

Zila Singh Vs. the State

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Court : Punjab and Haryana

Decided On : Nov-24-1953

Reported in : AIR1954P& H182

Judge : Khosla and; Harnam Singh, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 288; [Evidence Act, 1872](#) - Sections 33, 137, 145, 154 and 157; [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Criminal Appeal No. 532 of 1953

Appellant : Zila Singh

Respondent : The State

Advocate for Def. : Har Parshad, Asst. Adv.-General

Advocate for Pet/Ap. : A.N. Chona, Adv.,; Manmohan Singh, Adv. for; H.R. Sodhi

Judgement :

Khosla, J.

1. The appellant Zila Singh was tried by the learned Additional sessions Judge of Rohtak upon a charge of murder under Section 302, Penal Code. The learned Sessions Judge found him guilty and sentenced him to death. He has appealed to

this Court and the case is also before us for the confirmation of the death penalty.

2. The charge against the appellant was that he murdered his wife Bhani toy cutting off her throat with a knife early on the morning of 7-5-1953.

3. The story for the prosecution briefly is that the relations between the appellant and his wife, Bhani, had become strained because the latter was suspected of infidelity. Some weeks before this occurrence the appellant took Bhani's ornaments and sent her away to her parents. Two or three days later he returned the ornaments to her and a few days later he went to fetch her. He brought her back to his house but apparently there was no reconciliation between the spouses. The appellant wrote a letter in which he announced his intention of punishing his wife for her evil conduct. This letter was addressed to the Sub-Inspector of Police but was never sent. It was recovered from the appellant's house during the course of the investigation.

4. On the night of occurrence husband and wife slept on the upper storey of their house. Early in the morning Lakhia, the father of the appellant, heard a cry and going up to the roof saw his daughter-in-law lying on the ground with her throat cut. The appellant was the only other person present near her & he said that he had finished her. Saying this he went away. Chand Kaur and Bha-gan, sisters-in-law of the appellant, deposed to the same effect. These two women were sleeping on the ground-floor of the house, and on going up saw Bhani lying on the ground with her throat cut. She had apparently had a brief struggle with the appellant and the appellant after cutting her throat dragged her from the cot on which she was sleeping along the floor to a distance of about 10 or 12 feet and then left her. He also left the knife at the spot before leaving the house.

5. The report of the occurrence was made by Lakhia, father of the appellant, who went to the Police Station, ten miles away, and described the manner in which his son had murdered his wife. The police took up the investigation of the case and when the appellant was arrested he was found to be wearing a 'dhoti' and a vest which appeared to be stained with blood. The stains were examined and it was found that the 'dhoti' was stained with human blood although the source of the blood on the vest could not be determined because the stain had disintegrated.

During the investigation of the case the letter to which I have already made a reference was also recovered. The writing of this letter was examined by a Handwriting Expert who pronounced it to correspond with the writing of the appellant.

6. At the trial the appellant pleaded not guilty and completely denied the charge against him. He said that he was away in the fields working and a suggestion was made that the deceased had committed suicide by cutting off her own throat.

7. It is to be observed that all the eye-witnesses Lakhia, Chand Kaur and Bhagan did not support the prosecution story at the trial and their depositions made in the Court of the Committing Magistrate were read out and treated as evidence under the provisions of Section 288, Criminal P. C. The evidence against the appellant therefore consists of:

1. the statements of Lakhia, Chand Kaur and Bhagan as made before the committing Magistrate; 2. the recovery of a bloodstained 'dhoti' and a vest from the person of the appellant; 3. motive indicated by the letter recovered from the house of the appellant and also by oral evidence; and 4. the fact that death took place in circumstances which point to the appellant alone being the culprit.

8. Mr. Chona who argued the case on behalf of the appellant vehemently argued that the learned Sessions Judge had acted illegally in relying upon the statements made by the witnesses before the Committing Magistrate. He contended that the procedure adopted by him was against law and that since the previous statements had not been put to the witnesses for the purpose of contradicting them these statements could not be used as substantive evidence.

