were two decrees. It is not necessary for us to express any opinion in respect of such a case.

We believe that the view adopted by us has also been acted upon in this Court for many years. For instance in the Gangwal Case Dulahin Jadunath Kuar was held entitled to appeal to the Privy Council as of right even though the variation which had been made in appeal was in her favour (P. C. Appeal No. 38 of 1927, decided on the 20th January, 1928). We are not aware of any case and none has been cited in which a contrary view might have been taken by this Court.

For the above reasons we are of opinion that the decree of this Court did not affirm the decision of the trial Court. The applicant is therefore entitled to appeal as a matter of right. We accordingly order that the applicant should be granted a certificate that as regards the value and nature the case fulfils the requirements of section 110 of the Code of Civil Procedure. No order as to costs.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty

HARI KRISHNA (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

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Evidence Act (I of 1872), sections 17 and 18—Criminal Procedure Code (Act V of 1898), section 164—Explosive Substances Act (VI of 1908), section 5, prosecution under—Accused wounded by explosion—Statement of accused recorded before any offence registered and before investigation started—Statement not bearing certificate under section 164, Cr. P. C. and not read over to accused—Admissibility of statement in evidence either as dying declaration, confession or admission—Suspicion, whether can be basis of decision.

*Criminal Appeal No. 350 of 1934, against the order of Babu Gopendra Bhushan Chatterji, Sessions Judge of Sitapur, dated the 26th of September, 1934.

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Suspicion, though a ground for scrutiny, cannot be made the foundation of a decision. The Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. *Mohammad Mehdi Hasan Khan* v. *Sri Mandar Das* (1), and *Mina Kumari Bibi* v. *Bijoy Singh Dudharyia* (2), relied on.

Where the accused was wounded by an explosion and his statement was recorded by a Magistrate before any offence in respect of the occurrence was registered and before any investigation under Chapter 14 of the Code of Criminal Procedure was started and no oath was administered to the accused, nor did the statement bear the certificate required under section 146, Cr. P. C. and there was nothing to show that it was read over to the accused before the thumb-mark was affixed to it, *held*, that it was inadmissible in evidence in his prosecution under the Explosive Substances Act either as a dying declaration or as a confession or as an admission.

Dr. J. N. Misra and *Mr. A. P. Nigam*, for the appellant.

The Assistant Government Advocate (*Mr. H. K. Ghosh*), for the Crown.

NANAVUTTY, J.:—This is an appeal filed by Pandit Hari Krishna Vaid, against the judgment of the learned Sessions Judge of Sitapur convicting him under section 5 of the Explosive Substances Act (VI of 1908) and sentencing him to undergo three years' rigorous imprisonment, and to pay a fine of Rs.100 or in default to undergo a further term of rigorous imprisonment for three years.

I have heard the learned counsel for the appellant as also the learned Assistant Government Advocate, and have perused the evidence on the record.

The appellant Hari Krishna was charged with having been found in possession of explosive substances under such circumstances as to give rise to a reasonable suspicion that he did not have them in his possession, or under his control, for a lawful purpose, and that he used them either for the making of a bomb or was in possession of an explosive bomb which burst while he was holding

(1) (1912) L.R., 39 I.A., 184. (2) (1917) L.R., 44 I.A., 72.

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it in his hand at the "Gandhi Ashram" in village Salempur, police station Kotwali in the district of Sitapur, on the afternoon of the 27th of December, 1933.

The story of the prosecution is briefly as follows: There is a building known as Gandhi Ashram in village Salempur not far from the city of Sitapur. This house was built some 10 or 11 years ago by Pandit Sheo Ram Vaid, who is the elder brother of the appellant Hari Krishna. Sheo Ram Vaid left this house about a year and a half ago and took up his residence in Lucknow, where he started practice as an Ayurvedic physician leaving his house in Salempur in charge of his brother Hari Krishna and one Ram Chandra. On the afternoon of the 27th of December, 1933 at about 2.30 p.m. a loud report like the firing of a gun was heard by people who were in the neighbourhood of the house. The sound of this explosion attracted those who were doing work near the Gandhi Ashram. Jagan Pasi, P. W. 3 who was cutting grass in a field close by, proceeded to the house and saw the appellant Hari Krishna covered with yellow marks on his face and his left hand bleeding profusely. Jagan then went to inform the village chaukidar Angnu Pasi of the occurrence at the latter's house at Durgapur. The chaukidar put Hari Krishna in charge of Jagan Pasi and himself left for Sitapur to make a report. At about 4 p.m. on the same afternoon of the 27th of December, 1933, Ram Chandra Brahman lodged a report of the occurrence in the presence of the City Kotwal, Munshi Abdul Rauf Khan, at the Kotwali of Sitapur. This report is entered in the general station diary and is exhibit 2. It is to the effect that Ram Chandra, son of Ganga Prasad Brahman, of Kasba Khairabad, mohalla Mahendra Tola, was in the service of Sheo Ram Vaid of Salempur, that he had gone to Khairabad at 12 noon that day and returned at 2.30 p.m. and that at 2.45 p.m. when he reached Salempur Jagan Pasi told him that Pandit Hari Krishna, brother of the vaid (Pandit Sheo Ram)

