
(1939) 12 AHC CK 0013

Allahabad High Court

Case No: None

Emperor

APPELLANT

Vs

Aftab Mohd. Khan and
Others

RESPONDENT

Date of Decision: Dec. 8, 1939

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 417
- Evidence Act, 1872 - Section 157
- Penal Code, 1860 (IPC) - Section 147

Citation: AIR 1940 All 291 : (1940) 10 AWR 85

Hon'ble Judges: Braund, J

Bench: Division Bench

Judgement

Braund, J.

We are dealing in this case with two appeals (Nos. 300 and 312 of 1938 respectively) u/s 417, Criminal P.C., and one application for revision (No. 296 of 1938), all presented by, or at the instance of, the Local Government. The Appeal No. 300 of 1938 is an appeal in which the fifty-seven respondents, all of whom were acquitted, were upon their trial before the learned Sessions Judge of Bulandshahr. The Appeal No. 312 of 1938, involves eight respondents three of whom were convicted upon charges in connexion with the incident at the temple which we shall mention later and five of whom were convicted upon charges in connexion with the incidents in the bazaar which we shall also deal with. The Revision Application No. 296 of 1938 involves as respondents the same eight men who are respondents in Appeal No. 312 of 1938 and asks for a revision of sentences passed upon them in respect of certain charges in respect of which they were convicted at the trial.

2. It will be convenient if we begin by setting out as shortly as we can a narrative of the events which led to the trial in question. The case, which was tried by the learned Sessions Judge in November 1937, has become known as the Amarpur dacoity case.

Amarpur is a village or a small town in the Bulandshahr district and seems to be one of the twelve villages which go under the collective name of "Bara Basti." The twelve villages adjoin each other within an area of some seven square miles. They contain a cosmopolitan population of Pathans and other Mussalmans and Vaishes and other Hindus. The particular town of Amarpur possesses a population of a little over two thousand made up, as far as we can gather, of about eight hundred Pathans, eight hundred other Mussalmans, three hundred Vaishes and some three hundred other Hindus.

3. The learned Sessions Judge has been at considerable pains and we hesitate to say that we do not think him right in having done so, to investigate the exact relations between the Hindu and Mahomedan populations of the place, for, it is necessary at the outset to say that the conflict out of which these proceedings have arisen was one which, if not communal, in the strict sense, was, at any rate, one between Mahomedans on the one side and Hindus on the other side. With very few exceptions, all the hundred and twenty men who were tried by the learned Sessions Judge, the appeals of many of whom are now before us, were Mahomedans, while it will be seen from the evidence, when we come to deal with it, that all the victims of the disturbance which took place were Hindus. The learned Judge was therefore probably right to devote considerable attention to the relations which existed in the town between the two communities. He has found a number of circumstances which might be supposed to afford grounds for ill feeling between them. It appears that the commerce of the place was principally in the hands of the Vaishes who possessed between twenty-five and thirty shops, while only three or four belonged to the Mahomedans. In addition the Vaishes carried on a flourishing money lending business in the course of which many, if not most, of the Mahomedans and other non-Vaishes of the town had become obliged to them. The learned Judge has found that for the past few years there had been a change, inasmuch as some years ago it was the Pathans who were the prosperous community. But they had been gradually displaced and reduced to poverty and debt by the Vaishes, who succeeded in getting into their hands a considerable part of the property which formerly belonged to the Pathans. In this way it comes about that a great number of the accused are indebted to the complainants.

4. In addition to this, the learned Judge has observed certain other phenomena in the place, particularly one or more cases in which attempts had been made by Mahomedans to convert non-Mahomedans of the town to Islam and a dispute which had been going on since 1934 concerning an alleged encroachment by a mosque upon certain land belonging to some of the Hindus. This dispute culminated in an appeal which was to be heard on 19th November 1936, the day after the disturbance in question took place. We also have read, and carefully considered, the evidence relating to the relations between the two communities of the place. While we think that it does bear out the view formed by the learned Judge that there was ill-feeling between them, we ourselves hesitate to pursue it very far or to deal with it at length in this judgment because we take the view that, although in assessing the value of the evidence it is a matter always to be borne in

mind, it cannot serve as a substitute for a critical examination of the evidence itself. We shall have occasion during the course of this judgment to say that in this and in other respects the learned Judge has adopted a number of altogether arbitrary tests in weighing the evidence and, in our view, this is one of the matters in which it is possible that he has allowed himself to be unduly influenced by the surrounding atmosphere. We think it probable that many irritating factors could be found to exist in almost every village which contains a mixed population of Hindus and Mahomedans and, while we agree that this must necessarily be a proper matter in every case to bear in mind, we think nevertheless that it cannot serve in any way as a substitute for a careful examination of the individual evidence of each witness. This was not a communal riot of the character with which this province is so unhappily familiar, for the rioters do not appear to have been actuated by religious frenzy against the opposite community. It cannot be said that the riot was not of a communal nature at all, but it was essentially a quarrel between the Mahomedans on the one side, assisted by a few low caste Hindus, and a section of the Hindu community, namely the Vaishes, on the other, the root cause being economic rather than religious. Although it is said that there was a mob of Mahomedans, armed with lathis and spears, only nine Hindu shop-keepers, all Banias except for two Sunars, were injured during the looting of the bazar, and none of the injuries were grievous. It would thus appear that the rioters were less inspired by fanatical fury against the Hindus as such than by a desire to loot and plunder the Banias.

