TAHSILDAR SINGH AND ANOTHER

v.

THE STATE OF UTTAR PRADESH

1959

May 5.

(B. P. SINHA, JAFER IMAM, J. L. KAPUR, A. K. SARKAR, K. SUBBA RAO and M. HIDAYATULLAH, JJ.)

Criminal Trial—Police Statements—Use of—Omission, when amounts to contradiction—Code of Criminal Procedure, 1898 (V of 1898), s. 162—Indian Evidence Act, 1872 (1 of 1872), s. 145.

A music performance attended by a large number of persons including two police informers Bankey and Asa Ram was going on on a platform in front of the house of one Ram Saroop. At that time there was a full moon and the light of a gas lamp and several lanterns. The informers had placed their guns on a cot close to the platform and one Bharat Singh was sitting on that cot. The accused along with 15 or 20 persons suddenly arrived armed with fire arms to kill the informers and stood behind a well on the southern side, from where they shouted that no one should run away and advanced firing shots. Two persons were killed on the spot. Bharat Singh was hit and he ran northwards pursued by the culprits and was also shot dead. The culprits turned over the dead bodies and on seeing Bharat Singh's face they exclaimed that Asa Ram informer had been killed. They then passed in front of Ram Saroop's house and disappeared. While going they carried away Bankey's gun from the cot. The appellants and seven others were sent up for trial for this occurrence. At the trial the defence alleged that prosecution had developed its case. The police statements of the eye witness did not mention the facts regarding the scrutiny of the dead bodies and the presence of the gas lantern, and the defence counsel put the following two questions with respect to these omissions to the first eye witness produced:—

1. "Did you state to the Investigating Officer that the gang rolled the dead bodies of Nathi, Saktu and Bharat Singh and scrutinised them and did you tell him that the face of Asa Ram resembled with that of the deceased Bharat Singh?"

2. "Did you state to the Investigating Officer about the presence of the gas lantern?"

The Sessions Judge disallowed the questions and on account of this order similar questions were not put to the other eye witnesses. The Sessions Judge convicted the appellants under s. 302 Indian Penal Code and sentenced them to death. The appellants appealed to the High Court and made an application alleging that the Sessions Judge had not allowed the defence counsel to put omissions amounting to material contradictions to

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the eye witnesses and prayed that the eye witnesses be summoned so that the questions disallowed may be put to them.

Though the High Court held that the omissions amounted to contradictions and that the Sessions Judge had wrongly disallowed cross-examination with respect thereto, it found that even after ignoring these two circumstances there were other facts which showed that the culprits had come close to the eye witnesses and that they had unmistaken opportunity of identifying the appellants in the light of the full moon and the lanterns. The High Court accordingly dismissed the application for summoning the eye witnesses holding that no prejudice had been caused to the appellants by the disallowance of the cross-examination in respect of omissions and also dismissed the appeals and confirmed the convictions and sentences of the appellants.

Held, (Per SINHA, KAPUR, SARKAR and SUBBA RAO, JJ.) that the omissions did not amount to contradictions and that the Sessions Judge was right in disallowing cross-examination in respect thereof. A statement to the police could be used under s. 162 of the Code only for the purpose of contradicting a statement in the witness box under the second part of s. 1, Evidence Act, but it could not be used for the purpose of cross-examining the witness under the first part of s. 145. A statement made to the police but not reduced to writing, could not be used for any purpose, not even for contradiction. It was incorrect to say that all omissions in regard to important features of the incident which were expected to be included in the statement made before the police, should be treated as contradictions. An omission in the police statement could amount to a statement and be used as a contradiction only when (i) it was necessarily implied from the recital or recitals found in the statement, (ii) it was negative aspect of a positive recited in the statement or (iii) when the statement before the police and that before the Court could not stand together. It was for the the trial Judge to decide in each case, after comparing the part or parts of the statement recorded by the police with that made in the witness-box, whether the recital intended to be used for contradiction was one of the nature indicated above.

In re Ponnusami Chetty, (1933) I.L.R. 56 Mad. 475; *In re Guruva Vannan,* I.L.R. (1944) Mad. 897; *Ram Bali* v. *State,* A.I.R. 1952 All 289; *Badri Chaudhry* v. *State,* A.I.R. 1926 Pat. 20, *Sakhawat* v. *Crown,* I.L.R. (1937) Nag. 277, referred to.

Rudder v. *The State,* A.I.R. 1957 All. 239; *Mohinder Singh* v. *Emperor,* A.I.R. 1932 Lah. 103; *Yusuf Mia* v. *Emperor,* A.I.R. 1938 Pat. 579; *State of M. P.* v. *Banshilal Behari,* A.I.R. 1958 M.P. 13, disapproved.

Held, (Per IMAM and HIDAYATULLAH, JJ.) that the questions that were put by the defence counsel were properly ruled out by the Sessions Judge as they did not set up contradictions, but attempted to obtain from the witnesses versions of what they

had stated to the police which were then to be contradicted. The reference to s. 145 Evidence Act in s. 162 of the Code of Criminal Procedure brings in the whole of the manner and machinery of s. 145 and not merely the second part. An accused is entitled to cross-examine the witness under the first part of s. 145 with respect to the police statement. Relevant and material omissions amount to vital contradictions which can be established by cross-examination and confronting the witness with his previous statement to the police. In the circumstances of the present case even if the defence had been allowed to put questions concerning the omissions, it would not have affected the credibility of the witnesses and no prejudice was caused to appellants by the disallowance of the questions.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 67 of 1958.

Appeal by special leave from the judgment and order dated September 11, 1957, of the Allahabad High Court in Criminal Appeal No. 1388 of 1956 and Referred Trial No. 133 of 1956, arising out of the judgment and order dated September 8, 1956, of the Court of the Additional Sessions Judge at Etawah in Sessions Trial Nos. 83 and 109 of 1955.

Jai Gopal Sethi and *R. L. Kohli*, for the appellants.

S. P. Sinha, *G. C. Mathur* and *G. N. Dikshit*, for the respondent.

1959. May 5. The judgment of B. P. Sinha, J. L. Kapur, A. K. Sarkar and K. Subba Rao, JJ. was delivered by K. Subba Rao, J. and the judgment of Jafer Imam and M. Hidayatullah, JJ., was delivered by M. Hidayatullah, J.

Subba Rao J.

SUBBA RAO, J.—This appeal by special leave raises the question of construction of s. 162, Code of Criminal Procedure. On June 16, 1954, one Ram Sanehi Mallah of Nayapura gave a dinner at his home and a large number of his friends attended it. After the dinner, at about 9 p. m., a music performance was given in front of the house of Ram Sanehi's neighbour, Ram Sarup. About 35 or 40 guests assembled in front of Ram Sarup's platform to hear the music. The prosecution case is that a large number of persons armed with fire-arms suddenly appeared near a well situated on the southern side of the house of Ram Sarup and

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opened fire which resulted in the death of Natthi, Bharat Singh and Saktu, and injuries to six persons, namely, Hazari, Bankey, Khem Singh, Bal Kishan, Mizaji Lal and Nathu.

The topography of the locality where the incident took place is given in the two site-plans, Ex. P-57 and Ex. P-128. It appears from the plans that the house of Ram Sarup faces west, and directly in front of the main door of his house is a platform; to the south-west of the platform, about 25 paces away, is a well with a platform of 3 feet in height and about 13 feet in width around it; and to the west of the platform in front of Ram Sarup's house the audience were seated.

The prosecution version of the sequence of events that took place on that fatal night is as follows: After the dinner, there was a music performance in front of the platform of Ram Sarup's house and a number of persons assembled there to hear the music. Saktu played on the Majeera while Nathu was singing. It was a full-moon night and there were also a gas lamp and several lanterns. Bankey and Asa Ram placed their guns on a cot close to the platform and Bharat Singh was sitting on that cot. While Bankey was among the audience, Asa Ram was still taking his dinner inside the house. At about 9 p. m., the accused along with 15 or 20 persons arrived from an eastern lane, stood behind the well, shouted that no one should run away and advanced northward from the well firing shots. Natthi and Saktu were hit and both of them died on the spot. Bharat Singh, who was also hit, ran northward and was pursued by some of the culprits and was shot dead in front of Bankey's house shown in the plan. Bankey, who was also shot at and injured, took up Asa Ram's gun and went up to the roof of Ram Sarup's house wherefrom he fired shots at the dacoits, who were retreating. Asa Ram, who was luckily inside the house taking his dinner, ran up to the roof of Ram Sarup's house and saw the occurrence from over the parapet. The culprits turned over the dead-bodies of Saktu, Natthi and Bharat Singh and, on seeing Bharat Singh's face, they exclaimed that Asa Ram was killed. Thereafter, they

proceeded northward, passed through the corner of Ram Sarup's house and disappeared in the direction of the Chambal. They also carried away Bankey's gun which was on the cot.