His argument is that under Section 288, Criminal P. C., a statement made by a witness before the Committing- Magistrate can only be used in evidence for the purpose of contradicting or corroborating a witness who is examined at the trial. The statement must be put to the witness and he must be given a chance of explaining any contradiction or discrepancy in it. The portion which is so put to the witness may then be used as evidence. He also contended that the statement could only be read out and used in evidence after the witness had been examined

and cross-examined.

In support of his argument he cited -- 'Emperor v. Zawar Rahman', 31 Cal 142 (PB) (A); -- 'Emperor v. Ajit Kumar', AIR 1945 Cal 159 (E); --'Emperor v. Rahenuddin Mondar, AIR 1944 Cal 823 (C) and -- 'Gopal Khaitan v. The King', AIR 1949 Cal 597 (D).

9. It seems to me that there is some misconception regarding the object and application of Section 288, Criminal P. C. This section is not intended to provide a procedure for contradicting or corroborating a witness who appears at the trial before the Sessions Court. These objects may be attained by the provisions of Sections 145 and 157, Evidence Act. Even if Section 288, Criminal P. C., had not been enacted a witness could be contradicted or corroborated by a statement, which he had previously made before the Committing Magistrate.

The real object of Section 288, Criminal Procedure Code, is wholly different. It is intended to make a statement before the Committing Magistrate substantive evidence in certain cases. When a previous statement is used in order to contradict a witness it does not become substantive evidence, it does not take the place of evidence which he has actually given at the trial, it merely serves to discredit him or to set him up as a witness of truth. But under Section 288, Criminal P. C., the previous statement becomes substantive evidence. It is to be looked upon as good evidence as the evidence given at the trial. It may take the place of evidence given at the trial.

In applying Section 288, Criminal P. C., the Court first holds that a witness is either deliberately withholding information in his possession or is deliberately telling a lie, and having come to this decision the Court takes up the previous statement of the witness and in its discretion directs it to be treated as substantive evidence. This is quite different to using a statement for the purpose of contradicting or corroborating a witness.

10. In one or two cases Courts appear to have taken the view that the words 'subject to the provisions of the Indian Evidence Act' in Section 288, Criminal P. C., mean that the section is to be read with Sections 145 and 157, Evidence Act,

and these Courts have taken the view that under Section 288, Criminal P. C., previous statements can only be used for the purpose of contradicting or corroborating statements made at the trial. This in my view is quite wrong.

The phrase 'subject to the provisions of the Indian Evidence Act' merely refers to the provisions with regard to relevancy, admissibility etc. What Section 288, Criminal P. C., in effect means is simply this: In certain circumstances the Court may treat the statements made before the Committing Magistrate as evidence in the case for all purposes, but this evidence will only be good evidence if it satisfies the usual requirements of admissibility, relevancy etc. under the Evidence Act. But if these conditions are satisfied then the previous statement becomes good evidence.

11. It seems to me therefore that the procedure for applying the provisions of Section 238, Criminal P. C., is this: A witness when he is being examined before the Sessions Court appears to be suppressing something or appears to be telling a false story. The Court comes to the conclusion that the witness has been won over or has chosen to change his position. The court refers to the statement made by the witness before the Committing Magistrate and finds that in that statement the witness had narrated a wholly different story. The Court then comes to the conclusion that this is a case in which it should exercise its discretion under Section 288, Criminal P. C.

In order to come to a decision the Court looks at all the circumstances of the case, examine the previous statement to satisfy itself that it complies with the provisions of the Evidence Act with regard to relevancy and admissibility, it satisfies itself that the accused had an opportunity of cross-examining the witness and the statement was read out to the witness and admitted by him to be correct. In short, it sees that all the usual formalities for recording evidence were complied with. The court then orders that the previous statement be read out and as soon as it is read out it becomes substantive evidence. Nothing more is required and the provisions of Section 288, Criminal P. C., have been fully complied with.

In the interests of justice, however, the Court will give an opportunity to the witness to explain his position so that the explanation may be taken into account for

considering what weight is to be attached to the previous evidence or for deciding whether a prosecution for perjury should be started against the witness. But the giving of this opportunity to the witness to explain the previous statement is not a condition precedent to the statement becoming good evidence. The reason simply is this. The objectives of Section 288, Criminal P. C., are not the same as the objectives of Sections 145 and 157, Evidence Act. These latter sections do require that the previous statement be put to the witness, but Section 288, Criminal P. C., does not contemplate such confrontation.

