ALLAHABAD HIGH COURT

Rudder

Vs.

State (Allahabad)

Criminal Appeal No. 68 of 1956, against order of Civil and S. J. Budaun
(V. Bhargava and Sahai, JJ.)

07.01.1956. 23.05.1956

JUDGMENT

V. Bhargava, J.

1. During the hearing of this appeal it was pointed out by learned counsel for the appellants that the appellants had been seriously prejudiced as the learned Sessions Judge during the trial had disallowed a certain question being put to one of the important witnesses named Satya Narain.

2. According to the prosecution, the murder of Pahlad took place in a ghar while he was sleeping on a cot, and only other two persons who were in the ghar at the time of the murder were Sardar Lal and Satya Narain who were also sleeping on two different cots a few paces away from the cot of Pahlad. Sardar Lal and Satya Narain are two of the witnesses on whose statements the prosecution relies to prove the case against the appellants. The murder is said to have been committed by Rudder appellant by firing two shots at Pahlad. Sardar Lal in his evidence stated that he woke up on hearing the sound of a shot being fired and thereafter saw the appellants running away which implies that he did not actually see any of the two shots being fired by Rudder appellant. The other witness, Satya Narain, who is a young boy aged 13 years also stated that he woke up on the sound of firing of a pistol and saw the three accused who were near Pahlad's cot. He went on to add that he saw the accused Rudder firing a second shot with a pistol. In this connection learned counsel for the accused, who was appearing in the trial Court, put the following question to this witness :

> Q. "Why did you not tell the Investigation Officer that you had seen the second shot being fired."

There is note by the learned Sessions Judge that this question was disallowed as it referred merely to an omission. It appears that the learned Sessions Judge took the view that this omission in the statement of witness Satya Narain made to the Investigating Officer under Section 161, Criminal Procedure Code, did not amount to a contradiction and consequently the witness could not be cross-examined as to the statement made by him to the investigating officer, in view of the

provisions of Section 182, Criminal Procedure Code.

In our opinion, the decision of the learned Sessions Judge on this question was quite wrong. The question whether a statement recorded by the Investigation Officer under Section 161, Criminal Procedure Code can be used for the purpose of challenging the deposition made by a witness in Court on the basis that he omitted to make that statement when examined by the Investigating Officer, came up for consideration in *Subedar v. State*[1], In that case there was a difference of opinion between two learned Judges of this Court and the case was thereupon referred for the opinion of a third Judge. At that stage it came up before one of us and it was held as follows :

> "When examined in Court, Manbhawan stated that he went to the spot on hearing the uproar and heard Nattha inciting Subedar to give a blow with the spade to Bhajan Lal, whereupon Subedar gave a blow on Bhajan Lal's head and Bhajan Lal fell down. Thereafter Mitthu rushed to the rescue of Bhajan Lal and wielded his lathi.

He then proceeded to give other details of the incident. When examined by the police during the investigation, he did not include these details about the beginning of the incident. He began by stating that when he reached the scene of occurrence on hearing the alarm, he saw Bhajan Lal already lying on the ground while Mitthu was present there. In the statement before the police there was, therefore, omission to mention that he had seen the beginning of the fight. It is true that all omissions do not amount to contradictions and the statements given before the police cannot be used in evidence at all for any purpose except for the purpose of bringing out a contradiction. There are, however, certain omissions which amount to contradictions and have been treated as such by this Court as well as other Courts in this country. Those are omissions relating to facts which are expected to be included in the statement before the police by a person who is giving a narrative of what he saw, on the ground that they relate to important features of the incident about which the deposition is made.

In a case of this nature, where Manbhawan was stating what he saw, he would certainly have stated to the police also the incitement by Nattha to Subedar to give a blow to Bhajan Lal and the actual infliction of that blow by Subedar if he had really witnessed that part of the incident. He could not have begun his statement to the police by saying that he saw Bhajan Lal lying on the ground unless it was true that, at the time when he reached the place of the incident, Bhajan Lal had already been injured and bad fallen down. The omission in this respect is, therefore, an omission of a very material part of the incident which amounts to a contradiction so that the statement before the police under Section 162 of the Code of Criminal Procedure was admissible in evidence and could be relied upon to bring out that contradiction during the trial so as to show that the statement made by Manbhawan in Court was not reliable, in this respect."

3. In our opinion the view expressed in the case which has been reproduced above lays down the correct principle of law and that view should be applied to the present case also. In the present case it is clear that the question which was disallowed should have been permitted by the learned Sessions Judge. Satya Narain in his deposition in Court purported to be an eye-witness of the act by which the murder of Pahlad was committed, by stating that he saw the accused Rudder firing

a second shot from the

[1] Criminal Appeal No. 77 of 1952 (All)

pistol. It appears that the defense case was that at the first stage when Satya Narain was examined by the Investigating Officer, he did not make such a statement. All he stated was that he was awakened by the firing of the shot and then he saw these three appellants standing near the cot of Pahlad. The omission was on a very material point. If this deposition in Court is believed it would mean that he is an eye-witness of the commission of the act of murder, whereas if it is disbelieved, it would mean that he did not actually witness the act by which the murder was committed. Such an omission would certainly amount to a contradiction. Had Satya Narain actually seen the second shot being fired it must be expected that he would have mentioned this fact in his statement given to the Investigating Officer. The learned Sessions Judge was, therefore, wrong in disallowing the question which was put to the witness.

