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Court : Allahabad

Decided On : Mar-16-1910

Reported in : 6Ind.Cas.101

Judge : George Knox and ;Karamat Husain, JJ.

Appellant : Rustam and ors.

Respondent : Emperor

Judgement :

George Knox, J.

1. Rustam Ranghar, Pirthi, Mithani and Hoshnak Rajput have been convicted of the wilful murder of one Anup Singh and sentenced to death. The case has been submitted to us for confirmation of the sentences of death by the Additional Sessions Judge of Meerut. We have also before us a petition from Jail sent in by Rustam. Pirthi, Mithan and Hoshnak have had their cases laid before us by learned Counsel. The case for the prosecution has been very fully and carefully set out by the learned Additional Sessions Judge in his judgment, and we do not propose going into the facts of the case. We agree with the learned Additional Sessions Judge that it is beyond doubt that Anup Singh was murdered on the 10th of August, 1909. The Medical evidence shows that death was due to wounds on the neck which had divided the trachea and gullet and severed the vessels on both sides of the throat. Evidence is given by one Bijai Singh to the effect that on the

9th of August, he saw Anup Singh riding close by the spot where he was ploughing and with him was the prisoner Rustam. So far as the record shows that was the last time when Anup Singh was seen alive by any person or persons except those who murdered him. We have also the evidence given by one Radha, a boy 12 years of age, whose attention was called on the same day seeing 4 men standing at the corner of the sugarcane field where he was grazing his cattle. He noticed that they had a fifth man down on the ground. He went to see what was happening but was driven off by a man who threatened him with a lathi. He swears that Rustam was the man who ran to beat him. He also says that Rustam was pressing the throat of the man on the ground. He identified Rustam out of a number of other persons at the jail and so far as we can judge, his evidence touching this matter may be received without a doubt as to its accuracy. In addition to this we have two statements made by the accused Rustam himself. The first was made on the 21st of August 1909. In this statement he tells us that he had passed Bijai Singh Jat at the time he was with Anup Singh. Shortly after he says that the other accused in Court joined him, that one of them Hoshnak caught Anup Singh by the leg, gave him a jerk and brought him off the pony he was riding. He says that Hoshnak took out a knife and passed it across the throat of Anup Singh, while he and the accused Mithan caught hold of Anup Singh's legs. On the 16th of September, he clearly admitted that he was one of the four persons who killed Anup Singh. It is true that he afterwards withdrew these statements. . After examining his statements carefully we see no reason to believe that his first statements were either tutored statements or made under any illegal influence. The learned Additional Sessions Judge and the Assessors were satisfied upon this evidence as to the guilt of Rustam and we think rightly satisfied. The murder was a deliberate and cold blooded murder and without any extenuating circumstances. We dismiss the appeal of Rustam, confirm the conviction and sentence, and direct that the latter be carried out according to law.

2. There remain the cases of the accused Pirthi, Mithan and Hoshnak. The learned Sessions Judge convicts these three men upon the confession of Rustam which he accepts as undoubtedly true. He holds that the confession has been corroborated as regards these three men by the evidence of Bijai Singh, the herd boy Radha and Jhandu and the witnesses Harbhuj and Ganeshi Kumarhin, He

thinks the last mentioned witnesses are all of them corroborated as to their statements and that these statements can be corroborated by the. evidence of the Sub-Inspector Sant Singh. We are not as strongly impressed by the confession of Rustam as the learned Judge appears to have been. The learned Judge looks upon the confession as a confession of which Rustam unbosomed himself eagerly and impulsively. The Sub-Inspector says that when Rustam came before him on the 20th of August, he at once poured over his story as though to relieve his mind. It is significant, however, to find that the Sub-Inspector did not consider the evidence sufficient against the others. The statement made the following day before the Magistrate is undoubtedly a long and detailed statement but it is noteworthy that the part which Rustam assigns to himself in the transaction is what many persons in the same condition as himself do look upon as a minor part on such a transaction. It was according to him Hoshnak who took out the knife and actually cut Anup Singh's throat. It was Pirthi who held down Anup's head in order to allow the throat to be cut. Rustam and Mithan, according to Rustam, merely caught hold of Anup's legs to prevent him struggling. It is difficult also to understand how, even under the circumstances described by Rustam, Hoshnak at any rate, if not Pirthi, could have avoided being stained with blood. The moment the throat was cut, blood must have spurted up and no amount of subsequent covering would affect that first rush of blood in any way. When we come, however, to consider whether there is any evidence on the record which corroborates the particular portion taken in the transaction by each of the accused individually, we are face to face with fresh difficulties. The witness Radha identified Rustam but none of the other accused, and in his statement Radha saysthat it was Rustam who was pressing down the man's throat. Two men he says were sitting on the fallen man, and two were standing, and the man who had fallen was moving his legs about, but. his hands were held down. His reason for identifying Rustam was that he was the man who ran forward to beat him and so frightened him off. The second witness Jhandu, also a herd boy but apparently an older boy than Radha, came to the spot just as Radha did and according to him it was the man who had the knife in his hand who ran after him. If Rustam is correct that man would be Hoshnak, and it was another man who ran to Radha. The only further corroboration that can be got from any of the witnesses above mentioned is that

