
(1961) 07 GUJ CK 0008
In the Gujarat High Court

Naginlal Nandlal

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 06-07-1961

Acts Referred:

Constitution of India, 1950 — Article 14
Evidence Act, 1872 — Section 157, 159, 160, 161, 165
Penal Code, 1860 (IPC) — Section 161, 165, 165A

Citation : (1962) CriLJ 142 : (1961) GLR 664

Hon'ble Judges : V.B. Raju, J;A.R. Bakshi, J

Bench : Division Bench

Judgement

V.B. Raju, J.—This is an appeal by one Naginlal Nandlal, who was convicted by the learned Sessions Judge, Surat, u/s 161, Indian Penal Code and u/s 5(2) of the Prevention of Corruption Act. The learned Judge acquitted accused No. 2.

2. The prosecution case was that the complainant Ratilal Somabhai, used to deal in illicit liquor and used to give bribes generally to the members of the police force. It is also alleged that after some time the complainant stopped dealing in illicit liquor and that the two police constables, who were accused Nos. 1 and 2 at the trial, made a demand from him for the payment of Rs. 25/- as bribe. As the complainant had stopped his dealing in illicit liquor, he went and gave information to the P.S.I. Mansuri of the Anti-Corruption Department, who recorded his information on 31.1.60. On 1.2.60, P.S.I., Mansuri made a report to the Judicial Magistrate, First class Surat, and asked for permission to investigate fresh a permission was necessary u/s 5A of the Prevention of Corruption Act. The magistrate gave the sanction u/s 5A of the Prevention of Corruption Act.

3. At the trial, the prosecution relied of the evidence or the complainant Ratilal, of one of the panchas, of the police constable Mahadev and of the P.S.I. Mansuri. The prosecution also relied on the two Panchnamas.

4. In appeal, the conviction of the appellant is challenged. It is urged that the evidence of the prosecution witnesses should be rejected. It is urged that the

order of the Magistrate giving permission to P.S.I. Mansuri for investigation was bad because it contravened the principles laid down in H.N. Rishbud and Inder Singh Vs. The State of Delhi, . It is also contended that, the order of the Magistrate giving authority to P.S.I. Kantilal for further investigation was also bad. It is urged that on account of the illegality in the investigation, the appellant had been prejudiced. It is also contended that the power to investigate did not include the power of laying a trap and that the laying of a trap was illegal. It is also contended that the prosecution could not rely on the Panchnama and that the Panchnama should not have been admitted in evidence. Lastly, it is contended that the learned Special Judge was wrong in believing the evidence of the prosecution witnesses in regard to the appellant and in rejecting the evidence of the defence witness.

5. At the trial, the appellant was charged under Section 161, Indian Penal Code, and u/s 5(2) of the Prevention of Corruption Act, both of which are cognizable offences. In this connection, it is important to refer to the provisions of Section 156 of the Code of Criminal Procedure, Section 156, Cri.P.C. reads as follows:

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered u/s 190 may order such an investigation as above-mentioned.

This section is found in Chapter XIV of the Code of Criminal Procedure, which relates to "information to the police and their powers to investigate". Section 154, Criminal Procedure Code, which is found in this Chapter, provides that every information relating to the commission of a cognizable offence should either be in writing or should be reduced to writing. Section 156, Cri. Pro. Code then provides that any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire (into or try under the provisions of Chapter XV relating to the place of inquiry or trial. An officer in charge of a police-station has therefore power to investigate such cases. It is true that under the Prevention of Corruption Act, cases u/s 161 of the Indian Penal Code and u/s 5(2) of the Prevention of Corruption Act are now triable by Special Judges in view of Sections 6 and 7 of the Criminal Law Amendment Act, Sections 6 and 7 of the Criminal Law Amendment Act, 1952, have made no change in the law as regards the power to investigate and as regards police officers' powers to investigate. This change has been effected by Section 5A of the Prevention Of Corruption Act, which reads as follows:

Notwithstanding anything contained in the Code of Criminal procedure, 1898 (Act V of 1898), no police officer below the rank:

(a) in the presidency towns of Madras and Calcutta, of an Assistant Commissioner of Police,