12. Mr. Chona stressed the phrases 'in the discretion of the presiding Judge' and 'subject to the provisions of the Indian Evidence Act' in Section 288, Criminal P. C. He argued that 'in the discretion of the presiding Judge' meant that the statements must be put to the witnesses and that 'subject to the provisions of the Evidence Act' referred to Sections 145 and 157, Evidence Act. I have given my reasons for repelling this argument and have set out the true Interpretation to be placed upon these two phrases. I shall now discuss the cases cited by Mr. Chona.

13. The first case cited by Mr. Chona was --'31 Cal 142 (PB) (A)', but this was not a case in which a statement before the Committing Magistrate was transferred to the Sessions file and treated as evidence under Section 288, Criminal P. C. This was a case in which the record of the proceedings before the Committing Magistrate was read out to the Jury with the object of contradicting the testimony of the prosecution witnesses. In such a case it is necessary to confront the witness with his previous statement.

In -- 'AIR 1945 Cal 159 (B)', the prosecution put in evidence the depositions made by two witnesses before the committing Magistrate and these depositions were allowed to be filed under the provisions of Section 288, Criminal P. C. Edgley J. took the view that the prosecution had sought to contradict the evidence given by the witness before the trial Judge by a portion of his statement made before the Committing Magistrate and that being so the statement should have been read out to the witness and he should have been allowed opportunity to explain or reconcile any discrepancy.

It appears that Edgley J. took the view that the phrase 'subject to the provisions of the Indian Evidence Act' referred to Section 145, Evidence Act. With great respect to Edgley J. I find myself unable to subscribe to this view. It is possible that the Judgment of Edgley J. was to some extent influenced by the law prevalent in England. There depositions made before the Coroner can never be treated as substantive evidence. They can only be used for the purpose of contradicting the witnesses' statements as given at the trial.

The Indian Law goes further than the English Law in this respect, and Section 288, Criminal P. C. clearly lays down that depositions made before the Committing Magistrate become substantive evidence in some cases.

Edgley J. in dealing with -- 'AIR 1944 Cal 323 (C)', made similar observations, but here too he took the vi'w that the object of transferring the previous statement was to contradict the witness'sstatement at the trial.

In -- 'AIR 1949 Cal 597 (D)', this matter was again considered by the Calcutta High Court and Harries C. J. laid down that the discretion under Section 288, Criminal P. C., must be exercised very spar-ingly and carefully. Harries C. J., however, did not say that it was necessary to have recourse to the procedure laid down in Section 145, Evidence Act. He stressed the point that the discretion must be exercised with great care and caution.

There are several cases in which it has been held that the whole statement made before the Com-mitting Magistrate may be used as substantive evidence under Section 288, Criminal P. C., even if it is not put to the witness at the trial. Reference may be made to -- 'Mohomed Surwar v. Emperor', AIR 1942 Lah 215 (E); 'Rano v. Emperor', AIR 1944 Sind 178 (F) and -- 'Fakira v. King Emperor', AIR 1937 P. C. 119 (G).

14. I may explain the difference between the application of Sections 145 and 157, Evidence Act and Section 288, Criminal P. G. in another manner. Section 145 will be applied when a witness called by one party gives a story in support of the case of that party. The opposite parly wishes to discredit him by showing that he had on a previous occasion made a wholly different statement. The previous statement

will then be read out to the witness, or in other words he will be confronted with it and he will be asked to explain the discrepancy or contradiction. The object of doing this is to discredit the witness and to show that he is a false witness and therefore not to be relied upon.

On the other hand Section 157 will be applied if the party calling the witness wishes to show that the witness is in fact a witness of truth and he had on a previous occasion made a similar statement. The previous statement of such witness will then be read out and proved. In so far as it corroborates the later statement it becomes admissible as corroborative evidence.