The motive for the offence is stated thus: The culprits were members of a notorious gang called the Man Singh's gang, who, it is alleged, were responsible for many murders and dacoities in and about the aforesaid locality. That gang was in league with another gang known as Charna's gang operating in the same region. Asa Ram and Bankey had acted as informers against Charna's gang, and this information led to the killing of Charna. Man Singh's gang wanted to take vengeance on the said two persons; and, having got the information that the said two persons would be at the music party on that fateful night, they organized the raid with a view to do away with Asa Ram and Bankey.

Out of the nine accused committed to the Sessions, the learned Sessions Judge acquitted seven, convicted Tahsildar Singh and Shyama Mallah under 14 charges and awarded them various sentences, including the sentence of death. Before the learned Sessions Judge, Tahsildar Singh took a palpably false plea that he was not Tahsildar Singh but was Bhanwar Singh, and much of the time of the learned Sessions Judge was taken to examine the case of the prosecution that the accused was really Tahsildar Singh, son of Man Singh. The other accused, Shyama Mallah, though made a statement before the Sub-Divisional Magistrate admitting some facts, which were only exculpatory in nature, denied the commission of the offence before the committing Magistrate and before the learned Sessions Judge. As many as eight eye-witnesses described the events in detail and clearly stated that both the accused took part in the incident. When one of the witnesses, Bankey (P. W. 30), was in the witness-box, the learned Counsel for the accused put to him the following two questions in cross-examination:

1. "Did you state to the investigating officer that the gang rolled the dead bodies of Natthi, Saktu and

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Bharat Singh, and scrutinized them and did you tell him that the face of Asa Ram resembled that of the deceased Bharat Singh ?"

2. "Did you state to the investigating officer about the presence of the gas lantern ?"

In regard to the first question, the learned Sessions Judge made the following note:

"The cross-examining Counsel was asked to show the law which entitles him to put this qustion. He is unable to show any law. I, therefore, do not permit the question to be put unless I am satisfied."

In respect of the second question, the following note is made:

"He is also unable to show any law entitling him to put this question. I will permit him to put it if he satisfies me about it."

It appears from the deposition that no other question on the basis of the statement made before the police was put to this witness. After his evidence was closed, the learned Judge delivered a considered order giving his reasons for disallowing the said two questions. The relevant part of the order reads:

"Therefore if there is no contradiction between his evidence in Court and his recorded statement in the diary, the latter cannot be used at all. If a witness deposes in Court that a certain fact existed but had stated under section 161 Cr. P. C. either that that fact had not existed or that the reverse and irreconcilable fact had existed, it is a case of conflict between the deposition in the Court and the statement under section 161 Cr. P. C. and the latter can be used to contradict the former. But if he had not stated under section 161 anything about the fact, there is no conflict and the statement cannot be used to contradict him. In some cases an omission in the statement under section 161 may amount to contradiction of the deposition in Court; they are the cases where what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence."

It is enough to notice at this stage that the learned Sessions Judge did not by the said order rule that no

omission in the statement made under s. 161 of the Code of Criminal Procedure can be put to a witness, but stated that only an omission which is irreconcilable with what is stated in evidence can be put to a witness. The said two omissions were not put to any of the other witnesses except to one to whom only one of the said omissions was put. No other omissions were put in the cross-examination either to P. W. 30 or to any other witness. The learned Sessions Judge on a consideration of the voluminous evidence in the case held that the guilt was brought home to the said two accused and convicted them as aforesaid. Tahsildar Singh and Shyama Mallah preferred two separate appeals to the High Court against their convictions and sentences. The two appeals were heard along with the reference made by the learned Sessions Judge under s. 374 of the Code of Criminal Procedure for the confirmation of the sentence of death awarded to the appellants. The learned Judges of the High Court, after reviewing the entire evidence over again, accepted the findings of the learned Sessions Judge and confirmed the convictions and sentences passed on the appellants. Before the High Court a petition was filed by the appellants alleging that the learned Sessions Judge did not allow the Counsel for defence to put omissions amounting to material contradictions to the eye-witnesses and therefore the said eye-witnesses should be summoned so that the said questions might be put to them. That petition was filed on May 1, 1957, and on July 30, 1957, after the argument in the appeals was closed, the petition was dismissed. Presumably, no attempt was made to press this application either before the appeals were taken up for argument or during the course of the argument; but the question raised in the petition was considered by the learned Judges of the High Court in their judgment. The judgment discloses that the learned Counsel appearing for the appellants argued before the High Court that the learned Sessions Judge wrongly disallowed the aforesaid two questions, and the learned Judges, conceding that those two questions should have been allowed, held that the accused

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were not prejudiced by the said fact. They justified their conclusion by the following reasons:

"We did so because among other reasons we decided to ignore these two circumstances and to base our findings on matters of greater certainty, namely, the fact of the miscreants firing while advancing, passing in front of Ram Swarup's platform and taking away Bankey's gun from the cot, movements which brought them close to the eye-witnesses and thereby gave the witnesses an unmistakable opportunity of seeing their faces in the light of the lanterns and the full moon. These factors made recognition by witnesses independent of any gas lantern or any scrutiny of the dead bodies, so that these matters ceased to be of any real consequence and therefore made the summoning of the eye-witnesses before us quite unnecessary". In the result, they dismissed the appeals. The present appeal is by special leave filed against the judgment of the High Court.

Learned Counsel for the appellants raised before us the following points: (1) (a). Section 162 of the Code of Criminal Procedure by its own operation attracts the provisions of s. 145 of the Evidence Act and under the latter section the whole vista of cross-examination on the basis of the previous statement in writing made by the witnesses before the police is open to the accused; to illustrate the contention: a witness can be asked whether he made a particular statement before the police officers; if he says "yes", the said assertion can be contradicated by putting to him an earlier statement which does not contain such a statement. (1) (b). The word "contradiction" is of such wide connotation that it takes in all material omissions and a Court can decide whether there is one such omission as to amount to contradiction only after the question is put, answered and the relevant statement or part of it is marked, and, therefore, no attempt should be made to evolve a workable principle, but the question must be left at large to be decided by the Judge concerned on the facts of each case. (2) The High Court erred in holding that only two questions were intended to be put in cross-examination to the prosecution

witnesses whereas the Advocate for the accused intended to put to the witnesses many other omissions to establish that there was development in the prosecution case from time to time but refrained from doing so in obedience to the considered order made by the learned Sessions Judge. (3) Even if only two questions were illegally disallowed, as it was not possible to predicate the possible effect of the cross-examination of the witnesses on the basis of their answers to the said questions on their reliability, it should be held that the accused had no opportunity to have an effective cross-examination of the witnesses and therefore they had no fair trial. (4) The learned Judges committed an illegality in testing the credibility of the witnesses other than the witness who gave the first information report by the contents of the said report.

The arguments of the learned Counsel for the respondent in respect of each of the said contentions will be considered in their appropriate places.

We shall proceed to consider the contentions of the learned Counsel for the appellants in the order in which they were addressed:

Re. (*1*) (*a*): Diverse and conflicting views were expressed by Courts on the interpretation of s. 162 of the Code of Criminal Procedure. A historic retrospect of the section will be useful to appreciate its content. The earliest Code is that of 1872 and the latest amendment is that of 1955. Formerly Criminal Procedure Code for Courts in the Presidency towns and those in the mofussil were not the same. Criminal Procedure Code, 1882 (10 of 1882), consolidated the earlier Acts and prescribed a uniform law to all Courts in India. It was superseded by Act 5 of 1898 and substantial changes were made by Act 18 of 1923. Since then the Code stands amended from time to time by many other Acts. The latest amendments were made by Act 26 of 1955 which received the assent of the President on August 10, 1955, and by notification issued by the Central Government its provisions came into force on and from January 1, 1956. We are not concerned in this case with the Amending Act of 1955, but only with the Act as it stood before the amendment of 1955.

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In Act 10 of 1872 the section corresponding to the present s. 162 was s. 119, which read:

"An officer in charge of a Police-station, or other Police officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

Such person shall be bound to answer all questions relating to such case, put him by such officer, other than questions criminating himself.

No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence."

This section enables a police officer to elicit information from persons supposed to be acquainted with facts, and permits him to reduce into writing the answers given by such persons, but excludes the said statement from being treated as part of the record or used as evidence. Act 10 of 1882 divided the aforesaid s. 119 into two sections and numbered them as ss. 161 and 162, which read:

S. 161: "Any Police-officer making an investigation under this chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

Such person shall be bound to answer truly 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."

S. 162: "No statement, other than a dying declaration, made by any person to a Police-officer in the course of an investigation under this chapter shall, if reduced to writing, be signed by the person making it, or be used as evidence against the accused.

Nothing in this section shall be deemed to affect the provisions of section 27 of the Indian Evidence Act, 1872."

