1955

December 8.

TILKESHWAR SINGH AND OTHERS

v.

THE STATE OF BIHAR.

[VIVIAN BOSE, VENKATARAMA AYYAR and CHANDRASEKHARA AIYAR JJ.]

Evidence—Joint recording of statements made by witnesses during investigation—Legality—Testimony of such witnesses in court—Admissibility—Substitution of a charge under s. 149, I.P.C. for one under s. 34, I.P.C.—Validity—Accused filing statement instead of being examined in court—Legality—Prejudice—Code of Criminal Procedure, (Act V of 1898), ss. 161(3), 342—Indian Penal Code (Act XLV of 1860), ss. 34, 149.

Although the joint recording of statements made by witnesses during an investigation is a contravention of s. 161(3) of the Code of Criminal Procedure and must be disapproved, that by itself does not render the testimony given by such witnesses in court inadmissible. It is, however, for the court to decide whether it will rely on such testimony or attach any weight to it.

Zahiruddin v. *Emperor*, (A.I.R. 1947 P.C. 75), applied.

Baliram Tikaram v. *Emperor*, (A.I.R. 1945 Nag. 1) and *Maganlal Radhakishan* v. *Emperor* (A.I.R. 1946 Nag. 173), disapproved.

Bejoy Chand Patra v. *The State*, (A.I.R. 1950 Cal. 363), approved.

The court has power to substitute a charge under s. 149 of the Indian Penal Code for a charge under s. 34.

Karnail Singh and others v. *The State of Punjab*, ([1954] S.C.R. 904) and *Willie Slaney's case*, (Criminal Appeal No. 6 of 1955), referred to.

Although s. 342 of the Code of Criminal Procedure contemplates oral examination of the accused in court and though the practice of filing written statements is to be deprecated, the fact that the accused filed a statement instead of being examined is no ground for interference unless he is shown to have been prejudiced thereby.

Consequently, in a case where the accused were put up for trial under s. 302 read with s. 34 of the Indian Penal Code, and the Additional Sessions Judge relying on the evidence of three of the prosecution witnesses whose statements during the investigation were recorded jointly in contravention of s. 161(3) of the Code of Criminal Procedure, convicted and sentenced them to transportation for life and the High Court in appeal agreed with the findings of fact, but altered the conviction to one under s. 326 read with s. 149 of the Indian Penal Code, as also the sentence, their conviction was not liable to be set aside.

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 150 of 1954.

On appeal by special leave from the judgment and order dated the 12th August 1953 of the Patna High Court in Criminal Appeal No. 345 of 1952 arising out of the judgment and order dated the 20th August 1952 of the Court of Additional Session Judge, Darbhanga in Session Case No. 12 of 1952.

H. J. Umrigar and *R. C. Prasad,* for the appellant.

B. K. Saran and *M. M. Sinha,* for the respondent.

1955. December 8. The Judgment of the Court was delivered by

VENKATARAMA AYYAR J.—The appellants were charged before the Additional Sessions Judge, Darbhanga under section 302 read with section 34 of the Indian Penal Code for the murder of one Balbhadra Narain Singh. They were also charged, some under section 147 and the others under section 148, for being members of an unlawful assembly and for rioting.

The case of the prosectuion was as follows : The deceased and the appellants were pattidars in the village of Mahe, and there was ill-feeling between them on account of the village pattidari. On 5-3-1951, at about 10 A.M. the deceased was returning from the river to his *baithka.* On the way, the appellants who were armed with bhalas, sword and lathi, and some others surrounded him at the courtyard of the village school and attacked him. One Harischandra Singh who is still absconding, plunged his bhala into the abdomen of the deceased, and the appellants joined in the attack on him. The deceased ran to his *baithka.* and from there, he was taken to the police station at Singhia. There, he made a complaint which has been filed as the first information report, and therein he set out the incidents mentioned above, and implicated the appellants as concerned in the attack. The deceased was then taken to the hospital, and in view of his precarious condition the doctor recorded his dying declaration. The deceased was then sent

for treatment to the hospital at Samastipur, but on the way he died. On the basis of the first information report and on the enquiries made by them, the police charged the appellants under section 302 read with section 34 for murder and under sections 147 and 148 for rioting. The defence of the appellant was that the deceased was attacked by some unknown assailants in his *baithka* in the early hours of 5-3-1951, and that they were not concerned in the offence.