Therefore both in the case of Section 145 and Section 157 the previous statements do not become substantive evidence. They are merely proved for the purpose of discrediting or corroborating a witness.

On the other hand Section 288, Criminal P. C., will come into play when a witness is examined by the Sessions Court and does not appear to be telling the whole truth. The Public Prosecutor will then say to the Judge:

'This witness was a witness of truth but for some reason he is not now prepared to speak the whole truth. He may have been won over or tampered with and is therefore suppressing some facts and deliberately misstating others. I therefore ask you to refer to his previous statement as made before the Committing Magistrate and having satisfied yourself that that statement was made according to the rules of evidence laid down in the Evidence Act treat it as substantive evidence.'

If this request is acceded to then the statement before the Committing Magistrate becomes substantive evidence. The Judge may wholly disregard the statement made at the trial and base his judgment upon the previous statement.

15. As the matter is of some importance I may briefly sum up my conclusions at the risk of repetition. It is within the discretion of the Sessions Judge to have recourse to the provisions of Section 288, Criminal P. C. He must exercise this discretion sparingly and judicially.

Ordinarily, he will do so only when he is convinced that the witness is deliberately suppressing the truth or misstating facts to his knowledge. He will then record his finding to this effect and look at the statement which the witness had made before the Committing Magistrate. He will satisfy himself that this statement was recorded under the provisions of the Evidence Act. It must have been recorded in the presence of the accused, he must have been given an opportunity of cross-examining the witness, the statement must have been read over to the witness and admitted by him to be correct, and the subject-matter of the statement must be relevant to the inquiry and be admissible under the Evidence Act. Having satisfied himself upon these points he will have the statement read out and the statement will then at once become substantive evidence in the case. In fairness to the witness the judge will give an opportunity to the witness to explain any discrepancy or contradiction, but this is not essential.

16. In the present case we find that the procedure laid down by law was in fact followed. The statements were read out in Court, the witnesses were confronted with them and were given an opportunity to explain the contradictions involved. The explanation given by them was that the previous statements were made under police pressure. There is no justification for suspecting that any pressure was exercised upon Lakhia before he went to the Police Station or that he was prevailed upon to make an incriminating statement against his own son. I am satisfied that when the case was before the Committing Magistrate the witnesses made statements voluntarily and in implicating Zila Singh they were merely actuated by the feeling that the appellant having murdered his wife should pay for his crime.

17. In this view of the matter it is clear that the charge of murder has been proved against the appellant beyond all reasonable doubt. The statements of Lakhia, Chand Kaur and Bhagan make it quite clear that the appellant and the deceased were alone on the upper storey of the house when this murder was committed. The appellant was seen going down the steps and the deceased was lying with her throat freshly cut. There was motive for the murder and the letter recovered from the house of the appellant has been proved by a Handwriting Expert to be in the appellant's hand. This letter shows that the appellant was annoyed with the

deceased either because he suspected her of infidelity or for some other reason. The recovery of a bloodstained 'dhoti' and a vest from the person of the appellant is an additional piece of incriminating evidence, and the circumstances of the case taken as a whole point only to one conclusion, namely that the appellant murdered his wife. The appellant's conviction must therefore be upheld.

18. With regard to the sentence, only one knife blow appears to have been given to the deceased.

The deceased was suspected of unfaithfulness and it is not known what was the immediate provocation for this murder. It may be that there was a quarrel between husband and wife, the appellant accusing his wife of adultery and the wife repudiating the charge in violent terms or it may be that some other quarrel took place between the two spouses. In the circumstances it seems to me that this is not a case in which the extreme penalty of death should be exacted, and I would therefore substitute the sentence of transportation for life for the death sentence awarded by the learned Judge.

19. In the result therefore I would dismiss the appeal but reduce the sentence to the sentence of transportation for life. The sentence of death therefore is not confirmed.

Harnam Singh J.

