5, the legal representatives of defendant 7 and def. 8, except to the extent of the 8th defendant's right to maintenance under Ex. 371, is dismissed with costs. So far as the 8th defendant is concerned, the appeal filed by her is allowed with costs proportionate to her interest in the property throughout.

Appeal No. 335 dismissed.
Appeal No. 334 partly allowed.

NOOR KHAN

v.

STATE OF RAJASTHAN

1963

August 19

(A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH JJ.)

Criminal Trial—Murder—Asquittal by Trial Court—Conviction after setting aside acquittal by the High Court—Validity—Provisions relating to the record of statements of witnesses by Police and failure to supply copies to the accused—If and when vitiates the trial—Prejudice—Code of Criminal Procedure, 1898 (*Act 5 of* 1898). *ss.* 161(3), 162, 173(*b*), 207*A*(3).

The appellant and nine others were tried before the Sessions Judge for offences of rioting and being members of an unlawful assembly and causing in furtherance of their common object death of one person and serious injuries to four others. The appellant was also charged for the substantive offence of causing the death by gun-shot injuries. All the accused persons were acquitted at the trial. In appeal against acquittal by the State, the High Court set aside the acquittal of the appellant and sentenced him to imprisonment for life under s. 302 Indian Penal Code and confirmed the order in respect of the rest. The appellant's main contention in this Court was that under s. 161 of the Code of Criminal Procedure it was obligatory upon an investigating officer to record the statements of witnesses examined by him and if those statements were not made available to the accused at the trial, a valuable right was lost to the accused, and the trial must on that account alone be regarded as vitiated.

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Held: (i) Where the circumstances are such that the court may reasonably infer that prejudice has resulted to the accused from the failure to supply the statements recorded under s. 161, the court would be justified in directing that the conviction be set aside and in a proper case to direct that the defect be rectified in such manner as the circumstances may warrant. It is only where the court is satisfied, having regard to the manner in which the case has been conducted and the attitude adopted by the accused in relation to the defect, that no prejudice has resulted to the accused that the court would, notwithstanding the breach of the statutory provisions, be justified in maintaining the conviction.

On the facts of the present case no prejudice was caused to the accused and the plea of prejudice was neither raised in the High Court, nor any substantial argument in support of the same was advanced in this Court.

Narayan Rao v. *State of Andhra Pradesh*, A. I. R. 1957 S. C. 737 and *Pulukuri Kotyya* v. *Emperor*, L. R. 74 I. A. 65, relied on.

Baliram v. *Emperor*, I.L.R. [1945] Nag. 151, *Maganlal* v. *Emperor*, I.L.R. [1946] Nag. 126 and *Maroti Mahagoo* v. *Emperor*, I.L.R. [1948] Nag. 110, disapproved.

(ii) In the present case the Sessions Judge did not found his conclusion upon the demeanour of the witnesses and the High Court rightly observed that the presence of the four injured persons at the scene of offence was assured by the evidence of injuries, and must be regarded as established beyond reasonable doubt.

Sheo Swarup v. *King Emperor*, L. R. 61 I. A. 398, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 9 of 1963.

Appeal by special leave from the judgment and order dated November 9, 1962 of the Rajasthan High Court in D. B. Criminal Appeal No. 407 of 1961.

Purushottam Trikamdas, C. L. Sarren and *R. L. Kohli*, for the appellant.

S. K. Kapur and *R. N. Sachthey*, for the respondent.

August 19, 1963. The Judgment of the Court was delivered by

Shah J.

SHAH J.—Noor Khan, resident of Kuchaman in the State of Rajasthan, and nine others were tried before the Additional Sessions Judge, Sirohi in the State of Rajasthan for offences of rioting and being members of an unlawful assembly and causing in furtherance of their common object death of one Pratap, at about 2-30 p. m. on September 29, 1960 and serious injuries to four others on the same occa-

sion. Noor Khan was also charged for the substantive offence of causing the death of Pratap by gunshot injuries. The Sessions Judge acquitted all the persons accused at the trial. In appeal by the State, the High Court of Rajasthan set aside the order of acquittal in favour of Noor Khan and confirmed the order in respect of the rest.

