CALCUTTA HIGH COURT

Emperor

Vs

Lal Mia

(Khundkar ,J.)

21.01.1943

JUDGMENT

Khundkar, J.

1. This is a reference under Section 374, Criminal P.C., for confirmation of the sentence of death passed upon two persons, Lai Mia and Abdur Rashid, who were, tried for the murder of a man called Abdul Sattar Muktar. The case for the prosecution, briefly stated, was as follows : On the night of 17th September 1942, the two accused, who were probably accompanied by others, effect an entry into the hut in which Abdul Sattar Muktar was sleeping, and the intruders perpetrated an assault upon him with cutting weapons. Many of the injuries inflicted were fatal. The assailants ran away, and the injured man made sounds which attracted the attention of the neighbours. A number of persons, who were living in other huts of the deceased's bari, came to the spot, and to them he stated that Fazu and Ujir Ali Muktar had done for him. He then expired. Information of the occurrence was carried to the police station by one Dudu Mia, a relation of the deceased, and it was recorded at 7 o'clock on the following morning. It is to be noted, that according to the prosecution, the deceased did not mention either Abdur Rashid or Lal Mia as his assailants. But, as just stated, the case for the prosecution would appear to be, that more than two men entered the hut when the deceased was attacked, and that the present two accused persons were among them.

2. The only real evidence against these two persons consists of the testimony of four witnesses, P.Ws. 4, 5, 9 and 10 who state, that they were proceeding to the house of the deceased upon hearing a noise when they saw and recognized the two accused persons running away, and that both of them were armed with cutting weapons. There is really no other evidence against the accused persons, and the testimony of these four witnesses has got to be carefully examined. Witness 4, Habib Ulla, is a servant of the deceased man. Witness 5, Abdul Kasem, is a schoolstudent. On the night of the occurrence, these two persons were sleeping in one of the huts of the deceased's bari, which is no more than 25 cubits from the hut in which the deceased was sleeping. The evidence of witness 4 is that he was aroused from slumber at about midnight by a sound which led him to think that cattle had broken, out of the cowshed. He roused P.W. 5, Abdul Kasem, who lighted a lamp. It was raining. There was another man in the hut called Abdul Malek, who was also roused by P.W. 4. The three of them proceeded to the cattle-shed, but finding the cattle safely tethered they were returning when they discovered that the door of the

deceased Abdul Sattar's hut was open. They then heard groans. Just at this time they saw the two accused Lal Mia and Abdur Rashid running away. The two accused were at a distance of 10 cubits from them, but the witnesses were able to recognize them by the light of the lamp which the witnesses had with them. These three witnesses found the deceased lying outside the steps of his hut, and they carried him inside. He said before he died that he had been struck by Fazu and Ujir, and that he himself had injured three of his assailants with a spear. The two sisters of the deceased, who were living in adjoining hut, arrived on the scene. Several of the villagers also came. Dudu was sent to the police station to lay the first information. Before we proceed any further, we would point out that the two sisters of the deceased who are said to have come to the spot immediately after the crime, have not been examined by the prosecution, nor has the man Abdul Malek. Coming now to the first information report, we find that what the informant stated was this: When Abdul Sattar Muktar was being struck, he cried out and fell struggling outside on the eaves of that ghur. On hearing his cries, his sisters came running with the lamp in hand from the weat bhiti ghur towards the bedroom of Abdul Sattar Muktar and found Abdul Sattar lying on the eaves. When they shouted out, his servants, Habu Mia and Abdul Malek and Master Munshi who were in the outhouse of Abdul Sattar Muktar eame running towards the bari and they carried Abdul Sattar Muktar from the eaves into his bedroom and kept him lying on the floor with his head towards the south. On hearing a hue and cry in the house of Abdul Sattar Mia, I went to his house after 12 o'clock in the night. My house stands on the eastern bank of the tank of Abdul Sattar Muktar's house. I found Abdul Sattar Muktar alive but he could not speak. On questioning his sisters, Afzal Bia and Madan Bia and his labourer Habu, I came to learn that the Muktar, after he had been brought inside the ghur had stated 'Ujir Ali Muktar has done away with me. There was none else in the Muktar's bedroom. His wife by the last marriage is on a trip to her father's house. Abdul Sattar Mia married the daughter of Uzir Ali Muktar also. She is in her father's house now. The Muktar Saheb does not bring her. And he has many litigations and enmity with his father-in-law, Ujir Ali Muktar.... Then on a hue and cry being raised, Osman Ali, Ana Mia, Lokeman, Fazu Bepari and many others of the village came to the house of Abdur Sattar Mia in that very night, saw the injuries on the body of Abdul Sattar Mia and found him dead.

