

ALLAHABAD HIGH COURT

Shyamlal Sharma

Vs

King-Emperor

(Seth, J.)

29.04.1949

JUDGMENT

Seth, J.

1. These two references to this Full Bench have been connected together because the questions referred in both of them depend for their decision on the interpretation of Section 162, Criminal P.C. In either case the applicant is a railway employee who has been convicted of an offence of receiving illegal gratification under Section 161, Penal Code; in either case a police trap was laid to capture the accused red-handed in the commission of the crime; in either case the services of a Magistrate were employed to witness the commission of the crime; in either case the Magistrate recorded a report detailing the events that took place in his presence and the manner in which the trap was laid; and in either case the Magistrate made free use of the report to refresh his memory while deposing as a witness. It was contended in both these cases, when they came up for hearing before this Court, that the depositions of the Magistrates were inadmissible because they had made use of their reports, in contravention of the provisions of Section 162, Criminal P.C., and should therefore be excluded from consideration.

2. Applicant Shyam Lal Sharma in Criminal Revision No. 1436 of 1946 was an Assistant Goods Clerk at Kathgodam railway station at the time when he is alleged to have committed the offence and applicant Ram Prakash in criminal Revision No. 184 of 1947 was the Station Master of Panki railway station at the time when he is alleged to have accepted the bribe. These cases will hereinafter be referred to as the Kathgodam and the Panki cases respectively. The questions referred for decision in the two cases, though allied are not identical. It appears, however, that the question referred in the Kathgodam case can be answered on the basis of the decision of the points involved in the Panki case. I propose therefore to take up that case first.

3. The relevant facts of the Panki case are as follows: Ahibaran Singh, a Sub-Inspector of the Special Police Establishment, Delhi, received information that the applicant Ram Prakash had

agreed to accept a bribe from one Amant Ullah. He made an application (Ex. P.-13) to the Additional District Magistrate of Kawnpur on 31st March 1946, in which he stated that Ram Prakash had agreed to accept a bribe and asked for permission under Section 155 (2), Criminal P.C., to investigate the case. He then went on to state that the bribe would be paid to Ram Prakash that very evening, and ended by making a request that a First Class Magistrate be deputed to witness the transaction, to prepare a report embodying the events and to make over all the documents to him to complete the investigation. The Additional District Magistrate granted both the requests. He permitted Ahibaran Singh to investigate the offence and deputed a First Class Magistrate, Mr. Ibrahim, to comply with the request of Ahibaran Singh. Mr. Ibrahim witnessed the occurrence, arrested the applicant, searched his person, recorded certain statements and then prepared a report, embodying an account of all that he had done and of all that had happened in his presence, and made over that report, together with all the documents in connection with the case, to Ahibaran Singh. This report is Ex. P.-10 of the record and will, hereinafter, be referred to as such.

4. It has been noticed that Mr. Ibrahim made free use of Ex. p.-10 while he was in the witness-box and gave his statement after referring to it from the beginning to the end, and that for this reason it was contended that his deposition should be ruled out of consideration. It appears to have been contended in reply that Ahibaran Singh had no permission to investigate the offence of which Ram Prakash has been convicted and therefore the prohibition contained in Section 162, Criminal P.C., did not apply to Ex. P.-10. Thus a subsidiary question arose for consideration as to whether the permission granted by the Additional District Magistrate on 31st March 1946, related to the offence of agreeing to accept bribe which had already been committed before the permission was asked for or whether it related to the investigation of the offence of accepting illegal gratification, of which the applicant Ram Prakash has been convicted. The following two questions have, under these circumstances, been referred for decision to this Bench:

(1) Whether the permission to investigate under Section 155 (2), Criminal P. C, given to Mr. Ahibaran Singh on his application dated 31st March 1946, related to the investigation of the case of bribery which was instituted in Court against the accused applicant and in which case he has been convicted.

Whether it related to the case of corruption arising out of the offence committed earlier by the applicant's demanding and agreeing to accept bribe.

(2) Whether the report prepared by the Magistrate after witnessing the incident and then made over to the Sub-Inspector amounted to a statement to the investigating officer contemplated under Section 162, Criminal P.C.?

5. Great reliance was placed on the decision of their Lordships of the Judicial Committee in *Zahiruddin v. King Emperor*¹ when the case was argued before the referring Bench and great

reliance was placed on that decision before us also. It may, however, be pointed out that the case was not relied upon so much to support any particular proposition of law as to stress the fact that the present cases resemble Zahiruddin's case A.I.R. (34) 1947 P.C. 75,(Suupra) in some particulars and that, therefore, the depositions of the Magistrates should be excluded from consideration in the same way in which the deposition of the Magistrate was excluded from consideration in that case. It appears to me, however, that Zahiruddin's case A.I.R. (34) 1947 P.C. 75(Supra) has no material bearing on the decision of the questions referred to us. It is desirable, therefore, to discuss this case first, to clear the ground for a proper consideration of the questions with which we are concerned.

