before us had to concede that such is the case, and all he could do was to suggest that even now the case should be remanded to the lower Court and that the petitioner should be allowed to amend her petition accordingly, but I do not think that this would be the proper course to take in the present case since a party who wishes the Court to exercise its discretion in his favour must come to the Court with a full and frank presentation of the facts in the first instance, and cannot expect the Court to exercise its discretion after an admission of this kind has been made only through the force of circumstances. I would accordingly instead of confirming the decree *nisi* set it aside with no order as to costs.

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KAPUR, J.—I agree.

Kapur, J.

BISHAN NARAIN, J.—I agree.

Bishan Narain, J.

SUPREME COURT

Before Bijan Kumar Mukherjea, Vivian Bose and B. Jagannadhadas, JJ.

H. N. RISHBUD AND INDER SINGH,—*Appellants*

versus

THE STATE OF DELHI—*Respondent*

Criminal Appeals Nos. 95 to 97 and 106 of 1954

1954

14th December

Prevention of Corruption Act (II of 1947)—Section 5 (4) and Proviso to Section 3 corresponding to Section 5-A enacted by Prevention of Corruption (Second Amendment) Act (LIX of 1952)—Provisions of—Whether mandatory or directory—Investigation conducted in violation of these provisions—Whether legal—Trial following upon such investigation—Whether legal—Duty of Court in such cases stated—Code of Criminal Procedure (V of 1898)—Investigation under—Function of—Steps it consists of—Delegation of powers—How far permissible.

Held, that section 5 (4) and proviso to section 3 of the Prevention of Corruption Act (II of 1947) and corresponding section 5-A introduced by the Prevention of Corruption (Second Amendment) Act (LIX of 1952) are mandatory and not directory and that the investigation conducted in violation thereof bears the stamp of illegality. But it does not

necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.

Held further, that when such a breach is brought to the notice of the Court at an early stage of the trial, the Court will have to consider the nature and extent of the violation and pass appropriate orders for such reinvestigation as may be called for, wholly or partly, and by such officer as it considers appropriate with reference to the requirements of section 5-A of the Act.

Held also, that according to the Code of Criminal Procedure investigation is a normal preliminary to an accused being put up for trial for a cognizable offence (except when the Magistrate takes cognizance otherwise than on a police report) and its function is to ascertain the facts and circumstances of the case. Under the Code it consists generally of the following steps :—

(1) Proceeding to the spot;
(2) Ascertainment of the facts and circumstances of the case;
(3) Discovery and arrest of the suspected offender;
(4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial ; and
(5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by the filing of a charge-sheet under section 173.

The scheme of the Code also shows that while it is permissible for an officer-in-charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer-in-charge of the police station, it having been clearly provided in section 168 that when a subordinate officer makes an investigation he should report the result to the officer in charge of the police station. It is also clear that the final step in the investigation, viz., the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer-in-charge of the police station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under section 551.

Held also, that when a statutory provision enjoins that the investigation shall be made by a police officer of not less than a certain rank, unless specifically empowered by a Magistrate in that behalf, notwithstanding anything to the contrary in the Code of Criminal Procedure, it is clearly implicit therein that the investigation (in the absence of such permission) should be conducted by the officer of the appropriate rank. This is not to say that every one of the steps in the investigation has to be done by him in person or that he cannot take the assistance of deputies to the extent permitted by the Code to an officer in charge of a police station conducting an investigation or that he is bound to go through each of these steps in every case. When the Legislature has enacted in emphatic terms such a provision it is clear that it had a definite policy behind it.

Appeal by Special Leave granted by the Supreme Court by its order dated the 27th October 1953 and 13th September 1954 from the Judgment and order dated 24th August 1953, and dated 27th August 1954, of the High Court of Judicature for the State of Punjab at Circuit Bench, Delhi in the above cases arising out of the Judgment and order, dated the 25th May 1953. of the Court of Special Judge, Delhi, in Corruption Cases Nos. 12, 13 and 14 of 1953.

For Appellant No. 1—MESSRS. H. J. UMRIGAR and RAJINDER NARAIN, Advocates.

For the Respondent—MR. C. K. DAPHTARY, Solicitor-General for India (MESSRS. G. N. JOSHI, P. A. MEHTA and P. G. GOKALE, Advocates, with him).

JUDGMENT

The Judgment of the Court was delivered by—

Jagannadhadas, J.

JAGANNADHADAS, J. These are appeals by special leave against the orders of the Punjab High Court made in exercise of revisional jurisdiction reversing the orders of the Special Judge, Delhi, quashing certain criminal proceedings pending before himself against these appellants for alleged offences under the Penal Code and the Prevention of Corruption Act, 1947. The Special Judge quashed the proceedings on the ground that the investigations on the basis of which the appellants were being prosecuted were in contravention of the provisions of subsection (4) of section 5 of the

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Prevention of Corruption Act, 1947, and hence illegal. In Appeal No. 95 of 1954 the appellants are two persons by name H. N. Risbud and Indar Singh. In Appeals No. 96 and 97 of 1954 H. N. Risbud above-mentioned is the sole appellant. These appeals raise a common question of law and are dealt with together. The appellant Risbud was the Assistant Development Officer (Steel) in the office of the Directorate-General, Ministry of Industry and Supply, Government of India, and the appellant Indar Singh was the Assistant Project Section Officer (Steel) in the office of the Directorate-General, Ministry of Industry and Supply, Government of India. There appear to be a number of prosecutions pending against them before the Special Judge, Delhi, appointed under the Criminal Law Amendment Act, 1952 (Act XLVI of 1952). We are concerned in these appeals with Cases Nos. 12, 13 and 14 of 1953. Appeals Nos. 95, 96 and 97 arise, respectively, out of them. The cases against these appellants are that they along with some others entered into criminal conspiracies to obtain for themselves or for others iron and steel materials in the name of certain bogus firms and that they actually obtained quota certificates, on the strength of which some of the members of the conspiracy took delivery of quantities of iron and steel from the stock-holders of these articles. The charges, therefore, under which the various accused, including the appellants, are being prosecuted are under section 120-B I.P.C., section 420 I.P.C., and section 7 of the Essential Supplies (Temporary Powers) Act, 1946. In respect of such of these accused as are public servants, there are also charges under section 5(2) of the Prevention of Corruption Act, 1947.

Under section 5(4) of the Prevention of Corruption Act, 1947, a police officer below the rank of a Deputy Superintendent of Police shall not investigate any offence punishable under subsection (2) of section 5 without the order of a Magistrate of the First Class. The first information reports in these cases were laid in April and June

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1949, but permission of the Magistrate, for investigation as against the public servants concerned, by a police officer of a rank lower than a Deputy Superintendent of Police, was given in March and April 1951. The charge-sheets in all these cases were filed by such officers in August and November 1951, i.e., subsequent to the date on which permission as above was given. But admittedly the investigation was entirely or mostly completed in between the dates when the first information was laid and the permission to investigate by an officer of a lower rank was accorded. It appears from the evidence taken in this behalf that such investigation was conducted not by any Deputy Superintendent of Police but by officers of lower rank and that after the permission was accorded little or no further investigation was made. The question, therefore, that has been raised is, that the proceedings by way of trial initiated on such charge-sheets are illegal and require to be quashed.

