

State Vs. Hotey Khan and ors.

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Court : Allahabad

Decided On : Jan-01-1960

Reported in : AIR1960All521; 1960CriLJ1167

Judge : D.N. Roy and ;D.P. Uniyal, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 164, 288 and 417;
[Evidence Act, 1872](#) - Sections 145

Appeal No. : Criminal Appeal No. 379 of 1958

Appellant : State

Respondent : Hotey Khan and ors.

Advocate for Def. : Sripat Narain Singh, Adv.

Advocate for Pet/Ap. : Government Adv.

Disposition : Appeal dismissed

Judgement :

Roy, J.

1. This is an appeal by the State against an order of acquittal of the two respondents, Hotey Khan and Zahoor, who were charged under Section 302 I. P. C., for the murder of one Shahzor Khan in his Kotha in village Chitta within police

circle Kotwali Buland-shahr on 21-4-1957 at about 2 p.m.

2. The story on which the prosecution was founded was briefly this. Hotey Khan and Zahoor along with one Yunis were wanted by the Pilkhwa police in connection with a case under Section 396 I. P. C. A requisition was received from that police station by police station Kotwali Bulandshahr for the arrest of these three persons who had for some time past been evading arrest. Shahzor Khan, the deceased, was acting as an informer, and with his help Mahabir Singh constable P. W. 6 assisted by another constable and a Chowkidar was able to arrest Yunis on 19-4-1957 when Yunis was engaged along with Karam Sher Khan P. W. 1 in working a Persian wheel over a well. On that date Hotey Khan and Zahoor, although wanted by Mahabir Singh constable, could not be arrested.

It is, however, said that Shahzor gave a promise to Mahabir Singh constable that he would try his level best to get Hotey Khan and Zahoor arrested. The prosecution contended that Hotey Khan and Zahoor got scent of the matter and on the following day, namely, 20-4-1957, they went to the gher of Shahzor at about midday and there, in the presence of Kalia P. W. 5, they reprimanded Shahzor for his solicitude in helping the police in getting them arrested, and they further gave him a threat that if he did not desist from his activities they would kill him. As has been stated by Kalia P. W. 5, Shahzor did not take the matter seriously; and he gave a challenge to Hotey Khan and Zahoor that they may try to kill him if they could, and that he himself would deal with them in such fashion as he thought proper. One day later, that is on 21-4-1957, the murder of Shahzor is said to have been committed in his Kotha where Shahzor had been sleeping at about 2 p.m. Shahzor was lying over a cot. Another cot in the same Kotha was occupied by Imam Khan P. W. 2, his relation. Hotey Khan and Zahoor, it is said made appearance there. Zahoor pressed Shahzor over the cot and Hotey started inflicting injuries on him with a gandas. Shahzor woke up and raised shrieks.

Upon his shrieks Imam Khan also woke up. Imam Khan, it is said, reprimanded the two assailants but they asked him to keep mum else he would be visited with the same consequences. Imam Khan, however, continued to raise cries which attracted Na-zecr Khan P. W. 3 and Nasseb Khan P. W. 4. Na-zeer Khan was

coming from his field and was going to the village and when he was at a distance of about 25 yards from the gher of Shahzor he heard the cries. Nasseb Khan was at his threshing floor which was at a distance of 25 paces from the Kotah of Shahzor and he too was attracted by the cries.

These two persons, upon the evidence propounded by them, either saw the actual assault on Shahzor or they saw Hotey Khan and Zahoor coming out of the Kotha of Shahzor after committing the crime and running away towards the grave-yard where they were chased by these persons as also by Karam Sher Khan P. W. 1, a cousin of the deceased, who was proceeding from his house to his Kotha which lay at a distance of about 150 yards from the Kotha of Shahzor. Their effort to apprehend the two culprits was not successful. The culprits ultimately escaped. Shahzor met with an instantaneous death.

3. A report of the occurrence was lodged at police station Kotwali by Karam Sher Khan P. W. 1 on that very day at 4-55 p.m., the police station having been at a distance of about 3 3/4 miles from the place of occurrence. Karam Sher Khan although not an actual eye-witness of the occurrence formulated the first information report upon the information that had been given of the matter to him by Imam Khan, Nasseb Khan and Nazeer Khan. At the time of the making of this report Sub-Inspector Masood Murtaza P. W. 8 the Second Officer at police station Kotwali happened to be present. He took up investigation of the matter and he proceeded to village Chitta where he reached at about 6-15 p.m. He found the dead body of Shahzor inside his Kotha. Inquest was made by him over the dead body.

