doubt, trustees, and for specific purposes property became vested in them under the will, but with regard to the residue there was no trust declared and no direction given to distribute it among the heirs-at-law and that in the absence of such a trust or direction the executors cannot be held to be express trustees, or trustees for a specific purpose, and section 10 of the Indian Limitation Act did not apply. It was also held in *Muhammad Habibullah Khan* v. *Safdar Husain Khan*[3] that where there was no express trust section 10 of the Indian Limitation Act would not apply.

On the analogy of these cases it would appear that the widow in the present case was not a trustee for the applicants and that section 19 D of the Court Fees Act does not apply.

I agree, therefore, that the appeal should be dismissed with costs.

Decree confirmed.

J. G. R.

[3] (1884) 7 All. 25.

CRIMINAL REVISION

Before Mr. Justice Patkar and Mr. Justice Baker.

EMPEROR *v.* SHAIKH USMAN SHAIKH UMAR.*

1927
October 11

Criminal Procedure Code (Act V of 1898), section 162 (as amended by Act XVIII of 1923)—Statements of witnesses recorded under section 162—Copies of statements—Accused entitled to copies when witness is in witness-box—Indian Evidence Act (I of 1872), section 145.

Where a statement made by a prosecution witness has been recorded under section 162 of the Criminal Procedure Code, 1898, the accused is entitled to demand that a copy of it should be furnished to him, only when the witness is in the witness-box to give his evidence against the accused and is sought to be cross-examined under section 145 of the Indian Evidence Act.

In re Peramasami Ragudu[1] and *Madari Sikdar* v. *Emperor*,[2] followed.

Per BAKER, J. :—" The accused is not entitled as a matter of course to a copy of the statements, unless the Court has previously referred to them and has exercised its discretion in the light of the second proviso to the section."

*Criminal Application for Revision No. 155 of 1927.

[1] (1925) 27 Cr. L. J. 100. [2] (1926) 54 Cal. 307.

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EMPEROR v. SHAIKH USMAN

THIS was an application to revise conviction and sentence passed by G. K. Choudhari, Second Class Magistrate at Nandurbar, confirmed in appeal by T. T. Kothawala, District Magistrate of West Khandesh.

The accused was charged with offences under sections 277 and 295 of the Indian Penal Code, for defiling a well and a tap in a masjid. He was tried by a Magistrate, who on the close of the prosecution case, framed a charge against the accused on December 14, 1926. The next hearing of the case was fixed for December 22. The accused applied to the Magistrate, on December 15, for copies of statements made by prosecution witnesses and recorded under section 162 of the Criminal Procedure Code. The Magistrate dismissed the application. The trial went on and ended in conviction of the accused, who was sentenced to pay fine. The conviction and sentence were upheld, on appeal, by the District Magistrate.

The accused applied to the High Court.

D. G. Dalvi, for the accused.

P. B. Shingne, Government Pleader, for the Crown.

PATKAR, J. :—In this case, the accused Shaikh Usman Shaikh Umar was tried on charges under sections 277 and 295 of the Indian Penal Code. He was convicted by the Second Class Magistrate, Nandurbar, and the convictions and sentences have been upheld by the District Magistrate, West Khandesh.

It appears that on December 14, 1926, the prosecution case was finished, the charge was framed, and after the examination of the accused the case was adjourned to December 22, 1926. On December 15, 1926, an application was made on behalf of the accused requesting that he should be furnished with the copies of the statements of the witnesses on behalf of the prosecution under section 162 of the Criminal

Procedure Code as he had to cross-examine the witnesses on December 22, 1926, and stating that he would not be in a position to cross-examine the witnesses unless the copies were given to him. The Police Prosecutor made an endorsement on the application that he objected to the copies being granted as there was nothing on the record to show that the statements of any of the witnesses were recorded by the Police. The learned Magistrate on December 22, 1926, made an order that under the circumstances no copies could be granted.

It is urged on behalf of the accused that he was entitled to get copies of the statements of the witnesses on behalf of the prosecution under section 162 of the amended Criminal Procedure Code. Under section 162, no statement made by any person to a Police-officer in the course of an investigation or any record thereof in the Police diary or otherwise or any part of such statement or record shall be used for any purpose at any inquiry or trial. The first proviso deals with the case where witnesses are called for the prosecution whose statements have been taken down in writing as aforesaid. Under the proviso, the accused has to make a request to the Court and 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. Under the old Criminal Procedure Code, the accused was not entitled to obtain a copy of such statement, and it was left to the discretion of the Court, if the Court thought it expedient in the interest of justice, to direct that the accused be furnished with copies of the statements. Under the second proviso to section 162, if the Court is of opinion that any part of such statement is not

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relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interest of justice and is inexpedient in the public interests, the Court shall record such an opinion and exclude such part from the copy of the statement furnished to the accused. Under the new Criminal Procedure Code, subject to proviso 2, the accused is entitled to a copy of the statement under section 162 for the purpose of contradicting the prosecution witness in the manner provided by section 145.

