RAMKISHAN MITHANLAL SHARMA

v.

THE STATE OF BOMBAY.

[And Two Connected Appeals]

1954

October 22.

[BHAGWATI, JAGANNADHADAS and VENKATARAMA AYYAR JJ.]

Code of Criminal Procedure (Act V of 1898), s. 162—Whether applicable to investigations under the City of Bombay Police Act (Bombay Act IV of 1902) prior to its repeal by Bombay Act XXII of 1951—Evidence relating to test identification parades—Whether and under what circumstances admissible under s. 162 of the Code of Criminal Procedure.

Indian Evidence Act (I of 1872), s. 27—Evidence that discovery was made "in consequence of information given by the accused" or "at the instance of the accused", whether admissible, when the admissible part of the information given is not sought to be proved.

Code of Criminal Procedure (Act V of 1898), ss. 297, 298, 537—Charge to the Jury—Duty of Judge—Misdirection—Effect of—Indian Evidence Act (I of 1872), s. 167—Improper admission or rejection of evidence—Effect of—Duty of Appellate Court in hearing appeal.

Investigation in this case was started on the 20th April, 1951, under the City of Bombay Police Act (Bombay Act IV of 1902), the provisions of the Code of Criminal Procedure being then inapplicable to Bombay City Police by virtue of s. 1(2)(a) of the Code. In 1951, the Bombay Police Act (Bombay Act XXII of 1951) was passed by which both the Bombay Act IV of 1902 and the provision in s. 1(2) (a) of the Code of Criminal Procedure in so far as it made the Code inapplicable to Bombay City Police, were repealed. This Act came into force on 1st August, 1951, and after that date the provisions of the Code of Criminal Procedure became applicable to investigations by the Bombay City Police.

Under s. 63 of the City of Bombay Police Act (Bombay Act IV of 1902), no statement made by a person to a Police Officer during investigation, reduced to writing, may be used in evidence, while under s. 162 of the Code of Criminal Procedure the ban applies also to oral statements made to a Police Officer during investigation, not reduced to writing.

Held, that s. 162 of the Code of Criminal Procedure by its very context and terms, applied to investigations conducted under Chapter XIV of the Code, and could not operate retrospectively and apply to investigations conducted prior to 1st August, 1951, by the Bombay City Police, as they were not investigations conducted under Chapter XIV of the Code. The test identification parades in regard to accused 1 and 2 having been held prior to the 1st August, 1951, s. 162 of the Code did not apply to the evidence

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received in regard to these parades, but the section applied to the evidence relating to the test indentification parades in regard to accused 4 as these were held after 1st August, 1951.

Banwari Gope v. *Emperor* (A.I.R. 1943 Patna 18) and *Delhi Cloth Mills* v. *Income-tax Commissioner, Delhi* (A.I.R. 1927 P.C. 242), referred to.

The purpose of identification parades being to enable witnesses to identify the properties involved or the persons concerned in the offence under investigation, the very process of identification involves a statement by the identifying witness that the particular property or person identified was concerned in the offence. This statement may be express or implied. Such a statement, whether express or implied, including signs and gestures, would amount to a communication of the fact of identification by the identifier to another person, and where the identifications are held in the presence of the Police, such communications are tantamount to statements made by the identifiers to a Police Officer in the course of investigation and come within the ban of s. 162 of the Code. The physical fact of identification has no separate existence apart from the statement involved in the very process of identification, and in so far as a Police Officer seeks to prove the fact of such identification, such evidence would be inadmissible under s. 162 of the Code, the only exception being the evidence sought to be given by the identifier himself in regard to his mental act of identification which he would be entitled to give by way of corroboration of his identification of the accused at the trial.

Where the Police Officers arrange the parade, produce the persons who are to be mixed up with the accused, and withdraw, leaving the actual parade solely and exclusively in charge of Panch witnesses, and the process of identification is carried out under the exclusive direction and supervision of the Panch witnesses, the statements involved in the process of identification would be statements made by the identifiers to the Panch witnesses and would be outside the purview of s. 162 of the Code.

Khabiruddin v. *Emperor* (A.I.R. 1943 Cal. 644); *Surendra Dinda* v. *Emperor* (A.I.R. 1949 Cal. 514); and *Daryoo Singh* v *State* (A.I.R. 1952 All. 59), approved. In re *Kshatri Ram Singh* (A.I.R. 1941 Mad. 675); *Guruswami Thevan* v. *Emperor* (1936 M.W.N. 177) and *Ramdhin Brahmin* v. *Emperor* (A.I.R. 1929 Nag. 36), disapproved.

Rao Shiv Bahadur Singh v. *State of Vindhya Pradesh* ([1954] S.C.R. 1098) and *Abdul Kader* v. *Emperor* (A.I.R. 1946 Cal. 452), referred to.

Per JAGANNADHADAS J.—Differentiation between the evidence of a Police Officer and that of Panch witnesses and identifying witnesses relating to the fact of prior identification in a parade held by a Police Officer on the ground of the latter being corroborative evidence, is unsound and inadmissible, and the evidence of the

Panch witnesses and identifying witnesses relating to the fact of prior identification would be inadmissible even as corroborative evidence.

Section 27 of the Indian Evidence Act is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. But clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.

Kottaya v. *Emperor* (A.I.R. 1947 P.C. 67), referred to.

Where evidence was given by a Police Officer that "in consequence of a certain statement made by the accused" and "at the instance of the accused", a tin box was dug out of a mud house, and the nature of the statement made or information given by the accused was not sought to be proved, s. 27 was not attracted and *prima facie* there was nothing to prevent the evidence being admitted against the accused concerned.

Durlav Namasudra v. *Emperor* ([1931] I.L.R. 59 Cal. 1040), referred to.

Per JAGANNADHADAS J.—There is considerable force in the objection that when a Police Officer speaks to a discovery being made "at the instance of the accused" or "in consequence of information given by the accused", the prosecution cannot be permitted to rely on such evidence without placing the admissible portion of the information on record. The information given by the accused in such a situation may be such as, on scrutiny, might show only his remote connection and not direct connection with the objects recovered. In such a situation, evidence of the bare fact of information having been given may cause serious prejudice.

Summing up to the Jury does not mean merely giving a summary of the evidence. The Judge should marshall the evidence so as to bring out the lights and the shades, the probabilities and improbabilities, so as to give proper assistance to the Jury who are to decide which view of the facts is true. The charge should not consist of a long rambling repetition of the evidence, without any attempt to marshall the facts under appropriate heads, or to assist the Jury to sift and weigh the evidence so that they may be in a position to understand which are the really important parts of the evidence and which are of secondary importance.

Ilu v. *Emperor* (A.I.R. 1934 Cal. 847) and *Nabi Khan* v. *King Emperor* (A.I.R. 1936 Cal. 186), referred to.

Held, that as regards accused 4 there had been an error of law in admitting evidence of the test identification parades relating to him. The admission of such inadmissible evidence would amount to a misdirection; but misdirection by itself would not be a ground for reversal under s. 537 of the Code unless such misdirection had in fact occasioned a failure of justice, nor is reception

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of evidence inadmissible under s. 162 of the Code necessarily fatal. The Appellate Court has to see whether the reception of inadmissible evidence influenced the mind of the jury so seriously as to lead them to a conclusion which might have been different but for its reception. What the Appellate Court should do is to exclude the inadmissible evidence from the record and consider whether the balance of evidence is sufficient to maintain the conviction. The Court of Appeal should take the whole case into consideration and determine for itself whether the verdict of the Jury was justified or whether there had in fact been a failure of justice. The Court of Appeal is entitled to substitute its own verdict for the verdict of the Jury if on examining the record for itself it comes to the conclusion that the verdict of the Jury was erroneous or that there had been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.

