

(1971) 05 OHC CK 0002

In the Orissa High Court

Case No : Death Reference No. 1 of 1971 and Criminal Appeal No's. 55 and 60 of 1971

State

APPELLANT

Vs

Rajendra Singh
 Rajndra Singh Vs State of Orissa

RESPONDENT

Date of Decision : 12-05-1971

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 164, 206, 219, 219(2), 288
Evidence Act, 1872 — Section 145, 154
Penal Code, 1860 (IPC) — Section 201, 302, 323, 34

Citation : (1971) 37 CLT 724

Hon'ble Judges : S. Acharya, J;B.K. Patra, J

Bench : Division Bench

Advocate : Government in D.R. No. 1 of 1971 and N. Prasad, R.C. Mohanty, S.K. Sinha and J. N. Jagati, in Cr. As. Nos. 55 and 60/71, for the Appellant; R.C. Mohanty and J.N. Jagati, D.R. No. 1 of 1971 and Government Advocate in Cr. As. Nos. 55 and 60/71, for the Respondent

Final Decision : Allowed

Judgement

B.K. Patra, J.—The Appellants were convicted u/s 302/34, Indian Penal Code by the Sessions Judge of Mayurbhanj-Keonjhar for having in furtherance of their common intention caused the death of one Rushi Patra. For the said conviction, Appellant Ghanashyam Prasad Sahu was sentenced to undergo rigorous imprisonment for life and Appellant Rajendra Singh was sentenced to death. Both the Appellants were further convicted under Sections 201/34, Indian Penal Code and while Ghanashyam Prasad Sahu was sentenced to suffer rigorous imprisonment for five years, the other Appellant was sentenced to undergo rigorous imprisonment for seven years. Both the Appellants have preferred appeals against the said convictions and sentences passed against them. The Sessions Judge has also made a reference u/s 374, Code of Criminal Procedure for confirmation of the sentence of death passed on Rajendra Singh. The reference and the appeals were heard together.

2. One Ram Golam Sahu, a resident of Bihar has a licence to run a liquor Bhati at mouza Bolaniposi. Appellant Ghanashyam Prasad Sahu is the son of Ram Golam Sahu and used to remain in charge of the Bhati. Appellant Rajendra Singh and one Kanta @ Kanta Prasad Singh, who was one of the accused in the trial Court but has since been acquitted, were employees under Ghanashyam Prasad Sahu at the Bhati. Besides these two, There were other employee a in the Bhati, one of them being Mathura Prasad p.w. 8 and the other the deceased Rushi Patra, on Wednesday (10-1-1968), the deceased Rushi Patra was sent with the Bhati of Liquor to be delivered to p.w. 5" a retail dealer at mouza Baikala. Appellant Rajendra Singh also went to that village with the deceased to realise outstanding arrears from some retail sellers. The prosecution case is the both Rajendra Singh and the deceased returned to the Bhati that evening. As the deceased Rushi Patra took some fresh liquor without the permission of the master Ghanashyam, The latter rebuked him. On the deceased taking exception to his being abused by Ghanashyam. The latter gave some slaps to the deceased as a result of which he fell down. Thereafter, Ghanashyam caught hold of both the bands of the deceased and Rajendra Singh caught hold of his two legs and then the latter (Rajendra) assaulted the deceased with a small stick on his thigh, scrotum and other tender parts. Rushi Patra became senseless and about a half an hour thereafter died. The further case of the prosecution is that thereafter under the direction of Ghanashyam Prasad, Rajendra Singh and Kanta Prasad carried the dead body from the place of assault accompanied by one Nageswar who has since absconded. Nageswar, it seems, carried a Bhar, two tins and a Bala which Rushi Patra used to carry while carrying liquor to villages for delivery to retail dealers. The dead "body was left on the Goda land in Guduruposi village and the Bhar, the two tins and the Bala which Nageswar carried were also placed near the dead body obviously to make it appear that while the deceased was returning on Wednesday evening from Baikala village he fell down at the spot and died. On the following morning, Kasinath Naik p.w. 1 noticed the dead body and made inquiries at the Balaiposi Bhati to ascertain if the deceased was one of the labourers engaged at the Bhati. The Appellant Ghanashyam Sahu, it seems, directed him to report the matter to the Police which p.w. 1 did. p.w. 9, the Officer-in-charge drew up the U.D. F.I.R. Ext. 4, proceeded to the spot, held an inquest over the dead body and sent it for post mortem examination. During the course of enquiry, the Sub-Inspector of Police came to know that it was a case of homicide, and, therefore, on his own information, the F.I.R. Ext. 6-1 under Sections 302/201, Indian Penal Code was drawn up on 23-1-1968 against four accused persons, namely, Ghanashyam Prasad Sahu, Rajendra Singh, Kanta Prasad Singh and Nageswar Singh. During the course of investigation the statement of Mathura Prasad p.w. 8, said to be the sole eye-witness to the occurrence, was recorded u/s 164, Code of Criminal Procedure. A charge-sheet under Sections 302/201, Indian Penal Code was filed only against the two Appellants Ghanashyam Prasad Sahu and Rajendra Singh.

