'Of the jurisdiction of the criminal Courts in enquiries and trials'. Chapter XVI of that Fart is headed as 'Of complaints to Magistrates', Chapter XVII as 'of the commencement of proceedings before Magistrates', Chapter XVIII as 'Of inquiry into cases triable by the Court of Session or High Court,' Chapter XIX as 'Of the charge', Chapter XX as 'Of the trial of summons-cases by Magistrates', Chapter XXI as 'Of the trial of warrant-cases by Magistrates', Chapter XXII as 'Of summary trials', Chapter XXIII as 'Of trials before High Courts and Courts of Session', Chapter XXIV as 'General provisions as to inquiries and trials', Chapter XXV as 'Of the mode of taking and recording evidence in inquiries and trials', Chapter XXVI as 'Of the judgment', Chapter XXVII as 'Of the submission of sentences for confirmation', Chapter XXVIII as 'Of execution', Chapter XXIX as 'Of suspensions, remissions and commutations of sentences' and Chapter XXX 'Of previous acquittals or convictions'.

The Cr. P. C. clearly envisages two stages: The investigation stage which is known as extra-judicial proceeding and the trial stage which is known as judicial proceeding. Judicial proceedings start when a Magistrate issues processes under Section 204, Cr. P. C. or when in a sessions case, he fixes a date for inquiry under Section 207-A of the Code. In the present case, identification proceedings took place before the investigating officer submitted his report under Section 173, Cr. P. C. to the Magistrate concerned. In ILR 45 Bom 834 : (AIR 1921 Bom 3), a Full Bench of the Bombay High Court held that a statement recorded under Section 164, Cr P. C. is not 'Evidence' in a judicial proceeding. I am in respectful agreement with this view.

23. Even after a statement or confession, recorded under Section 164, Cr. P. C. has been formally proved, it will still not be substantive evidence and can be put to no other use than that of contradicting the deponent thereof under Section 145, or of corroborating him under Section 147 of the Act. (See AIR 1948 PC 38 and . The same is the position of an identification memorandum which contains statements within the meaning of that word occurring in Section 164, Cr. P. C., of persons who had gone to identify the suspects at the test identification parade. (See Sarju Singh v. Emperor and Lal Singh v. Emperor, AIR 1925 tan 19).

That being the law, it cannot be held that by not formally proving it and simply filing the memorandum of identification in Court, the position of the party relying upon it is improved and it can raise presumptions mentioned in Section 80 of the Act in its favour, so as to read the identification memorandum as substantive evidence, it becomes imperative that what a person stated or pointed out at the test identification parade must be put to him when he appears as a witness in Court and if he denies it, to have the Magistrate who conducted the identification parade, to prove the identification memorandum. It is settled that evidence of identification furnished by identification parade can only be hearsay except as to the simple fact that the person was in a position to show that he knew a certain suspect by sight. (See AIR 1925 Lah 19 (Supra)).

24. In this Court there is a conflict of authority on the question referred to us. In 0043/1961 : AIR1961 All153 , James and Takru, JJ. without giving any reasons, held that an identification memorandum prepared in respect of a test identification parade similar to ours was admissible under Section 80 of the Act, but a contrary view has been taken by our brothers Uniyal and Gynendra Kumar, JJ. in : AIR1963 All308 . I find myself in respectful agreement with the view taken by this Court in the latter case. The view taken by me is fortified by the decision of Lindsay and Sulaiman, JJ. in AIR 1921 All 215 at p. 216, where, while dealing with statements under Section 164, Cr. P. C., they observed as follows at page 216 :

'these statements are of course not made on oath, and again, they are made in the course of extra-judicial proceedings'.

25. The learned Deputy Government Advocate invited our attention to AIR 1938 Lah 477, where Coldstream, J. held that the record of a statement under Section 164, Cr. P. C. must be presumed to be genuine. The learned Judge gave no reasons for the decision and did not discuss the provisions of Section 80 of the Act. In : AIR1934 All340 , Bennet, J. observed as follows:

'The Magistrate who recorded the dying declaration was lagally authorised to do so, and the inquiry which he was making was an inquiry directed for the purpose of recording a particular statement. Consequently the dying deposition does amount to evidence within the meaning of Section 80,'

Bennet, J. relied upon Maqbulan v. Ahmad Husain, ILR 26 All 108 (PC), where on pages 117 and 119 the Judicial Committee held that the statement of a witness in a previous case was admissible to prove the previous statement of the witness without calling in further evidence. The Privy Council did not mention Section 80 of the Act. In my view, the case of ILR 26 All 108 (PC) (Supra) is clearly distinguishable because the earlier statements had been recorded in a Court in a judicial proceeding and the statement had obviously been made on oath. Section 80 of the Act, therefore, was applicable in terms, but that is not the position before us, nor that was the position before Bennet, J. In Surajbali's case : AIR1934 All340 . With great respect to the learned Judge, I am unable to agree with him.

26. ILR 13 Mad 421, 3 Cri LJ 370 (Mad) (Supra), : AIR 1959 AP250 (Supra), 8 Bom LR 589 (Supra), 34 Cri LJ 469 : (AIR 1933 Lah 321) and ILR 22 All 115, support the proposition that a person making a false statement under Section 164, Cr. P. C. is guilty of perjury. We are not called upon in the instant case to decide as to whether a person making a false statement under Section 164, Cr. P. C. is guilty of perjury or not. In any case, I have already given my reasons for holding that a statement made under Section 164, Cr. P. C. is not 'evidence', is not made in a 'judicial proceeding' and is not given under oath. I am, therefore, unable to share the view taken in these cases.

27. No arguments were addressed to us from the Bar on the question as to whether or not the memorandum of identification prepared in this case would be relevant under Section 35 of the Act and admissible under Sections 77 and 73 of

the Act, apart from the provisions of Section 80 of the Act. We are, therefore, not called upon to go into that question.

28. For the reasons mentioned above, I would answer the question referred to us in the negative.

B.D. Gupta, J.

29. I have had the advantage of reading the elaborate reasons given by my Lord the Chief Justice and brother Jagdish Sahai in support of the opinion recorded by them. I am in respectful agreement with their opinion that the question referred to the Full Bench must be answered in the negative.

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