5. The town of Amarpur possesses, as we have said, a mosque. It also possesses a Hindu temple situated about a furlong from the town. It is a small temple containing an image of Shiva, without a roof but enclosed, as we understand, by a wall. The curtilage contains a garden, a chabutra and a little temple which houses the image itself. The evidence leaves much to be desired as to how exactly the temple was constructed-a matter not altogether without importance when we come to consider the charges themselves later on. A Hindu named Durga Prasad Brahman was the pujari of the temple. The town has also a bazar lying to the north of the temple and connected with it by a long road bordered by houses. The business centre of the town-we shall call it in this case the bazar-was at a cross-roads on this road rather less than half a mile north of the temple at which point four roads met, the one from the south leading from the temple and continuing to the north intersected by a road running from east to west.

6. On 18th November 1936 at about 7 o'clock in the morning the pujari, Durga Prasad Brahman-so the story goes-was reciting "arti" and ringing the small temple hand bell. This apparently is a common form of a Hindu ceremony consisting of a kind of chant by the pujari to the accompaniment of the bell. "With him were two other men Sri Ram and Kanhaiya Lal who were there apparently as worshippers repeating the "arti." That was the scene when the first of the incidents with which we are dealing occurred. To put the matter at this stage shortly, the case for the prosecution in the trial Court was that while these three men were performing their devotions in the manner we have described at the Shiva Temple, they were attacked by some eight Muslims. Sri Ram and Durga Prasad

Brahman, the pujari, were both injured-the former grievously while the third man, Kanhaiya Lal, ran away. It is said, moreover, that another of the party of attackers seized the hand bell out of the pujari's hand and made off with it. It is also alleged that all, or at any rate some of, the intruders burst into the temple with their shoes on and thereby defiled it.

7. Although at this stage we are engaged merely in giving a history of the matter, it will be convenient to pause and point out that the eight men in question who were charged in respect of this incident in the Court below were the eight respondents Sardar Muhammad Khan alias Sardar, Nisar Ahmad alias Nisar, and Kale alias Muhammad Saeed Khan (who are respondents 1, 2 and 3 to the Appeal No. 312 and the Revision No. 296), Saeed Muhammad Khan, Noor Muhammad Khan alias Muhammad. Noor, Aftab Ahmad alias Ahmad Noor Khan, Hazrat Noor and Aftab Muhammad Khan alias Aftab Khan who are respondents Nos. 26, 8, 2, 50 and 1 to the Appeal No. 300 of 1938 which is before us. These eight men were all charged in respect of this incident at the temple as well as in respect of their general participation in the disturbance which took place later at the bazar. "We shall have to deal with the charges made more particularly later on but it is sufficient for us at present to say that, so far as the temple incident alone is concerned, they were charged under Sections 323 and 325 with causing hurt to the two men we have mentioned and under Sections 295 and 296 in respect of defilement of the temple and of disturbing a religious assembly. Of the eight men charged with a specific participation in the attack on the temple three men only were convicted, namely Sardar Muhammad Khan alias Sardar, Nisar Ahmad alias Nisar and Kale alias Muhammad Saeed Khan. As regards the first one, Sardar Muhammad Khan, the learned Judge has found him guilty under Sections 296, 323 and 325, 1.P.C., and has sentenced him to one month's imprisonment u/s 296, to one week's imprisonment u/s 323 and to three months' imprisonment u/s 325. As regards the second and third ones, Nisar Ahmad alias Nisar and Kale alias Muhammad Saeed Khan, the learned Judge has found them guilty of the same offences and has sentenced them to the same punishments. So much therefore, for the narrative of what happened at the temple itself.

8. The story then runs that Kanhaiya Laran to the bazar and related there what had happened at the temple. Meanwhile Sri Ram and Durga Prasad Brahman found their way to the bazar where Sri Ram, who is a shop-keeper, was laid out on his own chabutra. A sensation ensued and a vehicle was sent for to take him to the hospital. At that point two crowds of Mahomedans, interspersed by a few Hindus, are said to have appeared, one crowd coming from the north headed by one Khuda Noor Khan (who is respondent 4 to the Appeal No. 300) and the other crowd coming from the west headed by Rashid Khan (who is respondent 9 to the same appeal). We pause to observe at this stage that Khuda Noor Khan and Rashid Khan are two of the leaders of the Mahomedan community in this place and are comparatively influential men. A volume of evidence has been directed against them which we shall have occasion to deal with later. At this stage, it is sufficient to observe that one of them is said to have led the crowd of between a hundred and two

hundred men coming from the north, while the other is said to have led a crowd of similar proportions from the west. The crowd is said to have carried lathis and spears and the evidence is that they and their leaders were shouting "Ya Ali," beat and loot the Baniyas. Their intention can only be described, if the evidence is true, as a more or less general intention to loot the bazar and beat the Baniyas. Apart therefore from the temple incident, the subject-matter of the remaining charges against the respondents relates to the looting of the bazar and they have been uniformly charged under Sections 395 and 397 with dacoity and with using deadly weapons to that end and also under Sections 323 and 325 with causing hurt. To put the matter shortly, we have therefore to deal with a situation on this morning in which an attack was made by eight men on the temple at about seven in the morning and in which about an hour later there is said to have been a general looting of the bazar by two crowds of Mahomedans. That, of course, is assuming that the prosecution story is substantially true. This is a general outline of what is said to have happened.