4. In this connection reliance has been placed by the learned Deputy Government Advocate in support of the learned Sessions Judge on this point on the remarks by Desai, J., in the case of *Ram Bali v. State*[2], The learned Deputy Government Advocate urged that the interpretation given of Section 162, Criminal Procedure Code. In that case was a decision by a Division Bench, and if we differ from that decision, it would be appropriate that the point be referred to a larger Bench in order that the principle of law, which is of great importance, may be properly settled so far as this State is concerned. Having looked at the judgment delivered by the two learned Judges in that case we are unable to accept the contention of the learned Deputy Government Advocate that the interpretation placed on Section 162 in that case represents the view of the Bench as a whole. The other member of the Bench, Dayal, J., nowhere discussed this question in his judgment. He began his judgment by saying that he agreed with Desai, J., that the appeal of one of the appellants be disallowed and the appeal of two appellants be allowed. He then proceeded to note down briefly his reasons and added that he would not enter into a discussion of the evidence of the witnesses who were cross-examined at a very great inordinate length which led to an undue prolongation of the trial and much unnecessary expenditure of time. Proceeding on this basis, Dayal, J., did not at all discuss the question whether the omissions in the statement of certain witnesses did or did not amount to contradictions and whether it was possible to prove those omissions keeping in view the provisions of Section 162, Criminal Procedure Code. His silence on the point indicates that in his opinion it was not necessary for the decision of the appeal to enter into this question at all. He nowhere expressed his concurrence with the view expressed by Desai, J. He, of course, did not express any dissent either. In these circumstances, the views expressed by Desai, J., should be held to be the views of a single Judge of this Court and it is, therefore, in our opinion, not necessary to refer this question to a larger Bench, as we can reconsider the views expressed by a single Judge. Even Desai, J., in that decision conceded that in some cases the omission in the statement under Section 162 may amount to contradiction of the deposition in Court.

He proceeded further to hold that these are cases where what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence. With respect, we are unable to agree

with this limitation placed on the nature of the omissions by him. It is of course correct that if the omission is such that what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence, such an omission does amount to contradiction.

[2] AIR 1952 All 289

But this does not define the entire scope of the principle. There can be other omissions also on material points which should have found place in the statement made under Section 161, Criminal Procedure Code if what is stated in the deposition in Court is really correct.

5. In Criminal Appeal No. 77 of 1952 (All), to which we have already referred above, there was an omission by witness Manbhawan about seeing a part of the incident. When he was examined by the Investigating Officer he stated that he came on the scene of occurrence and then, omitting part of the incident, put forward by the prosecution, began his deposition by relating a later part of the incident. It was held that the omission in his statement to the investigating Officer about the earlier part of the incident amounted to contradiction and could be used for the purpose of disbelieving his deposition in Court that he had seen that earlier part of the incident. His statement before the Investigating Officer did not expressly or impliedly negative the fact that that part of the incident had taken place. It only resulted in negativing his assertion that he had seen that part of the incident. It Was held, and, in our opinion, rightly, that the omission in the statement to the Investigating officer in these circumstances amounted to contradiction and could be brought out in the cross-examination of the witness under Section 162, Criminal Procedure Code. In the present case the position is very similar.

6. Desai, J., also went on to hold that if the statement under Section 162, Criminal Procedure Code can be reconciled with the deposition in Court and can stand with it then there is absolutely no contradiction. The question whether the deposition in Court can or cannot be reconciled with the statement recorded under Section 161, Criminal Procedure Code can only be settled after the omission has been brought to the notice of the witness and the witness has had an opportunity to give his explanation. If after the explanation it appears that the two are reconcilable, it would cease to be a contradiction. But that can happen not only in the case of an omission, but even in the case of an apparent contradiction of positive facts included in the deposition and the statement under Section 161 Criminal Procedure Code. There may appear to be a contradiction between the deposition in court and the statement under Section 161 Criminal Procedure Code but when it is put to the witness, he may give an explanation which may reconcile them, whereupon the contradiction may cease to be a contradiction. The mere fact that he may possibly reconcile the two statements cannot affect the applicability of the proviso to Section 162 Criminal Procedure Code in the case of an omission which is of such a nature that it can be held to be a contradiction.

7. In these circumstances it appears to us that the appellants were deprived of a valuable right of properly cross-examining Satya Narain witness and this defect in trial has to be cured. We, therefore, direct that Satya Narain shall be summoned for further cross examination in this court.

The case will be listed before this bench as a part heard case as early as possible when the court reopens after the vacation. It is not possible to decide this case earlier as learned counsel for both parties are agreed that it will not be possible to examine this witness before the 1st June 1956 and it is not possible for this bench to meet thereafter until the court re-opens. When Satya Narain is cross-examined on this point it may also become necessary to examine the investigating officer in order to prove the statement or part of the statement made by Satya Narain to him under Section 161 Criminal Procedure Code. Further during the hearing of the case it has appeared that some explanation from the investigating officer is needed with regard to the points of compass marked in the site plan prepared by him. In these circumstances the investigating officer shall also be summoned to appear on that very date. The investigating officer to be summoned is Sub Inspector Sri Gopal who was second officer, police station Usehat in May and June 1955.

8. Learned counsel are agreed that this case may come up before us next on Monday the 23rd July 1956. Office must take steps to see that both witnesses are summoned for that date well in advance.
Order accordingly.