

**APPELLATE CRIMINAL.***Before Varma and Rowland, JJ.*

KING-EMPEROR

v.

MANGRU KISAN.\*

*Criminal Trial—retracted confession of an accused, whether admissible against co-accused—corroboration—rule of prudence.*

A retracted confession by an accused person is admissible against a co-accused but the rule of prudence is to seek corroboration before the conviction of the co-accused is based thereon; the question as to what the nature of the corroboration should be depends upon the facts of each particular case.

*Sheonarain Singh v. King-Emperor*(1), *Guja Majhi v. King-Emperor*(2) and *Partap Singh v. The Crown*(3), followed.

*Emperor v. Gangappa Kardeppa*(4), *Kashimuddin v. Emperor*(5), *Emperor v. Lalit Mohan Chuckerbutty*(6), *Yasin v. King-Emperor*(7) and *Barnabas Christian v. King-Emperor*(8), referred to.

Reference under section 374 of the Code of Criminal Procedure, 1898.

The facts of the case material to this report are set out in the judgment of Varma, J.

*K. K. Banerji*, for the appellants.

*The Advocate-General*, for the Crown.

VARMA, J.—This is a reference under section 374 of the Code of Criminal Procedure by the Judicial

\* Death Reference no. 25 of 1937 and Criminal Appeal no. 155 of 1937. Reference made by T. Luby, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 8th June, 1937, and appeal from his decision, dated the 3rd June, 1937.

(1) (1928) I. L. R. 8 Pat. 262.

(2) (1917) 2 Pat. L. J. 80.

(3) (1925) I. L. R. 6 Lah. 415.

(4) (1913) I. L. R. 38 Bom. 156.

(5) (1934) I. L. R. 62 Cal. 312.

(6) (1911) I. L. R. 38 Cal. 559.

(7) (1901) I. L. R. 28 Cal. 689.

(8) (1934) 15 Pat. L. T. 711.

Commissioner of Chota Nagpur, who has passed the sentence of death upon Mangru Kisan aged 25 years and Bagul Kherwar aged 27 years, under section 302 of the Indian Penal Code, for the murder of one Lakhu *alias* Labha Kisan, aged about 20 years according to the post-mortem report. The accused have also appealed from jail and their appeal has been heard along with this reference.

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The murder seems to have been committed on the night of the 25th of January, 1937. It came to light in a peculiar manner. One Kashi Prasad (p. w. 1), a constable, while he was passing the Dak Bungalow in Mahuadanr noticed a dead body covered with a cloth and a deg near about it. He informed the Sub-Inspector who came to the spot. The Sub-Inspector found that the throat of the dead man had been cut. He drew up a first-information-report (Exhibit 8) on his own information, as well as an inquest report and a list of articles found. The dead body was naked except for a vest, and the dhoti covered the dead body (Exhibits V and IV, respectively). A neck thread with ornaments (Exhibit VI) and a waist thread with a purse and tweezers (Exhibit VII) and some rice dyed yellow (Exhibit X) were found lying near the dead body. Similar rice was found tied in a corner of the dhoti. It was on the 26th of January, which happened to be a chaukidari parade day, and the Sub-Inspector showed the dead body to the various chaukidars who had assembled. One Ghunja chaukidar of Nawatoli identified the dead body as that of Lakhu Kisan of his village. Later on the dead body was identified by Lakhu's wife (p. w. 3), Raghu Kisan (p. w. 6) and Damber Kisan (p. w. 20) of Nawatoli. After identification the dead body was sent for post-mortem examination.

The Assistant Surgeon who held the post-mortem examination found three incised wounds on the right side of the cervical region (neck) at the level of the 3rd, 4th and 6th cervical vertebrae. All the injuries

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were almost horizontal but at slightly lower level in front. The wounds measured 6 inches,  $6\frac{1}{2}$  inches and 7 inches, respectively, in length. The depth of each was 4 inches to 5 inches, and the width of each was  $1\frac{1}{2}$  inches to 2 inches. Death, according to the Assistant Surgeon, was due to the neck injuries which had been caused by a sharp cutting instrument by some man or men, and each injury was sufficient to cause instantaneous death. In the opinion of the Assistant Surgeon the injuries could be caused by a balua.