6. Zahiruddin was also a railway employee and was posted as a grain depot officer at the Howrah railway station. It was reported that he was about to accept a bribe and so a police trap was laid to catch him during the commission of the offence. The proceedings were witnessed by a Magistrate, Mr. Roy. Nearly three months after the occurrence, the investigating officer visited Mr. Roy at his residence and Mr. Roy there handed over to the investigating officer a written and signed statement containing an account of what he had done and what he had witnessed. Mr. Roy made a free use of the statement while deposing in the case, The Magistrate held that when a police officer, during the investigation of an offence, obtains a signed statement from a witness in contravention of Section 162, Criminal P.C., the evidence of the witness, at the trial, must be rejected. The High Court, on the other hand, held that there was no substantial reason to think that Mr. Roy's evidence, without the use of the statement to refresh his memory, would have been in any material particular different from the evidence, which he actually gave, and was therefore admissible. It was, throughout, an admitted fact that the statement of Mr. Roy, which he had used to refresh his memory, was a statement made to a police officer during the course of an investigation of the offence, at the trial in respect of which offence it was used. On these facts their Lordships reversed the decision of the High Court and laid down the following propositions of law:

(1) The effect of the contravention of Section 162 (1), Criminal P.C., depends on the prohibition which has been contravened.

(2) If the contravention consists in the signing of a statement made to a police officer and reduced to writing, the evidence of the witness who signed the statement does not become inadmissible, although its value may become seriously impaired as a consequence of the contravention.

(3) If the witness makes material use of statement while giving his evidence at the trial, his evidence is rendered inadmissible, otherwise the prohibition contained in the section would be disregarded.

None of these propositions has been controverted in these cases and the questions referred to us

do not involve the decision of any matter covered by these propositions. The questions referred to us deal with matters that were found to exist in Zahiruddin's case A.I.R. (34) 1947 P.C. 75 and about which no controversy existed in that case. What we have to determine is whether the documents used by the Magistrates to refresh their memories while giving their evidence are statements made to a police officer during the course of an investigation of the offence, during the trial, in respect of which offence they were used. The questions referred to us have, therefore, to be considered without reference to Zahiruddin's case A.I.R. (34) 1947 P.C. 75.

7. The first question may now be taken into consideration. The order of the Additional District Magistrate permitting investigation is a very short order. Its implications cannot be determined without a reference to the application of Ahibarn Singh (Ex. p. 13) which is therefore reproduced in extenso as follows, along with the order of the Additional District Magistrate:

To The Additional District Magistrate, Cawnpore.

Sir, Respectfully I beg to state as under :

(1) That one Amanatullah a representative of the firm Nawab Hasan Ali Khan Ratan Lal, Commission Agents Khatauli, has to book some 18 bundles of jute from Panki E.I.R. to a station in the Punjab.

(2) That the said Amanatullah approached the S.M. for the purpose, who demanded illegal gratification from him at the rate of Rs. 3 per bundle of jute for the booking of which the freight would be paid where the delivery has to be taken.

(3) That as a result of protest and beseech by Amanatullah to the S.M. the latter having reduced the above demand to Rs. 2-8-0 per bundle and has agreed to accept this illegal gratification for the booking of jute bundles at the rate of Rs. 2-8-0 per bundle, which Amanatullah has reluctantly agreed to pay.

(4) That the S. M. has thereby committed an offence under Section 161, Penal Code, which is non-cognizable by the police. I therefore request you to kindly grant permission to investigate the case as required under Section 155 (2), Criminal P.C.

(5) That Amanatullah has agreed to co-operate with me to effect the red-handed capture of the accused accepting bribe at the said settled rate. It is therefore requested to your honour to depute one of your First Class Magistrates willing to accompany the raiding party in some inconspicuous dress in order to place himself at such a place from where he can witness the transaction and possibly hear the conversation between the transacting parties. The payment will be made this evening, (6) The Magistrate so deputed may kindly be directed to record the statements of the transacting parties and to prepare a report embodying the events of the case in it

and then to make over all the documents including recovery list etc., to me to complete the investigation.

Sd. Ahibaran Singh, Special Police Establishment, Government of India, 18 Daryaganj, Delhi.

Camp Cawnpore.

...31-3-1946.

Mr. Ibrahim will please do this. Investigation in the case under Section 155 (2), Criminal P.C. to be made by S.I.

Sd. Illegible, 31-3-1946.

