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KHANNanavutty,
J.

In my opinion there is no reason to interfere with the conviction and sentence passed upon the accused⁶ Niazoo Khan and Raunak Ali Khan by the learned trying Magistrate. The convictions are perfectly legal and the sentences of fine imposed are by no means too severe. I accordingly reject this reference and direct that the files be returned.

Reference rejected.

APPELLATE CRIMINAL.

*Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice Rachhpal Singh*

1934
January, 29

BHAGWAN DIN (BHAGAN) (APPELLANT) v. KING-EMPEROR.
(COMPLAINANT-RESPONDENT)*

Confession—Elements of a valid confession—Rules to be observed in recording confessions—Indian Penal Code (Act XLV of 1860), section 302—Requirements of a valid confession not made out—Accused, whether entitled to benefit of doubt.

Held, that it is most desirable that the accused should be sent to jail custody and removed from police influence before they are placed before Magistrates for the recording of their confessions. It is also very necessary in the interests, both of the accused and of the prosecution, that the accused, after their confessions have been recorded, should not be sent back to police custody and that at the time when the confessions are recorded they should be assured that they need be under no fear of going back into the custody of the police. The Magistrates ought also to see that where confessions of several accused are recorded, one accused should not be able to hear the statement made by another.

Where the accused are produced before a Magistrate from police custody for the recording of their confessions and after the confessions have been recorded they are handed back to police custody and the Magistrate does not inquire from the accused if they had been beaten by the police or if any promise had been made by the police to make any of them approver

*Criminal Appeal No. 545 of 1933, against the order of Pandit Tika Ram Misra, Additional Sessions Judge of Unao, dated the 9th of December, 1933.

in the case and he does not record the questions put and the explanations made by him to each confessing accused but he puts down only their purport in his memorandum, and the confessions do not give sufficient details of the crime and no sufficiently strong motive is made out for the accused committing such a heinous crime and the confessions are retracted at the very first opportunity, *held*, that the prosecution has failed to bring home the charge of murder against the accused and they are entitled to the benefit of doubt and must be acquitted.

Mr. *Nasirullah Beg*, for the appellant.

The Government Advocate (Mr. *G. H. Thomas*), for the Crown.

SRIVASTAVA and RACHHPAL SINGH, JJ.:—These are three appeals by Bhagwan Din, Nanhku, and Nanha against the order dated the 9th of December, 1933, of the learned Additional Sessions Judge of Unao convicting them under section 302 of the Indian Penal Code for the murder of one Ram Dularay and his mistress, Musammat Gulaba, on the night between the 18th and 19th of May, 1933. The two first named persons have been sentenced to death and the third, Nanha, to transportation for life. The reference for confirmation of the death sentence passed against Bhagwan Din and Nanhku is also before us.

The case for the prosecution is that Ram Dularay and Musammat Gulaba were carrying on some money-lending business and that the three appellants were indebted to them—Bhagwan Din to the extent of Rs.10 and Nanhku and Nanha to the extent of Rs.8 each. There were two cross-cases pending in the court of the Special Magistrate of Mohan between the deceased and Bhagwan Din. One of these was a case brought by Musammat Gulaba against Bhagwan Din under section 324 of the Indian Penal Code and section 24 of the Cattle Trespass Act, and the other was a case brought by Bhagwan Din against Ram Dularay and Musammat Gulaba charging them of offences under sections 323 and 324 of the Indian Penal Code. These cases were fixed for hearing in the court of the Special

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Magistrate for the 19th of May. On the evening previous, Gulaba and Ram Dularay are said to have left their village Sidhur for Mohan, which is a distance of 15 or 16 miles, after dusk. On the morning of the 19th of May Basant, chaukidar, as he was taking out his pigs to graze, noticed the dead bodies of Ram Dularay and Gulaba lying in a grove at a distance of about 1 mile from the *abadi* of village Sidhur. He left the dead bodies in charge of the mukhia and went to police station Auras, a distance of about 4 miles from that place, to make a report. The report was made on the 19th of May at 10 a.m. and the sub-inspector in charge of the police station took up the investigation the same day. In this report the chaukidar expressed a suspicion against Bhagwan Din because of the criminal case which was going on between him and the deceased persons. He also mentioned the names of Fateh Bahadur Singh and Lachhmi Narain, who were friends of Bhagwan Din and were helping him in his defence.

