

Kamal Kanto Das Vs. the State

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Court : Kolkata

Decided On : Dec-17-1958

Reported in : AIR1959Cal342,1959CriLJ694

Judge : S.N. Guha Ray and ;N.K. Sen, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 154, 162 and 423; ;
[Evidence Act, 1872](#) - Sections 60 and 153

Appeal No. : Criminal Reference No. 4 of 1958 and Appeal No. 431 of 1958

Appellant : Kamal Kanto Das

Respondent : The State

Advocate for Def. : Amaresh Chandra Roy, D.L.R. and ;Amal Kumar Basu, Adv.

Advocate for Pet/Ap. : Nalin Chandra Banerjee and ;Arun Kumar Mukherjee, Adv.

Disposition : Appeal partly allowed

Judgement :

S.N. Guha Ray, J.

1. This reference under Section 374 of the Cr. P. C. for the confirmation of the sentence of death passed upon Kamal Kanto Das and his appeal arise out of his

trial for having murdered Nemai Charan Das, an uncle of his. His father Netai was also put on trial along with him and the charge against both was under Section 302 of the I. P. C. read with Section 34 of the I. P. C. Netai was acquitted of the charge on a majority verdict of 5: 4. Kamal, however, was found guilty of the charge by a majority verdict of 8: 1. The learned Judge agreed with and accepted this verdict, convicted him and sentenced him to death,

2. Nemai was a brother of Netai, father of Kamal, the appellant. Nemai used to live in Holding No. 29 which abuts on Umesh Banerjee Lane proceeding from West to East and also on another branch of Umesh Banerjee Lane proceeding from the main branch northward. Holding No. 29/1 which is in the possession of Netai lies on this northward branch of Umesh Banerjee Lane and adjoins Holding No. 29 occupied by Nemai on the north. Holding No. 29/1/1 belonging to Ganesh adjoins Nemai's holding on the north and abuts on the northward branch of Umesh Banerjee Lane. Holding No. 29 originally belonged to Charushila, an aunt of the three brothers, Nemai, Netai and Ganesh and she made a deed of gift in favour of Nemai in respect of his holding. One-half share of holding No. 29/1 also belonged to Nemai but Netai acquired this one-half of Nemai by purchase.

3. Netai built a tin shed and a part of this Ha shed rested on the boundary wall between Nemai's house and Netai's. This boundary wall is said to belong to Nemai. Nemai Das instituted Title Suit No. 412 of 1956, the plaint of which is marked Ext. 12, in the 2nd Court of the Munsif at Howrah on 21-9-1956. This suit was pending at the time of the occurrence. Nemai Das filed an application before the Howrah Municipality on 27-4-1956 alleging that Netai had constructed a small unauthorised shed of corrugated iron roofing without any plan or sanction of the Municipality, with the supporting poles placed on the southern wall of Nemai's double storeyed building at 29 Umesh Banerjee Lane and praying for demolition of the said unauthorised structure. There was a second application on 8-6-1956, but that application has not been proved. There was a third application Ext. 13/1, on 14-8-1957. As a result of the first and the second applications of Nemai the Municipality called upon Netai and Ganesh to provide side space on the south of holding No. 29/1, Umesh Banerjee Lane. This requisition was made on 4-7-1956 and as the requisition was not complied with the Municipality filed a case before

the Municipal Magistrate on 5-9-1956. That Municipal case was also pending at the date of the occurrence.

