APPELLATE CRIMINAL.

Before Mr. Justice Burn.

IN RE PONNUSAMI CHETTY (FIRST ACCUSED), PETITIONER.*

1933, January 16.

Code of Criminal Procedure (Act V of 1898), *sec.* 162—*Use of statement recorded under—For contradiction only—Omission from such statement of a statement made at the trial is not contradiction of latter statement.*

A statement made by a witness to the police in an investigation under section 162 of the Code of Criminal Procedure cannot be used when the witness is under examination in an inquiry under Chapter XVIII, Criminal Procedure Code, in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the police. Statements recorded under section 162 can be used at a subsequent inquiry or trial for one purpose only, to contradict the witness. An omission from a statement made under that section cannot be said to be a contradiction of a statement made in the witness box. It is not permissible to use such statements to show "development" of the prosecution case.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Negapatam, dated the 9th day of December 1932 and made in Preliminary Register Case No. 4 of 1932.

K. S. Jayarama Ayyar and *K. Venkataramani* for petitioner.

Public Prosecutor (*L. H. Bewes*) for the Crown.

Cur. adv. vult.

JUDGMENT.

The point raised in this case is whether a statement made by a witness to the police in an investigation

* Criminal Revision Case No. 14 of 1933.

PONNUSAMI CHETTY, *In re.*

under section 162 of the Code of Criminal Procedure can be filed, or exhibited, or, in short, used, when the witness is under examination in an inquiry under Chapter XVIII of the Code of Criminal Procedure in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the police.

Statements recorded under section 162 of the Code of Criminal Procedure can be used at a subsequent inquiry or trial for one purpose only, to *contradict* the witness. If they are to be used for this purpose the statements made under section 162 must be duly proved, and used in the manner laid down in section 145 of the Evidence Act. It follows of course that, unless there is a *contradiction* between the statement recorded under section 162 and the statement made by the witness in the course of his deposition, the statement recorded under section 162 cannot be used at all. It is therefore obvious that the question raised in this case must be answered in the negative, unless an *omission* from a statement under section 162 can be said to be a *contradiction* of a statement made in the witness box. Reduced to these terms the matter appears to me to be too simple to admit of any argument. Whether it is considered as a question of logic or of language, "omission" and "contradiction" can never be identical. If a proposition is stated, any contradictory proposition must be a statement of some kind, whether positive or negative. To "contradict" means to "speak against" or in one word to "gainsay". It is absurd to say that you can contradict by keeping silence. Silence may be full of significance, but it is not "diction", and therefore it cannot be "contradiction".

It is clear therefore that a statement under section 162 of the Code of Criminal Procedure cannot be used

during an inquiry or trial in order to show that a witness is making statements in the witness box which he did not make to the police.

PONNUSAMI CHETTY, *In re.*

The same conclusion follows from a consideration of section 145 of the Evidence Act. If it is intended to contradict the witness *by the writing*, his attention must be called to those parts of the writing which are to be used to contradict him. It would be in my opinion sheer misuse of words to say that you are contradicting a witness *by the writing*, when what you really want to do is to contradict him by pointing out omissions from the writing. I find myself in complete agreement with the learned Sessions Judge of Ferozepore who observed that "a witness cannot be confronted with the unwritten record of an un-made statement." See *Mohinder Singh* v. *Emperor*(1).

In the case cited, it was held by COLDSTREAM J. that the view of the learned Sessions Judge was not correct. Reference was made to the judgment of DALIP SINGH J. in *Hazara Singh* v. *The Crown*(2), but in neither of these cases was it explained how an omission could amount to a contradiction. The instance given by DALIP SINGH J. was that of a witness who should state under section 162 of the Code of Criminal Procedure that three persons were beating a man, and should later allege that four persons were beating the same man. I would say with all respect that such statement would be in fact contradictory. It is impossible to state a case in which an omission amounts to a contradiction.

There is apparently no decided case in this High Court but I cannot see that there is any real difficulty in the matter. There is some apparent divergence of view in the Patna High Court. Mr. K. S. Jayarama Ayyar for the petitioner relies on the case of *Iltaf Khan*

(1) A.I.R. 1932 Lah. 103, 110. (2) (1927) I.L.R. 9 Lah. 389.