8. It is evident that the application (Ex. P-13) divides itself into two distinct parts. The first part, consisting of the first four paragraphs, states facts which disclose that an offence under Section 161, Penal Code, has already been committed and contains a request for permission to investigate, under Section 155 (2), Criminal P.C. It may be noticed that an agreement to accept bribe or an attempt to obtain bribe, is as much an offence under Section 161, Penal Code, as the actual acceptance of the bribe. According to the allegations contained in ex. p-13 an offence under Section 161, Penal Code, had already been committed and Ahibaran Singh could, under Section 155 (2), Criminal P.C., ask for permission to investigate that offence. The second part of the application consists of the rest of it. In this second part Ahibaran Singh informed the Additional District Magistrate that he believed that an offence under Section 161, Penal Code, of accepting bribe would be committed that evening and made a request that a First Class Magistrate may be deputed for the purposes set out in the application. It is remarkable that the statements about the two different offences, one of which had already been committed and the other of which was likely to be committed, are followed by two different requests. The request for investigation has not been made at the end of the application after mentioning both the offences. It is thus clear that permission was sought to investigate the first offence only and not to investigate the offence which was expected to be committed and which might have been committed or might not have been committed. If Ahibaran Singh had desired permission to investigate both the offences, he would not have inserted a request for permission to investigate immediately after narrating the first offence, but would have put it at the end of the application, after having mentioned the expected offence also. In the absence of anything to the contrary in the order of the Additional District Magistrate, there seems to be no good reason to suppose that the permission granted was different from the permission asked for.

9. It was contended by the learned Crown counsel that a Magistrate is not authorised to grant permission to investigate an offence under Section 155 (2), Criminal P.C., before it has been committed and therefore, in the absence of anything specific in the order itself to indicate that an

anticipatory permission was given to investigate the expected offence, it should not be presumed that the Additional District Magistrate did or intended to do anything illegal but that, on the contrary, it should be presumed that only such permission was given as the Additional District Magistrate was competent to give. Learned Counsel for the applicant controverts this proposition and contends that anticipatory permission may be given under Section 155 (2), Criminal P.C. He has relied upon two Calcutta decisions in support of this contention. They are *Nandalal Chakravarty v. King Emperor*² and *Superintendent and Remembrancer of Legal Affairs, Bengal v. K. Zahiruddin*³

10. There is nothing in the first case to support the contention, beyond the fact that the permission to investigate, in that case appears to have been obtained before the offence was committed. The learned Judges were not called upon to consider whether anticipatory permission is good permission under Section 155 (2), Criminal P.C., and the case does not contain any decision on this point. It is urged, however, that the following observations in Zahiruddin's case A.I.R. (33) 1946 Cal. 483 at p. 487, support the contention that an anticipatory permission may be granted: For their own convenience in this type of cases the system is for the police to move the District or the Additional District Magistrate as was done here for an order for investigation. The order is really given in anticipation of the commission of the offence. So far, in all the cases of this type, which had been heard there, it has been accepted that such an order is valid, and it follows as a conclusion that once the crime is committed, anything done by way of investigation is done as an investigation under Chap. XIV, Criminal P.C. It would appear from these observations in Zahiruddin's case A.I.R. (33) 1946 Cal. 483, that the learned Judges simply noticed the practice prevailing with the police and the magistracy in the province of Bengal and the fact that its validity had never been challenged without considering or deciding if it was, in fact, valid. They did not proceed beyond pointing out its consequences. It follows, therefore, that this case cannot be accepted as an authority in support of the proposition that an anticipatory permission is a valid permission. It does not contain any adjudication on the point. To the best of my information no such practice prevails in these provinces. Moreover, in my judgment, the validity of such a practice cannot depend upon its unchallenged prevalence. It has to be determined by reference to the relevant provisions of law and the object intended to be achieved by them.

11. Lastly, reference was made, in this connection, to the judgment of their Lordships of the Judicial Committee in Zahiruddin's case A.I.R. (34) 1947 P.C. 75 (ubi supra) and it was contended on its basis that the High Court having approved the practice of giving anticipatory permission and the Judicial Committee having expressed no dissent from that view, it should be inferred that their Lordships have approved the view of the High Court and have thus impliedly held that such a permission is valid. This would not be a legitimate inference. Approval involves a conscious consideration of the object to be approved and there appears nothing in the report of Zahiruddin's case A.I.R. (34) 1947 P.C. 75, to show that their Lordships' attention was ever invited to this aspect of the case. Indeed, there is no mention whatsoever of the permission to

investigate in the judgment of their Lordships. It is obvious that the case was discussed and decided on the assumption that the statement was made by Mr. Roy during the course of an investigation and the validity of that investigation was never challenged by anybody. Zahiruddin's case A.I.R. (34) 1947 P.C. 75, cannot be assumed to lay down any proposition of law impliedly, which was not considered and pronounced by their Lordships. There is the very high authority of Halsbury L.C., in support of the proposition that a case is only an authority for what it actually decides and cannot be quoted for a proposition that may seem to follow logically from it. Discussing the authority of *Allen v. Flood* 1898 A.C. 1, his Lordship made the following observations in *Quinn v. Leatham* (1901) A.C. 495:

Now, before discussing the case of *Allen v. Flood* 1898 A.C. 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

The decision in Zahiruddin's case A.I.R. (34) 1947 P.C. 75, should, therefore, be read as applicable to the facts proved or assumed to be proved in that case and not as an authority for the proposition that the assumptions made were well-founded. It is, therefore, necessary to consider the merits of this contention as if it were *res integra*.