Abdul Rahim v. *King Emperor* ((1946) L.R. 73 I.A. 77, *Mushtaq Hussain* v. *State of Bombay* ([1953] S.C.R. 809), *Ilu* v. *Emperor* (A.I.R. 1934 Cal, 847); *Nabi Khan* v. *Emperor* (A.I.R. 1936 Cal. 186); *Khabiruddin* v. *Emperor* (A.I.R. 1943 Cal. 644); *Surendra Dinda* v. *Emperor* (A.I.R. 1949 Cal. 514) and *Mathews* v. *Emperor* (A.I.R. 1940 Lahore 87), referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 4, 23 and 28 of 1954.

Appeal by Special Leave granted by the Supreme Court by its Order dated the 2nd April, 1953, from the Order dated the 12th January, 1953, of the High Court of Judicature at Bombay in Criminal Appeal No. 22 of 1953, arising out of the Judgment and Order dated the 6th October, 1952, of the Court of Sessions Judge, Greater Bombay, in Case No. 20 of 1952.

A. K. Basu (*J. B. Dadachanji* and *Naunit Lal,* with him) for the appellant in Criminal Appeal No. 4 of 1954.

T. Godiwala and *B. P. Maheshwari* for the appellant in Criminal Appeal No. 23 of 1954.

Jai Gopal Sethi (*B. P. Maheshwari* and *T. Godiwala,* with him) for the appellant in Criminal Appeal No. 28.

M. C. Setalvad, Attorney-General for India (*Porus A. Mehta* and *P. G. Gokhale,* with him) for the respondent.

1954. October 22. The Judgment of Bhagwati and Venkatarama Ayyar JJ. was delivered by Bhagwati J. Jagannadhadas J. delivered a separate Judgment .

BHAGWATI J.—Anokhelal Ranjit Singh, original accused 1 and appellant in Criminal Appeal No. 28 of 1954, Harnarain Nanakchand, original accused 2 and appellant in Criminal Appeal No. 23 of 1954 and Ramkishan Mithanlal Sharma, original accused 4 and appellant in Criminal Appeal No. 4 of 1954, along with one Rubidas Radhelal, original accused 3 since deceased and one Bankelal Devisingh still absconding were charged under section 397 read with section 395 of the Indian Penal Code with having committed decoity and used deadly weapons at the time of committing the same and were also charged under section 396 of the Indian Penal Code with having committed the murder of Lawrence Quadros at the same time and place and in the course of the same transaction while committing the said dacoity. The trial was held before the Sessions Judge for Greater Bombay with the aid of a special jury. The jury returned unanimous verdicts of guilty against each of the accused and the learned Sessions Judge convicted them and sentenced each of them to transportation for life. An appeal filed by them to the High Court of Judicature at Bombay was summarily dismissed. Special leave was granted to them to appeal to this Court and these three special leave appeals have now come on for hearing and final disposal before us.

The prosecution alleged that the Lloyds Bank Ltd. had a branch situated at Hornby Road and had three entrances, the main one on Hornby Road and two others on Outram Road and Bastion Road. It was customary for the Bank to send cash from time to time to the Reserve Bank whenever the Head Cashier thought that there was a surplus. On a day previous to the day when cash was to be sent, the Head Cashier would give the currency notes to the Assistant Cashiers. As a token of having checked up the notes each of the Assistant Cashiers would put their signatures on the top and the bottom notes in a bundle containing 100 notes of Rs. 100 each, and would affix thereon the rubber stamp of the Bank. These notes then would be tied up in what are known as "thappis" each "thappi" consisting of 10 bundles of 100 notes each. On the day that the cash was to be sent an escort party would go to the

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Reserve Bank with the cash consisting of two Assistant Cashiers, one European Officer and a peon. The Assistant Cashiers would then put the cash into a leather bag which bag would be attached by an iron chain to the person of the peon. The Lloyds Bank it appears had received a large deposit from the Bank of Iran a few days prior to the day in question and it was decided that an amount of Rs. 12 lakhs should be sent to the Reserve Bank of India on the 20th April, 1951.

In the morning of the 20th April, the escort party consisted of Brightling, Sarkari and Doctor and the peon Rama Madura and taxi No. BMT 1829 was summoned to carry the party to the Reserve Bank. The escort party emerged from the rear door of the Bank and went up to the taxi. Bala Gopal Kadam, a watchman, was on duty on Bastion Road. When the escort party came out, the taxi's bonnet was in the direction of the Empire Cinema and the driver Lawrence Quardros was at the driver's seat. Brightling got into the taxi first and took his seat on the rear seat and was followed by Rama Madura. Sarkari went round in front and took his seat next to the taxi driver. Rama Madura after entering the taxi placed the bag on the taxi's floor and was about to take his seat. Doctor was standing with his left hand on the rear door of the taxi on the Bank side waiting for Rama Madura to take his seat. It was at this juncture that accused 1, 2 and 4, Rubidas and Bankelal attacked the taxi and the escort party. One of these persons first wrenched open the door to the taxi driver's seat, leaned inside and fired twice with a revolver. One of these shots caused an injury to Lawrence Quadros near the collar bone, which almost instantaneously caused his death and his body came out with the head first. The man who so shot after leaning into the taxi went round the front of the taxi and took his seat next to the driver's seat. There was another man behind this one when the driver was shot, and he pulled out Lawrence Quadros from the taxi and took his seat at the steering wheel. That man was Rubidas—one time a motor driver in the employ of the Pan American Airways at Delhi. Accused 1 also armed with a revolver stood on the road side of the

taxi and fired twice at the taxi from that side and accused 2 and 4 were either at the back or on the Bank side and were also armed with revolvers. Sarkari first thought that these shots were tyre-bursts and naturally got out of his seat to inspect the tyres but hearing further shots he realised that an attempt was being made to loot the cash. He got frightened and went in the direction of Outram Road. Brightling got out of the taxi, first went a little towards the back of the taxi and then seeing that the taxi was surrounded, zigzagged and went towards the junction of Outram and Bastion Roads where he tried unsuccessfully to stop a passing car. Accused 1 who was firing at the taxi came near it, opended the back door of the taxi on the road side with his shoulder and got into the taxi. Accused 2 came towards the rear door of the taxi on the Bank side and fired at Doctor injuring him on the dorsum of his left palm. Kadam at about this time raised his baton, realising that Doctor was in danger whereupon accused 2 shouted "Khabardar, chhod do chale jao, bhago" or words to that effect and shot at him injuring him in his right eye. That injury resulted in the total loss of his right eye. Both the accused 2 and 4 were armed with revolvers. A driver by name Sarvarkhan, was sitting on the foot-path near the taxi and seeing the body of Lawrence Quadros falling out of the taxi he tried to go up to him but the accused 4 prevented him from doing so shouting at him "khabardar" and threatened him with his revolver." During the course of the attack someone of these men shot at Rama Madura. Rama Madura became unconscious and accused 2 and another dragged him out from the taxi. The taxi was then started whereupon Brightling, who was still on Bastion Road, after making signals to the Cash Department to show as to what was taking place picked up a motor cycle parked near the corner of the Parsi Lying-in-Hospital and threw it in the way of the taxi but Rubidas, who was driving that taxi, managed to drive it away. The taxi however had to be first driven at a slow speed and one Major Casey, who was standing at the corner of the foot-path saw the whole of the incident and also those inside the taxi when it was

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driven past him. The prosecution alleged that accused 1, 2 and 4, Rubidas and Bankelal surrounded and attacked the taxi and its inmates and after snatching away the bag tied to Rama Madura's belt with the cash containing Rs. 12 lakhs drove away in that taxi. Brightling and some other employees of the Bank after some time secured a car which was parked nearby and went round in search of the taxi but to no purpose. Brightling then reported the matter to the Esplanade Police Station but before that the telephone operator of the Bank, Mrs. Paterson who with Miss Vida Palmer, a clerk, had seen the incident from the window on the mezzanine floor had telephoned to the police and several police officers arrived at the Bank soon after. Lawrence Quadros was already dead and his body was sent to the morgue. Doctor, Kadam and Rama Madura, who had all been injured, were sent to St. George's Hospital. The taxi which was driven away by Rubidas with the accused and Bankelal seated therein was found abandoned at about 1-30 P.M. on that very day by the police not far from the Kashmir Hotel.