3. There are two other witnesses who have testified that they recognised the two accused persona when they were running away. These are P.Ws. 9 and 10, Sk. Ahmad and Suleiman. According to them, at about 12-80 A.M. they were fishing in a tank to the east of the house of the deceased. Upon hearing a row in the direction of that house they went towards it. They saw the two accused, Abdur Rashid and Lal Mia, coming out of the deceased's bari armed with daos. These witnesses had a hurricane lantern with them, and recognised the accused as the latter passed within three or four cubits of them. P.W. 10, Suleiman and one other witness, P.W. 14, Sk. Ahmed, said that when they entered the deceased's hut he was still alive, and that he was saying that Fazu and Djir Ali had done away with him. Altogether four witnesses deposed that the dying man mentioned Fazu and Ujir Ali as his assailants. Yet, neither of these persons were sent up to stand their trial. Upon this state of the evidence the learned Judge charged the jury as follows: Unless you believe the evidence of P.Ws., Habib Ulla, Abdul Kasim, Shaikh Ahmad and Suleiman, who say that they saw the accused running away from the direction of the scene of the occurrence, it will not be safe to cannot them on the remaining evidence. Habib Ulla was admittedly a servant of the deceased for many years and Abdul Kasem was a tutor - working in the deceased's house.... There is nothing whatever to show any enmity between them and the accused persons. P.W. 9, Shaikh Ahmed and P.W. 10, Suleiman are distantly (if at all) related to the deceased whereas the accused Abdur Rashid is a close relative of the deceased a first cousin

and would therefore be also a relative of the deceased's relatives. It is, therefore, for you to consider whether the relationship would, by itself, justify the rejection of the evidence of P.Ws. 9 and 10. Habib Ulla and Abdul Kasem say that they recognised the two accused by the light of a 'Kupibati' they had with them, and Shaik Ahmad and Suleiman say that they recognised them when they ran past them face to face by the 'light of a hurricane lantern.'

4. As far as the evidence upon the record goes, this direction would be unexceptionable. But the learned Judge's letter of reference to this Court reveals a somewhat startling state of affairs. That letter is as follows: Under Section 374, Criminal P.C., I have the honour to submit herewith the records of the case noted above to be laid before the Hon'ble High Court for confirmation of the sentence of death passed by me on the accused Lal Mia and Abdul Rashid. In this connection one unsatisfactory circumstance which was not made use of by the defence in either of the two trials, may be placed before their Lordships. The case obviously depends on the evidence of the four witnesses, Habibullah (P.W. 4), Abdul Kasem Munshi (P.W. 5), Shaikh Ahmad (P.W. 9) and Suleiman (P.W. 10), who claim to have seen the two accused persons running away from the scene of the murder with daes in their hands. It appears from the police diary, however, that Habibullah and Abul Kasem did not disclose this fact when they were first examined by the police, and that Shaikh Ahmed and Suleiman mentioned Lal Mian alone when they were examined on 21st September 1941. The relevant entries in the police diary are noted below:

(See next page for the entries) In view of the fact that there had been an earlier trial, I did not think it necessary to refer to the police diary in the course of the trial : I thought that every weak point in the prosecution case must have been known to the defence by this time. When I did refer to the diary it was too late to get this fact from the investigating officer who had already

Page of police diary.	Date	Witnesses examined.	Remarks.
6	18-9-1941.	Habib Ulla & Abul	No mention of any
30	21-9-1941.	Kasem Sk. Ahmed & Suleiman	recognition. Mentioned Lal Mia alone as having been recognised while running away.
40	24-9-1941.	Habib Ulla	No mention of recognition (he was examined on some other point).
47	30-9-1941.	Habib Ulla	Recognition of Lal Mian and Abdul Rashid mentioned for the first time.

been examined and discharged. The Hon'ble Judges may look into the police diary while hearing this reference and the police diary is therefore sent herewith. The relevant pages of the diary have been flagged. What inference should be drawn from the late, disclosure of the names of the accused by the witnesses to the police will be a matter for the Hon'ble Court to consider. There

appears to have been a strenuous attempt by the relatives of the deceased to save the accused persons (who are closely related to the deceased and therefore to the relatives of the deceased) and this is one possible explanation of this concealment. The other explanation is obvious.