The first two paragraphs of s. 119 of Act 10 of 1872 with slight modifications not relevant for the present

purpose constituted the corresponding paragraphs of s. 161 of Act 10 of 1882; and the third paragraph of s. 119 of the former Act, with some changes, was made s. 162 of the latter Act. There was not much difference between the third paragraph of s. 119 of the Act of 1872 and s. 162 of the Act of 1882, except that in the latter Act, it was made clear that the prohibition did not apply to a dying declaration or affect the provisions of s. 27 of the Indian Evidence Act, 1872. The Code of 1898 did not make any change in s. 161, nor did it introduce any substantial change in the body of s. 162 except taking away the exception in regard to the dying declaration from it and putting it in the second clause of that section. But s. 162 was amended by Act 5 of 1898 and the amended section read:

"(1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence:

Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing, and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof; and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Indian Evidence Act, 1872."

For the first time the proviso to s. 162 introduced new elements, namely: (i) The right of the accused to request the Court to refer to the statement of a witness reduced to writing; (ii) a duty cast on the Court to refer to such writing; (iii) discretion conferred on the Court in the interests of justice to direct that the accused be furnished with a copy of the statement; and (iv) demarcating the field within which such

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statements can be used, namely, to impeach the credit of the witness in the manner provided by the Indian Evidence Act, 1872. From the standpoint of the accused, this was an improvement on the corresponding sections of the earlier Codes, for whereas the earlier Codes enacted a complete bar against the use of such statements in evidence, this Code enabled the accused, subject to the limitations mentioned therein, to make use of then to impeach the credit of a witness in the manner provided by the Indian Evidence Act. On the basis of the terms of s. 162 of Act 5 of 1896, two rival contentions were raised before the Courts. It was argued for the prosecution that on the strength of s. 157 of the Evidence Act, the right of the prosecution to prove any oral statement to contradict the testimony of any witness under that section was not taken away by s. 162 of the Code of Criminal Procedure which only provided that the writing shall not be used as evidence. On the other hand, it was contended on behalf of the accused that when the statement of a witness was admittedly reduced into writing, it would be unreasonable to allow any oral evidence of the statement to be given when the writing containing the statement could not be proved. The judgment of Hosain, J., in the case of *Rustam* v. *King-Emperor* (1) and the decisions in *Fanindra Nath Banerjee* v. *Emperor* (2), *King-Emperor* v. *Nilakanta* (3) and *Muthukumaraswami Pillai* v. *King-Emperor* (4) represent one side of the question, and the judgment of Knox, J., in *Rustam* v. *King-Emperor* (1) and the observations of Beaman, J., in *Emperor* v. *Narayan* (5) represent the other side. A division Bench of the Bombay High Court in *Emperor* v. *Hanmaraddi Bin Ramaraddi* (6), after noticing the aforesaid decisions on the question, ruled that the police officer could be allowed to depose to what the witness had stated to him in the investigation for the purpose of corroborating what the witness had said at the trial. In that context, Shah, J., observed at p. 66:

(1) (1910) 7 A L.J. 468.
(2) (1908) 36 Cal. 281
(3) (1912) 35 Mad. 247.
(4) (1912) 35 Mad. 397.
(5) (1907) 32 Bom. 111
(6) (1915) 39 Bom. 58.

"The point is not free from difficulty which is sufficiently reflected in the diversity of judicial opinions, bearing on the question."

Presumably, in view of the aforesaid conflict, to make the legislative intention clear the section was amended by Act 18 of 1923. Section 162 as amended by the aforesaid Act reads:

"(1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination:

Provided, further that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused."

Sub-section (1) of the substituted section attempted to steer clear of the aforesaid conflicts and avoid other difficulties by the following ways: (a) Prohibited the use of the statement, both oral and that reduced into

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writing, from being used for any purpose at any inquiry or trial in respect of any offence under investigation; (b) while the earlier section enabled the accused to make use of it to impeach the credit of a witness in the manner provided by the Indian Evidence Act, 1872, the new section enabled him only to use it to contradict the witness in the manner provided by s. 145 of the said Act; (c) the said statement could also be used for the purpose of only explaining any matter referred to in his cross-examination; and (d) while under the old section a discretion was vested in the Court in the matter of furnishing the accused with a copy of an earlier statement of a prosecution witness, under the amended section, subject to the second proviso, a duty was cast upon the Court, if a request was made to it by the accused, to direct that the accused be furnised with a copy thereof. The effect of the amendment was that the loopholes which enabled the use of the statement made before the police in a trial were plugged and the only exception made was to enable the accused to use the statement of a witness reduced into writing for a limited purpose, namely, in the manner provided by s. 145 of the Indian Evidence Act, 1872, and the prosecution only for explaining the matter referred to in his cross examination. The scope of the limited use also was clarified. Under the old section the statement was permitted to be used to impeach the credit of a witness in the manner provided by the Indian Evidence Act; under the said Act, the credit of a witness could be impeached either under s. 145 or under s. 155(3). While the former section enables a witness to be cross-examined as to a previous statement made by him in writing without such writing being shown to him, the latter section permits the discrediting of the witness by proof of his previous statement by independent evidence. If a statement in writing could be used to discredit a witness in the manner provided by those two sections, the purpose of the Legislature would be defeated. Presumably in realisation of this unexpected consequence, the Legislature in the amendment made it clear that the said statement can only be used to contradict a

witness in the manner provided by s. 145 of the Evidence Act. By Act 2 of 1945, the following sub-section (3) was added to s. 161:

"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."

This sub-section restored the practice obtaining before the year 1923 with a view to discourage the practice adopted by some of the police officers of taking a condensed version of the statements of all the witnesses or a precis of what each witness said. It is not necessary to notice in detail the changes made in s. 162 by Act 26 of 1955, except to point out that under the amendment the prosecution is also allowed to use the statement to contradict a witness with the permission of the Court and that in view of the shortened committal procedure prescribed, copies of the statements of the prosecution witnesses made before the police during investigation are made available by the police to the accused before the commencement of the inquiry or trial. The consideration of the provisions of the latest amending Act need not detain us, for the present case falls to be decided under the Act as it stood before that amendment.

It is, therefore, seen that the object of the legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose, and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Act of 1898 for the first time introduced an exception enabling the said statement reduced to writing to be used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat the purpose of the legislature, by the Amendment Act of 1923, the section was redrafted defining the limits of the exception with precision so as to confine it only

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to contradict the witness in the manner provided under s. 145 of the Evidence Act. If one could guess the intention of the legislature in framing the section in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both the section and the proviso intended to serve primarily the same purpose, i.e., the interest of the accused.

Braund, J., in *Emperor* v. *Aftab Mohd. Khan* (1) gave the purpose of s. 162 thus at p. 299:

"As it seems to us it is to protect accused persons from being prejudiced by statements made to police officers who by reason of the fact that an investigation is known to be on foot at the time the statement is made, may be in a position to influence the maker of it and, on the other hand, to protect accused persons from the prejudice at the hands of persons who in the knowledge that an investigation has already started, are prepared to tell untruths."

A division Bench of the Nagpur High Court in *Baliram Tikaram Marathe* v. *Emperor* (2) expressed a similar idea in regard to the object underlying the section, at p. 5, thus:

"The object of the section is to protect the accused both against over-zealous police officers and untruthful witnesses."

The Judicial Committee in *Pakala Narayana Swami* v. *The King-Emperor* (3) found another object underlying the section when they said at p. 78:

"If one had to guess at the intention of the Legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both."

Section 162 with its proviso, if construed in the

(1) A.I.R. 1940 All. 291. (2) A.I.R. 1945 Nag. 1.
(3) (1939) L.R. 66 I. A. 66.

manner which we will indicate at the later stage of the judgment, clearly achieves the said objects.

The learned Counsel's first argument is based upon the words "in the manner provided by s. 145 of the Indian Evidence Act, 1872" found in s. 162 of the Code of Criminal Procedure. Section 145 of the Evidence Act, it is said, empowers the accused to put all relevant questions to a witness before his attention is called to those parts of the writing with a view to contradict him. In support of this contention reliance is placed upon the judgment of this Court in *Bhagwan Singh* v. *The State of Punjab* (1). Bose, J., describes the procedure to be followed to contradict a witness under s. 145 of the Evidence Act thus at p. 819:

"Resort to section 145 would only be necessary if the witness *denies* that he made the former statement. In that event, it would be necessary to prove that he did, and *if the former statement was reduced to writing*, then section 145 requires that his attention must be drawn to those parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made."

It is unnecessary to refer to other cases wherein a similar procedure is suggested for putting questions under s. 145 of the Indian Evidence Act, for the said decision of this Court and similar decisions were not considering the procedure in a case where the statement in writing was intended to be used for contradiction under s. 162 of the Code of Criminal Procedure. Section 145 of the Evidence Act is in two parts: the first part enables the accused to cross-examine a witness as to previous statement made by him in writing or reduced to writing to without such writing being shown to him; the second part deals with a situation where the cross-examination assumes the shape of contradiction: in other words, both parts deal with cross-examination; the first part with cross-examination other than by way of contradiction, and the

(1) [1952] S.C.R. 812.