3. Commitment proceedings were started against the two Appellants in the

course of which the deposition of p.w. 8 Mathura Prasad was recorded on 24-5-1968. He gave evidence supporting the prosecution case. On 24-5-1968, the prosecuting Inspector filed an application before the committing Magistrate praying for the issue of a non bailable warrant of arrest against Kanta Prasad Singh and Nageswar Singh on the ground that there was evidence against them to show that they were guilty of the offence under Sections 201/34, Indian Penal Code. The application was allowed on 10-6-1968 and warrants of arrest were issued against these two person. Nageswar Singh could not be apprehended but Kanta Prasad Singh was arrested and produced in Court. The case against Nageswar Singh was thereafter split up and commitment, enquiry against the two Appellants and Kanta Prasad Singh started de novo, p.w. 8; the sole eye-witness was examined afresh and during such examination he stated that he did not see the deceased after the latter left the Bhati at midday on 10-1-1968 and that he had no knowledge as to when and how Rushi Patra died. Being of opinion that it is for the Court of Sessions to decide which of the two conflicting versions given by p.w. 8 should be believed, the learned Magistrate committed the two Appellants and Kanta Prasad Singh to stand their trial in the Court of Sessions, after framing a charge under Sections 302/34, Indian Penal Code against the two Appellants and charges u/s 201, Indian Penal Code against Rajendra Prasad, Kanta Prasad and a further charge u/s 323, Indian Penal Code against Ghanashyam Prasad Sahu.

4. In the Court of Sessions, charges under Sections 302/34 and 201/34, Indian Penal Code were framed against both the Appellants and Kanta Singh. Relying mainly on the evidence of p.w.s. 2 and 3, who deposed that they had seen the deceased at the Bhati on the evening of Wednesday (10-1-1968) and the statement made by p.w. 8 on the first occasion in the Court of the committing Magistrate which was brought on record u/s 288, Code of Criminal Procedure, the learned Sessions Judge convicted both the Appellants on the charges framed against them and sentenced them in the manner already stated. He acquitted the other accused Kanta Prasad Singh on the ground that he protested when the two Appellants assaulted the deceased and that although he joined hands with Appellant Rajendra Singh in carrying the dead body to a distant place, he did not do so voluntarily with the intention to cause disappearance of evidence but he had to do so on the direction of his master Ghanashyam Prasad.

5. The sheet-anchor of the case of the prosecution in this case is the statement made by p.w. 8 Mathura Prasad in the Court of the committing Magistrate on 24.5.1968 which the Earlier of the two statements made by him in that Court, and which has been brought on record u/s 288, Code of Criminal Procedure. It is not disputed that if this evidence is discarded, the prosecution case is bound to fail, even if we believe the evidence the two - other important witnesses in this case p.w.s. 2 and 3 that the deceased was seen at the Bhati on the evening of 10-1-1968 which would destroy the defence suggestion that Rushi Patra died on his way back from mouza Baikala and therefore he reached the Bhati at mouza Balaniposi. Mr. Nageswar Prasad, the learned Advocate for the Appellants

contends that p.w. 8 who at different stages had given different statements, cannot be relied upon as a witness of truth, and that in any case, the statement made by him in the Court of the committing Magistrate on 24.5.1968 cannot be legally brought on record u/s 288, Code of Criminal Procedure. Section 288, Code of Criminal Procedure provides that:

The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872.

