(1960) 08 CAL CK 0024

Calcutta High Court

Case No: Criminal Appeals No''s. 750 of 1959 and 96 of 1960

Arju alias Jogeswar Kumar	APPELLANT
Vs	
The State	RESPONDENT

Date of Decision: Aug. 5, 1960

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 157, 159, 164, 164(1), 164(2)
- Evidence Act, 1872 - Section 104, 145, 157, 9
- Penal Code, 1860 (IPC) - Section 395, 412

Citation: (1961) 2 ILR (Cal) 281

Hon'ble Judges: Das Gupta, J; D. Mookerjee, J

Bench: Division Bench

Advocate: Ajit Kumar Dutta and Prasun Chandra Ghosh, for the Appellant;Harideb Chatterjee, for the Respondent

Final Decision: Dismissed

Judgement

Debarata Mookerjee, J.

On the jury''s unanimous verdict Sarju alias Jagneswar Kumar, Sadhu alias Deodhari Goala, Tilakdhari Dosad alias Pasman alias Palwan and Yasin Khan have been convicted of dacoity u/s 395 of the Indian Penal Code. By reason of a previous conviction Tilakdhari has been sentenced to seven years'' rigorous imprisonment and the rest to five years'' rigorous imprisonment each. Of these four convicted men Sarju and Sadhu have been represented by Counsel; Tilakdhari has preferred an appeal from jail; Yasin Khan has submitted to the sentence.

2. The case for the prosecution, is that on January 9, 1959, at about 7 p.m. these Appellants with several others raided the house of one Shewnath Pandey within police-station Asansole. As soon as the miscreants appeared Shewnath''s servant, Ram Janam Gope (P.W. 5) gave an alarm; Shewnath himself bolted the front door leading to the house and went up with his servant on the roof of a ground floor

room, but Shewnath''s wife and son stayed on m the ground floor. The door was broken open and the miscreants armed with spears and lathis entered the courtyard. Crackers were thrown towards the roof. An iron safe was broken open in one of the rooms; trunks and suit eases containing clothes, ornaments and cash to the tune of about Rs. 2,500 were removed, Shewnath and Ram Janam recognised the Appellants and their co-accused when they were in the courtyard in the light of a burning hurricane lantern which was tied to a post.

3. After a short while the miscreants left and neighbours appeared on the scene.

4. Meanwhile an information had been given to the police by One Birendra Nath Bhaduri who sent a telephonic message on hearing the explosion of crackers coming from the direction of Shewnath''s house. The police arrived and took a detailed statement from Shewnath. In consequence of the information the police commenced investigation; the Appellants and the said Yasin were arrested and two dhotis said to belong to Shewnath were recovered on search. A test identification parade was held and then a charge sheet was submitted against them.

5. After a preliminary enquiry the Appellants were committed to take their trial before the court of Sessions. As we have indicated all were charged with haying committed dacoity; there was an additional charge against Sarju u/s 412 of the Indian Penal Code.

6. The Appellants pleaded not guilty and the defence was that they had been falsely implicated. Tilakdhari stated that he had been pointed out to the witnesses by the investigating officer at the police station. He claimed to have brought the matter to the notice of the Magistrate who held the test identification parade. Sarju denied that the dhotis had been found in his possession and alleged that he had been severely assaulted by the Police who had pointed him, out to the identifying witnesses. The Appellant Sadhu stated that he bore a cut mark on his forehead which made his identification easy and the police officer concerned had pointed out that special mark to the witnesses so that they might be enabled to identify him without difficulty.