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second with cross-examination by way of contradiction only. The procedure prescribed is that, if it is intended to contradict a witness 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. The proviso to s. 162 of the Code of Criminal Procedure only enables the accused to make use of such statement to contradict a witness in the manner provided by s. 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of s. 145 of the Evidence Act. Nor are we impressed by the argument that it would not be possible to invoke the second part of s. 145 of the Evidence Act without putting relevant questions under the first part thereof. The difficulty is more imaginary than real. The second part of s. 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate: A says in the witness-box that B stabbed C; before the police he had stated that D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness-box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer. On the other hand, the procedure suggested by the learned Counsel may be illustrated thus: If the witness is asked "did you say before the police-officer that you saw a gas light?" and he answers "yes", then the statement which does not contain such recital is put to him as contradiction. This procedure involves two fallacies: one is it enables the accused to elicit by a process of cross-examination what the witness stated before the police-officer. If a police-officer did not make a record of a witness's statement, his entire statement could not be used for any purpose, whereas if a police-officer recorded a few sentences, by this process of cross-examination, the witness's oral statement could be brought on record. This procedure,

therefore, contravenes the express provision of s. 162 of the Code. The second fallacy is that by the illustration given by the learned Counsel for the appellants there is no self-contradiction of the primary statement made in the witness-box, for the witness has yet not made on the stand any assertion at all which can serve as the basis. The contradiction, under the section, should be between what a witness asserted in the witness-box and what he stated before the police-officer, and not between what he said he had stated before the police-officer and what he actually made before him. In such a case the question could not be put at all: only questions to contradict can be put and the question here posed does not contradict; it leads to an answer which is contradicted by the police statement. This argument of the learned Counsel based upon s. 145 of the Evidence Act is, therefore, not of any relevance in considering the express provisions of s. 162 of the Code of Criminal Procedure.

This leads us to the main question in the case, i.e., the interpretation of s. 162 of the Code of Criminal Procedure. The cardinal rule of construction of the provisions of a section with a proviso is succinctly stated in Maxwell's Interpretation of Statutes, 10th Edn., at p. 162 thus:

"The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest.

The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail."

Unless the words are clear, the Court should not so construe the proviso as to attribute an intention to the legislature to give with one hand and take away with another. To put it in other words, a sincere attempt should be made to reconcile the enacting clause and the proviso and to avoid repugnancy between the two.

As the words in the section declare the intention of the legislature, we shall now proceed to construe the

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section giving the words used therein their natural and ordinary sense.

The object of the main section as the history of its legislation shows and the decided cases indicate is to impose a general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a police officer or any record thereof, or any part of such statement or record, be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner provided by s. 145 of the Evidence Act. We have already noticed from the history of the section that the enacting clause was mainly intended to protect the interests of accused. At the stage of investigation, statements of witnesses are taken in a haphazard manner. The police-officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel of voices raised all round. In such an atmosphere, unlike that in a Court of Law, he is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the statements which appear to him to be relevant. These statements are, therefore, only a summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement.

At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy *via media*, namely, while it enacts an absolute bar against the statement made before a police-officer being used for any purpose whatsoever, it enables the accused to rely

upon it for a limited purpose of contradicting a witness in the manner provided by s. 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar.

If the provisions of the section are construed in the aforesaid background, much of the difficulty raised disappears. Looking at the express words used in the section, two sets of words stand out prominently which afford the key to the intention of the legislature. They are: "statement in writing", and "to contradict". "Statement" in its dictionary meaning is the act of stating or reciting. *Prima facie* a statement cannot take in an omission. A statement cannot include that which is not stated. But very often to make a statement sensible or self-consistent, it becomes necessary to imply words which are not actually in the statement. Though something is not expressly stated, it is necessarily implied from what is directly or expressly stated. To illustrate: 'A' made a statement previously that he saw 'B' stabbing 'C' to death; but before the Court he deposed that he saw 'B' and 'D' stabbing 'C' to death: the Court can imply the word "only" after 'B' in the statement before the police. Sometimes a positive statement may have a negative aspect and a negative one a positive aspect. Take an extreme example: if a witness states that a man is dark, it also means that he is not fair. Though the statement made describes positively the colour of a skin, it is implicit in that statement itself that it is not of any other colour. Further, there are occasions when we come across two statements made by the same person at different times and both of them cannot stand or co-exist. There is an inherent repugnancy between the two and, therefore, if one is true, the other must be false. On one occasion a person says

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that when he entered the room, he saw 'A' shooting 'B' dead with a gun; on another occasion the same person says that when he entered the room he saw 'C' stabbing 'B' dead; both the statements obviously cannot stand together, for, if the first statement is true, the second is false and *vice versa*. The doctrine of recital by necessary implication, the concept of the negative or the positive aspect of the same recital, and the principle of inherent repugnancy, may in one sense rest on omissions, but, by construction, the said omissions must be deemed to be part of the statement in writing. Such omissions are not really omissions strictly so called and the statement must be deemed to contain them by implication. A statement, therefore, in our view, not only includes what is expressly stated therein, but also what is necessarily implied therefrom.

"Contradict" according to the Oxford Dictionary means to affirm to the contrary. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross-examining Counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the police-officer—in the sense we have indicated—and the statement in the evidence before the Court are so inconsistent or irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other.

It is broadly contended that a statement includes all omissions which are material and are such as a witness is expected to say in the normal course. This contention ignores the intention of the legislature expressed in s. 162 of the Code and the nature of the non-evidentiary value of such a statement, except for the limited purpose of contradiction. Unrecorded statement is completely excluded. But recorded one is used for a specified purpose. The record of a statement, however perfunctory, is assumed to give a sufficient guarantee to the correctness of the statement made, but if words not recorded are brought in by some fiction, the object of the section would be

defeated. By that process, if a part of a statement is recorded, what was not stated could go in on the sly in the name of contradiction, whereas if the entire statement was not recorded, it would be excluded. By doing so, we would be circumventing the section by ignoring the only safeguard imposed by the legislature, viz., that the statement should have been recorded.

We have already pointed out that under the amending Act of 1955, the prosecution is also allowed to use the statement to contradict a witness with the permission of the Court. If construction of the section as suggested by the learned Counsel for the appellants be accepted, the prosecution would be able to bring out in the cross-examination facts stated by a witness before a police-officer but not recorded and facts omitted to be stated by him before the said officer. This result is not decisive on the question of construction, but indicates the unexpected repercussions of the argument advanced to the prejudice of the accused.

As s. 162 of the Code of Criminal Procedure enables the prosecution in the re-examination to rely upon any part of the statement used by the defence to contradict a witness, it is contended that the construction of the section accepted by us would lead to an anomaly, namely, that the accused cannot ask the witness a single question, which does not amount to contradiction whereas the prosecution, taking advantage of a single contradiction relied upon by the accused, can re-examine the witness in regard to any matter referred to in his cross-examination, whether it amounts to a contradiction or not. I do not think there is any anomaly in the situation. Section 145 of the Evidence Act deals with cross-examination in respect of a previous statement made by the witness. One of the modes of cross-examination is by contradicting the witness by referring him to those parts of the writing which are inconsistent with his present evidence. Section 162, while confining the right to the accused to cross-examine the witness in the said manner, enables the prosecution to re-examine the witness to explain

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the matters referred to in the cross-examination. This enables the prosecution to explain the alleged contradiction by pointing out that if a part of the statement used to contradict be read in the context of any other part, it would give a different meaning; and if so read, it would explain away the alleged contradiction. We think that the word "cross-examination" in the last line of the first proviso to s. 162 of the Code of Criminal Procedure cannot be understood to mean the entire gamut of cross-examination without reference to the limited scope of the proviso, but should be confined only to the cross-examination by contradiction allowed by the said proviso.

The conflict of judicial opinion on this question is reflected in the decisions of different High Courts in this country. One of the views is tersely put by Burn J. in *In re Ponnusami Chetty* (1) at p. 476:

"Whether it is considered as a question of logic or language, "omission" and "contradiction" can never be identical. If a proposition is stated, any contradictory proposition must be a statement of some kind, whether positive or negative. To "contradict" means to "speak against" or in one word to "gainsay". It is absurd to say that you can contradict by keeping silence. Silence may be full of significance, but it is not "diction", and therefore it cannot be "contradiction".

Considering the provisions of s. 145 of the Evidence Act, the learned Judge observed thus at p. 477:

"It would be in my opinion sheer misuse of words to say that you are contradicting a witness by the writing, when what you really want to do is to contradict him by pointing out omissions from the writing. I find myself in complete agreement with the learned Sessions Judge of Ferozepore who observed that "a witness cannot be confronted with the unwritten record of an un-made statement"."

The learned Judge gives an illustration of a case of apparent omission which really is a contradiction, i. e., a case where a witness stated under s. 162 of the Code that he saw three persons beating a man and later

(1) (1933) I.L.R. 56 Mad. 475.

stated in Court that four persons were beating the same man. This illustration indicates the trend of the Judge's mind that he was prepared to treat an omission of that kind as part of the statement by necessary implication. A Division Bench of the Madras High Court followed this judgment in *In re Guruva Vannan* (1). In that judgment, Mockett, J., made the following observation at p. 901:

"I respectfully agree with the judgment of Burn, J., in *Ponnuswamy Chetty* v. *Emperor* (2) in which the learned Judge held that a statement under section 162 of the Code of Criminal Procedure cannot be filed in order to show that a witness is making statements in the witness box which he did not make to the police and that bare omission cannot be a contradiction. The learned judge points out that, whilst a bare omission can never be a contradiction, a so-called omission in a statement may sometimes amount to a contradiction, for example, when to the police three persons are stated to have been the criminals and later at the trial four are mentioned."