He recovered blood-stained earth from below the cot over which the dead body lay. He also took certain other articles lying over the cot which contained stains of blood. The dead body was sent to the mortuary for post-mortem examination. He examined Nasib Khan, Nazeer Khan, Imam Khan, Karam Sher Khan and Kalian on that very day. He made a search for the accused but he could not find them. Proceedings under Sections 87 and 88 Cr. P. C. had been taken against them and their property had been attached on the 26th of April, 1957. Hotey Khan and Zahoor were challaned as absconders and they were later on arrested by the

police of police station Sikanderabad.

4. The post-mortem examination on the dead body of Shahzor was conducted on 22-4-1957 by Dr. J. K. Dwivedi, Civil Surgeon of Bulandshahr. The following external marks of injuries were found on the dead body.

1. Incised wound 2' x 1/4' x scalp deep obliquely on the left side of head 1' behind the ear.

2. Incised wound 5' x 3' x deep down to spinal column and cutting the underlying bone on the back of neck transversely at middle running from a point 1 1/2' below the angle of lower jaw on left side backward across the neck.

3. Abrasion 2 1/2' x 3/4' on the left side back upper part.

4. Incised wound 3' x 1/2' x deep to muscles obliquely on the left side neck at the root. Upper and inner end of this wound was joining injury No. 2 at its middle.

5. All these injuries according to Dr. Dwi-Vedi were ante-mortem. The internal examination revealed that the third and fourth cervical vertebrae had been cut. The spinal cord was also completely cut under the fourth cervical vertebrae. The large blood vessels on the left side of neck were cut under injury No. 2. A lot of effused blood was present; in tissues of neck on left side and back. Death according to Dr. Dwivedi was due to shock and haemorrhage as a result of the injuries to neck and head.

Dr. Dwivedi stated that if these injuries of the neck and head could be inflicted in a lying down position, they could have been inflicted only if the deceased person at the time of the infliction of the injuries had been lying in such a position that his left side was facing upwards; but that if he was lying with his right side facing upwards, then in his opinion these injuries could not have been inflicted. Injuries Nos. 1, 2 and 4 according to him could have been inflicted by a weapon like a gan--dasa, and injury No. 3 could have been caused by friction with some hard substance. The medical evidence undoubtedly proved that Shahzor had been murdered by the infliction of injuries with a sharp edged weapon like a gandasa some time during the day on the 21st of April 1957.

6. The question which engaged the attention of the learned Sessions Judge, and which has engaged our attention too, is whether Hotey Khan and Zahoor, the respondents, were the murderers. As we have already said, the part which has been assigned by the prosecution to Zahoor was that he was pressing down Shahzor over the cot, and the part which had been assigned to Hotey was that he was giving injuries to the deceased with the gandasa. If the prosecution evidence justified the conclusion that the parts assigned to these two respondents had really been played by them, both of them would be equally guilty of the charge of murder of Shahzor.

In order to sustain the charge the prosecution relied upon three distinct categories of evidence. The first category was that of motive. The second category was that of a threat having been given to the deceased by these two respondents a day before the murder; and the third category consists of the evidence of the three alleged eye-witnesses Imam Khan P. W. 2, Nazeer Khan P. W. 3, Naseeb Khan P. W. 4 and of the circumstantial evidence furnished by Karam Sher Khan P. W. 1 who came forward to state that when he was attracted by the shrieks he found the two accused running towards the grave-yard having been chased by Imam Khan, Naseeb Khan and Nazeer Khan in which chase Karam Sher Khan had also joined but was unsuccessful in apprehending the two accused.

The learned Sessions Judge found the evidence on all the aforesaid categories wanting and faulty and he accordingly acquitted the two respondents. It has been contended on behalf of the State that the appraisal of the evidence made by the learned Sessions Judge was not correct and that there has been a serious miscarriage of justice by the acquittal of the two respondents. We would therefore propose dealing separately with each type of evidence enumerated above.

