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to try the petitioner for it. Consequently the petitioner was never in peril of punishment and cannot rely on the plea of *autrefois convict*. I agree with the decisions of the Magistrate and the Sessions Judge and would dismiss this petition. But in the matter of the sentence I am of opinion that it is far too severe and I would reduce it from two years to six months' rigorous imprisonment.

ROWLAND, J.—I have had the privilege of seeing the judgment of the learned Chief Justice and I concur in the proposed order. The ground for revision is thus stated in the application:—

“For that the incident being one and the same and the accused having been sentenced to pay a fine of Rs. 200, the second trial under section 355, I. P. C., is barred by section 403 of the Criminal Procedure Code.”

Sub-section (1) of section 403 which alone imposes a statutory prohibition on a second trial has been set out in full in the judgment of the learned Chief Justice who has demonstrated that it does not apply to the facts of this case. There being no other statutory provision in bar of the second trial, the applicant has not made out that the trial is barred by section 403.

As regards section 403(4) I agree with the learned Chief Justice that the High Courts of Bombay and Allahabad in the decisions cited have correctly stated the law.

Conviction upheld.

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APPELLATE CRIMINAL.

July, 2.

Before Terrell, C. J. and Rowland, J.

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Approver—statement made in committing court retracted in Session Court—Code of Criminal Procedure, 1898 (Act V of 1898), section 288.

*Reference under section 374 of the Code of Criminal Procedure (with Criminal Appeal no. 75 of 1929) made by D. E. Reuben, Esq., I.C.S., Sessions Judge of Cuttack, in his letter no. 440-Cr., dated the 23rd March, 1929.

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The mere fact that, in a trial before the Court of Session, an approver retracts the statement made by him in the committing court is no reason why that statement should not be taken into consideration against the accused person if it has been brought on to the record under section 238 of the Code of Criminal Procedure, 1898.

Jehal Teli v. King-Emperor(1) and *Sheonarain Singh v. King-Emperor*(2), referred to.

The facts of the case material to this report are stated in the judgment of Rowland, J.

S. M. Gupta, for the appellants.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

ROWLAND, J.—There are seven appellants the first five of whom have been sentenced to death under section 302 read with section 34, one Ananda Sahu has been sentenced to transportation for life under section 302 read with section 34 and one Jogi Sahu has been sentenced to transportation for life under section 120B of the Indian Penal Code. The first six appellants have also been convicted under section 201 read with section 311, no separate sentence being imposed.

The case comes before us on reference by the Sessions Judge under section 374 of the Criminal Procedure Code as well as on appeal by the convicts.

The prosecution examined 245 witnesses to prove that in pursuance of a conspiracy to which the appellants and others not before us were parties, Banamali Pati was on the 23rd May, 1928, at about 11 A.M. murdered in the village street of Balanga by the first six appellants who thereafter dragged his body to the kacherry, loaded it on a cart and carried it to the burning ghat where they began to burn it but were driven away and the half-burnt remains

(1) (1924) I. L. R. 3 Pat. 781.

(2) (1929) I. L. R. 8 Pat. 262.

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of the body rescued by villagers of Shambhu Bharathi, Patna. The defence was a denial of the facts alleged. No defence evidence was offered.

The case may be divided into two parts. First the incidents of the 23rd May and secondly the motive and conspiracy.

Now the general outlines of the story of the occurrence of the 23rd May are established by such abundant and overwhelming evidence that the learned Advocate for the appellants has not been able to challenge its correctness.

The day was a market day at Balanga and the several stages of the occurrence are deposed to by seven witnesses who have spoken to the actual commencement of the assault on Banamali, twenty-nine witnesses, who without claiming to have seen the first blow struck, witnessed the assault while it was still continuing, and a still larger number of witnesses who saw the removal of the body and the attempt to burn it at the ghat. It will, therefore, be sufficient to say with reference to the story in its outlines that the evidence in support of it is entirely unshaken. We have, however, been asked to hold that as regards the details of the actual killing the witnesses are discrepant and cannot be relied on as having observed correctly the parts played by individual accused. It is argued that the eye-witnesses of the first class who claim to have seen the first blow struck have given accounts which do not fit together and we are asked to infer that some if not all of these have confused what they saw with what they have heard from others and are not really to be regarded as eye-witnesses.