9. We think it convenient to pause at this stage to make some observations upon the charges which have been made against the respondents. They are all uniformly charged under the same Sections, 120B (conspiracy), 395 and 397(dacoity), 323 and 325(hurt), 435(arson) and 295 and 296(defilement and disturbance of worship). We think that these charges have been framed in a somewhat injudicious and indiscriminate manner. Apart altogether from the truth of the story, we think that a charge u/s 147, Penal Code, whether in addition to or in substitution for some of the existing charges, would have been appropriate to the bulk of the persons who were accused. And, observing as we do that a charge under that Section was originally framed, we are at a loss to understand for what reason it was dropped. We can conceive no case in which such a charge upon the materials available would have been more appropriate and, if that course had been adopted, we cannot help feeling that the learned Sessions Judge would have saved himself a great deal of trouble and that we ourselves should have found our task much easier. As it is, the course has been chosen of charging the accused with a number of special, and in some cases highly technical, offences which must necessarily be difficult to prove.

10. We pass now to the charges themselves. The first is a charge u/s 120B for criminal conspiracy. We think that we can deal with this charge shortly, and at once, by saying that we agree with the learned Sessions Judge in thinking that there is not a vestige of evidence upon which such a charge can be successfully based. The evidence of conspiracy rests really upon the testimony of two witnesses Chajjiwa (No. 31) and Shera (No. 92); The former gives evidence of being sent for on the day previous to 18th November by Rashid Khan and Khuda Noor Khan to a meeting at which, to put it generally, an attack on Hindus was discussed. No particulars are given and the witness is content to make such sweeping statements as:

All the accused present in Court excepting Rashid Khan and Amin Khan, son of Abdul Rahim Khan alias Kale Khan, were among the persons who had assembled at Rashid

Khan"s kolhu.

11. As regards the other witness, Shera, his evidence is equally vague. He speaks of seeing a hundred or a hundred and twenty, five persons gathered at Rashid Khan"s kolhu about seven in the evening and of hearing them talk about "punishing the Banias in the morning." We do not think for a moment that any serious attempt can be made to base a technical charge of conspiracy on such evidence as this. The offence of conspiracy u/s 120B, Penal Code, is one which requires detailed and specific proof against each of the accused that he individually participated in a particular design to do a particular criminal thing. Here we can find no trace of any such conspiracy. We regret that the charge of criminal conspiracy was ever raised but we have no doubt that it was designed to be used as a means of bringing the crime home to this very large number of accused persons by means other than direct proof of their individual share in the events of this morning. Again we think, that if that was the object, it would have been far better to have done it by introducing a charge u/s 147 or to have relied simply upon Section 34, Penal Code. The next charge against the respondents is a uniform charge under Sections 395 and 397, Penal Code, read with Section 34. This charge is based upon the attack by the crowds we have mentioned upon the bazar and upon the alleged presence of the appellants in one or other of those crowds. In many cases there is evidence before us of individual acts by individual appellants who were seen and recognized among the crowds. But in all cases we think that assistance is sought to be derived from Section 34 of the Code, for the purpose of implicating all the appellants in the hurt which was inflicted at both the temple and the bazar and in the looting which went on.

12. The next charge is the charge under Sections 323 and 325 which led to the hurt inflicted both at the temple and in the bazar. Apart from specific evidence relating to the injuries inflicted upon Sri Ram and Durga Prasad Brahman at the temple there is very little evidence of the individual beating in the bazar and therefore Section 34 is consistently relied upon to support this charge against the majority of the appellants. The next charge is u/s 435, I.P. C, and relates to arson. There is only one instance of anything being burnt and we think it right to say straightway that, so far as all the respondents are concerned against whom there is no specific evidence of their having individually taken part in that incident, we fail to see how any charge of arson can be established against them. This is, again, an instance, as we think, of an injudicious and indiscriminate sprinkling of the case with charges against the accused generally.

13. Finally there are charges under Sections 295 and 296, I.P. C, founded on the alleged defilement of the Shiva temple at 7 A.M. in the morning by the men who entered with shoes on their feet and the alleged disturbance by them of the worship taking place there. It has to be observed that this charge is levelled not merely against the eight men directly involved but against every one of the hundred and twenty odd men who were charged in respect of the disturbance in the bazar. Here again, as we think, is an instance of the lack of discretion shown in framing the charges against the accused, inasmuch as we are at a loss to understand how any but the eight men in question can possibly be involved in the

entry upon the temple or its defilement. It is wholly unreasonable, as we think, to suggest that there was any common intention to defile the temple or to disturb its worship running through the whole of the incidents of this day and common to all those who took part in them. We think therefore that the incident at the temple must be treated as a separate incident and we propose ourselves to do so. We have made these comments upon the charges partly because we desire to point out that, in our view, a very relevant charge u/s 147 has been omitted and partly to point out that we think that a minimum of discrimination has been shown in apportioning the others.