There were disputes between Noor Khan on the one hand and Pratap and his brothers on the other about a well in village Mundara. Noor Khan claimed to have purchased a half share in the well whereas Pratap and his brothers claimed the well to be their exclusive property, and there were several court proceedings about this dispute. It was the case for the prosecution that on September 29, 1960 at about 2-00 p. m. Noor Khan accompained by his father Samdu Khan and eight others went to Pratap's field (in which there was a farm, a house, a stable and the disputed well) and called upon Pratap to deliver possession of the well and on the latter declining to do so, Samdu Khan fired a muzzle-loading gun at Ganesh—brother of Pratap—but missed him. Noor Khan then fired at Pratap and killed him instantaneously. The other members of the party of Noor Khan at the instigation of Samdu Khan thereafter beat Ganesh, Prabhu, Mohan and Gulab—brothers of Pratap—with sticks and other weapons and caused them injuries. After the assailants retired, Ganesh lodged a complaint against 15 persons including Noor Khan and Samdu Khan at the police station, Bali. Ten out of those who were named in the complaint were arrested and tried before the Court of Session, Sirohi. The Sessions Judge acquitted all the accused holding that the story that there was an unlawful assembly of ten or more persons who went to the well and caused the death of Pratap was not reliable, for in his view the prosecution had failed to lead evidence of independent witnesses and alterations were made in the story of the prosecution from time to time and certain persons were falsely involved. He observed that there was enmity between the two sides and the testimony of witnesses who claimed to be present at the scene of assault was not corroborated by independent evidence and was on that account unworthy of credit, especially because the complainant Ganesh had named several persons who were proved not to have taken part in the assault.

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In appeal by the State, the High Court of Rajasthan convicted Noor Khan for causing the death of Pratap by firing a muzzle-loading gun and causing him fatal injury and thereby committing an offence punishable under s. 302 Indian Penal Code and sentenced him to suffer imprisonment for life. With special leave, Noor Khan has appealed to this Court.

Pratap died on September 29, 1960 as a result of gun-shot injury. The testimony of Dr. Mehta who performed the post-mortem examination on the dead body of Pratap discloses beside the wound of entry that the left lung of the victim was lacerated with pieces of metal. Dr. Mehta found on the body of witness Prabhu two contusions and an incised injury, on the body of Ganesh three contusions, on Mohan one contusion and on Gulab a swelling and in the view of Dr. Mehta the injuries were, at the time when he examined the injured persons on October 1, 1960, about 48 hours old. Prabhu, Ganesh, Mohan and Gulab were examined as witnesses for the prosecution, and they deposed that Noor Khan had caused the fatal injury to Pratap by firing a muzzle-loading gun at him, and that they were injured in the same incident by the members of Noor Khan's party. The injuries on these four persons strongly corroborate their story that at the time of the assault made on Pratap at about 2-00 p.m. on September 29, 1960 they were present. This story was further corroborated by two female witnesses, Bhanwari and Mathura.

The High Court in appeal by the State held that notwithstanding the infirmities in the prosecution case that in the first information, names of certain persons who were not present at the scene of occurrence were given by the complainant Ganesh on account of enmity and that there were discrepancies between the statements of the eye witnesses at the trial and the first information on the question as to who, out of the two persons Samdu Khan and the appellant Noor Khan, fired first, the substantial case of the prosecution remained unaffected thereby, for each of the four eye-witnesses Ganesh, Prabhu, Mohan and Gulab had marks of injuries the duration of which when examined by Dr. Mehta tallied with their story and the presence of the injuries lent assurance to their testimony that they were present at the occurrence, and the

absence of independent witnesses was not by itself a sufficient ground for discarding the testimony of the witnesses who claimed to have seen the assault on Pratap. Relying upon the testimony of Mst. Bhanwari supported by the testimony of Mohan Singh and Mst. Mathura the High Court held that the fatal injury to Pratap was caused by the appellant with a gun fired from a distance of about 4 ft. from the body of Pratap.