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had got himself burnt in an explosion, and that he found Hari Krishna lying unconscious in the verandah of the house on a cot with Jagan Pasi near him. The City Kotwal could get no further details of the occurrence from Ram Chandra and added a note in the diary that he would go to the spot and find out the true facts of the case, and take action accordingly. The City Kotwal at once proceeded to the spot and found the injured man lying unconscious and proceeded to search the house in the presence of Likhai, Paragi and Chhutkao. He found bloodstains on a *takht*, or wooden platform, which was cracked at one place, and he found that the plaster of the walls had also come off in some places. There were many pieces of aluminium lying about and the City Kotwal found a rod to which the pedal of a bicycle was attached inside the room. As it was getting dark the Kotwal did not think it safe to continue his search of the room with the help of a light as he feared that there might be other explosive substances in the room and a possibility of danger to human life. He therefore locked and sealed the room in the presence of witnesses and left constables to guard it that night. He took the injured Hari Krishna to the hospital at Sadar, and then went to report the occurrence to the Deputy Superintendent of Police who was on that day in charge of the district. At that time the injured man was still unconscious. Next morning the Kotwal unlocked the room in the presence of the same search witnesses and by this time the brother of the appellant Pandit Sheo Ram Vaid, had also arrived, and in his presence the Kotwal took possession of certain articles found in the house. Continuing his investigation the City Kotwal discovered that Hari Krishna had purchased sulphide of arsenic in a crude form which is known in the vernacular as "*mansal*" on two occasions from Babu Ram, a licensed vendor of poisonous chemicals in the City of Sitapur. The register of the licensed vendor showed that Pandit

Hari Krishna had purchased crude sulphide of arsenic for medicinal purposes on two occasions. Under the orders of the Deputy Superintendent of Police the City Kotwal registered an offence under sections 3 and 4 of the Explosive Substances Act (VI of 1908), on the 29th of December, 1933.

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The Civil Surgeon of Sitapur examined Hari Krishna in hospital on the very night that he was taken there, namely the 27th of December, 1933, and found the appellant still unconscious with his left hand blown off. The next day, that is to say, the 28th of December, 1933, the statement of Hari Krishna was recorded by a Deputy Magistrate, Mr. Islam Nabi Khan, in the hospital even before he was charged with any offence and before an offence under the Explosive Substances Act, or under the Indian Penal Code had been registered against anybody at police station Kotwali Sitapur. It is to be noted that no oath appears to have been given to Pandit Hari Krishna nor does the statement purport to be one recorded under section 164 of the Code of Criminal Procedure and there is nothing to show on the face of the record of this statement exhibit 10 that it was even read over to the deponent before his right thumb-mark was affixed to it.

After registering an offence under sections 3 and 4 of the Explosive Substances Act on the 29th of December, 1933, the City Kotwal proceeded with his investigation and ultimately on the 17th of January, 1934, he submitted charge sheet A against the appellant Hari Krishna. Under G. O. No. 857/J, dated the 21st July, 1934, from the Deputy Secretary to Government of the United Provinces, to the District Magistrate of Sitapur, the sanction of the Governor in Council of the United Provinces under section 7 of the Explosive Substances Act (VI of 1908), to the prosecution of Hari Krishna under section 5 of the said Act was conveyed to the District Magistrate of Sitapur. The appellant was committed to the Court of Session by the Sub

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divisional Magistrate of Sitapur on the 7th of July, 1934, a fortnight before the Local Government conveyed its sanction to his prosecution, and he was ultimately convicted and sentenced by the learned Sessions Judge of Sitapur on the 25th of November, 1934.