14. We now propose to deal particularly with the incident at the temple and the appeals against the eight respondents who are said to have been involved in it. As we have pointed out, three of these men, namely Sardar, Kale and Nisar, have been convicted under S3. 323 and 325 and 296 and have been sentenced to the terms of punishment to which we have drawn attention. The remaining five were acquitted. (After stating certain evidence the judgment proceeded further.) Upon this evidence and upon their admission that they were engaged in a fight at or near the temple, the learned Judge has convicted Sardar, Kale and Nisar but has acquitted the remaining five. The matter has caused us some little difficulty. But we have come to the conclusion, upon the best consideration of the evidence that we have been capable of giving it, that it would be unsafe to disturb the finding of the learned Judge. It is true that all eight of these men have been named by seven witnesses. As regards two of those witnesses however we scarcely think them satisfactory. Horam was only examined by the police ten or twelve days after the event while Hurmi seems to have left the place and gone to the jungle without telling anybody of what he had seen. He says he left "for fear of darogah" and, if so, he himself may have had a guilty conscience. Even Kanti Prasad failed to tell the darogah what he had seen of the temple incident when he had an opportunity of doing so on the 19th. "Whatever might have been our view, had we had an opportunity of seeing and hearing the witnesses ourselves, we think that in this case we should not be doing right by substituting a judgment of our own for that formed by the learned Sessions Judge as to the credibility of the eye-witnesses. Moreover, it is possible, as we think, to regard the uniformity of these seven witnesses as a trifle suspicious. So far as Kanti Prasad, Horam and Hurmi are concerned, they were all a little distance away and yet they all claim so particularly to have observed the incident as to be able to say exactly who it was that beat Durga Prasad Brahman and Sri Ram respectively and who it was that snatched the bell. However keen their eyesight may have been, we are disposed to doubt this record of their uniformity of observation unless there has been some subsequent discussion between them. On the whole therefore as regards the five men other than Sardar Mohammad Khan, Nisar Ahmad and Kaley we are disposed to dismiss this appeal so far as it may relate to their participation in the incidents at the temple.

15. As regards the three men who have been convicted, we agree with the learned Sessions Judge in thinking that they must be convicted under Sections 323 and 325(read with Section 34) in respect of the simple and grievous hurt inflicted upon Durga Prasad

Brahman and Sri Ram respectively and u/s 296, I.P.C., for voluntarily causing a disturbance to the assembly lawfully engaged in performing religious worship at the Shiva temple. For the purpose of Section 296, we have no doubt that three persons gathered together for purposes of worship are sufficient to constitute an "assembly." We agree with the learned Sessions Judge in not convicting them u/s 295 because, in our view, there is insufficient proof as to what constitute the temple precincts which ought to be regarded as sacred. As we have observed, there is a minimum of proof as to the "layout" of the temple and we are not satisfied that it has been strictly proved that they encroached upon the shrine itself. The result therefore of this part of the appeal is that as regards Saeed Mohammad Khan (No. 26), Noor Mohammad Khan, alias Mohammad Noor (No. 8), Aftab Ahmad alias Ahmad Moor (No. 2), Aftab Mohammad Khan, alias Aftab Khan, son of Mohammad Hanif Khan, (No. 1) and Hazrat Noor (No. 50) the Appeal No. 300 is dismissed as against them so far as it relates to the incident at the temple.

16. As regards Sardar Mohammad Khan alias Sardar Nisar Ahmad alias Nisar and Kale alias Mohammad Saeed Khan, and so far as it relates to the temple incident, the Government appeal against their acquittal upon charges under Sections 120B and 295, I.P.C., is dismissed. So far however as the revision application in respect of these three men is concerned in respect of the inadequacy of their sentences under the charges in respect of which they have been convicted for the temple incident, we think that the sentences inflicted by the learned Sessions Judge are inadequate. It will be remembered that those sentences are respectively one month u/s 296, one week u/s 323 and three months u/s 325, all to run concurrently. We have been impressed by the fact that these men have already spent some considerable time in jail. We appreciate that, if these sentences are enhanced, it will involve their being brought back to jail. We have the delay in the hearing of this appeal also present in our minds. But, considering all these matters, we do not think that, in the circumstances of the case, justice will be done unless we order that the sentences imposed by the learned Judge be now enhanced and that each be sentenced to six months" rigorous imprisonment u/s 296, to six months" rigorous imprisonment u/s 323 and to two years" rigorous imprisonment u/s 325, all sentences to run concurrently.

17. We have now to consider the cases of the respondents in so far as they relate to the bazar incidents, as distinct from the affair at the temple. We have already said that we can find no reason to treat the temple and the bazar incidents as one transaction so as necessarily to implicate whether u/s 34, I.P.C., or upon the footing of an express "conspiracy" u/s 120B those involved in the bazar incidents in the temple affair or vice versa. And we therefore think that it is necessary to treat what happened in the bazar altogether separately from what happened at the temple.

18. We have already had occasion to observe the method of assessment of the value of evidence adopted by the learned Judge. This method is most marked in the case of the witnesses of the bazar incidents. He has in his judgment at p. 988 grouped the witnesses which have dealt with what he describes as the "loot-mar" at the bazar and he has

considered their potentialities as truthful or untruthful witnesses. We could hardly have deprecated this display of industry had it been followed at any stage by a critical examination of their evidence on its merits, nor do we desire it to be thought that we consider such considerations as the relationship of witnesses to complainants and so forth as matters entirely to be ignored. But we find a tendency too readily to discard the evidence of these witnesses wholly upon personal-and in our view in many cases insufficient grounds without any apparent examination at all of what the witnesses have actually said. For instance, witnesses related to other prosecution witnesses are, upon that ground alone, often ignored. Witnesses indebted to the Vaishes are "per se" disqualified from giving truthful evidence. Complainants themselves are contemptuously dismissed as, on that account, unreliable, notwithstanding the fact that in many cases, such as the identification of their own looted property, they are the appropriate witnesses to give, if not the only persons who can give, the necessary evidence. Even the tenants of the complainants are, on that account, to be disbelieved. These are instances of the way in which the learned Judge has classified the various witnesses and, as we think, without a sufficient examination of the evidence itself, has dismissed almost all of them from his mind. We scarcely think that this method of approach was the right one, though we are far from saying that the learned Judge would not have been justified in bearing in mind most of the considerations he has raised in arriving at the true value of the evidence given by each individual witness. These methods have made our own task doubly difficult, as we have had to examine with the minutest care the evidence of each witness without in most cases the assistance of any real expression of the Judge's own views upon it. For that reason we know of no other way in which we can adequately deal with the case, than to take each individual respondent's case and to deal with it separately.

