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APPELLATE CRIMINAL.

Before Mr. Justice Mya Bu and Mr. Justice Dunkley.

NGA U KHINE AND OTHERS

v.

KING-EMPEROR.*

1934

Apl. 6.

Criminal Procedure Code (Act V of 1898), ss. 162, 537—Statement to police officer—Mode of user—Purpose of Court in referring to statement—Variations, detection of—Accused's right to use statement—Time of applying for copy of statement—Exclusion of portion of statement—Error of Court not vitiating trial.

Under s. 162 of the Code of Criminal Procedure a statement made by a person to a police officer in the course of an investigation, whether oral or reduced to writing, cannot be used for any purpose, except on the request of the accused or his advocate. A Judge or Magistrate has no authority to look at the police papers unless requested to do so by the accused or his advocate. The purpose for which the Court refers to the statement is in order to see whether any part of the statement ought to be excluded under the second proviso to the section, and not for the purpose of deciding whether there is in the statement material for cross-examination of the witness in the manner provided by s. 145 of the Evidence Act. Subject to any part of the statement being excluded under the second proviso to the section, the accused is entitled to a copy of the whole of the statement to the police.

Chedi Prasad Singh v. *Emperor*, 102 I.C. 773; *Emperor* v. *Bansidhar*, I.L.R. 53 All. 458; *Jhari Gope v. King-Emperor*, I.L.R. 8 Pat. 279; *Madari Sikdar* v. *Emperor*, I.L.R. 54 Cal. 307; *Nekram* v. *Emperor*, 129 I.C. 267; *Ramgulam* v. *King-Emperor*, I.L.R. 7 Pat. 205—*referred to.*

It is not for the Court to decide whether there is any variation between the statement in examination-in-chief and the statement recorded by the police. Subject to the power of the Court to disallow any question which does not fall within the scope of s. 145 of the Evidence Act, it is for the

* Criminal Appeal Nos. 1823 of 1933 and 74 of 1934 from the judgment and sentences of the Additional Sessions Judge of Arakan in Sessions Trial No. 49 of 1933.

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accused or his advocate to decide in what manner and to what extent he will use the statement for the purpose of cross-examination, so long as he conforms to the provisions of s. 145.

Bana Singh v. *King-Emperor*, I.L.R. 6 Ran. 137—*considered.*

The accused may apply for a copy of the statement of a witness to the police at any time after the witness has entered the witness box, and if necessary the cross-examination must be adjourned until the copy is supplied. The Court should exclude from the copy supplied that portion (if any) of the statement (*a*) which is irrelevant, or (*b*) the disclosure of which is unessential in the interests of justice as well as inexpedient in the public interest.

Nga Po Chon v. *King-Emperor*, I.L.R. 4 Ran. 356—*explained.*

If a mandatory provision of the Code of Criminal Procedure is infringed that does not of itself make it necessary to hold that the Court must have failed in administering justice to the accused.

Abdul Rahman v. *King-Emperor*, I.L.R. 5 Ran. 53; *Devidas* v. *The Crown*, I.L.R. 10 Lah. 794; *Emperor* v. *Barmha Singh*, I.L.R. 54 All. 1002; *Emperor* v. *Nurmahomed*, I.L.R. 54 Bom. 934; *In re Ramaraja*, I.L.R. 53 Mad. 937—*referred to.*

Where the error does not affect the jurisdiction of the Court or it has not caused a failure of justice, the provisions of s. 537 of the Code come into play, and such error does not vitiate the trial.

Emperor v. *Bechu*, I.L.R. 45 All. 124; *Subrahmania* v. *King-Emperor*, I.L.R. 25 Mad. 61—*referred to.*

McDonnell for the appellants.

A. Eggar (Government Advocate) for the Crown.

A girl aged 19 was found murdered in the house of her grandmother in Akyab. On the evidence the learned Additional Sessions Judge of Akyab found the appellant Maung U Khine guilty of murder and sentenced him to death. He found the other two appellants, E Maung and Hla Phan Thu, guilty of offences under s. 460 of the Indian Penal Code, and sentenced them each to five years' rigorous imprisonment.

