APPELLATE CRIMINAL.

Before Mr. Justice Heald and Mr. Justice Baguley.

1927

Dec. 13.

BANA SINGH
v.
KING-EMPEROR.*

Criminal Procedure Code (Act V of 1898), s. 162—Statements to police, how and when may be used in evidence.

No witness may be asked what he said to the police during an investigation under Chap. XLV of the Criminal Procedure Code, nor may any police officer be asked what a witness said to him during the investigation, nor may any bystander be questioned as to what he heard another person say to a police officer during the investigation.

Provided that, when a witness for the prosecution is being examined, if an accused has reason to believe that the statement which the witness is making in Court differs from the statement which he made to the police, then the accused or his advocate may ask the Court to refer to the record of any statement made by the witness to the police and if it be found that there is any variation between the two statements the defence are entitled to a copy of the record of the statement made to the police. That copy must then be proved, and the witness may be cross-examined on that statement under s. 145 of the Evidence Act and his attention must be drawn to the particular points in which his statement in Court differs from the record of his statement to the police.

McDonnell for the appellant.

Assistant Government Advocate for the Crown.

BAGULEY, J.—The appellant Bana Singh has been convicted by the Sessions Judge, Pegu, of the murder of Jana Singh and has been sentenced to death under section 302, Indian Penal Code.

The facts of the case according to the Crown are that the deceased, the accused and a third man, Kir Singh, were drinking together. They became noisy and possibly quarrelsome while they were at the teashop where they were drinking and were turned out.

* Criminal Appeal No. 1535 of 1927 from the order of the Sessions Judge of Pegu in Sessions Trial No. 64 of 1927.

1927

BANA SINGH v. KING-EMPEROR.

BAGULEY, J.

They came back to Jana Singh's house. Kir Singh who lived with Jana Singh lay down to sleep off the effects of the liquor and Bana Singh went to his own house nearby. Shortly afterwards Bana Singh came and called Jana Singh and they went out together. A little while after this Kisnaw, Jana Singh's wife, heard a cry from her husband that he had been cut by Bana. Not long afterwards Jana Singh's dead body with seven incised wounds upon it was found in the direction from which the call was heard. One of the wounds was necessarily fatal; another was sufficient to cause death in the ordinary course of nature and two others were grievous.

The case has been tried, I regret to say, with a complete disregard of the provisions of section 162, Criminal Procedure Code, with the result that evidence is on the record which ought not to be and evidence which ought to be on the record is not there. In consequence the case will have to be sent back to the Trying Court for the evidence which appears to be available to be properly brought on the record. As the application of section 162, Criminal Procedure Code, does not appear to be understood either by the Trying Court or by the Committing Court, it would be best to begin by explaining the real effect of the section in its present form so far as the Trying Court is concerned.

The first paragraph provides that no statement made to the Police in the course of an investigation shall be admissible at the trial of an offence under investigation at the time the statement was recorded. In consequence no witness may be asked what he said to the Police during the investigation, nor may any police officer be asked what a witness said to him during the investigation, nor may any bystander be questioned as to what he heard another person say to a

police officer during the investigation. If the first paragraph of section 162 stood by itself, that would be its effect.

The second paragraph of the section however loosens the rigidity of the first paragraph to a certain extent. In consequence of this paragraph, when a witness for the prosecution is being examined, if an accused has reason to believe that the statement which the witness is making in Court differs from the statement which he made to the police, then the accused or his advocate may ask the Court to refer to the record of any statement made by the witness to the police and, if it be found that there is any variation between the two statements, the defence are entitled to a copy of the record of the statement made to the police. That copy must then be proved, and the witness may be cross-examined on that statement under section 145 of the Evidence Act and his attention must be drawn to the particular points in which his statement in Court differs from the record of his statement to the police.

The third paragraph of section 162 is not of importance in connection with the present case.

If we now refer to the record of the Sessions Court in this case we find that Kisnaw (P.W. 5) was questioned with regard to what she said to the police when they examined her. The Sessions Court has not got a copy of her statement to the police proved and filed as an exhibit as it should have been. On reference to the committal record a copy of her statement to the police is found as an exhibit but it was not proved. Instead of that the Sub-Inspector of Police who recorded it was asked questions as to what Kisnaw said to him. This is not proving a statement as directed in section 162 ; and the provisions of that section must be *strictly* followed.

1927

BANA SINGH v. KING-EMPEROR.

BAGULEY, J.