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On behalf of the prosecution have been examined in the Court of Session, P. W. 1 Jagan Pasi, P. W. 2, Nanhey Pasi brother of Jagan Pasi, P. W. 3, Mr. B. N. Pal, Government Inspector of Explosives for Northern India, P. W. 4, Angnu chaukidar, P. W. 5, Head Constable Nazir Ali, P. W. 6, Constable Balgar Singh, P. W. 7, Constable Azim Ali, P. W. 8, Head Mohurrir Zahir Uddin, P. W. 9, Constable Shambhu Singh, P. W. 10, Babu Ram Vaish, P. W. 11, Dwarka Lodh, P. W. 12, Mr. Islam Nabi Khan, P. W. 13, Brij Mohan Lal, head clerk of the Civil Surgeon's office at Sitapur, P. W. 14, Sub-Inspector Faiz-ul-Hasnain, P. W. 15, Likhai Lodh, P. W. 16, Lachhman Brahman, and P. W. 17, Sub-Inspector Abdul Rauf Khan, Kotwal of Sitapur. Pandit Ram Chandra was examined under section 540 of the Code of Criminal Procedure by the learned Sessions Judge.

It is to be noted that not one of these prosecution witnesses is in a position to depose as to how the appellant Pandit Hari Krishna met with the accident which resulted in his hand being blown off. There is thus no eye-witness of the actual occurrence. It has been sought to supply this deficiency by putting in the mouth of certain prosecution witnesses statements which go to incriminate the appellant Hari Krishna. Thus P. W. 1, Jagan Pasi, has deposed that immediately after the occurrence he asked the appellant what had happend to him, and that the latter replied *"gola kasta tha woh dag gaya"*. This Urdu phrase has been translated by the learned Judge as "I was tying up a bomb but accidentally it exploded," but to my mind the phrase *"gola kasta tha"* does not mean that the bomb was being tied up with a string. I would translate the phrase *"gola kasta*

tha woh dag gaya" as "I was tightening up the bomb and then it exploded". Jagan Pasi has not been asked to explain what exactly he meant by the phrase "*gola kasta tha*", or what he understood the accused to mean by that phrase, and whether he was correctly repeating the phrase used by the appellant at that time. Be that as it may, I am very doubtful as to whether the appellant Hari Krishna was conscious immediately after the explosion. It seems to me from the frightful nature of the injuries inflicted on his hand and face that he must have been unconscious immediately after the accident happened, and the evidence of P. W. 1, Jagan Pasi, and of P. W. 2, Nanhey Pasi, and of Musammat Mula who was examined in the Court of the Committing Magistrate and whose deposition has been brought on the Sessions File as exhibit 14, and of P. W. 11, Dwarka Lodh, who deposed to the extra judicial confession of his alleged crime made by the appellant Hari Krishna is, in my opinion, utterly unreliable. There was no motive and no reason for the appellant confiding his secret to these persons. Moreover, his physical condition shortly after the explosion was not such that he could have remained conscious and given these persons an account of how the explosion took place. It is significant to note that the City Kotwal searched the house of the appellant on the 27th and 28th of December, 1933, even before the appellant had been charged with any offence either under the Explosive Substances Act or under the Indian Penal Code. It is proved by the evidence of the prosecution witnesses that the house in which the explosion took place was used as a dispensary by the appellant whose brother was a physician who practised the Ayurvedic system of medicine. The appellant himself admitted, when he was examined as an accused under section 364 of the Code of Criminal Procedure, that he used to purchase medicines like Chlorate of Potash and Sulphide of Arsenic and Sulphur for the preparation of his prescriptions. Even the

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Government Inspector of Explosives as P. W. 3, has deposed in cross-examination that Sulphur and Chlorate of Potash were used in the preparation of some allopathic medicines, but that he did not know whether they were also used in the preparation of Ayurvedic medicines.

Nanavutty, J.

The appellant has examined two apparently respectable witnesses D. W. 1, Pandit Jagannath Prasad Shukla, and D. W. 2, Pandit Jagannath Prasad Bajpai, who depose that a preparation of Chlorate of Potash Sulphur and *Mansal* (Sulphide of Arsenic), is used by physicians who practise the Ayurvedic system of medicine for curing skin diseases. D. W. 1, Pandit Jagannath Prasad Shukla hold the title of Ayurvedic Panchanan, and is a member of the Faculty of Ayurvedic Medicine and Surgery in the Benares Hindu University. He is also a member of the Advisory Committee of the Government Ayurvedic School at Patna. His evidence has not been shaken in cross-examination and I see no reason to mistrust it. D. W. 2, Pandit Jagannath Prasad Bajpai, is an Ayurvedic Acharya and a Professor of Ayurvedic Medicine at the Benares Hindu University lecturing on the diagnosis and treatment of diseases according to the Ayurvedic system. He is also a graduate of the Benares Hindu University, and he has deposed that according to the system of Ayurvedic medicine as practised in these modern days Sulphur, "*mansal*" (Sulphide of Arsenic), and Chlorate of Potash are used separately and jointly and that a mixture of these medicines is used in curing skin diseases, leprosy, itch, ringworm, etc.