The High Court was moved to set aside the convictions and to order a new trial on the ground of certain alleged irregularities at the trial. The High Court held that some of the allegations were untrue and trivial and rejected them, but proceeded

to consider the allegation that the learned Additional Sessions Judge had failed to supply on request copies of statements of certain prosecution witnesses made to the police during the investigation, and to adjourn the examination of these witnesses until the copies had been supplied. After recounting the above facts the judgment of the Court proceeds as follows:

DUNKLEY, J.—As regards the third point, this raises the construction of that much-debated section, 162 of the Code of Criminal Procedure. Pleader Mahmood says in his affidavit that he asked the Judge to refer to the statements to the police, recorded during the investigation of the case, of six prosecution witnesses and to supply him with copies thereof, that copies of extracts of the statements of three of these witnesses only were supplied, and that while these copies were being prepared he was compelled to proceed with his cross-examination of these witnesses, and the copies were only ready after the examination of the witnesses had been concluded. The learned Additional Sessions Judge says that he was asked to refer to the statements of only three witnesses, that he did so and marked those parts which were, according to the pleader Mahmood, contradictory, and had copies of those parts made at once, that Mahmood appeared to have a complete knowledge of the police papers, and proceeded at once on his own initiative with his cross-examination of the witnesses and did not wait until the copies were prepared, and that the copies were shown to him as soon as they had been prepared and were then filed on the record. The learned Judge's statement in regard to this matter is supported by the affidavits of the other pleaders in the case and of his clerks. It is further clear from the record of the

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evidence of the prosecution witnesses that Mahmood had, by some means or other, obtained knowledge of their statements to the police and was able to cross-examine the witnesses thereon. I therefore unreservedly accept the explanation of the learned Judge on this point. I am quite sure that the statements of only three witnesses were asked to be referred to, and that Mahmood voluntarily continued his cross-examination of these witnesses while the necessary copies of their statements were being prepared. Learned counsel for the appellant U Khine criticizes the procedure of the Additional Sessions Judge on three grounds, *viz.*, (i) that his client was entitled to copies of the whole statements of the witnesses to the police; (ii) that cross-examination of each of these witnesses should have been postponed until the necessary copy of his statement had been prepared and given to the defence pleader; and (iii) that the statements of these witnesses to the police, so far as they were used under the provisions of section 145 of the Evidence, were not proved. He has referred to a number of authorities of this Court and other High Courts regarding the interpretation of section 162 of the Criminal Procedure Code, and in order to dispose of these appeals it is necessary that we should come to definite conclusions as to the procedure which ought to be adopted in applying its provisions.

Section 162, sub-section (1), is in the following terms :

"No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as herein-

after provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination:

Provided, further, that if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused."

The plain meaning of the language of the section is that a statement made by a person to a police officer in the course of an investigation, whether oral or reduced to writing, cannot be used for any purpose, save on the request of the accused (or, of course, his pleader). In an unreported Criminal Appeal of this Court (1) there occurs the dictum of a learned Judge that "the Judge would be well-advised to refer to police papers privately." From this dictum I must, with the utmost respect, dissent. It seems to me to be clear, from the provisions of the section, that the Judge (or Magistrate) has no authority to look at the police papers unless requested to do so by the accused. It is not for me to speculate as to the intention of the Legislature in enacting this unhappily worded section; but it is certain that its effect is frequently

(1) Cr. Ap. No. 1080 of 1933.

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to defeat the ends of justice rather than to further those ends.

On the request of the accused, the Judge (or Magistrate) must refer to the statement of a witness to the police, if it has been reduced to writing, whether that statement is separately recorded or recorded in a Police Diary. [*Sulaiman Mohamed Bholat* v. *King-Emperor* (1).] The purpose for which the Judge (or Magistrate) refers to the statement is in order to see whether any part of the statement ought to be excluded under the second proviso to the section, and not for the purpose of deciding whether there is in the statement material for cross-examination of the witness in the manner provided by section 145 of the Evidence Act. Subject to any part being excluded under the second proviso to the section, the accused is entitled to a copy of the whole of the statement to the police. [*Madari Sikdar* v. *Emperor* (2); *Emperor* v. *Bansidhar* (3); *Ramgulam Teli* v. *King-Emperor* (4); *Jhari Gope* v. *King-Emperor* (5); *Chedi Prasad Singh* v. *Emperor* (6); *Nekram* v. *Emperor* (7).] It is not for the Court to decide whether there is any variation between the statement in examination-in-chief and the statement recorded by the police. On this point the case of *Saadat Mian* v. *King-Emperor* (8) has been dissented from in *Ramgulam Teli* v. *King-Emperor* (4). Subject to the power of the Judge (or Magistrate) to disallow any question which, in his opinion, does not fall within the scope of section 145 of the Evidence Act, it is for the accused or his pleader to decide in what