The important question is as to the point of time when the accused is entitled to make his request under the first proviso to section 162. I think that the application to get a copy of the statement must be made at the time when the prosecution witness, whom it is desired to cross-examine by reference to his previously recorded statement, appears in the witness-box. That view was taken before the amendment in the case of *Dadan Gazi* v. *Emperor*[1] and there is nothing in the amended Code to show that the accused is entitled to a copy of the statement at any time before the witness appears in the box. The reference in the first proviso to section 145 points to the time when the request is to be made. The time when such request is to be made is when the witness is sought to be cross-examined, and the statement, if duly proved, is to be used to contradict such witness under section 145 of the Indian Evidence Act. This view was taken by the Madras High Court in *Peramasami Ragudu, In re*,[2] where it was held that the accused is not entitled to copies of the statements made by prosecution witnesses at the Police investigation before their cross-examination is opened. The same view is accepted by the Calcutta High Court in the case of *Madari Sikdar* v. *Emperor*,[3] where it was held that

[1] (1906) 33 Cal. 1023. [2] (1925) 27 Cr. L. J. 100.
[3] (1926) 54 Cal. 307.

under the first proviso to section 162 the accused was entitled to be furnished with a copy of such statement only after the witness had been examined by the prosecution and his cross-examination had laid a foundation for the suggestion that his evidence in Court was contradicted by the previous statement recorded under section 161 of the Code, and not at any antecedent stage of the inquiry or trial. The words "if duly proved" indicate that the record of the statement cannot be admitted in evidence straightway, but the officer before whom the statement was made should ordinarily be examined as to any alleged statement that is relied upon by the accused for the purpose of contradicting the witness: *Emperor* v. *Vithu Balu.*[1] The statement by which it is sought to contradict the prosecution witness under section 162 must, therefore, be either proved by the investigating officer, or admitted by the witness in his cross-examination, or must be proved in some other way before it is put to the witness under section 145 of the Indian Evidence Act.

Though I am not prepared to hold that the cross-examination must lay a foundation for the suggestion that the evidence given by the witness before the Court is contradicted by the statement recorded under section 162 of the Criminal Procedure Code before the accused is entitled to request the Judge to refer to the writing and grant him a copy, I think that the accused is not entitled to a copy of the statement before the witness on behalf of the prosecution, who is sought to be cross-examined by such statement, is in the witness-box, and that the request has to be made to the Court when the witness on behalf of the prosecution is under cross-examination. In this case, some of the witnesses on behalf of the prosecution have not at all been cross-examined, and the request was not made when the

[1] (1924) 26 Bom. L. R. 965 at p. 967.

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witnesses were in the witness-box for cross-examination, but the application was made some time before the case was fixed for hearing and cross-examination of the witnesses. I think the application made on behalf of the accused on December 15, 1926, was misconceived, and that the accused was not entitled to copies of the statements under section 162 on the application made on December 15, 1926. I cannot, therefore, say that the learned Magistrate committed any error in declining to furnish the accused with the copies at that stage.

It appears from the remark made by the learned District Magistrate on appeal that he was not aware that the application of the accused to get copies of the depositions of witnesses was on the record. But, as I have said above, the application was premature.

I think, therefore, that the refusal of the Magistrate to give copies of the statements before the prosecution witnesses were in the box for the purpose of cross-examination is not, in my opinion, illegal.

We have sent for the statements of witnesses recorded during the Police investigation under section 161 of the Criminal Procedure Code, and on perusing them we are satisfied that they do not contain anything favourable to the accused, and that the accused is not in any way prejudiced in this case.

We would therefore discharge the rule.

BAKER, J. :—The applicant, in this case, was convicted by the Second Class Magistrate, Nandurbar, of offences under section 277 of the Indian Penal Code, for fouling the water of a public reservoir and section 295 of the Indian Penal Code, for injury to or defiling a place of worship with intent to insult the religion of any class, and was sentenced to a fine of Rs. 25, in default to undergo fifteen days' rigorous imprisonment under section 277 and a fine of Rs. 60 in default to undergo rigorous imprisonment for one month under section 295.

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The conviction and sentence were confirmed in appeal by the District Magistrate, West Khandesh.