5. The police investigation commenced on 18 September on which date P.W. 4, Habib Ulla was first questioned. He did not say that he had seen any one running away. Habib Ullah was again questioned on the 24th and still said nothing. It was not till the 30th that he for the first time narrated this story of recognition to the police. P.W. 5 Abdul Kasem was questioned by the investigating officer on the 18th and he did not either on that date, or at any time afterwards say anything to the police about having seen anybody running away. On the 21st, P.W. 9 Sheikh Ahmed, and P.W. 10 Suleiman, stated to the investigating officer that they had recognised only one of the accused, Lal Mia. The fact that these witnesses, upon whose story of recognition the conviction of the accused on a charge of murder entirely depends, did not narrate that story to the investigating officer, is a circumstance of the most vital importance. The jury knew nothing of this circumstance, and the accused have consequently not had a fair trial. The learned Deputy Legal Remembrancer has taken two points on behalf of the Crown. He has contended, firstly, that inasmuch as the defence did not apply for copies of the statements made to the police during investigation, and did not elicit from these witnesses in cross-examination the statements made by them to the investigating officer, those statements could not be brought on the record in the manner contemplated by proviso 1 to Section 162, Criminal P.C., and that not being on the record, the Judge could not refer to them in his summing up.

6. It is true that the defence did not apply for copies of the statements these witnesses had made to the investigating officer, nor were the witnesses cross-examined about those statements. But that does not conJ elude the matter. Section 162, Criminal P.C., does not prevent the Judge from looking into the record of the police investigation. This was a murder case, and as the evidence was not free from infirmities the Judge ought to have acquainted himself, in the interest of justice, with what the most material and indeed the only important witnesses for the prosecution had said during police investigation. Had he done so, he could without any impropriety have caused the discrepancy between the statements made by these witnesses to the investigating officer and their evidence at the trial, to be, brought on the record by himself putting questions to the witnesses under Section 165, Evidence Act. There is, in my opinion, nothing in Section 162, Criminal P.C., to prevent the Judge, as distinct from the prosecution or the defence, from putting to witnesses for the prosecution questions otherwise permissible, if justice obviously demands such a course. In the preyent case, we are strongly of the opinion that this is what, in the interests of justice, the learned Judge should have done. But he did not look at the record of the police investigation until after the investigation officer had been examined and discharged as a witness. Even at this stage he could have recalled the officer and P.Ws. 4, 6, 9 and 10, and questioned them in the manner provided by Section 165, Evidence Act. It is regrettable that he did not do so. The result, in our opinion, has been a mistrial, inasmuch as the accused have been adjudged guilty by a jury which was not in possession of material facts of a most important character, which though legally available, were not elicited at the trial.

7. The learned Deputy Legal Remembrancer's second contention, in the alternative, is that we should direct the accused to be retried. These two accused persons have al-ready been twice tried on the present charge, and although this would be no reason for refusing to order a third trial in a

proper ease, we have to consider whether the evidence here is of such a nature as to make another trial desirable for the ends of justice. This question need not detain us. Sufficient has been said to indicate how unreliable the evidence for the prosecution is. I refer again to a few facts. Neighbours who arrived, on the scene immediately after the occurrence, and who must have heard what was then being said have not been examined. Two persons who are alleged to have been named by the dying man as his assailants, have not been sent up to stand their trial. Witnesses who profess to have recognised the two accused as persons who were running away, did not say anything about this at the earliest opportunity when they were examined by the police. We are convinced that in such circumstances no useful purpose could be served by directing a re-trial. The accused are acquitted and they must be set at liberty forthwith.

Sen, J.

8. On the night of 17th September last, some person or persons entered the hut of the deceased Abdul Sattar Muktar of Daulatpur and committed a murderous assault upon him resulting in his death within a short time thereof. The cries of the deceased were heard by some of the neighbours, amongst whom was one Dudu Mia. He came on the scene while the deceased was still alive and later in the morning he went to the thana and lodged information. He stated that he had ascertained while he was at the house of the deceased that the deceased before dying had made the following statement, "Ujir Ali Muktar has done away with me." No one else was implicated in this information. The police took up investigations and sent up the two appellants Lal Mia and Abdur Rashid for trial on the charge of the murder of Abdul Sattar Muktar. The two accused have been found guilty under Section 302/34, Penal Code, by the unanimous verdict of the jury. The learned Judge accepting that verdict has sentenced both the accused to death and he has sent the matter to us for confirmation of the death sentence. The accused have also appealed.