The Allahabad High Court in *Ram Bali* v. *State* (3) expressed the principle with its underlying reasons thus at p. 294:

"Witness after witness was cross-examined about certain statements made by him in the deposition but not to be found in his statement under s. 162, Criminal P. C. A statement recorded by the police under s. 162 can be used for one purpose and one purpose only and that of contradicting the witness. Therefore if there is no contradiction between his evidence in Court and his recorded statement in the diary, the latter cannot be used at all. If a witness deposes in Court that a certain fact existed but had stated under s. 162 either that that fact had not existed or that the reverse and irreconcilable fact had existed it is a case of conflict between the deposition in the Court and the statement under s. 162 and the latter can be used to contradict the former. But if he had not stated under s. 162 anything about the fact there is no conflict and the

(1) I.L.R. (1944) Mad. 897. (2) (1933) I L.R. 56 Mad. 475.
(3) A.I.R. 1952 All. 280.

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statement cannot be used to contradict him. In some cases an omission in the statement under s. 162 may amount to contradiction of the deposition in Court; they are the cases where what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence."

At a later stage of the judgment, the learned Judges laid down the following two tests to ascertain whether a particular omission amounts to contradiction: (i) an omission is not a contradiction unless what is actually stated contradicts what is omitted to be said; and (ii) the test to find out whether an omission is contradiction or not is to see whether one can point to any sentence or assertion which is irreconcilable with the deposition in the Court. The said observations are in accord with that of the Madras High Court in *In re Guruva Vannan* (1). The Patna High Court in *Badri Chaudhry* v. *King-Emperor* (2) expressed a similar view. At p. 22, Macpherson, J., analysing s. 162 of the Code of Criminal Procedure, after its amendment in 1923, observed:

"The first proviso to section 162 (1) makes an exception in favour of the accused but it is an exception most jealously circumscribed under the proviso itself. "Any part of such statement" which has been reduced to writing may in certain limited circumstances be used to *contradict* the witness who made it. The limitations are strict: (1) Only the statement of a prosecution witness can be used; and (2) only if it has been reduced to writing; (3) only a part of the statement recorded can be used; (4) such part must be duly proved; (5) it must be a contradiction of the evidence of the witness in Court; (6) it must be used as provided in s. 145, Evidence Act, that is, it can only be used after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction, and there are others. Such a statement which does not contradict the testimony of the witness cannot be proved in any circumstances and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer."

(1) I.L.R. (1944) Mad. 897. (2) A.I.R. 1926 Pat. 20.

In *Sakhawat* v. *Crown* (1) much to the same effect was stated at p. 284:

"The section (s. 162) provides that such statements can be used only for the purpose of contradiction. Contradiction means the setting up of one statement against another and not the setting up of a statement against nothing at all. An illustration would make the point clear. If a witness in Court says 'I saw A running away' he may be contradicted under section 162 by his statement to the police 'I did not see A running away'. But by proving an omission what the learned Counsel contradicts is not the statement 'I saw A running away' but the statement 'I stated to the police that I saw A running away'. As section 162 does not allow the witness to depose 'I stated to the police that I saw A running away' it follows that there can be no basis for eliciting the omission. Our argument is further fortified by the use of the words "*any part* of such statement .....may be used to contradict." It is not said that *whole* statement may be used. But in order to prove an omission the whole statement has to be so used, as has been done in the present case."

The contrary view is expressed in the following proposition:

"An omission may amount to contradiction if the matter omitted was one which the witness would have been expected to mention and the Sub-Inspector to make note of in the ordinary course. Every detail is expected to be noted."

This proposition, if we may say so, couched in wide phraseology enables the trial Judge to put into the mouth of a witness things which he did not state at an earlier stage and did not intend to say, on purely hypothetical considerations. The same idea in a slightly different language was expressed by Bhargava and Sahai, JJ., in *Rudder* v. *The State* (2) at p. 240:

"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

(1) I.L.R. (1937) Nag. 277. (2) A.I.R. 1957 All. 239.

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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."

A similar view was expressed in *Mohinder Singh* v. *Emperor* (1), *Yusuf Mia* v. *Emperor* (2), and *State of M. P.* v. *Banshilal Behari* (3).

Reliance is placed by the learned Counsel for the appellants on a statement of law found in "Wigmore on Evidence", Vol. III, 3rd Edn., at p. 725. In discussing under the head "what amounts to a Self-contradiction", the learned author tersely describes a self-contradiction in the following terms:

"..... it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required."

The learned author further states, at p. 733:

"A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact."

The said statement is no doubt instructive, but it cannot be pressed into service to interpret the provisions of s. 162 of the Code of Criminal Procedure. In America, there is no provision similar to s. 162 of the Code. It is not, therefore, permissible, or even possible, to interpret the provisions of a particular Act, having regard to stray observations in a text-book made in a different context.

It is not necessary to multiply cases. The two conflicting views may be briefly stated thus: (i) omissions, unless by necessary implication be deemed to be part of the statement, cannot be used to contradict the statement made in the witness-box; and (ii) they must be in regard to important features of the incident which are expected to be included in the statement made before the police. The first proposition not only carries out the intention of the legislature but is also in accord with the plain meaning of the words used in the section. The second proposition not only stretches

(1) A.I.R. 1932 Lah. 103. (2) A.I.R. 1938 Pat. 579.
(3) A.I.R. 1956 M.P. 13.

the meaning of the word "statement" to a breaking point, but also introduces an uncertain element, namely, ascertainment of what a particular witness would have stated in the circumstances of a particular case and what the police officer should have recorded. When the section says that the statement is to be used to contradict the subsequent version in the witness-box, the proposition brings in, by construction, what he would have stated to the police within the meaning of the word "statement". Such a construction is not permissible.

From the foregoing discussion the following propositions emerge: (1) A statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness-box and for no other purpose; (2) statements not reduced to writing by the police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement; illustration: in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but in the witness-box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word "only" can be implied, i.e., the witness saw A only stabbing B; (ii) a negative aspect of a positive recital in a statement; illustration: in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness-box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion; and (iii) when the statement before the police and that before the Court cannot stand together; illustration: the witness says in the recorded

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statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediatly after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing, i.e., at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must necessarily be false.

The aforesaid examples are not intended to be exhaustive but only illustrative. The same instance may fall under one or more heads. It is for the trial Judge to decide in each case, after comparing the part or parts of the statement recorded by the police with that made in the witness-box, to give a ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfies the requirements of law.

The next point is what are the omissions in the statement before the police which the learned Sessions Judge did not allow the accused to put to the witnesses for contradicting their present version. The learned Counsel for the appellants contends that the accused intended to put to the witnesses the following omissions, but they did not do so as the learned Sessions Judge disallowed the two questions put to P. W. 30 and made a considered order giving his reasons for doing so, and that the learned Counsel thought it proper not to put the same questions or other questions in regard to omissions to P. W. 30 or to the other witnesses that followed him. The said omissions are: (1) The warning by the members of the gang on their arrival to the audience at the music party not to stir from their places; (2) the presence of a gas lantern; (3) the chase of Bharat Singh by the assailants; (4) the scrutiny of the dead bodies by the gang; and (5) the return of the gang in front of the house of Bankey. The learned Counsel for the respondent contests this fact and argues that only two omissions, namely, the presence of a gas-lantern and the scrutiny of the dead bodies by the gang, were put in the cross-examination of P. W. 30 and no other omissions were put to him or any other witness, and that indeed the order

of the learned Sessions Judge did not preclude him from putting all the omissions to the witnesses and taking the decision of the Judge on the question of their admissibility. He further contends that even before the learned Judges of the High Court the Advocate for the appellants only made a grievance of his not having been allowed to put the aforesaid two omissions and did not argue that he intended to rely upon other omissions but did not do so as he thought that the learned Sessions Judge would disallow them pursuant to his previous order. Before the High Court an application was filed for summoning eight eye-witnesses on the ground that the learned Sessions Judge did not allow the Counsel for defence to put the omissions amounting to material contradiction to them, but no mention was made in that application of the number of omissions which the accused intended to put to the eye-witnesses if they were summoned. That application was filed on May 1, 1957, but no attempt was made to get a decision on that application before the arguments were heard. Presumably, the Court as well as the parties thought that the application could more conveniently be disposed of after hearing the arguments. On July 30, 1957, i. e., after the appellants were fully heard, that application was dismissed and the detailed reasons for dismissing it were given in the judgment, which was delivered on September 11, 1957. The judgment of the learned Judges of the High Court clearly indicates that what was argued before them was that two omissions sought to be put to P. W. 30 were disallowed and therefore the accused did not put the said omissions to the other witnesses. It was not contended on behalf of the accused that other omissions were intended to be used for contradiction, but were not put to the witnesses as the Advocate thought that in view of the order of the learned Sessions Judge they would not be allowed automatically. The learned Judges held that the said two omissions amounted to material contradiction and that the learned Sessions Judge was wrong in disallowing them, but they ignored those