It is contended by Mr. Nageswar Prasad that:

(1) the proceeding which culminated in the commitment of the three accused persons to the Court of Sessions is only that part of the proceeding which is subsequent to 18.1.1969 when Kanta Prasad Singh had been produced in Court as an accused and that consequently the evidence of p.w. 8 Mathura Prasad recorded in the Court of the committing Magistrate on 24.5.1968 cannot be said to have been duly recorded under Chapter XVIII of the Code; and

(2) in any case, such evidence cannot be said to have been duly recorded "in the presence of the accused" because that statement of p.w. 8 had been recorded at a time when Kanta Prasad Singh was not even an accused in the case.

6. There does not appear to be any merit in the first part of the contentions of Mr. Nageswar Prasad. Firstly, there is no special procedure laid down in chapter XVIII of the Code for recording evidence and any evidence recorded by a Magistrate before commitment" whether recorded with a view to commitment or in the ordinary course of trial, is evidence recorded under Chapter XVIII. This would be clear from Section 219 of The Code of Criminal Procedure which provided that the committing Magistrate, or, in The absence of such Magistrate, any other Magistrate empowered by or u/s 206 may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before The commencement of the trial, and bind Them over to appear and give evidence in the Court of Sessions. That such evidence taken u/s 219 need not necessarily be in the presence of the accused is clear from Sub-section (2) thereof which provides that such examination shall, if possible, be taken in the presence of the accused meaning thereby that such examination may, in certain circumstances be also taken in The absence of the accused. In fact, a Division Bench of the Calcutta High Court in, Gopal Khaitan v. The King AIR 1949 Cal. 597, has held that

Where a Magistrate commenced a case as a trial before himself, but at a later stage decide to commit it, to the Court of Sessions, the evidence so taken is duly recorded under Chapter XVIII within the meaning of Section 288, Code of Criminal Procedure.

We are, therefore, not prepared to accept the contention of Mr. Nageswar Prasad

that the evidence of p.w. 8 recorded by the Committing Magistrate on 24-5-1968 cannot be said to be evidence duly recorded under Chapter XVIII of the Code.

7. The second part of Mr. Prasad's contention, however appears to us to have some, force. Section 288, Code of Criminal Procedure requires that the evidence of a witness recorded under Chapter XVIII to be treated as evidence at the trial should have been taken in the committal Court in the presence of the accused. Here, the expression "accused" would appear to mean all the accused in the case. The reason behind permitting evidence of a witness recorded in the Court of a committing Magistrate to be utilised as substantive evidence at the trial is that the accused in the Court of the committing Magistrate has an opportunity of cross-examining The witness. It follows that if such evidence is taken behind the back of the accused, it cannot acquire the sanctity to be utilised as substantive evidence against him. That is the reason why Section 288, Code of Criminal Procedure insists that the evidence must have been duly taken in the presence of the accused. It is true, that the evidence of p.w. 8 recorded on 24-5-1968 was in the presence of two of the accused persons, namely, Ghanashyam and Rajendra and it is contended that at least in regard to these two accused it can be treated as substantive evidence u/s 288, Code of Criminal Procedure. Section 288, however, provides that the evidence of a witness duly recorded under Chapter XVIII is to be treated as evidence in the case and not against any particular accused in the case. The contention that the impugned statement of p.w. 8 made on the first occasion in the Court of the committing Magistrate can be admitted u/s 288, Code of Criminal Procedure for the purpose of being utilised against Ghanashyam and Rajendra, although it cannot be utilised as against Kanta Singh does not therefore appear to be acceptable. It is, however, unnecessary for us to be decide this question finally because, as would be discussed hereafter, even if such statement of p.w. 8 in the Court of the committing Magistrate can be legally brought on record u/s 288, Code of Criminal Procedure it suffers from such infirmity that on the basis thereof the Appellants cannot be convicted.

8. We take this opportunity to impress upon all Sessions Judges that it is highly desirable that the Court should before the transfer of The earlier statement made by a witness in the Court of the committing Magistrate to the record of the Sessions case u/s 288, Code of Criminal Procedure, indicate in a brief order why the earlier deposition was being transferred to the record of the trial Court. This will make it quite clear to the accused that the earlier statement is likely to be used as substantive evidence against him. The learned Sessions Judge in this case has indicated nowhere in the order sheet that he was bringing on record u/s 288, Code of Criminal Procedure the previous statement of p.w. 8 made in the Court of the committing Magistrate; much less has he recorded his reasons for doing so. We are, however, satisfied on perusing the deposition of p.w. 8 in the Sessions Court that the accused persons were not prejudiced by such omission on the part of the trial Judge because the prosecution had cross-examined the witness with reference to the earlier statement made by him in the committing Magistrate's Court and as such the accused were aware that earlier statement

was being sought to be utilised at the trial.