4. The case for the prosecution briefly is that the civil suit filed by Nemai against Netai and the applications he filed before the Municipality which led to a case against him before the Municipal Magistrate embittered the feelings between Nemai on the one hand and Netai and his sons on the other to such an extent that on 17-9-1957 Nemai was done to death by Netai and his two sons Kamal and Bimal and that Bimal after Nemai was done to death committed suicide by swallowing Nitric Acid. The incidents which led to the killing of Nemai are said to be briefly that at about mid-day which was the day of the Biswakarma Puja Kamal and Bimal, the two sons of Netai came armed with a Tarawal and an iron rod and knocked at the door of Nemai Das on the eastern passage using abusive terms and threatened to kill Nemai. Nemai was not at home at the time. His wife Lakshmimoni Dassi came downstairs, opened the gate and enquired what had happened. Bimal then abused her in vulgar language and threatened to teach Nemai a lesson when he would be going to office. At this stage some neighbours intervened and removed both Bimal and Kamal. Nemai's wife frightened by the threats and the behaviour of Kamal and Bimal went to Shibpore Police Station and reported the incident there. Ext. 10 is the General Diary Entry based on this information of Lakshmimoni Dassi. It was recorded at 2-15 p.m. on 17-9-1957. Her husband also went to the Police Station and they returned from the police station together. On her way back home she made her husband wait at Mallick Fatak while she herself would go home ahead of him to see what was happening there. When she went home she found Kamal and Bimal still going about armed with reds. On seeing them armed and still loitering about, she again went to Shibpore Police Station and lodged another information on the basis of which another G. D. Entry was made. This is Ext. 11 recorded at 4-45 p.m. From the Police Station two constables were disputed to maintain peace and order there. When Lakshmimoni came back home with the two Constables she found her husband at home and she did not see Kamal and Bimal at the time. The Constables who had their Command Certificate with them returned to the Police Station after Lakshmimoni had signed the command certificate. As soon as the constables left, Kamal and Bimal again began shouting threats from inside their own house. Nemai then

asked them not to do that. This called forth a further stream of threats from the two brothers Kamal and Bimal who challenged Nemai to come out. Nemai then came out to the eastern passage and Kamal and Bimal rushed at him with rods in their hands. Nemai ran into Nilmoni Karmakar's house and took shelter there. Nilmoni Karmakar and his cousin Kalipada Karmakar who was then at home separated Nemai who had already been caught hold of from Kamal and Bimal and gave him shelter in their house. Nemai was actually inside a room under lock and key in that house.

5. On seeing this Lakshmimoni again went to Shibpore Police Station and reported the incident but no record was made of the information given by her and on her way back a Sub-Inspector of Police, namely, Amalendu Bhusan Kundu, P. W. 30 and a Constable accompanied her to her house. After she had left for the Police Station at about 7 p.m. Nemai came out of the room in which he had been locked, stopped at the Roak of Ranjit Chatterjee which is shown as 'Q' in the Sketch Map, Ext. 14. This part of Premises No. 22A, Umesh Banerjee Lane which is separated from Nemai's holding by the northward branch of that lane, lies just to the north of the main branch of the lane. After a short conversation he entered his house. As Nemai was proceeding along Umesh Banerjee Lane Kamal followed him for some distance and then left. Nemai entered his house by the western passage and within about 5 minutes from that time Ranjit and his two friends who stood on the roak heard Nemai shouting from the eastern passage 'Save me, I am being killed'. Then they ran towards the passage & found that while Netai was catching hold of Nemai, Bimal and Kamal each of whom were armed with a knife stabbed him. Sanat alias Bhontra, P. W. 5 who was one of the persons who had gathered there on hearing the cries of Nemai caught hold of Netai after the stabbing and Kamal who also had gone back to his house came out armed with an iron rod and struck at Sanat. Warned by another man who had come up by this time Sanat avoided the blow aimed at his head and received it on his back.

6. Netai and Kamal were then both caught hold of by the persons who had collected. Nemai was removed to the main Umesh Banerjee Lane from where he was sent to the hospital in an ambulance. On the way to the hospital, however, he expired. Shortly after this Bimal was discovered lying on the field to the south of