The Sub-Inspector started investigation and on the 27th of January, 1937, on receipt of some information he went to the house of Bagul accused in Gawalkhar village. He found Bagul there and searched his house. Inside the house he found a vest (Exhibit XIV) and a pair of shorts (Exhibit XV) which bore suspicious stains. Then the Sub-Inspector went to village Berapahar where Mangru lives, and found Mangru's wife in the act of washing three male garments (Exhibits XI, XII and XIII). These garments also bore suspicious stains. The Sub-Inspector then went out in search of Mangru and found him in village Narhari where he arrested Mangru. Mangru was wearing a dhoti (Exhibit XVII) which bore suspicious stains. Then in consequence of certain statements made by Mangru, the Sub-Inspector went to the house of Sudan Kisan in Gurgurtoli where Sudan's wife produced an axe (Exhibit IX) from under the eaves at the back of the house belonging to another Sudan. The axe also had some stains which the Sub-Inspector took to be blood stains. Then on the 28th of January the Sub-Inspector on the strength of some statements made by Mangru went to Berapahar jungle where Mangru produced three garments (Exhibits I, II and III). The Sub-Inspector noticed suspicious stains on Exhibits I and II. These materials were sent to the Chemical Examiner from whose report (Exhibit 4) it appears that he found human blood on Exhibits I and II found in the

jungle, on Exhibits IV, V and VI found on the dead body, on Exhibits XII and XIII found with Mangru's wife, on Exhibit XV the shorts found in Bagul's house, on Exhibit XVII found on Mangru's person, on Exhibit IX the balua, and also on some bark taken from the mahua tree and in a sample of earth taken from underneath the corpse. Blood stains were found on Exhibits XI (found with Mangru's wife) and XIV (found in Bagul's house), but the Chemical Examiner could not determine the origin of the blood.

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From the post-mortem examination it appears that the deceased had three injuries on the right side of the neck each of which was sufficient in itself to cause his death, and further the Doctor was of opinion that the wounds could be inflicted with an axe, and judging from the nature of the wounds he thought that the man was either asleep or intoxicated when he sustained the injuries.

There is no direct evidence in this case, and the witnesses examined can be classified into sets speaking about the motive for the crime, the incidents immediately preceding the crime, and incidents after the crime.

So far the motive for the crime is concerned, the evidence of Musammat Ghasni (p. w. 3) and Musammat Jhaulti is important. Musammat Ghasni says that she made the acquaintance of Mangru Kisan in Jeth previous to the date of the occurrence in Mahuadanr Bazar, when she was introduced to Mangru by Jhaulti. At that time Bagul accused was also with Mangru. Jhaulti and Ghasni used to meet the two accused on every Bazar-day (i.e. Monday) and have sexual intercourse with them, Ghasni with Mangru and Jhaulti with Bagul. (In passing it may be mentioned that Jhaulti's husband was not at home in these days and was working somewhere in Assam, but Ghasni's husband the deceased was living in Ghasni's house.) Her husband used to take her to task for reaching home late but she did not give up her intrigue with