7. The jury obviously believed the prosecution case, discounted. the defence and found the Appellants guilty.

8. On behalf of the Appellants Sarju, and Sadhu the learned. Judge''s summing up has been assailed on several grounds. It would be necessary to notice the criticisms. It is said that the verdict was vitiated by reasons of the fact that the learned Judge allowed evidence of the detailed information of the occurrence lodged by Shewnath to the police after investigation had already commenced. It is to be recalled that when the dacoity was in progress or immediately after it a telephonic communication was sent by one Birendra Nath Bhaduri on receipt of which the police arrived. That obviously was an information relating to a cognizable offence. It appears that after the police arrived a detailed statement was obtained from

Shewnath which was treated as the first information report. The learned Judge; realised the impropriety at a later stage of the proceedings when he withdrew Shewnath''s statement from the jury''s consideration. Obviously the question of its admissibility was debated before him and after hearing the parties he directed Birendra''s information to be treated as the first information and the information which Shewnath subsequently lodged, to be dealt with merely on the footing of a statement to the police during investigation. The learned Judge noted in his order sheet that Shewnath''s information should be treated as expunged and that it should not go to the jury as evidence.

9. This was done quite properly and we do not think there is any substance in this criticism that the verdict of the jury has been vitiated by reason merely of the fact that the jury was allowed to hear at the initial stage of the case a statement which was not admissible in law. There is nothing in the summing up which will justify the apprehension that in spite of the caution which the learned Judge gave, the jury still considered Shewnath''s statement to the police and allowed their verdict to he influenced by it.

10. A sketch map was prepared along with an index attached to by the investigating police officer. The document was placed before the jury in order that they might appreciate the evidence relative to the topography of the place. It was said that the index attached to the map contained statements which were inadmissible and should not on that account have been allowed to go to the jury. The obvious suggestion was that the index contained statements made to the police by witnesses during investigation. We have examined the index ourselves and are quite satisfied that this objection is wholly groundless. Nothing is contained in it which was not the result of the investigating officer''s own observation. It does not contain any statement of any kind which might be said to have been made to him in the course of investigation.

According to the evidence the police officer arrived on the scene soon after the miscreants had left but the alamats including a hurricane lantern, which was kept tied to a pole in the courtyard in the light of which Shewnath and his servant Ram Janam claimed to have been able to recognise the miscreants, were not seized until the following morning. The police officer gave an explanation of the delayed seizure of the alamats. The learned Judge drew the jury''s attention to the circumstance; but it is said that he failed to tell the jury to consider the import of this delay on the question of recognition of the Appellants. The criticism is that the seizure not having been made soon after the police arrived on the scene, the prosecution case of there being a burning lantern in the court-yard was rendered doubtful and even suspicious and accordingly it became the Judge''s duty to draw the jury''s attention to this question. The learned Judge did in fact ask the jury''s attention to this aspect of the matter. Although he might not have said in so many words that the delayed seizure of the hurricane lantern might have the effect of rendering the story of

recognition suspicious, their attention was drawn to the fact that the lantern in the courtyard was seized the next morning. The Judge also drew the jury''s attention to the precarious nature of the light in which Shewnath and Ram Janam were said to have been able to recognise the Appellants. We find nothing wrong in this part, of the summing up.

11. A complaint is made that no specific directions were given by the Judge as respects the fact that Sarju and Sadhu were pointed out to the identifying witnesses by the police. The learned Judge did deal with this aspect of the matter and he advised the jury to consider whether they were prepared to accept the evidence of identification, such as it was, in the case. He drew attention to the defence suggestion that alter their arrest the Appellants were said to have been pointed out to the witnesses at the police station. Reference was then made to the dates on which the Appellants were actually produced in court before the test identification parades were held. This was obviously done with a view to placing before the jury the relevant materials with all their implications In our view there can be no complaint to the summing up on this score.

12. It has been argued that Shewnath and Ram Janam, master and servant could not possibly have seen the miscreants in the courtyard since they were on the house top when the raid was in progress. The argument seems to be that there was a verandah the roof of which was on the same level with the roof of the room: the courtyard was clown below. Crackers were being thrown towards the roof, and situated as they were; it would not be possible for them to see how the miscreants entered the house and left it. The contention seems to be that there was a tin roof to the north beyond which lay the main entrance to the house. There might have been difficulty in, seeing, the miscreants as and when they entered the house or left it; but there could possibly be no difficulty in noticing them when they were on the courtyard. If the roof of the verandah and the roof of the room on which Shewnath and his servant Ram Janam were stationed, were on different levels or if the roofs were on separate structures, there might have been some substance in the criticism. The Judge appears to have drawn the jury''s attention to the materials on the record in this regard and we do not think it was necessary for him to tell the jury that the recognition of the Appellants became precarious by reason of the actual position Shewnath and his servant had taken up on the roof.

