

## BALESHWAR RAI AND OTHERS

1962

April 26.

v.

## THE STATE OF BIHAR

(K. C. DAS GUPTA, J. R. MUDHOLKAR and T. L. VENKATARAMA AIYAR, JJ.)

*Criminal Procedure—Statement made to investigating officer—If and when barred from being proved in evidence—“The period of investigation” and “Course of investigation”—If, Synonymous—Code of Criminal Procedure (Act V of 1898), s. 162.*

Section 162 of the Code of Criminal Procedure only bare proof of statement made to an investigating officer during the course of investigation. It does not say that every statement made during the period of investigation is barred from being proved in evidence. For a statement to come within the purview of s. 162, it must not merely be made during the period of investigation but also in the course of investigation. The two things, “the period of investigation” and “Course of investigation” are not synonymous. Section 162 is aimed at statements recorded by a Police Officer while investigating into an offence. This is clear from the opening words s. 162. They speak only of statement made to a police officer during the course of investigation. This implies that the statement sought to be excluded from evidence must be ascribable to the enquiry conducted by the investigating office and not one which is de-hors the enquiry.

**CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 176 to 178 of 1961.**

Appeals by special leave from the judgment and order dated August 10, 1961, of the Patna High Court in Cr. A. No. 152 of 1961 and Death Reference No. 3 of 1961.

*Sushil Kumar Jha, Subodh Kumar Jha and R. C. Prashad, for the appellants.*

*C. K. Daphtry, Solicitor General of India and S. P. Verma, for the respondents.*

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1962. April 26. The Judgment of the Court was delivered by :—

MUDHOLKAR, J.—This judgment will govern Criminal Appeals nos. 177 and 178 also. All these three appeals arise out of the same trial. The learned Additional Sessions Judge, Monghyr who conducted the trial convicted the appellant, Ramchandra Chaudhary who is appellant in Criminal Appeal No. 177 of 1961 for an offence under s. 302 Indian Penal Code. He also convicted Baleswar Rai *alias* Nepali Master, appellant in this appeal and Jogendra Chaudhary, appellant in Criminal Appeal No. 178 of 1961 of an offence under s. 302 read with s. 34, Indian Penal Code. He sentenced each of the three to death. Their appeals were dismissed by the High Court of Patna, and sentences of death passed against them were confirmed by it. They have come up before this Court by special leave.

The prosecution story is briefly as follows :—

On March 17, 1959 at about 8.00 p.m. the chaukidars of the village Fateha had assembled, as usual, in the 'crime centre' of the village. Their names are—Anandi Paswan, (deceased), Misri Paswan (P.W.2), Baleswar Paswan (P.W.3) and Narain Paswan. Anandi Paswan and Misri Paswan were lying on a chouki. Anandi Paswan had a 'bhala' and a 'muretha' while Misri Paswan had a 'pharsa' and a 'muretha'. These weapons as well as the shirt of the deceased were kept on the chouki. The other two choukidars were lying on the ground. The crime centre is housed in the 'dalan' of Tilak Chaudhary (P.W.6). One other person, Srilal Chaudhary, (P.W.7), the brother of Tilak Chaudhary, was also lying there on the khatia on the north-east of the said 'dalan'. In an adjacent room were P.W.11 Nathuni Chaudhary *alias* Durga Das and P.W.12 Ramchander Jha.

According to the prosecution a little before 9.00 p.m. someone from outside called out "Darogaji". On hearing this, the deceased Anandi Paswan and Misri Paswan got up. It was a moonlit night and they saw Ramchander Chaudhary, Jogendra Chaudhary and another person, who was later identified to be Nepali Master, standing closeby. As soon as they went towards the appellants, Jogendra Chaudhary and Nepali Master caught the deceased while Ramchandra Chaudhary caught Misri Paswan. Both Ramchandra Chaudhary and Jogendra Chaudhary had guns with them which were slung across their shoulders. These three persons then took the deceased and Misri Paswan to the road to the East of the 'dalan', running north to south, and proceeded southward. Neither the deceased nor Misri Paswan raised any cry, apparently because they were threatened that if they did so, they would be shot. When the party reached the place to the west of one Peare Sao's house and to the east of the house of Rampratap Tanti (P.W. 5), the deceased called for Rampratap's help, and freeing himself from the clutches of his captors started running way westward. Upon this Ramchandra Chaudhary let go the hand of Misri Paswan and fired at the deceased. Misri Paswan then ran into the house of Peare Sao and took shelter there. While entering that house, he heard a second gun shot. His presence in the house was detected by Mst. Ajo (P.W. 8), the wife of Peare Sao who forced him to leave the house. Thereafter he came out into the lane and concealed himself behind the door. After the moon had set and it became dark, he went to the house of Fakir Paswan (P.W. 4), which is to the east of the house of Peare Sao, and narrated the occurrence to him. He mentioned Ramchandra and Jogendra as the two persons who had taken part in the incident. In the early hours of the morning he went to the place where gun shots were fired, and found Anandi Paswan, chaukidar lying dead in a

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ditch by the side of the road, face downwards. He noticed that Anandi Paswan had received two gun shot wounds on his back. Thereafter he went home and contacted the other chaukidar, Narain Paswan and Baleswar Paswan. He placed them in charge of the dead body and then went to the police station along with Ramdeo, son of the deceased. He lodged the first information report at the police station. After recording it, the junior Sub-Inspector of police commenced investigation and after completing it submitted a charge-sheet against the three appellants on March 15, 1959.