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Mangru and, in fact, she says that she had told the chaukidar of the village that if her husband did not treat her better she would go and live with Mangru. On a Monday before the date of the occurrence Mangru had asked Ghasni to live with him but she said that she could not do so as her husband was alive. Mangru then enquired as to whether she would live with him if he killed her husband, and Ghasni replied that she would. Jhauri's evidence is to the same effect. She gives a further piece of information that when she, Ghasni and some other women had been to the Juri hill to collect fuel they met Mangru there and he enquired of Ghasni where her husband was, and she replied that her husband had gone to his father's house and would be coming back on Monday next. Raghu Kisan (p. w. 6) supports Ghasni in her statement that she had told him that if her husband did not treat her better she would go to live with Mangru. The father of the deceased, Laua Kisan (p. w. 8) tells us that the deceased was his son, that after his marriage he lived in his father-in-law's house at Nawatoli, that his son came to his house on the Friday before the day of occurrence and stayed till the following Monday when he left after taking his morning meal. Lakhu the deceased had for his meal rice, dal and sag. When he was about to depart the witness gave him some rice dyed with turmeric as an invitation to join his nephew's marriage. It may be mentioned that some rice found in the house of this witness was of the same colour as that of the rice found near the dead body and in a corner of the dhoti covering the dead body. We have then witnesses who saw Mangru and Lakhu the deceased before the latter's death. Jambu Oraon (p. w. 7) says that he saw them drinking together at the liquor shop in Mahuadanr Bazar. Towards sunset witness asked Lakhu to come home with him but Lakhu refused. The witness further says he found Lakhu quarrelling with other two men. The next witness on this subject is Sibta Kisan (p. w. 24). He is a postal runner and had been to the liquor shop in Mahuadanr

Bazar on Monday where he met Mangru and Bagul but did not notice anyone else with them. This witness had a balua with him, which Bagul wanted to borrow but the witness refused. He knew Mangru and Bagul from before because he used to meet them in Bazar on Mondays, his own village being two miles off from Mahuadanr. From the evidence of these two witnesses (p. ws. 7 and 24) there is no doubt that on the evening previous to the night of occurrence Mangru and Bagul were seen in the liquor shop at Mahuadanr Bazar. Jambu, of course, noticed the deceased also with them, but Sibta does not seem to have noticed the deceased there. It may be that till then the deceased had not arrived there. Then comes the evidence of witnesses who speak about the balua. Mangru's wife Mehri Kisain (p. w. 9), her brother Sudhan (p. w. 5) and Sudhan's wife Pardesia (p. w. 17) speak on this point. Sudhan says that on a Monday in Magh after supper when he was in his house Mangru went to him and said that he was to go home and pass through a jungle and would like to take some weapon with him. He borrowed the axe or balua (Exhibit IX) from Sudhan which Sudhan had purchased from Ratan Lohar two years ago. That same night Mangru came to Sudhan's house at about midnight. Sudhan was called out by Mangru. Sudhan woke up. Mangru asked for water to be poured on the balua. The witness noticed blood on the balua, and when asked as to whom he had killed Mangru replied that he had killed Ghasni's husband. It is better to quote verbatim the portion of the witness's evidence, which runs thus:

" I asked where he had killed him. He said ' in Nawatoli '. I asked why he had killed Lakhu. He said ' I want his wife '. I asked who else was there. He said ' my friend (phul) Bagul helped me ' "

On this point Sudhan is supported by his wife Musammat Pardesia (p. w. 17) who after referring to the other incidents repeats the conversation between Mangru and Sudhan as follows:

" I heard my husband asking Mangru ' What have you been doing, that there is blood on the axe? ' Mangru said ' I have killed Ghasni's

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1937. husband'. My husband asked 'Why?'. Mangru said 'I want to take his wife'. After washing the balua Mangru hid it in the thatch of our house. My husband also asked Mangru if he had killed Ghasni's husband by himself. Mangru said that he and Bagul had done the deed.'

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Ratan Lohar (p. w. 16) identifies the balua (Exhibit IX) as it was made by him for Sudhan.

The next witness of importance is Mahadeo Ahir (p. w. 23) who speaks about what he saw immediately after the occurrence. He had taken his daughter who was suffering from burns to the hospital at Mahuadanr. No accommodation being available he was lodging outside under a *machan*. At about midnight he heard thrice the cry of "aia" and saw two men running away. He did not recognize them.

