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attention of the committing Magistrate should be called to the fact that he recorded the age of Palku as 40 and of his son paryag as 35.

The separate sentences passed on the petitioners under section 147 are set aside. The sentences on Ajodheya and Nokha under section 326/149 are reduced to the period already served. The sentences on Paryag and Palku are reduced to one year's rigorous imprisonment. The separate sentence on the remainder will be treated as a consolidated sentence of 4 years under section 326/149.

Terrell, C.J.—I agree.

Sentences modified.

APPELLATE CRIMINAL.

Before Terrell, C.J. and Fazl Ali, J.

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 162—*provision mandatory—Court, jurisdiction of, to refuse to grant copies—court, power of, to look into police diaries for the purpose of finding out contradiction—statement before police, whether can be used by prosecution for corroborating statement made in court.*

The language of section 162, Code of Criminal Procedure, 1898, is mandatory and, therefore, once an application has been made by the accused for copies of statements recorded under section 161, the court has no jurisdiction to refuse unless the case comes under the second proviso to section 162.

Ram Gulam Teli v. *King-Emperor*(1), followed.

Maduri Sardar v. *King-Emperor*(2), dissented from.

A statement recorded under section 161 cannot be used by the prosecution for its own purposes and specially for the purpose of corroborating the statements made by prosecution witnesses in court.

*Criminal Appeal no. 102 of 1928, from a decision of Babu Kamala Prasad, Assistant Sessions Judge, Patna, dated the 21st April, 1928.

(1) (1928) I. L. R. 7 Pat. 205. (2) (1927) I. L. R. 54 Cal. 307.

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The facts of the case material to this report are stated in the judgment of Fazl Ali, J.

M. Yunus (with him *S. N. Bose* and *B. K. Sen*), for the appellants.

C. M. Agarwala (Assistant Government Advocate), for the Crown.

FAZL ALI, J.—The appellants were tried by the Assistant Sessions Judge of Patna and a jury for an offence under section 397 of the Indian Penal Code. The majority of the jurors found the appellants guilty under section 395 of the Indian Penal Code and the learned Assistant Sessions Judge has accepted the verdict and sentenced the appellants to various terms of imprisonment and to pay certain fines.

It is contended by Mr. Yunus on behalf of the appellants that the appellants did not have a fair trial in the Court below and that they were seriously handicapped in their defence because the learned Assistant Sessions Judge refused to grant them copies of statements made by certain important prosecution witnesses before the police to which they were entitled under the provisions of section 162 of the Code of Criminal Procedure. It appears that some of the prosecution witnesses had been examined twice by the investigating officer and when the appellants made an application before the Committing Magistrate for copies of their statements, they were supplied with copies of those statements only which had been made by these witnesses on the first day and not of those made on a subsequent day. It is said that these witnesses had not named the appellants when they were first examined and that the appellants did not know either that these witnesses had also been subsequently examined or that they had named any of the accused before the police on the second occasion. The investigating officer was examined on the 14th, 16th and 17th April before the Assistant Sessions Judge in the course of the trial of the present case, and on the

17th April he made the following statement in re-examination :

"On the 9th December, 1927, I again questioned the prosecution witnesses if they had recognized any thief and some of them gave names of some of the thieves saying that they had not named them before on account of the fear of the Goalas."

There is a note in the deposition of this witness indicating that the question in reply to which the above answer was given was objected to on behalf of the accused then and there; but the learned Assistant Sessions Judge allowed the Sub-Inspector to answer the question and recorded the answer. On the same day the accused filed an application before the Assistant Sessions Judge, in which they prayed that copies of the statements made by the witnesses before the police on the second occasion be supplied to them and the witnesses be recalled and the accused be given an opportunity of cross-examining them with regard to those statements of which they had no knowledge previous to the evidence given by the Sub-Inspector that day. The learned Assistant Sessions Judge, however, refused the application, the main ground for refusal being stated by him to be as follows :

"It is therefore clear from the language of the proviso (to section 162 of the Code of Criminal Procedure) that the court is to grant the copy if it is found on the examination of the witnesses that there are statements in the record of the police which may be used for contradicting statements made by the witnesses before the court and it is in that case that the copy of the diary is to be given. I have looked into the statement made by the witnesses who named some of the thieves on 9th December, 1927, and I don't think there is any statement which may be used to contradict the statement already made by them before the Court. That being the case, I do not think it is necessary that I should postpone the hearing of this case for giving copies of the statements to the accused and recalling the witnesses."

It is contended by Mr. Yunus that the learned Assistant Sessions Judge has entirely misconstrued the provisions of section 162 of the Code of Criminal Procedure in holding that according to that section a copy of the statement made by the prosecution witness before the police could be granted only if the witness had made a contradictory statement in Court. The question as to what section 162 of the Code of