9. As I have indicated before, the accused were not mentioned in the first information report. At the trial, however, evidence implicating the accused was given which may be summarised as follows : Four persons Habib Ullah, witness 4, Abul Kasem, witness 5, Sk. Ahmed, witness 9 and Suleiman, witness 10, all say that on hearing the cries of the deceased they went towards the deceased's house and at that time they saw the accused Abdur Rashid and Lal Mia coming out of the bari of the deceased, one armed with a chheni and the other with a dao. In addition to this, evidence was given by one Ganu Mia that on the night of the murder Abdur Rashid suddenly appeared at his house at about 1 or 2 A.M. and told him that he and Lal Mia had murdered Abdul Sattar Muktar. Further, two circumstances were relied upon by the Crown. The first circumstance was that both the accused were absconding after the occurrence and the second that certain injuries were found on the persons of the accused which supported the statement of the deceased that he had wounded some of his assailants. It is apparent from this summary of the evidence that the most important evidence against the accused is that given by the four witnesses who say that they saw the accused running away from the bari of Abdul Sattar Muktar armed with a chheni and a dao. The learned Judge took this view and stated it forcibly before the jury thus: Unless you believe the evidence of P.Ws. Habib Ulla, Abul Kasem, Shaikh Ahmed and Suleiman who Bay that they saw the accused running away from the direction of the scene of the occurrence it will not be safe to convict them on the remaining evidence.

10. Again he says:The four witnesses named above are therefore by far the moat important witnesses, and the whole case depends on whether you believe them or not.

11. After doing this he makes further remarks regarding the credibility of these witnesses and indicated a view that there was no reason to disbelieve them. I must now turn to a most unusual circumstance in this case. In his letter of reference to us the learned Judge says that it appears from the police diary that of the above mentioned four witnesses Abul Kasem did not mention to the police, anything about his having recognised either of the accused, Shaikh Ahmed and Suleiman mentioned Lal Mia alone, Habib Ulla when first examined by the police on 18th September did not mention anything about recognising the accused. On 30th September, that is to say, 12 days after the in vestigation had commenced, Habib Ullah for the first time stated that he had recognised Lal Mia and Abdur Rashid. The learned Judge says that owing to the fact that there had been an earlier trial he did not think it necessary to look into the police diary in the course of the trial. Then he says: I thought that every weak point in the prosecution case must have been known to the defence by this time. When I aid refer to the diary it was too late to get this fact from the investigating officer who had already been examined and discharged.

12. He goes on to observe that we may look into the police diary at the time of hearing this reference and draw such inference from it as we think proper. It is obvious from what has been said above that material which was very valuable to the accused and which was very damaging to the prosecution has not been placed before the jury. There can be no doubt that the statements in the police diary very seriously affect the credibility of the four most important witnesses in this case and that these statements were admissible in evidence in favour of the accused. In these circumstances, I consider that the accused have not had a fair trial and that the order of conviction and sentence cannot stand. The learned Deputy Legal Remembrancer placed some arguments before us with which I now propose to deal. He said, first, that the statements of these four witnesses recorded in the police papers could not be placed before the jury because the accused had not asked for them. His contention is that it was not the business of the Judge on his own initiative to place these matters before the jury and that when the accused did not ask for copies of the statements of these witnesses to the police it was not open to the Judge to do anything in the matter. In support of his argument he drew my attention to the provisions of Section 162, Criminal P.C. That section says that no statement made by any person to a police officer in the course of an investigation whether it be recorded or not shall be used for any purpose save as provided in proviso (1) to the section. Proviso (1) says that when any witness, whose statement has been reduced into writing by the police in accordance with the provisions of the Code is called for the prosecution, the Court shall, on the request of the accused, refer to such writing and give the accused a copy thereof for the purpose of using it in order to contradict the witnesses in the manner provided by Section 145, Evidence Act. The argument of the learned Deputy Legal Remembrancer is that, as the first part" of Section 162 prohibits the use of the statement of a witness to a police officer for any purpose other than that subsequently provided for in the proviso and as the proviso says that the Court shall, on the request of the accused, refer to the statement and give the accused a copy thereof, the Court has no power to do anything suo motu.

