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KANWAR BHAN v. BHAGAT JIWAN DAS

CURRIE J.

Mr. Har Gopal argues that the *ala malik* has an absolute right to refuse to accept *jhuri*. If that was so, it would, in my opinion, have been unnecessary to insert in the *Wajib-ul-arz* the condition that the *adna malik* had the right to regain possession on payment of *jhuri* and further the words relating to the method of assessment of the *jhuri* in case of dispute would have been entirely unnecessary. These words form part of the same sentence as the words relating to the refusal of the *ala malik* to accept *jhuri* and must be read with the first part of the sentence. They cannot be separated into two separate and distinct clauses.

In my opinion, therefore, the interpretation placed on this clause by the learned Single Judge was correct and I would dismiss the appeal with costs.

BHIDE J.

BHIDE J.—I agree.

P. S.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Coldstream J.

1935

Nov. 2.

BAIJ NATH BHATNAGAR (ACCUSED) Petitioner

versus

MOHAMMAD DIN (COMPLAINANT) Respondent.

Criminal Revision No. 525 of 1935.

Criminal Procedure Code, Act V of 1898, sections 162, 172 : Statements of witnesses recorded in Police diary in a previous case — whether the record can be referred to in order to contradict the witnesses in a subsequent case — without permission of the head of the Police Department — Indian Evidence Act, I of 1872, sections 123 and 76 — and whether a copy of the recorded statement can be demanded.

Held, that section 162, Criminal Procedure Code, does not forbid an accused person to contradict a witness by a previous statement made to the Police in an investigation not

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made in respect of the offence for which the accused is being tried — nor does section 172 forbid a recorded statement to be used at a trial for an offence not under investigation when it was made.

But, the record of a statement heard by a Police Officer in exercise of the power conferred by section 161 of the Code and recorded either in the diary, or separately, in the course of investigation proceedings is an *unpublished official record relating to an affair of State*, evidence derived from which cannot be produced in a case to which the first proviso to section 162 is not applicable, except with the permission of the officer at the head of the Police Department (*vide* section 123 of the Indian Evidence Act) nor can a copy of it be demanded under the provisions of section 76 of the Indian Evidence Act.

Kovuru Subbayya v. Peta Veeraya (1), *Emperor v. Dharam Vir* (2), *Kallu v. Queen-Empress* (3), and *Queen-Empress v. Nasiruddin* (4), referred to.

Case reported by Mr. M. R. Kayani, Sessions Judge, Gujranwala, with his No.176-J. of 1st April, 1935.

Nemo, for Petitioner.

JHANDA SINGH, for Government Advocate, for Respondent.

COLDSTREAM J.—The petitioner in this case was being tried by the District Magistrate of Gujrat for offences under sections 211, 344 and 504, Indian Penal Code. In order to contradict some of the prosecution witnesses by confronting them with statements made by them previously, he applied to the Magistrate (who being District Magistrate was also head of the District Police) to be furnished with copies of the records of statements made by them to the Police in the course of an investigation into an offence other than that for COLDSTREAM

(1) (1933) I. L. R. 56 Mad. 154.
(2) 1933 A. I. R. (Lah.) 498.
(3) 17 P. R. (Cr.) 1894.
(4) (1894) I. L. R. 16 All. 207.

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which he was being tried. The District Magistrate declined to give the copies. The learned Sessions Judge has recommended that this Court should, in the exercise of its revisional jurisdiction, order that the copies asked for be furnished. He has based his recommendation on the remark made by the Madras High Court in *Koruru Subbayya v. Peta Veeraya* (1) that a statement made to the Police is as good evidence as a statement made to any other person save for certain exceptions to be found in the Indian Evidence Act and in the Code of Criminal Procedure. That judgment as noticed by the District Magistrate in his order now under question did not deal with the point whether a person is entitled to be given copies of statements recorded by the Police.

It is true that the prohibition in section 162 of the Code of Criminal Procedure against the use of statements made to the Police relates only to the use of them at an enquiry or trial in respect of any offence under investigation at the time when such statement was used. (Before it was amended in 1923, the section forbade the use of any such statements ' as evidence.') It seems clear that section 162 does not forbid an accused person to contradict a witness by a previous statement made to the Police in an investigation not made in respect of the offence for which the accused is being tried.