The appeal before the High Court was one against an order of acquittal. But as explained by the Judicial Committee of the Privy Council in *Sheo Swarup and others* v. *King Emperor*(1) : "ss, 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. * * * * * But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses." It may be observed that in declining to accept the testimony of the witnesses who claim to have seen the assault, the Sessions Judge did not appreciate the full significance of the very important circumstance that on the person of the four eye-witnesses there were injuries which on the medical evidence must have been caused at or about the time when the fatal assault was made upon Pratap. It is highly improbable that all these witnesses who were members of the same family suffered injuries—some of which were severe—in some other incident or incidents on the day and about the time when Pratap was fatally injuried, and then they conspired to bear false testimony that they were present at the time of the assault upon Pratap. The presence of the four injured persons Ganesh, Prabhu, Mohan and

(1) L.R. 61 I.A. 398.

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Gulab at the scene of offence is assured by the evidence of injuries, and must, as the High Court observed, be regarded as established beyond reasonable doubt.

The Sessions Judge did not found his conclusion upon the demeanour of the witnesses, except possibly of Ganesh. He entered upon a reveiw of the evidence and rested his conclusion primarily upon four circumstances :

(i) that the persons who were proved not to be present at the time of the commission of the offence were sought to be involved in the commission of the offence;

(ii) that the evidence showed that only one shot was fired even though the witnesses deposed that both Samdu Khan and Noor Khan were armed with muzzle-loading guns and had used them at the the time of the assault;

(iii) that the distance from which the gun which caused the fatal injury to Pratap was fired was estimated by the witnesses at not less than 20 ft., whereas Dr. Mehta deposed that the gun was fired from a distance of only 4 ft. and

(iv) that the accused Noor Khan and others were deprived of the benefit of having access to the police statements recorded under s. 161 Code of Criminal Procedure.

The circumstance that two persons Narpat Singh and Pratap Singh were alleged in the first information to be members of the party which arrived at the scene of offence in company of Noor Khan and Samdu Khan, is one which may require the Court to scrutinize the testimony of Ganesh the informant with great care. But the High Court in arriving at its conclusion did not rely upon the testimony of Ganesh; that testimony was wholly discarded, and nothing more need be said about that testimony. Inclusion of names of Narpat Singh and Pratap Singh as members of the party of Noor Khan in the first information lodged at the police station does not, however, throw any doubt upon the testimony of other witnesses who did not attempt to involve them in the commission of the offence. The Sessions Judge also held that two other persons Kesia Choudhary and Sheonath Singh were also

named in the first information though they were not present at the scene of offence. Ganesh admitted when cross-examined that these two persons arrived at the scene of offence after the assault on Pratap and the other witnesses did not depose that they had seen them at the time of the assault. The fact, that certain persons who were on the admission made by Ganesh not present at the time when the party of Noor Khan arrived at the scene, may raise a serious doubt about the reliability of the testimony of Ganesh, but it would not by itself be a ground for discarding the story of the other witnesses. It is true that the witness Prabhu Singh s/o Guman Singh who was not a member of the family and who claimed to be an eye-witness to the assault on Pratap and others was found wholly unreliable, and another person cited as a witness Sohan Singh who was also not a member of the family was not examined at the trial. But the place and the time at which the offence is alleged to be committed, were such that presence of persons who were not near relations of Pratap may least be expected.

All the eye-witnesses have consistently deposed that it was Noor Khan who caused the fatal injury to Pratap. On the evidence of the witnesses both Noor Khan and Samdu Khan were armed with muzzle-loading guns at the time of the assault, and only one gun-shot injury is found on the body of Pratap. It was deposed by the witnesses that Samdu Khan had fired the gun carried by him at Ganesh but the shot missed Ganesh. But absence of gun-shot injury on the person of Ganesh does not render the entire story so inherently improbable that it may on that account be discarded as unreliable. Nor is the discrepancy as to the sequence of firing, between the first information and the testimony in Court, furnish a justifiable ground in support of that course.

