CALCUTTA HIGH COURT

Bejoy Chand Patra

Vs.

The State

Criminal Appeal No. 252 of 1949

(Harries, C.J. and Bachawat, J.)

24.02.1950

JUDGMENT

Harries, C.J.

1. This is an appeal from a conviction under Section 307, Penal Code, and a sentence of six years' rigorous imprisonment.

2. The charge against the appellant was that he on 13th July 1949 had attempted to murder his cousin, Kumud Chandra Patra, P. W. 1. The trial took place before a learned Assistant Sessions Judge sitting with a jury. The jury unanimously returned a verdict of guilty under Section 307, Penal Code, and agreeing with that verdict the learned Assistant Sessions Judge sentenced the appellant as I have indicated.

3. The facts of the case were comparatively simple. The appellant and the injured man, Kumud, were cousins and apparently were co-sharers in a tank near the village. Alongside this tank ran a roadway or a pathway and it is said on behalf of the prosecution that the appellant claimed the sole right in this approach to the tank. His right was disputed by the injured man and this, it is alleged, led to a quarrel between them sometime before the occurrence. On the day of the occurrence, namely, 18th July 1949 the injured man Kumud was standing at the edge of the water of the tank washing his hands when it is alleged that the appellant came from behind and struck Kumud with a big bhojali causing a severe bleeding injury. Kumud turned round, but the appellant showered further blows on him. Kumud being injured, amongst other places, on his hands as he was endeavouring to ward off the blows. The prosecution states that as many as 17 injuries were caused and Kumud was felled to the ground.

4. The shouts of the injured man brought a number of persons to the scene and on seeing these persons the appellant, it is said, ran away. In due course information was given to the police and this case was instituted against the appellant.

5. The defense was that the injured man had been injured by the appellant's wife who had to defend herself against an attempt by Kumud Patra to outrage her modesty or worse.

6. There were a number of eye-witnesses or people who heard cries and rushed to the scene. These persons appear to have been examined by the police under Section 161, Criminal Procedure Code, but the police had not complied with the mandatory provisions of that section.

7. Section 161, Criminal Procedure Code, is in these terms :

> "(1) Any police officer making an investigation under this chapter or any police officer not below such rank as the Provincial Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.
> (2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.
> (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement, of each such person whose statement he records."

8. An investigating officer is not bound to record the statements of a witness. That seems clear from sub-sections (3) which says that the police officer may reduce into writing any statement made to him. However, the sub-section provides that if he does reduce statements into writing he must make a separate record of the statement of each of the persons whose statements he records. In other words, if a police officer examines a number of witnesses he cannot record a condensed version of the examination of all of them or a precis of what the witnesses are supposed to have said. He must record what each witness says. He cannot for example record that witnesses A, B and C said so and so. Neither can he lawfully do what police officers frequently do, that is, record the statement of A and then add that witnesses B and C corroborate what A says. If he purports to reduce the statements into writing he must record the statement of each of the witnesses whom he examines.

9. In this case, as I have said, although a number of witnesses were examined their exact statements were not recorded. Whilst the investigating officer was being cross-examined an attempt was made to prove from him certain statements which the witnesses must have made in their examination under Section 161. The prosecution objected because the statements had not been separately recorded and were in a condensed or what has been referred to in this Court as a boiled form. The learned Assistant Sessions Judge upheld this objection in an order dated 16th November 1949 and observed as follows :

> "I have gone through the police diary; no statements appear to have been recorded by the S.I. (P. W. 12) under Section 161, Criminal Procedure Code. What he did was only to note the gist of the statements of the persons examined by him. So the learned pleader for the defense cannot be allowed to cross-examine the said witnesses with reference to the so-called statements of the prosecution witnesses named above in the police diary under Section 162, Criminal Procedure Code. The prayer is refused."

10. There appears to be no doubt that a number of witnesses were examined and the police purported in the diary to give the gist of the statements of the witnesses examined. Section 161 (3) of the Code makes it clear that if a police officer reduces into writing any statement made to him in the course of the examination he shall make a separate record of the statement of each person whose statement he records. He cannot give the gist of what a witness or witnesses have said. If he has recorded the gist then he has improperly recorded the statement which he should have recorded in full in the case of each witness under sub-sections (3) of Section 161. It appears to me in this case that the learned Judge has come to the conclusion that a precis or gist of statements were recorded and that is contrary to Section 161 (2).

11. It has been held by their Lordships of the Privy Council that though the police are bound to record the statement as made, nevertheless if such is not done the evidence of the witness does not become inadmissible. The cases of their Lordships of the Privy Council are *Pulukuri Kottaya v. Emperor*[1], and *Zahiruddin v. Emperor*[2], Their Lordships however in both these cases pointed out that the failure to comply with the provisions of Section 161, Criminal Procedure Code, might throw very grave doubt upon the evidence of the witnesses and it was a matter which the Court was entitled to consider when dealing with the credibility of the witnesses.