13. It is said that only one witness to the seizure of the alamats was called and no explanation was forthcoming as to why the other witnesses could not be examined. We do not think that this was at all a material omission which might be said to vitiate the jury''s verdict.

14. Complaint is then made that the learned Judge failed to tell the jury that neither Shewnath nor his servant Ram Janam should be trusted as truthful witnesses inasmuch as they did not describe at the first opportunity the physical features of the miscreants who had raided the house. It is true the evidence of these two men

was that they did not give, any description of the miscreants, but we do not think that the vouchsafing of such description to neighbours was a pre-condition for, believing that the evidence of identification was true. The Judge, in our view, was not required to tell the jury that the failure to describe the physical appearance of the miscreants was a circumstance which they must take into account in assessing the value they would attach to the evidence of identification given by the two witness.

15. It has been said that the learned. Judge omitted to tell the jury that although Shewnath''s wife and son were on the ground floor at the time of the raid and were consequently in a better position to see the miscreants, they were not called to give evidence in the case. It appears that Shewnath''s son was produced at the test identification parade and he failed to identify any of the suspects and there is nothing on the record to. suggest that Shewnath''s wife had in fact been able to recognise any One. It is not enough to say that she was close to the scene within a few yards of the place where the miscreants had collected in the courtyard. There must be material to suggest that she had actually been able to recognise any of the raiders. In the absence of anything to indicate that she was a competent witness in that sense and yet she was withheld, there was no necessity for the Judge to tell the jury to consider whether they should, in the circumstances, be prepared to draw an inference adverse to the prosecution that if she had been called she would not have supported the prosecution case. The mere fact that she was in close proximity to the raiders would not necessarily imply that she had been able to recognise them. It is not necessary to speculate; but it is not impossible that she was stricken with fear. In any event, we are not prepared to say that the absence of a direction that her non-examination cast doubt on the truth of the prosecution vitiated the jury''s verdict. The evidence shows that Shewnath had wrongly identified another man called Sadagar at the test identification parade.

16. It is said that this circumstance should have been highlighted before the jury so that they might have been warned to consider whether Shewnath was a witness at all fit to be believed. The complaint is that there was no direction to the jury to the effect that in view of Shewnath having identified a wrong person, his recognition of the Appellants became extremely precarious. We are not prepared to say that merely mecause Shewnath bad made a. mistake in the identification, parade in one case, his recognition of the Appellants became, jeopardised. In any event the jury had heard the evidence and it was not necessary for the learned Judge to detail every circumstances in the course of the summing up.

17. It has then been argued that the Appellant Sarju having been arrested in pursuance of a statement made by a co-accused, the Judge was required to caution the jury that that circumstance was not to be treated as being up any way suggestive of his complicity in the crime charged. It is not easy to appreciate this contention. What the learned Judge did was that he merely drew the jury''s attention to a fact which had emerged from the evidence; obviously on the statement of a

co-accused he was arrested. The evidence relative to the fact of arrest on such statement could not be considered in any way inadmissible and as far as we can see no question of prejudice can possibly arise in such case. Not infrequently it happens that a person comes to be arrested on the basis of information obtained by a police officer from a co-accused. Nothing more than that happened in this case and we cannot conceive how the Appellant Sarju could be said to have been prejudiced in any way. We do not think that the learned Judge was obliged in such circumstance to tell the jury that the fact of Sarju having been arrested on the identification of or on the information supplied by his co-accused, should not he taken as indicative of Sarju''s guilt.