7. On the question of motive there was the evidence of Mahabir Singh constable P. W. 6 and Karam Sher Khan P. W. 1. (His Lordship considered their evidence and proceeded :) The evidence of Mahabir Singh constable and of Karam Sher Khan was therefore not at all clear, cogent and convincing to establish the motive; and that evidence, in our opinion, had been rightly rejected by the learned Sessions Judge.

8. Coming now to the question whether on the 20th of April 1957 the two respondents had given a threat to Shahzor that if he did not desist from his activities in getting them arrested they would kill him, there was the solitary evidence of Kalia P. W. 5. (After reviewing his evidence, his Lordship continued :) The evidence of Kalia on the question of the alleged threat on 20-4-1957 cannot therefore be accepted and acted upon.

9. The eye-witness account of the matter which was tried to be supported by the alleged eye-witnesses Imam Khan P. W. 2, Nazeer Khan P. W. 3, Naseeb Khan P. W. 4, and the circumstantial evidence brought out in the evidence of Karam Sher Khan P.W. 1 had been equally unconvincing. Imam Khan P. W. 2 stated that on the day of the occurrence at about 2 p.m. he was sleeping in the Kotha of Shahzor. and was occupying one cot. There was another cot in the same Kotha over which Shahzor was sleeping. He woke up on hearing shrieks of Shahzor; and when he cast his glance towards him he found two persons assaulting Shahzor. both of whom had covered up their faces with Dhatus.

Their eyes were only visible to him and from their eyes and gait he inferred that they were Hotey Khan and Zahoor respondents. Just after the aforesaid statement had been made by Imam Khan witness before the Sessions Judge, the Sessions Judge made a note on the record to the effect that the witness had been answering question with difficulty and on being repeatedly enquired, and that the witness appeared to the Sessions Judge to be 'half mad'. After that note, the recording of the, statement of Imam Khan was continued. Imam Khan said that the man who appeared like Zahoor was pressing Shahzor, and the man who appeared like Hotey was cutting with the Gandasa. He further stated that he reprimanded them and then the man who was holding the gandasa showed him the gandasa, implying thereby that he should keep silent, but he kept on raising the alarm and that upon his alarm Naseeb Khan and Nasser Khan arrived and on seeing them both the miscreants ran away towards the grave-yard who were chased by Naseeb Khan and Nazeer Khan but could not be caught.

After that evidence was given by Imam Khan, the learned Sessions Judge, upon a request made by the State Counsel for permission to cross-examine the witness

on the ground that he had been won over by the defence, 'felt satisfied that the witness had turned hostile'. The witness was thereafter cross-examined by the State Counsel and he said that although he was examined at one stage by a Magistrate under the provisions of Section 164 Cr. P. C., and at another stage by the Committing Magistrate, he did not make mention to either of them that the miscreants had Dhatas on them.

He denied the suggestion made to him that the Dhatas had been introduced by him in the Court of Session in collusion with the accused in order to help them to get an acquittal. When he was cross examined on behalf of the accused he said that he could not say with certainty that the two miscreants had really been. Hotey Khan and Zahoor and that it was only his surmise or conjecture or suspicion that the two were Hotey Khan and Zahoor.

After that statement had been made and some further statement had been given by him in cross-examination by the defence counsel, the State counsel made a further request to the court that he may be permitted to cross-examine the witness further on 'the new matter introduced in the cross-examination by the defence.' That permission was given and some further cross-examination was directed by the State Counsel.

10. The other two witnesses Naseeb Khan and Nazecr Khan were thereafter examined. Nazeer Khan said that on 21-4-1957, at about 2 p.m. he was going from his field to the village and when he was at a distance of about 25 yards from the gher of Shahzor he heard the shouts raised by Imam, Khan and on hearing the shouts he went towards the Kotha and when he was still at a distance of about 15 yards from the Kotha he noticed that Zahoor and Hotey Khan were inside the Kotha. He saw that Zahoor was holding down Shahzor, and Hotey Khan was 'dealing gandasa blows on him. Shahzor was lying on a charpoy which was in front of the door.