there were four men who were that day running away from where the body was found or were somewhere near the body at about the time when it was found.

3. In a case of this kind the question of motive is also one that cannot be lost-sight of and as regards the three men, whose cases we are now considering, nothing has been proved that can in any way be considered an adequate motive for the murder of Anup Singh. In the case of the witness Bijai Singh the only corroboration that his statement gives is so far as Rustam is concerned. He gives no evidence that in any way touches the other three accused. It is also noteworthy, though the matter is of minor importance, that on the 21st of August, Rustam stated that it was Hoshnak who pulled Anup off his horse, whereas on the 16th of September, he says that this act was done by the accused Pirthi. There is also another remarkable feature in the statement of Rustam. He tells us that the enemies of Anup were Mula and Parsa, and Mula and Parsa promised to give him Rs. 200 if he killed Anup. He leaves us under the impression that he was in fact detailed for the purposes of this murder by the bribe of Rs. 200. He inlroduces Pirthi, Hoshnak and Mithan quite suddenly. It is not likely that if the four men were to be concerned in the murder, there would not have been some previous council heldby them, some introduction of the three men to Rustam as persons who were to assist him in this foul deed. All he says is that 'On Monday we started from Mulehra by the way leading to Mansurpur. There were 4 men in all, namely, Pirthi, Hoshnak, Mithan and myself.' When they did not find Anup on Monday, they came again on Tuesday, thesame four men. Rustam, he says, went ahead, the other three remaining behind. Thene would be no difficulty in Rustam having invented any three persons to take part in this transaction, for he leaves us without any data by which we can in any way test the association of these three men with this murder. The men concerned might have been Mula ar.d Parsa, or they might have been any other persons. They may not have been three. All this part of the case is left in obscurity. We consider it too dangerous to act upon Rustam's statement alone and to say 'that these three persons were associated With Rustam in the murder, or that there were three persons so associated. It is true that the boys Radha and Jhandu do so far bring the case nearer that they are positive that there were four men concerned in this murder. But even if we take their evidence to be absolutely accurate, we are still left with the difficulty that they were unable to identify any of

the three men. Jhandu in his statement in the Court of Session says that he recognized Mithan as one of the four, but we have no doubt that this evidence is utterly untrustworthy. He had an opportunity to identify Mithan when the four accused together with other persons were drawn up for the purpose of identification, i.e., on the 28th of August. We do not believe him when, after being unable to identify any one on the 28th of August, he, on or about the 16th of September, identified Mithan as the man who ran at him with a lathi. Moreover if it be true that it was Mithan who ran to him with a lathi, he, fails to corroborate Rustam upon this very important point that/it was Hoshnak who held the knife and cut Anup's throat. The learned Sessions Judge attributes same value to the statement of the thanadar, who stated in answer to questions put by the Court as follows: 'Bijai Singh told me that he had seen Rustam going along with Anup Singh on the day of the occurrence on the rajbaha bank near Johra. Radha said he was grazing cattle and saw four men beating a man on the rajbaha patti. Jhandu said the same thing, said he was grazing cattle with Radha. As justification for his view that these statements are admissible, the learned Judge refers us to the case of Fanindra Nath Chatterji v. King-Emperor 36 C. 281 : 13 C.W.N. 197 : 5 M.L.T.97 : 9 C.L.J. 199 : 9 Cr. L.J. 452 : 1 Ind. Cas. 970. Even if we accept what was laid down in that case, all that the statements can be used for is by way of corroboration of this one fact that on a particular day the witness mentioned made to him, the thanadar, certain statements relating to facts relevant to the investigation. The thanadar's evidence is of course no corroboration of the facts stated by the witness either to the thanadar or in Court and the value of the thanadar's statements in this particular case may be judged from this. Bijai Singh says on oath in the Court of Session: 'I told the darogha, and Rahman the Mukhia and others I did not know.' The thanadar tells us that Bijai Singh told him that he had seen Rustam going along with Anup Singh on the day of the occurrence on the rajbaha bank near Johra. It is difficult to see how the statement made by the thanadar can be corroboration of a statement which the witness himself says he never did make fo the thanadar. I mention this simply to show of what little use testimony of this kind is in a case while the danger of it is enormous. Sub-Inspectors are after all human beings. They consider it of vital importance when a crime has been committed to ascertain who committed the crime. Before their