Then we have Kir Singh, a witness who was examined in the Committing Court but whose presence could not be secured in the Sessions Court. The record of his evidence in the Committing Court was brought on the record of the Sessions Court under section 33 of the Evidence Act. He was questioned in the Committing Court as to what statement he made to the police, and what purports to be a copy of the statement to the police was filed in the record of the Committing Court. It again was not proved either in the Committing Court or in the Sessions Court and therefore cannot be regarded strictly as evidence either in the Committing Court or in the Sessions Court.

Ala Datta (P.W. 7) in the Sessions Court was asked questions in cross-examination as regards his statement made in the Committing Court, and also with regard to his statement made to the police. Nowhere in either file can I find any copy of his statement made to the police and therefore questions addressed to him with regard to such statement were absolutely inadmissible. If it was desired to cross-examine him on his statement in the Committing Court that statement should have been brought on to the record of the Sessions Court under section 288, Criminal Procedure Code.

Habib Khan, Nadir Khan, Amir Khan and Joka Singh were all questioned with regard to statements made in the Committing Court and the remarks which I have made with regard to Ala Datta and the questions addressed to him with regard to his statement in the Committing Court apply equally to these witnesses.

Shwe Tha (P.W. 12) was asked one question about his statement in the Committing Court, but as he repeated in the Trial Court the evidence which can

be found in his deposition in the Committing Court, there was no necessity to bring his statement in the Committing Court on the record of the Sessions Court.

Sub-Inspector of Police Maung Maung (P.W. 18) was cross-examined with regard to statements made to him by Kir Singh and by Kisnaw. This cross-examination ought not to have been allowed. It was completely barred by the first paragragh of section 162, Criminal Procedure Code, and was not made admissible by the provisions of the second paragraph.

Lastly, to complete my criticism of an unsatisfactory trial, in the Committing Court two defence witnesses were examined. Both were waived in the Court of Session. From the committal record it would appear that one of these witnesses, Gudir Singh (D.W. 2), was in a position to throw light on the case under investigation. I do not understand why the prosecution failed to call him in the Court of Session, and the Court should most certainly have called him of its own motion as a witness in a position to give evidence with regard to the case under investigation.

The case will have to go back to the Trying Court for such errors to be put straight as can be put straight; in the first place to regularise the cross-examination of the prosecution witnesses with regard to their statements made to the police. Ala Datta's statement to the police will have to be proved, and the Sub-Inspector of Police Maung Maung will have to be called to prove the statements recorded by the Police which are to be found in Exhibits B and C of the Committal Court. These two copies will have to be made exhibits in the Court of Session. This will have to be done in the presence of the accused, and the witnesses Kisnaw and Kir Singh (if the

1927

BANA SINGH v. KING-EMPEROR.

BAGULEY, J.

latter's presence can be secured) should be in attendance in order that they may be further cross-examined on these statements should the defence advocate think fit. Gudir Singh should be called by the Court and should be examined by the Court, and the defence should be allowed to cross-examine him if it thinks fit. The statements in the Committal Court of the witnesses I have mentioned as having been cross-examined on their statements in the Committing Court should also be brought on the record of the Sessions Court in order to make it complete. When this has been done the file should be returned to this Court.

HEALD, J.—I concur.

1928

Feb. 6.

[The appeal came for final decision before Cunliffe and Das, JJ., who upheld the conviction and sentence.]

PRIVY COUNCIL.

J.C.* 1927

Dec. 16.

BHOGILAL BHIKACHAND AND OTHERS (*Plaintiffs*)

v.

ROYAL INSURANCE CO., LTD. (*Defendants*).

(On Appeal from the High Court at Rangoon.)

Indian Evidence Act (I of 1872), ss. 153, 155, 157—Evidence as to veracity—Refreshing memory—Reference to inadmissible document—New case on facts after evidence closed—Absence of cross-examination—Bribery of witness—Insurance of diamonds during transit by registered post.

In a suit by the appellants claiming Rs. 1,76,000 the declared value of a parcel of diamonds insured by the respondent company against theft, robbery or loss during transit by registered post, together with interest:

Held, on the evidence (reversing the decree of the Appellate Court and restoring that of the Trial Judge) that the appellants had proved the loss under the policies, the respondents having failed to discharge the onus of establishing the fraudulent conspiracy which they alleged; and that the appellants were entitled to the decree prayed.

A Court should not base its judgment on, nor even entertain a view of, the facts suggested only after the evidence is closed, and consequently not put to the witnesses in cross-examination.

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* PRESENT:—VISCOUNT HALDANE, LORD ATKINSON, LORD BLANESBURGH, LORD DARLING and LORD WARRINGTON OF CLYFFE