9. Assuming that the earlier statement of p.w. 8 in the committing Magistrate's Court could be legally brought on record u/s 288, Code of Criminal Procedure, the question is whether this evidence taken along with the other evidence on record is sufficient to justify the convictions of the Appellants under Sections 302/34 and 201/34, Indian Penal Code. The statement made by a witness before the committing Court, and which is brought on record of the sessions case u/s 288 Code of Criminal Procedure constitutes substantive evidence before the Sessions Court, and as such, as a matter of law, no corroboration is necessary for accepting the same notwithstanding the fact that in the Sessions Court, the witness has made a statement contrary to the one previously made by him before- the committing Magistrate. But although that is the legal position, the fact remains that the witness made two contradictory statements on, two different occasions regarding The same incident, and to decide which of The two conflicting statements is to be accepted, prudence dictates that Borne corroboration is necessary through extrinsic evidence to decide whether The one version is to be preferred to the others. It is argued for The prosecution that the earlier of The two statements made by p.w. 8 in The committing Magistrate's Court receives corroboration from the still earlier statement made by him u/s 164, Code of Criminal Procedure, and that, Therefore, The Sessions Judge was right in accepting as true The earlier statement made by p.w. 8 in The committing: Court. If it is a mere question of corroboration, the later statement made by the p.w. 8 in the committing Court fits In with The statement made by him in the Court of Sessions. When p.w. 8 was examined in The committing Court on The earlier occasion, it was elicited from him in cross-examination that he was at that time working as a servant in a certain house at Mouza Patna where the police station is situated, that be was serving in that house since three months before be deposed in Court and that it was the Investigating Officer who secure that employment for him. During his cross-examination in the Sessions Court also he stated likewise and added that it was during such employment that his statement u/s 164, Code of Criminal Procedure was recorded and he was examined in the Court of The committing Magistrate. It is also alleged that The Investigating Officer threatened to prosecute him and subject him to torture if be did not depose as directed by him. According to him be bad given up the employment under that person at Patna when be was examined for The second time in the committing Magistrate's Court. The Investigating Officer p.w. 9 naturally denied the suggestion made to him that be had ever threatened p.w. 8 to depose in Court as directed by him. But the fact remains that p.w. 8 had stated even at the time when he was examined on the first occasion in The committing Court that he was at that time serving at Patna and that The service had been procured for him by the Investigating Officer. In the circumstances stated above, we are unable to find such intrinsic worth in the statement made by p.w. 8 in the Court of the committing Magistrate on the first occasion that it can form the basis of the conviction of the Appellants.

10. Support to the above statement is sought by the prosecution from the evidence of p.w.s. 2 and 3. These two witnesses were not examined in the Court of the committing Magistrate but were for the first time examined in the Court of Sessions, p.w. 2 when examined stated in his examination-in-chief

I was a retained labourer of Ram Golam the owner of Balaniposi Bhati. About two years back in the month of Makar on a Tuesday I had been to Bolaniposi Bhati of Ram Golam and saw Rusi Patra working there at about midday.

Suddenly at this stage, the prosecution was permitted to cross-examine the witness. Doubtless Section 154 of the Evidence Act gives discretion to the Court to permit the person who calls a witness to put in questions to him which might be put in cross examination by the adverse party. But this discretion should not be exercised without sufficient reason and the reason should be stated, because, by offering a witness, a party is held to recommend him as worthy of credence, and so, in general, it is not open to him to test the witness's credit or impeach his truthfulness. The Court has nowhere recorded any reason why it has permitted the prosecution to cross-examine the witness and we are also unable to see anything in the statement made by p.w. 2 which has been extracted above to indicate that he is not telling the truth. It, however, appears from his cross-examination by the prosecution counsel that during his examination by the Police at the stage of investigation he had made certain statements in support of the prosecution case. If he was sought to be confronted with those statements that could have been done only if he had denied those facts during his examination-in-chief. This elementary procedure has been overlooked by the learned Sessions Judge. In cross-examination by the prosecution counsel he stated