The first attack is made on the evidence of P. W. 1 Bhikari Sahu, who laid the first information in the case Ex. 1. The witness is a gomashtha in village Balanga of the zamindar Babu Ashutosh Chandra Mitra under Banamali Pati who was the zamindar's *naib*. His information was laid at the

police-station Nimapara, nine miles east of Balanga at 6 P.M. on the afternoon of 23rd May, 1928, the murder having been committed between 11 A.M. and noon. In his first information he states that Banamali Pati was going from the kacherry to his house to take his food, the witness accompanying him. When they arrived before the house of Bhikari Pati, this accused came out of his house to the village road and asked Banamali to settle his paddy dispute. While the conversation was going on, Bhikari was joined by Gobind Misra, brother of Bhikari Pati. Anand Pati, brother of Bhikari Pati and after them by Sama Khatua, Uchhab Sahu, Panchu Sahu and Nidhi Misra. All of a sudden Bhikari Pati brought out a curved knife and stabbed Banamali in the neck. Banamali fell down and Bhikari stabbed him on the belly with a three-forked spear; the other accused stood by. Someone suggested to beat the witness and he fled.

The beginning of the occurrence is differently described in the prosecution evidence at the trial where the case is that Banamali, as he went along the village street followed by Maga Barik, Bhikari Pati and Maguni Jena as well as Bhikari Sahu, was accosted by Anand Pati and Gobind Misra who complained that he had got their house thatched by Bowris (an untouchable caste, Anand and Gobind are Brahmins). Gobind and Anand caught the hands of Banamali and were then joined by Bhikari Pati, Shama Khatua, Panchu Sahu, Nidhi Misra, Uchhab Sahu and Ananda Sahu. The first blow was struck by Sama with a tara or lathi on the back of the neck of Banamali who fell down and was then stabbed in the stomach by Bhikari. Some witnesses have said that Panchu Sahu also stabbed Banamali in the neck. The explanation given by Bhikari Sahu for the discrepancy between his first information and his evidence in Court is that at the time of laying the first information he was both agitated and exhausted as he had had no food since early morning and,

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therefore, he made a confused statement. After laying this information he went away and had a bath and food. He then returned to the police-station and asked to have his information read over to him. This being done, he said that it was not correct in some particulars and made a second statement which was also recorded in first information form and is Ex. A. In this statement he mentions that Banamali leaving the kacherry was accompanied by Bhikari Satpathy as well as the witness; he does not mention Maguni Jena or Maga Barik; he mentions Gobind Misra and Anand Pati as the first persons who met and accosted the *naib* and refers to the thatching of the house by Bowris as the subject of the conversation. As regards the remainder of the assailants' party he said that they came from the Khamar house of Gangadhar Pati, whereas in the first information they are apparently described as coming from the house of Bhikari Pati. His evidence in Court regarding the actual murder agrees generally with Ex. A but he says that he did not notice where Sama, Uchhab and Panchu came from and he is not sure whether Nidhi came out of his own house. The discrepancies between the successive statements made by Bhikari Sahu would be *prima facie* a good foundation for an argument that Bhikari was not a real eye-witness but was telling a hearsay story and filling in details from his imagination, but that the evidence of other eye-witnesses has so abundantly proved the presence of Bhikari Sahu in the street at the time of the murder that I can feel no doubt that he is a genuine witness. It is, however, quite probable that he did not see or was unable to observe clearly the first onset and ought to be regarded as a witness falling in the second class of eye-witnesses, who did not see the first blow but saw the progress of the assault as it continued. Another witness with regard to whom a somewhat similar conclusion can be arrived at is P. W. 5 Maguni Jena. This witness was following Banamali from the kacherry towards Banamali's house as he had some grievance

to tell Banamali. Banamali said he would attend to the matter later and the witness turned his back and began to go towards the *hât* which is in the opposite direction. He had gone about 25 cubits when Banamali was attacked. In chief he described the assault as if he had seen it all but in cross-examination it appears that he turned round on hearing a noise. By this time the whole party of the assailants had surrounded Banamali; the witness went nearer but was chased away by Sama. This witness perhaps should be classed like Bhikari Sahu with the witnesses who did not see the first onset but witnessed the occurrence in its later course. Regarding Bhikari Satpati (P. W. 4) I can see no reason to doubt that he witnessed the occurrence from its very commencement. Maga Barik (P. W. 6) is a boy of about 15 years of age who was working as personal servant to Banamali and was following him from the kacherry to his house; he was carrying mangoes, a betel box and some cups when the assault began; he fled to the kacherry. I have no doubt that this witness is actually an eye-witness of the commencement of the assault and the first blow; he did not stay to witness its completion. The next witness who claims to have seen the first blow struck is Daitari Das (P. W. 8). He was rubbing his body with oil near the house of Mani Sahu. That house, as the map shows, is very close to the place of occurrence. Mani Sahu (P. W. 9) confirms the presence of Daitari Das outside the house; Mani himself was inside and came out and saw the later stages of the occurrence. Daitari Das confirms the description of the occurrence given by other witnesses. Raja Barik (P. W. 23) is not a resident of the immediate neighbourhood though he lives in the village. He says that he happened to be passing on the way from Hatsahi to his house. He is mentioned in the second statement of Bhikari Sahu (Ex. A) as one of the persons who had seen the occurrence, and I see no reason to doubt that he is a genuine witness. His account of the occurrence