(b) in the presidency town of Bombay, of a Superintendent of Police, and

(c) elsewhere, of a Deputy Superintendent of Police, shall investigate any offence punishable u/s 161, Section 165 or Section 165A of the Indian Penal Code (Act XLV of 1860) or under Sub-section (2) of Section 5 of this Act, without the order of a Presidency Magistrate or a Magistrate of the first class as the case may be, or make any arrest therefore without a warrant. x x x x

P.S.I. Mansuri is a P.S.I. of the Anti Corruption Department but it is conceded by the learned Assistant Government Pleader that he is not an officer in charge of a police Station. The power to investigate cognisable offences is given to police officers in charge of police stations. They can investigate cognisable offences even without the order of a Magistrate, provided the cases to be investigated are within the local limits of their police stations, as provided in Section 156, Cri. Pro. Code. As P.S.I. Mansuri is not an officer in charge of the police station he has no power to investigate any cognisable offence in view of the provisions of Section 156, Cri. Pro. Code, and the investigation by P.S.I. Mansuri of the cognisable offence against the appellant is therefore illegal and bad. But it is contended by the learned Assistant Government Pleader that P.S.I. Mansuri having obtained the sanction of a Magistrate to investigate, he has made the investigation in view of the provisions of Section 5A of the Prevention of Corruption Act. Section 5A provides that notwithstanding anything contained in the Code of Criminal Procedure, 1898, (Act V of 1898), no police officer below the rank of a Deputy Superintendent of Police shall investigate any offence punishable u/s 161, Section 165 or Section 165A of the Indian Penal Code or under Sub-section (2) of Section 5 of the Prevention of Corruption Act. This section therefore provides that such offences shall not be investigated by police officers below the rank of a Deputy Superintendent of Police, It further provides that officers below the rank specified therein should not investigate any offence without the order of a Presidency Magistrate or a Magistrate of the first class as the case may be. The provision is therefore of a negative nature.. It takes away the power given u/s 156, Cri.P.C. and provides a limitation on those powers. The first part of the section is not an enabling section of a positive type. It does not give any police officer power to investigate. In order to ascertain whether a particular police officer has power to investigate a particular offence or not, we have first to see the provisions contained in Section 156, Cri. Pro. Code, and secondly, we have to see whether the qualifications contained in or further restrictions placed by Section 5A of the Prevention of Corruption Act are satisfied. In other words, before a police officer can be said to have the power to investigate, he must satisfy the requirements Of both Section 156, Criminal Procedure Code and Section 5A of the Prevention of Corruption Act.

6. Section 156, Criminal Procedure Code gives powers of investigation to all officers in charge of police station with respect to offences within their local area. Section 551 of the Criminal Procedure Code and Section 91 (sic) of the Police Act give the same powers to all superior officers of police. Section 551, Criminal Procedure Code, provides that police officer superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. Section 91 (sic) of the Police Act is a similar section. Section 551 Cri.P.C. provides that any police officer superior in rank to an officer in charge of a police station, in other words, every Inspector of Police Or Deputy Superintendent of Police may exercise the same powers throughout the local area to which they are appointed as may be exercised by an officer in charge of a police station within the limits of his station. If an officer in charge of a police station can investigate an offence u/s 161, I.P. Code within the limits of his station, then every police officer superior in rank to him can investigate the same offence. In this connection, an officer in charge of a police station is defined in Section 4(1)(p) of Cri. Pro. Code as follows:

Officer in charge of a police station includes, when the officer in charge of the police station is absent from the station house or. unable from illness or other cause to perform his duties, the police officer present at the station house who is next in rank to such officer and is above the rank of constable, or when the State Government so directs, any other police officer so present.

