1951

The State of Bombay and Another v. F. N. Balsara.

appears to have been instituted to test the validity of a controversial measure and to secure a final decision on it to set at rest the doubts and uncertainties which may have clouded the minds of a section of the public as to how far the provisions of the Act conform to law and to the Chapter on Fundamental Rights in the present Constitution.

Patanjali Sastri J.

PATANJALI SASTRI J.—I agree and have nothing more to add.

Mukherjea J.

MUKHERJEA J.—I have read the judgment of my learned brother Mr. Justice Fazl Ali and I am in entire agreement with his conclusions and reasons. There is nothing further which I can usefully add.

S. R. Das J.

S. R. DAS J.—I agree and I have nothing further to add.

Vivian Bose J.

VIVIAN BOSE J.—I also agree.

Appeal No. 182 *allowed.*

Appeal No. 183 *dismissed.*

Agent for the appellants in Case No. 182 and respondents in Case No. 183 : *P. A. Mehta.*

Agent for the respondent in Case No. 182 and appellant in Case No. 183 : *Rajinder Narain* for *R. A. Gagrat.*

1951

June 1

TARA SINGH

v.

THE STATE.

[SAIYID FAZL ALI, PATANJALI SASTRI, S. R. DAS and VIVIAN BOSE JJ.]

Criminal Procedure Code (V *of* 1898), *ss.* 173 (1), 190 (1) (*b*), 340 (1), 342, 288—*Evidence Act* (1 *of* 1872), *s.* 145—*Filing of second challan—Whether vitiates first report—Examination of accused—Importance of—Statements made in Committal Court—When admissible.*

Where the report made by a police officer to the Magistrate complies with the requirements of s. 173 (1) of the Criminal Procedure Code the Magistrate can take cognisance of the case

1951

Tara Singh v. *The State*

under s. 190 (1) (b) of the Code. The fact that a second challan was put in later would not necessarily vitiate the first and invalidate the proceedings taken before the second challan was submitted.

The right conferred by s. 340 (1) of the Criminal Procedure Code does not extend to a right in an accused person to be provided with a lawyer by the State or by the Police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one, or to engage one himself, or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity.

An accused should be properly examined under s. 342 of the Code and, if a point in the evidence is considered important against the accused and the conviction is intended to be based upon it, then it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it if he so desires. This is an important and salutary provision and should not be slurred over.

It is not a proper compliance of s. 342 to read out a long string of questions and answers made in the Committal Court and ask the accused whether the statement is correct. A question of that kind is misleading. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. *Dwarkanath* v. *Emperor* (A.I.R. 1933 P. C. 124) referred to.

In view of the words "subject to the provisions of the Indian Evidence Act" which occur in s. 288 of the Criminal Procedure Code, the evidence given by a witness in the Committal Court cannot be used as substantive evidence in the Sessions Court unless the witness is confronted with those parts of his evidence which are to be used for the purpose of contradicting him, even though if the only object of the prosecution is to discredit the evidence given in the Sessions Court by cross-examination him with reference to previous statements made in the Committal Court, it is not necessary to do so.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 14 of 1951. Appeal against the Judgment and Order dated the 6th June, 1950, of the High Court of Judicature for the State of Punjab at Simla in Criminal Appeal No. 75 of 1950.

Hardayal Hardy for the appellant.

S. L. Chibber for the respondent.

1951

Tara Singh
v.
The State.

Bose J.

1951. June 1. The following Judgments were delivered.

BOSE J.—This is an appeal under article 136 (1) of the Constitution. The appellant, Tara Singh, was convicted of murder by the Additional Sessions Judge of Amritsar and sentenced to death. On appeal the High Court upheld the conviction and confirmed the sentence. Tara Singh has made a further appeal to this Court.

As we intend to order a retrial, it will not be desirable to say anything about the merits of the case. The case for the prosecution is that two persons, Milkha Singh and Hakam Singh, were murdered in the early hours of the morning of Friday the 30th of September, 1949. The former is the appellant's uncle. He died on the spot. The latter is the appellant's father. He was removed to the hospital and died there on Friday, the 7th of October, 1949.

The murders are said to have been committed about three in the morning. The appellant's brother Narindar Singh reported the occurrence at the Police Station, about 7 miles distant, at 8.45 the same morning. According to this report, Narindar was present and he named the appellant as the assailant.

