APPELLATE CRIMINAL.

Before Cunliffe and Henderson JJ.

1937
Feb. 9, 10.

SHAHED ALI MIRDHA
v.
EMPEROR.*

First Information Report—Code of Criminal Procedure (Act V of 1898), ss. 154, 162.

When an information is given orally under s. 154 of the Code of Criminal Procedure and a police officer does not reduce it into writing, he is doing what he ought not to do and is acting in an irregular way. If thereafter he investigates the truth or otherwise of the information, he is carrying on an investigation within the meaning of Chapter XIV of the Code. Section 162 applies to the statements made by persons examined by him. No such statement can be recorded or treated as a First Information Report.

Dargahi v. *Emperor* (1) dicussed.

CRIMINAL APPEAL.

The material facts of the case and the arguments in the appeal appear sufficiently from the judgment.

A. K. Basu and *Beereshwar Chatterji* for the appellants.

The Deputy Legal Remembrancer, Khundkar, and *Ajit Kumar Datta* for the Crown.

HENDERSON J. The appellants have been convicted of rioting; one of them, in addition, has also been convicted under s. 326, another under s. 325 and another under s. 324 of the Indian Penal Code. The case was a very ordinary one. The rioting was due to one of those disputes over land which so frequently happen in the district of Faridpur. In view of the order which we propose to make, it is not necessary to go into the facts of the case in any detail.

*Criminal Appeal, No. 845 of 1936, against the order of Kunja Bihari Ray, Sessions Judge of Faridpur, dated Sep. 13, 1936.

(1) (1924) I. L. R. 52 Cal. 499.

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The prosecution witness No. 10, Imandi *chaukidâr*, arrived at the *thânâ* and reported the occurrence to the prosecution witness No. 21, the Sub-Inspector of Police. That officer did not record the statement of the *chaukidâr* in writing. Later on, another witness named Sukur, prosecution witness No. 1, also arrived at the *thânâ*. His statement, which was recorded in writing, was regarded by the prosecution as the First Information Report and was allowed to go in full before the jury. It has, therefore, been contended that this statement was inadmissible in evidence in view of the provisions of s. 162 of the Code of Criminal Procedure and that the case ought to be retried.

Now, in my opinion, it would be perfectly idle to contend that the conduct of the Sub-Inspector is above suspicion. It was the duty of the prosecution witness No. 10 to report a cognisable offence at the *thânâ* and he did so. The reasons given by this officer for not recording his statement as the First Information are so flimsy that I cannot possibly accept them as genuine reasons, and I can only suppose that for reasons best known to himself this officer preferred to wait, with the result that a statement was eventually taken from the prosecution witness No. 1. But although the police officer did not record the statement of the *chaukidâr*, he started the investigation and had done a good deal in connection with it before the statement of Sukur was recorded. Whatever may be the technical legal position, there can be no doubt whatever that this statement of Sukur was recorded in the course of the *de facto* investigation.

On behalf of the Crown it is contended by the learned Deputy Legal Remembrancer that the legal investigation did not really start until Sukur's statement was recorded, because under s. 154, the officer-in-charge of the *thânâ* was bound to reduce the substance of the information into writing. In support

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of this, reliance was placed on certain observations of the learned Judges in the case of *Dargahi* v. *Emperor* (1).

That decision has been disapproved of by the Judicial Committee of the Privy Council with regard to the point upon which the case was actually decided and is, therefore, no longer good law. The present matter was never anything more than *obiter dictum*. The learned Judges in dealing with it based their opinion upon the special facts of the case, and I am by no means convinced that they intended to lay down that the investigation did not commence, because the Sub-Inspector did not comply with the provisions of s. 154. If they did, I can only say with great respect to them that I should not be able to concur in such an opinion. If we were to give effect to the contention of the learned Deputy Legal Remembrancer, there can be no doubt that startling results would follow.

In the first place, it would be open to any investigating officer to render the provisions of s. 162 entirely nugatory by refusing to take down any statement in writing until the investigation was completed. In the second place, he would not have any of the powers without which the investigation could not be carried on. Witnesses could refuse to answer questions and so forth. I have no doubt myself that when an information is given orally under s. 154 and a police officer does not reduce it into writing, he is doing what he ought not to do and has acted in an irregular way. But it is going too far to say that while investigating the truth or otherwise of the information, he is not carrying on an investigation within the meaning of Chapter XIV of the Code. He obviously is and if he is, s. 162 applies to the statements made by persons examined by him.

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It is obvious that each case must depend on its own facts and in the course of his argument the learned Deputy Legal Remembrancer indicated that in his opinion the test of commonsense ought to be applied. If we are going to apply that test here I imagine that everybody would agree that the information given by the *chaukidâr* was the First Information Report in this case. That being so, the learned Judge was wrong in allowing the statement made by Sukur to go to the jury.