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two circumstances and based their findings on matters of greater certainty. If really the Judges had made a mistake in appreciating the arguments of the learned Counsel for the appellants in the context of omissions, one would expect the accused to mention the said fact prominently in their application for special leave. Even if they omitted to mention that fact in the application for special leave, they could have filed an affidavit sworn to by the Advocate, who appeared for them before the learned Judges of the High Court, mentioning the fact that in spite of the argument specifically directed to the other omissions the learned Judges by mistake or over-sight failed to notice that argument. The learned Counsel who argued before us did not argue before the High Court, and, therefore, obviously he is not in a position to assert that the Judges committed a mistake in omitting to consider the argument advanced before them. But he made strenuous attempts before us to persuade us to hold that there must have been a mistake. He would say that the learned Counsel had in fact relied upon all the aforesaid omissions in support of his contention that there was development of the case of the prosecution from time to time and therefore he must have also relied upon the said omissions in the context of the statements made under s. 162 of the Code of Criminal Procedure; on the other hand, the fact that the learned Judges considered all the alleged omissions in connection with the said contention and only considered two omissions in regard to the contention based on s. 162 of the Code is indicative of the fact that the learned Counsel, for reasons best known to him, did not think fit to rely upon all the alleged omissions. The deposition of P.W. 30 also shows that only two omissions in the statement before the police, viz., the existence of a gas-lantern and the scrutiny of the dead bodies by the gang, were put to him in cross-examination and the learned Sessions Judge disallowed those questions on the ground that the learned Counsel was not able to show any law entitling him to put the said questions. Though the witness was examined at some length, no other alleged omissions in

the statement before the police were sought to be put to him. It would be seen from the short order made by the learned Sessions Judge at the time each one of the two questions were put, that the learned Sessions Judge did not give a general ruling that no omissions in a statement before the police could be put to a witness. The rulings were given, having regard to the nature of the omissions relied upon. But after the entire evidence of P. W. 30 was closed, the learned Sessions Judge gave a considered order. Even in that order, he did not rule out all omissions as inadmissible, but clearly expressed the view that if what was stated in the witness-box was irreconcilable with what was omitted to be stated in the statement, it could go in as material contradiction. Even after this order, it was open to the appellants to bring out all such omissions, but no attempt was made by them to do so. These circumstances also support the impression of the learned Judges of the High Court that what was argued before them was only in respect of the two specified omissions put to P. W. 30 in his cross-examination. We, therefore, hold that only two omissions relating to the existence of the gas-lantern and the scrutiny of the faces of the deceased by the appellants were put to P. W. 30 and were intended to be put to the other witnesses, but were not so done on the basis of the ruling given by the Court.

Would those two omissions satisfy the test laid down by us? The witness stated in the Court that there was a gas-lamp and that some of the miscreants scrutinised the faces of the dead bodies. In their statements before the police they did not mention the said two facts and some of the witnesses stated that there were lanterns. Taking the gas-lamp first: the scene of occurrence was not a small room but one spread-over from the well to Bankey's house. From that omission in the statement it cannot necessarily be implied that there was no gas-lamp in any part of the locality wherein the incident took place; nor can it be said that, as the witnesses stated that there were lanterns, they must be deemed to have stated that there was no gas-lamp, for the word "lantern" is

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comprehensive enough to take in a gas-lantern. It is also not possible to state that the statements made before the police and those made before the Court cannot co-exist, for there is no repugnancy between the two, as even on the assumption that lantern excludes a gas-lantern, both can exist in the scene of occurrence. The same can be said also about the scrutiny of the faces of the dead bodies. In the statements before the police, the movements of the appellants were given. It was stated that they shot at the people and decamped with the gun of Bharat Singh. The present evidence that in the course of their pursuit, they looked at the faces of two of the dead bodies does not in any way contradict the previous versions, for the said incident would fit in with the facts contained in the earlier statements. The appellants could have shot at the audience, pursued them, taken the gun of Bharat Singh and on their way scrutinised the dead bodies. The alleged omission does not satisfy any of the principles stated by us.

In this view, it is unnecessary to express our opinion on the question whether, if the said two omissions amounted to contradiction within the meaning of s. 162 of the Code of Criminal Procedure, the appellants were in any way prejudiced in the matter of their trial.

The last contention of the learned Counsel for the appellants is that the learned Judges of the High Court acted illegally in testing the veracity of the witnesses with reference to the contents of the first information report. A perusal of the judgment of the High Court shows that the Advocate for the appellants contended before them, *inter alia*, that the witnesses should not be believed as their present version was inconsistent with the first information report. The learned Judges assumed that the said process was permissible and even on that assumption they rejected the plea of the learned Counsel for the appellants that there was improvement in the prosecution case. The learned Judges were really meeting the argument of the learned Counsel for the appellants. It is idle to suggest that they erred in law in relying upon the first infor-

mation report to discredit the witnesses for the simple reason that they accepted the evidence in spite of some omissions in the first information report.

In the result, we confirm the judgment of the High Court and dismiss the appeal.

HIDAYATULLAH, J.—The judgment which I am delivering has been prepared by my learned brother, Imam, J. and myself.

We agree that the appeal be dismissed but would express in our own words the grounds upon which it should be dismissed.

The main contention advanced on behalf of the appellants was as follows: There was no fair trial of the appellants as they had been deprived of the right of cross-examination of the prosecution witnesses with reference to their statements made to the police during the police investigation. The trial Judge had disallowed two questions in this respect, and the lawyer for the appellants regarded the decision of the learned Judge as one which prevented him from putting further questions with respect to other matters concerning the police statements of the witnesses. The order of the learned Judge had to be respected. The order of the learned Judge was illegal, as on a proper interpretation of the provisions of s. 162 of the Code of Criminal Procedure, the appellants were entitled not only to put the two questions which were ruled out, but also questions with respect to other matters arising out of the police statements of the witnesses. The purpose of cross-examination is to test the reliability of the witnesses both as to what they had to say about the occurrence itself and concerning their identification of those who had participated in it. There were several matters with respect to which, if questions had been allowed to be put, an effective cross-examination might have resulted and enabled the appellants to persuade the trial Judge to hold that the witnesses were entirely unreliable. In a case of this kind in which the appellants were involved, there were only two principal questions which were of vital importance: (1) how far the witnesses had improved their

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story in their evidence in Court from what they had said to the police concerning the occurrence, and (2) the existence of opportunity and sufficient light to enable proper identification.

It may be assumed, although it has been a matter of controversy, that the order of the trial Judge disallowing the two questions which were put was understood by the lawyer for the defence to mean that all similar questions in the nature of omissions in the police statements with respect to matters stated in Court would be disallowed and therefore no attempt was made to put further questions to the witnesses in this respect.

Unfortunately, the lawyer for the defence had not in this particular case laid any adequate foundation upon which the two questions, which were ruled out, could have been properly put. From that point of view, the order of the trial Judge in disallowing those questions was not improper. It could not, therefore, be said that the trial Judge had done anything which could be rightly characterised as infringement of the provisions of s. 162 of the Code of Criminal Procedure or of the Indian Evidence Act, or even of the rules of natural justice.

Johari Chowkidar had reported the occurrence to the police station, which was a brief statement. Certain matters were, however, definitely mentioned—the names of the persons recognised in the occurrence, the number of persons killed and injured, the taking away of a gun which was with Bharat Singh, Bankey Kumhar firing his gun at the culprits in such a manner that some of them must have been injured, and the existence of light from the moon and lantern. The principal comment had been that in this report there was no mention of the culprits having advanced from the well towards the open place where villagers had gathered to hear the music. On the contrary, the first information report indicated that the firing was done from the parapet of the well. It is clear, however, from Johari's statement that the culprits had taken away the gun which was with Bharat Singh. This could only have been done if the culprits had

advanced from the well to the place where the villagers had assembled.

It was then commented that in the first information report the culprits were said to have come from the southern lane, while in Court the evidence was that they had come to the well from the eastern lane. The discrepancy is a minor one. Johari must have been concerned with reporting the first firing from the well, and he might have mistaken the actual direction from which the culprits had approached the well. Johari's statement made no mention of the culprits uttering any warning that no one was to run away as they advanced from the well, whereas in Court the witnesses spoke to that effect. This was a detail which Johari might not have considered to be of sufficient importance, as he was anxious to make a bare statement in order to get the police to proceed to the place of occurrence as quickly as possible. Johari's statement also makes no mention of the culprits examining the bodies of the dead and examining their faces and exclaiming that Asa Ram, one of the men whom they wished to kill, had been killed. Here again, this was a matter of detail which Johari might not have considered necessary to mention. The first information report made no mention of the existence of gas light. It did, however, mention the existence of light of lantern and existence of moonlight. The existence of light from lantern and the full moon obviously was sufficient to recognise known persons. It is in evidence that the appellants were known for several years to the witnesses who had identified them as participants in the occurrence. It could not be said with absolute certainty that the mention of the existence of light of lantern excluded the existence of gas light. The statement of Johari gives clear indication that the culprits did not remain all the time at the well, because they must have advanced to take away the gun which was with Bharat Singh. The culprits must have stayed at the place of occurrence for some time to enable Bankey Kumhar to fire his gun at them and to convey to Johari's mind the certainty that some of the culprits must have been injured. Reference is made only to

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some of the details and not to all the discrepancies pointed out in order to determine whether the alleged improvement in the story of the witnesses in Court from what they are alleged to have stated to the police was with reference to vital matters, which went to the root of the prosecution case.