The prosecution alleges that there were three eyewitnesses to the assault on the father Hakam Singh, namely the appellant's brother Narindar Singh, his mother Bibi Santi and his sister Bibi Jito, aged 14. They are said to have arrived on the scene while the appellant was still attacking the father with a kripan. The prosecution version is that these three persons saw the uncle Milkha Singh laying dead on the scene of the occurrence with injuries on his person, and it is said that the appellant admitted to them that he had killed the uncle.

The appellant is also said to have made an extrajudicial confession to three persons, Ujagar Singh (P.W. 8), Fauja Singh (P.W. 9) and Gurbakhsh Singh (P.W. 10). The prosecution also adduced evidence about three dying declarations made by the father Hakam Singh in each of which he implicated the appellant.

1951

Tara Singh
v.
The State

Bose J.

Two of these were made to the police and the third was recorded by a Magistrate on the 1st of October.

The appellant was arrested between 4 and 5 p.m. on Friday, 30th September, the day of the occurrence, and was produced before a Magistrate on the 1st October. The police asked for a remand to police custody till the 2nd as their enquiry was not complete. This was granted and the appellant was produced before another Magistrate on the 3rd.

When the appellant was produced on the 3rd October, the police handed over to the Magistrate what they called an incomplete challan dated the 2nd October, 1949, and also produced certain prosecution witnesses. It is not clear whether these witnesses were named in the challan of that date or not, but that is a matter which can be cleared up in the course of the retrial which we intend to order. Among the witnesses so produced were three who are said to have witnessed the occurrence. They were the appellant's brother Narindar, his mother Bibi Santi and his sister Bibi Jito. The Magistrate examined them straight-away and recorded their evidence.

The appellant was not at the time represented by counsel.

On the 5th of October, the police put in what they called a complete challan and on the 19th they put in a supplementary challan. The Magistrate committed the appellant for trial on the 12th of November, 1949.

The first objection taken to the trial is that the Magistrate had no power to take cognizance of the case on the 3rd October. Accordingly, the depositions of the three so-called eye-witnesses which he recorded on the 3rd cannot be received in evidence, and if they are excluded, then for reasons which I shall set out hereafter, the whole case against the appellant collapses because, according to the learned counsel, there is no other evidence on which the conviction can properly be based.

This part of the argument is based on section 190, Criminal Procedure Code. It is contended that cogni-

zance of an offence can only be taken in one of the ways set out in that section. We are concerned here with the method set out in clause (b) of sub-section (1), namely "upon a report in writing of such facts made by any police officer." It is contended that the police are not permitted to send in an incomplete report because of the provisions of section 173(1) which runs as follows :—

"Every investigation under this Chapter shall be completed without unnecessary delay, and as soon as it is completed, the officer in charge of the police station shall—

(*a*) forward to a Magistrate empowered to take cognizance of offence on a police report, a report in the form prescribed etc....."

I need not express any opinion about this because, in my opinion the challan which the police referred to as an incomplete challan, namely the one of 2nd October, 1949, was in fact a complete report within the meaning of section 193(1)(b), Criminal Procedure Code, read with section 173(1).

When the police drew up their challan of the 2nd October, 1949, and submitted it to the court on the 3rd, they had in fact completed their investigation except for the report of the Imperial Serologist and the drawing of a sketch map of the occurrence. It is always permissible for the Magistrate to take additional evidence not set out in the challan. Therefore the mere fact that a second challan was put in on the 5th October would not necessarily vitiate the first. All that section 173(1)(a) requires is that as soon as the police investigation under Chapter XIV of the Code is complete, there should be forwarded to the Magistrate a report in the prescribed form "seting forth the names of the parties, the nature of the information and the names of the person who appear to be acquainted with the circumstances of the case." All that appears to have been done in the report of the 2nd October which the police called their incomplete challan. The witnesses named in the second

1951

Tara Singh
v.
The State

Bose J.

challan of the 5th October were not witnesses who were "acquainted with the circumstances of the case." They were merely formal witnesses on other matters. So also in the supplementary challan of the 19th. The witnesses named are the 1st class Magistrate, Amritsar, who recorded the dying declaration, and the Assistant Civil Surgeon. They are not witnesses who were "acquainted with the circumstances of the case." Accordingly, the challan which the police called an incomplete challan was in fact a completed report of the kind which section 173(1)(a) of the Code contemplates. There is no force in this argument and we hold that the Magistrate took proper cognisance of the matter.