(1) (1928) I.L.R. 6 Ran. 672.
(2) (1926) I.L.R. 54 Cal. 307.
(3) (1930) I.L.R. 53 All. 458.
(4) (1927) I.L.R. 7 Pat. 205.
(5) (1928) I.L.R. 8 Pat. 279, at pp. 282, 283.
(6) 102 In. Ca. 773.
(7) 129 In. Ca. 267.
(8) (1926) I.L.R. 6 Pat. 329.

manner and to what extent he will use the statement for the purpose of cross-examination; but the cross-examination on the statement must be confined to alleged contradictions between the statement and the evidence-in-chief of the witness, and must be carried out in the manner provided by the latter part of section 145 of the Evidence Act, *i.e.*, by calling his attention to the parts of the statement which it is intended to use for the purpose of contradicting him. To this extent I must, with all due respect, dissent from the ruling of this Court in *Bana Singh* v. *King-Emperor* (1).

The accused may apply for a copy of the statement of a witness to the police at any time after he has been called, that is, at any time after the witness has entered the witness-box and while he is giving evidence. [*Babarali Sardar* v. *King-Emperor* (2) dissenting from *Madari Sikdar* v. *Emperor* (3) on this point; *Emperor* v. *Tahal Saithwar* (4); *Ramgulam Teli* v. *King-Emperor* (5).]

The cross-examination of the witness must be adjourned until the necessary copy has been given [*Saadat Mian* v. *King-Emperor* (6)]. This is essential, for it would defeat the object of granting a copy of the statement to the accused if he were to be provided with a copy only when cross-examination of the witness had been completed, or almost completed. It will rarely be necessary to exclude any part of the witness's statement to the police under the second proviso to section 162, and, therefore, the difficulty that such postponement of cross-examination might cause delay in the trial can usually be obviated by having copies of the police statements in readiness

(1) (1927) I.L.R. 6 Ran. 137.
(2) (1928) I.L.R. 56 Cal. 840.
(3) (1926) I.L.R. 54 Cal. 307.
(4) (1930) I.L.R. 53 All. 94.
(5) (1927) I.L.R. 7 Pat. 205.
(6) (1926) I.L.R. 6 Pat. 329.

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at the commencement of the trial, or it would be a sufficient compliance with the law to allow the defence pleader to see the original statement of the witness to the police and to cross-examine thereon while the copy is being prepared.

Under the second proviso to the section the Judge (or Magistrate) should exclude from the copy supplied any part of the statement which in his opinion satisfies one or other of two conditions, *viz.*, (i) that it is irrelevant, or (ii) that its disclosure to the accused is both unessential in the interests of justice and inexpedient in the public interest. It should be noticed that there are only two separate and distinct conditions under which a part of the statement can be excluded, and not three, as, with all due respect, has been wrongly stated in *Nga Po Chon* v. *King-Emperor* (1), where the word "or" occurring between the word "inexpedient" and the words "not essential," should be "and". To justify exclusion under the second condition mentioned above, the two circumstances mentioned therein must exist together in conjunction. If he excludes any part of the statement the Judge (or Magistrate) must record the opinion on which he bases such exclusion, but not his reasons for that opinion.

Those parts of the statement to the police which are used in cross-examination to contradict the witness must be proved and brought on to the record [*Madari Sikdar* v. *Emperor* (2)]. This can ordinarily be done by the admission of the witness that he made the statement, or by examination of the police officer who recorded it. If the latter course is necessary, in order to avoid delay

(1) (1926) I.L.R. 4 Ran. 356. (2) (1926) I.L.R. 54 Cal. 307.

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there can be no objection to allowing cross-examination subject to subsequent proof of the statement.

Hence the irregularities which the learned Additional Sessions Judge committed in this case are that he did not provide copies of the whole of the statements of the witnesses which were desired by the accused's pleader, and that he did not record his opinion for excluding parts of those statements, and, furthermore, that he did not postpone the cross-examination of the witnesses until the copies had been supplied. It is further objected that the parts of the statements put on record were not proved, but it is the duty of the defence to prove the statements of which they have made use in cross-examination, and, consequently, it is not open to the defence to raise an objection because such statements have been brought on the record without proof.

Learned counsel for the appellant U Khine urges that the provisions of section 162 of the Criminal Procedure Code are mandatory and, therefore, as the Court has failed to comply with them we must presume that a failure of justice has occurred, and we have no option but to set aside the convictions and sentences and order a retrial of the appellants. This is a contention with which I cannot agree, and there is ample authority for the proposition that if a mandatory provision of the Code of Criminal Procedure is infringed that does not of itself make it necessary to hold that the Court must have failed in administering justice to the accused [*Abdul Rahman* v. *The King-Emperor* (1); *In re K. Ramaraja Tevan* (2); *Emperor* v.