12. Section 155, Criminal P.C., occurs in chap. XIV of the Code which deals with investigation of offences. It makes a marked distinction between cognizable and non-cognizable offences. It authorises a police officer in charge of a police station, to investigate a cognizable offence without the order of a Magistrate, but forbids a police officer from investigating a non-cognizable case unless ordered by a Magistrate to do so. Section 155 (2), Criminal P.C., which deals with this matter, reads thus:

No police officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class, having power to try such case or commit the same for trial, or of a Presidency Magistrate.

13. It is evident that it was intended by this piece of legislation that a non-cognizable offence should not be investigated by the police, unless, a criminal Court, possessed of necessary jurisdiction, is moved by a complainant, to take cognizance of the offence or unless a Magistrate, of the description mentioned in the section, considers it desirable that the offence should be investigated. The section occurs in a statute dealing with the administration of criminal justice, which is administered in public interest and not in the interest of any private individual. It could

not have been intended, therefore, that a Magistrate should order an investigation arbitrarily or capriciously. On the other hand, it may be legitimately assumed that it was intended that, before making an order for investigation, he would carefully consider all the relevant circumstances that make it desirable that a non-cognizable offence should be investigated in public interest. Reference may be made, in this connection, to the decision of this Court in *Emperor v. Mohan Lal*⁴ The requirements of a valid sanction to prosecute were considered in that case. After pointing out that the materials placed before the sanctioning Magistrate contained no reference to the facts of the case and the offence, if any, which was alleged to have been committed, Mulla J. observed:

Then we find the brief order recorded by Mr. D.G.P. Anthony which does not show at all whether he applied his mind to any set of facts put before him and whether upon doing so he came to the conclusion that the applicant had committed an offence under Section 6 of the Ordinance. The cryptic order recorded by Mr. Anthony makes no reference at all to any offence. In fact it is not even clear in this case whether Mr. Anthony was empowered by the Provincial Government to grant sanction for prosecution for any offence committed under the Ordinance. My attention was drawn by learned Counsel for the Crown to a Government notification to the effect that all District Magistrates in the province were authorised by the Provincial Government to sanction prosecution under Section 14 of the Ordinance and it was contended that Mr. Anthony being at the time in the position of an Officiating Superintendent of Dehra Dun must be presumed to have the power contemplated by Section 14. I am not quite clear on this point, but one thing is quite clear to my mind and that is that the sanction for prosecution given in the present case was not a valid sanction as required by the law. As I have already stated the material on the record before me does not show at all whether Mr. Anthony ever applied his mind to any set of facts and having done so arrived at the result that any offence under Section 6 of the Ordinance had been committed by the applicant. His cryptic order does not even mention any offence. Such a sanction, in my opinion, is not a valid sanction and I must, therefore, hold that the prosecution in this case failed to remove the bar placed in its way by Section 14 of the Ordinance and upon that ground also it must fail.

Mohan Lal's case A.I.R. (34) 1947 ALL. 149(Supra), has a material bearing on the question under consideration, although it related to sanction for prosecution, for 'sanction to prosecute' and 'order to investigate' are allied subjects and should be governed by the same principles.

14. In my judgment, the fact whether there are reasonable grounds for believing that an offence has been committed, is a very material circumstance to be taken into account in deciding whether an investigation should be ordered. Unless a Magistrate is satisfied that reasonable grounds exist for believing that an offence has been committed, he would be acting arbitrarily in ordering an investigation to be made. It could not, therefore, have been intended that an investigation might be ordered in the belief that an offence was likely to be committed in future. An expected offence may or may not be committed or after the transaction is over it may remain a matter of doubt

whether the offence has been committed or not. On a perusal of a report of the transaction or after hearing an oral account of it, the Magistrate may not be satisfied that an offence has been committed and that an investigation is needed.

15. On the assumption that anticipatory permission is valid, an investigation will take place in such a case, although no investigation was called for and no investigation would have been ordered after a consideration of the report of the transaction. I have purposely said that an investigation will take place because the investigating officer will be duty bound to investigate, in obedience to the order of the Magistrate, ostensibly passed under Section 155 (2), Criminal P.C. Such an undesirable result could not have been intended by the Legislature, and an interpretation, opposed to the manifest intention of the enactment and which leads to undesirable results, is to be avoided. I am thus led to the conclusion that an anticipatory order to investigate is not a valid order.

16. This is an additional reason for holding that the permission granted by the Additional District Magistrate to Ahibaran Singh to investigate related to the offence which had already been committed and not to the offence for which the applicant was tried, for, unless it can be unequivocally established that the Additional District Magistrate was acting illegally, it should be presumed that he was acting in a lawful manner and had given only such permission as he was competent to give.

17. I, therefore, hold that the permission given to Ahibaran Singh related to the offence which had already been committed and which was described in the first four paragraphs on Ex. P-13 and not to the offence which was expected to be committed.

