APPELLATE CRIMINAL.

Before Mr. Justice Harrison and Mr. Justice Jai Lal.

PARTAP SINGH AND OTHERS—Appellants

versus

THE CROWN—Respondent.

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May 15.

Criminal Appeal No. 135 of 1925.

Indian Evidence Act, I of 1872, sections 159, 160—Dying declaration—proof of, by witness who recorded it but was unable to repeat contents thereof—Identification—evidence of officers conducting the identification parade.

In producing a document purporting to be the record of a statement made by a person who had died in consequence of injuries received in a riot, a head constable stated in Court that he had recorded the statement correctly as contained in the document, and that the deceased was in his senses at the time, but did not repeat in his own words what the deceased had said.

Held, that inasmuch as the surrounding circumstances, and more especially the length of the period which intervened between the recording of the statement and the trial of the case, rendered it impossible for the constable to recollect and repeat the words used, his statement should be treated as if he had prefaced it by stating categorically that he could not remember what the deceased had said.

Section 160 of the Evidence Act applies when the witness states in so many words that he does not recollect, and when the circumstances establish beyond doubt that this is so. Having no specific recollection of the facts he can only testify regarding the contents of the document before him and explain that he recorded correctly what the deponent said at the time.

Emperor v. *Balaram Das* (1), followed.

Ghazi v. *Crown* (2), *Abdul Jalil* v. *Empress* (3), and *Mylapore Krishnasami* v. *Emperor* (4), referred to.

(1) (1921) I. L. R. 49 Cal. 358. (3) 13 P. R. (Cr.) 1886.
(2) 17 P. R. (Cr.) 1911. (4) (1909) I. L. R. 32 Mad. 384.

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Held also, that where the witnesses stated in Court that they identified the assailants in an identification parade, but did not in all cases repeat in Court that they had picked out certain accused, evidence to this effect by officers who conducted the parade was admissible.

Emperor v. *Balaram Das* (1), followed.

Held further, that so long as it was shown that in picking out the men the witnesses understood that they were identifying them as having taken part in the riot, it was not necessary for the witnesses to have stated at that time what part was played by each individual.

Lal Singh v. *Crown* (2), distinguished.

Appeal from the order of J. Addison, Esquire, Sessions Judge, Sialkot, dated the 18th December 1924, convicting the appellants.

B. R. PURI, for Appellants.

DALIP SINGH, Government Advocate, for Respondent.

The judgment of the Court was delivered by—

HARRISON J.—A very serious riot took place on the 12th April 1924 at village Mahar in the Sialkot District in which three men—Maula Dad, Iman Din and Nawab, son of Umra—were killed and four men—Umar Din, Hussain Bakhsh, Nawab, son of Bulanda and Bakha—were injured: Hussain Bakhsh having two fingers cut off and having lost in consequence the use of both hands. Twenty men were sent up for trial, of whom four were discharged by the Committing Magistrate, eight were convicted by the Sessions Judge, and eight were acquitted. It is also said that four absconders took part in the riot. Of the men convicted six—Partap Singh, Kartar Singh, Ajab Singh, Ganda Singh, son of Jiwan Singh, Amar Singh and Ganda Singh, son of Khushal Singh—have

(1) (1921) I. L. R. 49 Cal. 358. (2) (1924) I. L. R. 5 Lah. 396.

been sentenced to death. Sharm Singh, son of Jawind Singh, and Bhan Singh, son of Atar Singh, have been sentenced to transportation for life. All have appealed, and the case is also before us for consideration of the question of the confirmation of the death sentences.

After hearing the arguments addressed to us by the learned counsel for the accused and the Crown we accepted the appeals of Bhan Singh, son of Atar Singh, and Ganda Singh, son of Khushal Singh, finding that the evidence was not sufficient to justify their conviction. After further consideration we have come to the conclusion that although there is a considerable amount of evidence against Sharm Singh and Amar Singh there is a certain element of doubt in their cases also.

In the case of Sharm Singh, Hussain Bakhsh—the most important witness—did not identify him at the parade held in jail though he, subsequently, picked him out in Court, and, although he, Sharm Singh, was identified by Nawab, son of Bulanda, and Bakha, the remaining evidence against him is not sufficient to establish beyond all reasonable doubt that he actually took part in the riot.

The case of Amar Singh is similar: he was identified neither by Hussain Bakhsh nor by Ahmad Din, and the remaining evidence in his case also is not conclusive.

We acquit both these men.

The facts are that a large "Bhangar" party consisting of some 20 men armed with *chhavis*, *gandasas* and *lathis* and headed, it is said, by Sohan Singh, *Zaildar*, who has not been sent up for trial, came from village Bhula to village Mahar. They

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marched to the house of Maula Dad, where he was sitting with Ahmad Din and Hussain Bakhsh, his brothers, and Imam Din, his cousin. They deliberately picked a quarrel and attacked first Hussain Bakhsh and then his companions. They killed Maula Dad and injured the others. Imam Din ran away to the house of one Sivaja, and was pursued by the attacking party. At this house two men, called Nawab, tried to protect him. Of these Nawab, son of Umra, was fatally injured and Nawab, son of Balanda, was beaten but survived. Imam Din died in consequence of his wounds.

The medical evidence shows that Maula Dad, who was killed, had four incised wounds on his head and six others on his body: Imam Din had two incised wounds on the head and twelve blows from a *lathi*, and was so seriously injured that he could not be carried to the hospital. Nawab, son of Umra, had 3 injuries, his leg having been cut right through, his forearm broken and his head fractured. Ahmad Din had 8 injuries, Nawab 13 and Bakha 4. Two of the accused Partap Singh and Kartar Singh were found in jail to have been injured—Kartar Singh having an incised wound on the back of the head and Partap Singh 4 injuries caused by a blunt weapon. Both counsel for the accused and counsel for the Crown rely on the fact of these two men having been injured, the latter pointing out that the medical evidence shows that the injuries must have been inflicted at or about the time of the riot, and that no satisfactory explanation has been given as to how they were caused, the former urging that there must have been a general *melée*, and that it is only fair to presume that it was the members of the village Mahar who began the quarrel.