Nazeer Khan claimed that he raised hue and cry whereupon both the accused persons came out and ran towards the grave-yard, and Imam Khan name out of the same Kotha shouting after them. He stated that a chase was given to the two accused but they could not be apprehended. According to Nazeer Khan, Nasseb

Khan witness came simultaneously with him to the Kotha and Naseeb Khan also joined in Riving the chase. Naseeb Khan witness stated that on the day of occurrence at about 2 p.m. he was at his threshing floor which is at a distance of about 25 paces from the Kotha of Shahzor. He heard shouts coming from the Kotha of Shahzor and he went there. When he was in front of that Kotha he saw two men coming out, and they were Hotey Khan and Zahoor. He did not see any weapon in the hand of any of them and he did not see them doing anything inside the room.

According to him. both went away slowly towards the west along the public way. He stated that on going inside the Kotha he saw Shahzor lying cut on a charpoy. The charpoy was just in front of the door. He saw Imam Khan coming out of the Kotha following the accused persons. He further stated that on seeing the corpse of Shahzor he and Nazeer Khan chased the accused up to the threshing floor but he had gone ahead and could not be apprehended. This witness was again treated as a hostile witness by the prosecution and he was dealt with just in the same manner as Imam Khan P. W. 2.

In other words, he was cross-examined on behalf of the State and then cross-examined on behalf of the accused and again further cross-examined on behalf of the State on permission sought by the Slate Counsel to cross-examine him on the 'newly elicited facts'. His cross-examination by the prosecution counsel brought out the fact that he had stated before the Committing Magistrate that when he went running towards the Kotha he heard Imam Khan shouting that Shahzor had been cut; and that he had further stated to the Committing Magistrate that he had seen Zahoor and Hotey Khan murdering Shahzor and that the aforesaid statements weie true.

He also stated that his statement made in exa-mination-in-chief in the Court of Sessions to the effect that he had not seen the accused persons doing anything was due to forgetfulness or lapse of memory. In his cross-examination by defence counsel he said that he did not see the two accused with Dhatas on, that he saw their backs when they were running away and that by seeing their backg he inferred that they were Hotey and Zahoor and that when he had chased them they

had already gone away about 200 paces ahead of him.

11. The evidence of these three witnesses made in the Court of Sessions was so highly discrepant that it hardly carried conviction. The result was that when arguments were to be heard in the case an application had been made on behalf of the prosecution by which it was sought that the statements of Imam Khan and Naseeb Khan made before the committing Magistrate be received in evidence under Section 288 Cr. P. C.

That application was disposed of by the learned Sessions Judge by his order dated 29-10-1957. By that order he said that he had read both the statements given by the witnesses and it appeared to him that the substance of the statement made before the committing Magistrate was different from the statement that was given in the Court of Session; and that whereas both the witnesses previously stated that they saw the two accused actually committing the murder, Imam Khan said in the Court of Session that he saw two persons whose faces were covered with Dhatas and their eyes were only visible and that from their eyes he could gather that they were the accused, and the other witness Naseeb Khan stated in the Court of Session that he saw two persons running away after the murder and he saw their backs and from their backs he gathered that they 'were the accused, and it seemed therefore that there was substantial difference between the earlier and the subsequent statements made by them; that it was apparent that what they subsequently .stated had been made under the influence of the accused, and therefore it was a fit case for the attraction of the provisions of Section 288 Cr. P. C. After having come to the conclusion the learned Sessions Judge further observed:

'I agree that the previous statements should not be admitted as substantial evidence without affording the accused full opportunity to cross-examine the witnesses with respect to their previous statements. The Court has ample power to recall the witnesses under Section 540 of the Code in order to arrive at the truth and to find out which of the two statements of these witnesses were correct. It is not only proper but it is the duty of the Court to find this out by recalling the witnesses.'

11a. After having struck that note of warning to the parties and for the guidance of the Court itself, the learned Sessions Judge, in our opinion, forgot altogether the obligation that was cast upon him. by admitting as substantive evidence on 6-11-1957 the earlier statements Exs. Ka-24 and Ka-25 of Imam Khan and Naseeb Khan respectively which were formally tendered by the prosecution without putting those statements to the witnesses. On the same date two other statements Exs. Ka-26 and Ka-37 made by the same witnesses under Section 104 Cr. P. C., were tendered in evidence by the prosecution and were admitted by the Court as substantive evidence.