the main Umesh Banerjee Lane and groaning. He too was taken to the hospital where his dying declaration was recorded and the doctor who examined him seeks to prove that statement which is to the effect that he swallowed Nitric Acid in the evening. When Lakshmimoni was coming back home accompanied by S. I. Amalendu Bhusan Kundu, they heard from a Tanti-buri on the way that her husband had been murdered. When they arrived at Umesh Banerjee Lane her husband had already been removed to the hospital. Meanwhile, one Pankaj Das of 29, Umesh Banerjee Lane, P. S. Shibpore informed the Police Station over the phone that 'an assault case over swords' happened at Panchanantalla between two brothers and the condition of the injured who was sent to hospital was serious. The gist of the telephonic information was recorded by S. I. Kamal Kumar Sen Gupta, P. W. 36 and he proceeded to the spot without delay. Bimal was still lying on the field and the Sub-Inspector had him removed in the Police Van to the hospital. As Nemai had already been sent to the hospital, the Sub-Inspector also went to the hospital. From the hospital S. I. Kamal Kumar Sen Gupta returned to the spot and then examined Ranjit Kumar Chatterjee whose statement was treated as the First Information Report in the case. Then on investigation Netai and Kamal were sent up by the police in charge sheet.

7. The defence of Kamal was that he was not at the place of occurrence but was inside their house at the time and the crowd which collected there particularly Bhontra, Gobinda and others assaulted him and his father Netai and also his brother Bimal and he was kept under surveillance by them and ultimately handed over to the police. It seems further to be his case that after Nemai had been stabbed Bimal was roughly handled by Gobinda, Bhontra and others who put acid into his mouth and then threw him in the adjoining field where he died. They denied having attempted to assault Nemai earlier in the day.

8. The evidence of Dr. Ukil, P. W. 16 who held the post mortem examination on the dead body of Nemai shows that Nemai had one incised punctured wound 1'x1/2'x abdominal cavity over the abdomen 11/2' above the umbilicus just to the left of the mid line, placed transversely and he had another incised punctured wound placed almost transversely 1'x1/2' chest cavity on the right side of the back at its lower part, 1/2' to the left of the posterior axillary line. On dissection injury No.

I was found to have cut through the skin, subcutaneous tissues, muscles, peritoneum, puncturing the small intestine on its way after perforating the mesentery and injury No. 2 was found to have cut through the skin subcutaneous tissues, fasciae muscles, parietal and visceral pleurae and the lower lobe of the right lung through the intercostal space between the 10th and the 11th ribs cutting the 11th rib slightly on its way. He also held post mortem examination on the dead body of Bimal and found a number of abrasions in various parts of his body and he found yellow stains in the mouth, pharynx. and oesophagus, larynx and trachea and also perforation of the stomach and from these he concluded that Bimal's death was due to some irritant or corrosive poison but he could not say definitely if it was Nitric Acid in the absence of the Chemical Examiner's report. The Chemical Examiner's report is Ext. 18. It says that reactions for salts of nitric acid have been obtained in the viscera said to be of Bimal Kanta Das. It is therefore, obvious from the doctor's evidence and from the report of the Chemical Examiner that Bimal's death was due to Nitric Acid. If Dr. G. N. Banerjee, P. W. 11 is to be believed Bimal himself swallowed nitric acid during the evening. The evidence of Dr. G. N. Banerjee, P. W. 11 who examined Kamal is that he found two ecchymosis and two abrasions on Kamal.

These were all fresh and slight. He also found on an examination of Netai that he had two abrasions, one swelling and two Haematomas, all of which except one Haematoma he described as slight.

9. There is a number of eye-witnesses to the occurrence. These are Ranjit Kumar Banerjee (P. W. 1) Chhabirani Das (P. W. 2), the ten year old daughter of Nemai, Gobinda Charan Addya (P. W. 4), Sanat Kumar Das alias Bhontra (P. W. 5), Kripamayee Dasi (P. W. 9) wife of Ganesh Das, the third brother of Nemai and Netai, Samir Kumar Ray (P. W. 10) and Kamala Bala Karmakar (P. W. 19) wife of Kalapada Karmakar and Nilmoni Karmakar (P. W. 21), the brother of Kalipada Karmakar.

10. The mid-day incident is sought to be proved by Ranjit (P. W. 1), Lakshimoni (P. W. 3), Madan Mohan Addya (P. W. 6), Gour Mohan Addvg (P. W. 8), Kripamayee Dassi (P. W. 9), Kamala Bala Karmakar (P. W. 19) and Nilmoni

Karmakar (P. W. 21). The incident which is alleged to have taken place at about 5-30 p.m. is sought to be proved by Ranjit (P. W. 1) Lakshmimoni (P. W. 3), Madan Mohan Addya (P. W. 6), Kripamayee Dassi (P. W. 9), Samir Kumar Roy (P. W. 10), Kamala Bala (P. W. 19) and Nilmoni Karmakar (P. W. 21).