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agrees with the prosecution case and he confirms the presence of Maguni Jena, Bhikari Sahu, Muga Barik and Bhikari Satpati. He went towards the place of occurrence but was driven away by Sama. There is one other witness Nidhi Misra. He is alleged to have been one of the conspirators and one of the party of murderers. He was made an approver and before the committing Magistrate supported the prosecution case. At the trial, however, he said that he did not see the murder and that he was on good terms with Banamali. He said that he had been drugged by Inspector Narsing and Inspector Khetra Mohan and tutored to make a false statement in the committing Magistrate's court. Babu Khetra Mohan Das, Inspector, is P. W. 239. He denies that Nidhi Misra was drugged or tutored. Narsing Charan Das, Inspector, is P. W. 245 and he makes a similar denial and states that he did not see Nidhi Misra at any time in the jail or met him anywhere except in the court or lock-up of the town thana. Nidhi had alleged that the intoxicant was administered to him in jail. The Assistant Jailer, Kripasindhu Panda, (P. W. 147) has been examined and deposes that in the jail Nidhi had no interviews except with his wife and son and had no intoxicant. I have no doubt that Nidhi's statement at the trial is entirely false and has been invented by him to explain away his previous evidence.

The principles which will be followed by a Court of Session in deciding what use to make of evidence given in the committing Magistrate's Court and tendered under section 288 at the trial when the witness has resiled from the previous statement have been fully discussed in the case of *Jehal Teli*(1). It is there laid down that the deposition given before the committing Magistrate is evidence to the same extent as it would have been evidence if it had been given before the trial Court. It is pointed out that such evidence cannot be effectively utilised unless it

(1) (1924) I. L. R. 3 Pat. 781.

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is shown by other evidence that the evidence given before the committing Magistrate should be preferred to and substituted for the evidence given at the trial. That is the view which prevails in the Patna High Court and all courts subordinate to it. This Court has considered recently the case of a confessing accused who had retracted at the trial the confession previously made by him, in *Sheonarain Singh v. King Emperor*⁽¹⁾ where it has been held that the law is not correctly stated by saying that a retracted confession carried no weight except against the maker and was not to be used against any one of the other co-accused. The correct position is that where a confession has been retracted the tribunal will consider whether it is corroborated in material particulars and whether the statement as a whole is a truthful statement and may in either of these cases give full weight to it. It has also been held in *Ratan Dhanuk v. King-Emperor*⁽²⁾ that the evidence of an approver is to be treated as on the same footing with that of any other witness if the initial suspicion attaching to an accomplice's evidence is removed and the trial court considers the evidence to be truthful evidence.

Applying these principles it is clear that there is no reason for not regarding the deposition of Nidhi in the committing Magistrate's Court as evidence along with the evidence of other witnesses both as to the murder itself and as to the conspiracy.

The Sessions Judge was of opinion that Nidhi's evidence before the committing Magistrate was substantially truthful evidence and the record contains ample corroboration of almost all the facts deposed to by Nidhi. His account of the murder itself agrees with that of the other witnesses in that Gobind Misra and Anand Pati accosted and detained Banamali on the road, while Bhikari, Sama Khatua, Ananda Sahu, Uchhab Sahu, Panchu and the witness came out. He

(1) (1929) I. L. R. 8 Pat. 262.

(2) (1929) I. L. R. 8 Pat. 235.

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adds another name Modhua Toka which is not given by the rest of the eye-witnesses. The first assault is described by other witnesses as given by Sama Khatua, whereas Nidhi says that Sama, Anand, Uchhab and Madhua all attacked Banamali with lathis. The witness says that Bhikari stabbed Banamali two or three times after he fell and that Gobind Misra and the witness kept people at bay on one side, while Panchu Sahu, Bhikari Pati, Uchhab and Anand Pati did the same on the other. There is one statement in Nidhi's evidence of which no direct corroboration is forthcoming but which is of importance. He says that at 9 A.M. or so Bhikari Pati had asked him to be ready for Banamali Pati at his front door and there is one more statement of importance that Jogi Sahu had promised to send men to the cremation ground to help in setting fire to the body. This statement also is not corroborated though Baja Barik (P. W. 23) has said that on the day of occurrence before the murder he had seen Jogi talking with Sama.

