

**APPELLATE CRIMINAL.**

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*Before Young C. J. and Sale J.*

KALA (CONVICT) Appellant,

*versus*

THE CROWN—Respondent.

**Criminal Appeal No. 467 of 1939.**

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*June 23.*

*Confession — partly exculpatory and partly inculpatory — No evidence that exculpatory element is false — Court whether competent to reject one part and accept the other.*

*Held*, that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible; but while the Court must not reject any statement of fact in the confession the Court is competent to reject any inference which the accused wishes to be drawn from the facts and which, in the opinion of the Court, is patently untenable.

*Emperor v. Balmakund* (1), relied upon.

*Appeal from the order of Mr. A. L. Fletcher, Additional Sessions Judge, Rawalpindi, dated 19th April, 1939, convicting the appellant.*

MOHAMMAD AMIN, for Appellant.

NAZIR HUSSAIN, Assistant Legal Remembrancer, for Respondent.

The judgment of the Court was delivered by—

SALE J.—Kala has been convicted, by the learned Additional Sessions Judge of Rawalpindi, under section 302 of the Indian Penal Code, for the murder of Qurban Ali, on the evening of the 11th September, 1938, at Santh Sarola, Rawalpindi district. One

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Mohammad Azim was also tried by the learned Additional Sessions Judge for participation in this offence but was acquitted.

The learned Sessions Judge has rejected almost the whole of the prosecution evidence and for the purposes of this appeal the conviction of Kala rests solely on the basis of a confession recorded during the investigation by a Magistrate and repeated before the Committing Magistrate but retracted in the Sessions Court. In these circumstances it is unnecessary to recapitulate in any detail the prosecution story as recited in the first information report and the evidence of the prosecution witnesses which the learned Sessions Judge has discarded.

The essential facts are that Qurban Ali, deceased, who was the Secretary of the Co-operative Credit Society of his village claimed that Kala, appellant, owed him some money. There were other causes of enmity also which need not here be detailed.

The appellant Kala, who is employed in the Commissariat Department at Razmak, came home on two months' leave at the beginning of September. On the 11th of September, the deceased Qurban Ali returned to his village after a visit to Rawalpindi. The appellant Kala was living with his uncle Azim, and according to the prosecution version, Azim and Kala accompanied by two other persons visited Qurban Ali on the evening of the 11th September and suggested that the latter should accompany them to Azim's house to settle their debt. Qurban Ali is alleged to have agreed very reluctantly to accompany Kala and Azim to the latter's house and the suggestion of the prosecution was that having decoyed Qurban Ali to Azim's house Kala with the assistance of Azim

deliberately murdered Qurban Ali in the verandah of his house.

The murder was committed with a *kulhari* and the medical evidence shows that the cause of death is one incised wound on the left side of the head which cut open the bone to the brain.

A report was made to the Police only after considerable delay which the learned Sessions Judge holds has not been explained. The Head Constable (P. W. 15) investigated the case on receipt of the report, came to Azim's house and found the dead body of Qurban Ali lying on a charpoy in the verandah of Azim's house with a *kulhari* still embedded in the head of the deceased. Blood was found lying on the floor.

There is no doubt that Qurban Ali was killed while in the verandah of the house of Azim by a blow from an axe.

The learned Sessions Judge rejected the evidence of the prosecution witnesses and held that Azim had probably been implicated on account of enmity and acquitted him. It is unnecessary to discuss this evidence since Mr. Nazir Hussain on behalf of the Crown concedes that the evidence of the witnesses is unreliable and has rightly been rejected by the learned Sessions Judge. The only evidence remaining, therefore, for our consideration is the confession of Kala.

This confession was recorded during the investigation by Mr. Nehru, Sub-Divisional Magistrate, Murree, on the 21st September, 1938, that is to say 9 days after the occurrence, with all the necessary precautions prescribed by the law. The confession was repeated before the Committing Magistrate but was retracted in the Sessions Court. Counsel for the appellant has suggested that the confession was not

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made voluntarily and was obtained from the accused by improper inducements on the part of the Police. We can find no foundation on the record for this suggestion. It is clear that the Sub-Divisional Magistrate who recorded the confession observed all the necessary formalities, and satisfied himself by questioning the accused that the confession was voluntary and genuine. This conclusion is corroborated by the fact that Kala adhered to his confession when he was examined by the Committing Magistrate on the 12th of October, 1938, and again on the 24th October, 1938. It is only six months later when he was examined in the Sessions Court that he retracted his confession. We are satisfied that the confession was recorded with due regard to all the necessary formalities and after observance of the necessary precautions. The confession is corroborated by circumstantial evidence, afforded by the finding of the body at the place indicated in the confession; by the proved manner of Qurban Ali's death; and lastly by the fact admitted by Kala, before the Committing Magistrate, that blood-stained clothes were removed from his person on arrest. We hold that the confession is voluntary and true and that reliance can be placed upon it.

According to this confession the appellant was sitting in the house of his uncle Azim when Qurban Ali, deceased, came there of his own motion to collect some debts alleged to be due from Kala. There was an exchange of abuses but Azim who was then present calmed down the contestants. It is then said that Azim had to leave to obey a call of nature; and that while Azim was away Qurban Ali attacked the appellant with a stick ("*soti lekar hamla kiya.*") To defend himself, Kala bent down to pick up a weapon

which happened to be at hand and hit Qurban Ali on the head. Kala says that he did not realise at the time that he was using an axe.

Such is the confession. The learned Sessions Judge says that the filthiest abuse does not constitute grave and sudden provocation and that, since he cannot accept Kala's version that he did not realise that it was an axe with which he struck Qurban Ali, Kala's offence is murder under section 302 of the Indian Penal Code, and he holds that there are no extenuating circumstances which would justify a sentence less than death. It has been held by a Full Bench of the Allahabad High Court, of which one of us was a member, that "where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible." *Emperor v. Balmokand* (1). This is a rule which has been already approved for the Courts of this province and which must be followed in the present case. In the absence of any reliable evidence in the present case we must accept this confession as a whole, so far as the statements of fact are concerned. These facts are that Qurban Ali came to the house of his uncle of his own motion, demanded his debts, abused the appellant in a filthy manner and later attacked the appellant with a stick, and that it was only in defence that the appellant hit Qurban Ali. On these facts it is patent that the appellant had a right of private defence against Qurban Ali. The question for our consideration that remains, is whether the appellant exceeded his right of private defence.

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(1) I. L. R. (1930) 52 All. 1011 (F. B.).

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The appellant would only have been justified in causing the death by an axe blow on the head if he had reasonable cause for apprehension that Qurban Ali would in assaulting him cause him death or grievous hurt. The only actual assault attributed to Qurban Ali by the appellant in the confession is abuse and an attack with a stick. The original confession uses the words: "*soti lekar hamla kiya.*" It does not say that the deceased actually hit the appellant and it only mentions the threat with a "*soti*" which is usually understood to be a light stick. Actually the appellant did not receive any injury nor does he complain of any injury having been received. The appellant is a young man of 27, employed in the Army and, so far as is known, of sound physique. The age of the deceased is nowhere specifically stated but he must have been a good deal older, since two of his sons have given evidence in this case, one Mansabdar being recorded as 25 years of age. It would seem, therefore, that the appellant had the advantage over the deceased, both in age and physique. In these circumstances, even on the appellant's own confession, it is impossible to hold that the appellant was justified in using an axe to cut open Qurban Ali's head.

There is another point. The appellant says in his confession that it was only after he had hit Qurban Ali that he discovered that he had used an axe. We have seen the axe in Court and even making allowances for the fact the light may have been dim, owing to the time being 8 P.M. we are unable to accept the appellant's explanation that he did not realise at the time the weapon he had picked up was an axe, and that he was using the sharp side for striking Qurban Ali. It is to be noted that in disbelieving this part of the confession we are not rejecting any statements

of fact in the confession but only rejecting an inference, which the appellant wishes to be drawn from the facts and which in our view is patently untenable.

We hold, therefore, that the appellant had a right of private defence against Qurban Ali but that he exceeded it. We, therefore, accept the appeal to the extent of altering the conviction to one under the second part of section 304 of the Indian Penal Code and we reduce the sentence to three years' rigorous imprisonment.

A. N. K.

*Appeal partly accepted.*

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**APPELLATE CIVIL.**

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*Before Tek Chand and Dalip Singh JJ.*

KISHAN SINGH (JUDGMENT-DEBTOR) Appellant,

*versus*

PREM SINGH AND OTHERS—Respondents.

Execution Second Appeal No. 1 of 1939.

*Indian Limitation Act (IX of 1908), First Sch., Art. 182 — Execution — Application against surety — Whether a step-in-aid of execution of decree against the original judgment-debtor.*

*Held*, that an application against a surety is a step-in-aid of execution of the decree within the meaning of Art. 182 of the First Sch. to the Limitation Act, so as to bring a subsequent application within time against the original judgment-debtor.

*Badr-ud-Din v. Muhammad Hafiz* (1), followed.

Other case-law, discussed.

*Second appeal from the order of Mr. S. B. Capoor, Additional District Judge, Ferozepore, dated 13th October, 1938, reversing that of Khan Abdus*

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June 26.