18. My answer to question No. 1 is as follows:

The permission to investigate under Section 155 (2) Criminal P.C. given to Ahibaran Singh on his application dated 31st March 1946, related to the investigation of the offence of agreeing to accept a bribe and attempting to accept a bribe, which had been committed before the said application was made and did not relate to the offence for which the applicant was tried and of which he has been convicted.

19. It seems desirable to have a clear grasp of the concept denoted by the expression "statement made by one person to another", before attempting an answer to the second question set out above.

20. The word 'statement' has several meanings. Having regard to the context in which it occurs in Section 162, Criminal P.C., it means a narration. A statement made to some person connotes the idea that the narration is addressed to that person and implies an animus on the part of the author of the statement, namely, an (intention to communicate the subject-matter of the statement to the

person to whom it is made or addressed. A statement is, therefore, made to such person or persons only as are intended to be addressed i.e., for whom the communication is meant and not to all those who may happen to overhear it, if it is an oral statement, or to all those who may happen to read it, if it is a written statement. It is for this reason that a statement made to a Magistrate in the presence and hearing of a police officer is not deemed to be a statement to the police officer also. It does not, however, make any difference whether the communication is made on request or unsolicited.

21. The determination of the question whether a statement has been made to a particular person, thus depending upon the intention of the author of the statement, it follows, that if the Author of a written narrative hands it over to some one the transaction does not amount to a statement made by the author to the person to whom the narrative is made over, unless it is handed over with the intention of making a statement to him, for, if the author intends to hand it over with some other intention, e.g. for safe keeping or for transmission to some third person, he cannot be said to have made a statement to the person to whom the narrative is delivered. It is worthy of notice that a statement, once made, may be repeated a number of times in identical words. This is possible where the statement is short and simple or where several copies of the written statement are made and separately addressed to a number of persons. Each repetition and each copy if separately addressed, is, in such a case, a separate statement and does not cease to be so because it is made in identical words. A statement to several persons may be regarded to be one statement only when it is Jointly addressed to all of them, but not where it is separately addressed.

22. The meaning of the expression 'statement' and 'statement made by one person to another', having been thus ascertained the second question referred to us for decision may now be considered.

23. The first point that requires to be determined in this connection is whether ex. P-10, is at all, a statement of Mr. Ibrahim within the meaning of that word as used in Section 162, Criminal P.C. It has already been observed that the word 'statement' in this section means a narration and Ex. P-10 is a written narration of all that took place on 31st March 1946, from the time when Mr. Ibrahim was approached by Ahibaran Singh, with the order of the Additional District Magistrate, up to 8.10 p. m. on that date, when this record was handed over by Mr. Ibrahim to Ahibaran Singh. It is, therefore, a statement within the meaning of that word in Section 162, Criminal P.C.

24. The second point that requires to be considered, then, is if it is a statement made by Mr. Ibrahim to Ahibaran Singh, who is indicated in the question by the expression 'the investigating officer'. In the light of what has been observed above, I am of opinion that Ex. p-10 is not a statement made to Ahibaran Singh or any person whatsoever; because Mr. Ibrahim never intended to address it to any person and the necessary animus to make it a statement to somebody is wanting. Mr. Ibrahim was never asked by Ahibaran Singh to make a statement and Mr. Ibrahim did not intend to make any statement to Ahibaran Singh while handing over Ex. P-

10 to him. He was directed by the Additional District Magistrate to prepare a report embodying the events of the case and to make over all the documents to Ahibaran Singh. Thus, he was not to keep with himself Ex. p-10, the report of the events prepared by him, but was directed to hand it over to Ahibaran Singh for such use as Ahibaran Singh might like to make of it. Exhibit P-10 was handed over to Ahibaran Singh not with the intention of narrating anything to him and was not addressed to him. It is, therefore, not a statement made by Mr. Ibrahim to Ahibaran Singh.

25. Assuming, however, that Ex. P-10 is a statement made to Ahibaran Singh, the next point to be considered is whether Ahibaran Singh was an investigating officer at the time when Ex. P-10 was handed over to him. I take it that the referring Bench intended to mean an investigating officer with reference to the offence of which the applicant has been tried and convicted, when it used the word 'investigating officer' without any qualification. The determination of this point involves a consideration of the question whether the investigation had begun when Ex. P-10 was handed over by Mr. Ibrahim to Ahibaran Singh.

26. The evidence on the record does not disclose anything to have been done by way of investigation by Ahibaran Singh before Ex. P-10 was handed over to him. At the time when the currency notes were offered by Amanat Ullah and accepted by Ram Prakash, Ahibaran Singh was outside the room in which this event happened. He is not an eye-witness of the alleged offence. He did not hear any conversation between Amanat Ullah and Ram Prakash. Ram Prakash was arrested by Mr. Ibrahim and not by Ahibaran Singh, for Mr. Ibrahim states in Ex. P. 10:

At this stage, I disclosed my identity and said that he was under arrest for accepting illegal gratification in my presence and hearing.