19. Before dealing with the cases of the individual respondents, there is one thing more we have to say in deference to Mr. David's able argument before us. It concerns the principles which ought to be adopted by the High Court in considering appeals of this kind at the instance of the Government u/s 417, Criminal P.C. We appreciate fully that, as a matter of jurisdiction, the whole case is at large before us both as to the facts and as to the law. But it is, in our view, impossible to refuse to face the fact that there is a difference between the consideration of a case upon an appeal of this kind and its consideration when "res integra" in the Court below. We are content to be guided-as indeed we must be guided-by the principles laid down by the Judicial Committee in *Sheo Swarup and Others vs. King Emperor* which we think clearly indicates what limits are in practice set to the discretion of an Appellate Court in a case of this kind. As the Privy Council has pointed out in the first and fourth of the matters it has expressly alluded to, the Appellate Court will be slow to disturb a finding of fact arrived at by a Judge who has had opportunities for assessing the value of evidence which the Appellate Court has not had. We think that an Appellate Court pursuing this principle will be slow to substitute a view of the facts of its own for an opposite view of the facts held by the Judge below, where the latter are, upon the evidence, reasonable views, even though the Judges in the Appellate Court might have preferred a view of their own if the matter had been "res integra". Moreover, as has

also been pointed out by the Judicial Committee, the presumption of innocence and the title of the accused to the benefit of any doubt are certainly not lessened by the fact that they have been acquitted at their trial. We have tried to adopt these principles in considering the cases of individual respondents in this appeal and we have been slow to disturb a finding of fact by the learned Judge except where we have come to the conclusion that, notwithstanding the advantages enjoyed by him in seeing and hearing witnesses, the conclusions he reached were wrong.

20. We shall now take the cases of individual respondents. We shall in each case indicate only whether or not they ought, in our judgment, to have been found by the learned Judge, on the evidence before him, to have participated in the looting and we shall leave till later an exact discussion of what offences those who ought to have been convicted have been guilty of.

21. (1) Aftab Mohammad Khan alias Aftab Khan. This man is one of those who are alleged to have taken part in the affair at the temple and in whose case we have already dismissed the appeal by the Government against his acquittal upon charges so far as they relate to that incident. He was also acquitted at the trial of any participation in the bazar incidents and we have now to deal with the appeal in that respect also. We have already mentioned the report, Ex. A-64 which Chuttan Lal rendered at about 1 P.M. on the day in question at the Basi police station. Mr. David who appears on behalf of a large number of the respondents has argued that the document is not admissible in evidence for any purpose. He puts the matter in this way. He says that A-64 is not the first information report and that it is obvious on its face that it was not recorded as such. We agree with him that A-64 was not itself the first information report in this case, having been recorded only at 1 p. M., some hours after the actual first information report (Ex. A-1) had been lodged by Mohammad Monir at Siyana Police Station at 10 A.M. Mr. David then says that the investigation had started before A-64 was recorded and points to the facts that police officers were at the scene at or about 10 A.M. With this too we agree. But Mr. David then goes on to say that, by virtue of Section 162(1), Criminal P.C., the Ex. A-64 must be treated as having been "made...to a police officer in the course of an investigation" and on that account cannot be used by the prosecution "for any purpose," including, of course, the purpose of corroborating its author's own evidence u/s 157, Evidence Act.

22. The real point to be determined is whether on the particular facts of the case, Chuttan Lal's statement given and recorded at the Basi police outpost at 1 P.M. on 18th November was a "statement made...in the course of an investigation" under the Code of Criminal Procedure. Conceding that the Ex. A-1 was the first information report and that an investigation pursuant to it was on foot at 11 A.M. we still do not think that the Ex. A-64 recorded a statement made "in the course of" the investigation. We have to consider what is meant by the words "in the course of." The view which Mr. David presses upon us is that they simply define the period of time between the moment the investigation started and the moment it ended and no statement made during that interval can ever be used,

whatever are the circumstances in which it is made. He asks us to treat the words solely as marking a span of time. The other view is that the words "in the course of" import the meaning that the statement has to be made, not merely after the investigation has started, but as a step in, or in conscious prosecution of, the investigation itself.

23. We cannot help feeling that to confine the words merely to a particular space of time puts too narrow a construction on them. Had that been the real intention of the Legislature, we cannot help feeling that it would have employed more simply the expression "after an investigation has started." Moreover, we may consider what the purpose of the Section is. As it seems to us it is to protect accused persons from being prejudiced by statements made to police officers who by reason of the fact that an investigation is known to be on foot at the time the statement is made, may be in a position to influence the maker of it and, on the other hand, to protect accused persons from the prejudice at the hands of persons who in the knowledge that an investigation has already started, are prepared to tell untruths.

