

always reduce the period for which he was to be imprisoned. I do not consider that such a result could have been intended by the Code, otherwise there would be a special provision in the Code for such an unusual result.\*

No other point was argued. Accordingly I dismiss this application in revision. The applicant will surrender to his bail and undergo the unexpired portion of his sentence.

1934

EMPEROR  
v.  
DARSU

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## APPELLATE CRIMINAL

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*Before Mr. Justice Thom and Mr. Justice Kisch*

EMPEROR v. NEM SINGH AND OTHERS\*

1934  
May, 1

*Criminal trial—Duties of prosecution—Suppression of material evidence in favour of the accused—Principles of British justice—Duties of court.*

In a criminal trial the prosecution authorities have no right to take it upon themselves to decide whether a witness, who gives vital evidence tending to establish the innocence of the accused, is not a reliable witness and to withhold his evidence on that ground. It is the function of the court to decide upon his reliability and the prosecution have no right to usurp that function. While there is no duty upon those who are charged with the preparation of a prosecution case to produce in court every person examined by the police, in a murder case where a witness has given evidence which supports a plea of *alibi* taken by one of the accused persons, that witness ought beyond all doubt to be produced; in no circumstances should the fact of his statement be withheld from the court. The suggestion that the court ought to shut its eyes to such irregularities on the part of the prosecuting authorities, on the idea that they are entitled to do their best to obtain a conviction where there seems to be little doubt that the accused are guilty, is to be unhesitatingly rejected. The courts are charged with the duty of administering the law according to the principles of British justice and not according to any rules or methods which may be adopted by the prosecuting authorities and sought to be justified by reference to the conditions which may exist in this country or in a particular district. No such argument can justify, in the absence of legislative sanction, the slightest departure from principles

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\*Criminal Appeal No. 1136 of 1933, from an order of Ganga Nath, Sessions Judge of Aligarh, dated the 20th of December, 1933.

1934

EMPEROR

NEM  
SINGH

which under the constitution, as by law established, the courts are bound to apply.

Messrs. *K. D. Malaviya* and *S. B. L. Gaur*, for the appellants.

The Government Advocate (*Mr. Muhammad Ismail*), for the Crown.

THOM, J. :—The appellants Nem Singh, Karan Singh, Kanwal Singh, Sahib Ram, Sheodan Singh and Mukhtar Singh have been convicted under section 302, read with section 149, of the Indian Penal Code. Sheodan Singh has been sentenced to transportation for life, and the others have been condemned to death. The appellants were charged in connection with the murder of one Shiam Lal. One Chhidda was charged along with them. Chhidda, however, has been acquitted in the sessions court.

The charge against the accused was that about 1 A.M. on the night of the 24th/25th of July, 1933, in the village Tarapur, they attacked Shiam Lal and inflicted upon him injuries to which he succumbed seven days later. That Shiam Lal on the night in question was the victim of an assault, and that he did sustain injuries which eventually resulted in his death is not in dispute.

According to the prosecution case, Shiam Lal was attacked by a body of ten or twelve men about 1 o'clock in the morning whilst he was asleep on a cot on his *chabutra*. The first information report was made by the witness Kanwal Singh, a cousin of the deceased, at 2-30 on the morning of the 25th.

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It will be observed that all the six appellants and no others were named by Kanwal Singh in this report. Further it will be noted that Roshan Lal, Girwar and Bhudeo Brahman were mentioned as witnesses. Roshan Lal and Girwar gave evidence in the sessions court against the accused. Bhudeo Brahman was not called as a witness, nor did his name appear in the calendar of

Crown witnesses. Further, no explanation was tendered to the court as to why he was not called as a witness.

The report of Dr. Asthana, who examined the deceased when he was taken to hospital some time about noon on the 25th, shows that Shiam Lal had undoubtedly been the victim of a brutal and determined assault. He sustained in the course of the attack no fewer than nine injuries. All these injuries are described as "cut wounds", with the exception of two, one which is called a contusion, and the other a scratch. Seven of the injuries were on the head or face. One, a cut wound, was on the left armpit, and one, a scratch, on the left shoulder. Seven of the wounds are described as simple, one as dangerous, and one as grievous. The grievous injury is described as a cut and fracture of the nose bone. The dangerous injury is described as a cut and fracture of the cranial bone so that the brain matter was exposed.

Although Shiam Lal had sustained these injuries he lived for seven days. The post mortem examination of his body was performed by the Civil Surgeon of Aligarh, Capt. Kapur. In his report he describes the injuries referred to in Dr. Asthana's report. He certifies death as having been due to fractures of the skull bone and injury to the brain substance caused by some heavy sharp weapon.