The police made various efforts to trace accused 4 and Bankelal but were unable to find them and they therefore charge-sheeted accused 1, 2 and Rubidas (who was original accused 3) and they were all committed to stand their trial in the Sessions Court. After those proceedings were over the accused 4 was arrested on the 25th December, at Bareli Station, and he too was charge-sheeted and was committed to Sessions. Rubidas, the original accused 3, died on the 3rd August, 1952, with the result that accused 1, 2 and 4 stood their trial on the charges under sections 395, 397 and 396 of the Indian Penal Code.

The defence of the accused 1, 2 and 4 was that they had nothing to do with the incident in question which took place in the morning of the 20th April, 1951. Though conceding that they had been in Bombay, accused 1 and 4 contended that accused 1 had left Bombay on the night of the 18th April, and accused 4 had left Bombay either on the 16th or 17th April, for Allahabad, that they were not in Bombay on the day in question but were in Allahabad where they had filed

two affidavits before one Tondon, the first class Magistrate at Allahabad. Accused 2 also conceded that he had stayed in Astoria Hotel with the accused 4 but he had left that hotel on the 18th April, and had gone to stay in Kashmir Hotel on that day and had stayed there until the night of the 20th April, when he left Bombay for Delhi. His case was that he had come to Bombay to make purchases for his wedding and his business and that he had nothing to do with the incident in question.

Before the learned Sessions Judge the prosecution led the evidence of various witnesses. That evidence may be grouped into three heads. One part of the evidence related to the movements and the activities of the accused before the 20th April, 1951, the other part of the evidence related to the actual participation of the accused in the occurrence which took place at Bastion Road on the morning of the 20th April, between 10-30 and 10-45 A.M., and the last part of the evidence related to the subsequent events including the arrest and the identification of the accused, the recoveries of the tin box containing the revolvers and the live cartridges, the steel trunk containing six 'thappis' and five bundles of 100 rupee notes and disbursements of cash by the accused towards the end of April, or the beginning of May. The accused were represented by counsel and searching and vigorous cross-examination was addressed to all the prosecution witnesses. The trial took considerable time. The counsel addressed the special jury at considerable length and the learned Sessions Judge summed up the whole case to the special jury in a charge which took well-nigh three days. It was a very exhaustive and a fair charge and in several respects was favourable to the accused. The learned Judge summed up the evidence which had been led by the prosecution, pointed out the defects as also the contradictions in the evidence of the several witnesses, administered the necessary warning in regard to the evidence of the identification parades, considered the cases of each of the accused separately and marshalled the evidence which had been led by the prosecution against each of them and fairly put to the jury the

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questions which they had to determine before they could arrive at their verdict. The jury took time to consider their verdict and returned as stated above unanimous verdicts of guilty against all the accused in respect of both the charges.

This being a trial by jury the appellants in order to succeed would have to establish that there were serious misdirections or non-directions in the learned Judge's charge to the jury such as would vitiate the verdict. The main contentions which were urged before us by the learned counsel for the appellants were :—

(1) That evidence inadmissible under section 162 of the Criminal Procedure Code and under section 27 of the Indian Evidence Act had been admitted and that therefore there was an error of law which amounted to a misdirection to the jury; and

(2) That there were misdirections in the learned Judge's charge to the jury which had the effect of misleading the jury or were in any event such as to render the charge unfair and prejudicial to the accused, thus causing a failure of justice.

The admission of inadmissible evidence was attacked on two counts:

(1) That the evidence in regard to the test identification parades held at the instance of the police and under their active supervision was hit by section 162 of the Criminal Procedure Code; and

(2) That the statement of the police officer that it was "at the instance of" or "in consequence of certain statement by" the accused that certain discoveries were made was hit by section 27 of the Indian Evidence Act.

The investigation in this case was started on the 20th April, 1951, and the Bombay City Police were then governed in the matter of investigation by the provisions of the City of Bombay Police Act (Bombay Act IV of 1902). Section 63 of that Act provided :—

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

There was a proviso to that section which enabled such statements to be used by the accused to impeach the credit of such witness in the manner provided by the Indian Evidence Act, 1872. It may be noted that under section 1(2) (a) of the Criminal Procedure Code the Code did not apply to the police in the towns of Calcutta and Bombay and therefore section 162 of the Criminal Procedure Code was not applicable to the investigations made by the Bombay City Police. On the 11th June, 1951, the State Legislature passed the Bombay Police Act (Bombay Act XXII of 1951). Section 167(3) of that Act repealed section 1(2) (a) of the Criminal Procedure Code so far as the police in the town of Bombay were concerned with the result that when this Act came into operation with effect from the 1st August, 1951, the Bombay City Police were also governed by the provisions of Criminal Procedure Code thus bringing into operation the provisions of section 162 thereof in the investigations conducted by the Bombay City Police. Section 162(1) of the Criminal Procedure Code provides :—

"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."

There is a proviso to this sub-section which enables the accused to use such statements to contradict such witnesses in the manner provided by section 145 of the Indian Evidence Act. The investigations conducted by the Bombay City Police were after the 1st August, 1951, assimilated to the investigations conducted by the police under the Criminal Procedure Code and oral statements made by persons to police officers in the course of the investigation also came within the ban of section 162 and could not be used for any purpose save that specified in the proviso to section 162(1).

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The provisions of section 162 applied to investigations conducted by the Bombay City Police from and after the 1st August, 1951. They applied to investigations "under this chapter", *i.e.,* investigations conducted under the Criminal Procedure Code, and therefore *prima facie* did not apply to the investigations conducted by the Bombay City Police prior to the 1st August, 1951, in which case section 63 of the City of Bombay Police Act IV of 1902 was applicable. It was however contended on behalf of the appellants that this section was a procedural one, that nobody had a vested right in any course of procedure, that alterations in procedure were to be retrospective unless there was some good reason against it or unless that construction be textually inadmissible [vide *Banwari Gope* v. *Emperor*(1) and *Delhi Cloth Mills* v. *Income-tax Commissioner, Delhi*(2)], that the ban under section 162 was operative when evidence in regard to the test identification parades was led before the learned Sessions Judge and that therefore all evidence in regard to these test identification parades whether they had been held before or after the 1st August, 1951, was inadmissible. It was contended on the other hand by the learned Attorney-General for the respondents that section 167(2) of the Bombay Police Act XXII of 1951 saved by clause (b) thereof any right, privilege, obligation or liability already acquired, accrued or incurred before such date and by clause (d) thereof any investigation, legal proceeding or remedy in respect of such right, privilege, obligation, liability, penalty, forfeiture or punishment and that therefore the investigation which had been made by the police under the provisions of the City of Bombay Police Act IV of 1902 was saved and did not come within the ban of section 162 of the Criminal Procedure Code. Both these contentions are untenable. Section 167(2) could only apply to those rights, privileges, obligations or liabilities already acquired, accrued or in incurred under the City of Bombay Police Act IV of 1902 before the date of its repeal. An investigation conducted by the police under the provisions of that Act would not

(1) A.I.R. 1943 Pat. 18. (2) A.I.R. 1927 P.C. 242.

create or impose any right, privilege, obligation or liability which could be saved by the provisions of section 167(2) of the Bombay Police Act XXII of 1951. The investigation which had been conducted up to the 1st August, 1951, would be governed by the provisions of City of Bombay Police Act IV of 1902 and unless there was something in the Bombay Police Act XXII of 1951 which referred to those investigations, all the incidents of those investigations would be governed by the provisions of the repealed Act and the question as to the admissibility in evidence of the results of such investigations would also have to be considered with reference to the provisions of that Act. Section 162 of the Criminal Procedure Code in terms applied to the investigations conducted "under this Chapter", *i.e.,* Chapter XIV which relates to information to the police and their powers to investigate, whereas section 63 of the City of Bombay Police Act IV of 1902 specifically referred to the investigations conducted "under this Act", *i.e.,* the City of Bombay Police Act IV of 1902. Section 162 of the Criminal Procedure Code therefore applied by reason of the context and the terms of that very section to investigations which had been conducted by the Bombay City Police after the 1st August, 1951, and would not have a retrospective operation, because the investigations conducted up to the 1st August, 1951, by the Bombay City Police would certainly not be investigations conducted "under this Chapter", *i.e.,* Chapter XIV of the Criminal Procedure Code. There is no substance therefore in either of these contentions and the question as to admissibility in evidence of the statements made in the course of investigation under the City of Bombay Police Act IV of 1902 would have to be considered in the light of the provisions of section 63 of that Act and not section 162 of the Criminal Procedure Code.

