REVISIONAL CRIMINAL.

1892
August 23.

Before Sir John Edge, Kt., Chief Justice.

QUEEN-EMPRESS *v.* MADHO.

Criminal Procedure Code, ss. 161 *and* 162—*Statement made by a witness to police officer making an investigation—Use of such statement to contradict witness—Use of statement against accused.*

A statement made by a witness under s. 161 of the Code of Criminal Procedure to a police officer investigating a case may be proved at the trial of such case to contradict such witness, the witness having been first cross-examined on the point in respect of which it is sought to contradict him. But where it appeared that, but for the principal witness for the defence having been discredited by means of proof of a previous inconsistent statement made by the said witness before the investigating officer, the accused would have been acquitted, it was *held* that this amounted to a using of such statement as evidence against the accused within the meaning of s. 162 of the Code of Criminal Procedure. *Queen-Empress* v. *Sitaram Vithal* (1), approved.

The facts of this case sufficiently appear from the judgment of Edge, C.J.

Mr. *C. C. Dillon,* for the applicant.

The Public Prosecutor (the Hon'ble Mr. *Spankie,*) for the Crown.

EDGE, C.J.—This is an application in revision. The applicant, one Madho, was convicted of the theft of some buffaloes and sentenced to a year's rigorous imprisonment under s. 379 of the Indian Penal Code by a Magistrate. He appealed, and his appeal was dismissed by the Sessions Judge. The question raised here is as to the effect of s. 162 of the Code of Criminal Procedure, 1882. The case for the defence, if true, would have shown that the buffaloes were not the buffaloes of the prosecutor. In order to make out that case certain witnesses were called, amongst others one Jahan. Jahan was confronted with a statement which he had made to the police officer in the course of the investigation relating to this theft held under Chapter XIV of the Code of Criminal Procedure, 1882. The police officer was called and contradicted Jahan as to the statement which

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had been made and proved, apparently to the satisfaction of the Magistrate, and in appeal to that of the Sessions Judge, that Jahan had made a certain statement to him which at the trial he denied having made, and that Jahan had not made a statement to him, which he made at the trial as to how he became possessed of the buffaloes. Now, I have no doubt that a statement to which s. 162 of the Code of Criminal Procedure applies may be proved to contradict a witness called for the defence of an accused person, that witness having first been cross-examined on the point, and in that respect I agree with the case of *The Queen-Empress* v. *Sitaram Vithal* (1). The question is how far further can the evidence of what the statement either did or did not consist of be used against an accused? S. 162 is quite clear, and provides that such a statement shall not be used as evidence against the accused. A statement, whether oral or written, if used in evidence may be used for either one of two purposes, either to show what it does actually contain, or to show what it does not contain. When a police officer to whom a statement has been made in the course of an investigation speaks to a statement having been made, and says that that statement did not contain a reference, for instance, to certain facts, that in effect is giving evidence of what the statement was, because it is showing that the statement as made did not contain a reference to those facts. It was contended by the Public Prosecutor that if a police officer on being asked "did the witness say so-and-so to you when making his statement?" should reply "he did," that piece of evidence should be excluded from consideration as against the prisoners by reason of s. 162; but if, on the contrary, the police officer should say "he did not," that piece of evidence would be admissible as against the prisoner. To my mind there is no difference: the one statement would be as necessarily excluded by reason of s. 162 as the other. The judgment of the Magistrate satisfies me that if it had not been for Jahan's having been contradicted by the statement which he had made to the police officer, the Magistrate would have acquitted the prisoner. Indeed the Magistrate says in his judgment that he did not consider the case for the prosecution

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a very probable one, and in fact he did release the prisoner on bail though the offence was not a bailable one. I can only regard the judgment of the Magistrate as showing that if it had not been for the contradiction afforded by the statement made to the police officer who was conducting the investigation, he would have acquitted the prisoner. In that view he must have treated that statement not only as discrediting the evidence of Jahan, but as evidence showing that the whole case for the defence was false, and consequently as evidence against the accused. The learned Sessions Judge, so far as I can read his mind through his judgment, was influenced by the same considerations as the Magistrate, and it appears to me that Madho, the appellant here, would most probably never have been convicted if his witness Jahan had not been called. Under the circumstances I must accede to this application and treat this conviction as having been made upon evidence which, as against the accused, was excluded by reason of s. 162 of the Code of Criminal Procedure, 1882. I accordingly allow the petition, set aside the conviction, and acquitting the prisoner, direct that he be set at liberty.

Before Sir John Edge, Kt., Chief Justice.

1892
September 12.

QUEEN-EMPRESS *v.* BHURE.

Act XI of 1878 (*Arms Act*), *s.* 19 (*c*)—"*Going armed*"—*Presumption as to persons found carrying arms.*

Where a person is found carrying arms apparently in contravention of the provisions of the Arms Act, it must be presumed, in the absence of proof to the contrary, that he is carrying such arms with the intention of using them should an opportunity of using them arise. *Queen-Empress* v. *Alexander William* (1), explained and approved.

This was a reference made by the Sessions Judge of Farakhabad in respect of an application for revision of an order of the Joint Magistrate convicting the petitioner, one Bhure, of an offence under s. 19, clause (*c*) of the Arms Act. The petitioner before the Magistrate denied possession of the weapon, possession of which was

(1) Weekly Notes, 1891, p. 208.