It is apparent from what has been stated above that even if the defence had been allowed to put questions concerning these alleged omissions in the statements of the witnesses to the police, it could not have made their evidence in Court unreliable with respect to any material particular concerning the occurrence or the identification of the accused.

From the above, it seems to us that there is no merit in the appeal. As, however, considerable argument has been made concerning the right of cross-examination and as to how the provisions of s. 162 of the Code of Criminal Procedure should be construed, it becomes necessary to consider the submissions of the learned counsel for the appellants.

The provisions of the Code of Criminal Procedure of 1861 and 1872 have been referred to by our learned brother, Subba Rao, J. Section 162 of the Code of 1872 made it clear that except for a dying declaration and matters coming within the provisions of s. 27 of the Indian Evidence Act of 1872, no statement of any person made to a police officer in the course of investigation, if reduced into writing, could be used as evidence against the accused. There was no restriction as to the extent of the right of an accused to cross-examine a prosecution witness concerning his statement to the police. Section 162 of the Code of 1898 prohibited the use of a statement reduced into writing, as evidence except any statement falling within the provisions of s. 32 of the Indian Evidence Act, 1872. The proviso to this section, however, expressly stated that in spite of the prohibition in the main provision, the accused could use such a statement to impeach the credit of the witnesses in the manner provided in the Indian Evidence Act of 1872. It will be seen therefore that until 1898 there was no restriction imposed upon the accused as to the extent

of his right of cross-examination. As s. 162 of the Code of 1898 entirely prohibited the use of the statement reduced into writing as evidence, the proviso to it safeguarded the right of the accused to impeach the credit of such witness in the manner provided in the Indian Evidence Act, 1872. Under the Indian Evidence Act, a witness's credit can be impeached under ss. 145 and 155 of that Act. The manner in which the provisions of these sections could be utilised to impeach the credit of a witness covers a wide field. If, however, it was intended to contradict a witness concerning his previous statement reduced into writing, then the provisions of s. 145 require that those parts of the writing by which it was sought to contradict the witness must be shown to him. There can be no doubt that the provisions of the Code from 1861 to 1898 in no way curbed the right of cross-examination on behalf of the accused. The provisions were intended to protect the accused in that no statement of a witness to the police reduced into writing could be used as evidence against him, but the right to cross-examine the witness to the fullest extent in accordance with the provisions of the Indian Evidence Act in order to show that he was unreliable, remained unaffected. The real question for consideration is whether the amendment of the Code in 1923 brought about such a radical change in the provisions of s. 162 of the Code as to suggest that the Legislature had taken a retrogade step, and had intended to deprive the accused of the right of cross-examination of prosecution witnesses concerning their police statements except in one restricted particular, namely, to make use of the statements reduced into writing to contradict the witnesses in the manner provided by s. 145 of the Indian Evidence Act.

The provisions of s. 162 of the Code of 1898 were amended in 1923 in the hope that the amendment would resolve the various doubts which had sprung up as the result of divergent judicial opinions as to the meaning of these provisions. The provisions of s. 162 of the Code of 1898 had been variously construed,

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and the amendment in 1923 has not improved matters. The amended section still remains difficult to construe. We shall endeavour now to construe it.

Under s. 161 of the Code, the police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. He may also reduce into writing any statement made to him in the course of such examination, and if he does so, he must make a separate record of the statement of each such person.

The legislature has, however, put restrictions upon the use of such statements at the inquiry or trial of the offence. The first restriction is that no statement made by any person to a police officer, if reduced into writing, be signed by the person making it. The intention behind the provision is easy to understand. The legislature probably thought that the making of statements by witnesses might be thwarted, if the witnesses were led to believe that because they had signed the statements they were bound by them, and that whether the statements were true or not, they must continue to stand by them. The legislature next provides that a statement, however recorded, or any part of it shall not be used for any purpose (save as provided in the section) at the inquiry or trial in respect of any offence under investigation at the time such statement is made. The object here is not easily discernible, but perhaps is to discourage over-zealous police officers who might otherwise exert themselves to improve the statements made before them. The Privy Council considered the intention to be:

"If one had to guess at the intention of the legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of the information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both."

It is possible that the legislature had also in mind that the use of statements made under the influence of the investigating agency might, unless restricted to a use for the benefit of the accused, result in considerable

prejudice to him. But whatever the intention which led to the imposition of the restrictions, it is manifest that the statements, however recorded, cannot be used except to the extent allowed by the section. The prohibition contained in the words "any purpose" is otherwise absolute.

Then follow two provisos. The first gives the right to the accused to make use of the statements for contradicting a witness for the prosecution in the manner provided by s. 145 of the Indian Evidence Act. It also gives a right to the prosecution to use the statement for purposes of re-examination of the same witness but only to explain any matter referred to in the cross-examination of the witness.

The first proviso, when analysed, gives the following ingredients:

(i) A prosecution witness is called for the prosecution;

(ii) whose statement has previously been reduced to writing;

(iii) The accused makes a request;

(iv) The accused is furnished with a copy of the previous statement;

(v) In order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by s. 145 of the Indian Evidence Act.

If the accused exercises the right in (v) above in any instance, then the prosecution has the right to use the statement in the re-examination of the witness but only to explain any matters referred to by him in cross-examination.

Section 145 of the Indian Evidence Act reads:

"*Cross-examination as to previous statements in writing*: 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."

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The section analysed, gives the following result:

(1) Witnesses can be cross-examined as to previous statements in writing or reduced into writing;

(2) These writings need not be shown to the witnesses or proved beforehand;

(3) But if the intention is to contradict them by the writings,

(a) their attention must be drawn to those parts which are to be used for contradiction;

(b) This should be done before proving the writings.

Our learned brother, Subba Rao, J., restricts the use by the accused of the previous statements to the mechanism of contradiction as detailed in (3) above, but says that the accused has no right to proceed under (1) and (2). He deduces this from the words of s. 162 of the Code of Criminal Procedure, where it is provided:

"in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872."

The fact that the accused can use the previous statement for the purpose of contradicting, shows that the previous statement cannot be used for corroborating the witness. Also there must be some basis for contradicting. This may arise, because of there being a contrary statement, irreconcilable statement or even material omissions. The accused can establish a contradiction by cross-examining the witness but only so as to bring out a contradiction and no more. We regret we cannot agree (and we say this with profound respect) that the accused is not entitled to cross-examine but only to contradict. In our opinion, the reference to s. 145 of the Indian Evidence Act brings in the whole of the manner and machinery of s. 145 and not merely the second part. In this process, of course, the accused cannot go beyond s. 162 or ignore what the section prohibits but cross-examination to establish a contradiction between one statement and another is certainly permissible.

This question loses much of its importance when

there are patent contradictions and they can be put to the witness without any cross-examination as in the two statements:

(a) I saw A hit B.

(b) I did not see A hit B.

But there are complex situations where the contradiction is most vital and relevant but is not so patent. There are cases of omissions on a relevant and material point. Let us illustrate our meaning by giving two imaginary statements:

(a) When I arrived at the scene I saw that X was running away, chased by A and B who caught him.

(b) When I arrived at the scene I saw X take out a dagger from his pocket, stab D in his chest and then take to his heels. He was chased by A and B who caught him.

There is an omission of two facts in the first statement, viz., (a) X took out a dagger from his pocket, and (b) he stabbed D in the chest. These two statements or their omission involve a contradiction as to the stage of the occurrence, when the observation of the witness began.

What s. 145 of the Indian Evidence Act provides is that a witness may be contradicted by a statement reduced into writing and that is also the use to which the earlier statement can be put under s. 162 of the Code of Criminal Procedure. When some omissions occur, there is contradiction in one sense but not necessarily on a relevant matter. The statements of witnesses may and do comprise numerous facts and circumstances, and it happens that when they are asked to narrate their version over again, they omit some and add others. What use can be made of such omissions or additions is for the accused to decide, but it cannot be doubted that some of the omissions or additions may have a vital bearing upon the truth of the story given. We do not think that by enacting s. 162 in the words used, the legislature intended a prohibition of cross-examination to establish which of the two versions is an authentic one of the events as seen by the witness. The use of the words " re-examination " and " cross-examination " in the same

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proviso shows that cross-examination is contemplated or in other words, that the manner of contradiction under s. 145 of the Indian Evidence Act comprises both cross-examination and contradiction. Indeed, the second part is only the final stage of the contradiction, which includes the earlier stages. Re-examination is only permissible where there is cross-examination.