It may be noted that the test identification parades in regard to the accused 1 and 2 were all held prior to the 1st August, 1951, and no question could therefore arise as to the provisions of section 162 of the Criminal Procedure Code being applicable to the evidence in

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regard to those parades. The test identification parades in regard to accused 4 however were held after the 1st August, 1951, between the 16th January and the 22nd January, 1952, and it remains to be considered how far the evidence in regard to those parades was admissible in evidence having regard to the provisions of section 162 of the Criminal Procedure Code.

There has been a conflict of opinion between various High Courts in regard to the admissibility of evidence in regard to these test identification parades. The Calcutta High Court and the Allahabad High Court have taken the view that identification of a person amounts to a statement within section 162 and that therefore the fact of such identification is not admissible in evidence. The High Court of Madras and the Judicial Commissioner's Court at Nagpur have taken the contrary view.

In *Khabiruddin* v. *Emperor*(1) the question arose as to the admissibility of identification of stolen property during investigation in the presence of police officers and it was held that section 162 embraced all kinds of statements made to a police officer in the course of an investigation, that the evidence of the fact of identification is nothing but evidence of the statements which constitute the identification in a compendious and concise form and that therefore any identification of stolen property in the presence of a police officer during investigation was a statement made to a police officer during investigation and was therefore within the scope of section 162. Pointing out by finger or nod of assent in answer to a question was held as much a verbal statement as a statement by word of mouth and no distinction was made between the mental act of the identifier on the one hand and the communication of that identification by him to another on the other. Even the fact of identification by the identifier himself apart from the communication thereof to another was considered to be within the ban of section 162.

This decision was commented upon in *Surendra Dinda* v. *Emperor*(2). There also the question arose as to the admissibility of the evidence of the sub-inspector

(1) A.I.R. 1943 Cal. 644. (2) A.I.R. 1949 Cal. 514.

of police that the witnesses told him that the articles produced by him were identified by them as their property and the statements by the witnesses themselves that they had identified the articles to the sub-inspector. It was held that the word "identified" had a double meaning. It meant the fact of actual recognition as well as the communication of that fact to a third person. There was distinction between on the one hand the actual fact of identification which is a mental act on the part of the person identifying, seeing an object or person and recognising that the object or person seen was identical with some particular object or person and on the other hand the communication to a third person of this mental act. The communication was of course a statement, but the identification by the identifier could not possibly be a statement. The Court however proceeded to observe that no distinction could be legitimately made between an actual verbal statement and some action on the part of the identifier disclosing the fact of his identification. Both were hit by section 162. The communication of his own mental act of recognition and identification to the police was what was hit but evidence in the Court subsequently by the actual identifier himself was not inadmissible under section 162. The Court further observed that it was not the actual act or process of seeing or recognising the accused in the presence of the officer which was affected by the provisions of the section, it was the communication of that fact to the police officer of which proof could not be given. It therefore held that the accused was entitled to object to the evidence of the sub-inspector, that the witnesses "identified" the articles to him or the evidence of the witnesses when they said they "identified" the articles in the presence of the sub-inspector in so far as the latter expression was taken to mean and include not only that they recognised the articles as theirs but conveyed the fact of that recognition to the sub-inspector.

The Allahabad High Court in *Daryao Singh* v. *State*(1) followed this decision of the Calcutta High Court in terms without adding any comments of its own.

(1) A.I.R. 1952 All. 59.

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These decisions of the Calcutta and the Allahabad High Courts seek to make a distinction between the mental act of identification and the communication of that fact to another person. The mental act of identification is not hit by section 162 but the communication thereof to another person either by an oral statement or even by signs or gestures including the pointing out by finger or nod of assent in answer to a question put to the identifier in that behalf would come within the ban of section 162. Anything which amounts to a communication of the fact of such identification by the identifier to another person is banned and no evidence in respect thereof can be given in a Court of law under section 162.

The High Court of Madras on the other hand in *In re Kshatri Ram Singh*(1) took the view that any evidence about the statements made by witnesses at the identification parades held by the police in the course of investigation was excluded by section 162, but the fact that witnesses had identified persons at parades held by the police might be proved. In coming to this conclusion the High Court followed an earlier decision of a Division Bench reported in *Guruswami Thevan* v. *Emperor*(2). In that case an objection had been taken to the admission of a note of an identification parade held by the police sub-inspector. It was contended that the document embodied a record of statements made by identifying witnesses to the sub-inspector and as such was inadmissible under section 162. Mr. Justice Wadsworth who delivered the judgment of the Court observed that the question was not without difficulty, for in the nature of things it was probable that when a witness identifies a person in a parade he does make some statement or other as to the purpose for which he identifies him and anything said by a witness at an identification parade held by the investigating officer might well be considered to come within the purview of section 162. On the other hand the mere act of a witness in picking out one individual from a parade was a revelant circumstance concerning which evidence is admissible and if the investigating officer made a note of that circumstance which he himself had observed, there was no

(1) A.I.R. 1941 Mad. 675. (2) 1936 M.W.N. 177.

apparent reason why that note should not be used in evidence. If in the course of that note he appends an inadmissible record of the statement of the identifying witnesses presumably any such portion of the note would have to be excluded from evidence. He applied that criterion to the document in question and the bare note of the personnel of the parade, the names of the witnesses, the way in which the parade was arranged and the numbers of the persons in the parade identified by each witness were held unobjectionable. What was excluded was the statement in regard to the identification of witnesses of the persons as having been concerned in the murder cases which were the subject-matter of investigation. A distinction was thus made between the physical fact of identification and the statement made by the identifier as regards the persons identified having been concerned in the offence.

The Judicial Commissioner's Court at Nagpur in *Ramadhin Brahmin* v. *Emperor*(1) expressed a similar opinion that evidence of police officers who give evidence with regard to the identification parades which were held and who depose to certain of the accused having been identified by prosecution witnesses in an identification parade was not inadmissible under section 162 as their evidence does not relate to any statement made to the police but is a simple exposition of a fact or circumstances witnessed by themselves. Here also a distinction appears to have been made between the physical fact of identification sought to be proved by the evidence of the police officers and the statements made by the identifier to the police.

In order to resolve this conflict of opinion one has to examine the purpose of test identification parades. These parades are held by the police in the course of their investigation for the purpose of enabling witnesses to identify the properties which are the subject-matter of the offence or to identify the persons who are concerned in the offence. They are not held merely for the purpose of identifying property or persons irrespective of their connection with the offence. Whether the police

(1) A.I.R. 1929 Nag. 36.