20. I agree with my learned brother in the order which he proposes to make, in the Court of Session the prosecution examined the evidence summarised hereunder: (His Lordship set out the summary of the evidence of Guran P. w. 4, Bharpai P. W. 5, Section I. Pran Nath P. W. 20, Mumick P. W. 21, Bhairam P. W. 15, Inder Singh P. W. 16, Ram Singh P. W. 19, Raj Rup P. W. 17, Lakhia. P. W. 3, Chand Kaur P. W. 8 and Bhagan P. W. 9 & then stated:) In arguments the truth of the evidence given by Guran, Shrimati Bharpai, Bhairam, Indar Singh and Raj Rup was not challenged. That being the position of matters, the findings given by the Court of Session that the relations between Mussamat Bhani and the appellant were strained, that the appellant was seen by Bhairam P. W. 15 and Indar Singh P. W. 16 on the morning of 7-5-1953 wearing 'dhoti', Exhibit P-6, and that the

appellant was not found in the village on 7-5-1953 are not challenged.

21. In examination under Section 342, Criminal P. C., hereinafter referred to as the Code, Zila Singh stated that 'dhoti'. Exhibit P-6, which might have got stained with blood when going home from the fields he covered the dead body of Mussamat Bhani, belonged to him. In that examination Zila Singh stated that one month before the occurrence he had left Mussamat Bhani at the house of Guran and that on that occasion Mussamat Bhani had requested him to retain the ornaments because there was likelihood of Mussamat Bharpai stealing those ornaments. Zila Singh stated in examination under Section 342 of the Code that he sent ornaments to Mussamat Bhani through Abhe P. W. 6 and Prithi P. W. 7. That the ornaments were sent to Mussamat Bhani through Abhe and Prithi was deposed to by Guran P. W. 4. Abhe and Prithi were tendered for cross-examination but were not cross-examined.

22. Mr. Amar Nath 'Chona' appearing for the appellant urges that in using the statements made by Lakhia, Shrimati Chand Kaur and Shrimati Bhagan before the Committing Magistrate the Court has contravened the provisions of Section 145, [Evidence Act, 1872](#), hereinafter referred to as the Act. In other words, it is said that deposition taken before Committing Magistrate which contradicts the evidence given in the Court of Session cannot be used against the prisoner without putting to the witness portions of the statement with which it is sought to contradict the witness. (His Lordship quoted the provisions of Section 288, Criminal p. c. and Section 145, Evidence Act and stated:)

23. Now, the general rule is that all evidence must be direct. In other words, the witness must himself appear in Court to give 'viva voce' evidence of the fact which he claims to have perceived unless the case falls within Section 33 of the Act. To, that rule Section 288 of the Code provides an exception by enacting that the Sessions Judge in his discretion may treat evidence of a witness duly recorded in the presence of the accused under Chapter. 18 of the Code as substantive evidence in the case though none of the conditions laid down in Section 33 of the Act is satisfied.

24. From a perusal of Section 145 of the Act, it is plain that the procedure prescribed by Section 145 of the Act does not govern the position when depositions taken before the Committing Magistrate are treated as substantive evidence in the Sessions trial under Section 288 of the Code.

25. Now, I come to that conclusion on the examination of Sections 145 and 154 of the Act. Section 154 of the Act provides that the Court may, in its discretion, permit the party who calls a witness to put any questions to him which might be put to him in cross-examination by the adverse party. Section 137 of the Act defines 'cross-examination' to be examination of a witness by the adverse party. In putting questions to the witness which might be put in cross-examination by the adverse party, the party calling that witness is not cross-examining the witness. If so, Section 145 of the Act does not govern the position.

26. Then it is plain that the evidence of a witness duly recorded in the presence of the accused under Chapter 18 of the Code when transferred to the record of the Sessions Court is to be treated as evidence in the case 'for all purposes' and not only for the purpose of contradicting the witness. In -- 'AIR 1937 PC 119 (G)' Lord Thankerton said:

'The only objection taken by them was to maintain that the deposition, when admitted under Section 288, could 'only be used for the purpose of cross-examination' within the provisions of Section 145, Evidence Act. But this objection is clearly untenable in view of the express provision of Section 288 of the Code that it is to be treated as evidence in the case 'for all purposes'.'