There is discrepancy between the estimates given by witnesses about the distance from which the fatal shot was fired by Noor Khan. Witnesses have estimated this distance as varying between 8 and 15 *poundas*—each *pounda* being equal to 'a step' or two feet. It appears however from the appearance of the injury and especially the charring and blackening of the wound of entry that the barrel of the gun could not have been at a distance exceeding 3 or 4 ft. But as we will presently point out, the estimate given

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by the witnesses, examined in the light of the topography and the circumstances in which the assault took place, will not warrant undue importance being attached to the estimates of illiterate and semi-literate villagers. The judgment of the Sessions Judge suffers from the infirmity that without attempting to concentrate his attention on the evidence of witnesses in the light of certain fixed positions on the scene of offence, and without attempting to secure a scale map, he discarded the story of the witnesses because of the discrepancy in the estimate of distances stated in terms of *poundas*. There were at the scene of offence, certain fixed objects such as the *Peepal* tree, the *Ora* (room), *dhalia* (stable), *phalsa* (opening in the hedge), well and *chabutra* (platform). If the evidence of the witnesses is examined in the light not exclusively of estimates of witnesses about the distance, which especially in the case of illiterate or semi-literate witnesses is notoriously unreliable, we have no doubt that the conclusion which the Sessions Judge was persuaded to reach cannot be accepted.

The estimate of the witnesses about the distance from which the gun was stated to have been fired by Noor Khan has varied. Ganesh deposed that the distance was about 20 ft. The other witnesses gave the estimate that the distance was about 8 to 15 *poundas*. It has to be noticed that according to the prosecution witnesses there were about ten persons present. Two of them were armed with guns, some with axes and the remaining with sticks. They must have spread themselves over the small area of the field in which the well, *Ora* and *dhalia* are situate. It appears to be the consistent testimony of the witnesses that the assaulting party were at the time of the assault somewhere near the *Peepal* tree, the situation of which is definitely established by reliable evidence, as being at a distance of about 8 ft. from the western end of the wall of the *Ora*. The gun which was used by Noor Khan was a muzzle-loading gun and the length of the barrel was 5 ft. According to the witnesses the party of the assailants had not advanced beyond the *peepal* tree and if as stated by Mst. Bhanwari who has been believed by the High Court corroborated as she was by witnesses Mst. Mathura and Mohan Singh, it appears that Noor Khan was near the *peepal* tree, the

inference is inevitable that the distance between the end of the barrel and Pratap did not exceed 4 ft. The existence of charring and the lodging of the entire discharge from the gun at a single point of entry does clearly establish that the gun was fired from close range. The evidence of the witnesses viewed in the light of the situation of the *Ora, dhalia* and the *peepal* tree as shown in the rough sketch Ext. P-2(a), does also suggest that the estimate given by the witnesses of the distance of the assailant from Pratap cannot be accepted. Mst. Bhanwari has stated that Noor Khan was at a distance of a pace from Samdu Khan, and that Samdu Khan and Noor Khan had fired when they were near the *peepal* tree. Prabhu has given the estimate of the distance between Noor Khan and Pratap as 10 paces, but the evidence discloses that Noor Khan fired the shot from a place opposite the *Ora.* Gulab stated that Samdu Khan stood at a distance of five *poundas* from him and Pratap was near him sitting near the *Ora.* Mohan deposed that the *peepal* tree is at a distance of 6 or 7 ft., and the accused persons were on the east side of the *peepal* tree and "in front of the centre of the *Dhalia.*" Mst. Mathura has stated that the accused persons had come to the rear of the *peepal* tree. Every witness has deposed that Pratap was sitting at a distance of a pace from the *Ora* wall facing south in which direction the *peepal* tree stood. This analysis of the evidence shows that Noor Khan fired his gun from a point south of the *Ora,* somewhere near the *peepal* tree, at Pratap who was sitting at a distance of about 2 ft. from the wall of the Ora. The High Court accepted the testimony of Mst. Bhanwari corroborated by the testimony of Mst. Mathura and Mohan Singh and has come to the conclusion that these three witnesses have deposed to a state of affairs which is consistent with the medical testimony. This is not to say that the testimony of other eye-witnesses is untrue, but it only discloses a faulty estimate of the distance given by illiterate villagers.