That the appellant had a dispensary at the Gandhi Ashram where he dispensed medicines according to the Ayurvedic system of medicine is a fact proved by the prosecution itself, and therefore there was nothing unusual or suspicious in his keeping Sulphur and Chlorate of Potash and *mansal* in his dispensary, and when to this fact is added the fact deposed to by the

two principal defence witnesses, namely D. W. 1 and D. W. 2, that these chemicals are used in the preparation of medicines for curing skin diseases, etc., then the explanation offered by the appellant as to how he met with this unfortunate accident seems very reasonable and probable. His ignorance of the fact that these substances when united are highly explosive and that he should not have used force in digging them out of the aluminium *lota* explains how this unfortunate accident happened which resulted in the loss of his left hand and incidentally in his prosecution under the Explosive Substances Act.

There is no evidence on the record to show that the appellant belongs to any revolutionary gang whose cult is the preparation of bombs. There is not a shred of evidence on the record worth the name to prove that the appellant was making any explosive substance or intentionally had in his possession or under his control any explosive substance under circumstances which would give rise to a reasonable suspicion that he did not have them in his possession for any lawful purpose. The prosecution witnesses have themselves proved that the appellant had these chemicals in his house for the lawful purpose of dispensing them according to the Ayurvedic system. The mere use of the word "*gola*" if it ever was used by the accused will not go to prove that the accused was making a bomb. No bomb was actually found in the house of the appellant and it seems to me that the whole case has been worked up against the appellant on mere suspicion.

It has been held by their Lordships of the Privy Council in *Chaudhuri Mohammad Mehdi Hasan Khan* v. *Sri Mandar Das* (1), that "it is a settled principle that suspicion though a ground for scrutiny cannot be made the foundation of a decision", and in *Mina Kumari Bibi* v. *Bijoy Singh Dudharya* (2), Sir LAWRENCE JENKINS in

(1) (1912) L.R., 39 I.A., 184(190). (2) (1916) L.R., 44 I.A., 72(77).

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delivering the judgment of their Lordships of the Privy Council pointedly observed:

"The Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony."

Nanavutty, J.

There may be grounds for suspecting that the appellant was making a bomb or had explosive substances in his possession for some unlawful purpose, but the prosecution has utterly failed to adduce positive evidence that the appellant was actually making a bomb or had explosive substances in his possession under circumstances such as to give rise to a reasonable belief that he had them in his possession and under his control for no lawful purpose.

The learned Sessions Judge has laid great stress upon the statement of the appellant recorded by the Deputy Magistrate Mr. Islam Nabi Khan (exhibit 10), and has held it to be a very important piece of evidence on behalf of the prosecution. For my part I find it difficult to understand under what authority that statement was recorded and under what category it falls, and under what rule of law it becomes admissible in evidence. Mr. Islam Nabi Khan was examined under section 540 of the Code of Criminal Procedure and he is P. W. 12. He has deposed at the end of his cross-examination that at the time when he recorded that statement he had no idea in his mind as to whether he was recording the statement of an accused person or of a witness. It has been treated by the learned Sessions Judge as the dying declaration of a person who was on the point of death but it is clear that if this statement is to be used as a dying declaration of the appellant the fact remains that the appellant is not dead and dying declarations are recorded not of persons who are accused of crimes but of persons who are themselves the victims of someone else's crime. It is also to be noted that this statement exhibit 10 does not show that the statement after it was recorded had been read over to the deponent although the Deputy Magistrate says that he did read over the state-

ments to the appellant. If he had done so that fact would have been noted at the end of the statement itself. The Deputy Magistrate has further deposed in cross-examination as follows:

"On seeing *the accused* I formed the opinion that the man's dying declaration should be recorded."

In this connection it is significant to note that the appellant Pandit Hari Krishna was not an accused person at the time when the statement was recorded by the Deputy Magistrate. No charge had been brought against him and no offence even had been registered up to the time in respect of the occurrence that took place at the house of the appellant. It is therefore clear that the statement of the appellant (exhibit 10) recorded by Mr. Islam Nabi Khan cannot be treated as the declaration as to the cause of his death by a dying man. In this statement the appellant stated that one Arjun Singh threw the *lota* on to the *takht* of the wooden platform, and an explosion followed and he became unconscious. The statement is not in the nature of an admission of guilt nor can it by any stretch of language be held to be self-exculpatory. It may be a false account of how the accident happened and indeed the appellant himself has in his examination in the Court of Session admitted that the statement, exhibit 10, contained false allegations against Arjun Singh. Whether the allegation made in this statement exhibit 10 be true or false, I am clearly of opinion that the document itself is not admissible in evidence and cannot be used by the prosecution to prove guilty intention, or *mens rea,* on the part of the appellant.