The applicant applies in revision on the ground that he was not furnished with a copy of the statements of witnesses before the police under section 162 of the Criminal Procedure Code. After the charge, the accused was asked if he wished to cross-examine the prosecution witnesses, and he stated on December 15, 1926, that he wanted to do so. The case was adjourned to December 22, and on December 15 he presented an application asking for copies of statements to the police. The police-prosecutor objected to the statements being given on the ground that there was so far nothing on the record to show that any statements had been made. The Magistrate refused copies of the statements, and the prosecution witnesses were not cross-examined with the exception of Exhibit 1, the complainant, and Exhibit 7. This point was raised in appeal and overruled. The statement in the appellate Court's judgment that there is nothing on the record to show that such an application was made appears to be incorrect. The case raises an important point of law, viz., the right of the accused to get a copy of the statements under section 162 of the Criminal Procedure Code, as amended by Act XVIII of 1923. There does not appear to be any direct ruling on the point since the amendment. It is to be noted that while the amendment of section 162 is in favour of the accused, the section lays down certain formalities which must be observed, and it is not the case, as appears to be generally supposed, that the amended section gives the right to the accused to demand copies of the statements made by the prosecution witnesses to the police until the formalities laid down by the section have been complied with. The section says :—

". . . 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

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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."

This latter proviso appears frequently to be overlooked, and reading the section as a whole it is clear that the grant of copies as a matter of course without the Court first referring to the statements with the object of excluding any portion which it considers irrelevant to the subject-matter of the trial, or any portion whose disclosure is not essential in the interests of justice and is inexpedient in the public interests, is not a compliance with the section as it stands and is in disregard of its provisions. It may, therefore, be laid down that the accused is not entitled, as a matter of course, to a copy of the statements, unless the Court has previously referred to them and has exercised its discretion in the light of the second proviso to the section. It has been held in the case of *In re Peramasami Ragudu*,[1] which was followed by the Calcutta High Court in *Madari Sikdar* v. *Emperor*,[2] that the proper time at which an application under section 162 should be made is when the cross-examination of the prosecution witnesses commences. It must, therefore, be held that in the present case the application made on behalf of the accused before the cross-examination of the witnesses had commenced is not a compliance with section 162, and that, strictly speaking, the Court was justified in refusing it. But, had the accused, after the cross-examination commenced, made an application asking

[1] (1925) 27 Cr. L. J. 100. [2] (1926) 54 Cal. 307.

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the Court to refer to the statements and to direct that the accused be furnished with a copy thereof for the purpose of contradicting the witnesses, the Court would have been bound to comply with the request. In the present case, it does not appear from the record whether any of the witnesses had been examined by the Police and the learned Government Pleader has had no instructions on the point and was unable to state definitely, whether the witnesses were examined or not. We have accordingly found it necessary to direct him to obtain information on the point from the police.

The statements have now been received and do not contain anything which would affect the cross-examination, nor has the accused been prejudiced by their non-production. The rule will therefore be discharged.

Rule discharged.

R. R.

APPELLATE CIVIL

Before Mr. Justice Madgavkar and Mr. Justice Patkar.

MOTI JAGTA (ORIGINAL DEFENDANT), PETITIONER *v.* INDURAI BHAURAI DESAI AND OTHERS (ORIGINAL PLAINTIFFS), OPPONENTS.*

1927

November 14

Mamlatdars' Courts Act (Bom. II of 1906), section 26, clause (b)—Landlord and tenant—Suit by tenant in Civil Court—Pending suit, possessory suit filed by landlord in Mamlatdar's Court—Jurisdiction of Mamlatdar to proceed.

Under section 26, clause (*b*) of the Mamlatdars' Courts Act, 1906, the jurisdiction of the Mamlatdar is barred when there is a civil suit pending between the parties in respect of any dispossession, recovery of possession or disturbance of possession.

Ramchandra v. *Narsinhacharya*[1] and *Nagappa* v. *Sayad Badrudin*,[2] referred to.

Per MADGAVKAR, J. :—" In a decided suit, the question as to recovery or disturbance of possession or dispossession would be *res judicata*, and no express clause as section 26, clause (*b*), would be necessary. It follows that the words ' has been ' are used to include present proceedings, that is to say, proceedings that are pending, and therefore apply to the proceedings between the parties, and, in fact, section 5, in any case, gives the Mamlatdar a clear discretion to refuse ejectment. It cannot, for a moment, be supposed that the Legislature

*Civil Revision Application No. 145 of 1927.

(1) (1899) 24 Bom. 251. (2) (1901) 26 Bom. 353.