On this evidence the learned Judicial Commissioner has convicted both the accused under section 302, Indian Penal Code, and awarded the capital sentence.

Mr. K. K. Banerji while dealing with the case of Mangru has referred to the various items of evidence against him and tried to point out that these taken individually do not lead towards the guilt of the accused; but where it is a case of circumstantial evidence the Court has to see whether the evidence taken as a whole points conclusively towards the guilt of the accused. In the case of Mangru the evidence is conclusive. His intrigue with Ghasni afforded sufficient motive for the crime, his inquiries about the movements of the deceased, his finding out articles from the Berapahar jungle which bore signs of blood, the finding of blood-stained clothes from his house, his borrowing the balua from his brother-in-law which bore blood stains, and finally his extra-judicial confession to his brother-in-law Sudhan which was heard by his brother-in-law's wife Pardesia leave no room for doubt that Mangru committed the crime of which he has been convicted and sentenced.

Mr. K. K. Banerji lays special stress on the case of Bagul and says that the evidence against him is

not conclusive. He raises a point of law that the retracted confession of a co-accused should not be taken into consideration to come to a finding of guilt of any person, and for this proposition he refers to various cases. He refers to *Barnabas Christian v. The King-Emperor*<sup>(1)</sup> where it was held that a confession which has been retracted must be viewed with suspicion, but if it is considered to have been a voluntary confession and substantially true, it can be admitted into evidence and used against its maker, and that if it is considered to be such a confession as substantially implicates its maker in regard to the crime with which he and the co-accused are charged, it can be used also against the co-accused, but even then it can carry no weight, except where it is substantially corroborated by good evidence from other sources. He then refers to *Emperor v. Gangappa Kardeppa*<sup>(2)</sup> where it was pointed out that the High Courts in India have laid down the rule of practice which had all the reverence of law, that a conviction founded solely on the confession of a co-accused could not be sustained, although there was nothing in section 30 of the Indian Evidence Act which prevented the Court from convicting after taking the confession of a co-accused into consideration. The strongest case in his favour is *Kashimuddin v. Emperor*<sup>(3)</sup> where dealing with a retracted and uncorroborated confession of an accused person their Lordships observed that such a confession has no value at all against the co-accused. This they have stated as a proposition of law relying on *Emperor v. Lalit Mohan Chuckerbutty*<sup>(4)</sup> which in turn is based on *Yasin v. King-Emperor*<sup>(5)</sup>.

But whatever views may have been expressed elsewhere, in our own High Court it was laid down in *Guja Majhi v. The King-Emperor*<sup>(6)</sup> that a retracted

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(1) (1934) 15 Pat. L. T. 711.

(2) (1913) I. L. R. 38 Bom. 156.

(3) (1934) I. L. R. 62 Cal. 312.

(4) (1911) I. L. R. 38 Cal. 559.

(5) (1901) I. L. R. 28 Cal. 689.

(6) (1917) 2 Pat. L. J. 80.



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confession was admissible in evidence against the accused. In *Sheonarain Singh v. King-Emperor*<sup>(1)</sup> it was laid down that a retracted confession is admissible in evidence but should have no weight attached to it unless it is corroborated in material particulars or the tribunal comes to the conclusion that the statement as a whole is a truthful statement. In either of these cases the retracted statement must be given full weight and may be used against a co-accused. In the judgment, speaking of retracted confessions, their Lordships said that a retracted confession must be regarded with stronger suspicion than that which attached to the confession of an approver who gives evidence in Court. But nevertheless such evidence is admissible and criticisms upon it can only be directed to its cogency.

In *Partap Singh v. The Crown*<sup>(2)</sup> it was laid down in agreement with the Patna view that the fact that a confession once made has been retracted is immaterial as regards the legality of the admission of the confession as evidence either against the person who made it (of whose conviction it may form the basis even without corroborative evidence) or as against other persons tried jointly with him for the same offence. But the weight to be attached to a retracted confession depends upon the circumstances of each particular case.