24. In the present case, the facts, as we find them are simple. Chuttan Lal left Amarpur at about 9 A.M. but we think that he did not leave for the purpose of making a report at all. We accept his evidence that he went to get help or possibly to get himself out of the way. If he had then had the making of a report in his mind he would certainly not have gone by a round about way to a mere police outpost at Basi. We believe him when he says that he only decided to make the report when urged to do so by his zamindar. It is true that he knew at that time that Mohammad Munir had started out to make a report at Siyana. But he did not know, and could not have known, that an investigation had started in consequence of that report. We think that, an investigation starts when the first step towards investigation is taken by the police. It did not by any means follow from the fact that Mohammad Munir had started for Siyana that an investigation was, or even would be on foot, for "non constant" that Mohammad Munir even reached Siyana or, if he did, that an investigation had started in consequence of his report. We think that the true view is that Chuttan Lal's report was a report which was made quite independently of, and in no relation to, any pending investigation. It was not designed to promote a pending investigation in any way but to start one. It had, in our opinion, no reference at all to the investigation which had in fact begun from Siyana. And, for these reasons, we think that it is not possible to say that it was made "in the course of" the investigation of the case which began with Mohammad Munir's report at Siyana.

25. We take the view that the words "in the course of" in the context of this Section import that the statement must be made as a step in a pending investigation to be used in that investigation. We do not think that the words "in the course of" refer merely to that period of time which elapses between the beginning and the end of the investigation. We think that the exact shade of meaning of the words "in the course of" may well vary according to their context. Obviously, if they themselves qualify a period of time (such as "in the course of the year") they are used to denote a span of time. If, on the other hand, they qualify a continuing process (such as "in the course of the proceedings") they denote, in

our view, something more than a mere period of time. It is a dangerous practice to take words from one statute to illustrate the meaning of words in another statute but we nevertheless venture, in order to illustrate our meaning, to point out the words used by Lord Dunedin in *Davidson & Co. v. M Robb or Officer* (1918) AC 304 in relation to the words "in the course of employment" used in the English Work-men's Compensation Act, 1906. He says:

In my view "in the course of employment" is a different thing from during the period of employment." It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master....

26. It serves to illustrate what we mean. We are encouraged to find that the High Court at Patna has expressed the same view on facts which are, we think, indistinguishable from those with which we are dealing: [Emperor Vs. Lalji Rai](#), . If an opposite view is to be implied in the decision of a two Judge Bench of the Calcutta High Court in [Mani Mohan Ghose Vs. Emperor](#), , we regret that we should be unable to follow it. In the result, therefore, we think that the Ex. A-64 is an admissible document, admissible for the purpose of corroborating the evidence given by Chuttan Lal himself. The learned Judge has however himself discarded this document altogether in the case of every one of the accused persons whom it implicated upon the sole ground that it "cannot be given any weight." We regard as slight the Judge's reasons which appear at p. 985 of the record for dismissing A-64 from his mind altogether as evidence confirming the oral testimony of Chuttan Lal. He observes that "there was no necessity for making a second report and that too at a different police station."

27. He says that A-64 was made "after some consultations in order to add some facts." And he concludes by commenting that Chuttan Lal had "failed in satisfactorily explaining the delay in making the report." We ourselves have not been able to dismiss this valuable exhibit so lightly as a piece of evidence corroborative u/s 157, Evidence Act, of Chuttan Lal's own evidence. It is true that Amarpur is situated within the police station jurisdiction of Siyana and that Basi is only an outpost. It is true also that the report was made at Basi some five hours after the affair began at Amarpur. But Chuttan Lal in his evidence has, as we have already said, explained and to our minds satisfactorily explained his movements during the intervening period. He first went to Narsena village and then to Daulatpur to tell his zamindar about what had happened. He got to the last mentioned place about 10 A.M. and waited an hour before seeing the zamindar. The zamindar gave him what was unquestionably good advice and told him to go to the nearest police establishment which happened to be an outpost at Basi three miles away and to make a report. That he did, reaching there about half an hour after noon. We do not find anything very extraordinary in this man's movements nor in his making of the report, as he was obviously unaware that any other report had been actually made and he was only doing what the zamindar had advised him to do. He did not set out with the object of making a report. Nor do we think it necessarily very strange that he had first gone to several villages in an attempt to get help. Chuttan Lal told his story to the darogha on the same day. There is nothing in

his story as given in evidence in the Sessions Court which, as we read it, is prima facie untruthful. In our view, therefore, Ex. A-64 is a valuable piece of evidence in so far as it serves to corroborate what its author has himself said in evidence. It named eleven men specifically as being implicated in the bazar incidents. We do not wish to be thought to assert that it is, by itself by any means conclusive. We only say that we regard it as a valuable piece of corroborative evidence not to be ignored in dealing with the evidence as a whole against those men whom it implicates. We have dealt with this Ex. A-64 at some length in the case of this particular appellant as it occurs in the case of several others as well and we do not desire in each case to set out again our particular reasons for relying upon it to the extent which we have indicated.

28. Apart from this exhibit and the evidence of Chuttan Lal himself, there are only two witnesses who give evidence implicating this respondent; one a boy of twelve years old who gave his statement to the police on 20th November and the other a Chamar named Nanda who only made his statement to the investigating officer on 1st December. The latter himself has said that between the date of the incident and the making of his statement to the police he told no one that he was a witness of the incidents that occurred in the bazar. We are not prepared to disagree with the learned Judge in declining to rely upon these two men. We are left, therefore, with the evidence of Chuttan Lal only and its corroboration by Ex. A-64. In all the circumstances we are not disposed, on this evidence standing alone, to disturb the finding of the learned Judge in respect of this man and to hold that he has been satisfactorily proved to have taken part in the rioting in the bazar.