11. Mr. Banerjee appearing for the accused Kamal took us through the whole of the evidence and if we could dispose of the reference and the appeal on the evidence on the record, it would certainly have been our duty to deal with this evidence in detail and to record our own conclusion. Mr. Banerjee has also made various criticisms of the evidence of these witnesses and it would have been our duty to deal with these criticisms again in detail before we would come to any conclusion, but we are constrained to say that there is at least one fact which has not been clearly explained by the evidence and which makes it impossible for us to come to a conclusion as regards the value of the evidence of the eye-witnesses and the rest of the evidence. This fact is that it appears from the Seizure List, Ext. 2/2, Item No. 6 that some drops of blood were recovered from 'the western wall of holding No. 22/1, Umesh Banerjee Lane which is in front of holding No. 29/1.' The description, therefore, of the place from which drops of blood were recovered is the western wall of holding No. 22/1, Umesh Banerjee Lane which is in front of holding No. 29/1. Holding No. 29/1 is, as already stated, the holding of Netai which is in between holding No. 29 belonging to Nemai and holding No. 29/1/1 belonging to Ganesh. In front of that on the other side of the northward branch of Umesh Banerjee Lane is 'K' which is the house of Santosh Ray. P. W. 8, Gour Mohan Addya says in his cross-examination at page 67 of the paper book that his house is premises No. 23 and just to the south of his house is that of Santosh Roy which is holding No. 22 and to the east of Santosh Roy's house is Chandi Ghosh's house which is holding No. 22/1. It is, therefore, obvious that the western wall of premises No. 22/1 is the eastern wall of Santosh Roy's house, or in other words, it is a wall between holding No. 22 and holding No. 22/1. If that is so, it is impossible to understand how premises No. 22/1 could be said to be in front of premises No. 29/1. There is thus a conflict between the number of the house and the description of its location in the Seizure List.-

12. One could have expected the Public Prosecutor to notice this and then to obtain an explanation from either the local witnesses or the police witnesses or from both. As a matter of fact, it is nothing less than amazing that the learned Public Prosecutor did not find this out at all nor did he care to ask either the Police Officer who discovered blood there or the witnesses to the Seizure List such as Ranjit and Gobinda, P. Ws. 1 and 4 respectively where exactly this blood was found. It is all the more amazing because the entry in the Seizure List itself does not constitute substantive evidence of the presence of marks of blood at the particular place mentioned. It is at best merely confirmatory evidence and unless there is substantive evidence there is nothing at all to confirm. To Ranjit a very general question appears to have been put and his answer was that the Daroga seized blood marks from the wall but the learned Public Prosecutor does not appear to have put a further question to clarify this matter, namely, the particular wall where blood marks were found. Kamal Kumar Sen Gupta, S. I. (P. W. 36) who found this blood and prepared the Seizure List, Ext. 2/2 merely stated in his examination-in-chief that he seized certain alampatti from the spot and made a seizure list and the seizure list in question is Ex. 2/2. It is at once obvious that the learned Public Prosecutor did not see the importance of the presence of blood marks at all and did not put the necessary question to the witnesses concerned.