(1) (1926) I.L.R. 5 Ran. 53. (2) (1930) I.L.R. 53 Mad. 937.

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Barmha Singh (1) ; *Emperor* v. *Nurmahomed Abdul Kadar* (2); *Devi Das* v. *The Crown* (3)].

In order that an infringement of the provisions of the Criminal Procedure Code should be of such a nature that it does not come within the purview of section 537 of the Code, it must go to the root of the trial and must in effect vitiate the proceedings. It must in effect amount to an assumption by the Court of a jurisdiction which it does not possess, or a failure to exercise a jurisdiction which it does possess [*Subrahmania Ayyar* v. *King-Emperor* (4) ; *Emperor* v. *Bechu Chaube* (5)]. That the errors committed by the learned Judge in this trial are not of this nature is perfectly plain. Learned counsel for the appellant U Khine has urged that the present case is exactly similar to the case of a Court refusing to allow any cross-examination at all of the prosecution witnesses, and he urges that in the latter case a retrial would undoubtedly be necessary. On this last point I am in agreement with him, but there is a great difference between the present case and a case where all cross-examination has been disallowed. In the latter case there would be no materials from which an appellate Court could judge whether the action of the trying Court had occasioned a failure of justice or not ; whereas in the present case all possible materials for deciding this point are available. I am clearly of opinion that the errors committed in this trial are at the most irregularities falling within the purview of section 537 of the Criminal Procedure Code and that, therefore, it is for the appellants to satisfy us that these errors have, in fact, occasioned a failure of

(1) (1932) I.L.R. 54 All. 1002.
(2) (1930) I.L.R. 54 Bom. 934.
(3) (1928) I.L.R. 10 Lah. 794.
(4) (1901) I.L.R. 25 Mad. 61.
(5) (1922) I.L.R. 45 All. 124.

justice. Moreover, section 167 of the Evidence Act would appear to be applicable in the present case and to lead to the same result.

We announced our decision on this point at the end of the first day's hearing of these appeals, and provided learned counsel with complete copies of the statements to the police, not only of those three witnesses, parts of whose statements have been admitted to the record, but also of the other three witnesses whose statements, it is alleged, were applied for by the defence, and we invited learned counsel for the appellants to point out to us how the appellants had been prejudiced in their defence by the failure to provide them at the trial with copies of these statements. Learned counsel for the appellant U Khine declined to look at them and made the astonishing assertion that we ourselves could not refer to them for any purpose without his request to do so, which he would not make. He cannot be permitted to approbate and reprobate at the same time in this manner. He cannot complain that the trial Court refused to refer to these statements, although requested by the appellants to do so, and then say that the appellate Court is not entitled to refer to them because the appellants have not requested it so to refer. I have studied these statements with care and compared them with the evidence given by the witnesses at the trial. In regard to the three witnesses, parts of whose statements to the police have been admitted to the record, they were cross-examined on their statements and all possible contradictions were brought out in their cross-examination. In regard to one of the other three witnesses, whose statements to the police are said to have been applied for, the appellants had this witness's first information report to the police as the

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basis of their cross-examination and full use was made of it ; and in regard to the other two, nothing exists in the statements which can possibly be considered as contradictory to the evidence given by them at the trial. I have already shown that in respect of the other two minor points raised by the defence the appellants suffered no prejudice, and the only possible conclusion is that the errors committed by the learned Additional Sessions Judge have not, in fact, occasioned a failure of justice.

[On the facts his Lordship upheld the conviction of Nga U Khine for murder and confirmed the sentence of death. His Lordship also upheld the convictions of the appellants E Maung and Hla Phan Thu for an offence under s. 460 of the Indian Penal Code, but having regard to their youth and the circumstances of the case, directed that they be sent to the Borstal School at Thayetmyo and there detained until they reach the age of 21.]

MYA BU, J.—The only matter put forward in support of the appeal of Maung U Khine relates to alleged irregularities in the conduct of the trial by the learned Additional Sessions Judge. As regards two of them, namely, (1) the refusal by the learned Additional Sessions Judge to call the Civil Surgeon, Akyab, as a witness for the defence and (2) his failure to put on record until the conclusion of the trial an extract from the general diary of the Akyab Police Station, I have nothing to add to the reasons given by my brother Dunkley in whose conclusions I fully agree.