It is a fact, that I, stated before I. O. that on the date of occurrence In the evening I returned to Bhati with cart-load of firewood. While returning to Bhati with a cart-load of firewood in the evening I saw Rushi Patra at the Bhati with a Bhar of tin and Bala in hand.

x x x x x

It may be noted at this stage that what is stated above is not the substantive evidence of the witness, but what he is alleged to have stated before the Police during investigation. He was then cross-examined by the defence counsel, and in the course of this cross-examination, he stated that he did not see Rushi Patra when he (p.w. 2) returned to the Bhati with a cart-load of firewood and that his statement to the contrary made to the Police during investigation was made due to threats by the Police. After his cross-examination, the following question was put to him by the Court:

Q. You have stated in chief that you saw Rushi Patra with M.Os I to III at Bhati in the evening when you returned there with a cart-load of fuel and again you have stated under cross-examination that you did not see Rushi Patra at all at Bhati in the evening on the date of occurrence but have stated to have seen under threat of assault. You are now to say which version of yours is true, namely whether

you saw Rushi Patra with M.Os. I to III in The evening at Bhati or you did not see him?

A. Yes. 1 saw Rushi Patra in the evening on the date of occurrence Oat Bhati with M.Os. 1 to 111.

It is elementary that a statement made by a witness to the Police during investigation can be used only for the purpose of contradicting that witness in the manner provided by Section 145 of the Evidence Act and cannot be used as substantive evidence in the case. The learned Sessions Judge obviously overlooked this fundamental principle, and treating as substantive evidence what the witness had stated before the Police asked him to reconcile it with certain statements made by the witness during the cross-examinations by the accused and elicited a certain answer which had been made use of in favour of the prosecution. The entire procedure adopted by the learned Judge appears to us to be illegal. The wide powers conferred on a Court u/s 540, Code of Criminal Procedure are aimed to be exercised with caution and circumstances and consistently with the principles of criminal law and the rules of evidence.

11. p.w. 3 had stated that on the date of occurrence, he was engaged as a labourer at the Bhati to bring fire-wood, that he came to the Bhati with the fire-wood in the evening and at that time saw Rushi Patra at the Bhati. It was suggested to this witness that when he was first examined by the police he stated he had no knowledge about the return of Rushi Patra to the Bhati on the evening of the date of occurrence. Although he denied the suggestion it as elicited from the Investigating Officer in cross-examination that when he first examined p.w. 3 at the village, the latter told him that he did not have any knowledge about The return of Rushi Patra to the Bhati on the evening of the date of occurrence.

12. We thus find on reading the evidence of p.ws. 2 and 3 that neither of them can be treated as a reliable witness. Assuming for a moment that they or any of them can be believed, it would only follow that Rushi Patra was found at the Bhati on the evening of the date of occurrence. True, this finding would go against the defence suggestion that Rushi Patra while returning from village Baikala fell down on the way and died. But the presence of Rushi Patra at the Bhati on the evening of the date of occurrence does not in any way prove either the occurrence in the manner stated by the prosecution that he was murdered at the Bhati on Wednesday night and much less that the Appellants had committed the murder. Where, having regard to the facts of the case a Court decides not to Act merely on the evidence of a witness brought on record u/s 288, Code of Criminal Procedure and seeks corroboration to it, the corroborating evidence must be such as to give a reasonable indication that not only what is said about the occurrence in general is true but also what is said against the particular accused persons sought to be implicated in the crime is true. The evidence of p.ws. 2 and 3, even if believed in its entirety, would not be sufficient either to show that Rushi Patra was murdered at the Bhati on the night of the date of

occurrence or that the two Appellants had taken part in the commission of the murder. We accordingly find that the prosecution has failed to establish the charges against the Appellants beyond all reasonable doubt. "In the view we take of the case, it is unnecessary for us to refer to the medical evidence to find out whether having regard to the nature of injuries found on the dead body a case u/s 302, Indian Penal Code is established against the assailants.