The above and other evidence as to the occurrence itself establishes the charge of murder against Gobind who with Anand Pati detained Banamali, against Sama who made the first assault and against Bhikari who completed the slaughter of the victim.

Accused 4 to 6 it has been argued came later, and the part taken by them may not have been more than keeping off intruders after the murder was completed, so that they should be regarded as accessories after the act. It is true that some witnesses are not clear as to the exact stage at which the three Sahu accused came on the scene but there are a good many others who are quite definite that these men were there and were actually driving off spectators while Bhikari was still continuing to stab Banamali. The weight of evidence certainly is that all these accused came on to the road armed before the murder was completed. If the murder was a prearranged matter and these accused had parts

assigned to them from beforehand such as keeping away intruders, it is of no avail to them to say that they struck no blow on the deceased. The Sessions Judge quite rightly relies on and follows the Privy Council decision in the case of *Barendra Kumar Ghosh v. King-Emperor*(1).

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The whole of the circumstances of the murder itself indicate that it was pre-arranged and even if the Sahu accused had arrived at a late stage their presence, armed and so conveniently near the scene could hardly be regarded as accidental. The Sahu accused are not near neighbours. The house of Ananda Sahu is at plot 148 of the map (Ex. 27) and is 330 feet east of the place of occurrence, that of Uchhab Sahu is plot 211 of the map and is 1,015 feet east, and that of Panchu Sahu is plot 247 of the map and is 1,260 feet east. They must have come beforehand prepared for the part they had to play.

Nothing contradictory to the prosecution case appears in the medical evidence; the body was extremely charred by burning and no lathi marks were visible. The Civil Surgeon says that on flesh so charred he would not expect to find them. He speaks of three penetrating wounds in the chest and abdomen which were the cause of death. These according to the direct evidence are all to be ascribed to Bhikari Pati.

The first six accused are, therefore, guilty under section 392.

The last appellant Jogi, however, took no part in the murder and has been convicted only of conspiracy. I have, therefore, to examine the evidence as to the conspiracy and as to his part in it.

The charge of conspiracy was not a part of the first information (Ex. 1) though that information mentions that at one time some of the accused had conspired to murder Banamali and there had been

(1) (1925) I. L. R. 52 Cal. 197, P. C.

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a police case about it. Bhikari Sahu the informant filed a petition of complaint (Ex. 2) on the 30th June, 1928, the date on which the charge sheet of this case was submitted, alleging that there was sufficient evidence of conspiracy before the police and praying that the accused be put on their trial on a charge of conspiracy. It was on this petition that the Magistrate took cognizance of the conspiracy charge along with the case of murder.

The prosecution case was that the conspiracy had its origin in January, 1925, when the opponents of Banamali led by Sama and Jogi Sahu began to meet together to concert measures against him.

There is nothing criminal about the first steps taken which were to petition successively the Settlement Officer, the landlord, Banamali's master, and the Superintendent of Police against Banamali. These petitions had no result. Then come meetings at which a few of the party formed an inner circle and deliberated in secret; Jogi is one of them. Sama declares to Kela Behera (P. W. 133) that Banamali must be killed and says the same thing in presence of Arjun Baral (P. W. 195) and Bhima Baral (P. W. 209) the latter of whom says that Jogi joined in the proposal. In July, 1926, an attempt on Banamali's life was apprehended. He was to be attacked on leaving the train at Satyabadi. He was warned and took another route but on the 18th July, 1926, a number of his enemies including Jogi had in fact collected at Satyabadi and one Baidhar Sahu was found in possession of a knife. The incident was reported to the police and Banamali desired a prosecution under section 120B of the Indian Penal Code but sufficient evidence was not forthcoming. As a sequel to this incident Sama, Jogi and others severely assaulted Bhalu Padhan (P. W. 183), a servant of Banamali, who had been a witness in the case. Sama and Jogi were convicted and sentenced to imprisonment. In jail Sama in Jogi's presence again declared his intention of killing Banamali as deposed to by Gokhulanand