For the Crown it is contended before me that statements recorded by the Police are nothing more than entries recording the investigation proceedings in the diary prescribed in section 172, that the whole of this diary is privileged and that the Magistrate w[illegible] right to refuse to order the copies asked for t[illegible]

(1) (1933) I. L. R. 56 Mad. 154.

given. In reply, the petitioner's counsel argues that the record of statements of witnesses examined under section 161 are not part of the diary, but separate records to which no protection is given by section 172 and that records of statements written by a Police Officer can be used in the same way as memoranda of statements made by any other person so long as they do not come within the scope of section 162.

So far as statements not reduced to writing are concerned I see no reason why statements made to a Police Officer in the course of an investigation should not, if relevant under the Evidence Act, be used at a trial for an offence not under investigation when they were made, provided that they are not held privileged by the provisions of section 123 or 124 of the Evidence Act.

The question whether a recorded statement written by a Police Officer in the course of an investigation can be used to confront the maker of the statement when he is giving evidence in a case which was not under investigation when he made the statement does not appear to have been raised before in this Court. The judgment in *Emperor v. Dharam Vir* (1) cited by counsel for the Crown does not express distinctly any decision on this point although it makes it clear that section 172 precludes a Court from giving an accused access to Police diaries of the investigation into the particular offence for which he is being tried or into a connected offence. In *Kallu v. Queen-Empress* (2) it was held by Plowden and Roe JJ. that the diary was the proper place for putting on departmental record memoranda of such statements made by persons examined by a Police Officer as he considers

(1) 1933 A. I. R. (Lah.) 498. (2) 17 P. R. (Cr.) 1894.

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of sufficient importance to be reduced to writing, and that when such statements are included in the diary they form an integral part of it. In the same judgment, however, Plowden J. remarked that it does not necessarily follow from the qualified protection of the diaries and memoranda against inspection by an accused in a judicial proceeding which is the result and continuation of the Police investigation, that the diaries or memoranda are privileged against production in any subsequent or collateral proceedings in which they are capable of being used as relevant evidence or to refresh the memory.

I understand the law on the matter to be this. Section 172 of the Code does not forbid a recorded statement to be used at a trial for an offence not under investigation when it was made. There is, however, no doubt in my mind that the record of a statement heard by a Police Officer in exercise of the power conferred by section 161 of the Criminal Procedure Code and recorded either in the diary or separately in the course of investigation proceedings is an unpublished official record relating to an affair of State, evidence derived from which cannot be produced in a case to which the first proviso to section 162 is not applicable except with the permission of the officer at the head of the Police Department (section 123 of the Evidence Act). By itself the record of the statement will prove nothing. As pointed out by Knox J. in *Queen-Empress v. Nasiruddin* (1) it cannot in any sense be termed a deposition and it is not evidence. It is not a public document, a copy of which must be given on demand under the provisions of section 76 of the Indian Evidence Act.

(1) (1894) I. L. R. 16 All. 207.

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But the fact or allegation that the statement has been reduced to writing will not preclude evidence of its having been made (subject of course to the provisions of the Evidence Act), for section 91 of the Evidence Act does not apply. To prove that the statement was made it would be necessary to call the Police Officer who heard it. If the accused has succeeded in having the original record of the statement produced, notwithstanding objections raised under sections 123, 124 or 125 of the Evidence Act, and the Police Officer has referred to it to refresh his memory under section 159, the provision of section 145 of that Act will apply.

The District Magistrate was not bound to give copies of the statements. There is, therefore, no reason for this Court to interfere.

A. N. C.

Recommendation refused.

APPELLATE CIVIL.

Before Addison and Abdul Rashid JJ.

MUSSAMMAT BEGUM BIBI AND ANOTHER (PLAINTIFFS) Appellants

versus

RAJA AND ANOTHER (DEFENDANTS) Respondents.

1935

Nov. 4.

Civil Appeal No. 101 of 1932.

Custom — Succession — Self-acquired property — Ranjhas *of village Midh Ranjha*, Tahsil *Bhalwal, District Shahpur—Married daughters or Collaterals of third degree*— Riwaj-i-am.

Held, that the married daughters of the last male holder, on whom the *onus* rested in face of the entries in the *Riwaj-i-am*, had failed to establish that among *Ranjhas* of village Midh Ranjha, *Tahsil* Bhalwal, District Shahpur, the married daughters were entitled to succeed to the self-acquired property of their father in preference to his collaterals in the third degree.