13. The result was that there is practically no substantive evidence to show that any blood mark was found at any place and particularly the exact location of the wall where the blood mark as mentioned in the Seizure List Ext. 2/2 was found. At the same time it is clear that there was blood mark somewhere. The importance of the question where exactly blood marks were found lies in the fact that there was no other place where the police found marks of blood. It is undoubtedly true that Ranjit Chatterjee speaks of blood marks on the spot where the injuries were inflicted, but then he also speaks of these having been washed although he is not in a position to state who washed them and when. He further states that it was pointed out to the Daroga that the blood marks were evidently washed and that the blood marks were there. But no question was put to any of the Sub-Inspectors. According to even Ranjit Chatterjee when the police arrived there were no blood marks found except where they were found according to the Seizure List, Ext. 2/2. Ranjit, as I have already stated, said that they were found on the wall but he did

not specify the wall where these were found. That being so, the exact location of the place where the blood marks were found has not been clearly elicited in the evidence although this much is clear that the blood marks were found at some place or other. If the blood marks were found in the western wall of premises No. 22/1, a question will certainly arise whether the evidence of the eye-witnesses who placed the occurrence in the northward branch of Umesh Banerjee Lane in front of holding No. 29/1 can be believed. If on the other hand the blood marks were found on the western wall of premises No. 22 which belongs to Santosh Roy and which is opposite premises No. 29/1, there might be a good ground for accepting the evidence of those of the eye-witnesses whose evidence on the usual tests being applied, may be found to be credible. As the two parts of the description in the seizure list of the place where the Mood marks were found seem to be at variance and as this cannot be explained except by the evidence of the witnesses who were present at the time when these blood marks were found, it is impossible for us to say from the seizure list alone where exactly the blood marks were found and if it is impossible to say that, it is hardly possible to use the presence of blood marks at a particular place as a test of the evidence of the eye-witnesses, for the simple reason that the place where the blood marks were found does not appear to have been clearly elicited in the evidence.

14. In this connection the question arises whether in this state of the evidence we are entitled to order a retrial as we are bound to do, because on the evidence such as it is it is impossible for us to record any finding either way. There is on the one hand the evidence, of a fairly large number of persons claiming to be eye-witnesses to what appears to have been a murderous assault on Nemai which resulted in his death shortly after the assault and there is on the other the entry in the seizure list, Ext. 2/2 which, as I already stated, is far from clear as it is and on which there is no clarifying evidence at all. We have in the circumstances hardly any option but to order a retrial because we think that if even one of the eye-witnesses is believed in full, the conviction of the appellant may be maintained. If on the other hand none of these eye-witnesses is believed, the appellant will have to be acquitted. The question whether any of these eye-witnesses should be believed or not depends amongst other factors on the question where exactly the marks of blood were found and as that has not been fully clarified it is not at all

possible for us to come to any conclusion on the evidence on the record. Section 423, Sub-section (1)(b) entitles the Appellate Court to do certain things. One of these things is to order the appellant to be retried. That the High Court in a suitable case can order retrial is therefore obvious from the terms of Section 423(1)(b) itself of (the Code of Criminal Procedure. The question, however, is whether the Supreme Court has gone to the length of laying down in three cases that the High Court cannot order retrial in any circumstances, I am inclined to think that the Supreme Court has nowhere laid down such a proposition in such general terms as indeed it could not have done in view of Section 423(1)(b) of the Code of Criminal Procedure. It is, therefore, necessary to examine these three cases. They all follow the decision of the Privy Council in *Abdul Rahim v. Emperor* . The first of these cases is *Mushtak Hussain v. State of Bombay*, : [1953]4SCR809 . In this case in view of fatal misdirections the Court had to consider what course it ought to follow. In so doing it pointed out that the simplest course open to it was to order a retrial; the next course was to remit the case to the High Court with a direction that it should consider the merits of the case and to say whether there had been a material failure of justice as a result of these misdirections and the third and the last course for it was to decide for itself whether there had been a failure of justice and an innocent man had been convicted. In deciding* whether there has been in fact a failure of justice in consequence of a misdirection the Court is entitled as laid down in *Abdul Rahim's* case to take the whole case into consideration and the Court in this particular case adopted the third course open to it because at the moment that was most conducive to the ends of justice. The second case is *Ramkishan Mithanlal Sharma v. The State of Bombay*, : 1955 CriLJ196 . It merely echoed the view taken in *Abdul Kahim's* case by the Privy Council but did not go into the question whether in every case it must look into the evidence. The third is an unreported decision in *Bhupati Bhusan Biswas v. The State of West Bengal*, in Criminal Appeal No. 113 of 1956 (SC). What the Court has said in this case is as follows:

'In our view on the findings that 'the misdirections' pointed out above have caused an erroneous verdict' 'and have also occasioned a failure of justice' the order of retrial cannot be sustained.