PONNUSAMI CHETTY, *In re.*

v. *King-Emperor*(1) whereas the learned Public Prosecutor relies on the observations of MACPHERSON J. in *Badri Chaudhry* v. *King-Emperor*(2). In the former case it appears to me (with all respect) that there is a slight confusion of thought. A witness named Mahabir Dubey, who during the trial had given evidence against the accused, had stated in cross-examination that when examined by the police he had said that he had seen the accused that evening. This statement was contradicted by the Sub-Inspector of Police who apparently referred to his record of the statement made by the witness under section 162 of the Code of Criminal Procedure, and found therein no record of any statement by Mahabir Dubey of the fact that he had seen the accused that evening. In such a case as that, the statement of Mahabir Dubey in the witness box that he had seen the accused was not contradicted either by the record of his statement under section 162 or by the evidence of the Sub-Inspector. What the Sub-Inspector contradicted (refreshing his memory no doubt by reading the record he had made under section 162) was *the statement of the witness he had told the police so and so.* It was a contradiction not of his evidence against the accused but of what he had said to the Sub-Inspector. And moreover it was a contradiction not between two statements made by the witness, but between a statement made by the witness and a statement by the Sub-Inspector. For such a purpose as this, the statement under section 162 of the Code of Criminal Procedure cannot be used; it can only be used in order to show that the witness in the box is contradicting something he has said before. It appears to me, with respect, that the reasoning of MACPHERSON J. in *Badri Chaudhry* v. *King-Emperor*(2) is entirely correct.

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(1) (1925) I.L.R. 5 Pat. 346.
(2) A.I.R. 1926 Pat. 20

PONNUSAMI CHETTY, *In re.*

The evidence in the case now in question is not before me. Mr. K. S. Jayarama Ayyar tells me that certain witnesses appear to have stated to the police merely that all the accused beat some one. In the witness box these witnesses, I am told, have added allegations against particular accused of particular acts. The defence wants to file their statement under section 162 of the Code of Criminal Procedure in order to show that when examined by the police they did not attribute any particular acts to any particular accused. As the learned Public Prosecutor points out, the defence thus wants to use the statement under section 162 of the Code of Criminal Procedure for a purpose not sanctioned by the Code. It is not permissible to use such statements in order to show "development" of the prosecution case; it is only permissible to use them to prove contradictions. In the present case there are no contradictions.

Mr. Jayarama Ayyar then asks how he is to contradict the witnesses when they say that they told the police exactly what they are telling the Court. The answer is simply that he must contradict the witnesses on this point by adducing counter-evidence, exactly in the same way as he would contradict on any other point. He can put questions to the police officer to whom they made the statements under section 162 of the Code of Criminal Procedure or he can cite witnesses, if any, who were present when those statements were recorded. He cannot, however, use the statements themselves.

It is not difficult to understand why the Legislature has restricted the use of such statements to a single purpose. Some of the reasons have been enunciated by KNOX J. so long ago as 1894 and most of the language is still appropriate even after the changes introduced

PONNUSAMI CHETTY, *In re.*

into section 162 of the Code of Criminal Procedure in 1923—see *Queen-Empress* v. *Nasiruddin*(1) :—

"Still more extraordinary is a permission given before the case came on for trial by which the accused were granted copies of statements recorded by the police during the investigation. Such statements are recorded by police officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at that stage and omit many matters equally material, and, it may be, of supreme importance as the case developes. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from by-standers. Over and above all, they cannot be in any sense termed depositions, for they are not prepared in the way of a deposition, they are not read over to, nor are they signed by, the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said. The law has safeguarded the use of them, and it never can have been the intention of the Legislature that, as in this case, copies of them should have been without question and as a matter of course made over to the accused or their Counsel."

The learned Sub-Magistrate's view of the provisions of section 162 of the Code of Criminal Procedure is substantially correct. His actual order is not quite accurately worded. It is impossible to "read over" portions alleged to have been omitted ; but the learned Sub-Magistrate only means that the witnesses are to be particularly questioned about the statements in their depositions which according to the defence were not made when the police questioned them under section 162 of the Code of Criminal Procedure.

There is no ground for interference in revision.

K.W.R.

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(1) (1894) I.L.R. 16 All. 207.