The next point urged was that when, the Magistrate recorded the evidence of the three eye-witnesses, he did not afford the appellant an opportunity of being represented by counsel though he is given that right by section 340 (1) of the Criminal Procedure Code. There might have been force in this contention because of the peculiar circumstances of this case, had it not been for the fact that the inquiry continued after the date on which the three eye-witnesses were examined and the appellant made no complaint about this. He did not at any of the subsequent proceedings before the Committing Magistrate ask for permission to engage a counsel or indicate in any way that he desired to be represented by one.

I have referred to the peculiar circumstances of this case. I say that because this is a case in which the accused is said to have killed his father and his uncle. As far as I can gather from the record, his only relatives are his brother Narindar, his mother Bibi Santi and his sister Bibi Jito. Ordinarily, when a man is arrested for murder and is proceeded against and he wants to be represented, his relatives come to his rescue and engage counsel for him, but in a case like this, if the prosecution story is true, the only relatives the man has would not help him because, in their eyes, he was a patricide and they, being filled with indignation against him, took all steps they could to bring

him to justice. On the other hand, if the present story of the appellant is correct and the witnesses were intimidated by the police, equally they would take no steps to assist the appellant. Either way, the appellant would, in the peculiar circumstances of the case, be helpless from that point of view. Therefore, had it not been for the fact that there were subsequent proceedings in which the appellant could have raised this objection had there been any substance in it, we might have considered the argument with more favour. But the appellant's subsequent conduct indicates that he had no intention of engaging counsel and made no grievance of the fact. I need hardly say that the right conferred by section 340 (1) does not extend to a right in an accused person to be provided with a lawyer by the State or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one himself or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity. There is no force in this contention either.

The next point taken regarding the committal stage of the case is that the Committing Magistrate did not examine the appellant properly under sections 209 and 342 of the Criminal Procedure Code. Section 342 (1) states that "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may etc..." And sub-section (3) states that "the answers given by the accused may be taken into consideration in such inquiry or trial." Further, section 287 requires that "the examination of the accused duly recorded by or before the Committing Magistrate shall be tendered by the prosecutor and read as evidence." (This refers to the sessions trial). It is important therefore that an accused should be properly examined under section 342 and, as their Lordships of the Privy Council indicated in *Dwarkanath* v. *Emperor*(1), if a point in the evidence is

(1) A.I.R. 1933 P.C. 124 at 130.

1951

Tara Singh
v.
The State

Bose J.

considered important against the accused and the conviction is intended to be based upon it, then it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it if he so desires. This is an important and salutary provision and I cannot permit it to be slurred over. I regret to find that in many cases scant attention is paid to it, particularly in Sessions Courts. But whether the matter arises in the Sessions Court or in that of the Committing Magistrate, it is important that the provisions of section 342 should be fairly and faithfully observed.

So far as the committal proceedings in this case are concerned, the examination was on the whole fair and full for the purposes of a Committal Court though I feel the form of the questions put could have been a little different. As they stand, the questions read more like cross-examination than an examination under section 208(2). I refer, for example, to the first question which reads as follows :—

"Was Milkha Singh deceased your uncle issueless and wanted to gift away his land to the Gurdwara Baba Bakala, which fact you resented?"

and to the second question which reads—

"did you also resent your father mortgaging his land ?"

The proper form in these two cases would have been to tell the accused who suggested that he resented the fact that his uncle who was issueless wanted to gift away his land, and in the second question, who said that he resented his father mortgaging his land, and then, after having told him that to ask him after each question whether he wanted to say anything about the matter. However, the point is trivial in this case because the questions put are based on the evidence of witnesses before the Committing Magistrate and the questioning was sufficient for the Committing Magistrate's purposes. All that he had to consider was whether under section 209(1) there were sufficient grounds for committing the appellant for trial and not

whether, on an appreciation of the whole evidence and other material in the case, including witnesses for the defence, the charge against him was proved. I am of opinion that despite some shortcomings the committal was good.