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We will first deal with the general criticisms which have been made on the evidence produced by the prosecution, and will then deal with the case of each accused.

The first point and one to which due importance must be attached is that the leader of the Bhangra party is said to have been Sohan Singh, *Zaildar*, who has not been sent up for trial, and counsel urges with considerable force that it was presumably found in the course of the investigation that he had been falsely implicated because of his prominent position, and that this fact must be taken as discrediting the whole of the evidence for the prosecution. We have given due weight to this contention, and have treated the evidence with extreme caution throughout.

In addition to the eye-witnesses who have given evidence in Court certain statements were recorded with a view to their being used as dying declarations. These were the statements of Hussain Bakhsh, Ahmad Din, and Nawab, son of Umra. Out of these men only Nawab, son of Umra, died, and it is only his statement which can be treated or considered to be a dying declaration. This was recorded by Muhammad Bashir, Head Constable, who certified in Court that he had recorded it correctly, and that Nawab was in his senses at the time. Counsel contends that inasmuch as Muhammad Bashir did not repeat in his own words what Nawab said to him this statement is inadmissible. In *Ghazi* v. *Crown* (1) and *Abdul Jalil* v. *Empress* (2) it was laid down that such statements must be proved, and this would appear to show that if proved they are admissible. We also find that it has been clearly laid down in *Emperor*

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v. *Balaram Das* (1) that such a statement is admissible in proof of its own contents, and it is unnecessary that the person who recorded it should repeat exactly what was said. In sections 159 and 160 of the Evidence Act a distinction is drawn between the manner in which a witness may refresh his memory by referring to the writing and the testimony which he can give of facts stated in the document. If it is merely a question of a man refreshing his memory the document itself is not tendered in evidence, and the witness merely gives evidence in the ordinary way after reading what has been written. Section 160 deals with the case where in spite of having written or read a document under the circumstances described in section 159 the witness has got no specific recollection of the facts therein recorded, but is sure that they were correctly recorded. Where this is the case the witness is still entitled to testify to the facts and the document itself is then tendered in evidence, —*vide*, *Mylapore Krishnasami* v. *Emperor* (2). This is what has happened here. The surrounding circumstances and more especially the length of the period, which intervened between the recording of the statement and the trial of the case, rendered it impossible for the constable to recollect and repeat the words used. His statement therefore should be treated in exactly the same way as if he had prefaced it by stating categorically that he could not remember what the deceased had said. Section 160 of the Evidence Act applies equally when the witness states in so many words that he does not recollect and when the circumstances establish beyond doubt that this is so. Having no specific recollection of the facts he can

(1) (1921) I. L. R. 49 Cal. 358. (2) (1909) I. L. R. 32 Mad. 384.

only testify to the effect that he recorded correctly what the deponent said at the time. The words of the section are "although he (the witness) has no specific recollection of the facts themselves." Whether he has such recollection or not is a question of fact to be established either by his own statement or as a natural, necessary, and unavoidable conclusion from all the surrounding circumstances. If the fact be established the section applies. We therefore find, following *Emperor* v. *Balaram Das* (1), that this evidence is certainly admissible.

The next point on which the counsel has laid stress is the evidence of identification dealing with the two parades, which were held at village Kalaswala and in jail. At the first of these parades accused Nos. 1—6 were not present, the obvious reason being, as found by the learned Sessions Judge, with whom we agree, that it was considered unnecessary to include them in this first parade as they and their names were already known and the parade was conducted not with a view to see which men out of those, who were arrested, could be identified by the witnesses, but to see which men out of a large number of over 250 the witnesses could pick out as having taken part in the riot. The criticism amounts to this that the witnesses themselves do not in all cases repeat in Court that they picked out certain men, that the evidence on the subject consists of the statements of officers who conducted the parade and who tell us what happened. This, counsel urges, is secondary or corroborative and not primary evidence, and therefore by itself has no value. Relying on the same ruling, which we have quoted above, we find that this evidence is admissible.

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A further criticism is that the witnesses are not stated to have told the officer who conducted the parade what part each man took in the riot. This, in our opinion, was unnecessary. It has to be shown that the witnesses knew what they were doing and understood that they were identifying the men who took part in the riot, and this has, in our opinion, been shown to have happened. *Sardar* Hazara Singh, *Tahsildar*, says that he told them to pick out the persons present in the riot. The evidence is quite sufficient, and it was unnecessary for him to record at the time or to examine the winesses as to the part played by each individual. The facts are not the same as those of *Lal Singh* v. *Crown* (1) on which counsel relies, for there the notes were merely referred to and nothing more, and the necessary facts were not established.

The fourth general criticism is that Hussain Bakhsh—the man who was seriously injured and who made the F. I. R.—has given a different statement in Court in the sense that he says that he was so seriously injured that he lost consciousness, and did not see all that is contained in the F. I. R. This is not of any great importance, and we are satisfied that he did not see exactly what part each of the rioters played ; and that at the time he made his F. I. R. he was not able to name all the persons who took part.

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[*Their Lordships then considered the evidence against each of the four remaining appellants, and dismissed their appeals confirming their sentences of death*—ED.]

N. F. E.

Appeal of four of the appellants accepted, the others dismissed.

(1) (1924) I. L. R. 5 Lah. 396.