Bhagwan Din and one Saktu were arrested on the 20th of May and the other two appellants, Nanhku, Nanha and a fifth person, Maiku, were arrested on the 21st. When Bhagwan Din was arrested it was noticed that there were blood-stains on the *dhoti* he was wearing. The sub-inspector took charge of the *dhoti* and prepared the recovery list, exhibit 19, in respect of it. Bhagwan Din is also alleged to have told the sub-inspector about a piece of cloth belonging to the deceased Musammat Gulaba having been thrown by him inside a well. This piece of cloth was recovered from the well the same day. Three pieces of ornaments were also recovered on the 20th of May, from the house of Saktu. A lantern was recovered from the house of Nanhku and a few other articles, including a *jhola* and *lota* were dug up from a heap of rubbish pointed out by him. All the five accused were produced before the Special Magistrate of Mohan on the 22nd

of May for their confessions being recorded, but the Magistrate not being free, they were taken to Unao and produced before Mr. A. N. Shukla, a Magistrate of the first class at Unao, on the 23rd of May, 1933. The Magistrate, after making them sit in his chambers for four hours, recorded their confessions.

The three appellants and the two other persons named above namely Saktu and Maiku were prosecuted for the offence of murder. They were all committed to the Court of Session. The learned Additional Sessions Judge acquitted Maiku and convicted the remaining four persons under section 302 of the Indian Penal Code. The three appellants were sentenced as stated above. The fourth man, Saktu, was sentenced to 10 years' rigorous imprisonment.

The case against the appellants rests on their confessions and on the recovery of certain articles to which reference has been made above. We will first of all examine the confessions with a view to see whether they are voluntary and true. We regret to note that in spite of the attention of Magistrates being repeatedly drawn to the provisions of section 364 of the Code of Criminal Procedure and the salutary instructions laid down for their guidance in the Manual of Government Orders, the provisions of the section and the rules just mentioned are more often than not overlooked. In the present case it is admitted that the accused were produced before the learned Magistrate from police custody. It is also admitted that after the confessions had been recorded they were handed back to police custody. We are sorry to find ourselves under the necessity of having to repeat that it is most desirable that the accused should be sent to jail custody and removed from police influence before they are placed before Magistrates for the recording of their confessions. It is also very necessary in the interests, both of the accused and of the prosecution, that the accused, after their confessions have been recorded, should not

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be sent back to police custody and that at the time when the confessions are recorded they should be assured that they need be under no fear of going back into the custody of the police. The statement of the Magistrate who recorded the confessions shows that he could not be sure whether any police officer did or did not pass by or stand near the room in which the accused were sitting. He could not even say whether or not the sub-inspector of police came with the accused to his court room. He admits that he did not inquire from the accused if they had been beaten by the police, nor did he inquire if any promise had been made by the police to make any of the accused approver in the case. He also stated that he did not inquire why the accused were making the confessions. Another fact brought out in his statement is that a person sitting in his retiring room could hear any statement which might be made by another person in his court room. The Magistrates ought to see that where confessions of several accused are recorded, one accused should not be able to hear the statement made by another. Section 364 of the Code of Criminal Procedure provides that the whole of the examination of the accused, "including every question put to him and every answer given by him shall be recorded in full in the language in which he is examined." The learned Magistrate admits in his cross-examination that he did not record word for word the questions put and the explanations made by him to each confessing accused. He put down only their purport in his memorandum.

All the confessions were retracted at the very first opportunity when the accused were examined by the Committing Magistrate. One of them, namely Nanhku, stated that he had been beaten severely by the *darogha* who had tied his testicles. Another accused, Nanha, stated before the Sessions Judge that when he was sitting in the chambers of the Magistrate, the *darogha* was tutoring him from the other side of the glass door.

The statement of the Magistrate shows that this was not impossible, as he admits that there is a glass door in his retiring room and that the office of the criminal tribes section of the Police Department is next door to his room. Having given our careful consideration to all the circumstances we are far from satisfied that the confessions in question were voluntary.

We are also not prepared to hold that they are true. There are several inconsistencies in the statements made by the five confessing accused. This would not have been the case if the story told by them was a true one. For instance the statement of Bhagwan Din shows that he alone struck Ram Dularay with *lathi* blows which felled him down. The statement of Nanhku, on the other hand, shows that Bhagwan Din and Nanhku both had struck Ram Dularay with *lathis*. The confessions also are by no means full and do not give sufficient details of the crime. It is said that after Musammat Gulaba had been killed, an attempt was made to cut off her feet with a *khurpa*, in order to remove the anklets. The confessions leave us entirely in the dark as to how they got the *khurpa* and from where. We are, therefore, of opinion that it would be very unsafe to place any reliance upon the confessions before us, either against any of the confessing persons or against his co-accused.

Next as regards the *dhoti* recovered from the person of Bhagwan Din and the other articles recovered from or at the instance of the accused. It is unfortunate that no question was put to Bhagwan Din for an explanation of the stains on the *dhoti* found on his person. It has been suggested by the learned counsel for the appellants that the *dhoti* might have got these stains of blood in the fight which took place between Bhagwan Din on the one side and Ram Dularay and Gulaba on the other which led to the two cross-cases mentioned above. This may or may not be so. But the fact remains that Bhagwan Din was never questioned

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about the blood stains and he was offered no opportunity to explain their existence. Under the circumstances it is not possible to attach any great value to this piece of evidence against Bhagwan Din.