But the most important defect in the trial which, it was urged by Mr. Purshottam appearing on behalf of the appellant, vitiates the order of conviction is that the accused persons were deprived of the right to obtain and use copies of the statements made by the witnesses before the investigating officer Hari Singh who stated that he

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had made 'jottings' or notes of the statements of witnesses, and that he did not record detailed statements in the course of the investigation, and that from these 'jottings' head-constable Kapuraram prepared the statements of the witnesses (supplied at the trial to the accused) when the witnesses were not present at the police station. In their cross-examination the witnesses who claimed to have witnessed the assault, asserted that certain statements attributed by Kapuraram to them were not made by them. The High Court observed that as the statements were written by Kapuraram from the 'jottings', no value could be attached to those statements and the testimony of the witnesses who denied having made certain parts of the statements found in the record prepared by Kapuraram could not render it unreliable. On the evidence of Hari Singh the investigating Officer, the statements of which copies were supplied to the accused purporting to be copies of statements recorded under s. 161 Criminal Procedure Code, were not in truth such statements, and the High Court was right in observing that the discrepancies between those statements and the evidence given by the witnesses at the trial would not necessarily support the plea of the defence that the version given at the trial was unreliable, as an afterthought. But it was urged that under s. 161 Criminal Procedure Code it is obligatory upon an investigating officer to record the statements of witnesses examined by him and if those statements are not made available to the accused at the trial, a valuable right which the Legislature has ensured in the interest of a satisfactory trial of the case is lost to the accused, and the trial must on that account alone be regarded as vitiated.

By s. 161 of the Code of Criminal Procedure, a police-officer making an investigation under Ch. XIV is authorised to examine orally any person supposed to be acquainted with the facts and circumstances of the case. The person so examined is bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. Sub-section (3) of s. 161 provides that a police-officer may reduce into writing any statement made

to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement of each such person whose statement he records. Section 162 of the Code as amended by the Criminal Procedure Code (Amendment) Act 26 of 1955 provides :

> "No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it ; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :"

By the proviso it is enacted that when a witness is called for the prosecution in such inquiry or trial, whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution to contradict such witness.

Section 173 of the Code by sub-section (4) as amended by Act 26 of 1955 provides that the officer in charge of the police station shall, before the commencement of the inquiry or trial, furnish or cause to be furnished to the accused, amongst others, a copy of the first information report recorded under s. 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements recorded under sub-section (3) of s. 161 of all the persons whom the prosecution proposes to examine as its witnesses. Section 207A of the Code of Criminal Procedure which is added by Act 26 of 1955 by sub-section (3) provides:

> "At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished,"

and the Magistrate shall then proceed to record the evidence of the witnesses produced by the prosecution and

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he may commit the case to the Court of Session on such evidence and after considering the documents referred to in s. 173.

The object of ss. 162, 173(4) and 207A(3) is to enable the accused to obtain a clear picture of the case against him before the commencement of the inquiry. The sections impose an obligation upon the investigating officer to supply before the commencement of the inquiry copies of the statements of witnesses who are intended to be examined at the trial so that the accused may utilize those statements for cross-examining the witnesses to establish such defence as he desires to put up, and also to shake their testimony. Section 161(3) does not require a police-officer to record in writing the statements of witnesses examined by him in the course of the investigation, but if he does record in writing any such statements, he is obliged to make copies of those statements available to the accused before the commencement of proceedings in the Court so that the accused may know the details and particulars of the case against him and how the case is intended to be proved. The object of the provision is manifestly to give the accused the fullest information in the possession of the prosecution, on which the case of the State is based, and the statements made against him. But failure to furnish statements of witnesses recorded in the course of investigation may not vitiate the trial. It does not affect the jurisdiction of the Court to try a case, nor is the failure by itself a ground which affects the power of the Court to record a conviction, if the evidence warrants such a course. The provision relating to the making of copies of statements recorded in the course of investigation is undoubtedly of great importance, but the breach thereof must be considered in the light of the prejudice caused to the accused by reason of its breach, for s. 537 Code of Criminal Procedure provides, amongst other things, that subject to the provisions contained in the Code no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, unless such

error, omission, irregularity or misdirection has in fact occasioned a failure of justice. By the explanation to s. 537 it is provided that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceeding.

