

REVISIONAL CRIMINAL.

Before Mr. Justice Tek Chand.

DEVI DAS, Petitioner

versus

THE CROWN, Respondent.

Criminal Revision No. 1916 of 1928.

Criminal Procedure Code, Act V of 1898, sections 162, 172—Entries in police diary—not evidence in the case—whether use of them vitiates the trial.

In convicting the accused the Magistrate referred in his judgment to statements of some of the witnesses for the prosecution made to the police, which had not been proved in the manner and to the extent permissible under section 162 of the Criminal Procedure Code, and also took into consideration statements made to the police during the investigation by persons who were *not* examined at the trial either by the prosecution or by the defence.

Held, that such use of police diaries was illegal.

Crown v. Ibrahim (1), *Queen-Empress v. Mannu* (2), and *Dal Singh v. Crown* (3), followed.

Held however, that this by itself was not a sufficient ground for ordering a new trial or for reversing the conviction, but that the Court must see whether the guilt of the accused is established by the other evidence on the record.

Application for revision of the order of H. B. Anderson, Esquire, Sessions Judge, Multan, dated the 15th October, 1928, affirming that of J. S. Thomson, Esquire, District Magistrate, Multan, dated the 6th August, 1928, convicting the petitioner.

B. R. PURI, for Petitioner.

D. R. SAWHNEY, Public Prosecutor, for Respondent.

(1) (1927) I.L.R. 8 Lah. 605. (2) (1897) I.L.R. 19 All. 390 (F. B.).

(3) (1917) I. L. R. 44 Cal. 876 (P. C.).

1928

Dec. 14.

JUDGMENT.

TEK CHAND J.—The petitioner, Devi Das, aged fifty-one was convicted by the District Magistrate, Multan, of an offence under section 377 of the Indian Penal Code for having committed unnatural offence with a twelve years' old *Biloch* boy, Ahmad, *alias* Hamid (P. W. 1), in an abandoned factory situate in the outskirts of the town of Muzaffargarh on the 17th of October, 1927, at about 10 or 11 P.M. In view of his age and position, he was sentenced to one year's rigorous imprisonment. His appeal has been dismissed by the learned Sessions Judge, Multan, and he has preferred a petition for revision to this Court. As the learned District Magistrate in his judgment had relied largely upon the police diaries and the learned Sessions Judge had rejected the evidence of the Civil Surgeon, Dr. H. J. Fordham (P. W. 5), and the report of the Chemical Examiner to the Punjab Government which were, to a large extent, inconsistent with the story for the prosecution, I found it necessary to examine the record for myself and to hear the counsel for the petitioner and the Public Prosecutor at length.

Before discussing the evidence for the prosecution on which the conviction is based, it is necessary to point out that the learned District Magistrate has acted illegally and with grave irregularity in referring in his judgment to the police diaries in disregard of the clear provisions of the law and numerous rulings of this Court and other Courts. Section 162 of the Criminal Procedure Code lays down in clear and unambiguous terms that no statement made by any person to a police officer in the course of an investigation under chapter XIV, or any record thereof, "whether in a police diary or otherwise, or any part of such statement or record, can be used

1928

DEVI DAS
v.
THE CROWN.
TEK CHAND J.

1928

DEVI DAS
v.
THE CROWN.
TEK CHAND J.

for any purpose (save as hereinafter provided) at any enquiry or trial in respect of any offence under investigation at the time when such statement was made." To this section is added the proviso, that *when any witness is called for the prosecution in such enquiry or trial, whose statement has been reduced into writing by a police officer, 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.* In clause (2) of the section a further exception is made in favour of the admission of dying declarations, and in section 172 power is given to a Criminal Court to send for the police diaries of a case under enquiry or trial before it and to use these diaries "*not as evidence in the case, but to aid it in such enquiry or trial.*" The Court may use the diaries for contradicting the investigating police officer when he is giving evidence or such officer may use them to refresh his memory. The provisions of the statute on these points are clear and imperative and it is not necessary to refer at length to the numerous rulings bearing on them. So far as section 162 is concerned it will perhaps be sufficient to refer to the recent decision of Addison and Skemp JJ. in *The Crown v. Ibrahim* (1) in which it has been pointed out that the only way a witness can be contradicted by a statement made to the police under the provisions of section 162 of the Criminal Procedure Code, is to prove that portion of his statement to the police which contradicts his evidence and to put it to him under section 145 of the Evidence Act so that the witness may be given an opportunity of

(1) (1927) I. L. R. 8 Lah. 605.

explaining the contradiction ; and that statements made to the police “ *cannot be used at a trial in any other way.*” With regard to section 172, Criminal Procedure Code, reference may be made to the following directions contained in volume II of the Rules and Orders of the High Court (page 54) :—

“ The provision of section 172, that any criminal Court may send for the police diaries, *not as evidence in the case*, but to aid it in any enquiry or trial, empowers the Court to use the diary not only for the purpose of enabling the police officer who compiled it to refresh his memory, or for the purpose of contradicting him, but for the purpose of tracing the investigation through its various stages, the intervals which may have elapsed in it, and the steps by which a confession may have been elicited, or other important evidence may have been obtained. The Court may use the special diary, *not as evidence of any date, fact or statement referred to in it*, but as containing indications of sources and lines of enquiry and as suggesting the names of persons whose evidence may be material for the purpose of doing justice between the Crown and the accused.

“ Should the Court consider that any date, fact or statement referred to in the police diary is, or may be, material, *it cannot accept the diary as evidence*, in any sense, of such date, fact or statement, and must before allowing any date, fact or statement referred to in the diary to influence its mind, establish such date, fact or statement by evidence.”

These directions are in accord with the rule laid down in the leading case *Queen-Empress v. Mannu* (1), which has been recently affirmed by their

1928

DEVI DAS

v.

THE CROWN.

TEK CHAND J.

1928
 DEVI DAS
 v.
 THE CROWN.
 TEK CHAND J.

Lordships of the Privy Council in *Dal Singh v. Crown* (1), and which is to the effect that "the special diary may be used by the Court to assist it in the enquiry or trial by suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the Crown and the accused ; but entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained."

Now in this case the learned Magistrate has not only referred in his judgment to the statements of some of the witnesses for the prosecution made to the police, which had not been proved as required under section 162, and which even in that case could be used for the very limited purpose aforesaid, but he has also taken into consideration the statements made to the police during the investigation by persons who were *not* examined at all at the trial either by the the prosecution or the defence. At page 4 of the judgment, while referring to one Udho Ram, who could not be found by the police, the learned Magistrate has remarked :—

"Udho Ram was called, but it was stated that he could not be found and he was eventually given up by the police. This is unfortunate for the case, as his statement before the police was particularly clear."

Again, at page 5 he has stated "Mangha before the police made a similar statement, but he has not been produced in Court. I venture, however, to mention this statement because therein he explains how it was that Udho Ram eventually came into the courtyard to look for Hamid." In another part of the judgment

he refers to his having drawn up a "rough timetable" of the events at the police station "extracted from the First Information Report and the *Zimnis*." The learned Public Prosecutor has frankly admitted before me that in this matter the learned District Magistrate has acted in contravention of the clear provisions of the law and that his findings are vitiated by a consideration of inadmissible and irrelevant evidence. This, however, is not of itself a ground for ordering a new trial or reversal of the conviction but this Court has to see if the guilt of the petitioner is established by the legal evidence on the record.

1928
 DEVI DAS
 v.
 THE CROWN.
 TEK CHAND J.

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(The remainder of the judgment is not required for the purposes of this report.—ED.)

N. F. E.

Revision accepted.