13. Before we part with this case, we would like to draw attention of all concerned to certain unsatisfactory features in this case. It may be remembered that the First Information Report Ext. 6-1 in this case was laid against four persons, namely, the two Appellants, Kanta Singh and Nageswar Singh. The charge sheet, however, was lodged against only two persons, namely, the two Appellants. It is presumed that before the charge-sheet was laid, superior Police Officers would have scanned the materials collected during investigation and must have been satisfied that there was no material to warrant a charge-sheet" being laid against Kanta Singh and Nageswar Singh. But surprisingly enough after p.w. 8 was examined in the Court of the committing Magistrate and he made a statement favourably to the prosecution, the Court Sub-Inspector suddenly thought of filing an application to implead Kanta Singh and Nageswar Singh as accused in the case. This necessitated fresh examination of p.w. 8 with the consequences already adverted to in the judgment. We do not make any definite suggestions but to us it appears that this is a matter which requires some departmental probe. We have in the course of the judgment pointed out the several irregularities committed by the learned Sessions Judge while recording the evidence. What surprised us most was that he treated The statement made by p.w. 8 before the Investigating Officer as substantive evidence which is clear from the following observations made by him in the judgment:

In the instant case, the statement of Mathura Prasad (p.w. 8) before I.O. before Magistrate u/s 164, Code of Criminal Procedure and his first statement before committal Court has been consistent.

This shows that the statement made before the Investigating Officer was utilised by him for the purpose of corroboration. This is fundamentally wrong.

14. For the reasons stated above, we would allow The appeals, But aside the conviction of The Appellants and acquit them of the offences with which they were charged and direct that they be set at liberty forthwith. The reference u/s 374, Code of Criminal Procedure made by The Sessions Judge is discharged.

S. Acharya, J.

15. In consonance with the observations made in Para 8 of the above judgment, I prefer to add a few lines regarding the Presiding Judge's duty to record an order indicating his reasons for bringing into record the committing Court depositions u/s 288, Code of Criminal Procedure, whenever such a step is taken by him. The power to treat the evidence of a witness duly recorded in the

committing Court in the presence of the accused as substantive evidence against him in the trial Court, as provided u/s 288, Code of Criminal Procedure is an extraordinary one and is in derogation of the general principle that a Court can only Act on the evidence given before it. That being so, The decision to utilise such a previous deposition of a witness u/s 288, Code of Criminal Procedure should be arrived at after careful consideration, and only when there are good and reasonable grounds for such a decision. The power u/s 288, Code of Criminal Procedure is to be applied in the discretion of the presiding Judge, which implies that he Presiding Judge must apply his judicial mind to the necessity of taking the extraordinary step of exercising the power u/s 288, Code of Criminal Procedure, and the said power cannot be used lightly and cannot be taken recourse to as a matter of course, and/or in a mechanical manner.

16. Their Lordships of the Allahabad High Court in the decision reported in AIR 1947 Allahabad 3932 at page 394 observed that:

It stands to reason that if the statements are to be so used they must be treated as additional evidence and their such use should be after affording an opportunity to the parties to question the witnesses about those statements after knowing full well that those statements might be used as substantive evidence.

17. It has also been observed in the decision reported in AIR 1959 Allahabad, 2383 at page 241 as follows:

The Actual words of the section do not make it obligatory for the prosecution to tender the statements or for the Judge to say that he was going to treat that evidence as evidence in the case at the very time when the witness was being faced with those statements in the witnesses-box, but the necessity for doing so is so vital in the interest of not only (airplay but for giving the accused a proper and real opportunity to meet those statements, which otherwise were of no consequence to him in the Court of Sessions, that we were of the view that it was but proper that the trial judge should indicate by an order that he was going to treat the evidence which had been recorded in the committing Magistrate's Court as evidence at the trial in order to enable the accused to meet that evidence.

18. In expressing The above view Their Lordships referred to other cases of their own Court, wherein the same view has been taken.

In *Musa v. Emperor* 30 Cr.L.J. 1929, page 333 at page 335 it has been held that

Under Section 288, Code of Criminal Procedure, the whole of the previous statement is to be treated as evidence and not only portions of it, and, therefore it was essential to put the whole of it to the witness and then after giving notice to the prosecution and the defence, it could be brought on record u/s 288, Code of Criminal Procedure.

19. In the above view of the matter the provisions of Section 288, Code of

Criminal Procedure can be taken recourse to only when, on good grounds, a decision to that effect is taken by the Presiding Judge by applying his judicial discretion in that direction; and an order to that effect is passed in The presence of both the parties affording them a suitable opportunity to meet and/or to treat the said statements in accordance with law.

20. I agree that the appeals be allowed and the reference u/s 374, Code of Criminal Procedure be discharged as stated in para 14 of the above judgment.