18. Sarju was charged in addition u/s 412 of the Indian Penal Code. That charge related to the recovery from his possession of two dhotis which were identified on the basis of dhobi marks as belonging to Shewnath. The case against him obviously was that he had been in possession of the dhotis which were amongst the proceeds of the dacoity. He had also been charged u/s 395 of the Code. The jury having found him guilty on this charge, the Judge did not proceed to take their verdict on the additional charge u/s 412. We do hot find anything illegal or improper in this. When a stolen property is recovered from the possession of a person shortly after a theft or dacoity, the presumption naturally arises that the person from whom it has been recovered is either a thief or dacoit or receiver of stolen property. It is said that the additional charge which was based upon evidence of recovery of the dhotis were merely a device to prejudice the Appellant Sarju cm the charge of dacoity. We do not at all agree. There might have been a charge of dacoity and in the alternative a charge u/s 412; but the mere tact that he was charged with both would not invalidate his conviction based on the jury''s verdict on the charge of dacoity. The recovery of stolen article would certainly be relevant evidence on the charge, of dacoity. Presumably the learned Judge thought that Sarju having been found guilty of the offence of dacoity, no further opinion by way of verdict u/s 412 from the jury was needed. Apart from the technical question whether the learned Judge was obliged to take the verdict on each of the charges framed there can be, we think, ho question of prejudice accruing to the Appellant Sarju on this account.

19. The next contention is that the learned Judge misdirected the jury in the case of the Appellants Sadhu and Sarju by telling them that the statements of witnesses made to the Magistrate at the test identification parade, though not substantive evidence was available for corroboration as well as contradiction. The complaint is founded on the fact that certain statements were made by the two identifying witnesses Shewnath and Ram Janam to the Magistrate who held the test identification parades, and those statements were deposed to as having been so made by the Magistrates concerned. Shri S.K. Mukherjee, one of the Magistrates who held one of the parades deposed that on April 21, 1959 Shewnath, while identifying the Appellant Sadhu stated that he was the person who brought out a trunk at the time of the dacoity; Ram Janam also stated that the Appellant Sadhu

was the man who took the trunk out at the time of committing the dacoity. Shri K.P. Garai, the other Magistrate, who held another parade on January 17, 1959, deposed to say that Shewnath told him at the time of the identification parade that the Appellant Tilakdhari was one of the persons who had committed the raid in his house; Ram Janam also said that Tilakdhari was one of the dacoits engaged in committing the dacoity. This Magistrate held another parade on January 28, 1959 at which Shewnath, while identifying Appellant Sarju, described him as one of the dacoits who had committed the dacoity; Ram Janam also told the Magistrate that Appellant Sarju was one of the persons who had committed the raid.

20. Thus the statements made by the identifying witnesses at the test identification parades to the two Magistrates who held them, were allowed in evidence on the footing that they corroborated the evidence given by the identifying witnesses in Court. The learned Judge accordingly directed the jury to treat the statements of the witnesses before the Magistrates at the identification parades as corroborative of the evidence which the witnesses gave before the court. He also made it plain that such previous statements might as well as used to contradict the evidence of the witnesses. The argument is that while statements made by the identifying witnesses at the identification parades would be available to the defence for purposes of contradiction, they would not be available to the prosecution for purposes of corroboration. It is therefore, said that the learned Judge seriously misdirected the jury by telling them that such previous statements were available for contradiction as well as corroboration.

21. There can be no question that a statement made by an identifying witness before a Magistrate at a test identification parade can never be substantive evidence of the truth of the facts it states. It is not disputed that such statements are available for purposes of contradiction; but it has been urged that it is not available for the purpose of corroboration. We think on authority as well as on principle, this contention is wholly untenable. In our opinion such previous statement is available for both the purposes that is, for corroboration and contradiction. There has, of course, to be substantive evidence before the court in proof of the fact it states and then the statement which was made by the witness before the Magistrate at the test identification parade is available for corroboration u/s 157 of the Evidence Act just as it is available for contradiction u/s 145 of that Act. If the previous statement has been reduced into writing then the attention of the witness concerned has to be drawn under the terms of Section 145 of the Evidence Act. When that is done, the previous statement does become available to contradict present testimony. Section 157 speaks of corroboration; its actual words appear to be important and require to be stated.

22. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be

proved.