27. In a case falling under Section 145 of the Act 'portions' of the previous statement of the witness can be used for the 'purpose of contradicting' him. That is not the position under Section 288 of the Code which provides that the 'previous statement' of the witness may be treated as evidence in the case 'for all purposes'. In using the previous statement of the witness as substantive evidence under Section 288 of the Code, the Court of session will give an opportunity to the witness to explain his position so that the explanation, if any, may be taken into account in considering the value to be attached to the evidence given in the Court of Commitment. From the evidence given by Lakhia, Shri-mati Chand Kaur and

Shrimati Bhagan, it is plain that before the Court of Session ordered the statements made by the witnesses before the Court of Commitment to be brought on the record the witnesses were specifically questioned about the incriminating statements made by them in the Court of Commitment.

28. Shrimati Chand Kaur gave evidence at the trial that nobody met her when she was going upstairs. In reply to a question by the Public Pro-secutor Shrimati Chand Kaur stated:

'I made the statement before the Committing Magistrate that when I and Shrimati Bhagan went upstairs before daybreak, we saw Shrimati Bhani lying dead and bleeding from the neck, and that the accused was going downstairs, but I gave this statement under police pressure. I also stated before the Committing Magistrate that Zila Singh and his wife were sleeping upstairs and that I, Dakhan, Bhagan, Dhanpati and Lakhia were sleeping on the ground-floor, but this statement was also given under police pressure.'

Shrimati Bhagan P. w. 9 stated at the trial:

'I gave my statement before the Committing Magistrate. I did not state before the Committing Magistrate that on the night of occurrence Zila Singh and his wife Shrimati Bhani were sleeping on the roof upstairs and that there was none else there, nor did I state that on inquiry the accused said that she committed suicide.'

Lakhia gave evidence at the trial:

'My statement was recorded by the Committing Magistrate. The statement recorded by the Committing Magistrate has been read out to me. This was not the statement given by me, but it was given under the pressure of the Sub-Inspector, Police.'

29. In these circumstances it is futile to contend that the incriminating statements made by Lakhia, Shrimati Chand Kaur and Shrimati Bhagan in the Court of Commitment were not put to the witnesses before the statements made by them in the Court of Commitment were transferred to the Sessions record. If so, it is not necessary to examine with any elaboration the point raised by Mr. Amar Natli

'Chona' that Section 145 of the Act controls the provisions of Section 288 of the Code. In -- 'AIR 1937 PC 119 (G)', Lord Thankerton said:

'The words 'subject to the provisions of the Evidence Act, 1872' cannot be read so as to limit the purposes for which it may be used.'

In support of the argument raised counsel cited -- '31 Cal 142 (FB) (A)'; -- 'AIR 1945 Cal 159 (B)'; -- 'AIR 1944 Cal 323 (C)' and -- 'AIR 1949 Cal 597 (D)'.

30. In -- 'Emperor v. Zawar Rahman (A)' counsel for the prisoner claimed a right to read to the jury the depositions taken before the Magistrate for the purpose of showing that the evidence given by the witnesses for the prosecution, when before the Magistrate, was contradictory to the evidence which they had given in the course of the trial. In that case the Court of Session had not acted under Section 288 of the Code. On those facts the Court found that counsel for the prisoner was not entitled to refer to the depositions taken before the Magistrate for the purpose of contradicting the witnesses without having drawn the attention of the particular witness to the contradiction in his deposition and without having given him the opportunity of explaining it.

31. In -- 'Emperor v. Ajit Kumar Ghosh (B)', the prosecution put in evidence the depositions made by two witnesses before the Committing Magistrate and the learned Judge allowed these depositions to be filed under the provisions of Section 288 of the Code. In considering the matter, Edgley J. said:

'Although on a proper application of the provisions of Section 288 of the Code the prosecution might have been able to use as substantive evidence the statement regarding Anadi before the Committing Magistrate, it must nevertheless be remembered that this application of Section 288 of the Code is 'subject to the provisions of the [Evidence Act, 1872](#)'. In substance the prosecution sought to contradict the evidence given by Baser before the trial Judge by a portion of his statement made before the Committing Magistrate. This can only be done by having recourse to Section 145, Evidence Act, as was made clear in -- '31 Cal 142 (FB) (A)' cited above.'

