

(1963) 12 GUJ CK 0001

In the Gujarat High Court

Case No : Criminal Confirmation Case No. 4 of 1963 with Criminal Appeal No's. 933, 934, 1094, 1095 and 1120 of 1963 with Criminal Revision Application No. 504 of 1963

State of Gujarat and Others

APPELLANT

Vs

Hiralal Devji and Others

RESPONDENT

Date of Decision : 20-12-1963

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 154
Evidence Act, 1872 — Section 145, 157

Citation : AIR 1964 Guj 261 : (1964) CriLJ 676 : (1964) 5 GLR 255

Hon'ble Judges : J.B. Mehta, J;B.J. Divan, J

Bench : Division Bench

Advocate : A.D. Desai, Assistant Govt. Pleader, for the Appellant; D.C. Trivedi, H.N. Jhala and N.C. Trivedi, for the Respondent

Judgement

Divan, J.

1-54. (After stating facts and discussing the evidence, the judgment continues as under) :

It is no doubt true that these discrepancies and divergences between the evidence given by Vaihunthlal in Court and his first information report do appear on record. However, the attention of Vaikunthlal was not drawn to any of these discrepancies or divergences or contradictions at the time when he was giving evidence before the trial Court. Therefore, it becomes necessary to examine as to what is the correct legal position regarding the use to be made of the first information report under such circumstances.

55. It is well settled law that the first information report recorded under Section 154 Cr. P. C. by an officer in charge of a Police Station is not substantive evidence but is a previous statement in writing of the maker of that document and can be used to corroborate or contradict the maker of that first information report. Section 145 of the Indian Evidence Act provides that a witness may be

cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. In the instant case we may emphasize once again that the attention of Vaikunthlal was not drawn to those parts of the first information report which are sought to be used for the purpose of contradicting Vaikunthlal's testimony in Court. In the case of *Bal Gangadhar Tilah v. Shrinivas Pandit* 42 Ind App 135 : (AIR 1915 PC 7), the Judicial Committee of the Privy Council considered the effect of the provisions of Section 145 of the Indian Evidence Act. There what happened was that the High Court had considered the effect of certain documents which were brought on record as substantive evidence and the High Court disbelieved the oral testimony of the witnesses in the light of those documents on record. Lord Shaw of Dunfermline, delivering the judgment of the Privy Council observed at page 146 of the report (Ind App.) : (at p. 11 of AIR) as follows:-

"A further mischance in point of procedure must now be mentioned. As already stated, the testimony of the plaintiffs' witnesses is not contradicted orally, and is internally a consistent body of evidence. But various minutes and documents are the subject of minute analysis, observation, and comment by the learned judges of the High Court with a view to rebutting it. Their Lordships think it right to observe that, in view of the serious nature of the verdict of the High Court, they have considered it within their province themselves to peruse the documents. Having done so, they are of the opinion that, taken together, they completely confirm the case made in the witness-box, and that there is no ground, in fact, for the conclusion that they either contradict the testimony or cast any reasonable doubt upon it.

But they must also record their dissent from the view that the use made of these documents in this case was justified by law. On general principles it would appear to be sound that if a witness is under cross-examination on oath he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity on dispute. This is a general, salutary and intelligible rule, and where a witness's reputation and character are at stake the duty of enforcing this rule would appear to be singularly clear. Fortunately the law of India pronounces no uncertain sound upon the same matter."

Then the provisions of Section 145 of the Indian Evidence Act are set out and the judgment proceeds further as follows:-

"Their Lordships have observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed. The verdict of the High Court is an inferential verdict -- none the less sweeping on that account--but an inferential verdict actually of perjury."

56. In the case of *Awadh Singh v. Emperor*, AIR 1947 Pat 23, a Division Bench of the Patna High Court considered the effect of an inconsistency between the first information report and the evidence at the trial and it was held by the Division Bench as follows:-

"The lack of any cross-examination of the prosecution witnesses as to a fact within their knowledge, which the defence seek to establish, is properly a matter of comment and inference; but there is no obligation on the defence, by cross-examination, to fill in a lacuna in the case for the prosecution.

When there is an inconsistency between the *fard bayan* attached to the first information report made and signed by the complainant and his evidence given at the trial it is a matter which the prosecution witnesses should be asked to explain in examination-in-chief and no great weight can be attached to the failure of the defence to cross-examine the complainant on the point."