eyes, as they conduct investigation those facts become large which seem in their view to connect certain persons with the crime. Other facts at the time which did not so connect the case with the accused persons impress themselves so little upon their minds that either they do not record them at all, or if they do record them, not intentionally perhaps, in such a way that they seem to point in the same direction. No one who has experience of these matters can for a moment hold the view that a thanadar when he takes down statements made before him takes down the ipsissima verba used by witnesses. What he takes down is more or less the general result (matlab) as it appears to him of the statements made by the witnesses. The statement is as a rule never read over by him to the maker of it and indeed he would be a bold man who, surrounded by police officers, would, if the statement was read over to him, venture to say that the thanadar had incorrectly recorded what the thanadar thought that the witness had said. But the real danger is that in order to get corroboration of the fact that soon after an event occurred a witness made to the thanadar a statement which he makes in Court a mass of matter is introduced which sometimes with Judges and often with assessors ranks as evidence.

4. It is true that Section 162 of Act No. V of 1898 when amending the law so amended it as to make it open to the construction put upon it by the learned Judges of the Calcutta High Court. But can we legitimately infer that while the writing in the special diary or in the police officer's note book cannot be used as evidence, the statement which the same police officer thinks that he heard a witness say months before the trial it may be and after many other investigations have intervened to blow the accuracy of his memory on the point, based upon his notes made at the time, may be used as evidence against the accused? Speaking for myself I feel that when a police officer makes use of a writing whether in the special diary or in a separate piece of paper to refresh his memory and on the strength of it deposes to what he states. was a statement made by a witness to him, he is in reality using that writing which he then made as evidence against the accused, and that the Court which accepts the statement made by the police officer in such circumstances, whether it be upon the basis of Section 157, Evidence Act, or otherwise, is really using that writing as evidence against the accused. It appears to me to be little more than a verbal quibble to say that the

writing itself, which after all, apart from law, is the stronger evidence, may not be used as evidence against the accused, but the words of the police officer who may even at that moment be misreading what he wrote, or reading into it matters that he thinks were stated to him, is evidence against the accused. I cannot bring myself to think that this 'was the intention of the legislature. I know that as stated in Maxwell on the Interpretation of Statutes (Third Edition p. 30) a literal construction ot the words used in an Act has in general prima facie preference but in order to arrive at the real meaning of those words it is equally necessary to get the exact aim, scope and object of the law, to consider what was the law before the Act was passed, what was the mischief or defect for which the law did not provide, what is the remedy provided and the reason for the remedy. The law before the Act was passed would, even the learned Judges of the Calcutta High Court admit, have been against the use of such statement as evidence. I cannot find that there was any, the law did not provide. I cannot find anything to justify the belief that the remedy for some unknown mischief or the reason for the remedy was, while excluding the writing, to make it possible, by what I have before called a merely legal quibble, to allow the statement contained in such writings to be used as evidence in this round-about method, namely, excluding the writing itself bat allowing the police officer to take the writing in his hand and to read it out sentence by sentence, and so enable it to be used as evidence against the accused. It is not enough to say that the mere use of it as corroboration does not amount to such use. If the testimony of the witnesses is sufficient as it stands, it needs no corroboration. Its value against the accused is its value as it stands.