It has been argued that this statement, exhibit 10, is in the nature of a confession of an accused person. In this connection it is to be noted that this statement does not bear the certificate required from the Magistrate under section 164 of the Code of Criminal Procedure. It is also to be noted that the appellant was not an accused person at the time when this so-called confession was recorded, and further that there was no police

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investigation pending under Chapter 14 of the Code of Criminal Procedure in respect of any penal offence alleged to have been committed by the appellant at the time when this so-called confession was being recorded by the Deputy Magistrate. At the time when this statement of the appellant was recorded the latter was neither in the position of a complainant nor in that of an accused person nor in that of witness either for or against the Crown. It has been contended on behalf of the Crown by the learned Assistant Government Advocate that this statement of the appellant (exhibit 10), though it was not recorded under any provision of law either under the Indian Evidence Act or under the Code of Criminal Procedure is nevertheless admissible in evidence under sections 17 and 18 of the Indian Evidence Act as an admission on the part of the appellant of his being in possession of explosive substances. I confess I do not follow the reasoning of the learned Assistant Government Advocate on this point. The appellant admits even now that he did keep in his dispensary Sulphur, Cholrate of Potash and Sulphide of Arsenic (*mansal*), and that he dispensed these chemicals as occasion arose but the mere possession of these chemicals for the purpose of medicinal use is not an offence under the Explosive Substances Act. It is the use of these chemicals for the purpose of making bombs that brings one within the purview of Act (VI of 1908). The rulings cited on behalf of the Crown in support of the action of the Deputy Magistrate are wholly inapplicable to the admitted facts and circumstances of this case and I need not therefore discuss them.

The offence under the Explosive Substances Act was registered against the appellant on the 29th of December, 1933, and a day before this, his statement was recorded by the Deputy Magistrate. For the reasons given above I am clearly of opinion that this statement exhibit 10 is not admissible in evidence under any provision

of the Indian Evidence Act or of the Code of Criminal Procedure.

As regards the articles taken possession of by the City Kotwal when he searched the house of the appellant, I am of opinion that these articles do not in any way incriminate the appellant in respect of the charge framed against him, and I think it unnecessary to discuss this portion of the prosecution evidence.

Nanavutty, J.

The learned Sessions Judge at the close of his judgment observed "that the accused may be practising Ayurvedic medicine but the fact that Chlorate of Potash is unknown in that system of medicine and that admittedly a mixture was made of this drug with sulphur and sulphide of arsenic leads to the inference that he had possession of explosive substances under suspicious circumstances." In my opinion the statement in the judgment of the learned Sessions Judge that Potassium Chlorate is unknown in the Ayurvedic system of medicine is hardly correct in view of the evidence given by the defence witnesses. The learned Judge also speaks of "suspicious circumstances", but no such suspicious circumstances have been set forth nor is there any evidence on the record in proof of these alleged suspicious circumstances. The learned Sessions Judge says that it was for the accused to explain his lawful possession of these chemicals which in combination become highly explosive substances. So far as it was possible for the appellant to do so, I consider that he has fairly discharged that burden of proof, and even from the evidence of the prosecution witnesses it has been proved that he kept a dispensary where he gave out medicines and that sulphur, sulphide of arsenic and chlorate of potash commonly known as "*potas*" in the vernacular are medicines in common use. I reject entirely the extra-judicial confessions put into the mouths of witnesses like Jagan, Nanhey, Dwarka and Lachhman, and I hold that the appellant was not in a fit state,

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immediately after the occurrence, to make any such extra-judicial confessions to these witnesses.

There is in my opinion no evidence on the record to support the conclusion of the learned Sessions Judge that the appellant was preparing a bomb of a highly sensitive nature which suddenly exploded and led to the detection of the crime of which he has been convicted. This conclusion really begs the whole question and places upon the appellant the burden of proving affirmatively that he was not making a bomb, and that he did not have explosive substances in his possession for an unlawful purpose.

Nanavutty, J.

For the reasons given above I hold that the appellant is not guilty of the offence charged against him. The appellant has been in jail now for nearly a year and a half and has paid for his folly not only with the loss of his hand but also by undergoing imprisonment for over a year. This case ought to be a life-long warning to him not to handle dangerous chemicals without understanding their true nature.

I accordingly allow this appeal, set aside the conviction and sentence passed upon the appellant Pandit Hari Krishna, acquit him of the offence charged and order his immediate release. The fine, if paid, will be refunded to him.

Appeal allowed.