The relevant passage in this connection is at page 25, para 5; but it does not appear from the report that the decision of the Privy Council in *Bal Gangadhar Tilak's case* 42 Ind App 135 : (AIR 1915 PC 7) (*supra*) was cited before the learned Judges of the Patna High Court; and in view of the authoritative pronouncement of the Privy Council it is not possible for us to accept the view expressed by the Division Bench of the Patna High Court in *Awadh Singh's case*, AIR 1947 Pat 23.

57. In the case of *Tara Singh Vs. The State*, , the question before the Supreme Court was of the effect of deposition before the committing Magistrate having been brought on record under the provisions of Section 288 Cr. P. C. What happened in that case before the Supreme Court was that two out of the three eyewitnesses, whose depositions before the committing Magistrate were brought on the record of the Sessions Court, were not confronted in the manner required by Section 145 of the Indian Evidence Act and what happened was that when they were asked something about their previous statements, they replied that they were made under coercion. After setting out the provisions of Section 145 of the Indian Evidence Act, at page 446 it was observed as follows:

"Now, it is evident that one of the main purposes of using the previous statements was to contradict and displace the evidence given before the Sessions Court because until that evidence was contradicted and displaced, there was no room in this case for permitting the previous statements to be brought on record and used u/s 288. Therefore, as these statements were not put to these witnesses and as their attention was not drawn to them in the manner required by Section 145, Evidence Act, they were not admissible in evidence. The observations of the Privy Council in 42 Ind App. 135, at P. "147 : (AIR 1915 PC 7 at p. 11) are relevant here."

58. It was also observed as follows:-

"There is no reason why Section 145, Evidence Act, should be excluded when

Section 288 slates that the previous statements are to be subject to the provisions of the Indian Evidence Act. Section 145 falls fairly and squarely within the plain meaning of these words. More than that. This is a fair and proper provision and is in accord with the sense of fairplay to which Courts are accustomed. On giving effect to the plain meaning of these words, therefore, the evidence in the Committal Court cannot be used in the Sessions Court unless the witness is confronted with his previous statement as required by Section 145, Evidence Act. If the prosecution wishes to use the previous testimony to the contrary as substantive evidence, then it must confront the witness with those parts of it which are to be used for the purpose of contradicting him. Then only can the matter be brought in as substantive evidence u/s 288."

It may be pointed out that in *Tara Singh Vs. The State*, the Supreme Court was considering the effect of not drawing the attention of the witness to the statement brought on record u/s 288 Cr. P. C. It is well settled law that when the previous deposition before the committing Magistrate is brought on record under the provisions of Section 288, Cr. P. C. that deposition, becomes substantive evidence and thus the document in *Tara Singh Vs. The State*, stood on a higher footing than the first information report with which we are concerned in the instant case. Even then the Supreme Court said that unless the attention of the witness had been drawn to those parts of the previous deposition, with which it was proposed to contradict the witness, the document was not admissible in evidence at all.

59. This decision of the Supreme Court came up for consideration before the Supreme Court in the case of *Bhagwan Singh Vs. The State of Punjab*, *Tara Singh Vs. The State*, was distinguished. *Bhagwan Singh Vs. The State of Punjab*, the deposition before the committing Magistrate can be used to corroborate one of the two statements made before the Sessions Court. It was pointed out in *Bhagwan Singh Vs. The State of Punjab*, that Section 157 is as much a provision of the Indian Evidence Act as Section 145 and if the former statement can be brought in u/s 157, it can be transmuted into substantive evidence by the application of Section 288. It is true that in para 22 at page 217 Bose, J. gave an illustration and observed as follows :-

"Now, the former statement could not be used as substantive evidence. It could only be used as corroboration of the evidence in chief u/s 157 of the Evidence Act or to shake the witness's credit or test his veracity u/s 146. Section 145 is not called into play at all in such a case. Resort to Section 145 would only be necessary if the witness "denies" that he made the former statement. In that event, it would be necessary to prove that he did, and "if the former statement was reduced to writing", then Section 145 requires that his attention must be drawn to those parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary, because of the admission that it was made."