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officers interrogate the identifying witnesses or the Panch witnesses who are procured by the police do so, the identifying witnesses are explained the purpose of holding these parades and are asked to identify the properties which are the subject-matter of the offence or the persons who are concerned in the offence. If this background is kept in view it is clear that the process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject-matter of the offence or the persons identified were concerned in the offence. This statement may be express or implied. The identifier may point out by his finger or touch the property or the person identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that the particular property identified was the subject-matter of the offence or the person identified was concerned in the offence. All these statements express or implied including the signs and gestures would amount to a communication of the fact of identification by the identifier to another person. The distinction therefore which has been made by the Calcutta and the Allahabad High Courts between the mental act of identification and the communication thereof by the identifier to another person is quite logical and such communications are tantamount to statements made by the identifiers to a police officer in the course of investigation and come within the ban of section 162. The physical fact of identification has thus no separate existence apart from the statement involved in the very process of identification and in so far as a police officer seeks to prove the fact of such identification such evidence of his would attract the operation of section 162 and would be inadmissible in evidence, the only exception being the evidence sought to be given by the identifier himself in regard to his mental act of identification which he would be entitled to give by way of corroboration of his identification of the accused at the trial. We therefore approve of the view taken by the Calcutta and Allahabad High Courts in preference to the view taken

by the Madras High Court and the Judicial Commissioner's Court at Nagpur.

The learned Attorney-General however sought to make a distinction between the statements made to the police officers and the statements made to the Panch witnesses called by the police officers when conducting the test identification parades. He urged that a statement made to the police officers would be within the ban of section 162. But if in spite of the test identification parades having been arranged by the police Panch witnesses were called by the police and they explained to the identifying witnesses the purpose of the parades and the identification was made by the witnesses before them though in the presence of the police officers, the Panch witnesses could certainly depose to the fact of identification as also the statement made by the identifying witnesses to them without attracting the operation of section 162. He further urged that in such a case the identification would amount to a statement to the Panch witnesses even though the police officers were present at the time and it would be a question of fact whether the statement was made to the Panch witnesses or to the police officers which question would have to be determined having regard to the circumstances of each case. [Vide *Abdul Kader* v. *Emperor*(1) and *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh*(2)]. He contended that the test identification parades were held in the present case in the presence of the Panch witnesses who were called by the police for witnessing the same, that the Panch witnesses explained to each identifying witness the purpose of holding the parade, that the identification took place in the presence of the Panch witnesses who noted down the result of the identification, that Panchnamas were prepared by the police after the identification was held and were signed by the Panch witnesses and that therefore the identification of the accused by the identifying witnesses amounted to statements made by the identifiers to the Panch witnesses and not to the police and evidence in that behalf given by the Panch witnesses was therefore admissible in evidence.

(1) A.I.R. 1946 Cal. 452. (2) [1954] S.C.R. 1098.

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This argument would have availed the learned Attorney-General if after arranging the test identification parade the police had completely obliterated themselves and the Panch witnesses were left solely in charge of the parade. The police officers would certainly arrange the parade, would call the persons who were going to be mixed up with the accused in the course of the parade and would also call the Panch witnesses who were to conduct the parade. But once the Panch witnesses were called for the purpose the whole of the process of identification should be under the exclusive direction and supervision of the Panch witnesses. If the Panch witnesses thereafter explained the purpose of the parade to the identifying witnesses and the process of identification was carried out under their exclusive direction and supervision, the statements involved in the process of identification would be statements made by the identifiers to the Panch witnesses and would be outside the purview of section 162. In the case of the identification parades in the present case however the police officers were present all throughout the process of identification and the Panch witnesses appear only to have been brought in there for the purpose of proving that the requirements of law in the matter of holding the identification parades were fully satisfied. Not only were the police officers present when the identifying witnesses were brought into the room one after the other and identified the accused, they also prepared the Panchnama, read out and explained the contents thereof to the Panch witnesses, and also attested the signatures of the Panch witnesses which were appended by them at the foot of the Panchnama. The whole of the identification parades were thus directed and supervised by the police officers and the Panch witnesses took a minor part in the same and were there only for the purpose of guaranteeing that the requirements of the law in regard to the holding of the identification parades were satisfied. We feel very great reluctance in holding under these circumstances that the statements, if any, involved in the process of identification were statements made by the indentifiers to the Panch witnesses and not to the police officers as

otherwise it will be easy for the police officers to circumvent the provisions of section 162 by formally asking the Panch witnesses to be present and contending that the statements, if any, made by the identifiers were to the Panch witnesses and not to themselves. We are therefore of the opinion that the test identification parades in regard to the accused 4 which were held between the 16th January, and the 22nd January, 1952, attracted the operation of section 162 and the evidence of identification at those parades was inadmissible against accused 4.

The question as to the admission of evidence inadmissible under section 27 of the Indian Evidence Act really lies within a narrow compass. The contention in this behalf was based on the evidence of the Investigating Officer, Hujur Ahmed Khan, that on the 16th May, 1951, the accused 1 made a certain statement in consequence of which he took accused 1 and 2 to Itawa and leaving the accused 2 there the party proceeded to Bhagwasi with the accused 1 and his further evidence that the accused 1 there pointed out Baliram who at the instance of accused 1 dug out from a mud house a tin box containing three revolvers and two tins containing live cartridges. Exception was taken to the expressions "in consequence of a certain statement made by accused 1" and "at the instance of accused 1" which it was argued came within the ban of section 27. Section 27 of the Indian Evidence Act runs as under :—

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

Section 27 is an exception to the rules enacted in sections 25 and 26 of the Act which provide that no confession made to a police officer shall be proved as against a person accused of an offence and that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as

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against such person. Where however any fact is discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, that part of the information as relates distinctly to the fact thereby discovered can be proved whether it amounts to a confession or not. The expression "whether it amounts to a confession or not" has been used in order to emphasise the position that even though it may amount to a confession that much information as relates distinctly to the fact thereby discovered can be proved against the accused. The section seems to be based on the view that if a fact is actually discovered in consequence of information given some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. But clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. [*Kottaya* v. *Emperor* (1)].

On a bare reading of the terms of the section it appears that what is allowed to be proved is the information or such part thereof as relates distinctly to the fact thereby discovered. The information would consist of a statement made by the accused to the police officer and the police officer is obviously precluded from proving the information or part thereof unless it comes within the four corners of the section. If the police officer wants to prove the information or a part thereof, the Court would have to consider whether it relates distinctly to the fact thereby discovered and allow the proof thereof only if that condition was satisfied. If however the police officer does not want to prove the information or any part thereof, section 27 does not come into operation at all. What was stated by the Investigation Officer, Hujur Ahmed Khan, in the present case was that certain information was supplied to him by the accused 1 in consequence of which he took certain steps. He did not seek to prove that information or any part thereof in the evidence which he gave before the Court. Even when he said that Baliram dug out the tin box from the mud floor of a house at

(1) A.I.R. 1947 P.C. 67.

the instance of the accused 1 he did not seek to prove what that information was. The operation of section 27 was therefore not attracted and *prima facie* there was nothing to prevent that evidence being admitted against the accused 1. Reliance was however placed on an unreported judgment of Chagla C.J. and Gajendragadkar J. delivered on the 11th January, 1950, in Criminal Appeals No. 454 of 1949 and No. 464 of 1949 with revisional application No. 952 of 1949 in the case of *Rex* v. *Gokulchand Dwarkadas Morarka No. 1.* An exception was there taken to the statement of the police officer that in consequence of certain statements made by the accused 1 and 2 in that case he discovered the missing pages of the Bombay Samachar of the 23rd April, 1948, and it was contended that that statement was inadmissible in evidence. The question that really arose for the consideration of the Court there was whether the joint statement attributed to the accused 1 and 2 in that case was admissible without specifying what statement was made by a particular accused which led to the discovery of the relevant fact and it was rightly held that a joint statement by more than one accused was not contemplated by section 27 and the evidence of Mistry, the police officer, in that behalf should therefore have been excluded. An argument was however addressed by the learned Advocate-General who appeared for the State there that Mistry had not attempted to prove what statement the accused had made and all that he said was that in consequence of statements made by them a discovery was made. The learned Judges dealt with that argument as under :—

"In our opinion, this is a roundabout and objectionable way of attempting to prove the statements made by the accused without actually proving them. When the police officer speaks of "in consequence of a statement made by an accused a discovery was made", he involves the accused in the discovery. Whether he gives evidence as to the actual words used by the accused or not, the connection between the statement made by the accused and the discovery of the relevant fact is clearly hinted at. In our opinion,

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therefore, evidence cannot be given of any statement made by accused which results in the discovery of a fact unless it satisfies the conditions laid down under section 27 and this would be so even if the actual statement is not attempted to be proved by the prosecution. Even if the statement is not proved, the statement must be such as can be proved under section 27."

