

Procedure Code, for redecision on merits. Stamp on appeal to be refunded. Costs to follow final decision.

DIN MOHAMMAD J.—I agree.

A. N. C.

Appeal allowed.

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MUSSAMMAT
PURAN DEVI

v.
DILA RAM.

BHIDE J.

APPELLATE CRIMINAL.

Before Young C. J. and Sale J.

HANS RAJ (CONVICT) Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 606 of 1934.

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June 6.

Criminal Procedure Code, Act V of 1898, sections 162, 164: Confession—to whom should be forwarded after being recorded by a Magistrate—Evidence embodied in Inquest Report—whether admissible to defence—Indian Penal Code, Act XLV of 1860, sections 34, 302, 307: Concerted murderous attack by several persons—whether all guilty of murder—Criminal trial—Procedure.

Where a Magistrate, after completing the statement recorded by him under section 164, Criminal Procedure Code, hands it over to the Police Officer who had brought the accused to him, but the statement in due course reaches the Magistrate by whom the case was enquired into, and there is no suggestion that it was tampered with in transit—

Held, that there had been a substantial compliance with the provisions of section 164, though ordinarily a Magistrate who records a confession under that section should avoid handing over the document, after completion, to the Police in charge of the prisoner, but should forward it, as required by sub-section (2) of the section, direct to the Magistrate by whom the case is to be enquired into or tried.

Held also, that in a concerted murderous attack by more than one person on a Police party, it is wholly unnecessary to establish which of the appellants attacked which of the

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Policemen or indeed to show what particular weapon was used by either appellant. If the two appellants were engaged in a concerted attack upon the Police, and either of them was armed with a deadly weapon and used it to kill a Police Officer, they are both equally guilty of murder.

Held further, that statements of witnesses embodied in an Inquest Report, while the case was under Police investigation, are governed by section 162 of the Criminal Procedure Code, and can only be made accessible to the defence under the limitations provided by that section for the purpose of contradicting the statements made by the witnesses in evidence.

Held also, that where there is no distinct charge of conspiracy, or where it is unnecessary and the evidence is sufficient, if believed, to prove the particular offence with which the accused are charged, it is a waste of time and money to try and establish a conspiracy.

Appeal from the order of Mr. H. Asghar, Sessions Judge, Sialkot, dated the 7th February, 1934, convicting the appellant.

B. R. PURI, for Appellant.

DES RAJ SAWHNEY, Public Prosecutor, for Respondent.

The judgment of the Court was delivered by—

YOUNG C. J.

YOUNG C. J.—Hans Raj and Pritam Khan (*alias* Prabhe Khan) were charged under section 302, read with section 34, Indian Penal Code, and section 307, read with section 34, Indian Penal Code, in the Court of the learned Sessions Judge, Sialkot. The learned Judge found Hans Raj guilty under both sections and sentenced him to transportation for life. Prabhe Khan was found guilty under both sections and sentenced to death. Both appeal and we have to consider the question of the confirmation of the death sentence on Prabhe Khan.

At the outset it is to be noted that murder and attempt to murder were the only offences charged. On the 7th May these two together with Jagdish Chandar, absconder, and Kasturi Lal, who was acquitted at a previous Sessions trial on a similar charge, were travelling in a third class compartment in a train from Jammu to Sialkot. There were with them in the carriage three police officers and a bank peon. The train had not proceeded far before the accused and the others with them are alleged to have produced revolvers and a knife and attacked the police party. One police constable named Karam Dad was shot dead; two other police officials were wounded by bullets.

It is to be seen from the above that this is a simple case the facts of which lie within a small compass. It is almost unbelievable that in the Court below it took over two months to try and that the judgment extends to 42 printed pages. The reason is that the prosecution produced a mass of evidence in order to prove that the two accused were members of a terrorist association. It appears to us that this procedure was wholly unjustified. The sole point for decision was: were these two accused parties to a murderous attack upon the police? For this it was quite unnecessary, and indeed wholly irrelevant, to consider whether they were terrorists or members of any other body. There was no charge of conspiracy. This mass of evidence should have been excluded by the learned Sessions Judge.

The judgment of the learned Sessions Judge is divided into chapters. Chapter VI is headed: "Material evidence." It is unnecessary to consider most of the previous chapters. The procedure in this case in the trial Court has resulted in a great waste

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of public time and money. Fortunately for the purpose of this appeal counsel both for the Crown and the defence agreed that it was unnecessary to consider the irrelevant evidence. We are confining our attention to the question which ought to have been the sole question in the trial Court, namely, were these two accused parties to this murderous attack upon the police which resulted in the death of one policeman and the wounding of two others.