In , the Privy Council held; that if the court finds that as a result of misdirection the verdict of the Jury is erroneous, or the misdirection has, in fact, occasioned a failure of justice, then its duty is to interfere and it is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted. This Court in : [1953]4SCR809 and in : 1955 CriLJ196 has approved of this statement of law. In the circumstances of this case we are of the opinion that the High Court was in error in remanding the case for retrial; it should have followed the procedure laid down in the Privy Council case and should have gone into the evidence and determined for itself whether the accused were guilty or not.'

It is obvious from the last sentence that the Supreme Court in the circumstances of that particular case was of the view that the High Court was in error in remanding the case for retrial. It cannot be held to have laid down the broad proposition that in no case was the High Court entitled to order a retrial. What seems to us to emerge from these decisions beginning from Abdul Rahim's case decided by the Privy Council and the three cases decided by the Supreme Court is, that the High Court is entitled to go into the whole evidence tot deciding for itself whether in fact one or more misdirections have occasioned a failure of justice in the sense that a guilty man has been acquitted or an innocent person has been convicted and then to decide for itself whether there should be a conviction or acquittal wherever the evidence on the record permits it to come to a definite finding either way. Neither the Privy Council nor the Supreme Court has laid down in clear terms that where the High Court is not in a position to come to any finding either way on the evidence on the record, it would be debarred from ordering a retrial. Those three cases unlike the present one were cases where facts could be gone into by the Appellate Court only if there were misdirections which could have vitiated the verdict of the Jury and led to a failure of justice. In the present case, however, it is our duty to go into the facts irrespective of the question whether there are any misdirections and whether any such misdirections could have led to an erroneous verdict on the part of the Jury.

15. In the view we take we have no option, as already pointed out, but to order a retrial. In view of the order we are going to make we have deliberately refrained

from making any comments on the evidence in the case lest such comments should prejudice the trial. At the same time, however, certain things have got to be pointed out. The first is that the statement of Ranjit which was treated as the first information report in the case was not really the first information report because the police had already started investigation on the strength of a telephonic message received from Pankaj Das. Of course there was one Pankaj Das amongst the prosecution witnesses. He is P. W. 7. He does not admit having sent a telephonic message to the police. At the same time Mr. Banerjee has pointed out certain circumstances which according to him would tend to show that it was this very Pankaj Das who had sent this telephonic message. Whether this is so or not, the fact remains that one Pankaj Das sent a telephonic message to the police and on receipt of this telephonic message S. I. Kamal Kumar Sen Gupta, P. W. 36, proceeded to the spot; then after having taken Bimal to the hospital he came back to the spot and then examined Ranjit. Evidently, therefore, he had already started investigation so that Ranjit's statement was the statement of a person taken by the police during investigation. It also appears that when Lakshmimoni was coming back home from the police station accompanied by another Sub-Inspector, namely, Amalendu Bhusan Kundu, P.W. 13, she heard from one Tantiburi of the murder of her husband and the officer was then there. It is possible to say that neither this telephonic message nor the information given by this Tantiburi amounted to a first information contemplated by Section 154 of the Code of Criminal Procedure because the officer to whom Tantiburi gave the information was not the officer-in-charge of a police station and the telephonic message was not signed by the informant. As a matter of fact, the police did not know who the informant was and the information given by Tantiburi was not an information given by her to an Officer-in-Charge of a Police Station but whether or not the information given by the Tantiburi or the telephonic message of one Pankaj Das amounted to a first information report within, the meaning of the expression in Section 154 of the Code of Criminal Procedure it is obvious that the police had already moved in the matter and started investigation, for under Section 156 of the Code of Criminal Procedure an Officer-in-Charge of the Police Station may investigate any cognizable case even without a formal first information report and this was the view taken in *Chandrama Prasad Chamar v. The State*, ILR (1951) 1

Cal 539. We respectfully agree with that view. The statement, therefore, of Ranjit by Kamal Kumar Sen Gupta, S. I. is evidently bit by the provisions of Section 162 and should not be treated as the first information report.