It must not be overlooked that the cross-examination must be directed to bringing out a contradiction between the statements and must not subserve any other purpose. If the cross-examination does anything else, it will be barred under s. 162, which permits the use of the earlier statement for contradicting a witness and nothing else. Taking the example given above, we do not see why cross-examination may not be like this:

Q. I put it to you that when you arrived on the scene X was already running away and you did not actually see him stab D as you have deposed to-day ?

A. No. I saw both the events.

Q. If that is so, why is your statement to the police silent as to stabbing ?

A. I stated both the facts to the police.

The witness can then be contradicted with his previous statement. We need hardly point out that in the illustration given by us, the evidence of the witness in Court is direct evidence as opposed to testimony to a fact suggesting guilt. The statement before the police can only be called circumstantial evidence of complicity and not direct evidence in the strict sense.

Of course, if the questions framed were :

Q. What did you state to the police ? or

Q. Did you state to the police that D stabbed X ?

They may be ruled out as infringing s. 162 of the Code of Criminal Procedure, because they do not set up a contradiction but attempt to get a fresh version from the witnesses with a view to contradicting him. How the cross-examination can be made must obviously vary from case to case, counsel to counsel and statement to statement. No single rule can be laid down and the propriety of the question in the light of

the two sections can be found only when the facts and questions are before the Court. But we are of opinion that relevant and material omissions amount to vital contradictions, which can be established by cross-examination and confronting the witness with his previous statement.

The word "contradict" has various meanings, and in the Oxford English Dictionary it is stated as "To be contrary to in effect, character, etc.; to be directly opposed to; to go counter to, go against" as also "to affirm the contrary of; to declare untrue or erroneous; to deny categorically" and the word "contradiction" to mean "A state or condition of opposition in things compared; variance; inconsistency, contrariety". In Shorter Oxford English Dictionary, "contradict" is said to mean "To speak against; to oppose in speech; to forbid; to oppose; to affirm the contrary of; to declare untrue or erroneous; to deny; to be contrary to; to go counter to and go against" and "contradiction" to mean "A state of opposition in things compared; variance; inconsistency". The meaning given to the words "contradict" and "contradiction" in these Dictionaries must at least include the case of an omission in a previous statement which by implication amounts to contradiction and therefore such an omission is a matter which is covered by the first proviso to s. 162 and questions in cross-examination can be put with respect to it in order to contradict the witness. It is difficult to say as an inflexible rule that any other kind of omission cannot be put to a witness in order to contradict him, when the proper foundation had been laid for putting such questions. The words "to contradict him" appearing in s. 145 of the Evidence Act must carry the same meaning as the words "to contradict such witness" in s. 162 of the Code. In a civil suit, where the provisions of s. 162 of the Code of Criminal Procedure have no application, would it be correct to say that only questions concerning omissions of the kind suggested by our learned brother could be put and none other? We cannot see why a question of the nature of cross-examination regarding an omission with respect to a

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matter which the witness omitted to make in his previous statement and which, if made, would have been recorded, cannot be put. The facts and circumstances of each case will determine whether any other kind of omission than that referred to by our learned brother could be put to a witness in order to contradict him. It would be for the Judge to decide in each case whether in the circumstances before him the question could be put. The purpose of cross-examination is to test the veracity of the statement made by a witness in his examination-in-chief as also to impeach his credit. Not only is it the right of the accused to shake the credit of a witness, but it is also the duty of the Court trying an accused to satisfy itself that the witnesses are reliable. It would be dangerous to lay down any hard and fast rule.

We pause to look at the matter from another angle. We shall assume that the interpretation which the State claims should be put upon s. 162(1) is correct and compare the respective rights of the accused and the prosecution. According to this interpretation, the accused has no right of cross-examination in respect of the contradiction. This means that no question can be put about the previous statement but only the part in which there is a contradiction can be brought to the witness's notice and his explanation, if any, obtained. In other words, there is only "contradiction" and no more. But when the accused has used the statement to contradict the witness—it may be only on one point—what are the rights of the prosecution? The prosecution can use *any part of the statement* in the re-examination not only to explain the 'contradiction' but also *to explain any matter referred to in the cross-examination of the witness.*

If 'contradiction' does not include the right of cross-examination, the right of the prosecution must necessarily extend to re-examination in respect of *any other* matter needing explanation in the cross-examination at large. Thus, the accused cannot ask a single question of the nature of cross-examination but because he sets up a 'contradiction' in the narrow sense, the prosecution can range all over the previous

statement and afford the witness a chance of explaining any matter in his cross-examination by re-examining him which right includes the possibility of asking leading questions with the permission of the Court.

Thus, the accused makes a 'contradiction' at his own peril. By making a single 'contradiction', the accused places the entire statement in the hands of the prosecution to explain away everything with its assistance. One wonders if the legislature intended such a result, for it is too great a price for the accused to pay for too small a right. Fortunately, that is not the meaning of s. 162 of the Code of Criminal Procedure, and it is not necessary to read the word "cross-examination" in the proviso in a sense other than what it has.

The right of both the accused and the prosecution is limited to contradictions. It involves cross-examination by the accused as to that contradiction within s. 145 of the Indian Evidence Act and re-examination in relation to the matters 'referred to in the cross-examination of the witness'. The prosecution cannot range at will to explain away every discrepancy but only such as the accused under *his* right has brought to light. In our opinion, reading the section in this way gives effect to every part and does not lead to the startling and, if we may say so, the absurd results which we have endeavoured to set out above.

The question may be asked, how is there to be a cross-examination about a previous statement? It is difficult to illustrate one's meaning by entering into such an exposition. Any one interested to see the technique is invited to read Mrs. Maybrick's trial in the Notable English Trials (1912) at pages 77-79, the trial of William Palmer, pages 35,36, 50-51. Examples will be found in every leading trial. The question is, did the legislature intend giving this right? In our opinion, the legislature did and for the very obvious reason that it gave the prosecution also a chance to re-examine the witness, to explain 'any matter referred to in the cross-examination of the witness.'

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We respectfully do not agree that the section should be construed in the way our learned brother has construed it. Though we agree as to the result, our opinion cannot be left unexpressed. If the section is construed too narrowly, the right it confers will cease to be of any real protection to the accused, and the danger of its becoming an impediment to effective cross-examination on behalf of the accused is apparent.

This brings us to the consideration of the questions, which were asked and disallowed. These were put during the cross-examination of Bankey, P. W. 30. They are:

Q Did you state to the investigating officer that the gang rolled the dead bodies of Nathi, Saktu and Bharat Singh and scrutinized them, and did you tell him that the face of Asa Ram resembled that of the deceased Bharat Singh?

Q. Did you state to the investigating officer about the presence of the gas lantern?

These questions were defective, to start with. They did not set up a contradiction but attempted to obtain from the witness a version of what he stated to the police, which is then contradicted. What is needed is to take the statement of the police as it is, and establish a contradiction between that statement and the evidence in Court. To do otherwise is to transgress the bounds set by s. 162 which, by its absolute prohibition, limits even cross-examination to contradictions and no more. The cross-examination cannot even indirectly subserve any other purpose. In the questions with which we illustrated our meaning, the witness was not asked what he stated to the police, but was told what he had stated to the police and asked to explain the omission. It is to be borne in mind that the statement made to the police is 'duly proved' either earlier or even later to establish what the witness had then stated.

In our opinion, the two questions were defective for the reasons given here, and were properly ruled out, even though all the reasons given by the Court may not stand scrutiny. The matter was not followed up

with proper questions, and it seems that similar questions on these and other points were not put to the witness out of deference (as it is now suggested) to the ruling of the Court. The accused can only blame themselves, if they did not.

The learned Judges of the High Court ruled out from their consideration that these two circumstances made it possible for the witnesses to recognise the accused, but held that there was ample opportunity even otherwise for the witnesses to do so. The High Court was justified in so doing, and there being ample evidence on which they could come to the conclusion that the witnesses had, in fact, recognised the accused, it must inevitably be regarded as one of fact in regard to which this Court does not interfere.

Since no other point was argued, the appeal must fail, and we agree that it be dismissed.

Appeal dismissed.

THE TRUSTEES OF THE CHARITY FUND, ESPLANADE ROAD, FORT, BOMBAY

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY

(S. R. Das, C. J., N. H. Bhagwati and M. Hidayatullah, JJ.)

Income-tax—Public charitable trust—Exemption—Test—Indian Income-tax Act, 1922 (XI of 1922), s. 4(3)(i).

The appellants were the trustees of a charity fund known as "The Charity Fund founded by Sir Sassoon David, Baronet of Bombay". Clause 13 of the deed of trust, after declaring that the trustees should apply the net income for all or any of the following purposes, namely, (a) the relief and benefit of the poor and indigent members of Jewish or any other community of Bombay or other parts of India or of the world either by making payments to them in cash or providing them with food and