The person of Ram Prakash was searched and currency notes were recovered from his possession by the Magistrate. The recovery list, Ex. C, was also prepared by the Magistrate, Mr. Ibrahim. It was only attested by Ahibaran Singh. The railway receipts, their respective risk notes and forwarding notes and the last entry in the cash book as well as the finger print railway receipt book were all signed by Mr. Ibrahim. The statement of Ram Prakash, Ex. D, was recorded by the Magistrate in the absence of Ahibaran Singh who was sent out of the room when the accused was questioned. Other statements were also recorded by the Magistrate, Mr. Ibrahim, and there is nothing to indicate that those witnesses were produced by Ahibaran Singh before Mr. Ibrahim for recording their statements. It appears that Mr. Ibrahim recorded those statements of his own volition and perhaps because those witnesses were willing to give their statements. After this Ex. P-10 was written by Mr. Ibrahim at 8.10 P.M. and then and there handed over to Ahibaran Singh.

27. It is thus clear that Mr. Ibrahim took charge and remained in charge of all the proceedings that took place up to the time when Ex. P-10 was handed over by him to Ahibaran Singh and that nothing which may be described to be an investigation was done by Ahibaran Singh until Ex. p-

10 was handed over to him. It has been recently held by this Court in *Bhonda V. Rex*⁵ that an investigation under ch. 14, Criminal P.C., starts with the first step taken by the police towards the ascertainment of the offence and the culprit thereof and not before that. Ahibaran Singh has not been proved to have taken any such step before Ex. P-10 was made over to him. It was thus made over to him before the investigation had started. An investigating officer means an officer who is carrying on an investigation. There could not be an investigating officer before investigation had begun. Ahibaran Singh was, therefore, not an investigating officer when Ex. P-10 was handed over to him. Even if it be assumed that a person authorised to investigate may be deemed to be an investigating officer, also at a time before he has begun to investigate, Ahibaran Singh was not such an officer because, as found above in answer to the first question, he had no authority to investigate this crime.

28. My conclusion, therefore, is that Ex. p-10, even if it be assumed to be a statement made by Mr. Ibrahim to Ahibaran Singh, is not a statement made to the investigating officer, and that it was not handed over to Ahibaran Singh during the course of the investigation of the offence of which the applicant has been tried and convicted.

29. The last point to be considered in this connection is whether, if it be assumed that an investigation had started before Ex. P-10 was handed over by Mr. Ibrahim to Ahibaran Singh, the investigation was such as is contemplated by Section 162, Criminal P.C., that is, an investigation under chap. 14, Criminal P.C. This question falls to be determined on the assumption that an investigation had started when Ex. p-10 was made over to Ahibaran Singh and that it was handed over to him during the course of an investigation, which assumption has been found to be baseless.

30. The contention of the learned Crown counsel is that an investigation under chap. 14, Criminal P.C., means a properly authorised investigation and that an investigation of a non-cognizable offence ceases to be one under chap. 14, if the investigating officer is not properly authorised under Section 155 (2), Criminal P.C. His contention is that Ahibaran Singh was either not authorised at all or that his authority was invalid and therefore an investigation by him cannot be regarded to be an investigation under chap. 14, Criminal P.C.

31. I am of opinion that this contention is not well-founded. There are various provisions in the Criminal Procedure Code under which a police officer may hold an investigation, for example, an investigation by a police officer may be ordered under Section 196B, Criminal P.C., which section occurs in chap. 15 of the Code. Again, an investigation may be ordered by a Magistrate to be made by a police officer under Section 202 which occurs in chap. 16 of the Code. In my judgment, the expression "an investigation under this Chapter" occurring in Section 162, Criminal P.C., has been used to exclude the operation of Section 162, to investigations made under chaps. 15 or 16 or other provisions of the Code. It has a reference to the class of the investigation rather than to its strict legality.

32. Section 162, Criminal P.C., has been enacted for the protection of an accused person. To hold that a statement, made during the course of an investigation started and carried on without proper authority, would not be excluded from the prohibition contained in Section 162, would be to deprive an accused person, for no fault of his, of the protection afforded to him by the Legislature. It would put a premium on illegality and would be opposed to the intention of the Legislature and the policy underlying Section 162, Criminal P. C,

33. In my opinion, therefore, if an investigation is in all other respects an investigation under chap. 14, it would not cease to be an investigation under that Chapter within the meaning of Section 162, Criminal P.C., if it has been undertaken without necessary permission or on the strength of an invalid permission; and that the statements, recorded during the course of such investigation, would be as much hit by the provisions of Section 162, Criminal P.C., as the statements, recorded during the course of an investigation under chap. 14, properly undertaken. If, therefore, I had come to the conclusion that Ex. P-10 Is a statement made by Mr. Ibrahim to Ahibaran Singh during the course of an investigation, I would have had no hesitation in holding that the investigation was under chap. 14, and that Section 162, Criminal P.C., was applicable to the statement.

34. The result of the various points considered is that Ex. P-10, although a statement made by Mr. Ibrahim, is not a statement made by him to any person, much less to an investigating officer, and that it was not made during the course of the investigation of the offence of which the applicant has been tried and convicted.