The Additional Sessions Judge, Darbhanga accepted the evidence of the prosecution, and convicted the appellants under section 302 read with section 34, and sentenced them to transportation for life. He also convicted them, some under section 147 and the others under section 148, but imposed no separate sentence under those sections. The appellants took the matter in appeal to the High Court of Patna. The learned Judges agreed with the Sessions Judge in his conclusions of fact, but altered the conviction from one under section 302 read with section 34 to one under section 326 read with section 149, and the sentence from transportation for life to various terms of imprisonment. The learned Judges also maintained the conviction of the appellants on the charge of rioting, but awarded no separate sentence therefor. It is against this judgment that the present appeal is directed.

On behalf of the appellants, it was firstly contended by Mr. Umrigar that the finding of the courts below that the incident took place at the school courtyard and not at the *baithka* of the deceased was bad, because it was based on inadmissible evidence, *viz.*, Exhibit P-7 and the testimony of P.Ws. 4, 7 and 12. Exhibit P-7 is a statement of the deceased taken by the police officer subsequent to the lodging of the first information and after the investigation had begun, and its reception would be barred by section 162 of the Code of Criminal Procedure. But the learned Judges thought that it would be admissible under section 32(1) of the Indian Evidence Act, and the correctness of this view is disputed by the appellants. But even if Exhibit P-7 is inadmissible in evidence,

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that would not assist the appellants, as the learned Judges observed that apart from that document, they would have, on the other evidence, held that the deceased was attacked at the school courtyard.

Then, we come to the evidence of P.Ws. 4, 7 and 12 on which the courts below have relied in accepting the version of the incident as given by the prosecution. Mr. Umrigar contended that their evidence was inadmissible, because they were examined by the police at the stage of investigation, and their statements were not recorded separately as required by section 161(3) of the Code of Criminal Procedure. This is what the investigating officer, P.W. 18, deposed with reference to this matter.

"The Daffadar produced Sital Singh (P.W. 12), Ram Karan Singh (P.W. 7) and Ramkinker (P.W. 4). First of all, I examined them separately but recorded their joint statement in respect of common things. I made a separate record about the identification and the weapons".

The recording of a joint statement of the examination of P.Ws. 4, 7 and 12 is clearly in contravention of section 161(3), and must be disapproved. But the question is whether that renders the testimony of P.Ws. 4, 7 and 12 in court inadmissible. Section 161(3) does not say so, and indeed, seeing that the police are not bound to make a record of the statements of witnesses in which case there is admittedly no bar to the reception of their testimony, it would be anomalous if we were to hold that their evidence is inadmissible, because the statements were also reduced to writing but not in the manner provided in the section. The Indian Evidence Act contains elaborate provisions as to who are competent witnesses and on what matters their evidence is inadmissible. And on these provisions, P.Ws. 4, 7 and 12 are neither incompetent witnesses, nor is their evidence as to the incidents to which they deposed, inadmissible. In *Zahiruddin* v. *Emperor*(1) it was held by the Privy Council that the failure to comply with the provisions of section 162(1) might greatly

(1 A.I.R. 1947 P.C. 75.

impair the value of the evidence of the witness, but that would not affect its admissibility. On the same reasoning, it will follow that the evidence of P.Ws. 4, 7 and 12 is not inadmissible for the reason that their statements had been recorded by P.W. 18 jointly and not separately as required by section 161(3).

In support of his contention that their evidence is inadmissible, Mr. Umrigar relied on the decisions in *Baliram Tikaram* v. *Emperor* (1) and *Maganlal Radhakishan* v. *Emperor*(). In *Baliram Tikaram* v. *Emperor*( ), which was a decision under section 162 of the Code of Criminal Procedure the accused had not been furnished with copies of the statements recorded by the police officers under section 161, and it was held that that deprived the accused of a valuable right, and must have caused prejudice to them. That was the view taken in *Viswanath* v. *Emperor*(3), and no exception can be taken to it. But the learned Judges went on to observe that the evidence of the witnesses who gave statements at the investigation would itself be inadmissible. The reason for this opinion was thus stated by them :

"How can the evidence be admissible and proper for consideration when the accused is robbed of his statutory means of cross-examination and thereby denied the opportunity of effectively cross-examining his adverse witnesses ? No evidence recorded by the Court, unless it satisfies the requirement of section 138, Evidence Act, can become admissible and proper for consideration. It would indeed be bold to say that the evidence of a witness is legally admissible against a party even though he at the time it was given had not the full opportunity to cross-examine him".