It appears from the record that on 6-11-1957 Imam Khan P. W. 2 and Naseeb Khan P. W. 4 were again put into the witness-box & certain additional questions were put to them in cross-examination by the prosecution & by the defence, but the prosecution never tried to put to these witnesses their earlier statements made under Section 164 Cr. P. C., or later before the Committing Magistrate in order to elicit from them whether any part of those statements were supported and corroborated by them or were¹ refuted by them.

12. In dealing with the statements recorded under Section 164 Cr. P. C., the Sessions Judge relied principally upon a decision of the Madras High Court in Vellaiah Kone v. King Emperor, ILR 45 Mad 766: (AIR 1923 Mad 20) and he distinguished a decision of their Lordships of the Privy Council in Mamand v. Emperor . Those statements, together with, the statements recorded before the committing Magistrate, although taken upon the record as substantive pieces of evidence, were not. however, ultimately relied upon by the learned Sessions Judge in registering the guilt of the accused.

A question arises as to whether proper use of those statements had or had not been made and whether in the circumstances of the case the Sessions Judge was right, in bringing those statements as substantive evidence on the record. Statement of a witness is generally recorded under Section 164 Cr. P. C. to fix him to it when it is feared that he may resile afterwards or may be tampered with. Such statements can never be used as substantive evidence, of the truth of the facts contained therein, but they may be used under Section 145 of the Evidence Act for

contradiction of the witness who made it.

13. In *Emperor v. Akbar Badoo*, ILR 34 Bom 599 the facts were these. During the trial of the accused person, the Sessions Judge admitted into evidence and used against the accused: (1) statements made by the witness to the police implicating the accused, (2) the same witness's statement to the Panch, (3) and his statement as an accused person made before a Magistrate, and (4) statements made by the co-accused to the police. The witness, when he was examined before the Committing Magistrate, gave a consistent story; but he deposed to quite a different version when he was examined in the Sessions Court. The learned Sessions Judge disbelieved the changed story, and he used the witness's statements to the police and his statements as an accused person and his statements to the Panch, by way of corroboration of what the witness had stated to the committing Magistrate.

The accused was convicted and sentenced. On appeal the High Court held that it was an error to admit statements Nos. 1 and 2 for the purpose of corroborating statements No. 3, for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by Section 157 of the Indian Evidence Act and previous statements might be used to corroborate or contradict statements made at the trial, not to corroborate statements made prior to the trial. It was further held that statements No. 2 were altogether inadmissible as evidence of the accused's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself but could not be proved and used against the accused.

14. This Bombay decision came to be considered by the Madras High Court in ILR 45 Mad 766: (AIR 1923 Mad 20) upon which reliance had mainly been placed by the learned Sessions Judge in admitting the statement, in the present case, under Section 164 Cr. P. C. The Bombay view was dissented from by the Madras High Court and they placed reliance upon an earlier decision of their own reported in *In re Bayanna*, 2 Weir 821, where Coltins, C. J., and Benson, J. held that a statement made at the inquest could only be used to corroborate or to contradict a subsequent statement of the witness admissible as evidence. They went on to

say:

'The only use the prosecution could make of her statement at the inquest would be to partially corroborate her statement to the Magistrate; but when that statement is itself unworthy of credit, it cannot be materially strengthened by showing that the witness had previously made a statement partly in agreement and partly in direct and material disagreement with it.'

15. The above quoted observation, from the decision in 2 Weir 821 makes it abundantly clear that in order to seek corroboration certain factors must exist; and when the statement is itself unworthy of credit, it cannot be materially strengthened by showing that the witness had previously made a statement partly in agreement and partly in direct and material disagreement with it. The view of the Madras High Court reported in ILR 45 Mad 766: (AIR 1923 Mod 20) to the effect that a statement by a witness recorded by the Magistrate under Section 164 Cr. P. C. is admissible in evidence to corroborate the statement made by that witness before the Committing Magistrate and from which statement he resiles in the Sessions Court appears to us to have been stated too broadly; and, with all respect to that decision, we are unable to support it to the full.