32. From what I have said above, it is plain that -- '31 Cal 142 (PB) (A)' does not govern the position and the construction placed by Edgley J. (Roxburgh J, concurring) on Section 288 of the Code is not supported by the words used in that section. The words 'for all purposes subject to the provisions of the Indian [Evidence Act, 1872](#)' did not occur in the section as it stood prior to the amendment of 1923. In my opinion, the words 'subject to the provisions of the Indian [Evidence Act, 1872](#)' added by the Amending Act only mean that the evidence admitted under Section 288 of the Code is subject to the same rules as to admissibility and relevancy as any other evidence and that the Judge is not at liberty to admit irrelevant evidence under the section merely because it happens to be a deposition of the witness given before the Committing Magistrate. In this connection -- 'AIR 1944 Bind 178 (P)'; -- 'AIR 1943 Lah 215 (E)' and -- 'AIR 1937 PC 119 (G)' may be seen.

33. In deciding -- 'Emperor v. Rahenuddin Mondal (C)', Edgley J. thought that the object of transferring the previous statement under Section 288 of the Code was to contradict the evidence of the witness given at the trial.

34. In -- 'Gopal Khaitan y. The King (D)', the point decided was that the discretion under Section 288 of the Code must be exercised very sparingly and carefully. In that judgment it was not said that Section 288 of the Code is controlled by Section 145 of the Act. In -- 'AIR 1937 PC 119 (G)', their Lordships of the Privy Council observed that the words 'subject to the provisions of the Evidence Act' appearing in Section 288 of the Code, cannot be read so as to 'limit the purpose for which the deposition may be used'.

35. For the foregoing reasons, I overrule the objection that the Court of Session was not right in using against the appellant the evidence given by Lakhtia, Shrimati Chand Kaur and Shrimati Bhagan in the Court of Commitment. Lakhtia has three sons, Mehr Singh, Surat Singh and Zila Singh, appellant. Shrimati Chand Kaur is wife of Mehr Singh and Shrimati Bhagan is wife of Surat Singh.

36. Mr. Amar Nath Chona then urges that the Court was not right in acting under Section 288 of the Code before the witnesses were cross-examined by the defence counsel.

37. From a perusal of Section 208 of the Code, it is plain that the condition precedent to the use of the statement of a witness recorded under Chapter 18 of the Code as evidence at the trial, is that the witness should be 'produced and examined as a witness at the Sessions trial'. Section 137 of the Act deals with examination-in-chief, cross-examination and re-examination. In my judgment, on the conclusion of examination-in-chief of a witness the Court can in a fit case decide to act under Section 288 of the Code. In any event an order under Section 288 of the Code before the witness is cross-examined by the defence counsel does in no way prejudice the defence of the prisoner. In such a case counsel for the prisoner has on the record the evidence that is sought to be used against the prisoner when he begins to cross-examine the witness.

In acting under Section 238 of the Code the Additional Sessions Judge thought:

'Being very closely related to the accused, they--Lakhia, Shrimati Chand Kaur and Shrimati Bhagan have now made frantic efforts to save him from the gallows and have completely re-siled from the statements made by them before the Committing Magistrate, which are incriminating against the accused. It cannot be said that they broke down under the stress of cross-examination in this Court, but even in examination-in-chief they have now tried to put up a story different from the one stated before the Committing Magistrate.'

38. Sub-Inspector Pran Nath gave evidence that he did not press Lakhia, Shrimati Chand Kaur and Shrimati Bhagan to make the statements that they made in the Court of Commitment. Indeed, a perusal of the record shows that in the Court of Commitment Lakhia, Shrimati Chand Kaur and Shrimati Bhagan were not under the influence of the Police. No evidence was examined in defence.

39. For the reasons given above, I see no force in the objections raised to the admissibility of the statements of Lakhia, Shrimati Chand Kaur and Shrimati Bhagan recorded under Chapter 13 of the Code in presence of the accused.

40. In arguments it was not suggested that the evidence summarised in the opening paragraph of this order is capable of explanation upon any other reasonable hypothesis than that of the guilt of the appellant. Order accordingly.

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