(P. W. 121). There is evidence of other meetings which it is difficult to date exactly. In all of these Sama is prominent; in some Jogi is not mentioned but wherever he appears it is as Sama's companion and close associate. Jogi himself is said to have threatened the life of Dhuli alias Jogendra (P. W. 219) a gomashtha under Banamali in presence of Narain Pati (P. W. 214) whose statement in evidence is corroborated by the fact of his having written at the time a warning letter (Ex. 67) to Banamali. There is evidence of several occasions on which an attack on Banamali was apprehended but no attack was made as he got warning and took precautions. There can be no direct evidence that on those occasions the purpose of attacking him was formed until we come to the time regarding which Nidhi's evidence is available. Nidhi speaks of three occasions on which preparations were made to attack Banamali but proved abortive. Among the names given by Nidhi of persons who on these occasions went out to kill Banamali we do not find the name of Jogi, but it appears in Nidhi's evidence that Jogi, Sama and others persuaded him to join Sama's party and openly declared their intention to kill Banamali; that on the occasion of Banamali's visit to Bayabar tola it was Jogi who gave the conspirators information of his movements and further that on the day of the murder Jogi had promised to send men to help in burning the body. There is independent evidence, which I have already referred to, that Jogi was seen talking to Sama on the morning of the murder and we have it from Chana Prusti (P. W. 148) that on the day after the murder Jogi told him that Banamali would have been killed a day sooner had he passed by the route by which he was expected to go. I have dealt already with the admissibility of Nidhi's evidence. I find in agreement with the Sessions Judge that his deposition before the committing Magistrate was a substantially truthful statement and is corroborated in many particulars by independent evidence.

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Taking the evidence as a whole there is, I think, no room for doubt that there was a conspiracy to put Banamali to death; that Jogi was a party to it, and that Jogi had not dissociated himself from the party of the conspirators up to the date of the crime. I would, therefore, uphold the conviction of Jogi also.

It remains to consider the question of sentence in the case of accused 1 to 5. The murder, I have held, was deliberate and was done in pursuance of an intention formed long before and tenaciously pursued in face of repeated disappointments. It is difficult to see how any penalty other than death penalty can be regarded as adequate.

We have examined the record to see whether the character of the deceased was such as to furnish any extenuation of the guilt of those who killed him. Only an intolerable tyranny on his part would suffice to mitigate the crime and the evidence does not show that there was any such thing. The several accused had no doubt their grievances but these were ordinary personal grudges which though furnishing a motive do not supply any excuse for murder.

First, as regards Bhikari and Gobind, Bhikari was formerly a personal bodyguard of Banamali. He was fined in a criminal case of which Banamali financed his defence. He resented Banamali's demand for repayment of money spent in the case and for payment of paddy due to the landlord and of advances made by Banamali to Bhikari's father. Sama Khatua was also formerly a personal guard of Banamali whom he left because the latter, after financing the defence of a case in which Sama was prosecuted, refused to help him in appealing against the conviction and demanded repayment of the money spent in defending the case. The petition to the Settlement Officer is an attempt to revive an old claim of the tenants to some tanks and grazing ground which had been recorded in the name of the landlord as long ago as the previous record-of-rights. The

visit to the landlord was in connection with rent receipts and with settlement of waste lands, Sama Khatua's enmity was no doubt aggravated by the Katuri case and by his conviction of assault on Bhalu Padhan. Sama had also dispute with Banamali regarding certain lands which Sama had purchased but over which Banamali's uncle Muli held a mortgage. Eventually the dispute terminated in favour of Muli.

Accused 4 to 6 hardly appear to have any definite grievances of their own; they seem to have come in mainly as partisans of Sama. Jogi had a dispute with Banamali regarding land of one Panchei Bewa which was sold to each of them. Of the rival purchasers Banamali was successful. Jogi was convicted under section 352 in a case brought by Jaga Maharana which Jogi attributed to the influence of Banamali and was also convicted of assault on Bhelu Padhan. None of these matters furnish any justification or extenuation of the crime.

I would, therefore, accept the reference and confirm the death sentence on accused 1 to 5 and dismiss the appeal of all the accused.

We desire to pay tribute to the care and patience displayed by the learned Judge in trying this case. His judgment although in view of the volume of evidence necessarily of great length, is extremely clear and well ordered and deals most fairly with every contention which could be raised by the defence. We would also compliment Mr. Gupta upon the way in which he fulfilled his very onerous duties on behalf of the appellants. His task was hopeless but he faced it with great courage and discretion.

COURTNEY TERRELL, C. J.—I agree.

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