I turn next to the proceedings in the Sessions Court. There are two grave defects there which, in my opinion, vitiate the trial. The first is that the examination of the appellant was not in accordance with the provisions of section 342. The second is that when the depositions of some of the witnesses examined before the Committing Magistrate were brought on record in the Sessions Court under section 288, the witnesses who made the statements were not confronted with their previous statements as required by section 145 of the Evidence Act.

Dealing first with the examination of the appellant by the Sessions Judge, all he did was to read over the examination of the accused in the Commital Court and then record the following statements and answers :—

"Q. Did you make the statement on 9th November, 1949, as read out to you, and is it correct ?

A. Yes.

Q. Have you anything else to say ?

A. No. I am innocent and the statement of the witnesses in the Court of the Committing Magistrate were recorded without any notice to me. I could not therefore, engage any counsel.

Q. Do you wish to produce any defence ?

A. No."

Section 342 requires the accused to be examined for the purpose of enabling him "to explain any circumstances appearing in the evidence against him." Now it is evident that when the Sessions Court is required to make the examination under this section, the evidence referred to is the evidence in the Sessions Court and the circumstances which appear against the accused in that Court. It is not therefore enough to

1951

Tara Singh
v.
The State

Bose J.

read over the questions and answers put in the Committing Magistrate's Court and ask the accused whether he has anything to say about them. In the present case, there was not even that. The appellant was not asked to explain the circumstances appearing in the evidence against him but was asked whether the statements made before the Committing Magistrate and his answers given there were correctly recorded. That does not comply with the requirements of the section. There is also more than that in this case. The evidence recorded in the Committal Magistrate's Court is not as full and as complete as the evidence recorded in the trial before the Sessions Judge. Accordingly, it often happens that evidence is given in the Sessions Court and facts are disclosed which do not appear on the record of the Committing Magistrate. If the Judge intends to use these against the accused, it is clearly not enough to question him about matters which occurred in the Committal Court, for material of this kind will not be found in the committal record in these circumstances. That has happened here.

The Sessions Judge relied on the following circumstances. First of all, he characterised as a "most significant piece of evidence" the fact that the three eyewitnesses had admitted before him that the appellant was present in the Deohri before they went to the scene of the occurrence on hearing the victims' cries and that these witnesses did not suggest that there was anybody else who was responsible for the injuries to the deceased. Now, this was evidence which was recorded exclusively in the Sessions Court. The eye witnesses before the Sessions Judge had resiled from the previous statements which they made in the committal proceedings. Accordingly, a questioning by the Committing Magistrate would not and could not cover the point made here and, naturally, the Magistrate has not questioned the appellant about that circumstance.

As the three eye witnesses had resiled from their statements made in the committal proceedings, the Sessions Judge brought their depositions on record

under section 288, Criminal Procedure Code. He next relied on the evidence of these witnesses as recorded in the Court of the Committing Magistrate. One point he used against them was the evidence of motive which these witnesses supplied in the committal proceedings. The appellant was not told what that evidence was nor was he asked to explain it. He was questioned about this motive in the committal proceedings by the Committing Magistrate, but even there he was not told who had given the evidence, and the material on which the Committing Magistrate relied to establish the presense of motive was not disclosed.

The Sessions Judge also relied on the fact that the appellant had confessed to the three eye witnesses that he had killed his uncle and injured his father. There is not a single question regarding that either in the Committing Magistrate's Court or in the Sessions Court.

Another ground on which the Sessions Judge proceeded was the extra-judicial confessions made by the appellant to Ujagar Singh, Fauja Singh and Gurbakhsh singh. The appellant was questioned about an extra-judicial confession by the Committing Magistrate but not about one made to these three persons. What the Committing Magistrate asked was :—

"Did you confess on 30th September, 1949, at Timmowal before Ujagar Singh, Mangal Singh P.Ws. etc., that you had killed Milkha Singh and cause injuries to your father ?

It will be seen that Fauja Singh and Gurbakhsh Singh were not mentioned at all, and yet the Sessions Judge considered them "respectables of the village" and said that they were independent witnesses. If the appellant had been asked about them, he might have been able to show that they were not disinterested and that they had some motive for implicating him falsely, or that they were not there.