5. If it is corroborated that value is undoubtedly increased. The result is that, with all due respect to the learned Judges of the Calcutta High Court, I hold the view that the general provisions of the Evidence Act, contained in Section 157, are controlled by the special provisions of Section 162, Criminal Procedure Code, which followed it and which is a special enactment as against the wider and more general enactment in the Evidence Act. I say nothing about statements which have not been taken down in writing nor am I at the present moment considering the more difficult question, viz., when a police officer makes no use of statements recorded in writing but deposes to former statements which he says were made to him by witnesses when he was investigating an offence. In any case the value of

such testimony is so small as to make the use of it a very heroic remedy, to be used possibly if the statements of the witnesses have been deliberately attacked by the defence and a suggestion has been put forward that they are telling a concocted story. In the present case, the Sub-Inspector did use his diary and as I have already said used the writing as evidence and the Court in its judgment has made use of that writing against the accused.

Karamat Husain, J.

6. I am at one with my learned colleague in confirming the sentence passed upon Rustam and in allowing the appeals of Mithan, Pirthi and Hoshnak. With great respect to my learned colleague, I find myself unable to agree with him in the interpretation put upon Section 162 of the Code of Criminal Procedure (Act No. V of 1898). Section 162 of the old Code of Criminal Procedure (Act No. X of 1882) was as follows:

No statement other than a dying declaration made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it or be used as evidence against the accused.

7. In interpreting the section, the Bombay High Court in Imperatrix v. Jijibhai Govind 22 B. 596 said: We note for the information of the Joint Sessions Judge that the procedure followed by him in admittingas corroborative evidence against the accused all the statements (Exhibits 32-42) made by the witnesses to the police was distinctly opposed to the provisions of the law on this behalf and the rulings of this Court in Queen-Empress v. Sitaram Vithal 11 B. 657 and also Raghuni Singh v. The Empress Second Appeal No. 591 of 1896. The positive prohibition under Section 162, Criminal Procedure Code, cannot be set aside by reference to Section 157 of the Evidence Act.'

8. The Calcutta High Court in Queen-Empress v. Bhairab Chander Chuckerbutty 2 C.W.N. 702 took the same view and held that the general provisions of Section 157 of the Indian Evidence Act of 1872, were overridden by the special provisions of Section 162 of the Code of Criminal Procedure. Banerjee, J., said: 'in support of the fourth ground it is urged that by Section 157 of the Evidence Act the testimony

of a witness may be corroborated by any statement made by him relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact, and that the previous statements made by the witnesses to the Police, were, therefore, admissible in evidence. Bat Section 157 of the Evidence Act which lays down the general rule must be taken subject to the exception contained in the special rule enacted by Section 162 of the Code of Criminal Procedure which makes statement to the Police other than dying declaration inadmissible in evidence against the accused.' The term 'statement' in Section 162, notwithstanding the fact that it might have been taken to mean the statement reduced to writing, was taken to include an 'oral statement' in order to give a reasonable meaning to the term employed by the Legislature.

9. The language of Section 162 of the present Code of Criminal Procedure has been materially changed.

It is:

No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it: nor shall such writing be nsed in evidence.' The material change in question is the substitution of 'such writing' for 'statement.

10. In interpreting Section 162 of the present Code of Criminal Procedure (Act No. V'of 1898), the Calcutta High Court in Fanindra Nath Banerjee v. King-Emperor 36 C. 281 : 13 C.W.N. 197 : 5 M.L.T.97 : 9 C.L.J. 199 : 9 Cr. L.J. 452 : 1 Ind. Cas. 970, according to the head-note, comes to the conclusion that Section 162 of the present Criminal Procedure Code (Act No. V of 1898) prohibits the record of the statement of a witness taken under Section 161 as evidence but does not override the general provisions of the Evidence Act as to proof of such statement by oral evidence, and such statement is admissible under Section 157 of the Act in corroboration of the evidence of the witness given at the trial. The learned Judges say: The point may be shortly summed up thus. Section 157 of the Evidence Act allows the statement by way of corroboration to be proved. Section 162 of the Criminal Procedure Code, now in force, enacts that if any such statement as now under consideration is taken down in writing, the writing cannot be used as

evidence. If it be said that it is a refinement to hold that the writing cannot be admitted, but that the statement, if not reduced to writing, can, the answer is that the Legislature has chosen to alter its language in Section 162 of the present Criminal Procedure Code, drawing a distinction between the statement and the writing.'

11. I fully agree with the learned Judges of the Calcutta High Court in the view that Section 192 of the present Code of Criminal Procedure prohibits the use of 'such writing' as evidence but not the use of the oral statement made by a witness to the investigating police officer. No one can doubt that the term 'statement' is of a more general import than the term 'writing'. The former in the absence of anything to the contrary may include oral and written statements both: but the term writingcan by no possible stretch of its meaning include an oral statement and if the Legislature chooses to re-place a term of a more general import by a term of a less general import, Courts, by the canons of interpreiation, are bound to give effect to the change and to hold that the prohibition is limited to the term of the less general import i.e., to 'writing.'