23. There are certain pre-requisites to be fulfilled before this section can be applied. There has to be a present testimony to be corroborated by a former statement made by the witness; such former statement must have been made at or about the time when the fact took place or it must have been made before an authority legally competent to investigate the fact. Thus the former statement if made at or about the time when the fact took place; can be proved in corroboration of the present evidence if it was not made contemporaneously, even then it may be available to corroborate present testimony if it was made before any authority legally competent to investigate the fact. A contemporaneous statement seems to offer little difficulty but where a statement is made at a subsequent point of time, it may be a matter of some difficulty in view of the words actually used in the section. The words are "legally competent to investigate the fact". The word "investigate" has not been defined in the Indian Evidence Act. It has not been denned in the Indian General Clauses Act either; it has, however, been defined in the Code of Criminal Procedure which by Section 4(1) says " ''Investigation'' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in his behalf". The word thus defined in the Code of Criminal Procedure is a word of narrow import and refers to the proceedings of a police officer directed to the collection of evidence. We do not find any warrant for the view that the word "investigate" used in Section 157 of the Evidence Act should be understood in the narrow sense in which the word is used in the Code of Criminal Procedure. We think the word ""'investigate" occurring in Section 157 must be taken in its ordinary dictionary sense of ascertainment of facts, sifting of materials, search for relevant data; it merely means in this section a fact finding process and is not confined to one conducted by the police for the collection of evidence. As long as an authority legally competent to deal with the matter investigates, the requirement of Section 157 appears to be satisfied. Therefore, a statement made before any authority which has the legal competence to investigate the fact, can well be proved to, corroborate -present testimony. It seems to vis that a very extended meaning was impliedly accorded to the word "legally competent to investigate" by the Supreme Court in the case of Bhagwan Singh v. The State of Punjab S.C.A. 613. The question there was whether the statement made before the commiting Magistrate was available to corroborate the evidence-in-chief of a witness in the court of session who had resiled completely in cross-examination. Apart from the question of admitting the statement u/s 288 of the Code of Criminal Procedure, the point was whether the statement made before the committing court could be availed of to corroborate the evidence-in-chief of the witness concerned. It was observed: It (the prosecution) was entitled to use the former statement (statement before the committing court) either to contradict what was said in cross-examination or to corroborate what was said in chief. In either event, Section 288 of the Code of Criminal Procedure could be used to make the

former statement substantive evidence because what the section says is "subject to the provisions of the Indian Evidence Act" and not subject to any particular section of it. Section 157 is as much a provision of the Indian Evidence Act as Section 145 and if the former statement can be brought in u/s 157 it can be transmuted into substantive evidence by the application of Section 288". It is quite plain that in order that a former statement before a Magistrate could be availed of u/s 157, the conditions laid down in that section must be fulfilled. The statement made by the witness before the committing court was not a statement made at or about the time when the fact took place; it could only be a statement made before an authority legally competent to investigate the fact. Therefore, the statement made before the committing court was regarded as a statement made before an authority legally competent to investigate. It is only in this view that the previous statement of the witness before the committal Magistrate could, be treated as corroborative of the evidence in chief before the Court of Session. That being the position it seems plain that the word "investigate" used in Section 157 must be taken as a word of wide import and. the restricted meaning given to the word ""investigation" in the Code of Criminal Procedure cannot be attached to it.

24. The proceedings conducted by the Magistrate for purpose of identification would certainly be proceedings by a authority legally competent to investigate and any statement made by. a witness to such authority can be used to corroborate his testimony in Court.

25. The courts have generally held that a statement made by a witness to a Magistrate holding a test identification parade is a statement made u/s 164 of the Code of Criminal Procedure. Only Sub-section (1) and (2) of Section 164 are relevant to the present purpose.

(1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the Second Class specially empowered in this behalf by the State Government may, if he is not a police officer record any statement of confession made to him in the course of an investigation under this Chapter (or under any other law for the time being in force) or at any time afterwards before- the commencement of the inquiry or trial.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in Section 364, and such statements or confessions shall then fee for warded to the Magistrate by whom the case is to be inquired into or tried.