Next, the Sessions Judge considered that "the most important piece of evidence damaging to the accused" was the dying declaration of Hakam Singh recorded

1951

Tara Singh v. *The State*

Bose J.

by the Magistrate, P.W. 5. Neither the Sessions Judge nor the Committing Magistrate questioned the appellant about that. The Sessions Judge also relied on the two statements of Hakam Singh made before the police one of which the police recorded as his dying declaration. Again, not one word was put to the appellant about this.

Now, section 342(2) requires that the anwsers given by the accused may be taken into consideration. If the accused had been properly questioned and had given reasonable explanations and the Sessions Judge had omitted to take them into consideration, it is obvious that that would have constituted a grave defect in his judgment. How much graver is the defect when the accused is not questioned at all and is not given an opportunity of explaining the circumstances which are intended to be used against him. The unfairness of the Sessions Judge's conclusion can be gathered from the fact that he (the Sessions Judge) considered the evidence of the eye witnesses before him (as distinct from the depositions brought on record under section 288) material and then, not having asked the appellant for any explanation, he said :—

"The accused himself has not rendered any explanation as to at whose hands the two deceased had met their death."

This is precisely what the Privy Council commented on in *Dwarkanath* v. *Emperor*(1) where the High Court having relied on a piece of evidence which it considered vital went on to say that the accused had not explained it. Their Lordships remarked that that "deprives of any force the suggestion that the doctor's omission to explain what he was never asked to explain supplies evidence on which the jury should infer etc."

The High Court has fallen into the same error and has based its decision on material which the appellant was not asked to explain. For example, the learned Judges rely on the evidence of the three eye

(1) A.I.R. 1933 P.C. 134 at 135.

witnesses before the Committing Magistrate. They also rely on the fact that Narindar's evidence in the Committing Magistrate's Court in corroborated by the First Information which he gave to the police. The appellant was not questioned about these matters either in the Sessions Court or by the Committing Magistrate. The High Court also relies on the evidence of the three witnesses who speak about the extra-judicial confession and the learned Judges state that these witnesses "are not suggested to be in any way unfriendly to the appellant and they seem to be persons of respectability." Here, again, if the appellant was not asked whether these witnesses were unfriendly or not, it is not fair to use the absence of such a suggestion as something which tells against the appellant. It is true the accused can cross-examine as to comity but he is not confined to that. It may be that in a given case cross-examination would be futile, for it would only elicit a denial, whereas a statement made by the accused which the Code directs should be used as evidence, for or against him, might be of great value. In any event, the Code directs that the accused shall be afforded these opportunities and an omission to do so vitiates the trial if prejudice occurs or is likely to occur.

The High Court also bases its conclusion on the circumstantial evidence arising from the production of the Kripan and the recovery of the shirt from the appellant. Those articles are said to be stained with human blood. The appellant was not asked to give any explanation about this. The Serologist's report had not been received when the appellant was questioned by the Committing Magistrate. Therefore, he could not be asked to explain the presence of human blood stains on the Kripan. All he was asked was whether the blood-stained Kripan was recovered at his instance. That is not enough. He should also have been asked whether he could explain the presence of blood stains on it. The two are not the same. Then, in the Sessions Court there was the additional evidence of the Imperial Serologist showing that the Kripan had

1951

Tara Singh v. *The State*

Bose J.

stains of human blood on it. That was an additional and very vital piece of evidence which the appellant should have been afforded an opportunity of explaining.

I cannot stress too strongly the importance of observing faithfully and fairly the provisions of section 342, Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the Committal Court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of section 342, Criminal Procedure Code, is so

gross in this case that I feel there is grave likelihood of prejudice.

But this it not the only error. Two of the three eye witnesses whose depositions before the Committing Magistrate were brought on the sessions record under section 288 were not confronted with their former statements in the manner required by section 145, Evidence Act. All that happened is that they were asked something about their previous statements and they replied that they were made under coercion. Now, section 145 of the Evidence Act states that :—

"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 ....".

This is all that seems to have occurred in the cases of Bibi Santi (P.W. 6) and Bibi Jito (P.W. 7). But the section goes on :—

"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.*"

Now, it is evident that one of the main purposes of using the previous statements was to contradict and displace the evidence given before the Sessions Court because until that evidence was contradicated and displaced, there was no room in this case for permitting the previous statements to be brought on record and used under section 288. Therefore, as these statements were not put to these witnesses and as their attention was not drawn to them in the manner required by section 145, Evidence Act, they were not admissible in evidence. The observations of the Privy Council in *Bal Gangadhar Tilak* v. *Shrinivas Pandit*(1) are relevant here.

