1925.

BADRI NARAYAN SINGH v. MAHANTH KAILASH GIR.

KULWANT SAHAY, J.

as mahanth. The possession of the transferee became adverse to the institution from the date of the transfer upon the finding that the transfer was without any legal and justifying necessity; but even assuming that his possession was permissive during the lifetime of the vendor Ram Kishun Gir, the cause of action in any event accrued on the death of Ram Kishun Gir, and it is admitted that Ram Kishun Gir died more than twelve years before the suit. The succeeding mahanths represented the institution completely and the defendant did acquire a title by adverse possession for more than twelve years not only from the date of his purchase but also from the death of the vendor.

I am, therefore, of opinion that the decision of the learned Subordinate Judge cannot stand. The result is that the appeal is decreed. The decree of the Subordinate Judge is set aside and that of the Munsif restored. The appellant is entitled to his costs.

MULLICK, J.—I agree.

Appeal decreed.

APPELLATE CRIMINAL.

1925.

Dec., 21.

Before Ross and Foster, J.J.

ILTAF KHAN

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 162—*Police diary, contradiction of witness by.*

In a trial on a charge of murder two witnesses deposed that on the evening of the occurrence they saw the accused persons passing through the village and thereafter they did

* Death Reference no. 22 of 1925 and Criminal Appeal no. 198 of 1925, from a decision of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 18th November, 1925.

not see them at their house. The sub-inspector deposed that in the course of the investigation these witnesses had stated to him that the accused persons had been found absent from the village after the occurrence, but had not stated that they had seen them fleeing on the date of the murder. One of the witnesses referred to above admitted at the trial that he did not inform the sub-inspector that he had seen the accused that evening. The other witness maintained that he had so informed the sub-inspector. The trial court held that by reason of section 162 the sub-inspector's evidence on this point was inadmissible.

Held, in appeal, that the sub-inspector's evidence was admissible.

[*cf. Guhi Mian* v. *King-Emperor* (1), Rep.].

Badri Chowdhury v. *King-Emperor* (2), doubted.

Iltaf Khan and Shamsuddin Khan were sentenced to death by the Judicial Commissioner of Chota Nagpur on conviction of a charge of murdering Ram Sawarath Dubey on the 2nd of May, 1925, at Chanderpura. The sentences were submitted to the High Court for confirmation, and the prisoners appealed against their convictions.

The most important question which arose in the appeal was whether the accused persons had been seen fleeing away from the vicinity of the scene of occurrence shortly after the murder.

Athar Hussain, for the appellants.

L. N. Sinha, Government Pleader, for the Crown.

Ross, J. (after stating the facts of the case and considering the other evidence, proceeded): There remain four witnesses Jogeswar Dusadh, Mahabir Dhobi, Munshi and Bhajan; and their evidence is directed to prove the fact that the accused were seen running away shortly after the murder. Jogeswar

(1) (1925) I. L. R. 4 Pat. 204. (2) (1925) 6 Pat. L. T. 620.

1925.

ILTAF KHAN v. KING-EMPEROR.

ROSS, J.

is the brother-in-law of Munshi and Mahabir is a neighbour. They are both residents of Kamat and their evidence in court is that on the evening of the day of occurrence, about 2 gharis before sun-set, they saw the two accused passing through the village and thereafter they did not see them at their home. The weak point about their evidence is that they did not make any such statement to the police. Before the Sub-Inspector all that was said was that the accused had been found absent from the village after the occurrence. Jugeswar Dusadh admitted that he did not mention to the Sub-Inspector his having seen the accused in the lane, but Mahabir Dubey maintained that he did make that statemnt. The Sub-Inspector says that he examined these witnesses on the 9th and that they stated only that the accused were absent from the village from the day of occurrence and they did not, so far as he remembered, say that they had seen the accused fleeing on the date of the murder.

On this evidence a question of law arises in the view of the learned Judicial Commissioner. Plainly there is a very important discrepancy between the evidence of these witnesses in court and their statements to the police; and if their statements to the police were in the form deposed to by the Sub-Inspector, the statements made subsequently at the trial cannot safely be acted upon. The learned Judge, however, considering himself bound by the decision of this Court in *Badri Chowdhuri* v. *King Emperor*(1) held that such use of the notes of the witnesses' statements in police diaries was not warranted by law and apparently rejected the police statement; and, in consequence, believed the evidence at the trial. Now, so far as Jogeswar is concerned, no question arises. He admitted that he did not make the statement to the police that he had seen the accused that evening. Mahabir Dubey

(1) (1925) 6 Pat. L. T. 620.

maintained that he did and the Sub-Inspector contradicted him. Why should this not be evidence? Apparently the learned Judicial Commissioner is referring to the observation by one of the learned Judges who decided that case (an observation which on the facts found must be regarded as obiter, because on the facts no question of the construction of section 162 of the Code of Criminal Procedure arose) that only a part of the recorded statement can be used and that " it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer ". To construe section 162 of the Code of Criminal Procedure as meaning that while any part of the statement of a witness to the police may be used to contradict him, yet if the contradiction consists in this that a statement made at the trial was not made in any part of the statement to the police, such a contradiction cannot be proved, seems to be an artificial construction. I am unable to adopt it; and, with respect, I must dissent from that view. I can find nothing in the language of section 162 which would lead to such a conclusion. I would therefore hold that the evidence of the Sub-Inspector with regard to these witnesses is relevant and on the strength of that evidence I would discard their evidence in Court.

[After dealing with the remainder of the evidence his Lordship proceeded as follows:]

On the whole therefore I feel convinced that in this case the evidence falls far short of proof to justify the conviction of the appellants. I would therefore allow the appeal and set aside the conviction and sentence and direct that the appellants be acquitted and set at liberty.

FOSTER, J.—I agree.

Convictions and sentences set aside.