12. If the term 'writing' were ambiguous and were applicable to oral statements, a Court would have done well to hold that the use of oral statements is prohibited; but when the term writing cannot include oral statements, a Court is helpless. The following are some of the canons of interpretation which I quote from Maxwell on the Interpretation of Statutes pp. 4, 5, 4th Ed.:

When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation. Absoluta sententia expositore non indiget. Such language best declares without more the intention of the law-giver and is decisive of it. The Legislature must be intended to mean what it has expressed and consequently there is no room for construction. Where by the use of clear and unequivocal language capable of only one meaning, anything isenacted by the Lpgislature, it must be enforced even though it be absurd or mischievous. If the words go beyond what was probably the intention, effect must never theless be given to them. They cannot be construed contrary to their

meaning as embracing or excluding oases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the intention conveyed may be, it must receive its full effect. When once the intention is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable but to expound it as it stands according to the real sense of the words.

13. I am fully alive to dangers of the view that Section 162 of the present Code of Criminal Procedure does not prohibit the use as evidence of the oral statements made by a witness to police officer in the course of an investigation. Those dangers have been so well set out by my learned colleague in his well-considered judgment. They, however, show that the present law is highly unsatisfactory and calls for immediate amendment. They are not to make a Court hesitate in givingto the term 'writing' in Section 162 of the present Code of Criminal Procedure the only meaning which can be given to it. The time that intervenes between the happening of an event and the deposition of a witness as to that event may affect the weight of the testimony but not its admissibility.

14. The fact that it was not the intention of the Legislature to alter the law on this point, which prohibited the use of the statements of witnesses made to the investigating police' officer, cannot also be taken into considera-tion in construing Section 162 of the present Code. A portion of the head-note in Norendra Nath Sircar v. Kamal Basini Dasi 23 C. 563 : 23 I.A. 18, is as follows: 'The object of codifying a particular branch of the law is that on any point specially dealt with, the law should thenceforth be ascertained by interpreting the language used in that enactment instead of as before searching in the authorities to discover what may be the law as laid down in prior decisions. The language of such enactment must receive its natural meaning without any assumption as to its having probably been the intention to leave unaltered the law as it existed before.' In my opinion, Section 162 of the present Code of Criminal Procedure prohibits the use as evidence of such writing' only but does not prohibit the use as evidence of oral statements made by witnesses to an investigating police officer and, therefore, there is no conflict between that section and Section 157 of the Indian Evidence Act in respect of oral statements made by witness to an investigating police officer. It follows that

the use as evidence for corroboration, under Section 157 of the Indian Evidence Act, of an oral statement, not taken down in writing by the police officer, is not prohibited by the section. I go a step further and say that the use as evidence of an oral statement made by a witness to the police officer for corroboration even when it is taken down in writing by him is not prohibited by the section. It may be said that to draw a distinction between the 'writing' and the 'statement' taken down in writing by the police officer is a distinction of form rather than of substance [see the remarks of Beaman, J., in Emperor v. Narayan Raghunath Patki 32 B. 111 at p. 141 : 9 Bom. L.R. 789 : 6 Cr. L.J. 164 : 2 M.L.T. 414] The answer to this is that the Legislature has, in amending Section 162 of the Code of Criminal Procedure, chosen to substitute 'writing' for 'statement' and a Court cannot say that it is clone for the sake of mere variety in form without intending a change in substance. The act of legislation is too solemn for such a supposition. Legislators do not play with the life and property of people by aplay upon words.

15. In discussing the non-applicability of Section 91 of the Indian Evidence Act to an oral statement made by a witness to a police officer and entered by him in his special diary, I shall show that the distinction between the oral statement made by the witness and the entry in the diary is a distinction in sub-stance.