16. The next thing we must point out is that the way in which a previous conviction of Gobinda was sought to be proved is bad in law. Gobinda was questioned in cross-examination whether it was a fact that he lived by looting others or that he was arrested by the police in connection with the looting of a Dalda Van in front of Surki Kal or that he was arrested in connection with a taxi robbery and he repelled all these suggestions.

17. He does not appear to have been questioned at all about any previous conviction of his. The defence, however, appears to have called for certain papers from the Shibpore Police Station. One of these papers is the Register of Unidentified Persons in P. R. B. Form No. 70 kept under Rule 417. The number of this form has now been changed. This is now Form No. 93. It appears from this register that in one column Gobinda Addya was shown as untraced. At the same time there is an entry against his name in column No. 10 as 'P. convicted.' In column 8, there is the word 'un-traced' and then in column 5 there are the Sections 395 and 397 of the Indian penal Code mentioned one above the other. It is difficult to understand what precisely this entry means but in any event that is not a proper proof of a previous conviction, because it represents at best mere bear-say information and the proper proof of a previous conviction of a witness is a certified copy of the order of conviction or on the analogy of the provisions of Section 511 of the Code of Criminal Procedure which does not in terms apply to the mode of proof of a previous conviction of a witness.

'by an extract certified under the hand of the Officer having the custody of the records of the Court in which such conviction or acquittal was had to be a copy of the sentence or order, or by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered.'

18. In any event, what was sought to be used as proof of the previous conviction of Gobinda is not legal evidence at all of any such previous conviction. Mr.

Banerjee was asked to produce a certified copy of the order showing that there was a previous conviction. He was not able to do so within the time at his disposal, but in view of the order, we are going to make that hardly matters because it will be open to him to prove this previous conviction during the retrial. Sanat, P.W. 5, appears to have been questioned in his cross-examination about his character and his answers were as follows :

'I was never in police surveillance. It is not a fact that I was accused in any looting case from a Dalda Van. It is not a fact that I was accused in a case for looting dhupis cloth at the crossing of Kasundia Road. I was never accused in any case for assaulting Bistu Babu, a lawyer of this Court.'

Then, P.W. 3 Kamal Kumar Sen Gupta was questioned in his cross-examination as to whether there was a history sheet of Sanat maintained in the Thana and whether the history sheet was in respect of active criminals and his answer was in the affirmative and from this affirmative answer it was argued that Sanat was an active criminal. The learned Judge in his summing up referred to the evidence of the previous conviction of Gobinda at p. 155 of the paper book and to the character of Sanat at p. 157. But Section 153 of the Evidence Act lays down that when a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; if he answers falsely, he may afterwards be charged with giving false evidence. To this general Rule the section provides two exceptions. The first exception is that if a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction. The second exception is that if a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted. Sanat was questioned about his character only with the object of shaking his credit. When therefore he had denied having any connection with these cases or that he was under police surveillance or that there was a history sheet against him as an active criminal, no evidence to contradict him would be admissible unless this evidence could be brought within either of the two exceptions. Exception I obviously has no application because this evidence to contradict had nothing to do with the previous conviction, nor does it

come within exception 2 because the question is not such as tends to impeach his impartiality although it tends to impeach his character. The evidence therefore that was sought to be introduced is not admissible at all under Section 153 of the Indian Evidence Act. Secondly, we must point out that the history sheet is not admissible in evidence at all as proof of a man's character because this history sheet may be based on information that the police receives from time to time. It would, therefore, be hit by the provisions against hearsay evidence.

19. The result then is that the conviction of the appellant under Section 302 read with Section 34 of the Indian Penal Code must be set aside together with the sentence passed and the case sent back for retrial according to law by the Sessions Judge of Howrah.

20. The appeal is allowed to this extent and the Reference is rejected. The appellant will continue to remain in custody and the hearing of the case should be expedited.

21. N. K. Sen, J.: I agree.