12. This point as to the admissibility of evidence of witnesses whose statements have been improperly recorded by the police was considered by a Bench of this Court in the case of *Lakshman Chandra v. Emperor*[3], The Bench held that failure to supply copies of statements of witnesses recorded under Section 161, Criminal Procedure Code, either because the statements were lost, destroyed or were recorded in a boiled form in contravention of sub-sections (3) of that section does not make the evidence of those witnesses inadmissible. The Bench however held that in such circumstances if the trial is by a jury, the Judge should give proper directions to the jury as regards the weight to be given to such evidence which the accused had no opportunity to test by cross examination in some particulars. If such statements were deliberately destroyed or were recorded in a boiled form in contravention of law, that would be tantamount to withholding of evidence by the prosecution and a presumption might be raised under Section 114, Evidence Act, 1872, that the evidence if produced would have gone against the prosecution.

13. The statements of witnesses were undoubtedly recorded in this case in a condensed or, if I may use the words of the Bench which decided Lakshman Chandra Ghose's case (52 CWN 401 : AIR 1948 Calcutta 278 : 49 Cr LJ 469), in a boiled form contrary to the express provisions of sub-sections (3) of Section 161. This Bench held that where such was the case the jury should be directed that the police had not observed the law and that the jury might, if they thought proper, presume under Section 114, Evidence Act, that if these statements had been recorded the witnesses might well have been flatly contradicted.

14. We are bound by the case of *Lakshman Chandra Ghose v. Emperor*[4] and therefore we are bound to hold that in this

[1]51 CWN 474 : (AIR 1947 PC 67 : 48 Cr LJ 533) [3]52 CWN 401 : (AIR 1948 Cal 278 : 49 Cr LJ 469)
[2]51 CWN 555 : (AIR 1947 PC 75 : 48 Cr LJ 679) [4](52 CWN 401 : AIR 1948 Cal278 : 49 Cr LJ 469)

case where no reference whatsoever is made to the manner in which these statements were recorded in the charge to the jury, the charge is defective. The jury should have been warned as to the danger of accepting these witnesses in the circumstances as witnesses of truth and should

have been told that it was open to them, if they thought proper, to disbelieve these witnesses on the assumption that their statements, if properly recorded, would have contradicted their evidence in Court. It appears to me that in the present case the failure to warn the jury of the effect of the non-compliance with sub-sections (3) of Section 161 vitiates the verdict. The verdict may well have been otherwise if the jury had been warned and properly directed concerning their duty in approaching the evidence for the prosecution. That being so, the verdict cannot stand and must be set aside.

15. It appears to me that this is a case in which there should be a retrial. There is a good deal of evidence, but that is hotly denied and the defense have put forward a very different version. It is a case pre-eminently fitted for decision by a jury and that being so I think a new trial should be ordered.

16. I should like to mention that when the new trial is held the learned Judge presiding must carefully consider whether or not cross examination to contradict the witnesses is possible from the condensed or boiled statements recorded by the police. If it is possible from those condensed statements to make out what a witness said to the police then such can be put to the witness to contradict him or her under Section 162, Criminal Procedure Code. On the other hand, if the actual statements of the witnesses cannot be deduced from the gist which was recorded then the learned Judge must treat the case as one in which statements of witnesses were recorded but in contravention of Section 161(3) of the Code, and consequently must direct the jury as provided for in the case of *Lakshman Chandra Ghose v. Emperor*[5], and in accordance with the observations which I have made in this judgment.

17. If, however, the witnesses can be cross examined and confronted with what must have been their statements to the police in order to contradict the witnesses then of course the jury can draw no adverse inference from a failure properly to record the statements. The learned Judge should consider the statements as recorded and come to the conclusion whether or not they can be intelligently put to the witnesses. If they can be put then it cannot properly be held that the statements were improperly recorded in violation of Section 161 (3). For the purposes of this judgment, I must assume that they were improperly recorded by reason of the order which the learned Judge passed forbidding any questions on these statements.

18. Before concluding I should like to point out that if it is possible to deduce from the gist recorded what witnesses said then what each witness said must be put to the witness if it is intended to contradict the witness by use of such statement. It is not sufficient to obtain proof of the statements from the investigating officer and then ask the jury to hold that the witnesses have contradicted themselves. A previous statement in writing cannot be used to contradict a witness unless that witness has had an opportunity of dealing with the statement and explaining it away if possible. This is clear from Section 145, Evidence Act, which provides :

[5]52 CWN 401 : (AIR 1948 Cal 278 : 49 Cr LJ 469)

> "A witness may be cross examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

19. I merely point out the proper procedure to be followed because in the hearing the first attempt to use these statements if they could be used at all appears to have been made in the cross-examination of the investigating officer.

20. In the result therefore this appeal is allowed and the verdict of the jury and the conviction and sentence are set aside and the appellant will be retried by a Judge of the rank of Sessions Judge, other than the Judge who presided over the original trial, sitting with a jury. In this trial the statements of witnesses if they can be deduced from the gist must be allowed to be put to the witnesses to contradict them. But if the statements of witnesses cannot be deduced from the gist then in his charge to the jury the learned Judge will deal with the failure properly to record these statements as directed in Lakshman Chandra Ghose's case (52 CWN 401 : AIR 1948 Calcutta 278 : 49 Cr LJ 469) and in this judgment. The accused should be furnished with a copy of this gist of the statements whether such can or cannot be used in cross-examination. The fact that the statements cannot be used is no ground for denying the right of the accused to these statements.
21. The appellant will continue on the same bail until the commencement of the retrial. Whether he will continue on bail during that trial will be a matter for the learned Judge presiding.

Bachawat, J.

22. I agree.

Appeal allowed.