The third of the alleged irregularities is concerning the provisions of section 162 of the Code of Criminal Procedure. Upon the affidavits of the pleader who defended Maung U Khine at the trial

and other affidavits in support of the pleader's allegations on the one hand, and the explanation tendered by the learned trial Judge and the affidavits of his clerks and of other pleaders who appeared in the trial on the other hand, the only conclusion we can properly come to is that the learned trial Judge was asked to refer to statements of only three and not six witnesses as alleged by the pleader, that the learned Judge having referred to the statements marked parts which the pleader pointed out to be contradictory and ordered copies to be made of such parts, that while the copies were being made the pleader who appeared to have a complete knowledge of the contents of the police papers was not compelled or required to proceed but voluntarily proceeded with or continued the cross-examination of the witnesses, and that when the copies had been made they were shown to the pleader and in the absence of anything done by the pleader in that regard they were filed on the record.

The first question for determination is whether, and if so to what extent, the learned trial Judge contravened the provisions of section 162(*1*) of the Criminal Procedure Code. According to the plain meaning of the section no statement made by a person to a police officer in the course of an investigation or any record thereof or any part of such statement or record may be used for any purpose at any enquiry or trial except as provided in the first proviso to the sub-section. The sub-section as it stood before the amendment of the Criminal Procedure Code in 1923 merely provided against the use of the record of such statement or any part thereof as evidence, but by the amendment the use for any purpose whatever of such statement

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or record or any part of such statement or record at an enquiry or trial of the offence under investigation at the time when such statement was made is entirely prohibited except as provided by the first proviso to the sub-section, under which an imperative duty is cast upon the Court, on the request of the accused (or, of course, his pleader), to refer to the record of such statement. Therefore unless and until the accused or his pleader makes the request, the duty of the Court to refer to such record does not arise and the prohibition contained in the main sub-section remains unqualified. For these reasons I join, with the utmost respect to the learned Judge concerned, in the note of dissent struck by my learned brother Dunkley with reference to the dictum that "the Judge would be well advised to refer to police papers privately" appearing in Criminal Appeal No. 1080 of 1933 of this Court.

Under the proviso an imperative duty is cast upon the Court, on the request of the accused or his pleader, not only to refer to such record but also to direct the accused to be furnished with a copy thereof, although under the second proviso not only does the Court have the right but also it is its bounden duty to exclude from the copy to be furnished to the accused any part of such statement, if the Court is of opinion that such part is not relevant to the subject-matter of the enquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests. Where the Court excludes such part from the copy of the statement furnished to the accused the Court must record its opinion (but not the reasons therefor) by which it justifies the exclusion. The plain meaning of the

two provisos then is that the Court on the request of the accused is bound to refer to the record of the statement of a witness called for the prosecution for the purpose of forming an opinion (1) whether any part of such statement is not relevant to the subject-matter of the enquiry or trial or (2) whether its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests; and when no part of the statement is found not to be relevant to the subject-matter of the enquiry or trial or is found to be such that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, the Court must direct that the accused be furnished with a copy of the record of the statement; but if the Court is of opinion that any part of such statement is not relevant to the subject-matter of the enquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, the Court must record such opinion, but not the reasons therefor, and must exclude such part from the copy of the statement furnished to the accused and then direct that the accused be furnished with a copy of such statement, less such part as the Court excludes. There is nothing in the language of these two provisos to suggest that it is the duty of the Court to decide whether there is any variation between the statement of the witness in Court and the statement recorded by the police before directing that the accused be furnished with a copy of the statement. It must be borne in mind that the exclusion of any part of the statement of a witness to the police on the ground of irrelevancy under the second proviso is not irrelevancy based on want of contradiction, inconsistency or discrepancy between the witness's statement

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in Court and his statement to the police, but irrelevancy with reference to the subject-matter of the enquiry or trial. Therefore it does not appear to be a necessary ground for requiring the Court to direct that the accused be furnished with a copy of the statement of a witness to the police that there should be any variation between the witness's statement in Court and his statement to the police. In so far as the ruling in *Bana Singh* v. *King-Emperor* (1) indicates that there should be such variation in order that the accused be entitled to a copy of the record of the statement made to the police, I am at one with my learned brother Dunkley in respectfully dissenting from it.

Upon other points relating to the interpretation of the provisions of section 162 the views expressed by my learned brother in his lucid judgment are supported not only by the plain meaning of the section but also by judicial pronouncements quoted by him and I have nothing to add to his observations but state that I entirely agree with his views.

I also agree that such irregularities as we have found that the learned trial Judge has committed are at most irregularities falling within the purview of section 537 of the Criminal Procedure Code and that they have not in fact occasioned any failure of justice.

Upon the facts of the case I agree that there is no substance in the appeal of any of the three appellants. I agree in the order proposed by him.

(1) (1927) I.L.R. 6 Ran. 137.