The prosecution case is that the murder of Shiam Lal was perpetrated by the six appellants. In support of their case the prosecution have adduced two dying declarations, one oral and one written, of Shiam Lal himself, the evidence of three or four eye-witnesses, the evidence of two witnesses who say they saw the accused conspiring together shortly before the murder was committed, and the evidence of certain witnesses who testified upon the question of enmity between the deceased and the appellants.

1934

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 EMPEROR  
 v.  
 NEM  
 SINGH
*Thom, J.*

1934

EMPEROR  
v.  
NEM  
SINGH

Thom, J.

The accused Kanwal Singh preferred a plea of *alibi*. In view of the facts which have been elicited in the sessions court and during the hearing of this appeal, it is necessary for us to refer to this plea at some length. Mr. *Malaviya*, for the appellants, in the course of a most able and exhaustive argument has succeeded in raising in my mind the very gravest doubt as to whether Kanwal Singh was amongst Shiam Lal's assailants. Further, if his contentions are accepted, and they seem to be well founded, there undoubtedly is a very grave suspicion that the prosecuting authorities in the preparation of this case have been guilty of highly irregular conduct.

Kanwal Singh's defence is that on the night in question he was in Aligarh and that he slept that night in the dharamshala of Maluk Chand. Kanwal Singh is a history-sheeter. He was under the surveillance of the police, and according to the prosecution evidence he was found absent from his house in Tarapur on the night of the 24th July. P. W. 13, Waris Ali constable, deposed that the village of Tarapur is in his circle. Kanwal Singh and Tej Singh were under police surveillance in Tarapur. One Anwar Khan and he went to Tarapur on the night of the 24th July, 1933, at about 12 P.M. He went to Kanwal Singh's house and found him absent. As a result he made a report, which is Ex. P15. In the course of this report he states: "When at 12 o'clock in the night we watched Kanwal Singh, bad character No. 98, in Tarapur he was not found at his residence. We went to the house of Nem Singh mukhia. He too was not found present. Then we reached the house of Padam Singh Jat. We found Nem Singh and Padam Singh talking together. When we said that Kanwal Singh, bad character, was absent, both the persons kept silent. After reflecting something Nem Singh mukhia said that he (Kanwal Singh) had gone to Aligarh and would stay at the dharamshala of Maluk Chand." As a result of this report the police in Aligarh were requested to report whether Kanwal Singh was in Aligarh on the

night of the 24th July. Investigation was made by the police in Aligarh, and it was reported that Kanwal Singh arrived in Aligarh on the 24th July, 1933, at 8 P.M. and that he left on the 26th July, 1933, at 8 A.M.

Independently of this report Abdul Rashid, constable of Rasalganj, made report Ex. 16. This report is in the following terms: "Kanwal Singh, son of Naubat Singh, caste Jat, resident of Tarapur, in the Gonda circle, entered in the history-sheet, came in last evening in order to look after a case and stayed in the dharamshala of Lala Maluk Chand in muhalla Sarai Rahman in this circle. He was watched therein and was found present. He will be watched throughout his stay."

In the sessions court the prosecution produced Azim Uddin constable, P. W. 14. This witness stated: "I am posted at chowki Rasalganj, Aligarh. On the 24th July, 1933, at about 7 or 7-30 P.M. a person came to the chowki and said that he was under police surveillance and had come from thana Gonda, that he was a resident of Tarapur and would stay at night in the dharamshala of Maluk Chand. He told his name as Kanwal Singh. He told his father's name also, which I do not recollect. I told the head constable when he came to the chowki. *I cannot identify that person as I have seen him at night in the dark.*"

Abdul Rashid, the head constable who made the report Ex. 16, gave evidence in the sessions court. He stated in his evidence that on the 24th of July, 1933, Azim Uddin constable informed him that a person who gave his name as Kanwal Singh, Jat of Tarapur, and of thana Gonda had come and told him that he (Kanwal Singh) was under police surveillance and would stay at night in the dharamshala of Maluk Chand. He proceeds: "Azim Uddin told me this at about 8-30 P.M. I went on my round and then to Maluk Chand's dharamshala at about 1 A.M. The doors of the dharamshala were shut and were chained from inside. I called out Kanwal Singh. One person replied that he was present. I did

1934

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 EMPEROR  
 F.  
 NEM  
 SINGH

Thom, J.

1934

EMPEROR  
v.  
NEM  
SINGH*Thom, J.*

not see that person. I went to the kotwali next morning and made a report of Kanwal Singh's arrival, whose copy is Ex. 16. I got Exs. 17/1 and 17/2 for inquiry. The report Ex. P17 on the back of 17/2 was sent by me to thana Gonda. It is in my handwriting. I sent it to thana Gonda. On the night of the 25th July, 1933, also I went to the dharamshala of Maluk Chand. I called Kanwal Singh and I got a reply that he was present. I did not see the person on the night of the 25th July also. Some constables told me at the chowki on the morning of the 26th July that that person had gone. I made a report of his departure in the kotwali."