The material facts of this case are that during April, 1931, a cheque for Rs.497-4-0 was drawn on the Sialkot branch of the Imperial Bank, which on the 2nd of May, 1931, was discovered to be a forgery. Private investigation by the Bank followed but was unsuccessful and on the 6th of May a report was made to the police. In the course of the investigation a police party headed by Assistant Sub-Inspector Ata Ullah, Khan Bahadur, Head Constable, and Karam Dad, foot constable, proceeded to Jammu to make enquiries taking with them a Bank peon Haveli Ram for the purpose of identification. Arriving at Jammu on the 7th May, 1931, Haveli Ram identified Kasturi Lal and Hans Raj as being concerned in this forgery. When these two men were found they were in the company of Jagdish Chandar and Prabhe Khan. The police took all four to Jammu police station. Here it is alleged by the police that Kasturi Lal, being mainly concerned in the forgery, was directed to attend at the police station, Sialkot, the other three were discharged. In his confession Hans Raj alleges that he also was kept under police detention. Whatever the truth may be, it is common ground that the police party travelled by train to Sialkot that evening accompanied by Kasturi Lal, Hans Raj, Prabhe Khan and Jagdish Chandar.

The case for the prosecution is that Jagdish Chandar, Prabhe Khan, Kasturi Lal and Hans Raj organized a concerted murderous attack on the police. The case for the defence is that during the journey the police maltreated Kasturi Lal and thereby drew upon themselves an attack by Jagdish Chandar and his friends to avenge the treatment of Kasturi Lal; but the defence version does not explain how the party of the accused came to be in possession of revolvers or why the revolvers were used on the police.

It has been argued in this connection by Mr. Puri that the story of a concerted attack by the accused's party on the police must be rejected. It is contended that at least two of the accused's party being under detention by the police, they must have been searched in which case it would be inconceivable that they could have been left in possession of lethal weapons. The Assistant Sub-Inspector Ata Ullah and the police, however, deny that the accused were under arrest. In this matter we are of opinion that the police have not told the whole truth. It seems to us unlikely that the four accused should by chance, or of their own free will, be travelling with the police party from Jammu to Sialkot in the particular circumstances of this case. We are of opinion that although none of the accused's party may have been under formal arrest, at least two of them, *viz.*, Kasturi Lal and Hans Raj, must have been travelling under some form of compulsion, whether by the British police or of the Kashmir State police. It is unnecessary to speculate. We are of opinion, in disagreement with the view taken by the learned Sessions Judge that none of the accused's party were in fact subjected to any search (Hans Raj in his confession does not say they were)—a fact which explains how they came to be in possession of lethal weapons.

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It will be convenient at this stage to consider the confession proved against Hans Raj which was retracted during the Sessions trial. This confession is Exhibit P.W.53-B and was recorded by Mr. C. H. Disney, first class Magistrate, who gave evidence for the prosecution as P.W.19. The learned Sessions Judge has rejected this confession for reasons which we are unable to appreciate. Mr. Puri has attempted to support the decision of the learned Sessions Judge in this respect by drawing attention to certain discrepancies noted in Mr. Disney's evidence at page 20 of the paper book. These discrepancies consist of certain minor differences between the vernacular and the English record of Hans Raj's statement. We are of opinion that these discrepancies, such as they are, are wholly immaterial and they do not in any way affect the admissibility of the confession.

Another point taken by Mr. Puri is that although the necessary certificate and memorandum regarding the voluntary nature of the confession appears on the English record, it has been omitted from the vernacular record. Whatever may have been the effect of this omission, it has been cured by Mr. Disney's evidence in Court.

Further it has been urged that Mr. Disney failed to comply with the provisions of sub-section (2) of section 164, Criminal Procedure Code, which require that the statement, after being recorded, shall be forwarded to the Magistrate by whom the case is to be enquired into or tried. Mr. Disney states in his cross-examination that after completing the statement he made it over to the same police officer who had brought Hans Raj before him. But the statement admittedly reached the Magistrate by whom the

case was enquired into, in due course. There is no suggestion that it was tampered with, in transit; and Mr. Puri concedes that his client has not been prejudiced by the method of forwarding the statement actually adopted by Mr. Disney. We are, in these circumstances, of opinion that there has been substantial compliance with the provisions of the section. At the same time, we take this opportunity of pointing out that a Magistrate who records a confession under section 164, Criminal Procedure Code, should avoid handing over the document after completion to the police in charge of the prisoner, but should forward it, as required by sub-section (2) of section 164, Criminal Procedure Code, direct to the Magistrate by whom the case is to be enquired into or tried.