26. There can be no question that these statements are not substantive evidence and judicial opinion has been uniform that they can in no case be treated as substantive evidence. Accordingly this Court has nearly consistently held that the statements made by a witness to a Magistrate at a test identification parade can be

used to corroborate or to contradict his evidence in Court.

27. It is necessary to review some of the cases. In the case Emperor Vs. Sekendar Ali Shah Raham Ali Shah, . 406 it was held that the statement u/s 164, Code of Criminal Procedure, was not substantive evidence at all against the accused and its only purpose could have been to -negative the evidence of the witness as given in Court. No question arose in this case as to whether the statement was available for the purpose of corroboration. In the case of Manik Gazi v. Emperor AIR (1952) Cal. 36 this Court held that the statement made u/s 104 may be used to corroborate or to contradict a statement made in Court in the manner provided under Sections 157 and 145 of the Evidence Act. The observation here was of a general nature but nevertheless it clearly said that the statement u/s 164 was available for purposes of corroboration as much as for contradiction. But a different note was struck in the case of Kanai Lal Dwary v. The State AIR (1950) Cal. 418 where Chief Justice Harries expressed the View that a statement made by a witness before an identifying Magistrate at a test parade could only be used for purposes of contradiction. The actual words used by the learned Chief Justice are these:

It is I know usual for a Magistrate to record statements made by witnesses at test identification parades. But that does not mean that those statements are admissible in evidence. They are statements made u/s 164, Code of Criminal Procedure, to Magistrate after investigation has commenced. They are not confessional statements and are not recorded as such. That being so, they can only be admissible to contradict a witness. It is true that a statement was used to contradict one of the witnesses against Kanai, but the evidence was admitted by the learned Judge as if it was substantive evidence against the accused. The evidence should not be admitted in chief and should only be admitted for one purpose, namely, to contradict the person who is alleged to have made a statement to the Magistrate.

28. It is clear that the learned Chief Justice then thought that such statements were available only for purposes of contradiction. In the case of Sheik Pinju and Others Vs. The State, the learned Chief Justice appears to have doubted whether such statements were available only for purposes of contradiction. He, however, declined to go into the question at a greater length, since it was not necessary to do so in the case before him. The decision was confined to the question whether the statements u/s 164 were to be treated on the footing of substantive evidence. But in the case of Badan Pandit v. The State Unreported decision in Criminal Appeal No. 163 of 19S1 the same learned Chief Justice took note of the decision of the Judicial Committee in the case of (1949) L.R. 76 I.A. 147 (Privy Council) and revised his earlier opinion and held as follows:

It appears to me that the learned Judge should have told the jury that if they were satisfied that these statements were made to the learned Magistrate by the various witnesses as deposed to by the latter, then they could only treat the statements as corroborating or contradicting the witnesses. If they were satisfied that statements

were made which were in accord with the evidence, they should have been told that at most they could regard the evidence of those statements as corroboration of the evidence of the witnesses in the box in the Sessions trial.

29. It is plain that the Judicial Committee had already ruled in Bhuboni Sahu''s case that a statement made u/s 164 of the Code of Criminal Procedure can never be used as substantive evidence of the facts stated, but it can be used to support or challenge evidence given in court by the person who made the statement. Thus the decision of Harries, C.J. in the last mentioned case conforms to the decision of the Judicial Committee in Bhuboni Sahu''s case; and whatever impressions to the contrary might have been imported by the earlier decision in the case of Kanai Lal Dwary v. The State (supra) the position was completely clarified. It was made plain that the statement made by a witness u/s 164 is available to corroborate as well as to contradict his evidence in court. The position, therefore, clearly is that the statements made by witnesses to Magistrate at test identification parades are available to the prosecution for purposes of corroboration of their testimony as much as they are available to the defence for purpose of contradiction.