This view was reiterated by the same learned Judges in *Maganlal Radhakishan* v. *Emperor*(2), but, for the reasons already given, we are unable to accept this as a correct statement of the law. We are of the opinion that while the failure to comply with the requirements of section 161(3) might affect the weight to be

(1) A.I.R. 1945 Nag. 1. (2) A.I.R. 1946 Nag. 173.
(3) I.L R. [1937] Nag. 178.

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attached to the evidence of the witnesses, it does not render it inadmissible. That was so held by Harries, C.J. and Bachawat, J. in *Bejoy Chand Patra* v. *The State*(1), where this question arose directly for decision, and we are in agreement with this view. In the present case, the attention of the learned Judges was drawn to the infirmity in the evidence of P.Ws. 4, 7 and 12, arising by reason of the failure to observe section 161(3), but they were, nevertheless, prepared to accept it as reliable. We must accordingly hold that the findings of the courts below are not open to attack on the ground that they were based on inadmissible evidence.

It was next contended that the charge on which the appellants were tried was one under section 302 read with section 34, and that the learned Judges of the High Court erred in convicting them under section 326 read with section 149. Before the learned Judges the contention that was pressed was that there was no power in the court to substitute section 149 for section 34, but they declined to accept it. The question has since been considered by this Court in *Karnail Singh and others* v. *The State of Punjab*(2) and *Willie Slaney's case*( ). It is conceded by Mr. Umrigar that in view of these decisions, the question is no longer open. It must be answered adversely to the appellants.

It was finally contended that there had been no proper examination of the appellants under section 342, and that the conviction should accordingly be quashed. What happened was that when the court commenced its examination under section 342, the appellants stated that they would file written statements. Those statements were very elaborate and furnished the answer of the appellants to all the points raised in the prosecution evidence. Mr. Umrigar was unable to suggest any question which could have been put, with reference to which the statements did not contain an answer. Clearly, the appellants have not been prejudiced. It is no doubt true that

(1) A.I.R. 1950 Cal. 363. (2) [1954] S.C.R. 904.
(3) Criminal Appeal No. 6 of 1955.

section 342 contemplates an examination in court, and the practice of filing statements is to be deprecated. But that is not a ground for interference, unless prejudice is established. And it is nothing unusual for the accused to prefer filing statements instead of answering questions under section 342, lest they should suffer by inadvertent admissions or by damaging statements. As no prejudice has been shown, this contention also must be rejected.

In the result, the appeal is dismissed.

JAYARAM VITHOBA AND ANOTHER

v.

THE STATE OF BOMBAY.

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December 13.

[VIVIAN BOSE, VENKATARAMA AYYAR and CHANDRASEKHARA AIYAR JJ.]

Code of Criminal Procedure (Act V of 1898), s. 423(1)(b) and (d), s. 439—Powers of Appellate Court—High Court's powers of revision—Conviction by the trial Court but no sentence—High Court confirming conviction and awarding sentence—Legality—Bombay Prevention of Gambling Act (Bombay Act IV of 1887), ss. 4(a), 5.

The first appellant was prosecuted under s. 5 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) for being present in a gaming house for the purposes of gaming and was, in addition, charged under s. 4(a) of the Act for keeping a gaming house. The Presidency Magistrate, who tried the case, found him guilty under s. 4(a) and sentenced him to three months' rigorous imprisonment. He also found him guilty under s. 5 but awarded no separate sentence under that section. In revision, the High Court set aside the conviction under s. 4(a), but confirmed that under s. 5 and awarded a sentence of three months' rigorous imprisonment under that section. It was contended for the first appellant that the High Court had no power under s. 423(1)(b) of the Code of Criminal Procedure to impose any sentence under s. 5 of the Act when no such sentence had been awarded by the Magistrate and that, in any event, the award of such a sentence amounted to an enhancement and was, in consequence, illegal, as no notice had been issued therefor, as required by law.

Held, that though s. 423(1)(b) of the Code of Criminal Procedure was not applicable to the case, the High Court had power to pass the sentence under s. 423(1)(d).

The law does not envisage a person being convicted for an