It appears further from the police diary that the dharamshala was visited by two other constables between the hours of 12 and 1 on the night of the 24th/25th July. They also called out the name of Kanwal Singh and a voice replied from within that Kanwal Singh was present.

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We were requested by learned counsel for the appellants to examine the police diary. An examination of this diary has brought to light another important fact which was not before the Sessions Judge when he decided this case.

As already noted, Azim Uddin was the only prosecution witness who testified to having seen Kanwal in Aligarh on the night of the 24th July. He stated, however, in his evidence that the night was dark and that the man could not be recognized. This, upon the face of it, is unlikely. It is difficult to believe that a constable would not take ordinary steps to enable him to observe the features of a history-sheeter who reported to him. In his statement, which is recorded in the police diary, which he made on the 6th August, 1933, Azim Uddin said: "On the 24th July, 1933, a person who gave himself out as Kanwal Singh, son of Naubat Singh Jat, bad character, resident of Tarapur, police station Gonda, told me that he put up at night in the dharamshala of

Maluk Chand. I did not know him from before. I can identify him if I see him. As regards the night I cannot say who was present and who responded to the call. Next day on the 25th July, 1933, I again saw that very man at the outpost."

It will be observed that there is a very obvious and marked discrepancy between the statement which Azim Uddin had made to the police on the 6th August, 1933, and the evidence which he gave in the sessions court. In his statement to the police he said that he could identify the man, and that not only had he seen him at night, but he had seen him on the following day. In his evidence in the sessions court he said that he had only seen the man in the dark and that he could not identify him. No explanation has been given by the prosecution for this discrepancy. It has been suggested that it was quite possible that by the time he came to give evidence in the sessions court Azim Uddin would not have been able to identify Kanwal Singh owing to the lapse of time. I cannot accept this suggestion. Kanwal Singh was a history-sheeter. He may or may not have been known to Azim Uddin, but Azim Uddin undoubtedly, as the police diary shows, saw him not only in the dark on the 24th, but in broad daylight on the 25th July, 1933. On the 26th July this constable must have known that Kanwal Singh was being named as one of the murderers of Shiam Lal, and we refuse to believe that he could not, in these circumstances, have identified Kanwal Singh as the man he saw on the 24th July in Aligarh. It is rather significant that he was not asked by counsel for the Crown in the sessions court to say whether he could identify Kanwal Singh or not. I am driven, therefore, to conclude that Azim Uddin gave false testimony in the sessions court, and the inference is inevitable that he gave false testimony at the instigation of the prosecution authorities. Indeed no other reasonable explanation is possible. This conclusion is borne out by another fact which an examination of the

1934

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 EMPEROR  
 P.  
 NEM  
 SINGH
*Thom, J.*

1934

EMPEROR  
v.  
NEM  
SINGH*Phom, J.*

police diary discloses. As was stated in the evidence of Indar Singh, one Tejpal was the chowkidar on duty at the dharamshala on the night of the 24th July, 1933. Tejpal was not called as a witness by the Crown. No explanation was offered to the court as to why he was not called. A suggestion has been made that the learned Sessions Judge was well aware of the existence of Tejpal and of the fact that he had made a statement to the police. The passage already quoted from his judgment, however, certainly does not bear out this suggestion. In that passage, in which he discusses the evidence as to Kanwal Singh's whereabouts on the night of the 24th July, he makes no reference to the visit to the dharamshala of the other constables who, according to the diary, did visit the dharamshala and inquire if Kanwal Singh was there between 12 and 1 on the night of the 24th/25th July. I am bound to conclude, therefore, that the fact that Tejpal had made a statement to the police which was recorded in the police diary was not brought to the notice of the learned Sessions Judge and that he was unaware of the fact. Now according to the police diary, Tejpal stated that Kanwal Singh, *whom he knew*, arrived and registered at the dharamshala at 8 P.M. on the night of the 24th July. Tejpal states that he was not in the dharamshala all night, and therefore he is unable to speak to Kanwal Singh's movements after the hour of 8 o'clock. This statement of Tejpal that Kanwal Singh was in the dharamshala at 8 P.M. on the night of the 24th was vital to the defence case. It was a most important piece of evidence bearing upon the movements of Kanwal Singh on the night of the murder—a piece of evidence which was in the hands of the prosecuting authorities and which has been deliberately suppressed by them. A suggestion has been made that the prosecution authorities who were concerned in the preparation of the Crown case were inclined to the view that Tejpal was not telling the truth, and therefore they decided not to put him into the witness-box. I have no