30. Accordingly there is no substance in the contention raised fey the Appellants in this behalf.

31. A question may, however, arise whether the statement recorded by a Magistrate at a test identification parade is a statement u/s 164 of the Code of Criminal Procedure. It is well known that identification proceedings are held for the purpose of establishing u/s 9 of the Evidence Act, the identity of any thing or person whose identity is relevant. That provision makes the facts relevant with a view to fixing or determining the identity of a person or thing. But the machinery seems to be provided by the law of procedure. It seems plain that these proceedings are held in aid of investigation which is concerned with the collection of evidence. When the police officer receives a report of the commission of a cognizable offence or has reason to suspect commission, he is required u/s 157 of tins Code of Criminal Procedure to make forthwith a report of the some to a Magistrate empowered to take cognizance of such offence upon a police report. Section 159 provides that such Magistrate, on receiving such report, may direct an investigation, or if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into or otherwise to dispose of, the case in manner provided in this Code. Concentrating on that part of the section which is relevant to our present purposes, we think that a Magistrate empowered to take cognizance on a police report, may direct a investigation on receiving the report of the police officer u/s 167 or such Magistrate may depute any subordinate Magistrate to hold a preliminary inquiry into the case. Section 159 relates to a point of time when the offence is under investigation and the Magistrate is given the power to aid such investigation in manner indicated, in the section. It frequently happens that a Magistrate is deputed to hold a test identification parade and when the Magistrate holds one, he

does it in pursuance of Section 159 of the Code. Any statement made by a witness to such Magistrate need not necessarily be viewed as a statement made u/s 164. As we have seen Section 164 provides that statement of a witness is required to be recorded in such of the manners prescribed for recording evidence as in the Magistrate''s, opinion best fitted for the circumstances of the case. The direction is that the statement should as far as possible be recorded in "the way in which evidence is recorded. Of course the Magistrate is given a wide discretion in the matter. Generally evidence is recorded on oath. In any event, the direction is that the record of a statement u/s 184 is to conform to the manner, as far as possible, of recording evidence. The statements that are made by witnesses before the Magistrate holding a test identification parade are in actual practice, rarely, if ever, recorded in the manner prescribed for recording evidence. They are merely bald statements indicating that a particular suspect did something or said something at the time of committing the offence under investigation. These statements are generally of the briefest kind and hardly seen to approximate to any of the recognised or known modes of recording evidence. We are inclined to think that statements made by a witness to a Magistrate at a test identification parade may be treated as plain previous statements made to such Magistrate functioning in discharge of duties imposed upon him u/s 159 of the Code of Criminal Procedure rather than treat those statements as having been made u/s 164 of the Code of Criminal Procedure. Thus when a Magistrate records statements u/s 159 it may reasonably be held that the statements so made are statements before an authority legally competent to investigate. There can be no question about the Magistrate''s jurisdiction and competency to hold the inquiry in terms of Section159 and if we do not read the word "investigate" in Section157 in a limited sense, as we think we cannot, imposed upon it by the Code of Criminal Procedure, then it must be held that a Magistrate acting under Section159 is on authority legally competent to investigate. In such view a statement before a Magistrate holding a test identification parade will be capable of being used to contradict as well as to corroborate the testimony of the witness concerned. There will be no difference in the result if the Magistrate be deemed to have recorded the statement under Section164 or be deemed to have recorded it in an untrammelled manner under the provision of Section159 of the Code of Criminal Procedure.

32. The view we take of statements at identification parades finds some support in the case of Samiuddin v. Emperor (1928) 32 C.W.N. 616. In that case the Magistrate who held the parade was not one of the Magistrate nominated under Section164 to record a statement under that section. It was accordingly contended that any statement recorded by such Magistrate could not be made use of in any way. The contention was negatived and this Court held that a test identification may be conducted by any Magistrate and even if the Magistrate holding such identification is not empowered to deal with the matter under enquiry, he can prove the statements made before him under Section157 of the Evidence Act. It seems further

to have been held that Section164, Code of Criminal Procedure, covers the case where a Magistrate acts professedly under that section and records a statement made to him.

33. We accordingly hold that when a witness makes a statement before a Magistrate holding a test identification parade, the statement thus made whether treated as having been made under Section159 or under Section164 of the Code of Criminal Procedure will be available for corroboration under Section157 as well as for contradiction under Section145 of the Evidence Act.