35. I would, therefore, answer the second question in the negative.

36. The relevant facts of the Kathgodam case may now be briefly stated. Shabirul Haq, a Sub-Inspector of Special Police Establishment, presented an application to Mr. Chooramani, Sub-Divisional Magistrate of Khabhar and Tarai, on 7th November 1945. The application was addressed to the Deputy Commissioner of Nainital but was presented to the Sub-Divisional Magistrate. This application stated that the Assistant Goods Clerk of Kathgodam railway Station was in the habit of accepting bribes and that a bribe would be paid to him that day. It also contained a request that some First Class Magistrate be deputed to witness the transaction, to take down the statements of the witnesses and the Goods Clerk according to law and to issue orders for making an investigation. Mr. Chooramani decided to accompany the Sub-Inspector and witness the occurrence himself. He witnessed the occurrence which took place on 8th November 1945, and prepared a report. This report was addressed to the A.D.M. by which initials I understand the Additional District Magistrate was meant. The last paragraph of the report is as follows:

I am herewith enclosing a list of papers which I enclose along with this report. I have given a

copy of this report to Sub-Inspector for his diary.

37. While in the witness box, Mr. Chooramani made free use of this report, which has been marked as Ex. P-16, to refresh his memory and gave his statement with its help. It was contended on behalf of the applicant in this Court that Mr. Chooramani's evidence should be rejected because he had given his evidence with the help of a previous statement of his which could not be used for that purpose by reason of the provisions of Section 162, Criminal P.C. The referring Bench was satisfied that Mr. Chooramani handed over to the Sub-Inspector the copy of his report to the Additional District Magistrate during the course of investigation, but in view of the other contentions raised in the case, referred the following question for decision to this Bench:

Whether the making over of the copy of his report addressed to the Additional District Magistrate by Mr. Chooramani to the investigating officer amounted to a statement made to the investigating officer as contemplated by Section 162, Criminal P. C?

38. It is clear from the English record of the deposition of Shabirul Haq that he wanted to take the statement of the Magistrate, Mr. Chooramani, and for that purpose approached him on the night between 8th and 9th March 1945, and that Mr. Chooramani, instead of making any oral statement, handed over a copy of the report made to the Additional District Magistrate, as his statement to Shabirul Haq. It has already been observed above that if a person hands over the record of facts and events made by him to another person as his statement, it amounts to his statement to that person. The handing over of the copy of the report addressed to the Additional District Magistrate by Mr. Chooramani to the investigating officer, therefore, amounted to a statement made to the investigating officer as contemplated by Section 162, Criminal P.C.

39. It may, however, be noticed that we have not been called upon to answer the question whether ex. P-16 itself is a statement such as contemplated by Section 162, Criminal P.C. This will be a matter for decision by the referring Bench itself. There was some controversy before us as to whether Ex. p-16 is the original report sent to the Additional District Magistrate or it is the copy of the original report which was handed over to the Sub-Inspector. On the evidence of the Sub-Inspector Shabirul Haq and on an examination of the record, we were inclined to the view that it is the original report but, again this is not a question which has been referred to this Bench for decision and is a matter to be decided by the Bench itself. Only a limited question has been referred to us for decision and for the reasons already given, I answer it in the affirmative.

Raghubar Dayal, J.

40. I agree.

Wanchoo, J.

41. I agree.

42. By the Court - Criminal Revision No. 1436 of 1946 : Our answer to the question referred to us for decision is in the affirmative

43. Criminal Revision No. 184 of 1947 : Our answer to the first question referred to us is as follows : "The permission to investigate under Section 155 (2), Criminal P.C., given to Ahibaran Singh on his application dated 31st March 1946, related to the investigation of the offence, of agreeing to accept a bribe and attempting to accept a bribe, which had been committed before the said application was made and did not relate to the offence for which the applicant was tried and of which he has been convicted."

44. Our answer to the second question is in the negative.

44a. Let these answers be returned to the Bench concerned along with the record of the case.

[On the Criminal Revision No. 1436 of 1946 coming back before the Division Bench consisting of Dayal and Bhargava JJ., the following order was delivered.]

45. Pt. Shyam Lal Sharma applies in revision against his conviction under Section 161, Penal Code, for having accepted Rs. 61 as bribe for booking 61 bags of potatoes on 8th November 1945 when he was working as Assistant Goods Clerk at railway station, Kathgodam.

46. The point of law that was raised in this revision was that the Courts below were wrong in taking into consideration the evidence of Mr. Chooramani, Sub-Divisional Magistrate, who had used the written statement he had made over to the investigating officer during his deposition in Court. Mr. Chooramani witnessed the alleged transaction and then prepared a report for the Additional District Magistrate about the transaction. When approached by the investigating officer he made over a copy of that report to him. In Court he used the paper, Ex. p-16, which is addressed to the Additional District Magistrate and which ends with the statement: "I am herewith enclosing a list of papers which I enclose along with this report. I have given a copy of this report to the Sub-Inspector for his diary."