In the present case the statements of the witnesses prepared by Kapuraram were supplied to the accused before the committal proceedings were started. Relying upon those statements as duly recorded under s. 161(3), cross-examination of the witnesses was directed. But in the Court of Session the investigating officer admitted that on September 29, 1960 he did not record the statements of witnesses in detail, but merely noted certain points and after reaching *Thana* Bali on September 30, 1960 he had got detailed statements of the witnesses written out by head-constable Kapuraram in the absence of the witnesses, and had destroyed the notes and jottings thereafter. Undoubtedly the investigating officer acted in a manner both irresponsible and improper, and thereby was instrumental in depriving the accused of the benefit of the "notes and jottings" written out by him. He destroyed the only documents which could be regarded as statements recorded under s. 161 and which are permitted to be utilized by the accused under s. 161. Counsel for the appellant relying upon the two judgments of the Nagpur High Court in *Baliram* v. *Emperor*(1) and *Maganlal* v. *Emperor*(2) submitted that omission to supply copies of the statements recorded under s. 161 is repugnant to the fundamental rules of practice necessary for the due protection of prisoners and the safe administration of justice, and where the accused was deprived of his statutory rights of cross-examination and thereby denied the opportunity of effectively destroying the testimony of prosecution witnesses the evidence of such witnesses whose statements have not been supplied to the accused is inadmissible at the trial. We are unable to accept this contention for in our view the law stated by the Nagpur High Court does

(1) I.L.R. [1945] Nag. 151.
(2) I.L.R. [1946] Nag. 126.

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not correctly interpret ss. 161 and 162 Code of Criminal Procedure. In a later case, the Nagpur High Court in *Maroti Mahagoo* v. *Emperor*(1) held that though the right which is given to the accused under s. 162 Code of Criminal Procedure to use the previous statements made to the police for the purpose of contradicting a witness is a valuable right, and where the omission to give copies to the accused is proved to have caused prejudice to the accused, the testimony of such witness must be received with extreme caution and the Court would be entitled in a suitable case even to ignore altogether such evidence, but the evidence is not inadmissible and every case must be decided on its own facts.

These cases were decided before the Code of Criminal Procedure was amended by Act 26 of 1955, but on the question raised by counsel there is no material difference made by the amended provision. After the amendment of the Code in 1955, it is the duty of the investigating officer in every case where investigation has been held under Ch. XIV to supply to the accused copies of the statements of witnesses proposed to be examined at the trial. Under the Code before it was amended, it was for the Court when a request was made in that behalf to supply to the accused statements of each witness when he was called for examination. The effect of the breach of the provisions of s. 207A and s. 173 Code of Crimnal Procedure was considered by this Court in *Narayan Rao* v. *State of Andhra Pradesh*(2) and it was held that failure to comply with the provisions of s. 173(4) and s. 207A(3) is merely an irregularity which does not affect the validity of the trial. It was observed, in dealing with the question whether an omission to comply with the provisions of s. 173(4) read with sub-section (3) of s. 207A necessarily renders the entire proceeding and the trial null and void :

> "There is no doubt that those provisions have been introduced by the amending Act of 1955, in order to simplify the procedure in respect of inquiries leading upto a Sessions trial, and at the same time, to safeguard the interests of accused persons by enjoining

(1) I.L.R. [1948] Nag. 110.
(2) A.I.R. 1957 S. C. 737.

upon police officers concerned and Magistrates before whom such proceedings are brought, to see that all the documents, necessary to give the accused persons all the information for the proper conduct of their defence, are furnished.

* * * * *

But we are not prepared to hold that noncompliance with those provisions has, necessarily, the result of vitiating those proceedings and subsequent trial. The word "shall" occurring both in sub-section (4) of s. 173 and sub-section (3) of s. 207A, is not mandatory but only directory, because an omission by a police officer, to fully comply with the provisions of s. 173, should not be allowed to have such a far-reaching effect as to render the proceedings including the trial before the Court of Session, wholly ineffective.

* * * * *

Certainly, if it is shown, in a particular case, on behalf of the accused persons that the omission on the part of the police officers concerned or of the Magistrate before whom the committal proceedings had pended, has caused prejudice to the accused, in the interest of justice, the Court may re-open the proceedings by insisting upon full compliance with the provisions of the Code.

In our opinion, the omission complained of in the instant case, should not have a more far-reaching effect than the omission to carry out the provisions of s. 162 or s. 360 of the Code."