Relying on this definition, it is contended that a head constable can be an officer in charge of a police station and that therefore every P.S.I. would be an officer superior in rank to an officer in charge of a police station. The offence that was tried and for which, the appellant has been convicted was committed on 2.2.60. The question then would be as to who was in charge of the police station on 2.2.60. It is provided in the Bombay Police Manual, 1950 (Seventh Edition), page 1, para 2(3) that a Sub-Inspector of Police is ordinarily in charge of a police station except in certain cases, in which an Inspector is in charge. Ordinarily, therefore, Section 551, Cr.P. Code and Section 91 (sic) of the Police Act would come to assist only officers superior in rank to a Sub Inspector of police. But, P.S.I. Mansuri is not an officer superior in rank to P.S.I. But the learned Assistant Government Pleader contends that u/s 4(1)(p), Cr.P.C., even a head constable can act as an officer in charge of a police station and his contention is therefore that for the purpose of Section 551, Cr.P.C., every Sub Inspector would be an officer superior in rank to the officer in charge of a police station. But if we look at the definition contained in Section 4(1)(p), Cri. Pro. Code, it only provides that officer in charge of a police station" includes, when the officer in charge of the police station is absent from the station house or unable from illness or other cause to perform his duties, the police officer present at the station house who is next in rank to such officer. For the purpose of the definition in Section 4(1)(p) of Cr.P.C., the officer next in rank is included in the definition only during the time the officer in charge is absent from the station house or is unable from illness or

other cause to perform his duties. u/s 156(1), Cri. Pro. Code, a head constable may investigate a cognisable case, provided he is included in the definition of "officer in charge of a police station" by reason of the officer in charge of the police station being absent from the station house or unable from illness or other cause to perform his duties and provided further that the case is within the local limits of the jurisdiction of the police station. But Section 551, Cri. Pro. Code has reference to the permanent police officer in charge of the police station and not to the officer in charge temporarily for a short period and next in rank to the permanent officer in charge of the police station. We therefore reject the contention of the learned Assistant Government Pleader that by reason of Section 551, Cri. Pro. Code, every Sub Inspector or police would be an officer superior in rank to an officer in charge of the police station. Section 551, Cr. P. C., refers to the powers which may be exercised by such officer within the limits of his station. In the case of a head constable the powers are for a certain period. Section 551, Cr.P.C., has therefore no reference to head constables acting for the officer in charge of the police station during his temporary absence etc. Section 551 has reference to the main officer in charge of the police station and to the powers exercised by such officer within the limits of his station, and to police officers superior in rank to such officer. As P.S.I. Mansuri is admittedly not an officer in charge of a police station, he is also admittedly not an officer superior in rank to an officer in charge of the police station. He is, admittedly not an officer superior in rank to the P.S.I. The investigation made by his would be contrary to the provisions of Section 156 of the Cr.P.C., notwithstanding that he has taken the sanction of the Magistrate u/s 5A of the Prevention of Corruption Act. As already discussed, the fact that the sanction of the Magistrate was obtained would get over the obstacle placed by Section 5A of the Prevention of Corruption Act, but it does not remove the two obstacle placed by Section 156, Cri.P. Code. We, therefore hold that the investigation made by P.S.I. Mansuri was illegal and bad.

7. In this connection, the learned Assistant! Government Pleader relies on R.P. Kapur and Others Vs. Sardar Pratap Singh Kairon and Others, . Their Lordships of the Supreme Court were there dealing with the contention that the investigation of cases by a Deputy Superintendent of Police of C.I.D, amounted to a denial of the right of equal protection of the laws within the meaning of Article 14 of the Constitution. Their Lordships observed that the investigation by Sardar Hardayal Singh, who was a police officer superior in rank to an officer in charge of the police station and who could exercise the powers of an officer in charge of a police station, cannot be said to be bad. Sardar Hardayal Singh was a Deputy Superintendent of Police of C.I.D. and he was an officer superior in rank to an officer in charge of the police station. It was also held that the jurisdictional area of the Deputy Superintendent of Police, C.I.D. extended over the whole State. Their Lordships therefore were not dealing with the case of investigation by an officer in charge of a police station but with investigation by an officer superior in rank to an officer in charge of the police station. The decision therefore does not

assist the Asst, Government Pleader.

8. There is some force in the argument of the learned Counsel for the appellant that the Magistrate should not have given sanction in this case in view of the principles laid down by their Lordships of the Supreme Court in H.N. Rishbud and Inder Singh Vs. The State of Delhi, . Their Lordships observed as follows:

When a Magistrate is approached for granting such permission he is expected to satisfy himself that there are good and sufficient reasons for authorising an officer of a lower rank to conduct the investigation. The granting of such permission is not to be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it.