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Criminal Procedure lays down has been very fully considered by a Division Bench of this Court in the case of *Ram Gulam Teli* v. *The King-Emperor*(1) where both the learned Judges expressly dissented from the view taken in *Maduri Sardar* v. *The Emperor*(2) that before a copy could be given some foundation must be laid in cross-examination for the suggestion that the evidence given in Court was contradicted by a previous statement recorded under section 161 of the Code of Criminal Procedure. Jwala Prasad, J., in dealing with this question observed as follows: "The words 'refer to such writing' (in section 162) do not in any way restrict the right of the accused to obtain the copy nor is the writing to be referred to for the purpose of seeing whether there is any contradiction or not between the statements made in Court and the statement recorded by the police officer." I fully agree with the view taken by the learned Judges in that case and am of opinion that the learned Assistant Sessions Judge was wrong in not allowing the prayer made on behalf of the accused in the application of the 17th April. In this case the accused had applied before the Committing Magistrate for copies of the statements to which they were entitled and it was not their fault if the copies of all the statements made by the prosecution witnesses before the police were not supplied to them. They made an application to the Assistant Sessions Judge as soon as they learnt that there were other statements than those of which copies had been supplied to them. The learned Assistant Sessions Judge does not say that the application was unreasonable. He rejected the application on the ground that he had gone through the statement and he did not find it in any way contradictory to the statements made by the witnesses in Court. It is clear that the learned Assistant Sessions Judge was wrong in refusing the application on this ground. The language

(1) (1928) I. L. R. 7 Pat. 205. (2) (1927) I. L. R. 54 Cal. 307.

of section 162 is mandatory and the learned Assistant Sessions Judge had no power to refuse the application once it had been made unless the case came under the second proviso to section 162 of the Code of Criminal Procedure and in his opinion the statement made by the witness was not relevant to the subject-matter of the inquiry or trial and that its disclosure to the accused was not essential in the interests of justice and was inexpedient in the public interest. Further there is nothing in section 162 of the Code of Criminal Procedure to authorize the Court to look into the statement in the police diaries for the purpose of finding out whether it is contradictory to the statement made in Court or not before granting the application. This is really the function of the lawyer for the accused after a copy of the statement has been granted to him. There may be cases in which the accused or his lawyer is inclined to treat certain statements as contradictory whereas the Court may think there are no contradictions and there is nothing in the Code to suggest that the decision of the Court on the point must prevail; nor is there anything in the language of the section to suggest the view that the accused are to be debarred from examining the statements for themselves to find out if there are any contradictions, merely because the Court has formed an opinion that there are no contradictions.

It is next contended by Mr. Yunus that the learned Assistant Sessions Judge was wrong in allowing the investigating officer to state in re-examination that some of the prosecution witnesses had named some of the accused. In my opinion this contention is equally sound. Section 162 clearly provides that statements made before the police can be used only by the accused and that also only for the purpose of contradicting the prosecution witnesses. There is nothing in the Code to justify the use of these statements by the prosecution for its own purposes and especially for the purpose of corroborating the statements made by prosecution witnesses in Court. This

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being the law, the accused properly objected to the procedure when the Sub-Inspector was re-examined on the point, and in my opinion the learned Assistant Sessions Judge was wrong in overruling the objection.

Mr. Yunus then draws our attention to an application on behalf of the accused in which they made a grievance of the fact that the order which the Assistant Sessions Judge recorded on the 17th April and by which he refused to give to the accused copies of the statements recorded in the police diaries had been read out by the learned Judge within the hearing of the jurors. This order says definitely that the prosecution witnesses had made the same statements before the police as in Court and that there were no contradictions in the two statements, and it is difficult to say how far this view expressed by the Judge would have weighed with the jurors in forming their opinion as to the reliability of the prosecution witnesses. In my opinion it was not proper for the learned Assistant Sessions Judge to have read out the order in Court within the hearing of the jurors, and if he had done so it was proper for him to have cautioned the jurors and explained to them that the statements made before the police were legally no evidence in the case and that consequently they should not be influenced by the note made by the Assistant Sessions Judge that there were no statements in the diaries that might be used to contradict the statements made by the prosecution witnesses in Court.

In my opinion the errors pointed out on behalf of the accused are more than mere irregularities and it cannot be said that the accused were not handicapped in their defence in consequence of those errors. Under the circumstances, it is only fair that the appellants should have a retrial, which they claim.

I would, therefore, set aside the conviction and sentences and send back the case for retrial by the Sessions Judge of Patna or any other Court competent to try the case.

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All the appellants except Chamari Gope and Faujdar Gope are to be released on bail to the satisfaction of the District Magistrate to appear when required. Chamari Gope and Faujdar Gope, who are on bail at present, will execute fresh bail bonds to the satisfaction of the District Magistrate to ensure their attendance when required.

TERRELL, C.J.—I agree.

Re-trial ordered.

APPELLATE CIVIL.

Before Das and Wort, J.J.

SUBHAG CHAMAR

v.

NAND LAL SAHU.*

1928.

August, 14.

Malicious prosecution—suit for damages—complaint against plaintiff dismissed—process not issued—suit, maintainability of.

A suit for damages for malicious prosecution cannot proceed when the proceeding alleged to give rise to the cause of action had ended in the dismissal of the complaint under section 203 of the Code of Criminal Procedure, 1898, and no process had been issued against the plaintiff; and the mere fact that the plaintiff had cross-examined the witnesses for the complainant cannot alter the character of the proceedings.

Golap Jan v. *Bhola Nath Khetry*(1), followed.

Crowdy v. *Reilly*(2), distinguished.

Yates v. *Queen*(3), referred to.

*Appeal from Appellate Order no. 285 of 1927, from an order of A. C. Davies, Esq., I.C.S., District Judge, Shahabad, dated the 24th September, 1927, reversing a decision of Babu Umakant Prasad Sinha, Munsif, Sasaram, dated the 11th March, 1927.

(1) (1910-11) 15 Cal. W. N. 917. (2) (1912-13) 17 Cal. W. N. 554.

(3) (1884-85) 14 Q. B. D. 648.