The Court in that case relied upon the observations made by the Judicial Committee of the Privy Council in *Pulukuri Kotayya* v. *Emperor*(1) to the effect that when a trial is conducted in a manner different from that prescribed by the Code, the trial is bad, and no question of curing an irregularity arises, but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under s. 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very

(1) L.R. 74 I.A. 65.

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comprehensive provisions of the Code. In dealing with result of failure to supply copies of statements recorded under s. 161 Code of Criminal Procedure, the Judicial Committee observed in *Pulukuri Kotayya's case*(1) :

> "The right given to an accused person by this section is a very valuable one and often provides important material for cross examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to guage its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate break-down of the whole of his evidence and in the present case it has to be remembered that the accused's contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to s. 162 as matter of gravity. A.I.R. 1945 Nag. 1 where the record of statements made by witnesses had been destroyed, and 53 All. 458, where the Court had refused to supply to the accused copies of statements made by witnesses to the police, afford instances in which failure to comply with the provisions of s. 162 have led to the conviction being quashed. Their Lordships would, however, observe that where, as in those two cases, the statements were never made available to the accused, an inference, which is almost irresistible, arises of prejudice to the accused."

However strong the inference may be, failure to supply copies will not by itself render the trial illegal. The Court must in each case consider the nature of the defect, the objection raised at the trial, and the circumstances which lead to an inference of prejudice. The strength of the inference of prejudice must always be adjudged having regard to the circumstances of each particular case. *Narayan Rao's Case*(2) related to failure to comply with the provisions of ss. 173 and 207A. It appears that in that case the statements of witnesses recorded under s. 161 were supplied to the accused in the Court of Session, and irregularity in the proceeding to that extent was

(1) L.R. 74 I.A. 65. (2) A.I.R. 1957 S.C. 737.

mitigated. In the present case what could be regarded as statements recorded under s. 161(3) were never supplied to the accused. But on that account the principle applicable to the consequences of deprivation of the statutory right is not different.

The Trial Court observed that the copies of the statements which were handed over to the accused were not the record of the statements made by the witnesses but they were dictated by the sub-Inspector Hari Singh from the 'jottings' made by him of some points, the statements having been written by head-constable Kapuraram. The Court then observed :

> "It is to be noted that head constable Kapuraram was not present at the place of occurrence when the investigating officer examined the witnesses on 29-9-60. The statements of witnesses which are in the handwriting of head constable Kapuraram, therefore, could not have been written and read over to witnesses in the village Mundara station, Bali, and, therefore, the statements on which the prosecution rely were never read over to and admitted correct by the witnesses. There are several portions in the statements of witnesses which have been brought on record by the defence counsel on which there is complete contradiction between the statements of eye witnesses and the investigating officer."

But the contradictions were, it appears, primarily as to the presence of Harpat Singh and Pratap Singh whose names were mentioned in the first information by witness Ganesh, and against whom no charge-sheet was filed and as to some matters not of much importance, such as the acts and conduct of persons other than Noor Khan the appellant in this appeal. For instance, Prabhu denied that he had stated that Prabhu Singh and Sohan Singh were eye witnesses to the assault. Mst. Mathura denied that she had stated that the accused had 'indecently abused and threatened Ganesh and Pratap to leave the well otherwise they would kill them,' and a similar denial was made by Mst. Bhanwari. The contradiction in the statement of Prabhu related to some proceedings in Court arising out of the disputes relating to the well. It is of course very unsatisfactory that the notes, or the 'jottings' as they are

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called, of the statements made by the witnesses before Hari Singh were not available to the accused because they were destroyed by him and what were made available to the accused were not in truth the statements which could be utilized under s. 162 Code of Criminal Procedure. For this unsatisfactory state of affairs, sub-inspector Hari Singh must be held responsible. But solely on that account, as we have already observed, we are unable to hold that the trial was illegal. No attempt appears to have been made by the Trial Court to scrutinize the diary of sub-inspector Hari Singh, nor was any objection raised in the High Court that by reason of the failure to make the notes or the jottings available to the accused any prejudice was caused. Not a single question was asked to Hari Singh about the nature of those jottings, or notes—whether they were mere memoranda which the writer alone could understand, or were detailed notes of statements made to him, which were arranged into proper shape when dictated to Kapuraram. The High Court in dealing with this objection observed :

> "Having regard to the manner in which the police statements are alleged to have been prepared by Kapuraram, no value can be attached to them and if the witness disowned certain portions of those statements, his evidence at the trial cannot be rendered unreliable on that account."

