tion, I do not conceive it to be any part of my duty to make out a contrary case on their behalf. On this finding it is not possible to hold that the acts of defendant 3 are covered by the language of s. 270(1) of the Constitution Act. His order to defendants 4 and 5 to close the gate of the station compound and to mount guard on it was manifestly unlawful and without any authority. In carrying out that order they could not be held to be acting or to be purporting to act in the execution of their duty as servants of the Crown. Section 270 (1) would afford as little protection to them as to defendant 3.

It was conceded on behalf of the respondents that if s. 270 (1) was not applicable to the case, the suit would not be barred by limitation, either under art. 2 of the First Schedule of the Limitation Act, or by virtue of the provisions of s. 53 of the Madras District Police Act.

On the quantum of damages, the appellant's counsel did not ask us for any higher sum than that assessed by the trial court, *viz.*, Rs. 5,000. This was not contested on behalf of the respondents.

In my opinion the appellant is entitled to a decree against defendants 3 to 5 for Rs. 5,000 with proportionate costs throughout. But as the majority of the Court have taken a different view, the order of the Court will be as they have proposed.

Appeal dismissed.

Agent for the Appellants: *Ranjit Singh Narula.*

Agent for the Respondents: *Ganpat Rai.*

SAHDEO GOSAIN AND ANOTHER
v.
THE KING EMPEROR.

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Feb. 17; *March* 6.

[SIR PATRICK SPENS C.J., SIR SRINIVASA VARADACHARIAR and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Criminal trial—Identification—Merely picking out certain person while identifying others in the dock—Value of such evidence—Criminal Procedure Code (Act V of 1898), s. 162—Statement made to police during investigation—Admissibility.

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Where several persons including X were charged with rioting, and a witness for the prosecution who had not identified X at any test identification parade, nor named him in his evidence at the trial as a person who had participated in the riot, merely picked him out as one of the rioters while identifying those accused persons in the dock whom he had already named in his evidence as participants in the riot: *Held,* that as against X the evidence of the witness was of no value.

In view of the provisions of s. 162 of the Criminal Procedure Code a statement made by a witness for the prosecution before the police during the investigation naming the accused as one of the rioters cannot be used to corroborate the evidence given by that witness during the trial in favour of the prosecution.

APPEAL from the High Court of Judicature at Patna. Criminal Appeal No. 1 of 1944.

This was an appeal from a judgment of the High Court of Patna (Shearer and Sinha JJ.) in Criminal Appeals Nos. 382 and 578 of 1943 of that Court confirming the conviction of the appellants and sentences passed on them by the Special Judge of Bhagalpur in a trial held under Ordinance No. II of 1942.

The material facts appear in the judgment.

1944. Feb. 17. *Bhabananda Mukherjee* for the appellants. The constitutional question is concluded by the ruling of this Court in *Piare Dusadh's* case (1). On the merits there is no evidence to implicate the appellants. Of the nine witnesses for the prosecution only P. W. 1 and P. W. 3 were able to identify the accused at the trial. As regards the 1st appellant, P. W. 3 did not name him in his evidence at the trial but merely picked him out when identifying in the dock the accused whom he had named. There was also no identification parade. The evidence of this witness is, therefore, of no value. The High Court itself is of opinion that the evidence of P. W. 1 standing by itself is not reliable. Hence the 1st appellant should be acquitted. With regard to the 2nd appellant, his name was not mentioned by P. W. 1 when this witness was examined by the Magistrate. But the High Court has relied on the statement made by this witness before the police during the investigation. The provisions of s. 162, Criminal

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Procedure Code, have been violated. This statement cannot be used for incriminating the accused.

Mehdi Imam for the Crown. The case is entirely one of appreciation of evidence. The High Court was satisfied on the evidence of the guilt of the accused. There is no ground for interference. The memorandum of evidence made by the Special Judge does not clearly state that the witness had not named Sahdeo Gosain. With regard to Sitaram Gosain, though P. W. 1 did not name him in the examination before the Magistrate he named him before the police and so no value should be attached to the omission to name him before the Magistrate.

Bhabananda Mukherjee replied.

Cur. adv. vult.

March 6. The judgment of the Court was delivered by

ZAFRULLA KHAN J.—On the 14th August, 1942, a large crowd raided the Ghogha railway station on the East Indian Railway, burnt the records and destroyed or damaged the furniture and telephone equipment. Ten persons were put on trial in respect of this occurrence before the Special Judge, Bhagalpur, under Ordinance No. II of 1942. Eight of them were convicted and were sentenced to various terms of imprisonment. Seven of the convicts, including the two appellants before us, preferred appeals to the High Court at Patna. The appeals of five of the convicts were allowed and they were acquitted. The two appellants, whose appeals were dismissed by the High Court, have further appealed to this Court on a certificate under s. 205 of the Constitution Act.

The constitutional questions raised in the appeal are concluded by our judgment in *Piare Dusadh and Others* v. *The King Emperor* (1).