It is the prosecution case that the appellants are "veteran criminals" and the chaukidars used to report about their movements and that this was the motive for the murder. It was further said that the deceased had helped the Dalsingsarai police in arresting one Motia Mushar, who was the ploughman of the appellant Ramchandra, in a dacoity case.

All the appellants denied having participated in the incident. The defence is that a false case has been concocted by the police.

The main evidence against the appellant is that of P.W. 2, Misri Paswan. He has actually named Ramchandra Chaudhary and Jogendra Chaudhary in the first information report. Regarding the third appellant, he stated that he was unknown. Ramchandra and Jogendra have been identified not only by Misri Paswan, but also by five other witnesses, Narain Paswan, Rampratap Tanti, Srilal Chaudhary, Nathuni Chaudhary and Ramchander Jha. All these five persons had an opportunity to see the appellants because, it may be recalled, some of them were in the 'dalan' and some in the adjacent room when the appellants came near there and one of them cried out "Darogaji". Their evidence has been accepted

as true and adequate not only by the learned Sessions Judge who had an opportunity to see and hear the witnesses depose but also by the High Court. Their evidence cannot be reappraised in their appeals by special leave.

The learned counsel, however, said that in so far as Jogendra Chaudhary is concerned, common intention to commit murder had not been established. The existence of common intention has always to be inferred from facts. Here it has been established that all the three appellants came together. Two of them, Ramchandra and Jogendra had guns, with them. The prosecution has established to the satisfaction of the learned Additional Sessions Judge and the High Court that as Anandi Paswan was giving information to the police about the movements of the appellants and had also taken the major part in getting one Motia Mushar arrested in a dacoity case, Ramchandra nursed a grievance against Anandi. The inference, therefore, must be that he had come with the intention of taking revenge on Anandi Paswan by killing him and the other two appellants who accompanied him shared that intention. As the High Court has pointed out, this is made clearer by the statement of Misri Paswan to the effect that Ramchandra said at the time of the incident that 'his (servant) Motia' was taken away forcibly and then Jogendra asked the deceased sarcastically, "Where is your military today?" In the circumstances, therefore, there can be no doubt that common intention to commit murder was established not only with respect to Jogendra but also with respect to Nepali Master who was all along with them.

On behalf of Nepali Master the learned counsel contended that he has been identified at the test identification parade by one witness only and that the other persons did not turn up for identification and, therefore, it is not legally permissible to base

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the identification by only one person. It is sufficient to say that even the evidence of a single witness can sustain the conviction of an accused person if the court which saw and heard him depose regards him as a witness of truth. However, in this case, Nepali Master was identified not by one witness only but by two witnesses (P. W. 7) Srilal Choudhary and (P. W. 9) Dukhi Mahto. It was said that Srilal is an old man of 75 and has a weak eyesight and therefore his evidence should be kept out of account. His evidence has been believed by the learned Sessions Judge as well as by the High Court and we cannot reassess it.

It was contended before the High Court and is also contended before us that as the test identification was held long time after his arrest, the evidence of these two witnesses could not be believed. This circumstance was also considered by the High Court and it observed :

“The contention is attractive; but, in view of Ex. 6, it is difficult to accept the same”.

Exhibit 6 is an anonymous letter written to Senior Sub-Inspector, Kashi Nath (P. W. 22), of which the only portion which has been admitted in evidence reads thus :

“The rascal Anandia Choukidar spoiled the life of that poor Mushar by instigating the S. I. of Police of Dalsingsarai and subsequently he also spied against us for nothing”

This document along with ex. 3, dated June 9, 1959, which is admittedly in the handwriting of Nepali Master, was sent to the Government handwriting expert. Both the documents were examined by him. In his evidence he has stated.

“The Board of Experts consisting of myself, Chatterjee and Srivastava examined

these independently and our unanimous opinion was that Ex. 3, tallied with disputed writings (Ext. 6)."

This being so, the admission contained in Ext. 6 as to the motive is clearly admissible under s. 21 of the Evidence Act. The High Court was, therefore, right in holding that Ext. 6 afforded corroboration to the evidence of (P. W. 7) Srilal Chaudhary and (P. W. 9) Dukhi Mahto.

It is then contended that Ex. 6 is hit by s. 162 of the Criminal Procedure Code because it was received by the Sub-Inspector during the course of the investigation. Section 162 of the Criminal Procedure Code only bars proof of statements made to an investigating officer during the course of investigation. Section 162 does not say that every statement made during the period of investigation is barred from being proved in evidence. For a statement to come within the purview of s. 162, it must not merely be made during the period of investigation but also in the course of investigation. The two things, that is, "the period of investigation" and "course of investigation" are not synonymous. Section 162 is aimed at statements recorded by a police officer while investigating into an offence. This is clear from the opening words s. 162. They speak only of statements made to a police officer during the course of investigation. This implies that the statement sought to be excluded from evidence must be ascribable to the enquiry conducted by the investigating officer and not one which is *de hors* the enquiry. A communication like Ext. 6 will not fall within the ambit of such statements. In this view we hold that the document in question is not hit by s. 162 of the Criminal Procedure Code and the High Court was right in admitting it in evidence.

There is no substance in the appeals and they are, therefore, dismissed.

*Appeal dismissed.*

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