16. The matter came up for decision before a Bench of this Court in *Emperor v. Bishun Datt* : AIR1927 All705 where it was held that a previous statement of a witness recorded under Section 164 Cr. P. C. can be used as provided for by Sections 145 and 155 of the Indian Evidence Act, but it cannot be used as substantive evidence of the facts deposed to therein. It is evident that under Section 145 the statement is used for purposes of contradiction; and under Section 155 the statement is used for impeaching the credit of the witness. Those were the uses to which the previous statements under Section 164 Cr. P. C. were sought by the prosecution.

Where the provisions of Section 145 apply, 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. Under Section 155 of the Evidence Act the credit of a witness may be impeached by the adverse party, or, with the consent of the Court by the party who calls him in the different ways enumerated in the section itself.

We have already said, the previous statements) under Section 164 Cr. P. C., made by these two witnesses were not sought to be relied upon for the purposes of Section 155 of the Evidence Act.

17. In a case which went before the Privy Council in it was held that the statement of a witness made under Section 164 can be used only to discredit the evidence given by him in Court, and not for any other purpose, and such a statement cannot be treated as substantive evidence of the facts stated. It was further laid down that where in view of a statement made by a witness under Section 164, the Court considers that he has been won over by the defence his evidence in Court must be entirely ignored.

This Privy Council decision lays down the law on the subject beyond the pale of controversy; and, in our opinion, the learned Sessions Judge was not right in seeking, under the circumstances of the present case, corroboration of the statement of the two witnesses made before the committing Magistrate from their earlier statements made under Section 164 Cr. P. C. and specially when those statements were not specifically put to the witnesses when they were before the Court.

18. Coming now to the statements made before the committing Magistrate by Imam Khan and Naseeb Khan which were tendered by the prosecution under Section 288 Cr. P. C., we are of opinion that the discretion exercised by the learned Sessions Judge had been exercised rather lightly and that the provisions of Section 288 were misapplied. The section no doubt confers power on the Sessions Judge to treat the evidence of a prosecution witness taken before the Committing Magistrate as substantive evidence in the trial before him. It is of course not meant to be used in every case as a matter of course. The discretion is to be used by the Judge very sparingly and in those cases only where there is reason to believe that a witness is deliberately departing from the evidence given

before the Magistrate. As the previous deposition when put, becomes substantive evidence for all purposes. Courts should be extremely cautious in applying Section 288.

It is not intended that the previous statement should be put in whenever there are some discrepancies. It should be done only in exceptional cases, e.g., when a witness resiles entirely or to a great extent from, his previous statement, or where he has forgotten a great deal of what he said previously. The prosecution or the defence has no right to put in the statement, and it is wrong to apply Section 288 merely because the prosecution required it. And before the evidence in the committing Court is brought on record, the prosecution or defence must be given notice for an opportunity to test the evidence by further cross-examination.

It has been held in several cases that when depositions are sought to be admitted under Section 288, Section 145 of the Evidence Act governs the situation and they cannot be admitted unless contradictory portions are put to the witness by the opposite party or by the Judge. The Supreme Court agreed with the view that Section 145 of the Evidence Act applied and his previous statement cannot be used unless the witness is confronted with it. (See *Tara Singh v. State* : [1951]2SCR729).

19. The decision in *Tara Singh's* case : [1951]2SCR729 came to be considered by the Supreme Court in a subsequent decision in *Bhagwan Singh v. State of Punjab* : 1952 CriLJ1131 . There out of four eye-witnesses 'A', 'B', 'C' and 'D' produced by the prosecution in a Sessions trial, 'A' and 'B' supported the prosecution, 'C' supported it in the examination-in-chief but resiled in cross-examination and was treated as hostile. 'D' turned hostile from the start. 'C' and 'D' were cross-examined by the prosecution. His previous statement in committal proceedings was put to 'C' who admitted to have made it. The Court relied for conviction on the testimony of 'A' and 'B' and other facts and also referred to the previous statements of 'C' and 'D'.