47. We at first considered that this paper Ex. p.16 was the copy which had been made over to the Sub-Inspector, and referred the following question to a Full Bench:

Whether the making over of the copy of his report addressed to the Additional District Magistrate by Mr. Chooramani to the investigating officer amounted to a Statement made to the investigating officer as contemplated by Section 162. Criminal P.C.

48. The answer of the Full Bench to this question is in the affirmative.

49. It now appears that paper Ex. p.16 is not the copy which was made over to the investigating officer, but was the original report which Mr. Chooramani had forwarded to the Additional District Magistrate. Mr. Chooramani howhere states that Ex. P. 16 is that copy which he made over to the investigating officer. What he stated is:

I made over report Ex. P.16 with all connected papers to the A.D.M.I gave a copy of my report to the Sub-Inspector.

What Mr. Dhabbirul Haq, Sub-Inspector, deposed in this connection is:

He handed over Ex. P-16 to me when I went to him. It is wrong to say that Ex. p-16 was prepared in my presence. I was given a copy of it by the Magistrate. I did not partake in the preparation of the report Ex. P. 16.

The first expression that the Magistrate handed over Ex. p 16 to him led to the impression that Ex P. 16 was the copy. The later expressions of the Sub-Inspector make it clear that Ex. P-16 is not the copy made over to him, but is the original which was forwarded to the Additional District Magistrate.

50. It appears from the papers on the record also that Ex. p. 16 is the original report. Ex. 11 the complaint, which the Sub Inspector filed in Court for the prosecution of the applicant, had an enclosure which gave the names of the witnesses and the documents and the list of documents included at serial item No. 10, the Magistrate's report. It is, therefore, clear that Ex. P. 16 is the report and not a copy of the report which Mr. Chooramani had made over to the investigating officer and whose proper place would be the case diary. We, therefore, hold that Ex. P. 16 is not the copy which was handed over to the Sub-Inspector, but is the original report which Mr. Chooramani sent to the Additional Districts Magistrate.

51. His report to the Additional District Magistrate, Ex. P 16, could be used by Mr. Chooramani for refreshing his memory and its use as such is not prohibited under Section 162, Cr. P.C. It is contended for the applicant that what Section 162, Cr. P.C., prohibits is the use of the contents of the statement and any record thereof. We are not prepared to accept this contention. Every statement in connection with any transaction must more or less contain the same set of facts. A narration of such facts become a statement to a particular person when that narration is made to that person with the intention of making a statement to that person. Such view has been expressed in the judgment of the Full Bench. It would follow, therefore, that what is barred under Section 162 Cr. P.C., is the narration of facts to the Sub-Inspector and its record and not the narration of the same facts to other persons. If it were not so, and Section 162, Cr. P.C., is to be interpreted in the way learned Counsel for the applicant wants it to be interpreted, the effect would be that the facts concerning the transaction which in the nature of things must come before

a Court of law for adjudication could not be used by the Court in view of Section 162, Criminal P.C., because those facts must ordinarily be stated by those witnesses before the investigating officer during the course of the investigation. It cannot be presumed that the Legislature intended to take away under Section 162 the right of the Courts to get from witnesses facts concerning a certain transaction about which they had to adjudicate. In fact, Section 162, Criminal P.C., is just one of the provisions concerning the procedure for the Courts to determine the accuracy of the facts alleged. To our mind Section 162, Criminal P.C., bars the use of the particular statement made to the investigating officer and not the use of identical or similar statements made to others.

52. It has also been argued that Section 162, Criminal P.C., bars the use of any record whatsoever of the statement made to a police officer, and that the original report in this case is certainly a verbatim record of what the statement of Mr. Chooramani to the investigating officer was, it being just a copy of the report to the Additional District Magistrate, and therefore Ex. P-16 cannot be used for the purpose of refreshing his memory. What is prohibited is the use of any record of a statement made to the investigating officer. Such a record cannot possibly come into existence prior to the making of the statement itself. The original report cannot be said to have been prepared after the preparation of its copy and its delivery to the investigating officer as a statement about the transaction by Mr. Chooramani.

53. We are, therefore, of opinion that there was no bar to the use of the report Ex. P-16 by Mr. Chooramani for refreshing his memory during his deposition and that, therefore, his statement is not inadmissible as contended in view of Section 162, Criminal P.C.

54. We have to accept the findings of fact arrived at by the Courts below that the applicant accepted the money as illegal gratification for booking certain goods. It follows that the applicant's conviction under Section 161, Penal Code, is correct. We, therefore, dismiss this application in revision. The applicant is on bail. He must surrender and serve out his sentence.

Cases Referred.

1A.I.R. (34) 1947 P.C. 75
249 C.W.N. 484
3A.I.R. (33) 1946 Cal. 483
4A.I.R. (34) 1947 ALL. 149
5A.I.R. (36) 1949 ALL. 364