The learned Judges then proceeded to consider the following observations of Rankin C.J. in *Durlav Namasudra* v. *Emperor*(1) :

"There seems to me to be nothing in section 24 or 25 to prevent evidence being given: 'In consequence of something said by the accused I went to such and such a place and there found the body of the deceased.' In cases under section 27 the witness may go further and give the relevant part of the confession."

The learned Judges expressed their inability to agree with this view of the law observing that Rankin C.J. was really dealing academically with the various sections of the Indian Evidence Act and he was not called upon to decide this point. With the utmost respect the learned Judges of the Bombay High Court committed the same error which they thought Rankin C.J. had committed, because immediately thereafter they observed :—

"We would also like to add that, in the circumstances of this case, this discussion is somewhat academic, because even if we accept the contention of the Advocate-General and hold that the statement of the investigating officer is admissible, it cannot, possibly help the prosecution case very much."

What they were considering was the case of a joint statement made by the accused 1 and 2 in that case and these observations made by them expressing their inability to agree with Rankin C.J.'s view of the law were clearly obiter.

The evidence of the police officer would no doubt go to show that the accused knew of the existence of the fact discovered in consequence of information given by

(1) (1931) I.L.R. 59 Cal. 1040, 1045.

him. But that would not necessarily show his direct connection with the offence. It would merely be a link in the chain of evidence which taken along with other pieces of evidence might go to establish his connection therewith. This circumstance would therefore be quite innocuous and evidence could certainly be given of that circumstance without attracting the operation of section 27.

If it were necessary to do so we would prefer to accept the view of Rankin C.J. to the one expressed by the learned Judges of the Bombay High Court. This question as regards the inadmissibility of evidence under section 27 of the Indian Evidence Act must therefore be answered against accused 1.

Turning now to the misdirections and non-directions such as to vitiate the verdict of the jury, the main misdirection which was pointed out by the learned counsel for all the accused before us was in regard to the question whether four or five persons were concerned in the commission of the offence. Particular exception was taken to paragraph 59 of the learned Judge's charge to the jury :—

"Brightling, Baburao Raje, Miss Vida Palmer, Mrs. Paterson and witness Sarkari, if you were to accept his evidence here on this part of the case, were all definite that there were five or more men surrounding the taxi and concerned in the attack while Holmes said that there were at least four, if not more, which means that he was not certain about the number. If you were to find from the statement of Casey that he saw some men trying to pile into the taxi from the rear door of the taxi on the Bank side, that would suggest that there were at least five men concerned even according to Casey. Consider this question carefully and then if you find after scrutiny of this evidence that there were at least five men conjointly concerned then only section 395 would apply. That briefly was the evidence so far as the question as to the number of men is concerned."

Our attention was drawn to the evidence of these several witnesses and it was pointed out that far from

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their being definite that there were five or more men concerned in the commission of the offence there was evidence to show that only two persons were occupying the front seats and two persons were occupying the rear seats in the taxi which brought the number of persons to four and not five as contended by the prosecution. Exception was also taken to the manner in which the expression "piling into the taxi from the rear door of the taxi on the Bank side" was sought to be interpreted by the learned Judge, thus belittling the significance of the evidence of Major Casey that when the taxi went past him he saw two persons in the front seats and two persons in the rear seats of the taxi. It was further pointed out that according to the evidence of Miss Vida Palmer and Mrs. Paterson there were only five or six persons there in all. Their evidence did not definitely say that these five persons were the persons concerned in the commission of the offence and that some of them might as well have been passers-by or Baburao Raje or Sarvarkhan, who happened to be present there at the scene of the occurrence and were certainly not concerned in the commission of the offence. It was also pointed out that Holmes, the sub-manager of the Bank, who witnessed the occurrence from behind the double glasses of the windows was not in a position to know how many persons actually took part in the affair and was also not in a position to see how many persons had got into the taxi. We have carefully considered these criticisms of the evidence of the several witnesses but are unable to come to the conclusion that there was any misdirection on the part of the learned Judge in his summing up to the jury. The evidence of each of these witnesses was discussed by the learned Judge and the main defects and contradictions in their evidence were clearly pointed out by him to the jury. The actual words used by him in the paragraph in question were that the several witnesses were all definite that there were five or more men surrounding the taxi and concerned in the attack and on the evidence as a whole we do not see any exception to the correctness of that statement. The explanation which was given of the expression

"piling into the taxi from the rear door of the taxi on the Bank side" was also unobjectionable. The words "piling into the taxi" could certainly be appropriate when describing the getting into the taxi of "some other persons" and that expression certainly was capable of being understood to mean that more than one person was trying to get into the taxi from its rear door on the Bank side. All these points were clearly put by the learned Judge to the jury and we are of the opinion that there was no misdirection at all in that part of the learned Judge's summing up to the jury. It was strictly within the province of the jury on the evidence as it was summed up by the learned Judge to them on this aspect of the question to come to the conclusion whether four or five persons were concerned in the commission of the offence and they brought in a unanimous verdict of guilty under section 395 of the Indian Penal Code.

The other misdirections which were sought to be pointed out by the learned counsel for the accused 1 and 2 were minor misdirections, if any, and need not detain us, as we are clearly of the opinion that even though those misdirections were there they were not such as to vitiate the verdict of the jury. We must however advert to the serious misdirection which it was contended was apparent on the face of the learned Judge's charge to the jury and which was the result of the learned Judge's not bringing into prominence the various points which could be urged in favour of the accused. It was contended that the learned Judge merely reiterated in various places the story of the prosecution and did not point out the weaknesses or the defects in that story, that he did not advert to the various criticisms which were levelled against the story of the prosecution by the counsel for the defence, that he did not point out to the jury the improbabilities of the prosecution story or the incredibility of the prosecution witnesses in regard to the salient features of the prosecution case, that he did not draw the pointed attention of the jury to the infirmities attaching to the prosecution evidence in regard to the test identification parades and that the learned Judge's summing up to

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the jury was on the whole unfair and prejudicial to the accused.

Section 297 of the Criminal Procedure Code lays down that in cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided. The Judge lays down the law and directs the jury on questions of law. So far as the facts are concerned however they are within the exclusive province of the jury. But even there the Judge has to sum up the evidence for the prosecution and defence. Summing up does not mean that the Judge should give merely a summary of the evidence. He must marshall the evidence so as to bring out the lights and the shades, the probabilities and the improbabilities so as to give proper assistance to the jury who are required to decide which view of the facts is true. Vide *Ilu* v. *Emperor*(1). The Judge should give the jury the help and guidance which they are entitled to expect from the Judge and which it is his duty to give. The charge should not consist of a long rambling repetition of the evidence, without any attempt to marshall the facts under appropriate heads, or to assist the jury to sift and weigh the evidence so that they will be in a position to understand which are the really important parts of the evidence and which are of secondary importance. It is necessary in every criminal case for the Judge carefully, properly and efficiently to charge the jury and he should not go into unnecessary details with regard to such aspects of the case which are really of very little importance. Vide *Nabi Khan* v. *Emperor*(2). It has been observed by the Privy Council however in *Arnold* v. *King-Emperor*(3), that—

"A charge to a jury must be read as a whole. If there are salient propositions of law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact the determination of which is ultimately left to the jury, it must needs be that the

(1) A.I.R. 1934 Cal. 847.
(2) A.I.R. 1936 Cal. 186.
(3) (1914) I.L.R. 41 Cal. 1023.

view of the Judge may not coincide with the view of others who look upon the whole proceedings in black type. It would, however, not be in accordance with usual or good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province. But in any case in the region of fact their Lordships of the Judicial Committee would not interfere unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred."