In this particular case, in his application asking for sanction, P.S.I. Mansuri stated as follows:

The permission to investigate the offence is sought because it is not possible to obtain the services of the Dy. S.P.A.C. and P.I.B. Ahmedabad to investigate the case and also the Bureau being an independent Unit, the case cannot be entrusted to any of the local Dy. Supdt. of Police or any other officer of the local police force.

The learned Magistrate passed an order stating that

looking to the reasons Cited, and going through the complaint, I am satisfied that, this is a fit case, in which permission should be granted. Hence sanction is accorded.

The reasons given by P.S.I. Mansuri in his application are that it was not possible to obtain the services of the Dy. S.P.A.C. and P.I.B., Ahmedabad and secondly that A.C. and P.I.B, being an, independent Unit, the case could not be entrusted to any local Dy. S.P. or any other officer or the local police force. It is contended that in Ms evidence P.S.I. Mansuri has conceded that he made no inquiry whether the Dy. S.P. was available or not. In his evidence the P.S.I. Mansuri has deposed that he did not make any attempts to find out Where the Dy.S.P. was on 31.1.60 at 7 p.m. and even thereafter he made no attempt to find out where the Dy.S.P. was on 31.1.60 or on 1.2.60. P.S.I. Mansuri also wrote that an ordinary police officer should not investigate an offence under the Prevention of Corruption Act even if he is otherwise competent to investigate such an offence u/s 156, Cri. Pro. Code. The learned Magistrate accepted these reasons without deciding whether the reasons were sufficient or whether the reasons were sound. However, in view of the rulings in The State of Madhya Pradesh Vs. Veereshwar Rao Agnihotry, , and The State of Madhya Pradesh Vs. Mubarak Ali, , the learned Government Pleader contends that the Magistrate can take into consideration the administrative convenience at the time of giving sanction u/s 5A, Criminal Procedure Code (Sic?Prevention of Corruption Act?). But there is nothing in this case to show that it was really necessary for the purpose of administrative convenience to give to P.S.I. Mansuri the sanction to investigate. Their Lordships

of the Supreme Court have observed in *The State of Madhya Pradesh Vs. Mubarak Ali*, as follows:

A Magistrate cannot surrender his discretion to police officer, but must exercise it having regard to the relevant material made available to him at that stage. He must also be satisfied that there is sufficient reason, owing to the exigencies of administrative convenience, to entrust a subordinate officer with the investigation." The defect in the investigation by Kantilal after the transfer of P.S.I. Mansuri is of the same type and does not need any further discussion. Even when granting sanction to the successor of Mansuri, the learned Magistrate observed that "looking to the reasons cited, sanction is accorded to P.S.I. K.S. Patel to investigate the matter under the Prevention of Corruption Act." This order also suffers from a defect for the reasons already given.

Their Lordships have also referred to the observations in *H.N. Rishbud and Inder Singh Vs. The State of Delhi*, where the Supreme Court emphasised the necessity to adhere strictly to the provisions of Section 5A. In *Din Dayal Sharma Vs. The State of Uttar Pradesh*, , however, it was held that generally a conviction is not vitiated because there has not been strict compliance with the provisions of the Prevention of Corruption Act in the matter of investigation by a police officer. In *The State of Madhya Pradesh Vs. Veereshwar Rao Agnihotry*, , it was held that although the provisions of the Prevention of Corruption Act relating to the rank of the police officer in the matter of investigation of an offence under the Act had not been complied with, the defect in the investigation would not take away the jurisdiction of the Special Magistrate to try the case, in view of these decisions, notwithstanding the illegality in the investigation and the defect in the order of the Magistrate, we hold that the trial is not bad or vitiated.

9. It is, however, contended that prejudice has been caused to the appellant by reason of the fact that P.S.I. Mansuri had taken interest in the case by laying a trap. It is urged that in these circumstances, the evidence of P.S.I. Mansuri should be rejected, because his investigation is illegal. We agree that where the investigation is conducted by an officer contrary to the provisions of the statute, and where the sanction is bad, the evidence of such a police officer must be regarded with, caution.