As regards the piece of cloth recovered from the well it was either not sent to the Imperial Serologist or, if sent to him, there is no report of that officer to show the nature of the stains alleged to have been found on it. It is also rather strange that of all other things Bhagwan Din should have picked out this piece of cloth for the purpose of throwing it into the well. It may be noted that he makes no mention of having removed this cloth from the body of Musammat Gulaba or of having thrown it into the well, in the confession made by him before the Magistrate.

As regards the evidence furnished by the other articles, the value of it depends upon the value to be attached to the identification evidence produced in respect of them. It is in evidence that the said articles were shown by the sub-inspector in the course of his investigation to the witnesses produced for their identification. This circumstance greatly discounts the value of the testimony of these identifying witnesses. Mr. Wasihuddin Ahmad Kirmani, the Magistrate who conducted the identification proceedings, has stated that he had been supplied from the tahsil with a set of similar articles in order to mix them with the articles in question which he had received from the malkhana. He was of opinion that the articles were so dissimilar that anyone who had seen the articles once could have no difficulty in separating them from those received from the tahsil. We regret that under the circumstances we are not prepared to attach any value to the evidence of Puttu, P. W. 13, Hanoman, P. W. 14, and Chaudhi, P. W. 15, who identified the articles before Mr. Wasihuddin Ahmad.

It is admitted by the learned Government Advocate that there is no other evidence to establish the guilt

of the accused. He has, however, laid stress upon the existence of enmity between Bhagwan Din and the deceased and on the fact of all the three appellants having been indebted to the deceased. It is true that there had been a quarrel between Bhagwan Din and the deceased a few days before the murder took place, but the facts of the case show that it was nothing more than a village quarrel and we are not prepared to say that it affords any sufficiently strong motive even for Bhagwan Din to commit such a heinous crime. We have already stated the petty amounts for which the appellants were indebted to the deceased. The prosecution has not suggested any relationship between Bhagwan Din and the other accused, nor is there anything to show that Bhagwan Din stood on any intimate or friendly terms with the other accused. It seems very difficult to believe that all these persons because of their being indebted to the deceased for such paltry sums, should have conspired to commit the murder.

Thus having given our careful consideration to all the circumstances we are of opinion that the prosecution has failed to bring home the charge to any of the appellants. They are, in our opinion, entitled to the benefit of doubt. We accordingly allow their appeals, set aside the convictions and sentences, and direct that they be set at liberty at once.

It has been mentioned above that one of the accused, Saktu, was sentenced by the learned Additional Sessions Judge to 10 years' rigorous imprisonment. It is difficult to understand how the learned Additional Sessions Judge awarded him this sentence in the case of an offence under section 302 of the Indian Penal Code. Saktu has not appealed, but the illegality of the sentence being patent and having come to our notice, we think it proper that we should deal with the matter in the exercise of our power of revision under section 439 of the Code of Criminal Procedure. If we thought that the charge against Saktu had been satisfactorily

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established, it would have been necessary for us to issue notice against him for enhancement of the sentence, but having examined the record and the evidence we are satisfied that the case against Saktu is even weaker than the case against the three appellants. Saktu in his confession did not admit that he had taken any part in the murder. None of his co-accused also assigned him any part in the commission of the crime. All that was said was that he had been standing at some distance and that after the murder had been committed, he removed the ornaments which were subsequently recovered from him.

For the reasons given above we are of opinion that the charge against Saktu also has not been made out. We accordingly, in exercise of our powers of revision under section 439 of the Code of Criminal Procedure, set aside his conviction and sentence and direct that he be set at liberty at once.

Appeal allowed.

REVISIONAL CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava and
 Mr. Justice Rachhpal Singh*

1934
 February, 5

LALA BASANT LAL AND ANOTHER (APPLICANTS) v. MOHAM-
 MAD NAWAB ALI KHAN (JUDGMENT-DEBTOR-OPPOSITE
 PARTY)*

Civil Procedure Code (Act V of 1908), section 68 and order XXI, rule 90—United Provinces Government notification No. 576/IA—93 requiring transfer of execution of decree cases involving sale of agricultural land from civil courts to Collector—Sale held by civil court before the 1st of April, 1932, but not confirmed—Notification, whether applies to the sale—Section 68, Civil Procedure Code, scope of—Local Government's power to transfer execution cases to Collector under section 68.

*Section 115 Application No. 47 of 1933, against the order of Dr. Chaudhri Abdul Azim Siddiqi, Additional Subordinate Judge of Lucknow, dated the 18th of February, 1933, confirming the order of Saiyid Akhtar Ahsan, Munsif of Lucknow District, dated the 20th of July, 1932.