To appreciate the argument it is necessary to notice the relevant sections of the Prevention of Corruption Act, 1947 (Act II of 1947) (hereinafter referred to as the Act). Section 3 of the Act provides that offences punishable under section 161 or 165, I.P.C., shall be deemed to be cognizable offences. Section 4 enacts a special rule of evidence against persons accused of offences under section 161 or 165, I.P.C., throwing the burden of proof on the accused. Broadly stated, this section provides that if it is proved against an accused that he has accepted or obtained gratification other than legal remuneration, it shall be presumed against him that this was so accepted or obtained as a motive or reward, such as is mentioned in section 161, I.P.C. Subsections (1) and (2) of section 5 create a new offence of "criminal misconduct in discharge of official duty" by a public servant punishable with imprisonment for a term of seven years or fine or both. Subsection (3) thereof enacts a new rule of evidence as against a person accused of the commission of offences under sections 5(1) and (2). That rule, broadly stated, is that when a person so accused, or any other person on his behalf, is in

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possession of pecuniary resources or property disproportionate to the known sources of his income and for which he cannot satisfactorily account, the Court shall presume him to be guilty of criminal misconduct unless he can displace that presumption by evidence. The offence of criminal misconduct which has been created by the Act, it will be seen, is in itself a cognizable offence, having regard to item 2 of the last portion of Schedule II of the Criminal Procedure Code under the head "offences against the other laws". In the normal course, therefore, an investigation into the offence of criminal misconduct under section 5(2) of the Act and an investigation into the offence under sections 161 and 165, I.P.C., which have been made cognizable by section 3 of the Act would have to be made by an officer-in-charge of a police station and no order of any Magistrate in this behalf would be required. But the proviso to section 3 as well as subsection (4) of section 5 of the Act specifically provide that "a police officer below the rank of a Deputy Superintendent of Police shall not investigate any such offence without the order of a Magistrate of the First Class or make any arrest therefor without a warrant". It may be mentioned that this Act was amended by Act LIX of 1952. The abovementioned proviso to section 3 as well as subesection (4) of section 5 have been thereby omitted and substituted by section 5-A, the relevant portion of which may be taken to be as follows—

> "Notwithstanding anything contained in the Code of Criminal Procedure, no police officer below the rank of a Deputy Superintendent of Police (elsewhere than in the presidency towns of Calcutta, Madras and Bombay) shall investigate any offence punishable under sections 161, 165 or 165-A of the Indian Penal Code or under section 5(2) of this Act without the order of a Magistrate of the First Class".

This amendment makes no difference. In any case the investigation in these cases having taken place

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prior to the amendment, what is relevant is section 5(4) as it stood before the amendment. It may also be mentioned that in 1952 there was enacted the Criminal Law Amendment Act, 1952 (Act XLVI of 1952), which provided for the appointment of Special Judges to try offences under sections 161, 165 and 165-A, I.P.C., and under subsection (2) of section 5 of the Act such offences were made triable only by such Special Judges. Provision was also made that all pending cases relating to such offences shall be forwarded for trial to the Special Judge. That is how the present cases are all now before the Special Judge of Delhi, appointed under this Act.

On the arguments urged before us two points arise for consideration. (1) Is the provision of the Prevention of Corruption Act, 1947, enacting that the investigation into the offences specified therein *shall not be conducted by any police officer of a rank lower than a Deputy* Superintendent of *Police without the* specific order of a Magistrate, directory or mandatory. (2) Is the trial following upon an investigation in contravention of this provision illegal.

To determine the first question it is necessary to consider carefully both the language and scope of the section and the policy underlying it. As has been pointed out by Lord Campbell in *Liverpool Borough Bank* v. *Turner* (1), "there is no universal rule to aid in determining whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed". (See Craies on Statute Law, page 242, Fifth Edition). The Criminal Procedure Code provides not merely for judicial enquiry into or trial of alleged offences but also for prior investigation thereof. Section 5 of the Code shows that all offences "shall be investigated, inquired into,

(1) (1861) 30 L. J. Ch. 379

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tried and otherwise dealt with in accordance with the Code" (except in so far as any special enactment may provide otherwise). For the purposes of investigation offences are divided into two categories 'cognizable' and 'non-cognizable'. When information of the commission of a cognizable offence is received or such commission is suspected, the appropriate police officer has the authority to enter on the investigation of the same (unless it appears to him that there is no sufficient ground). But where the information relates to a non-cognizable offence, he shall not investigate it without the order of a competent Magistrate. Thus it may be seen that according to the scheme of the Code, investigation is a normal preliminary to an accused being put up for trial for a cognizable offence (except when the Magistrate takes cognizance otherwise than on a police report in which case he has the power under section 202 of the Code to order investigation if he thinks fit). Therefore, it is clear that when the Legislature made the offences in the Act cognizable, prior investigation by the appropriate police officer was contemplated as the normal preliminary to the trial in respect of such offences under the Act. In order to ascertain the scope of and the reason for requiring such investigation to be conducted by an officer of high rank (except when otherwise permitted by a Magistrate), it is useful to consider what "investigation" under the Code comprises. Investigation usually starts on information relating to the commission of an offence given to an officer-in-charge of a police station and recorded under section 154 of the Code. If from information so received or otherwise, the officer-in-charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for discovery and arrest of the offender. Thus investigation primarily consists in the ascertainment of the facts and circumstances of the case. By definition, it includes "all the proceedings under the Code for the collection of evidence conducted by a police officer". For the above

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purposes, the investigating officer is given the power to require before himself the attendance of any person appearing to be acquainted with the circumstances of the case. He has also the authority to examine such person orally either by himself or by a duly authorised deputy. The officer examining any person in the course of investigation may reduce his statement into writing and such writing is available, in the trial that may follow, for use in the manner provided in this behalf in section 162. Under section 155 the officer-in-charge of a police station has the power of making a search in any place for the seizure of anything believed to be necessary for the purpose of the investigation. The search has to be conducted by such officer in person. A subordinate officer may be deputed by him for the purpose only for reasons to be recorded in writing if he is unable to conduct the search in person and there is no other competent officer available. The investigating officer has also the power to arrest the person or persons suspected of the commission of the offence under section 54 of the Code. A police officer making an investigation is enjoined to enter his proceedings in a diary from day-to-day. Where such investigation cannot be completed within the period of 24 hours and the accused is in custody he is enjoined also to send a copy of the entries in the diary to the Magistrate concerned. It is important to notice that where the investigation is conducted not by the officer-in-charge of the police station but by a subordinate officer (by virtue of one or other of the provisions enabling him to depute such subordinate officer for any of the steps in the investigation) such subordinate officer is to report the result of the investigation to the officer-in-charge of the police station. If, upon the completion of the investigation it appears to the officer-in-charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his executing a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground, to place the accused on trial, he is to take the necessary steps therefor under section 170 of the Code. In

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either case, on the completion of the investigation he has to submit a report to the Magistrate under section 173 of the Code in the prescribed form furnishing various details. Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under section 173. The scheme of the Code also shows that while it is permissible for an officer-in-charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer-in-charge of the police station, it having been clearly provided in section 168 that when a subordinate officer makes an investigation he should report the result to the officer-in-charge of the police station. It is also clear that the final step in the investigation, viz., the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer-in-charge of the police station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under section 551.

It is in the light of this scheme of the Code that the scope of a provision like section 5(4) of the Act has to be judged. When such a statutory provision enjoins that the investigation shall be made by a police officer of not less than a certain rank, unless specifically empowered by a Magistrate in that behalf, notwithstanding anything to the contrary in the Code of Criminal Procedure, it is

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clearly implicit therein that the investigation (in the absence of such permission) should be conducted by the officer of the appropriate rank. This is not to say that every one of the steps in the investigation has to be done by him in person or that he cannot take the assistance of deputies to the extent permitted by the Code to an officer-in-charge of a police station conducting an investigation or that he is bound to go through each of these steps in every case. When the Legislature has enacted in emphatic terms such a provision it is clear that it had a definite policy behind it. To appreciate that policy it is relevant to observe that under the Code of Criminal Procedure most of the offences relating to public servants as such, are non-cognizable. A cursory perusal of *Schedule* II of the Criminal Procedure Code discloses that almost all the offences which may be alleged to have been committed by a public servant, fall within two chapters, Chapter IX "Offences by or relating to public servants" and Chapter XI "Offences against public justice" and that each one of them is non-cognizable. (*Vide* entries in Schedule II under sections 161 to 169, 217 to 233, 225-A as also 128 and 129). The underlying policy in making these offences by public servants non-cognizable appears to be that public servants who have to discharge their functions—often enough in difficult circumstances—should not be exposed to the harassment of investigation against them on information levelled, possibly, by persons affected by their official acts, unless a Magistrate is satisfied that an investigation is called for, and on such satisfaction authorises the same. This is meant to ensure the diligent discharge of their official functions by public servants, without fear or favour. When, therefore, the Legislature thought fit to remove the protection from the public servants, in so far as it relates to the investigation of the offences of corruption comprised in the Act, by making them cognizable, it may be presumed that it was considered necessary to provide a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a police officer of a

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designated high rank. Having regard, therefore, to the peremptory language of subsection (4) of section 5 of the Act as well as to the policy apparently underlying it, it is reasonably clear that the said provision must be taken to be mandatory.

It has been suggested by the learned Solicitor-General in his arguments that the consideration as to the policy would indicate, if at all, only the necessity for the charge-sheets in such a case having to be filed by the authorised officer, after coming to his own conclusion as to whether or not there is a case to place the accused on trial before the Court, on a perusal of the material previously collected, and that at best this might extend also to the requirement of arrest of the concerned public servant by an officer of the appropriate rank. There is, however, no reason to think that the policy comprehends within its scope only some and not all the steps involved in the process of investigation which, according to the scheme of the Act, have to be conducted by the appropriate investigating officer either directly or when permissible through deputies, but on his responsibility. It is to be borne in mind that the Act creates two new rules of evidence, one under section 4 and the other under section 5(3), of an exceptional nature and contrary to the accepted canons of criminal jurisprudence. It may be of considerable importance to the accused that the evidence in this behalf is collected under the responsibility of the authorised and competent investigating officer or is at least such for which such officer is prepared to take responsibility. It is true that the result of a trial in Court depends on the actual evidence in the case but it cannot be posited that the higher rank and the consequent greater responsibility and experience of a police officer has absolutely no relation to the nature and quality of evidence collected during investigation and to be subsequently given in Court.

A number of decisions of the various High Courts have been cited before us bearing on the questions under consideration. We have also

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perused the recent unreported Full Bench judgment of the Punjab High Court (1). These disclose a conflict of opinion. It is sufficient to notice one argument based on section 156(2) of the Code on which reliance has been placed in some of these decisions in support of the view that section 5(4) of the Act is directory and not mandatory. Section 156 of the Criminal Procedure Code is in the following terms—

> "156. (1) Any officer-in-charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area/within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.
>
> (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
>
> (3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned".

The argument advanced is that section 5(4) and proviso to section 3 of the Act are in substance and in effect in the nature of an amendment of or proviso to section 156(1), Cr. P.C. In this view, it was suggested that section 156(2) which cures the irregularity of an investigation by a person not empowered is attracted to section 5(4) and proviso to section 3 of the 1947 Act and section 5-A of the 1952 Act. With respect, the learned Judges appear to have overlooked the phrase "under this section". which is to be found in subsection (2) of section

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156, Cr. P.C. What that subsection cures is investigation by an officer not empowered under that section, i.e. with reference to subsections (1) and (3) thereof. Subsection (1) of section 156 is a provision empowering an officer-in-charge of a police station to investigate a cognizable case without the order of a Magistrate and delimiting his power to the investigation of such cases within a certain local jurisdiction It is the violation of this provision that is cured under subsection (2). Obviously subsection (2) of section 156 cannot cure the violation of any other specific statutory provision prohibiting investigation by an officer of a lower rank than a Deputy Superintendent of Police unless specifically authorised. But apart from the implication of the language of section 156(2), it is not permissible to read the emphatic negative language of subsection (4) of section 5 of the Act or of the proviso to section 3 of the Act, as being merely in the nature of an amendment of or a proviso to subsection (1) of section 156, Cr. P.C. Some of the learned Judges of the High Courts have called in aid subsection (2) of section 561, Cr. P.C. by way of analogy. It is difficult to see how this analogy helps unless the said subsection is also to be assumed as directory and not mandatory which certainly is not obvious on the wording thereof. We are, therefore, clear in our opinion that section 5(4) and proviso to section 3 of the Act and the corresponding section 5-A of Act LIX of 1952 are mandatory and not directory and that the investigation conducted in violation thereof bears the stamp of illegality.

The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards

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cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises. A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in section 190, Cr. P.C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190, Cr. P.C. is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e. sections 193 and 195 to 199. These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore, a nullity. Such an invalid report may still fall either under clause (a) or (b) of section 190(1), (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation section 537, Cr. P.C. which is in the following terms is attracted.

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, unless such error, omission or irregularity, has in fact occasioned a failure of justice".

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If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in *Prabhu* v. *Emperor* (1) and *Lumbhardar Zutshi* v. *The King* (2). These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.

It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for. Such a course is not altogether outside the contemplation of the scheme of the Code as appears from section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. Nor can it be said that the adoption of such a course is outside the scope of the inherent powers of the Special Judge, who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case.

(1) A.I.R. 1944 P.C. 73
(2) A.I.R. 1950 P.C. 26

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When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under section 537, Cr. P.C. of making out that such an error has in fact occasioned a failure of justice. It is relevant in this context to observe that even if the trial had proceeded to conclusion and the accused had to make out that there was in fact a failure of justice as the result of such an error, explanation to section 537, Cr. P.C. indicates that the fact of the objection having been raised at an early stage of the proceeding is a pertinent factor. To ignore the breach in such a situation when brought to the notice of the Court would be virtually to make a dead letter of the peremptory provision which has been enacted on grounds of public policy for the benefit of such an accused. It is true that the peremptory provision itself allows an officer of a lower rank to make the investigation if permitted by the Magistrate. But this is not any indication by the Legislature that an investigation by an officer of a lower rank without such permission cannot be said to cause prejudice. When a Magistrate is approached for granting such permission he is expected to satisfy himself that there are good and sufficient reasons for authorising an officer of a lower rank to conduct the investigation. The granting of such permission is not to be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it. In our opinion, therefore, when such a breach is brought to the notice of the Court at an early stage of the trial the Court will have to consider the nature and extent of the violation and pass appropriate orders for such reinvestigation as may be called for, wholly or partly, and by such officer as it considers appropriate with reference to the requirements of section 5-A of the Act. It is in the light of the above considerations that the validity or otherwise of the objection as to the violation of section 5(4)

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of the Act has to be decided and the course to be adopted in these proceedings, determined.

The learned Special Judge before whom the objection as to the violation of section 5(4) of the Act was taken took evidence as to the actual course of the investigation in these cases. In the cases out of which Criminal Appeals Nos. 96 and 97 of 1954 arise, the first information report which in each case was filed on 29th June 1949, was in terms on the basis of a complaint filed by the Director of Administration and Co-ordination, Directorate of Industry and Supply. This disclosed information constituting offences including that under section 5(2) of the Act. The cases were hence registered under various sections including section 5(2), of the Act. The investigation that was called for on the basis of such a first information report was to be by an officer contemplated under section 5(4) of the Act. The charge-sheets in these two cases were filed on 11th August 1951 by a Sub-Inspector of Police, R. G. Gulabani and it appears that he applied to the Magistrate for permission to investigate into these cases on 26th March 1951. His evidence shows that so far as the case relating to Criminal Appeal No. 97 of 1954 is concerned, he did not make any investigation at all excepting to put up the charge-sheet. All the prior stages of the investigation were conducted by a number of other officers of the rank of Inspector of Police or Sub-Inspector of Police and none of them had taken the requisite permission of the Magistrate. In the case out of which Criminal Appeal No. 96 of 1954 arises the evidence of R. G. Gulabani shows that he took up the investigation after he obtained permission and partly investigated it thereafter but that the major part of the investigation was done by a number of other officers who were all below the rank of Deputy Superintendent of Police without having obtained from the Magistrate the requisite sanction therefor. Both these are cases of clear violation of the mandatory provisions of section 5(4) of the Act. In the view we have taken of the effect of such violation it becomes necessary for the Special Judge to reconsider the course to be adopted in these two cases.

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As regards the case out of which Criminal Appeal No. 95 of 1954 arises it is to be noticed that the first information report which was filed on 30th April 1949, disclosed offences only against Messrs Patiala Oil Mills, Dev Nagar, Delhi, and others, and not as against any public servant. The case that was registered was accordingly in respect of offences punishable under section 420, I.P.C., and section 6 of the Essential Supplies (Temporary) Powers Act, 1946, and not under any offence comprised within the Prevention of Corruption Act. The investigation proceeded, therefore, in the normal course. The evidence shows that the investigation in this case was started on 2nd May 1949, by Inspector Harbans Singh and that on 11th July 1949, he handed over the investigation to Inspector Balbir Singh. Since then it was only Balbir Singh that made all the investigation and it appears from his evidence that he examined as many as 25 witnesses in the case. It appears further that in the course of this investigation it was found that the two appellants and another public servant were liable to be prosecuted under section 5(2) of the Act. Application was then made to the Magistrate by Balbir Singh for sanction being accorded to him under section 5(4) of the Act and the same was given on 20th March 1951. The charge-sheet was filed by Balbir Singh on 15th November 1951. He admits that all the investigation by him excepting the filing of charge-sheet was prior to the obtaining the sanction of the Magistrate for investigation. But since the investigation prior to the sanction was with reference to a case registered under section 420, I.P.C. and section 6 of the Essential Supplies (Temporary) Powers Act, 1946, that was perfectly valid. It is only when the material so collected disclosed the commission of an offence under section 5(2) of the Act by public servants, that any question of taking the sanction of the Magistrate for the investigation arose. In such a situation the continuance of such portion of the investigation as remained, as against the public servants concerned by the same officer after obtaining the permission of the Magistrate was reasonable and legitimate.

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We are, therefore, of the opinion that there has been no such defect in the investigation in this case as to call for interference.

In the result, therefore, Criminal Appeal No. 95 of 1954 is dismissed. Criminal Appeals Nos. 96 and 97 of 1954 are allowed with the direction that the Special Judge will take back the two cases out of which these appeals arose on to his file and pass appropriate orders after reconsideration in the light of this judgment.

Criminal Appeal No. 106 of 1954.

JUDGMENT

The Judgment of the Court was delivered by—

JAGANNADHADAS, J. This is an appeal by special leave against a common order of the High Court of Punjab relating to Cases Nos. 19 to 25 of 1953 before the Special Judge, Delhi. It raises the same questions which have been disposed of by our judgment in Criminal Appeals Nos. 95 to 97 of 1954. Since the appeal is, in form, one against the order of the High Court refusing to grant stay of the proceedings then pending, it is sufficient to dismiss this appeal with the observation that it will be open to the appellants to raise the objections before the Special Judge.

SUPREME COURT

Before Sudhi Ranjan Das, N. H. Bhagwati, and Syed Jafer Imam, JJ.

NANAK CHAND,—*Appellant*

versus

THE STATE OF PUNJAB,—*Respondent*

Criminal Appeal No. 132 of 1954

1955

15th January

Code of Criminal Procedure (Act V of 1898)—Section 233—Accused charged under section 302 read with section 149 I.P.C.—Convicted under section 302 read with section 34 I.P.C.—Conviction, whether legal—Sections 236 and 237—Applicability of—Indian Penal Code (Act XLV of 1860)—Section 149—whether creates a specific offence.

N. C. and six others were charged under section 148 and section 302 read with section 149 of the Indian Penal Code. Charge of rioting was not proved and N. C. and three others were convicted under section 302 read with section 34 of the said Code while the other three were acquitted. On appeal it was held that section 34 did not apply and N. C. was convicted under section 302 of the Indian Penal Code and the sentence of death was confirmed. The question arose whether N. C. could legally be convicted for murder, and sentenced under section 302, Indian Penal Code, when he was not charged with that offence.

Held, that a person charged with an offence read with section 149 of the Indian Penal Code cannot be convicted of the substantive offence without a specific charge being framed as required by section 233 of the Code of Criminal Procedure.

Held, that section 237 of the Code of Criminal Procedure is entirely dependent on the provisions of section 236 of that Code. The provisions of section 236 can apply only in cases where there is no doubt about the facts which can be proved but a doubt arises as to which of several offences have been committed on the proved facts in which case any number of charges can be framed and tried or alternative charges can be framed. In these circumstances if there had been an omission to frame a charge, then under section 237, a conviction could be arrived at on the evidence although no charge had been framed.

Held, that section 149 of the Indian Penal Code creates a specific offence. This section postulates that an offence is committed by a member of an unlawful assembly in prosecution of the common object of that assembly or such as a member of the assembly knew to be likely to be committed in prosecution of that object and declares that in such circumstances every person, who was a member of the same assembly at the time of the commission of the offence, was guilty of that offence. Under this section a person, who is a member of an unlawful assembly is made guilty of the offence committed by another member of the same assembly, in the circumstances mentioned in the section, although he had no intention to commit that offence and had done no overt act except being present in the assembly and sharing the common object of that assembly. Without the provisions of this section a member of an unlawful assembly could not have been made liable for the offence committed not by him but by another member of that assembly. Therefore when the accused are acquitted of riot and the charge for being members of an unlawful assembly fails, there can be no conviction of any one of them for an offence which he had not himself committed.

Appeal by Special Leave granted by the Supreme Court by its Order, dated the 3rd September, 1954, from the Judgment and Order dated the 15th June 1954 of the High Court of Judicature for the State of Punjab at Simla in Criminal Appeal No. 287 of 1954, arising out of the Judgment and Order dated the 14th April 1954 of the Court of Additional Sessions Judge in Session Case No. 4 of 1954.

MR. J. G. SETHI, Senior Advocate, (MR. NAUNIT LAL, Advocate, with him), for Appellant.

MESSRS GOPAL SINGH and P. G. GOKHALE, Advocates, for Respondent.

JUDGMENT

The Judgment of the Court was delivered by

Imam, J.

IMAM, J. This appeal by Nanak Chand comes by special leave against the judgment of the Punjab (I) High Court. The appellant was convicted by the High Court under section 302 of the Indian Penal Code and the sentence of death passed on him by the Additional Sessions Judge of Jullundur was confirmed.

On the facts alleged by the Prosecution there can be no doubt that Sadhu Ram was killed on the 5th of November 1953, at about 6-45 p.m. at the shop of Vas Dev, P.W. 2. It is alleged that the appellant along with others assaulted Sadhu Ram. The appellant was armed with a takwa. Numerous injuries were found on the person of Sadhu Ram. According to the doctor, who held the *post-mortem* examination, injuries 1, 3 and 4 were due to a heavy sharp-edged weapon and could be caused by a takwa. It was denied by the Prosecution that deceased was assaulted by any other person with a takwa. According to the Medical evidence, injuries 1, 3 and 4 individually, as well as collectively, were enough to cause death in the ordinary course of nature.

In the Court of Sessions the appellant along with others was charged under section 148 and section 302, read with section 149 of the Indian Penal Code. The Additional Sessions Judge, however, held that the charge of rioting was not proved. He accordingly found the appellant and

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three others guilty under section 302, read with section 34 of the Indian Penal Code. He acquitted the other three accused. There was an appeal by three convicted persons to the High Court and the High Court convicted the appellant alone under section 302 of the Indian Penal Code, confirming the sentence of death but altered the conviction of the other accused from section 302/34 to section 323, Indian Penal Code. It held that the provisions of section 34 of the Indian Penal Code did not apply.

On behalf of the appellant questions of law and questions of fact were urged. It will be unnecessary to deal with the questions of fact if the argument on points of law is accepted.

The principal question of law to be considered is as to whether the appellant could legally be convicted for murder and sentenced under section 302, Indian Penal Code, when he was not charged with that offence. It was urged that as the appellant had been acquitted of the charge of rioting and the offence under section 302/149 of the Indian Penal Code, he could not be convicted for the substantive offence of murder under section 302, Indian Penal Code, without a charge having been framed against him under that section. Reliance has been placed on the provisions of the Code of Criminal Procedure relating to the framing of charges, the observations of the Privy Council in "*Barendra Kumar Ghosh* v. *Emperor*" (1), and certain decisions of the Calcutta High Court to which reference will be made later on. It was urged that for every distinct offence of which a person is accused, there shall be a separate charge and every such charge shall be tried separately except in cases mentioned under sections 234, 235, 236, 237 and 239 of the Code of Criminal Procedure. Section 149 of the Indian Penal Code creates a specific offence and it is a separate offence from the offence of murder punishable under section 302 of the Indian Penal Code. The provisions of sections 236, 237 and 238 of the Code of Criminal Procedure did not apply to

(1) (1925) I.L.R. 52 Cal. 197

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the facts and circumstances of the present case. On behalf of the Prosecution, however, it was urged that section 149 did not create any offence at all and, therefore, no separate charge was obligatory under section 233, Criminal Procedure Code and that in any event the provisions of sections 236 and 237 of the Code of Criminal Procedure did apply and the appellant could have been convicted and sentenced under section 302 of the Indian Penal Code, although no charge for the substantive offence of murder had been framed against him.

It is necessary, therefore, to examine the provisions of section 149 of the Indian Penal Code and consider as to whether this section creates a specific offence, Section 149 of the Indian Penal Code is to be found in Chapter VIII of that Code which deals with offences against the public tranquility. Section 149, I.P.C., reads:

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence".

This section postulates that an offence is committed by a member of an unlawful assembly in prosecution of the common object of that assembly or such as a member of the assembly knew to be likely to be committed in prosecution of that object and declares that in such circumstances every person, who was a member of the same assembly at the time of the commission of the offence, was guilty of that offence. Under this section a person, who is a member of an unlawful assembly is made guilty of the offence committed by another member of the same assembly, in the circumstances mentioned in the section, although he had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. Without the

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provisions of this section a member of an unlawful assembly could not have been made liable for the offence committed not by him but by another member of that assembly. Therefore, when the accused are acquitted of riot and the charge for being members of an unlawful assembly fails, there can be no conviction of any one of them for an offence which he had not himself committed. Similarly under section 150 of the Indian Penal Code, a specific offence is created. Under this section a person need not be a member of an unlawful assembly and yet he would be guilty of being a member of an unlawful assembly and guilty of an offence which may be committed by a member of the unlawful assembly in the circumstances mentioned in the section. Sections 149 and 150 of the Indian Penal Code are not the only sections in that Code which create a specific offence. Section 471 of the Indian Penal Code makes it an offence to fraudulently or dishonestly use as genuine any document which a person knows or has reason to believe to be a forged document and it provides that such a person shall be punished in the same manner as if he had forged such document. Abetment is an offence under the Indian Penal Code and is a separate crime to the principal offence. The sentence to be inflicted may be the same as for the principal offence. In Chapter XI of the Indian Penal Code offences of false evidence and against public justice are mentioned. Section 193 prescribes the punishment for giving false evidence in any stage of a judicial proceeding or fabricating false evidence for the purpose of being used in any stage of a judicial proceeding. Section 195 creates an offence and the person convicted of this offence is liable in certain circumstances to be punished in the same manner as a person convicted of the principal offence. Sections 196 and 197 to 200, I.P.C., also create offences and a person convicted under any one of them would be liable to be punished in the same manner as if he had given false evidence.

It was, however, urged on behalf of the Prosecution that section 149 merely provides for

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constructive guilt similar to section 34 of the Indian Penal Code. Section 34 reads—

> 'When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone".

This section is merely explanatory. Several persons must be actuated by a common intention and when in furtherance of that common intention a criminal act is done by them, each of them is liable for that act as if the act had been done by him alone. This section does not create any specific offence. As was pointed out by Lord Sumner in "*Barendra Kumar Ghosh* v. *Emperor*" (1), "a criminal act' means that unity of criminal behaviour which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence". There is a clear distinction between the provisions of sections 34 and 149 of the Indian Penal Code and the two sections are not to be confused. The principal element in section 34 of the Indian Penal Code is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime, In such a situation section 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone. There is no question of common intention in section 149 of the Indian Penal Code. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful

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assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object every member of the unlawful assembly would be guilty of that offence, although there may have been no common intention and no participation by the other members in the actual commission of that offence. In "*Barendra Kumar Ghosh* v. *Emperor* (1)", Lord Sumner dealt with the argument that if section 34 of the Indian Penal Code bore the meaning adopted by the Calcutta High Court, then sections 114 and 149 of that Code would be *otiose*. In the opinion of Lord Sumner, however, section 149 is certainly not *otiose*, for in any case it created a specific offence. It postulated an assembly of five or more persons having a common object, as named in section 141 of the Indian Penal Code and then the commission of an offence by one member of it in prosecution of that object and he referred to "*Queen* v. *Sabid Ali and others* (2)". He pointed out that there was a difference between object and intention, for although the object may be common, the intentions of the several members of the unlawful assembly may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of section 34, was replaced in section 149 by membership of the assembly at the time of the committing of the offence. It was argued, however, that these observations of Lord Sumner were *obiter dicta*. Assuming though not conceding that that may be so, the observations of a Judge of such eminence must carry weight particularly if the observations are in keeping with the provisions of the Indian Penal Code. It is, however, to be remembered that the observations of Lord Sumner did directly arise on the argument made before the Privy Council, the Privy Council reviewing as a whole the provisions of sections 34, 114 and 149 of the Indian Penal Code.

On behalf of the appellant certain decisions of the Calcutta High Court were relied upon in support of the submission made, viz: '*Panchu Das* v.

(1) (1925) I.L.R. 52 Cal. 197
(2) (1873) XX Weekly Reporter (Cr.) p. 5

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Emperor' (1), *'Reazuddin and others* v. *King-Emperor'* (2), and *'Emperor* v. *Madan Mandal and others* (3)'. These decisions support the contention that it will be illegal to convict an accused of the substantive offence under a section without a charge being framed if he was acquitted of the offence under that section read with section 149 of the Indian Penal Code. On the other hand, the prosecution relied upon a decision of the Full Bench of the Madras High Court in "*Theethumalai Gounder and others* v. *King-Empeor* (4)" and the case "*Queen-Empress* v. *Bisheshar and others* (5)". The decision of the Madras High Court was given in April 1924, and reliance was placed upon the decision of the Allahabad High Court. The decision of the Privy Council in *Barendra Kumar Ghosh's case* was in October 1924. The Madras High Court, therefore, did not have before it the decision of the Privy Council. It is impossible to say what view might have been expressed by that court if the Privy Council's judgment in the aforesaid case had been available to the court. The view of the Calcutta High Court had been noticed and it appears that a decision of the Madras High Court in "*Taikkottathil Kunheen* (6)", was to the effect that section 149, I.P.C. is a distinct offence from section 325 of the Indian Penal Code. Because of this it was thought advisable to refer the matter to a Full Bench. Two questions were referred to the Full Bench: (1) When a charge omits section 149, Indian Penal Code, and the conviction is based on the provisions of that section, is that conviction necessarily bad, or does it depend on whether the accused has or has not been materially prejudiced by the omission? (2) When a charge has been framed under sections 326 and 149, Indian Penal Code, is a conviction under section 326, Indian Penal Code, necessarily bad, or does this also depend on whether the accused has or has not been materially prejudiced by the form

(1) (1907) I.L.R. 34 Cal. 698
(2) (1901) 6 C.W.N. 98
(3) (1914) I.L.R. 41 Cal. 562
(4) (1924) I.L.R, 47 Mad. 746
(5) (1887) I.L.R. 9 Allah. 645
(6) (1923) 18 L.W. 946.

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of the charge? The Full Bench agreed with the view expressed by Sir John Edge in the Allahabad case that section 149 created no offence, but was, like section 34, merely declaratory of a principle of the common law, and its object was to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand which inflicted the grievous hurt. It was observed by Spencer, J., that a person could not be tried and sentenced under section 149 alone, as no punishment is provided by the section. Therefore, the omission of section 149 from a charge does not create an illegality, by reason of section 233 of the Criminal Procedure Code which provides that for every distinct offence of which any person is accused there shall be a separate charge. They did not agree with the general statement in *Reazuddin's case* (1), that it is settled law that when a person is charged by implication under section 149, he cannot be convicted of the substantive offence.

A charge for a substantive offence under section 302, or section 325, I.P.C., etc., is for a distinct and separate offence from that under section 302, read with section 149 or section 325, read with section 149, etc., and to that extent the Madras view is incorrect. It was urged by reference to section 40, I.P.C., that section 149 cannot be regarded as creating an offence because it does not itself provide for a punishment. Section 149 creates an offence but the punishment must depend on the offence of which the offender is by that section made guilty. Therefore, the appropriate punishment section must be read with it. It was neither desirable nor possible to prescribe one uniform punishment for all cases which may fall within it. The finding that all the members of an unlawful assembly are guilty of the offence committed by one of them in the prosecution of the common object at once subjects all the members to the punishment prescribed for that offence and the relative sentence. Reliance was also placed upon the decision of the Patna High Court in "*Ramasray Ahir* v. *King-Emperor*" (2) as well as the decision

(1) (1901) 6 C.W.N. 98
(2) (1928) I.L.R. 7 Patna 484.

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of the Allahabad High Court in *Sheo Ram and others* v. *Emperor*" (1). In the former case the decision of the Privy Council in *Barendra Kumar Ghosh's case* was not considered and the decision followed the Full Bench of the Madras High Court and the opinion of Sir John Edge. In the latter case the Allahabad High Court definitely declined to answer the question as to whether the accused charged with an offence read with section 149, Indian Penal Code, or with an offence read with section 34, Indian Penal Code, could be convicted of the substantive offence only.

After an examination of the cases referred to on behalf of the appellant and the Prosecution we are of the opinion that the view taken by the Calcutta High Court is the correct view, namely, that a person charged with an offence read with section 149 cannot be convicted of the substantive offence without a specific charge being framed as required by section 233 of the Code of Criminal Procedure.

It was urged that in view of the decision of this Court in *Karnail Singh and another* v. *State of Punjab* (2), a conviction under section 302, read with section 149, could be converted into a conviction under section 302/34 which the trial Court did. There could be no valid objection, therefore, to converting a conviction under section 302/34 into one under section 302 which the High Court did. This argument is unacceptable. The High Court clearly found that section 34 was not applicable to the facts of the case and acquitted the other accused under section 302/34, that is to say, the other accused were wrongly convicted by the trial court in that way but the appellant should have been convicted under section 302. The High Court could not do what the trial court itself could not do, namely, convict under section 302, as no separate charge had been framed under that section.

(1) A.I.R. 1948 Allah. 162.
(2) 1954 S.C.R. 904.

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It was urged by the Prosecution that under the provisions of section 236 and section 237 of the Code of Criminal Procedure a person could be convicted of an offence which he is shown to have commited although he was not charged with it. Section 237 of the Code of Criminal Procedure is entirely dependent on the provisions of section 236 of that Code. The provisions of section 236 can apply only in cases where there is no doubt about the facts which can be proved but a doubt arises as to which of several offences have been committed on the proved facts in which case any number of charges can be framed and tried or alternative charges can be framed. In these circumstances if there had been an omission to frame a charge, then under section 237, a conviction could be arrived at on the evidence although no charge had been framed. In the present case there is no doubt about the facts and if the allegations against the appellant that he had caused the injuries to the deceased with *takwa* was established by evidence, then there could be no doubt that the offence of murder had been committed. There was no room for the application of section 236 of the Criminal Procedure Code.

It had been argued on behalf of the Prosecution that no finding or sentence pronounced shall be deemed invalid merely on the ground that no charge was framed. Reliance was placed on the provisions of section 535 of the Code of Criminal Procedure. Reference was also made to the provisions of section 537 of that Code. Section 535 does permit a court of appeal or revision to set aside the finding or sentence if in its opinion the non-framing of a charge has resulted in a failure of justice. Section 537 also permits a court of appeal or revision to set aside a finding or sentence, if any error, omission or irregularity in the charge has, in fact, occasioned a failure of justice. The explanation to the section no doubt directs that the court shall have regard to the fact that the objection could and should have been raised at an earlier stage in the proceedings. In the present case, however, there is no question

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of any error, omission or irregularity in the charge because no charge under section 302 I.P.C., was in fact framed. Section 232 of the Code of Criminal Procedure permits an appellate court or a court of revision, if satisfied that any person convicted of an offence was misled in his defence in the absence of a charge or by an error in the charge, to direct a new trial to be had upon a charge framed in whatever manner it thinks fit. In the present case we are of the opinion that there was an illegality and not an irregularity curable by the provisions of sections 535 and 537 of the Code of Criminal Procedure. Assuming, however, for a moment that there was merely an irregularity which was curable, we are satisfied that, in the circumstances of the present case, the irregularity is not curable because the appellant was misled in his defence by the absence of a charge under section 302 of the Indian Penal Code.

By framing a charge under section 302, read with section 149, I.P.C., against the appellant, the Court indicated that it was not charging the appellant with the offence of murder and to convict him for murder and sentence him under section 302, I.P.C., was to convict him of an offence with which he had not been charged. In defending himself the appellant was not called upon to meet such a charge and in his defence he may well have considered it unnecessary to concentrate on that part of the prosecution case. Attention has been drawn to the medical evidence. With reference to injury No. 1 the doctor stated that the wounds were not very clean-cut. It is further pointed out that the other incised injuries on the head were bone-deep. The bone, however, had not been cut. Injuries on the head although inflicted by a blunt weapon may sometimes assume the characteristics of an incised wound. Reference was made to Glaister on Medical Jurisprudence, 9th Ed., at page 241, where it is stated that under certain circumstances, and in certain situations on the body, wounds produced by a blunt instrument may stimulate the appearance of an incised wound. These wounds are usually found over the bone which is thinly covered with

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tissue, in the regions of the head, forehead, eyebrow, cheek, and lower jaw, among others. It is also pointed that Vas Dev P.W. 2 had admitted that Mitu took away the takwa from the appellant after Sadhu Ram had been dragged out of the shop but no takwa blow was given outside the shop. Parkash Chand P.W. 4, another eye-witness, also admitted that Mitu had taken the takwa from the appellant when they had come out of the shop. It was urged that if a specific charge for murder had been framed against the appellant, he would have questioned the doctor more closely about the incised injuries on the head of the deceased, as well as the prosecution witnesses. It is difficult to hold in the circumstances of the present case that the appellant was not prejudiced by the non-framing of a charge under section 302, Indian Penal Code.

Having regard to the view expressed on the question of law, it is unnecessary to refer to the arguments on the facts.

The appeal is accordingly allowed and the conviction and the sentence of the appellant is set aside and the case of the appellant is remanded to the court of Sessions at Jullundur for retrial after framing a charge under section 302 of the Indian Penal Code and in accordance with law.

SUPREME COURT

Before Sudhi Ranjan Das, N. H. Bhagwati, and Syed Jafer Imam, JJ.

MAHANT SALIG RAM,—*Appellant.*

versus

MUSSAMMAT *MAYA DEVI,—Respondent.*

Civil Appeal No. 118 of 1953

1955

January 21st

Custom—Gurdaspur District—Succession to self-acquired property—Whether daughter excluded by collaterals within the fourth degree—General Custom of the Punjab stated—Onus to prove custom in variance with the general custom—On whom lies—Riwaj-i-Am—Evidentiary value of—Riwaj-i-Am of Gurdaspur District compiled in 1913—Whether a reliable or trustworthy document.

Held, that in the Gurdaspur district the custom governing the succession to self-acquired property is the same as the general custom in the Punjab that a daughter excludes the collaterals from succession to the self-acquired property of her father. The initial onus, therefore, is on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a special local custom excluding the daughter which is binding on the parties.

Held, that the entries in the Riwaj-i-Am are entitled to an initial presumption in favour of their correctness irrespective of the question whether or not the custom, as recorded, is in accord with the general custom, the quantum of evidence necessary to rebut that presumption will, however, vary with the facts and circumstances of each case. Where, for instance, the *Riwaj-i-Am* lays down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace that presumption; but where, on the other hand, the custom as recorded in the *Riwaj-i-am* is opposed to the custom generally prevalent, the presumption will be considerably weakened. Likewise, where the *Riwaj-i-am* affects adversely the rights of the females who had no opportunity whatever of appearing before the Revenue authorities, the presumption will be weaker still and only a few instances would be sufficient to rebut it.

Held, that the *Riwaj-i-am* of the Gurdaspur District compiled by Mr. Kennaway in 1913 is not a reliable or trustworthy document as the truth of the statements recorded therein has been doubted by the compiler himself in the preface and the statements stand contradicted by the instances collected and set out in Appendix 'C' of the same *Riwaj-i-Am*.

On Appeal from the Judgment and Decree dated the 28th July 1949 of the High Court of Judicature for the State of Punjab at Simla in Civil Regular First Appeal No. 365 of 1946 arising out of the Decree dated the 31st day of October 1946 of the Court of the Sub-Judge 1st Class, Pathankot, in Suit No. 110 of 1945.

For the Appellant : Mr. Rajinder Narain, Advocate.

For the Respondent : Mr. K. L. Gosain, Senior Advocate, (Messrs. R. S. Narula and Naunit Lal, Advocates, with him).

JUDGMENT

Das, J.

The Judgment of the Court was delivered by—

DAS, J. This is an appeal by the plaintiff in a suit for a declaration of his title as collateral within four degrees of Gurdial, who was a Sarswat

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Brahmin, resident of Pathankot in the district of Gurdaspur and the last male holder of the properties in suit.

Gurdial died many years ago leaving certain lands in villages Bhadroya, Kingarian and Pathankot, Tehsil Pathankot in the district of Gurdaspur, and leaving him surviving his widow Musammat Melo and a daughter Musammat Maya Devi, the respondent before us. Some time in the year 1926, a portion of the land in village Bhadroya was acquired for the Kangra Valley Railway and a sum of Rs. 1,539-7-0 was awarded to Musammat Melo. On an objection by the appellant this amount was deposited in the Court of the Senior Subordinate Judge, Gurdaspur, with a direction to pay the interest on this amount to Musammat Melo.

On the 28th September 1944 Musammat Melo died and the Revenue Courts ordered mutations in respect of the lands in the three villages in favour of the respondent as the daughter of Gurdial.

On the 10th March 1945, the appellant filed the suit out of which this appeal arises against the respondent for a declaration that he was entitled to the lands mentioned in the plaint as well as to the sum of Rs. 1,539-7-0 in preference to the respondent under the custom governing the parties whereunder the collaterals of the last male holder excluded the daughter.

The respondent contested the suit mainly on the grounds—

(i) that the suit for a mere declaration was not maintainable,

(ii) that the parties were governed by Hindu Law and not by custom,

(iii) that the appellant was not a collateral of Gurdial at all,

(iv) that the properties in suit were not ancestral, and

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(v) that there was no custom whereunder the collaterals of the father who was the last male holder excluded the daughter from succession to the self-acquired property of her father.

The Subordinate Judge in his judgment pronounced on the 31st October 1946, held—

(i) that the lands in suit being in possession of tenants, the suit for a declaration of title thereto was maintainable but the suit for a declaration in respect of the sum of Rs. 1,539-7-0 was not maintainable in view of the provisions of the Indian Succession Act relating to succession certificates,

(ii) that the parties were governed by custom and not by Hindu Law,

(iii) that the appellant was a collateral of Gurdial within four degrees,

(iv) that the land in Khata No. 2 of village Kingarian was ancestral while the rest of the lands in suit were non-ancestral and

(v) that there was a custom according to which a daughter was excluded from inheritance by the collaterals up to the fourth degree with respect to ancestral as well as self-acquired property of the last male-holder as laid down in the case of *Buta Singh* v. *Mt. Harnamon* (1).

In the result, the Subordinate Judge decreed the suit in respect only of the lands in suit and ordered the parties to bear their own costs.

Against this judgment and decree the respondent preferred an appeal to the Lahore High Court. The appellant preferred cross-objections against the order as to costs and against the finding that the lands in the three villages except the land in

(1) A.I.R. 1946 Lah. 306.

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Khata No. 2 of vilage Kingarian were non-ancestral. After the partition of India the appeal was transferred to the High Court of East Punjab.

By its judgment dated the 28th July 1949 the East Punjab High Court allowed the appeal and dismissed the cross-objections on the following findings:—

(i) that the suit for declaration of title to the lands was maintainable as all the lands in suit were in the possession of tenants,

(ii) that the lands in suit except the land in Khata No. 2 of village Kingarian were non-ancestral, and

(iii) that according to the custom prevailing in the Gurdaspur District a daughter was entitled to succeed to non-ancestral property in preference to collaterals even though they were within the fourth degree.

The High Court accordingly modified the decree of the Subordinate Judge to the extent that the declaration in the appellant's favour was made to relate only to the land in Khata No. 2 of village Kingarian which was held to be ancestral. On an application made by the appellant on the 26th August 1949, the High Court, by its order, dated the 5th June 1950, granted him a certificate of fitness to appeal to the Federal Court. After the commencement of the Constitution of India the appeal has come before this Court for final disposal.

The first question raised before us but not very seriously pressed is as to whether the lands in suit other than those in Khata No. 2 in village Kingarian were ancestral or self-acquired. Our attention has not been drawn to any material on the record which induces us to take a view different from the view concurrently taken by the Courts below. We, therefore, see no force or substance in this contention.

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The main fight before us has been on the question as to whether there is a custom in the Gurdaspur District governing the parties under which a collateral within the fourth degree excludes the daughter of the last male holder from succession to the self-acquired property of her father. The customary rights of succession of daughters as against the collaterals of the father with reference to ancestral and non-ancestral lands are stated in paragraph 23 of Rattigan's Digest of Customary Law. It is categorically stated in sub-paragraph (2) of that paragraph that the daughter succeeds to the self-acquired property of the father in preference to the collaterals even though they are within the fourth degree. Rattigan's work has been accepted by the Privy Council as "a book of unquestioned authority in the Punjab". Indeed, the correctness of this paragraph was not disputed before this Court in *Gopal Singh* v. *Ujagar Singh* (1). The general custom of the Punjab being that a daughter excludes the collaterals from succession to the self-acquired property of her father the initial onus, therefore, must, on principle, be on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a special local custom excluding the daughter which is binding on the parties. Indeed, it has been so held by the Judicial Committee in *Mst. Subhani* v. *Nawab* (2), and the matter is now well settled.

The appellant claims to have discharged this initial onus in two ways, namely (i) by producing the Riwaj-i-am of the Gurdaspur District prepared by Mr. Kennaway in 1913 and (2) by adducing evidence showing that the collaterals of one Harnam Singh, who was also a Sarswat Brahmin of the Gurdaspur District and indeed a member of this very family of Gurdial succeeded in preference to his daughter. It is pointed out that no instance has been proved on the part of the respondent

(1) (1954) 17 S.C.J. 562
(2) I.L.R. 1940 Lah. 154

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showing that the daughter ever excluded the collaterals from succession to the self-acquired property of the father. The trial Court as well as the High Court took the view that the evidence as to the succession to the property of Harnam Singh was of no assistance to the appellant for the reason that the evidence was extremely sketchy, that it did not appear whether the properties left by Harnam Singh were ancestral or self-acquired or whether the properties left by him were of any substantial value at all as would have made it worthwhile for the daughter to claim the same in addition to the properties gifted to her by her father during his lifetime. Further, the fact that the daughter did not contest the succession of the collaterals to the properties left by Harnam Singh, even if they were self-acquired, might well have been the result, as held by the High Court, of some family arrangement. We find ourselves in agreement with the Courts below that the instance relied upon by the appellant is wholly insufficient to discharge the onus that was on him to displace the general custom recorded in paragraph 23(2) of Rattigan's Digest of Customary Law.

The appellant contends that in any case he has fully discharged the onus that was on him by producing in evidence the Riwaj-i-am recording the custom of the district of Gurdaspur which was compiled by Mr. Kennaway in 1913. Reference is also made to the earlier Riwaj-i-ams of the Gurdaspur District prepared in 1865 and 1893. Answer to question 16 as recorded in the Riwaj-i-am of 1913 shows that subject to certain exceptions, which are not material for our purpose, the general rule is that the daughters are excluded by the widow and male kindred of the deceased, however remote. This answer goes much beyond the answers to the same question as recorded in the Riwaj-i-ams of 1865 and 1893 for those answers limit the exclusion in favour of the male kindred up to certain specified degrees. The answer to question 17

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of the 1913 Riwaj-i-am like those to question 17 of the 1865 and 1893 Riwaj-i-ams clearly indicates that except amongst the Gujjars of the Shakargarh tehsil all the remaining tribes consulted by the Revenue authorities recognised no distinction as to the rights of the daughters to inherit (i) the immovable or ancestral, and (ii) the movable or self-acquired property of their respective fathers. It is claimed that these answers quite adequately displace the general custom and shift the onus to the respondent to disprove the presumption arising on these Riwaj-i-ams by citing instances of succession contrary to these answers. In support of this contention reference is made to the observations of the Privy Council in *Beg* v. *Allah Ditta* (1), that the statements contained in a Riwaj-i-am form a strong piece of evidence in support of the custom therein entered subject to rebuttal. Reliance is also placed on the observations of the Privy Council in *Mt. Vaishno Ditti* v. *Mt. Rameshri* (2), to the effect that the statements in the Riwaj-i-am might be accepted even if unsupported by instances. The contention is that on production by the appellant of the Riwaj-i-am of the Gurdaspur District the onus shifted to the respondent to prove instances rebutting the statements contained therein. This, it is urged, the respondent has failed to do.