In the case of Narindar Singh, his previous statement does seem to have been put to him in the proper

(1) 42 I.A. 135 at 147.

1951

Tara Singh
v.
The State

Bose J.

way. The particular portions on which the prosecution desired to contradict him were read out and he was afforded an opportunity of explaining them. So the inadmissiblity extends only to the other two witnesses.

There is some difference of opinion regarding this matter in the High Courts. Section 288 provides that the evidence recorded by the Committing Magistrate in the presence of the accused may, in the circumstances set out in the section, "be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872." One line of reasoning is that section 145, Evidence Act, is not attracted because that section relates to previous statements in writing which are to be used for the purpose of contradiction alone. Statements of that kind do not become substantive evidence and though the evidence given in the trial can be destroyed by a contradiction of that kind, the previous statements cannot be used as substantive evidence and no decision can be grounded on them. But under section 288, Criminal Procedure Code, the previous statement becomes evidence for all purposes and can form the basis of a conviction. Therefore, according to this line of reasoning, section 145 of the Evidence Act is not attracted. Judges who hold that view consider that the provisions of the Evidence Act referred to are those relating to hearsay and matters of that kind which touch substantive evidence.

The other line of reasoning is that section 288 makes no exception of any provision in the Evidence Act and therefore section 145 cannot be excluded. As that section is one of the provisions of the Act, the statements are subject to its provisions as well. All that section 288 does is to import into the law of evidence something which is not to be found in the Evidence Act, namely, to make a statement of this kind substantive evidence, but only when all the provisions of the Evidence Act have been duly complied with.

In my opinion, the second line of reasoning is to be preferred. I see no reason why section 145 of the

Evidence Act should be excluded when section 288 states that the previous statements are to be "subject to the provisions of the Indian Evidence Act." Section 145 falls fairly and squarely within the plain meaning of these words. More than that. This is a fair and proper provision and is in accord with the sense of fairplay to which Courts are accustomed. Even the learned Judges who take the first view consider for the most part that though it is not obligatory to confront a witness with his former statement when section 288 is resorted to, it is always desirable that that should be done if only for the reason that an omission to do so weakens the value of the testimony. I am of opinion that the matter is deeper than that, and giving effect to the plain meaning of the words "subject to the provisions of the Indian Evidence Act" as they stand, I hold that the evidence in the Committal Court cannot be used in the Sessions Court unless the witnesses is confronted with his previous statement as required by section 145 of the Evidence Act. Of course, the witness can be cross-examined about the previous statement and that cross-examination can be used to destroy his testimony in the Sessions Court. If that serves the purpose of the prosecution, then nothing more is required, but if the prosecution wishes to go further and use the previous testimony to the contrary as substantive evidence, then it must, in my opinion, confront the witness with those parts of it which are to be used for the purpose of contradicting him. Then only can the matter be brought in as substantive evidence under section 288. As two of the eye witnesses were not confronted in the manner required by section 145, their statements will have to be ruled out, and if that is done the material on which the conviction is based is considerably weakened.

I have considered anxiously whether this is a case in which we should direct a retrial *de novo* or whether the retrial should be from the stage at which the irregularity occurred or whether we should refuse to allow a retrial and acquit the appellant. Having given my anxious thought to this matter, I am of opinion that

1951

Tara Singh
v.
The State

Bose J.

there should be a retrial *de novo* in the Sessions Court either by the same or by some other Sessions Judge. I consider it inexpedient to say more than this, lest I prejudice the issue one way or the other.

The conviction and sentence are set aside and the case is sent back to the High Court with a direction that that Court will order a retrial *de novo* in the Sessions Court, treating the committal as good.

FAZL ALI J.—I agree and have nothing to add.

PATANJALI SASTRI J.—I agree and have nothing further to add.

DAS J.—I agree to the order proposed by my learned brother Bose.

Re-trial ordered.

Agent for the appellant : *Ganpat Rai.*

Agent for the respondent : *P. A. Mehta.*