29. These respondents are numbered according to the numbers in the record of the proceedings on appeal. (2) Aftab Ahmad alias Ahmad Noor Khan.-This man is not named in either the Ex. A-64 which we have already discussed or in the Ex. A-1, which was the first information report filed by the chowkidar, Munir. His case, therefore, rests entirely on the evidence of eye witnesses. He too, is alleged to have been engaged in the temple incident but has been acquitted in respect of those charges. There are only three witnesses against him, a boy, Om Prakash, aged 9 or 10, who is a nephew of the complainant Chuttan Lal and who appeared to the learned Judge to be "tutored"; another boy, named Din Dayal who is only twelve years old, whose cross examination was not altogether reassuring; and another witness, Debi Das, who admits to having very poor vision. We think that, in the absence of any form of corroborative evidence, the learned Judge cannot be criticized for his acquittal of this man and that the appeal in respect of him must also be dismissed.

30. (3) Dhoomi son of Munna. This man also has been altogether acquitted by the learned Judge. We think that on the evidence he ought to have been convicted. He is one of those who are named in the Ex. A-64, the corroborative value of which we have already discussed; and in addition there are ten eye witnesses against him. It is true that the value of the evidence of the eye witnesses varies. We have had to examine the evidence of each eye witness in relation to each respondent individually.

31. At this point we meet a peculiar phenomenon which runs through a good deal of the evidence given in connexion with the case, that is to say the identity of the identifications given by various sets of witnesses. This is not altogether an easy matter. For while any two or more men may well have been in a position to recognise a particular group of rioters and those only, we cannot dismiss from our minds that where witnesses who have no obvious connexion with one another furnished lists and in particular long lists of identical people whom they say they have recognized among the looters, there is a possibility that this identification is the result of collaboration between them rather than of actual observation. We shall indicate these witnesses as we reach them. At this stage we think that the true principle to adopt is, while not necessarily discarding their evidence altogether, to regard it, nevertheless with a great deal of suspicion unless it is confirmed from other reliable sources. This principle we have adopted throughout the case. (The judgment then discussed the case of Dhoomi, considered the cases of respondents 4, 9, 5, 6 and 7, individually and proceeded to consider that of respondent 8.) There are no less than 12 eye-witnesses against him. The first is Murari Lal, who was examined on 18th November. He has given identical evidence with no one else and seems to us to be reliable. The learned Judge has disbelieved him primarily because he was a complainant. We are at a loss to understand upon what principle a complainant who after all is one of the persons most likely to know the facts should "ex hypothesi" be unworthy of belief. We can understand that his evidence ought in all cases to be carefully tested; but why it is to be supposed to suffer an irrebuttable presumption of unworthiness we are at a loss to comprehend. We do not propose to go through the evidence in detail of all these witnesses, of whom there are 12. It suffices to say that we can find nothing which *prima facie* discredits the evidence of such of them as the man we have just mentioned, of Piarey Lal, who had every opportunity to recognize the witness who broke into his own shop, of Chuttan Lal who made the report, of Narain Das and of several others.

32. We think that the evidence against this respondent is conclusive, even without the assistance of any evidence of what property was traced to him, to show that he was one of those who engaged in looting in the bazaar on this morning. He ought, we think, to have been convicted. (The judgment then resumed discussion of cases of certain accused and then proceeded to consider that of respondent 32.) In this case the respondent is only charged with "receiving" the proceeds of the dacoity. He has been acquitted by the learned Judge, and, as we think, rightly. We do not think we need discuss the case at length. The respondent in his own statement has said that he left Amarpur several days before the 18th November and went hawking in the outstations. There is no evidence that this is not true and no attempt has been made to show that he was ever in his house between the 18th (when the goods were stolen) and the 21st (when they were discovered). We think that no man can be convicted u/s 412, I.P.C., for "receiving or "retaining" stolen goods unless he is shown at the material time to have been in possession or control of the place where they were discovered or at least to have had some knowledge of their deposit there. We have not overlooked Section 114, Evidence Act. Moreover, we are not satisfied as to why this man's house was searched

twice on consecutive days, nor that access to the interior could not have been had through the "slats" which apparently formed the wall. We think that the appeal must fall to be dismissed in this case. (The judgment then dealt with the cases of the rest of the accused and concluded as follows.) First we dismiss the Appeals Nos. 300 and 312 so far as they relate to the acquittal of such of the respondents as were affected by them upon charges under Sections 120 B, 295, 296, 325 and 435, I.P.C. Secondly, we dismiss the Appeal No. 300 against the acquittal of the respondent Bhatia, son of Ghisua, upon the charge against him u/s 412, I.P.C. Thirdly, we allow the Appeal No. 300 against the acquittal of the respondent, Mt. Alladi, wife of Chote, upon the charge against her of receiving, except that we alter the conviction to one u/s 411, I.P.C. Fourthly, we dismiss the Appeals No. 300 and 312 so far as they relate to the acquittal of such of the respondents as are affected thereby on the charges under Sections 395, 397 and 323 read with Section 34, I.P.C., except in the cases of the following respondents: (3) Dhoomi, son of Munna; (4) Khuda Noor Khan, son of Abdul Razzak Khan; (9) Rashid Khan, alias Abdul Rasheed Khan; (5) Mahtab, son of Dhooni; (6) Mohammad Amin Khan, son of Abdul Ghani Khan; (7) Niaz Mohammad Khan, son of Faiz Mohammad Khan; (8) Noor Mohammad Khan, alias Mohammad Noor; (16) Ghafoor, son of Ramzani; (19) Hamid Khan, alias Madda, son of Abdul Majid Khad; (27) Shadi, son of Shubrati; (28) Tulshi, son of Raghubansi; (29 and 30) Mohammad Sadiq Khan and Mohammad Zafar Khan, sons of Mohammad Rashid Khan; (31) Sultan Mohammad Khan, son of Mohammad Hanif Khan; (34) Amir Mohammad Khan, son of Haqdad Khan; (35) Habibur Rahman, son of Abdul Ghafoor; (36) Abdul Majid, son of Ali Bux; (37) Alla Mehar, son of Bhura; (46) Gulsher, son of Ali Bux; (49) Hanif Khan, son of Ibrahim Khan; (56) Nasir Ahmad Khan, son of Yamin Khan, Sardar Mohammad Khan, alias Sardar, son of Mohammad Rashid Khan, Kaley, alias Mohammad Sayeed Khan, Abdul, alias Abdulla, son of Hussain Bux, Gulsher, son of Nathua, Habibur Rahman, son of Abdul Rahman, Hakimullah, son of Mustaqim.