It was, however, urged on behalf of the Crown that no harm has been done by the improper admission of this evidence. I am bound to say that in my opinion Mr. Basu was rather unkind to the learned Judge when dealing with the way in which he put this part of the case before the jury. It is really the prosecution who are entitled to complain about it. All that the learned Judge did was to urge in repetition after repetition that in view of the information the jury ought to view the prosecution case with suspicion. He says this:—

> The defence pointed out that this conduct on the part of the *dârogâ* in such a heinous offence to wait for the arrival of Sukur was objectionable, and that this conduct led to concoction of a case against the accused persons as well as the story of the place of occurrence.

It seems to me that the improper refusal or omission of a police officer to take down an oral statement in writing really throws no light whatever on the question whether totally different persons concocted a case or not. The learned Judge put altogether far too much stress on this aspect of the case.

The real point is not what the learned Judge said but what the jury did. It is impossible for us to know whether or not they relied upon the statement in order to bring in their verdict of guilty. The learned Judge certainly told them that it was not substantive evidence, but they may not have understood what he meant by that. Further, in view of the way in which he actually dealt with this statement, I should not be at all surprised if the jury did

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in fact consider it as substantive evidence. Suffice it to say, for all we know to the contrary, this evidence which was improperly admitted may have turned the scale against the appellants and we think that there ought to be a retrial.

We, accordingly, allow these appeals, set aside the convictions and sentences and direct that the appellants be retried.

Those of the appellants, who are on bail, will remain on the same bail pending the retrial. The other appellants will be treated as undertrial prisoners.

CUNLIFFE J. I agree with the judgment which has just been given by my learned brother, and I respectfully adopt the reasons he has set out in his judgment as to why there should be a new trial in this case. I am of the opinion that the learned Judge was responsible in addition to the misdirection to which my learned brother has called attention for other very grave misdirections here. He was trying the type of case with which I am sure he is very familiar indeed. It was the kind of crime that is constantly occurring in the Bengal *mofussil.*

Two sets of people had a difference of opinion with regard to two properties. In this particular case the matter was submitted to local arbitration and afterwards the party who considered that their case had not been properly dealt with waylaid the members of the other party. The learned Judge, in his presentation of the undisputed facts in the case, sets them out very clearly. He shows how, as the unarmed party were going home, they were set upon by the armed party among whom were the accused and the party were in number, so the learned Judge says, about thirty to thirty-five. As a result of this attack, the deaths of two people took place. One was by name Kadem Ali and the other was known as Korban and as learned counsel, who did not quite rightly take us through the whole evidence in the

case, now reminds me that it was even worse than that. There was a third man by the name of Jabbar who was also killed. It further appears that after Kadem and Korban had been severely injured when their friends wished to take them away to be medically treated, the attackers refused to let them go and it was also shown that as a result when they were allowed to be taken away, one of them died on the boat and the other died some time later. Those are very simple and very familiar circumstances unfortunately in the district. How did the learned Judge deal with this? Instead of putting the named persons upon their trial for murder he resorts to his old form of misdirection—in a slightly altered form this time by directing the jury that they were to consider the cases of the accused, firstly, under the aspect that they are guilty of crimes under s. 304 read with s. 149. Anything more puzzling to a jury I cannot imagine. Section 304 is the culpable homicide section of the type which does not amount to murder. As I had occasion to point out yesterday, it was based upon qualifications to culpable homicide where there are certain exceptions taking it out of the murder section and putting it into this section which one would describe in the United Kingdom as being man-slaughter. That is what the jury had first to decide whether this attack amounted to culpable homicide not amounting to murder (why not amounting to murder I do not know), and then alongside of it they have got to make up their minds as to whether this crime was committed with an intention at the back of the minds of the perpetrators of being guilty of a common desire to riot. On another occasion when we were dealing with the learned Judge's charge, he mixed up the culpable homicide section, s. 304 with s. 34, which was perhaps a little easier for the jury to understand. I desire to say that when the absconders are tried (if they ever are) the learned Judge who presides at the retrial should consider very carefully whether he will not ask the

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jury the simple question as to whether those persons who, the evidence shows, caused the death by their action, were not guilty of murder pure and simple.

I also wish to say that I think the case should further be considered in the light of what was the effect in law of preventing these persons who had been so badly wounded from being taken away to be properly treated. My own view is that the jury might well decide that if persons who have caused injuries to others, from malice aforethought, allow them to be stopped from receiving proper treatment that is an action which in itself may be considered on the murder basis. It is quite obvious that if those persons had kept the wounded men long enough in their forcible custody, they would have died on their hands. As it was, they died some time later and their forcible detention may have had something to do with their death. The charge is a terribly long one. It amounts to well over 50 pages of close written type and we are never certain in these cases whether this is the actual charge which was delivered to the jury or not. Learned counsel, who appears for the appellants, rather suggests to us from his recollection, as he was present at the trial, that the version which we are now considering is an expanded copy of what was actually said to the jury in Bengali translated and elongated into English. Whether it is an exact copy or whether it is a slightly inflated copy I do not know. But I do know this that if I had been a juror sitting there, and if I had been forced to listen to this charge for as long as these jury men were kept listening to it at the end of the learned Judge's speech, I think I should have been so muddled in my mind that I should have been unable to have given as sensible a verdict as they did. For these reasons, I agree that it is absolutely essential that there should be a new trial.

Appeal allowed. Retrial ordered.

A. C. R. C.