Bearing these principles in mind we have got to scrutinise how far these criticisms levelled against the learned Judge's charge to the jury are of any avail. We have been taken into the evidence of the several witnesses in great detail by the learned counsel for the accused but we are unable to come to the conclusion that there is any serious misdirection such as to vitiate the verdict of the jury or that there has been a failure of justice. The learned Judge's charge to the jury has been scrupulously fair and he has in several places brought out the points which militate against the story of the prosecution and support the defence version. He has been at pains to point out the various defects and contradictions in the evidence of the prosecution witnesses and has fairly put it to the jury to consider whether in view of the same they would accept the testimony of the several witnesses. He has marshalled the evidence against each of the accused separately and has also pointed out in their proper places the criticisms which have been levelled against the evidence of the prosecution witnesses in regard to each of the accused. Apart from the general observations which he made in regard to the scrutiny of the evidence of the test identification parades he has also in appropriate places reiterated the warning in regard to that evidence and has put the jury wise to the whole position in regard to such evidence. On reading the charge as a whole we are of the opinion that there is nothing in the learned Judge's charge to the jury which would, to use the words of their Lordships of the Privy Council, "amount to a complete misdescription of the whole bearing of the evidence" or that "there is any failure of justice."

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We are unable to agree with the submission made by the learned counsel for the accused before us that the charge was grossly unfair or contained any serious misdirection or non-direction such as to vitiate the verdict of the jury.

The result therefore is that so far as the verdict of the jury against accused 1 and 2 is concerned the same was not vitiated either by the admission of inadmissible evidence or by any misdirection or non-direction. The convictions of these accused and the sentences passed upon them by the learned Sessions Judge will therefore be confirmed.

As regards accused 4 however there has been an error of law in admitting evidence of the test identification parades in regard to him which we have held was inadmissible under section 162 of the Criminal Procedure Code. The admission of such inadmissible evidence would amount to a misdirection in the learned Judge's charge to the jury in regard to that accused and it is necessary therefore to consider what would be the effect of the admission of such inadmissible evidence so far as that accused is concerned.

Learned counsel for the accused relied upon the observations in *Kabiruddin* v. *Emperor*(1), that it was impossible to ascertain what was the effect of this evidence on the minds of the jury and that it was also impossible to say that this inadmissible evidence did not have considerable effect on the jury and their verdict. He therefore urged that the verdict should be set aside and the case remanded for retrial. A later decision of the Calcutta High Court reported in *Surendra Dinda* v. *Emperor*(2), however, took the view that every breach of section 162 would not vitiate a trial. Reception of evidence inadmissible under section 162 was not necessarily fatal and in an appeal the Court had to see whether the reception influenced the mind of the jury so seriously as to lead them to a conclusion which might have been different but for its reception. It must always be a question whether prejudice had been caused in such cases, and, if not, whether the materials

(1) A.I.R. 1943 Cal. 644, 646. (2) A.I.R. 1949 Cal. 514.

left were sufficient within the meaning of section 167 of the Indian Evidence Act. The position in this behalf has got to be considered with reference to the provisions of section 537 of the Criminal Procedure Code and section 167 of the Indian Evidence Act. Section 537 of the Criminal Procedure Code provides :—

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account.....

(d) of any misdirection in any charge to a jury, ...unless such.....misdirection has in fact occasioned a failure of justice."

Section 167 of the Indian Evidence Act provides :—

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

The latest pronouncement on this question was the decision of the Privy Council in *Abdul Rahim* v. *King Emperor*(1), where it was laid down that where inadmissible evidence had been admitted in a criminal case tried with a jury, the High Court on appeal may, in view of section 167 of the Indian Evidence Act after excluding such inadmissible evidence, maintain a conviction, provided that the admissible evidence remaining was, in the opinion of the Court, sufficient clearly to establish the guilt of the accused. It was observed that :—

"Misdirection is not in itself a sufficient ground to justify interference with the verdict. The High Court must under the provisions of section 423, sub-section 2 and section 537 of the Criminal Procedure Code proceed respectively to consider whether the

(1) (1946) L.R. 73 I.A. 77.

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verdict is erroneous owing to the misdirection or whether the misdirection has in fact occasioned a failure of justice. If the Court so finds, then its duty is to interfere. In deciding whether there has been in fact a failure of justice in consequence of a misdirection the High Court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent one convicted."

This decision was followed by our Court in *Mushtaq Husain* v. *State of Bombay*(1) and the Court held that where a jury has been misdirected and has based its verdict on assumptions and conjectures, the Supreme Court may order a retrial or remit the case to the High Court with a direction that it should consider the merits of the case in the light of the decision of the Supreme Court and say whether there has been a failure of justice as a result of the misdirections, or it may examine the merits of the case and decide for itself whether there has been a failure of justice in the case and that in deciding whether there has been in fact a failure of justice in consequence of a misdirection the Court would be entitled to take the whole case into consideration. This Court discussed the statute law in India which in certain circumstances permitted an appeal against a jury verdict and authorised the appellate Court to substitute its own verdict on its own consideration of the evidence and came to the conclusion that unless it was established in a case that there had been a serious misdirection by the Judge in charging the jury which had occasioned a failure of justice and had misled the jury in giving its verdict, the verdict of the jury could not be set aside.

What has therefore got to be done in cases where inadmissible evidence has been admitted and has been incorporated in the learned Judge's charge to the jury is to exclude the inadmissible evidence from the record and consider whether the balance of evidence remaining thereafter is sufficient to maintain the conviction.

A question was raised in this connection by the learned Attorney-General whether having regard to

(1) [1953] S.C.R. 809.

the observations of their Lordships of the Privy Council in *Abdul Rahim* v. *King-Emperor* (*supra*) and of this Court in *Mushtaq Husain* v. *State of Bombay* (*supra*) the Court was justified in considering the balance of evidence for itself and substituting its own verdict for the verdict of the jury. He relied upon the observations of the Privy Council approving the decision in *Mathews* v. *Emperor*(1) to the effect that the appellate Court was entitled to examine the evidence to see whether it justified the verdict pronounced or whether there had in fact been a failure of justice and also upon the observations of Mr. Justice Mahajan, as he then was, to the effect that on the materials on record no reasonable body of men could have arrived at the verdict. There is no doubt that these observations occur in the judgments above referred to. But if these judgments are read as a whole they go to show that it is for the Court of Appeal to take the whole case into consideration and determine for itself whether the verdict pronounced by the jury was justified or whether there had been in fact a failure of justice. The merits of the case had to be examined by the Court of Appeal and the Court had to decide for itself whether the conviction could be maintained.

As a matter of fact this very question was mooted before the Privy Council in *Abdul Rahim* v. *King-Emperor*(2) as under:

"The controversy which, as the reported cases show, has long existed in the High Courts of India has centered round the question whether the appellate court, in deciding whether there is sufficient ground for interfering with the verdict of a jury, particularly where there has been a misdirection by the judge, has the right and duty to go into the merits of the case for itself and on its own consideration of the evidence to make up its mind whether the verdict was justified or not. On the one hand, it has been said that the accused is entitled to have his guilt or innocence decided by the verdict of a jury and that the appellate court has no right to substitute its own judgment in place of a verdict by a jury.....On the other hand, it

(1) A.I.R. 1940 Lah. 87. (2) (1946) L.R. 73. I.A. 77, 93.