It was objected that the evidence of 'C' and 'D' was not legally admissible as the formalities under Section 288, Cr. P. C., were not observed and hence the conviction was vitiated. It was held that the use of the evidence of 'C' and 'D' did

not make any difference as the evidence of 'A' and 'B' which, was believed by the Judge was sufficient to afford a basis for conviction and the mere fact that extraneous matter not necessary for conviction was; also called in aid would not affect the result; that the lower Court had not used the former statement of 'C' as substantive evidence but merely as corroboration of what was said by him in examination-in-chief; further that though the former statement could not be used as substantive evidence it could be used as corroboration of the evidence in chief under Section 157 of the Evidence Act or to shake the witness's credit or test his veracity under Section 146. Section 145 is not called into play at all in such a case as resort to Section 145 would only be necessary if the witness denies that he made the former statement; but when the witness admits the former statement all that is necessary is to look to the former statement of which no further proof is necessary; and that in the case of 'C' the prosecution had a choice because of two conflicting versions given in chief and in cross-examination.

It was entitled to use the former statement either to contradict what was said in cross-examination or to corroborate what was said in chief and in either event Section 288 of the Code could be used to make the former statement substantive evidence because what the section says is 'subject to the provisions of the Indian Evidence Act' and not subject to any particular section in it, and that Section 157 is as much a provision of the Indian Evidence Act as Section 145 and if the former statement can be brought in under Section 157, it can be transmuted into substantive evidence by the application of Section 288.

To that extent the earlier decision in Tara Singh's case : [1951]2SCR729 had been distinguished. It was further observed that with regard to 'D' who was hostile from the start no question of corroboration arose and his former statement was used only for contradiction by complying with the formalities of Section 145, Evidence Act.

20. As far back as in 1901 a Bench of the Madras High Court in Queen Empress v. Doraisamy Ayyar, ILR 24 Mad 414 held that under Section 288 Cr. P. C., the Court is not restricted to admitting the evidence of a witness duly taken before the Committing Magistrate merely for the purpose of contradicting that witness when

he is called as a witness at the Sessions Court, and that the section is intended to enable the Court to read the previous evidence as substantive evidence in the case at the trial where, for the purpose of justice, the adoption of such a course is found necessary by the Judge.

21. The question arises whether the mere bringing in of a previous statement made before the committing Magistrate on the sessions record under the provisions of Section 288 Cr. P. C. forces the Sessions Judge to accept that earlier statement as conclusive and true and prevents him from discarding it at a later stage, that is at a stage after the admission, on the ground that upon the totality of the circumstances and the evidence in the case it was not a true and correct statement. A Bench of this Court in *Gopi v. State*. 1955 All LJ 201 to which one of us happened to be a party, held:

'Having admitted the statement of a witness-made before the committing Magistrate under Section 288. Cr. P. C., the Sessions Judge is not justified in discarding it on the ground that it is not a truer and correct statement.'

We think that that proposition was laid a little too broadly and it was never intended to mean that once a statement is admitted by the Sessions Judge under Section 288 Cr. P. C. the Sessions Judge is pre-eluded from weighing that evidence in the light of other evidence produced in the case and in discarding it if the situation so requires on the ground that it was not a true and correct statement. We are wholly unable to find anything in Section 288 which prescribes the value or weight to be attached to the evidence thus admitted.

Once admitted, it is on the same footing as any other legal evidence in the case, that is to say, it is to be considered as part of the material upon which the verdict is to be given. Its value is a question in a particular case for the Court; whether any portion or whole of the evidence thus admitted is entitled to credit, and if so, to such a degree that a conviction may be based on it wholly or in part. These are very important questions for the Judge to decide and they are also very important questions for the superior Court when the finding is not final, but then also they are not affected by Section 288. These, in our opinion, ought to be the guiding factors and ought to be taken as the consequences flowing out of Section 288 of the

Code.

22. Judged in the light of the observations which we have made above, and weighing the evidence of the three principal witnesses, namely, Imam Khan, Nazeer Khan and Naseeb Khan given in the Court of Sessions, and also weighing the statements of Imam Khan and Naseeb Khan made in the Court of the committing Magistrate, those statements are so inconciliably that no part of the same can safely be relied upon in coming to the conclusion that the charge was proved beyond doubt. In an appeal against acquittal there must be compelling reasons, and unless it be shown that the decision appealed against is patently perverse and is absolutely against the weight of evidence, on the record, a Court of appeal would not be justified in reversing the acquittal into a conviction. There is the initial presumption of innocence in favour of accused; and that presumption when strengthened by an acquittal assumes greater force. In all aspects of the matter we are of opinion that this is not at all a case in which we should interfere with the acquittal of the respondents. The appeal is therefore dismissed.

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