On the merits, it was contended that on the criterion adopted by the High Court with regard to the reliability of the prosecution evidence in the case, the appellants were entitled to an acquittal. Of the nine witnesses examined on behalf of the prosecution with reference to the occurrence itself, only two, P. W. 1

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and P. W. 3, were able to identify any of the accused persons at the trial. The High Court found, however, that the testimony of neither of these two witnesses could be implicitly relied upon, and that it would not be safe to maintain the convictions, except where the testimony of one of these witnesses was corroborated by that of the other. This test the High Court thought was satisfied in the case of the two appellants before us, Sahdeo Gosain and Sitaram Gosain, and their convictions were accordingly confirmed.

As regards Sahdeo Gosain, it was pointed out that P. W. 3 had not named him in his evidence at the trial as a person already known to him who had participated in the riot, but had merely picked him out as one of the rioters while identifying those accused persons in the dock whom he had already named in his evidence as participants in the riot. It was urged that as P. W. 3 had not identified Sahdeo Gosain at any test identification parade, his pointing him out in the dock as one of the rioters was of no value even as corroborative evidence of what P. W. 1 might have stated against him. The learned Judges of the High Court were of the opinion that the memorandum of the evidence of P. W. 3 made by the Special Judge was not clear as to whether the witness had named Sahdeo Gosain or had merely identified him in the dock by sight. We are unable to appreciate the difficulty experienced by the learned Judges, as the memorandum appears to us to be perfectly clear on the point. The witness named four of the accused persons as those whom during the course of the riot he had identified among the rioters. He stated that they were present in the dock and then proceeded to the dock to identify them. The memorandum then records, "Witness picks out Sahdeo and says that he saw this accused also in the mob". This can only mean that while identifying the accused persons whom the witness had already named, he pointed to Sahdeo and said that he had also been among the rioters. There is nothing else in the memorandum which casts any doubt on this matter. As against Sahdeo therefore the evidence of this witness is of no value whatever.

Our attention was also invited to the evidence of P. W. 4, the station master at Ghogha. He stated that he had witnessed all the incidents of the riot but was unable to identify anyone, as he was a new man in the locality. In cross-examination he admitted that he knew Sahdeo Gosain, by sight, as he kept a shop near the station, though he did not know his name. As this witness did not state that he had seen Sahdeo Gosain among the rioters, the doubt with regard to this appellant's complicity in the riot is further strengthened.

As regards Sitaram Gosain, it was urged that though P. W. 1, did mention his name at the trial as one of the rioters, he had not mentioned his name in his statement recorded under s. 164 of the Criminal Procedure Code on 18-8-1942, only four days after the occurrence. On this point all that the learned Judges of the High Court have observed is, "As regards Sitaram Gosain the criticism is that though prosecution witness No. 1 has named him in Court he did not name him in his examination before the Magistrate under s. 164 of the Criminal Procedure Code, though the accused have brought it out in cross-examination of the investigating officer that Sitaram had been named by P. W. 1 before the police". It was argued on behalf of the Crown that the last part of this sentence disposes of the criticism set out in the first part. We are by no means certain that that is so. The learned Judges do not even state whether the statement made by P. W. 1 to the police was before or after his examination under s. 164, Criminal Procedure Code, much less as to how the fact that he had named Sitaram Gosain before the police explains his failure to mention his name before the Magistrate. Both statements appear to have been recorded on the same day, but there is no material on the record which would enable us to determine which was made first. Besides, under the provisions of s. 162 of the Criminal Procedure Code, a statement made to the police during the course of the investigation can be used only for the purpose of contradicting a prosecution witness and cannot except in that connection be used for any other purpose.

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We have examined the statement of P. W. 1 recorded under s. 164 of the Criminal Procedure Code, and find that it relates to the incidents of the 14th August as well as to certain incidents of the 15th August. In connection with both these occurrences, the witness mentioned the names of the same eight persons whom he had identified on each occasion and he mentioned them in the same order. The statement is a detailed one and its examination leaves no doubt in our minds that the omission of Sitaram's name was not a slip of memory on the part of the witness. It was suggested on behalf of the appellants that his statement to the police was made after his statement to the Magistrate and that Sitaram's name may have been introduced in it in answer to leading questions put to him by the investigating officer. Be that as it may, the failure of the witness to mention Sitaram's name in his statement to the Magistrate robs his subsequent statement against Sitaram made at the trial nearly four months later of all value.

This leaves against each of the appellants only the uncorroborated testimony of one witness, which in the circumstances of this case, the learned Judges of the High Court were not prepared to regard as sufficient to support a conviction. We are satisfied that the complicity of neither of the appellants in the incidents of the 14th August, 1942, has been established beyond reasonable doubt.

We allow their appeal and declare that in place of the order of the High Court there shall be substituted an order directing their acquittal and immediate release.

Appeal allowed.

Agent for the Appellants: *Sumair Chand Jain Raizada.*

Agent for the Respondent: *S. P. Varma.*

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