10. Before we turn to the evidence in this case, it is necessary to dispose of the second contention of the learned Counsel for the appellant that a Panchnama should not be looked at by Judges while appreciating evidence. In the instant case, after a complaint had been given to the P.S.I. Mansuri by Ratilal on 31.1.60, the P.S.I. asked the complainant to come to his house at 8 A.M. On 2.2.60 when he made a Panchnama of giving three currency notes to the complainant. The second Panchnama was made after 2 P.M. the same day after, according to the prosecution, the currency notes had been recovered from the appellant Nagin. The prosecution relies on these two Panchnamas to prove the numbers of the currency notes and also to corroborate the evidence of the Panchas and the P.S.I. One of the Panchas Mahomed Anvar has been examined

as P.W. 2. He has given substantive evidence. He has deposed that a Parichnama was drawn up and read over to the Panchag and signed by the Panchas. He did not know the name of the constable who wrote the Panchnama. The Panch had himself not written any part of the Panchnama nor did he dictate any part of the Panchnama. After the first part of the Panchnama was written out, he signed it first. The second Panchnama was then signed afterwards. P.S.I. Mansuri also signed the Panchnama.

11. It is to be considered what exactly a Panchnama is. Panchas see certain things and I hear certain things and what they see and [hear is recorded in a Panchnama. A Panchnama is generally but not always written by a police constable and is signed by Panchas and also by the police officer who is present at the time of the making of the Panchnama. A police officer is generally present at the time when the incidents are seen or heard by the Panchas. A Panchnama can be regarded either as a statement made by the Panchas to the police officer present or as a note made by the Panchas regarding what they had seen or heard. It is not suggested that it should be regarded as a statement made by one Panch to another. If a Panchnama is a statement made by the Panchas to the P.S.I. or to the police officer present at the time of the making of the Panchnama then the next question is whether the Panchnama was made during the course of investigation under Chap. XIV of Cr.P.C. Some Panchnamas may be Panchnamas which are not made in the course of the investigation of a cognisable offence under Chap. XIV, Criminal Procedure Code, for example, some Panchnamas may be made u/s 103, Cr.P.C. which provides that before a search is made under Chapter VII, Cr. Pro. Code, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situated, and in their presence the search is made, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses. Such a Panchnama made u/s 103 may not be hit by Section 162, Cr. Pro. Code if it was not made under Chapter XIV. In the instant case, however, the Panchnama is not one made u/s 103, Cr. Pro. Code, "but it is admittedly a Panchnama made in the course of the investigation of a cognisable offence. Section 162 of Cr.P.C. provides that no statement made by any person to a police officer in the course of an investigation under Chapter XIV shall, if reduced to writing, be signed by the person making it nor 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 provided in the section) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. The section therefore prohibits the person making the statement from signing the statement. It also prohibits the use of the statement except in the manner indicated therein. Admittedly in the instant case, the Panchnama was made in the course of the investigation of a cognisable offence, and when the Panchnama is to be regarded as a statement made by the Panchas to a police officer, then it

should not be signed by the Panchas and it should not also be used for any purpose other than the one indicated in Section 162, Cr.P.C. It is not contended before us by the learned Assistant Government Pleader that Section 157 of the Evidence Act overrides the provisions of Section 162 Cr.P.C. and that notwithstanding Section 162, Cr.P.C. a statement made to a police officer in the course of the police investigation can be used for corroboration u/s 157 of the Evidence Act. Section 157 of the Evidence Act deals with the use for corroboration of all previous statements. Section 162, Cr.P.C. deals with a particular type of statements, namely the statement made to a police officer in the course of the police investigation of a cognisable offence under Chapter XIV of the Code of Criminal Procedure. Section 162, Cr.P.C. is a special provision and overrides the provisions contained in Section 157 of the Evidence Act. The same view has been taken in *Rakha v. The Crown* ILR Lah 171 : AIR 1925 Lah 399 where it has been held that the rule laid down in Section 157 of the Evidence Act is controlled by the special provisions contained in Section 162 of the Criminal Procedure Code. In *Emperor Vs. Najibuddin and Others*, it has been observed that Section 162, Cri. P.C. repeals, by implication, Section 157, Evidence Act, so far as concerns statements made to a police officer in the course of an investigation.