hesitation in saying that the suppression of the fact that Tejpal had made this statement was in the highest degree improper on the part of the prosecution authorities. There is no duty upon those who are charged with the preparation of a prosecution case to produce in court every person examined by the police. But in a murder case where a witness has given evidence which supports a plea of *alibi* taken by one of those who have been charged with the murder, that witness ought beyond all doubt to be produced. In no circumstances should the fact of his statement be withheld from the court. The prosecution authorities have no right to take it upon themselves to decide whether a witness who gives vital evidence of this sort is or is not a reliable witness. That is the function of the court. The prosecution has no right to usurp the function of the court. The conduct of the prosecuting authorities in the present case in keeping back this piece of evidence is deserving of the strongest condemnation. It was only on perusal of the police diary, which the court is entitled under the Criminal Procedure Code to examine, that the vital fact that Kanwal Singh was in Aligarh on the night of the 24th July was brought to light.

1934

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 EMPEROR  
*v.*  
 NEM  
 SINGH

Thom, J.,

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The result is that the appellants must all be acquitted. It may well be that amongst the appellants before us there are some who were concerned in the murder of Shiam Lal, and that therefore as a result of our decision guilty men go free. For this, however, in a very large measure the police and the prosecuting authorities themselves are responsible. The police are responsible because they failed thoroughly to investigate one of the most vital points in the case, namely, whether there was a lantern burning over Shiam Lal's cot on the night of his murder. The prosecuting authorities are responsible in a large measure also, because they deliberately withheld from the court evidence which ought to have been brought to the notice of the court. I am well

1934

EMPEROR  
v.  
NEM  
SINGH

Thom, J.

aware that it may be said, and sometimes is said, that the court ought to shut its eyes to such irregularities on the part of the prosecuting authorities. After all, it is argued, if there is little doubt that accused challaned by police are guilty, the prosecuting authorities are entitled to do their best to obtain a conviction. I unhesitatingly reject any such suggestion. That "the end justifies the means" is a doubtful proposition in any sphere. Emphatically it can find no countenance in a court of justice. As a result of centuries of experience a code of principles has been evolved which British courts observe in the investigating of criminal charges, in deciding civil disputes, and generally in the dispensing of justice. By rigid, punctilious observance of those principles the administration of British justice has gained a reputation for purity and fairness unsurpassed in any part of the world. It is the right of every man, be he guilty or innocent, to insist that he be tried according to those principles. Those principles are for the protection of the accused, not only against arbitrariness on the part of the court itself but against the activities of a possibly unscrupulous prosecuting authority. His Majesty's Judges under the constitution of India are charged with the duty of administering the law according to the principles of British justice and not according to any rules or methods which may be adopted by the prosecuting authorities which it is sometimes sought to justify by reference to the conditions which may exist in this country or in a particular district. No such argument can justify the slightest departure from principles which under the constitution, as by law established, the courts are bound to apply. In the absence of legislative sanction this Court will refuse to countenance suggestions of deviations therefrom which come from those who are unacquainted with the principles of jurisprudence and who are neither learned in the law nor experienced in its practice.

1934

EMPEROR  
v.  
NEM  
SINGH

To sum up: In the present case the prosecution has relied on a dying declaration which contains at least two false statements. It has relied on the evidence of four witnesses, Ram Charan, Azim Uddin, Lakshmi Narain and Reoti, who clearly gave perjured evidence, and upon the evidence of other witnesses which in all likelihood is perjured so far at least as it relates to the accused Kanwal Singh. It has failed to produce reliable evidence on the vital question as to whether a lantern was burning above Shiam Lal's cot. Further, the statement of one most important witness, Tejjal, was withheld from the court. The suspicion which these facts raise against the prosecution case is further accentuated by the remarkable circumstances that although ten or twelve men conspired to murder Shiam Lal and did murder him, only the appellants were recognized by Shiam Lal himself, by the witnesses who speak to the conspiracy and to the actual assault, with this exception that one witness states that he recognized also Chidda and another. In all the circumstances I am clearly of the opinion that the conviction of the accused is not justified.

KISCH, J.:—I agree that the appeal must be allowed and the appellants acquitted. The several peculiar circumstances about the case, which have been set out in full by my learned brother, raise a grave doubt in my mind as to whether any of the appellants were in fact recognized by the so-called eye-witnesses. I may note in this connection that two mere boys, Sheodan Singh and Mukhtar Singh appellants, aged about 17 and 15 respectively, the sons of Padam Singh an old enemy of the deceased and of some of the prosecution witnesses, are among those stated to have been recognized.

I concur in the view that the action of the prosecution in suppressing important facts connected with the plea of *alibi* of Kanwal Singh appellant is most reprehensible and consider that an inquiry should be made into the conduct of those responsible.