Looking at these cases I feel no doubt that the law is as stated in *Sheonarain Singh v. King-Emperor*<sup>(1)</sup> and has not been affected by any observations in *Barnabas Christian v. King-Emperor*<sup>(3)</sup>. A retracted confession by a co-accused is admissible in evidence but the rule of prudence is to seek corroboration before the conviction of a co-accused is based thereon; as to what the nature of the corroboration

(1) (1928) I. L. R. 8 Pat. 262.

(2) (1925) I. L. R. 6 Lah. 415.

(3) (1934) 15 Pat. L. T. 711.

should be will depend upon the facts of each particular case. In accordance with this proposition of law we have to consider the case of Bagul. Now, Sibta's evidence is clear that Bagul asked for a loan of Sibta's balua on the evening previous to the day of occurrence and that Bagul and Mangru were together when this demand was made. Then Jambu's evidence is to the effect that at the liquor shop he saw the deceased quarrelling not only with Mangru but with both the accused, and at midnight we find Mahadeo seeing two persons running away after he had heard the cry of "aia" thrice. This evidence, at any rate, shows that there were at least two persons connected with the crime. Then comes the finding of blood stained shorts in the house of Bagul. Two witnesses identify the shorts as belonging to Bagul. Search-witness Doman Ahir (p. w. 11) speaks about the finding of the shorts from the house of Bagul accused, although he says he had not seen him wearing shorts. But Pachal Gosain (p. w. 18) another search-witness says that he had seen Bagul wearing these shorts. Bagul's own statement is that the shorts did not belong to him and he gave no explanation for the blood stains found on them. These circumstances are ample corroboration of the confession made by Mangru to Sudhan, which was heard by his wife. In these circumstances I have no doubt that the charge of murder has been brought home to Bagul conclusively.

Then comes the question of sentence. So far as Mangru is concerned, his motive was a sordid one, he wanted to have the deceased's wife and for this purpose he committed the crime. There is no extenuating circumstance. Although I have no doubt about the guilt of Bagul, at first sight the part taken by him did not appear to be so important as that of Mangru; but on further consideration I am of opinion that this accused is equally responsible. Mangru may have been influenced very much by his anxiety to get the deceased's wife, but whatever Bagul did was done in cold blood. Mangru is aged 25 according to the

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Sessions Judge, and Bagul is aged 27 years. It cannot be said that he was coerced into giving his help because he was an older man than Mangru. I do not find any extenuating circumstance in his case either.

I would therefore accept the reference, dismiss the appeal and confirm the sentence of death passed against both the accused.

ROWLAND, J.—I agree.

*Appeal dismissed.  
Sentence confirmed.*

S. A. K.

### APPELLATE CIVIL.

*Before Courtney Terrell, C.J. and Manohar Lall, J.*

NIRMAL KUMAR NAWLAKHA

v.

SANT LALL MAHTO.\*

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August, 9.

*Mortgage—co-sharer, mortgage by, of undivided share in property jointly held by co-sharers—partition—other co-sharers take mortgaged property free from mortgage—mortgagee's right to proceed against the property allotted to his mortgagor—onus of proof, when shifts from one side to the other.*

In order to shift the onus from one side to the other, the evidence adduced by the party on whom the onus lies must be held to be sufficient to establish a prima facie case.

*Stoney v. Eastbourne Rural District Council*(1), referred to.

Where a co-sharer mortgages his undivided share in a property held jointly by all the co-sharers and the mortgage is followed by a partition and the mortgaged property is allotted to the other co-sharers, they take the property, in the absence of fraud or collusion, free from the mortgage and the mortgagee is entitled to seize only that property which, after the partition, has fallen to the share of the mortgagor.

\*Appeal from Original Decree no. 89 of 1933, from a decision of Babu Nidheshwar Chandra Chandra, Subordinate Judge of Purnea, dated the 20th December, 1932.

(1) (1927) 1 Ch. 867.