34. Returning to the facts of this case, we must say at once that so far as the Appellant Sadhu is concerned there has occurred a misdirection which is likely to have vitiated the verdict. It seems plain that while the Magistrate holding the test identification parade said that the witnesses Shewnath and Ram Janam" had stated to him that the Appellant Sadhu had been seen carrying away a trunk, the witnesses themselves did not make an affirmative statement in court to the effect that they had, seen the Appellant to do so. That being the position there is nothing to corroborate; the primary evidence must be the evidence of the witnesses themselves. If they said that they had not made that statement, then the question of corroborating their evidence by that statement would never arise. The learned Judge completely disregarded the evidence of the witnesses in this behalf. He should have told the Jury that in view of the evidence of Shewnath and Ram Janam, no question of corroborating them by previous statements arose. That being the opinion we think the verdict in his case has been vitiated. We have accordingly to consider the evidence ourselves in order to be able to see whether the verdict was justified.

35. Before we do so we wish to say that there has occurred no misdirection so far as the cases of the other two Appellants Tilakdhar and Sarju are concerned. The objections to the Judge''s summing up as respects Appellants Sarju have already been dealt with. We have also considered the case of Tilakdhari who has appealed from jail. There is nothing in the summing up in the case either of these two Appellants which would entitle us to enter into evidence in their case. Their appeals fail.

36. The case against Sadhu depends on the evidence of the master and servant, Shewnath and Ram Janam. Their evidence read together is seen to follow the usual pattern of testimony given in a case of dacoity. Both of them have spoken to the details of the raid; both of them said that they went up on the top of the house and they were in a position to see the miscreants assembled in the courtyard. According to them there was a hurricane lantern tied to a pole in that courtyard. The case clearly is that these witnesses were able to recognise the Appellant Sadhu in the light of that lantern. There was considerable criticism of the fact that the lantern was not seized by the police officer on the night of the occurrence. We have considered the criticism but are not persuaded that the story of recognition was invented later

on to suit that story, the hurricane lantern was seized the next morning. It might have been desirable for the investigating officer to seize the alamats at once since when he arrived at the place the night had not far advanced; if however, he waited until the approach of dawn, that fact by itself cannot possibly expose his proceedings to the charge of manufacturing evidence for the purpose of helping the story of identification by Shewnath and Ram Janam,

37. The evidence of recognition is quite clear. Both Shewnath and Ram Janam identified the Appellant Sadhu in court. That was the primary evidence and it was supported by the evidence of the test parade which was held inside the jail soon after his arrest. It is to be recalled that Sadhu was arrested on April 14, 1959; he was produced at the test identification parade on April 21; on that date he was identified at. the parade by Shewnath and Ram Janam. The Magistrate who held the parade has given evidence in the case. He has deposed to say that he took all steps to preclude collusion. Nothing has transpired which would entitle us to hold that there was any kind of collusion at the parade. The Magistrate''s order sheet clearly shows that this Appellant Sadhu was arrested on the 14th; he was produced in court the next day, and was remanded at once to jail custody till the l6th. On April 16, 1959, there appears a note in the Magistrate''s order sheet that the other accused were produced from hajat. It does not seem to us probable that this Appellant was produced on the 16th in Court. In any event the identification parade was held on April 21, 1959, it must be held with due expedition and we do not think there was any chance of opportunity of this Appellant being seen by any of the identifying witnesses between his production in court and the date when he was identified in jail at the parade.

38. We have taken into account the Appellant Sadhu''s statement u/s 342 of the Code of Criminal Procedure. He stated that he had been pointed out at the police station and complained that he had been identified by the scar mark that appeared on his forehead. The mere fact that he had a scar mark on his forehead will not make his identification at the parade worthless. A scar on the forehead is not a very unfamiliar thing. At any rate, it does not appear to us that it was such a distinctive mark as to have rendered the test identification proceedings utterly valueless.

39. On a consideration of the evidence as a whole we think that in spite of the misdirection the jury''s verdict as respects the Appellant Sadhu was just and proper.

40. In the result the convictions and sentences based on jury''s verdict are maintained.

41. The appeals are dismissed.

D.N. Das Gupta, J.

42. I agree.