13. In my opinion, this is a misreading of the section. The first part of Section 162 says that the statement made by a person to a police officer during investigation cannot be used for any purpose other than that mentioned in the proviso. I stress the word purpose. The purpose mentioned in the proviso is the purpose of contradicting the evidence given in favour of the Crown by a prosecution witness in Court by the use of the previous statement made by such

witness to the police officer. The purpose is to discredit the evidence given in favour of the prosecution by a witness for the Crown. The section prohibits the use of the statement for any other purpose than this. It does not say that the statement can only be used, at the request of the accused. The limitation or restriction imposed in the first part of Section 162, Criminal P.C., relates to this purpose for which the statement may be used; it does not relate to the procedure which may be adopted to effect this purpose. The proviso which sets out the limited purpose also mentions the way in which an accused person may obtain a copy of the statement of a witness to the police in order that he may use it for the purpose mentioned but it does not in any way purport to take away the power that lies in the Court to look into any document that it considers necessary to look into for the ends of justice and to put such questions to a witness as it may consider necessary to elicit the truth. I realise that the proviso would prevent the Court from using statements made by a person to a police officer in the course of investigation for any other purpose than that mentioned in the proviso but it does not in any other way affect the power that lies in the Court to look into documents or put questions to witnesses suo motu. It seems to me to be absurd to suggest that a Judge cannot put a question to a witness which a party may put. In this connection I would refer to the provisions of Section 165, Evidence Act, where the necessity of clothing the Judge with very wide powers to put questions to witnesses and to look into documents is recognized and provided for. This is what the section says: The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

14. There are two provisos to the section but I need not refer to them as they deal with matters which are not relevant to the point under discussion; there is, in my opinion, nothing in Section 162, Criminal P.C., which presents a Judge from looking into the police (diaries suo motu and himself using the statement of a person examined by the police recorded therein for the purpose of contradicting such person when he gives evidence in favour of the Crown as a prosecution witness. The Judge may do this or he may make over the recorded statement to the lawyer for the accused so that he may use it for this purpose. In my opinion, in a case of the present description where the evidence given in Court implicates persons who are not mentioned in the first information report it is always advisable for the Judge to look into the police papers in order to ascertain whether the persons implicated by witnesses at the trial had been implicated by them during the investigation.

15. The next point urged by the learned Deputy Legal Remembrancer is that the learned Judge having discovered these materials after the trial, he could do nothing in the matter and that this Court is also for the same reason powerless to use these materials in this reference and appeal. 1 am unable to accept this view. So far as I am aware there is nothing in the Code, or anywhere else which would prevent us from taking into consideration the facts brought to our notice by the learned Sessions Judge for the purpose of determining the proper course which we should follow in the light of these facts. It is a strange proposition to put before this Court that in a case where two persons have been sentenced to. death it is powerless to act when it is apprised of the fact that valuable material which could and should have been put in evidence in favour of the accused was not put before the jury owing to the [inaptitude of the lawyers for the accused or I to the apathy or lack of vigilance on the part of the Judge. I hold the view that we jean make full use of

these materials before us for the purpose of doing justice. As an appellate Court, we can ourselves take additional evidence or direct such evidence to be taken under Section 428, Criminal P.C. As a Court dealing with a reference under Section 374, Criminal P.C., we can make a further enquiry or take additional evidence or direct these things to be done by the Sessions Court under Section 375, Criminal P.C. It is therefore idle to suggest that we are powerless to do anything upon being apprised of the facts that valuable evidence in favour of the accused which could have been adduced has not been given. Again, on going through the letter of reference carefully, it becomes clear that the learned Sessions Judge became aware of these facts at a time when it was possible for him PC remedy matters himself. Pie says: When I did refer to the diary it was too late to get this fact from the investigating officer, who had already been examined and discharged.

16. It is clear from this that he was aware of this matter before he passed sentence, otherwise he most certainly would have said that he could do nothing in the matter as he had already passed sentence on the accused. He does not say this but he says that he could do nothing because it was too late to recall the investigating officer. I find it difficult to understand the attitude of the learned Judge. Here were two persons being tried for their lives; the Judge becomes aware of a very material piece of evidence which would go in favour of the accused and which would throw doubt upon the truth of the evidence given by the four most important witnesses for the Crown; in spite of having this knowledge the Judge goes on with the trial and charges the jury as if these materials were not in existence and on the jury finding the accused guilty he condemns them to death. His reason for pursuing this course and not placing this evidence before the jury is that the investigating officer had already been examined and discharged. It seems to me to be a most callous way of proceeding with the trial of an accused person. Surely, it ought to be obvious to any fair-minded person and much more so to a Judge that the inconvenience caused by postponing the trial and recalling the investigating officer is a trivial matter when the lives of two persons are at stake. The learned Judge had ample power to recall the investigating officer and any of the other witnesses; he acted most injudiciously and improperly in not exercising that power. I agree with my learned brother that upon the materials before us and in the circumstances mentioned by him the only course for us to follow is to set aside the conviction and sentence and acquit the accused.