12. As observed by their Lordships of the Supreme Court in *Ramkishan Mithanlal Sharma Vs. The State of Bombay*, , a Panchnama cannot be treated as a statement made to the Panch witnesses and not to the police officers as Otherwise it would be easy for the police officers to circumvent the provisions of Section 162, Cr.P.C. by formally asking Panch witnesses to be present and contending that the statements, were made to the Panch witnesses and not to themselves. Their Lordships were there dealing with the statement made by an identifying witness in the presence of the police and the Panchas, and they observed that such a statement must be regarded as a statement made to the police officer and not to the Panch witnesses. For similar reasons, a Panchnama made by the police cannot be regarded as a statement made by one Panch witness to another. It can be regarded as a statement made by the Panch witness to the police officer, and, if so, it would be hit by Section 162, Cr.P.C. If the Panchanama was not made during the course of the investigation, then it would not be hit by Section 162, Cri. P.C. But we are not. dealing with such a Panchnama.

13. A Panchnama can also be treated as a note or a record made by the Panch witness to refresh his memory. Section 159 of the Evidence Act provides as follows:

A witness may, while under examination, refresh his memory by referring to any writing made, by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and

read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Whenever a witness may refresh his memory by referring to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

In view of Section 159 of the Evidence Act, even if the Panchnama is not written by the Panch himself but by another person, Section 159 Evidence Act, would apply to it provided the Panchnama was read by the witness within the time mentioned in Section 159, Evidence Act and if when he read it he knew it to be correct. In such a case the Panchnama can be used by a witness to refresh his memory as laid down in Section 159 of the Evidence Act. When the writing is used by a witness to refresh his memory, the provisions of Sections 160 and 161 of the Evidence Act also would apply. Section 160 of (sic) Act provides as follows:

A witness may also testify to facts mentioned in any such document as is mentioned in Section 159, although he has no specific recollection of the facts themselves if he is sure that the facts were correctly recorded in the document.

It is also clear from this section that in the case of a writing used by the witness to refresh his memory, the writing itself cannot be admitted in evidence. Even in cases where the witness has no specific recollection of the facts the witness has to testify to the facts mentioned in the document used by him to refresh his memory. It is therefore clear from this section that the writing used by the witness to refresh his memory cannot be admitted in evidence. But, as provided in Section 161 of the Evidence Act, any such writing must be produced and shown to the adverse party if he requires it, and such party may, cross-examine the witness thereupon, and in cross-examination the adverse party may prove the writing to contradict the evidence of the witness. Therefore, if a Panchnama is a statement made in the course of the police investigation under Chapter XIV, Cr.P.C. then it would fall within the scope of Section 162, Cr.P.C. If the Panchnama is a note, a writing or a record made by the witness to refresh his memory, it can be used as provided by Sections 159, 160 and 161 of the Evidence Act, and the document itself cannot be produced in evidence by the party calling the witness, "finis view has been taken in Mohanlal Babaibhai v. Emperor 43 Bom LR 163 : AIR 1941 Bom 149 where it was observed by Sir John Beaumont, C.J. at pp. 166 and 167 (of Bom LR) : (at p. 151 of AIR) as follows:

The Panchnama is merely a record of what a Panch sees, and the only use to which it can properly be put is that when the panch goes into the witness box and swears as to what he saw, the panchnama can be used as a contemporary record to refresh his memory. But a police officer is not entitled to give evidence of what the panch told him, that he saw, and that is what it comes to if a police

officer is allowed to put in the panchnama. A police witness may state that he held a panchnama and offer to produce the record if the accused asks for it, but he cannot bring it on record in his evidence-in-chief.

Sir John Beaumont also referred to a decision of the Bombay High Court in *Rustam Cursetji Lam v. Emperor* 34 Bom LR 267 : AIR 1932 Bom 181. That was also a decision of Sir Beaumont C.J. It has been observed therein at p. 272 (of Bom LR) : (at p. 183 of AIR) as follows:

The other observation I desire to make is in connection with the panchnama (which was put in. Sergeant Taylor in giving evidence says that he made a search of the premises of Dr. Lam in company of two panchas and he then puts in the panchnama signed by the panchas and apparently that panchnama was, treated as being evidence that the panchas had agreed with the accuracy of Sargeant Taylor's evidence as to what he found on the search. Of course the panchnama is not evidence of anything of the sort. If a police officer conducts a search in company of panchas he may give evidence of that fact. He may say "I searched the premises in company of two independent persons whose names were so and so". But if he desires that the evidence of the panchas is to be used to fortify his own evidence and show that his evidence as to the search is correct, then, he must call these panchas. He is not entitled to Put in a signed panchnama and rely on that as evidence that the panchas agree with his evidence.