33. Fifthly, in respect of the above mentioned 27 respondents, we think that they must all be convicted upon charges against them under Sections 323 and 395 both read with Section 34, I.P.C., in that they and each of them, in pursuance of the common intention of all of them, committed dacoity in the bazaar of Amarpur on 18th November 1936 and therein caused hurt. For the reasons in respect of each of them which we have discussed at such length we have no doubt that they all individually took an active part in the looting that went on. Moreover, their actions and the evidence which we have accepted of the cries of the leaders of the Mahomedan crowds to the effect that the Hindu Banias were to be "beaten" and "looted" to our minds, point clearly to an intention common to all the participants in the disturbance that the Hindu shops were to be looted and, when occasion offered Hindus injured. We do not think that we can reasonably come to any other conclusion. For this reason, we are disposed to make use of Section 34, I.P.C., in convicting all of them under Sections 395 and 323 rather than to seek out individual acts of looting and assault. We do not include a conviction u/s 325, I.P.C., because (with the exception of the injury to Sri Ram at the temple in respect of which the respondents

Sardar Mohammad Khan, Kaley and Nisar Ahmad have already been convicted by the Sessions Judge) no other grievous injury is proved to have been inflicted throughout the course of the whole affair. The convictions of these three men u/s 325 will of course stand, in addition to the conviction of the first two under Sections 395 and 323, read with Section 34, which we now add. Nor do we think fit to make use of Section 397, I.P.C., as we do not think that the use of "deadly weapons" has necessarily been established against any individuals.

34. Seventhly we observe that in the cases of the four men, Abdul, alias Abdulla, Gulsher, Habibur Rahman and Hakimullah who are respondents 4, 5, 6 and 7 to the Government Appeal No. 312 they have already been convicted by the learned Sessions Judge in respect of offences u/s 380, I.P.C. For the sake of uniformity, and because their offence is now merged in the larger offence of dacoity, of which we have convicted them, we think it right to set aside these convictions and the sentences passed in respect of them and we do so accordingly. It remains for us to consider the question of the sentences and in that connexion we shall take into our consideration the remaining application (Revision No. 296 of 1938) on the part of the Government for a review of the sentences passed by the learned Sessions Judge. In the ensuing sentences which we think fit to pass, whether by way of revision of the sentences already passed by the learned Judge or upon the convictions which we ourselves have made, we have in all cases taken into account that they have already passed some time in jail or in custody. Three of the convicted respondents, namely Dhoomi (No. 3), Mahtab (No. 5) and Tulshi (No. 28) are charged also u/s 75, I.P.C., and their previous convictions have been either proved or admitted. We shall therefore in their cases inflict somewhat more severe sentences.

1. As to Sardar Mohammad Khan, Nisar Ahmad, alias Nisar and Kaley, alias Mohammad Sayeed (respondents 1, 2 and 3 to Appeal No. 312) these men now stand convicted under Sections 296, 323 and 325, I.P.C. They have been sentenced by the learned Sessions Judge to undergo rigorous imprisonment for one month u/s 296, one week u/s 323 and three months u/s 325. We consider that these sentences were wholly inadequate having regard to what they did. We sentence each of these men, namely Sardar Mohammad Khan, Nisar Ahmad and Kaley: (a) u/s 296, I.P.C. to six months rigorous imprisonment; (b) u/s 323(read with Section 34), I.P.C. to six months" rigorous imprisonment; (c) u/s 325(read with Section 34), I.P.C., to two years" rigorous imprisonment.

2. As to all the twenty-seven men in whose cases we are allowing this appeal in respect of the looting in the bazaar and whose names we have set out above, they each stand now convicted also u/s 395, read with Section 34, I.P.C. We have carefully considered whether there is any ground (other than in relation to Section 75) upon which we can, and ought, to differentiate between them. We" recognize that they differ in age, some being under twenty and others old men. We have moreover observed that a leading part was taken in the affair by Khuda Noor Khan and Rashid Khan. But, on the whole, we have come to the conclusion that there is no sufficient reason for us to differentiate between

them. The sentence which we think it proper to pass upon all of them, except Dhoomi, Mahtab and Tulshi, in respect of the offence u/s 395, read with Section 34, I.P.C., is that they each undergo three years" rigorous imprisonment. In the cases of Dhoomi, Mahtab, and Tulshi we sentence them to five years" rigorous imprisonment.

3. As regards the respondent, