

*Present:* Jayewardene A.J.

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WICKREMESINGHE *v.* FERNANDO.

189—*P. C. Colombo, 37,517.*

*Police Information Book—Reference by Magistrate—Credibility of witness—Criminal Procedure Code, s. 122 (3).*

Where a Magistrate referred to the Police Information Book for the purpose of testing the credibility of a witness by comparing his evidence with a statement by him to the Police,—

*Held,* that the use of the Police Information Book was irregular.

**A** PPEAL from a conviction by the Police Magistrate of Colombo.

*Hayley, K.C. (with De Jong), for appellant.*

June 8, 1928. JAYEWARDENE A.J.—

The accused has been convicted of causing grievous hurt to one Simon Fernando and sentenced to one month's rigorous imprisonment.

After a witness, Siadoris Fernando, was examined for the prosecution, the learned Magistrate made the following record:—" I receive a strong impression that the witness is an adverse witness to the prosecution. I call for the Police record, and compare evidence given in Court with the witness's evidence given to the Police."

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Counsel for the appellant contends that the Magistrate has made a wrong use of the Police Information Book, and that the conviction is therefore bad.

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The Indian Code of Criminal Procedure 5 of 1898, section 172 (2), provides that any Criminal Court may send for the Police Diaries and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

Our Code has taken over this section, but has made an addition that a statement made to a Police Officer or Inquirer may be used to prove that a witness made a different statement at a different time (section 122 (3) ); it is specially provided, however, that in such a case the attention of the witness must be drawn to that part of his statement which is used to contradict him.

Both sections provide that the Police Officer who made the record may use it for the purpose of refreshing his memory, subject to the safeguards provided in sections 145 and 161 of the Evidence Act.

In *R. v. Mannu*<sup>1</sup> the Full Bench of the Allahabad High Court laid down the rules in regard to the use of Police Information Books. Edge C.J. condemned the practice of the use of statements of a witness without the witness being questioned as to the truth or otherwise of the statements and without affording to the prosecution or to the accused, as the case may be, an opportunity of explaining or contradicting such statements. The Chief Justice remarked that such a use of a Police Diary by a Court is entirely illegal.

It was held that the attention of the witness must be called to the portion of the writing by which it is intended to contradict him before proof of the written statement can be given.

In *Dal Sing v. The King*<sup>2</sup> the Privy Council held that the Judges in the Court of Appeal in India (Central Province) were wrong in testing the testimony of witnesses by reading the earlier statements of those witnesses made to the Police and entered in the Police Diary. Their Lordships said: "In other words, they treated what was thus entered as evidence which could be used at all events for the purpose of discrediting these witnesses. In their Lordships' opinion this was plainly wrong. It was inconsistent with the provisions of section 172 of the Criminal Procedure Code."

In *Hamid v. Karthan*,<sup>3</sup> where the information book was used for the purpose of corroborating certain portions of the evidence, Wood Renton C.J. thought that such a use was a violation of the provisions of section 122 (3) of the Criminal Procedure Code.

<sup>1</sup> (1897) I. L. R. 19 All. 390.<sup>2</sup> (1917) 116 L. T. 621.<sup>3</sup> (1917) 4 C. W. R. 363

In *Dias v. Kiriwanta*<sup>1</sup> it was held that statements made by witnesses under chapter XII. cannot be used as substantive evidence, and in *King v. Cooray*<sup>2</sup> Garvin A.C.J. observed that a Criminal Court may use statements recorded in an information book, not as evidence, but to aid it in such inquiry or trial.

The Privy Council adopted the rule laid down in the Allahabad case<sup>3</sup> that the diary may be used "to assist the Court which tries the case by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of doing justice between the Crown and the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact, or statement contained in the diary." These principles have been followed in many cases in India.<sup>4</sup>

It has been held that facts and statements written in the Police Diaries cannot be used as materials to help the Court to come to a finding on the evidence, and that what the Court should do with the Police Diaries is to discover out of them any matter of importance bearing upon the case and then call for the necessary evidence to have the matter legally proved.<sup>5</sup> It has also been said that it required the utmost discrimination and discretion to make a proper use of such (Police) records, and while they may fairly be appealed to for the history of the several stages through which the Police investigation into a crime has passed, they afford no safe or certain material from which conclusions of guilt can be drawn<sup>6</sup>

Applying these tests to the present case, the learned Magistrate was wrong in calling for the Police record and comparing the evidence given in Court by the witness Siadoris Fernando with his evidence given to the Police.

The case is not without doubt. I therefore set aside the conviction and acquit the accused.

*Set aside.*

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<sup>1</sup> (1918) 5 C. W. R. 187.

<sup>2</sup> (1928) 28 N. L. R. 74, p. 83

<sup>3</sup> (1897) I. L. R. 19 All. 390.

<sup>4</sup> *Sohoni's Ind. Crim. Pro. Code, 12th ed.*  
p. 352.

<sup>5</sup> 10 C. W. R. 600.

<sup>6</sup> I Leg. Rem. 26 (Sohoni 353).