But the case was one of a search under the provisions of the Gambling Act conducted in pursuance of a search warrant issued by a Magistrate, and the Panchnama was not made in the course of police investigation under Chap. XIV of the Code of Criminal Procedure. Such a panchnama will not be hit by the provisions of Section 162, Cri. P.C. The observations made in 34 Bom LR 267 : AIR 1932 Bom 181 were repeated on 43 Bom LR 163 : AIR 1941 Bom 149 and followed. The observations in 43 Bom LR 163 : AIR 1941 Bom 149 are that if the police wanted to rely on a Panchnama, they must call a Panch to prove it. It is observed in this case that

the putting in of a Panchnama without calling the panch is not only an infringement of the rules of evidence against the admission of hearsay evidence, but it is unfair to the accused, because it enables the police to get the advantage of evidence in corroboration without putting that evidence to the test of cross-examination; if the practice of allowing the prosecution to put in a panchnama without calling the panch is still in force despite the decision of this Court, I hope that Magistrates will see that it is stopped.

In making these observations, the case of 34 Bom LR 267 : AIR 1932 Bom 181 was followed, and that case, as already stated, refers to a panchnama which was not made in the course of police investigation under Chap. XIV, Cri. P.C. The observations made in 34 Bom LR 267 : AIR 1932 Bom 181 and repeated in 43 Bom LR 183 : AIR 1941 Bom 149 do not therefore affect the view expressed by us which finds support in the observations made in 43 Bom LR 163 : AIR 1941

Bom 149 already quoted earlier.

14. Section 162. Cri. P.C. would however hit only statements made to a police officer in the course of an investigation under Chapter XIV Cri. P.C. It would not hit statements which are not made to a police officer. In *Bhogilal Chunilal Pandya Vs. The State of Bombay*, , their Lordships of the Supremo Court have held as follows:

The word "statement" used in Section 157 of the Indian Evidence Act, is used in its primary meaning and there is nothing in the section which in any way requires that an element of communication to another person should be imported into the meaning of the word "statement" used therein.

They held that Section 157 of the Evidence Act makes a previous statement of particular type, namely the writing made by the witness and kept secret, admissible. They observed that the main evidence is the statement of the witness in the Witness box and a document of this nature is only used to corroborate him. They also held that refreshing memory u/s 159 of the Evidence Act is confined to statements in writing made under the conditions mentioned in that section, while corroboration u/s 157 may be by statements in writing or even by oral statements. They therefore held that a "statement" u/s 157 means only "something that it stated" and the element of communication to another person is not necessary before "something that is stated" becomes a statement under that section. It is therefore clear from the decision of their Lordships of the Supreme Court that for the purpose of Section 157, a statement may be an Oral or a written statement communicated to another person or may be a statement made by a person which is not communicated to another person. A statement may be a statement even if it is not communicated to another person. An oral statement is necessarily communicated to another person. If it is an oral statement communicated to another person, it can be reduced into writing by the latter. Section 157 of the Evidence Act does not say that the statement must be oral or that the statement must be made to another person. It merely requires that the statement must be one made by the witness. The words "made by" are important. If the statement is oral it must be spoken or uttered by the witness. If it is a written statement, it must be written by the witness in his own hand. If it is written by another person and signed by the witness it would be an oral statement made by the witness to the writer and reduced to writing by the latter. Section 157 of the Evidence Act would apply to a written statement only if it is in the hand of the witness. Even if a Panchnama is regarded as a written statement, Section 157 of the Evidence Act would not apply to it unless it is in the handwriting of the Panch. Even if it is in the handwriting of the Panch, it would be hit by Section 162, Cri. Pro. Code, if the writing or panchnama was handed over or sent or shown to a police, officer in the course of an investigation under Chap, XIV Cri. P.C. because handing over, sending and showing are means of communicating the statement.

15. But, in the instant case, it is admitted that the Panchnamas were not written

by the Panchas at all nor were they dictated by the Panchas, In fact, the Panchnama was dictated by the P.S.I. and written by a police constable.