There is no doubt or dispute as to the value of the entries in the Riwaj-i-am. It is well settled that though they are entitled to an initial presumption in favour of their correctness irrespective of the question whether or not the custom, as recorded, is in accord with the general custom, the quantum of evidence necessary to rebut that presumption will, however, vary with the facts and circumstances of each case. Where, for instance, the Riwaj-i-am lays down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace that presumption; but where, on the other hand, the custom as recorded in the Riwaj-i-am is opposed to the custom generally prevalent, the

(1) L.R. 44 I.A. 89: A.I.R. 1916 P.C. 129
(2) I.L.R. 10 Lah. 186: L.R. 55 I.A. 407. A.I.R. 1928 P.C. 294

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presumption will be considerably weakened. Likewise, where the Riwaj-i-am affects adversely the rights of the females who had no opportunity whatever of appearing before the Revenue authorities, the presumption will be weaker still and only a few instances would be sufficient to rebut it. (See *Khan Beg* v. *Mt. Fateh Khatun* (1), *Jagat Singh* v. *Mst. Jiwan* (2). The principles laid down in these cases were approved of by the Judicial Committee in *Mst. Subhani's* case *supra.*

Learned counsel appearing for the appellant contends that even if the presumption as to the correctness of the Riwaj-i-am be weak, the respondent has not cited a single instance of a daughter having excluded the collaterals from succession to the self-acquired property of her father and has, therefore, failed to discharge the onus that was thrown on her as a result of the production by the appellant of the Riwaj-i-am of 1913 and, consequently, the appellant must succeed. This argument overlooks the fact that in order to enable the appellant to displace the general custom recorded in Rattigan's work and to shift the onus to the respondent the appellant must produce a Riwaj-i-am which is a reliable and trustworthy document. It has been held in *Qamar-ud-Din* v. *Mt. Fateh Bano* (3) that if the Riwaj-i-am produced is a reliable and a trustworthy document, has been carefully prepared and does not contain within its four corners contradictory statements of custom and in the opinion of the Settlement Officer is not a record of the wishes of the persons appearing before him as to what the custom should be, it would be a presumptive piece of evidence in proof of the special custom set up, which if left unrebutted by the daughters would lead to a result favourable to the collaterals. If, on the other hand, it is not a document of the kind indicated above then such a Riwaj-i-am will have no value at all as a presumptive piece of evidence. This principle has been followed by the East Punjab High Court in the

(1) I.L.R. 13 Lah. 276 at pp. 296-297
(2) A.I.R. 1935 Lah. 617
(3) I.L.R. 26 Lah. 110: A.I.R. 1944 Lah. 72

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later case of *Mohammad Khalil* v. *Mohammad Bakhsh* (1). This being the position in law, we have to scrutinise and ascertain whether the Riwaj-i-ams of the Gurdaspur District in so far as they purport to record the local custom as to the right of succession of daughters to the self-acquired properties of their respective fathers are reliable and trustworthy documents.

Twenty-two tribes including Brahmins were consulted by Mr. Kennaway who prepared the Riwaj-i-am of 1913. In paragraph 4 of the Preface Mr. Kennaway himself states that many of the questions related to matters on which there really existed no custom and the people had merely stated what the custom should be and not what it actually was. In Appendix 'C' are collected 56 instances of mutations in which the daughter inherited. In these there are four instances relating to Brahmins. Answer to question 16, as recorded in this Riwaj-i-Am, has been discredited and shown to be incorrect in at least three cases, namely, *Gurdit Singh* v. *Mt. Malan* (2), *Kesar Singh* v. *Achhar Singh* (3), and *Buta Singh* v. *Mst.Harnamo* (4). The answer to question 16 as recorded in the 1913 Riwaj-i-Am, it was pointed out, went much beyond the answer given to the same question in the Riwaj-i-Ams of 1865 and 1893. The answer to question 17 of the 1913 Riwaj-i-Am that no distinction is to be made between ancestral and self-acquired property has not been accepted as correct in not less than six cases, namely, *Bawa Singh* v. *Mt. Partap Kaur* (5), *Jagat Singh* v. *Mt. Jiwan* (6), *Kesar Singh* v. *Gurnam Singh* (7), *Najju* v. *Mt. Aimna Bibi* (8), *Gurdit Singh* v. *Mt. Man Kaur* (9), and *Labh* v. *Mt. Fateh Bibi* (10). The statements in a Riwaj-i-Am, the truth of which is doubted by the compiler himself in the preface and which

(1) A.I.R. 1949 E.P. 252
(2) I.L.R. 5 Lah. 364
(3) A.I.R. 1936 Lah. 68
(4) A.I.R. 1946 Lah. 306
(5) A.I.R. 1935 Lah. 288
(6) A.I.R. 1935 Lah. 617
(7) A.I.R. 1935 Lah. 696
(8) A.I.R. 1936 Lah. 493
(9) A.I.R. 1937 Lah. 90
(10) A.I.R. 1940 Lah. 436

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stand contradicted by the instances collected and set in Appendix 'C' of the same Riwaj-i-Am and which have been discredited in judicial proceedings and held to be incorrect cannot, in our opinion, be regarded as a reliable or trustworthy document and cannot displace the initial presumption of the general custom recorded in Rattigan's book so as to shift the onus to the daughter who is the respondent.

The appellant relies on the cases of *Ramzan Shah* v. *Sohna Shah* (1), *Nanak Chand* v. *Basheshar Nath* (2), *Mt. Massan* v. *Sawan Mal* (3), *and Kesar Singh v. Achhar Singh* (4). The first three cases are of no assistance to him although the second and third relate to Brahmins of Gurdaspur, for the properties in dispute in those cases were ancestral and the respondent does not now dispute the appellant's right to succeed to her father's ancestral properties. These cases, therefore, do not throw any light on the present case which is concerned with the question of succession to self-acquired property. Further, in the last case, the collaterals were beyond the fourth degree and it was enough for the Court to say that irrespective of whether the properties in dispute were ancestral or self-acquired the collaterals in that case could not succeed. It is also to be noted that the earlier decisions were not cited or considered in that case.

In our opinion the appellant has failed to discharge the onus that was initially on him and that being the position no burden was cast on the respondent which she need have discharged by adducing evidence of particular instances. In these circumstances, the general custom recorded in Rattigan's book must prevail and the decision of the High Court must be upheld. We accordingly dismiss this appeal with costs.

(1) 60 P.R. 1889
(2) 3 P.R. 1908
(3) A.I.R. 1935 Lah. 453
(4) A.I.R. 1936 Lah. 68.

THE INDIAN LAW REPORTS

PUNJAB SERIES

CRIMINAL WRIT.

Before Bhandari, C.J. and Khosla, J.

S. AMRAO SINGH,—*Petitioner.*

versus

THE STATE,—*Respondent.*

Criminal Writ No. 43 of 1951.

1951

December, 20th

Criminal Procedure Code (V of 1898), Section 144—Constitution of India, Articles 19, 25 and 31—Section 144 of the Criminal Procedure Code, whether ultra vires *the Constitution, Articles 19, 25 and 31—Constitution (First Amendment) Act, 1951—Subsection (2) of Section 3—Effect of.*

Interpretation of statutes—Part of the section ultra vires *and part* intra vires*—Rule of construction—Constitution of India, Article 13—Effect of.*

Held, that after the Constitution (First Amendment) Act, 1951, all laws relating to maintenance of public order are to be considered *intra vires* the Constitution. In so far as section 144, Criminal Procedure Code, empowers the District Magistrate to issue orders in the interest of public order the section is good law and *intra vires* the Constitution.

Held, also that it is not open to law courts to paraphrase an expression used in the statute when invoking the provisions of Article 13 of the Constitution. But if phrases are used in the alternative and these phrases are mutually