In our opinion, in the light of the distinction between *Tara Singh Vs. The State*, and *Bhagwan Singh Vs. The State of Punjab*, , pointed out above, the question whether the previous statement can be used for the purpose of testing the veracity of the witness does not arise so far as the facts of the instant case are concerned. In the instant case, we are not dealing with two contradictory statements made by Vaikunthlal in the course of the same testimony but we are concerned with a situation where the defence wants to contradict and challenge the testimony of Vaikunthlal with reference to the previous statement of Vaikunthlal reduced to writing viz., Ex. 9, the first information report, Under these circumstances, the provisions of Section 145 of the Evidence Act, even according to the ratio decidendi in *Bhagwan Singh Vs. The State of Punjab*, , would come into play. We may point out that the judgments in both the cases referred to above were delivered by Bose, J. and Fazl Ali and Bose, JJ. were parties to both the judgments but in *Tara Singh Vs. The State*, , besides Fazl Ali and Bose, JJ., Patanjali Sastri and S. R. Das, JJ. were also parties; whereas *Bhagwan Singh Vs. The State of Punjab*, , was decided by Fazl Ali and Bose, JJ. In our view, so far as the facts of the present case are concerned, the provisions of Section 145, Evidence Act would come into play even on the basis of the decision in *Bhagwan Singh Vs. The State of Punjab*, .

60. Our attention was drawn also to the judgment of the Supreme Court in the case of *Ram Bilas Singh v. State of Bihar*, Criminal Appeal No. 73 of 1961, decided by the Supreme Court on January 29, 1963 : (1964 (1) Cri L J 573). The judgment of the Supreme Court was delivered by Mudholkar, J. At page 9 of the blue print of the judgment of the Supreme Court, it is stated as follows :

"Applying the law as set out above, we must find out whether what the High Court has done in this case is right. In the first place, though it was vaguely stated by some of the witnesses examined in the case that 40 or 50 persons took part in the incident including the 7 persons mentioned in the first information report and the charge sheet, the prosecution case throughout has been that only seven named persons took part in the incident. Even the first Information report of Deva Singh (P.W. 2), one of the injured persons, mentions only the seven persons who were, placed for trial and no other. There, is no suggestion therein that any other persons took part in the incident. The Court of Session, however, without discussing the point and without finding as to how many persons were members thereof, has come to the conclusion that there was an unlawful assembly, the common object of which was to dismantle the Dochara and assault Laldeo Singh and Deva Singh. The High Court has proceeded more or less on the assumption that there was an unlawful assembly, only some members of which were put up for trial, four of whom were acquitted and three convicted. It was necessary for the High Court to consider whether the statements of some of the witnesses that the unlawful assembly consisted of many more than seven persons are true or whether they should be rejected in view of the fact that the first information report shows that only seven persons who were named therein, committed the offence. It had also to consider the further question of prejudice

by reason of the defect in the charge. Upon the law as stated by this Court in Mohan Singh Vs. State of Punjab, , and in other cases it would have been competent to the High Court to look into the entire evidence in the case; oral and documentary, and consider whether there was an unlawful assembly or not. But it has not done so. Had the High" Court come to a reasoned conclusion that there was an unlawful assembly consisting of more than five persons. Including the appellants and some other persons who were unidentified and convicted the appellants u/s 147 and, with the aid of Section 149, also of some other offence committed by a member or members of the unlawful assembly other than the acquitted persons the matter would have stood on a different footing. But it has not done so."

It may be pointed out that In that case, the Supreme Court set aside the judgment and sent back the case to the High Court for deciding it afresh after determining the question which it was essential for the High Court to determine. In our view, in this case before the Supreme Court, the witnesses were not disbelieved, on the ground of contradiction between the first information report and the depositions of the witnesses before the trial Court. All that the Supreme Court was pointing out was that the High Court had not decided the question which should have been determined by the High Court in the light of the fact that the prosecution case from the beginning was that only seven named persons had constituted the unlawful assembly and not that 40 or 50 persons had taken part in the incident. Under these circumstances, it cannot be said that this judgment of Supreme Court in the case of Cri. Appeal No. 73 of 1961, D/- 21-1-1953 : [1964 (1) Cri LJ 573 S,C), can help us in deciding the question of procedure to be followed when a witness is sought to be contradicted by reference to his statement before the police or by reference to his first information report.