16. The argument that the use of an oral statement made by a witness to an investigating police officer when reduced to the form of a document is inadmissible by Section 91 of the Indian Evidence Act is not free from flaws. The argument in the first place cannot establish that Section 162 of the present Code of Criminal Procedure prohibits the use of the oral statement made by a witness to the investigating officer and that is the point in question. In the second place, Section 91 of the Indian Evidence Act has no application to an oral statement made to an investigating police officer for it is not a matter, which is required by law to be reduced to the form of a document [see Reg. v. Uttamachand, Kapoor Chand 11 B.H.C.R. 120, Empress v. Kalicharan and Chunari 8 C. 154]. In the third place, the entry in the diary of the police officer, correctly speaking, is not the statement, either oral or written, of the witness for any legal purpose. It is by a habit of thought induced in those who have constantly to deal with the depositions of witnesses that the entry in diary is mistaken for the statement made by a witness' by the

application of the term 'statement' to such entry in ordinary parlance. This calls for some elucidation. No one can doubt that speech and writing are two distinct objective entities perceptible by two different senses. Speech is heard by the ear and writing is seen by the eye. A deaf person is not a possible witness to a speech nor a blind person to a writing. Both are means for expressing ideas. A. may state orally that a certain event happened or may write that it happened: but in order to constitute the oral or the written statement of A to be his act in the eye of the law, it must have been made with a consenting mind as his own juristic act. If A while asleep says that he saw B kill C with a sword, the statement is not his oral statement against B in the same way if A while hypnotised writes a promissory-note that note is not A's writing to prove the debt. In legal transactions one man by means of agency can adopt the act of another as his own. In a case of oral statements as juristic acts, this is not usual but in case of writing as a juristic act it is very common. B. may write a letter for A. The letter is the act of B and not of A but A is allowed by law to adopt that letter as his own act. This, however, cannot take place unless A with a consenting mind accepts that letter to be his own juristic act. Apply these general remarks to the point in question; it is evident that the entry in the diary is the act of the police officer and that act can only become the act of the witness if he with a consenting mind adopts it as his own act. The paint may ha considered in another way. A makes an oral statement within the hearing of B, C and D. The oral statement of A under Section 3, illustration (c) of the Indian Evidence Act is a fact and by Section 60 of that Act it must be proved by direct evidence which is the statement by B, C and D that they heard A say so and so. Now suppose that when A made that oral statement, B took it down in writing. Can B be allowed when called as a witness to prove the oral statement made by A within his hearing to produce, his own writing and to depose that this is the statement which A made? In my opinion he cannot be allowed to do so to prove the oral statement made to him by A. That writing is not what B heard and is not the act of A. It can make no difference if B happens to be an investigating police officer. If he is called to prove an oral statement made to him by A, his direct testimony will bo the statement that he heard A say so and so and his entry in the diary will in no way be regarded as the act of A which is sought to be proved.

17. The case of a statement made by a witness before a Court is different. His oral statement is required by law to be reduced to the form of a document and that writing which in fact is the act of the presiding officer of the Court is, in consequence of the consent of the witness, deemed to represent his own oral statement and is his own juristic act. In Bhulai v. King-Emperor 13 O.C. 7 : 5 Ind. Cas. 357, certain remarks are against the view that there is a distinction in substance in 'writing' and 'statement' but the question that under Section 162 of the present Code of Criminal Procedure the police officer can be called as a witness to depose to what was stated to him by a witness is left open One of the learned Judges says:

Whether it is permitted under the law as it stands now to defeat the policy under which statement in writing of the witnesses to the police cannot be admitted except for the sole purpose mentioned in Section 162 of the Code by calling in the police officer to depose to what was stated to him from his recollection, it is not for me to decide in this case, as I have already shown that in this case the police officer deposing to those statements was allowed to refresh his memory by referring to this diary and thus practically to put in the contents thereof-..

The question is whether the provisions of Section 161 of the Evidence Act or of Section 162 of the Criminal Procedure Code, are to prevail in this case. I think the provisions of the latter statute which is a special statute dealing with such statement should prevail.

18. For the above reasons, I hold that Section 162 of the present Code of Criminal Procedure prohibits only the use as evidence of the writing which records the statements of the witnesses made to the investigating police officer, that that section, so far as oral statements of the witnesses are concerned, is not in conflict with Section 157 of the Indian Evidence Act and those oral statements made to the police officer may be proved by calling him as a witness in order to corroborate the testimony of the witnesses.

19. The result is that we allow the appeals of Pirthi, Mithan and Hoshnak, set aside their conviction and sentences and direct that they be released and if on bail that the bail bonds be discharged.

20. The appeal of Rustam is dismissed. The conviction and sentence passed upon him are confirmed, and it is directed that the latter be carried out according to law.

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