The learned Sessions Judge has also assigned as a reason for rejecting the confession, that it is a mixture of truth and palpable falsehood and contains matter which in the opinion of the learned Sessions Judge is "not only totally ridiculous and incredible but even grossly repugnant to commonsense." The learned Sessions Judge has referred to what he calls the "constant shuffling and passing of the revolver, cartridges and knife from one hand to another in the railway compartment under the very eyes of the police." It appears to us that the learned Sessions Judge has exaggerated the effect of Hans Raj's statement. It is here necessary to refer to the confession itself. The material part reads as follows:—

"Jagdish Chandar and Prabhe Khan were released at the *thana*, while I and Kasturi Lal were taken by the police. Prabhe Khan accompanied us at his own request. We were taken to the railway station. Shortly after Jagdish Chandar also arrived at the station in a tonga. He and Prabhe Khan

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spoke together and then Jagdish Chandar informed me that they had decided to release Kasturi Lal, and that I should take Kasturi Lal's revolver from him in case he was searched. Kasturi Lal made an excuse of asking me where the balance of the money was and on this pretext he was allowed to speak to me alone in the railway compartment. There, at my request, he quietly gave me his revolver * * * * * When Kasturi Lal was taken out by the police I quietly gave Jagdish the knife I was carrying and he made it over to Prabhe Khan. I kept the revolver * * * On the pretence of speaking to Kasturi Lal about a lawyer, Jagdish Chandar secretly obtained a box of revolver bullets from him. Kasturi Lal then went back to his own seat. Jagdish Chandar gave me the bullets. I went to the lavatory and loaded my revolver with five bullets—one chamber remained empty. I then came back to my seat."

It will be seen from this that Jagdish Chandar and Prabhe Khan came to the station of their own free will. It is to be noted that Kasturi Lal and Hans Raj were suspected of forgery. The police had apparently no indication that they were dangerous criminals inclined to violence or likely to be armed with lethal weapons. There is nothing unbelievable, therefore, in the statement that Hans Raj should be allowed to speak either to Jagdish Chandar or to Kasturi Lal or that Kasturi Lal should be allowed to speak to Jagdish Chandar. Under these circumstances it would be perfectly simple for the accused's party to pass from one to the other small weapons like the pistols exhibited in this case or a small box of cartridges. These articles have been produced before us in Court. It would have been otherwise if the police had cause to suspect the accused of being violent

criminals. There is nothing in our opinion in the confession of Hans Raj which is not in accord with what might easily have happened under the circumstances of this case. The fact undoubtedly remains that there were revolvers or pistols in that compartment and that they were used. The police were negligent in the matter of searching the accused and unfortunately have paid for their neglect.

The confession is clearly admissible in evidence and may be taken into consideration against both appellants who were jointly tried. Hans Raj implicates himself to an equal extent with the other accused. The confession of Hans Raj is corroborated by the evidence of the eye-witnesses, and in our opinion, gives, in all essential points, a substantially true account of this occurrence.

Turning now to the occurrence in the compartment, it is in evidence that while the train was nearing Suchetgarh station at about 7-15 P.M., according to the estimate of time given by the eye-witnesses (though Hans Raj in his confession puts it at about 8-30 P.M.) some one shouted: "Hans Raj, ready" whereupon Jagdish Chandar, Prabhe Khan and Hans Raj whipped out their revolvers and Jagdish Chandar fired at Karam Dad, while Hans Raj and Prabhe Khan also fired at the police party. Karam Dad, constable, though injured, attacked Jagdish Chandar in self-defence whereupon Prabhe Khan, Hans Raj and Kasturi Lal went to Jagdish Chandar's rescue and extricated him from Karam Dad. Hans Raj also shot at Karam Dad while Prabhe Khan stabbed Karam Dad in the back with a knife. This occurrence was over in about a minute; and occurring as it did after dusk at a time when the light in the carriage, if any, would only be very dim, it is not

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surprising to find that there are discrepancies in the evidence as to which of the assailants fired which particular shot and at whom. We are of opinion that these discrepancies are wholly immaterial and do not in the least affect the truth of the prosecution case. It is common ground that as the train was slowing down for Suchetgarh station, Prabhe Khan and Hans Raj jumped off the train followed by Jagdish Chandar and escaped. One of the assailants left behind in the carriage a revolver (Exhibit P/7), which is certainly one of the weapons used in this case. The learned Judge in giving Hans Raj a lesser sentence does so, because he comes to the conclusion that only two revolvers were used and that Hans Raj did not possess or fire either of them. We have considered the expert evidence and the circumstantial evidence of the discovery of bullets in the carriage. We are not satisfied that only two revolvers were in fact used. Two kinds of bullets were discovered, but it may well be that two revolvers may have used the same calibre of cartridges. We believe the confession of Hans Raj on this point and the evidence of the police, that there were in fact more than two revolvers or pistols used, and that Hans Raj did fire one of them.

Kasturi Lal the only prisoner who failed to escape was previously tried for participation in this murderous attack and was acquitted by the Sessions Court for reasons which are immaterial to the case under appeal, though he was convicted for an offence in respect of the forged cheque. The two appellants together with Jagdish Chandar admittedly jumped out of the running train and remained absconding for two years when Hans Raj drew attention to himself by writing a letter to the Viceroy, which led to his arrest; and it was on information given by Hans Raj that Prabhe Khan was arrested.

The evidence of the eye-witnesses in essentials we accept.

It is clear to us that the evidence of the eye-witnesses, the confession of Hans Raj, and the circumstances under which this sudden attack was made upon the police show premeditation and common intention on the part of the two appellants. It is wholly unnecessary to establish which of the appellants attacked which of the policemen or indeed to show what particular weapons were used by either appellant. If the two appellants were, as we have found, engaged in a concerted attack upon the police and either of them was armed with a deadly weapon and used it to kill a police officer they are both equally guilty of murder.

It was urged before us that the learned Sessions Judge had wrongly refused to permit the defence to make use of certain alleged statements of witnesses embodied in the Inquest Report. At the time that this Inquest Report was made it was obvious that the death of Karam Dad was homicidal and the case was therefore under police investigation so that the statements of any witnesses thus recorded by the police are governed by the provisions of section 162, Criminal Procedure Code, and could only have been made accessible to the defence, under the limitations provided by that section, for the purpose of contradicting the statements made by these witnesses in evidence. In point of fact there are no contradictions. It is true that there is no specific mention of the use of a knife in the Inquest Report; nor is there any mention of the signal word 'Ready.' But these are omissions which do not amount to contradictions. Moreover it is obvious from the medical evidence that a knife must have been used so that the omission of

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this weapon in the Inquest Report is in any case of no significance. It follows that no inference prejudicial to the prosecution can be drawn from the Inquest Report.

In Chapter VII of the judgment dealing with "Expert evidence" the learned Sessions Judge has attempted to fix the number of shots fired. This under the circumstances of this case is wholly impossible. Several shots may undoubtedly have gone out of the windows and the bullets for this reason would not be recovered. Accordingly the finding of the learned Sessions Judge that only two revolvers were used and not three, cannot be accepted.

The evidence in this case leaves us in no doubt that both the appellants actively participated in this murderous assault upon the police.

We would in conclusion observe that the lack of candour on the part of the police with regard to the detention of Kasturi Lal and Hans Raj has added greatly to the difficulty of this trial and has given an argument to the defence that the rest of the police evidence is unreliable. We think it is possible that the police adopted this attitude because the arrest in Kashmir may have been illegal. It cannot too often be pointed out that the conviction of guilty persons would be more certainly obtained if the prosecution was confined to simple and true evidence and no attempt was made either to hide essential facts or to embroider the case. It would further add to the facility of trials if irrelevant evidence was excluded. Further, where there is no distinct charge of conspiracy, or where it is unnecessary, and the evidence is sufficient, if believed, to prove the particular offences with which the accused are charged, it is a waste of

time and money to try and establish a conspiracy. We invite the attention of the proper authorities to this criticism of the evidence and the procedure adopted in this case.

The result is that we confirm the convictions of both the appellants. With regard to Prabhe Khan, we confirm the sentence of death passed upon him. In our opinion Hans Raj is fortunate to escape the extreme penalty; but since the Crown has not petitioned for enhancement, we have not thought it necessary to take any action on our own motion. Both the appellants are equally guilty of a brutal and premeditated murder and should have received the same sentence. This consideration, however, does not entitle us to commute the sentence passed on Prabhe Khan.

The appeal is dismissed.

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Appeal dismissed.

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