61. We are informed by Mr. D. C. Trivedi, the learned Advocate appearing on behalf of the defence, that in many Courts subordinate to this High Court, the practice of the Presiding Judges and Magistrates is to discourage questions seeking to contradict the maker of the first information report, with reference to the statements set out in the first information report itself. We do not know whether any; such practice in fact prevails or not but if such a practice does prevail, then it is to be deprecated. The clear provisions of Section 145 of the Indian Evidence Act and the decisions in Tara Singh Vs. The State, go to show that the previous statement of a witness either made by him in writing or reduced to writing cannot be used for" the purpose of contradicting him unless his attention has first been drawn to those parts of previous statements in writing or reduced to writing by which it is proposed to contradict him. As has been pointed out in the decisions which we have discussed until now, it is a principle of fair play that such an opportunity should be given to the witness when he is before the trial Court. We also wish to emphasize that in many sessions cases when an advocate appointed by the Court appears and particularly when a junior advocate, who has not much experience of the procedure of the Court, has been appointed to conduct the defence of an

"accused person, it is the duty of the Presiding judge to draw his attention to the statutory provisions of Section 145 of the Indian Evidence Act, as explained in 42 Ind App 135 : "(AIR 1913 PC 7) and Tara Singh Vs. The State, and no Court should allow a witness to be contradicted by reference to the previous statement in writing or reduced to writing unless the procedure set out in Section 145 has been followed. It is possible that if the attention of the witness is drawn to these portions with reference to which it is proposed to contradict him,) he may be able to give a perfectly satisfactory explanation; and in that event the portion in the previous statement which would otherwise be contradictory would no longer go to contradict or challenge the testimony of the witness. In the light of this legal position, we are unable to accept Mr. Trivedi's contention on behalf of the accused that the statements in the first information report should be considered for the purpose of contradicting the testimony of Vaikunthla! and thereby discrediting him as an untruthful witness.

62. Mr. Trivedi also wanted to use the contents of the first information report for the purpose of challenging the testimony of other witnesses who have been examined in this case. His contention was that the first information sets out the case with which the eye-witnesses and others first approached the authorities and in the light of that first information the evidence of all other witnesses can be considered. In the case of Abdul Gani and Others Vs. State of Madhya Pradesh, , it was observed as follows :

"It was then urged that the first information report was a sketchy document and was intentionally kept in this state in order to leave enough scope for fabrication and that no reliance should have been placed upon it. So far as we have been able to see, the first information report has not been used as substantive evidence in the case at all by the High Court but has been used only to corroborate the statements of the eye-witnesses. It is not possible to accept the suggestion that because this report was not as full as it could have been, it should be ignored altogether. There is no warrant for doing so."

We may point out that the head-note (c) in this case is rather misleading. The head-note purports to say that though the first information is not as full as it could be, it cannot be ignored altogether and it could be used to corroborate the statements of the eye-witnesses. We are unable to read para 13 of the judgment of the Supreme Court in the manner in which it has been summarized in head-note (c) because the Supreme Court has not in fact used the first information report to corroborate. All that it pointed out was that the High Court had not used it as substantive evidence, and there was no warrant for saying that it was used as substantive evidence.

63. In our opinion, the correct legal position regarding the first information report and the use to be made of it has been set out in the judgment of the Supreme Court in the case of Nisar Ali Vs. The State of Uttar Pradesh, , and there Kapur, J.-considering the effect of the first information report recorded u/s 154, Cr. P. C. stated as follows:

"A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker u/s 157, Evidence Act, or to contradict it u/s 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses."

With respect we follow this ratio of the decision of the Supreme Court in Nisar Ali Vs. The State of Uttar Pradesh, , because it is obvious that a person other than the maker of the first information report cannot be sought to be contradicted by a statement set out in the first information report when he himself is not responsible for making that previous statement which has been recorded as a first information report. It is a sound principle of the law relating to the appreciation of evidence that a man can be contradicted by his own previous statement and if the provisions of law permitted can be corroborated by his own previous statement made at or about the time of occurrence or otherwise as contemplated by Section 157 of the Evidence Act but a man cannot be contradicted by something for which he himself is not responsible and, therefore, we are unable to accept the contention of Mr. Trivedi that the first information report, Ex. 9, made by Vaikunthla] can be used to contradict the statements made by other witnesses.