The High Court has carefully analysed and considered the evidence of the witnesses who deposed that they had seen the assault and it was assured that four out of the witnesses who had received injuries on their person must have been present on the scene of offence and the testimony of three out of those witnesses was acceptable viewed in the light of the evidence of Mst. Bhanwari and Mst. Mathura. We have gone through the material parts of the evidence of the witnesses to which our attention was directed, and after carefully scrutinising the evidence in the light of the infirmities pointed out, especially the denial of the copies of the notes or jottings made by Hari Singh, we are unable to disagree with the High Court.

The Sessions Judge discarded the testimony of the witnesses, in view of discrepancies on matters of compara-

tively minor importance and because the witnesses were relatives of the deceased, and they made statements as to the distance from which the assault was made which could not be true in the light of the medical evidence. The High Court did not accept this view of the Trial Court. In an appeal with special leave we do not think that we would be justified in interfering with the conclusion of the High Court especially when our attention has not been invited to any substantial infirmity in the reasoning of that Court.

We may repeat that the provisions of s. 162 Code of Criminal Procedure provide a valuable safeguard to the accused and denial thereof may be justified only in exceptional circumstances. The provisions relating to the record of the statements of the witnesses and the supply of copies to the accused so that they may be utilised at the trial for effectively defending himself cannot normally be permitted to be whittled down, and where the circumstances are such that the Court may reasonably infer that prejudice has resulted to the accused from the failure to supply the statements recorded under s. 161 the Court would be justified in directing that the conviction be set aside and in a proper case to direct that the defect be rectified in such manner as the circumstances may warrant. It is only where the Court is satisfied, having regard to the manner in which the case has been conducted and the attitude adopted by the accused in relation to the defect, that no prejudice has resulted to the accused that the Court would, notwithstanding the breach of the statutory provisions, be justified in maintaining the conviction. This, in our judgment, is one of those cases in which such a course is warranted.

The action of the sub-inspector Hari Singh in destroying the notes cannot but be deplored. But the destruction of the notes recorded by him appears to be the result of ignorance, not of any dishonesty. Even so, if on a careful scrutiny of the evidence we felt that there was reasonable ground for holding that the appellant Noor Khan was prejudiced because he was deprived of the right which the Legislature had ensured him in making his defence, we would have set aside the conviction. We have however considered the evidence of the witnesses

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carefully and examined it in the light of the criticism offered by counsel for Noor Khan, and after giving due weight to the opinion of the High Court and the Trial Court have come to the conclusion on the facts of this case that no prejudice appears to have been caused.

As we have already pointed out, the plea of prejudice caused to the accused does not appear to have been raised in the High Court, and apart from the general plea of illegality of the trial because of the failure to supply the copies of the record of the statements made to Hari Singh, no substantial argument in support of the plea of prejudice has been advanced.

On the view we have taken, this appeal fails and is dismissed.

Appeal dismissed.

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August 22

STATE OF MYSORE
v.
K. MANCHE GOWDA

(P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.)

Civil Servant—Reasonable opportunity—Dismissal based on previous punishments—Whether an opportunity to explain be given in second show cause notice—"Presumptive knowledge" and "reasonable opportunity"—Constitution of India, Art. 311(2)—*Government of India Act,* 1935, *s.* 240(3).

The respondent was holding the post of an Assistant to the Additional Development Commissioner, Planning, Bangalore. A departmental enquiry was held against him and the Enquiry Officer recommended that the respondent be reduced in rank. After considering the report of Enquiry Officer, the Government issued a notice calling upon respondent to show cause why he should not be dismissed from service. The reply of the respondent was that the entire case had been foisted on him. After considering his representation, the Government passed an order dismissing him from service. The reason given for his dismissal was that the respondent had on two earlier occasions committed certain offences and he had been punished for the same. However, those facts were not given as reasons for the proposed punishment of dismissal from service.