16. In this connection, it is necessary to refer to the provisions, of Section 5 and Section 165 of the Evidence Act. Section 165 of the Evidence Act provides that the judgment must be based upon facts declared by the Evidence Act to be relevant and duly proved. Section 5 of the Evidence Act provides as follows:

Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

It is, therefore, clear that there must be a positive provision in the Evidence Act making a fact relevant before a fact can be treated as relevant and before it can be proved, and the facts must be proved in the manner laid down in the Evidence Act. In this connection, in AIR 1941 16 (Privy Council) , the following observations have been made:

What matters should be given in evidence as essential for the ascertainment of truth it is the purpose of the law of evidence, whether at common law or by statute, to define. Once a statute is passed which purports to contain the whole law, it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience choosing, no doubt, to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which, has been eliminated has been considered to be of such doubtful value as, on the whole, to be more likely to disguise truth than discover it. It is therefore discarded for all purposes and in all circumstances. To allow a Judge to introduce it at his own discretion would be to destroy the whole object of the general rule.

The Privy Council also observed that the statement of law made by the High Court of Allahabad that the Evidence Act prohibits the employment of any kind of evidence not specifically authorised by the Act, is correct. It is therefore the duty of a Judge to see that the judgment is based on relevant facts duly proved, and that there is some specific provision in the Evidence Act relating to the relevancy of the facts proved. It is also contended by the learned Assistant Government Pleader that what is hit by Section 162, Cri. P. Code, is only a statement made in the course of police investigation having reference to some acts having been done or seen before the statement was recorded and that the section would not apply to a statement having reference to things which happened at the time of the statement. We cannot accept this argument, because there is nothing in Section 162 to restrict its scope in the manner suggested by the learned Assistant Government Pleader. It is sufficient for attracting the provisions of Section 162, Cri. Pro. Code that the statement is made to a police officer in the course of the police investigation whatever be the matter to which it refers.

17. The contention that a panchanama being a document can be proved, is not correct. Evidence may be oral Or documentary. Documentary evidence is to prove the contents of a document, Seen the question is what the contents of the document are But when the question is what a witness has seen or what he has heard etc., the evidence must be oral and must be direct. When the question is what the witness has seen, he must say what he has seen. There is no question of documentary evidence to prove the fact which a witness has seen and to prove that the witness has seen that fact. A document may be used for contradicting the witness but when the question is what the witness has" seen, there must be direct oral evidence as to what he has seen. Sometimes, a witness's memory may be weak; tile witness may refresh his memory by referring to any writing made by himself at the time of the transaction concerning this question as provided in Section 159 of the Evidence Act. The witness may also refer to any such writing made by any other person, and read by the witness within the time referred to in Section 159, if when he read it he knew it to be correct. The very fact that a provision is made for a witness for refreshing his memory by referring to certain documents in order to prove certain facts makes it clear that the evidence of such facts trust be given by the oral evidence of the plaintiff and not by producing a document.

18. The Panchnama is only a note made by the witness at the time of The incident, which he has seen, and the only use which can be made of such a document is that provided in Sections 159 and 160 of the Evidence Act. The question in such a case is not as to the contents of the Panchnama but as to what the witness, who was present at the time of the incident, has seen, and this can be proved by the oral evidence of the witness, if necessary by refreshing the memory by referring to any note made by him as provided in Section 159 of the Evidence Act.

19. The contention that die police officer Mansuri has no authority to lay a trap in the course of the investigation would, even if sound, mean that this part of the investigation is illegal. It is not necessary to decide this point finally because we have already held on two grounds that the investigation is illegal and it is not necessary to decide whether it is legal on a third ground. We have already held that notwithstanding the illegality in the investigation, the trial and the conviction of the appellant are not vitiated. We, therefore, do not propose to decide this point finally in this case, whether the laying of a trap is outside the authority of the police officer who has investigated the offence. * * * * *

We are, therefore not prepared to hold that the case against the appellant is proved beyond reasonable doubt.

24. We set aside the conviction and sentence passed upon the appellant and order that he should be acquitted. The appeal is allowed. Fine if paid should be refunded. Bail bond to be cancelled.