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is argued that it is impossible for the court to perform the duty laid on it by the Code without applying its own mind to the soundness of the verdict." Section 537 of the Criminal Procedure Code was then referred to as also the two distinct lines of cases supporting these divergent points of view. The Privy Council then came to the conclusion that the ratio of cases beginning with *Elahee Buksh*(1) and ending with *Mathews* v. *Emperor*(2) was correct and held that the Court was entitled to examine the evidence for itself and see whether it justified the verdict pronounced or whether there had in fact been a failure of justice. The Court of Appeal is thus entitled to substitute its own verdict for the verdict of the jury if on examining the record for itself it comes to the conclusion that the verdict of the jury was erroneous or that there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.

It is therefore necessary to consider whether the balance of evidence on the record after excluding the evidence of test identification parades in regard to accused 4 is sufficient to maintain his conviction. We have been taken through the evidence which was led on behalf of the prosecution seeking to prove that accused 4 was concerned in the commission of the offence. Baburao Raje was no doubt characterised as an unreliable witness. But even apart from his evidence there was evidence of Sarvarkhan which was sufficient to establish the participation of accused 4 in the offence. His presence at the scene of the occurrence and his participation in the offence was clearly deposed to by Sarvarkhan and we see no reason in spite of the criticisms levelled against his evidence by learned counsel to discard his testimony in that behalf. There is also sufficient evidence of his previous conduct, his association with the accused 1 and 2, his activities in Bombay after he arrived there from Delhi in the beginning of April, 1951, in regard to the renting of rooms and garage from Tayabali Vaid and attempting to acquire the Vauxhall and the Chevrolet cars from Haribhau and Ramdas respectively, his

(1) (1866) 5 W.R. 80. (Cr.). (2) A.I.R. 1940 Lah. 7.

conversations with Lalchand and in particular (1) the conversation outside the Sandhurst Road Branch of the Central Bank of India Ltd., and (2) the conversation at Apollo Bunder near the Sea Wall where he, accused 1 and Lalchand had gone after having the hair-cut at the Taj Mahal Hotel and survey of the site of the Lloyds Bank by him along with the other accused as deposed to by Chinoy and Ramesh Chandra Mehta which make it highly probable that he must have been present at the scene of the occurrence and must have participated in the commission of the offence as deposed to by Sarvarkhan. His subsequent conduct also in leaving Bombay by the Calcutta Mail bound for Allahabad on the night of the 20th April, 1951, and the expression of relief at his finding accused 1 at the last moment entering his compartment, proved as it is by the evidence of Gogte contrary to his own assertion and the assertion of accused 1 that they had left Delhi for Kanpur on the 18th April, 1951, and had sworn an affidavit there before the Magistrate, Mr. Tandon, also support the same conclusion. All this evidence in our opinion is sufficient to establish the case of the prosecution against him and we are satisfied that even excluding the evidence of the test identification parades in regard to him the balance of evidence remaining on record is enough to maintain his conviction.

The result therefore is that the appeals of all the accused fail and must stand dismissed.

JAGANNADHADAS J.—I agree that the appeals should be dismissed. But I consider it necessary to make a few observations as regards the questions debated before us in these cases with reference to section 162 of the Criminal Procedure Code and section 27 of the Indian Evidence Act.

I agree that the objection under section 162 of the Criminal Procedure Code to the admissibility of evidence relating to identification parades does not apply to those held prior to the 1st August, 1951. The only identification parade, therefore, objection to the admissibility of which requires consideration is that which relates to the fourth accused held in January, 1952.

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The evidence in this behalf has been given by (1) the Police-Inspector, P. W. 80, Huzur Ahmed Mahomedali Khan, (2) and Panch witness, P.W. 113, Damodar Dayaram, and (3) the two eye-witnesses, P.Ws. 13 and 15, Baburao Parshram Raje and Sarwar-khan. An attempt has been made to argue before us that while the evidence of the police officer may be inadmissible, the evidence of the Panch witness as well as of the identifying witnesses themselves, relating to the fact of the prior identification, as an item of corroborative evidence is admissible. I agree that, on the evidence given in this case, there is no scope for such differentiation and that the entire evidence relating to the prior identification parades concerning the 4th accused is, in substance, evidence only of the prior statements of the identifying witnesses to the police officer and is hence inadmissible. But I wish to guard myself against being understood as having assented to the suggestion that in law a differentiation can be made in such cases between the three classes of evidence, *viz.*, (1) of the police officer, (2) of the Panch witness, and (3) of the identifying witness himself, in so far as they speak to a prior identification at a parade held by the police officer. I am inclined to think that such differentiation is unsound and inadmissible. The legal permissibility thereof is a matter of importance because, though the evidence of prior identification is only corroborative evidence, still such corroboration is of considerable value in cases of this kind.

Next as regards the objection to the admissibility of evidence raised with reference to section 27 of the Indian Evidence Act, the main items of evidence are (1) the recovery on the 16th May, 1951, of a tin box containing three revolvers and two tins containing live cartridges, and (2) the find on the 19th May, 1951, of a steel trunk containing Government currency notes of the value of Rs. 6,47,400 on the production thereof by Kamalabai, the wife of the first accused, at a village Bhagwasi which is her native place. So far as the first is concerned it is not of much consequence because the expert evidence did not show that any of the three bullets which were found at the scene of offence were

in fact fired from the three revolvers above recovered and this has been sufficiently indicated in the charge to the jury. It is the second item that is of importance. This arises from the fact that some of the currency notes had identification marks showing that they were part of the bundle of notes which formed the object of the offence. The evidence in this behalf is that of the Police Inspector, P.W. 80, which is as follows :

"We started from Delhi at about 6 A.M., and reached Bagwasi at about 2 or 3 P.M., on the 19th of May. The 1st accused took us to a certain house where he pointed out witness Kamala (wife of the first accused). *At the instance of the 1st accused* witness Kamala brought from somewhere outside that house a steel box.....When it was opened I found therein six big bundles and five smaller bundles of hundred rupee G. C. Notes."

The portion is this evidence which is objected to is that this production was "at the instance of the first accused" seeking thereby to establish the direct connection of the first accused with the find of this very large sum of money which bears indications that it was out of that lost to the Bank by the offence. It may be that when a police officer speaks to a recovery being "on the information of" or "at the instance of" an accused, section 27 of the Indian Evidence Act is not in terms attracted. But what is objected to on behalf of the appellants is that when a police officer speaks to a recovery of this kind as having been "at the instance of an accused" or "in consequence of information given by an accused" he is being allowed to place on record not merely the fact of his having received some information but also the implication thereof, *viz.*, that the information is of a character which directly connects the accused with the objects recovered. It is urged that the prosecution cannot be permitted to rely on such evidence without placing the admissible portion of the information on the record. I am inclined to think that there is considerable force in this objection. The information given by an accused in such a situation may be such which, if scrutinised, shows only his

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remote connection and not direct connection. In such a situation evidence of the bare fact of information having been given may be inadmissible and such evidence may cause serious prejudice. I am not, therefore, prepared to say that the view expressed by Chief Justice Chagla in the unreported judgment(1), placed before us is erroneous. I would reserve my opinion in this behalf for fuller consideration. In the present case, however, even if the evidence of the police officer that the recovery was at the instance of or in consequence of information furnished by the first accused is ruled out, there is still the fact spoken to by him that the trunk containing the currency notes was produced by Kamalabai, wife of the first accused, at her native place. This item of evidence is clearly admissible against the first accused as indicating his connection. Therefore no prejudice can be said to have been caused. It is also to be noticed that no objection under section 27 of the Indian Evidence Act appears to have been taken at the trial nor is there any indication of it in the grounds of appeal to the High Court.

In view of our opinion that the evidence of identification parades relating to the fourth accused was inadmissible, we were taken through the rest of the evidence as against this accused. I agree, on a consideration of that evidence, that this is not a case in which interference with the verdict even as against the fourth accused is called for.

Appeals dismissed.

(1) Judgment of the Bombay High Court in Criminal Appeals Nos. 454 and 464 of 1949 in the case of *Rex* v. *Gokulchand Dwarkadas Morarka No.* 1, delivered on the 11th January, 1950.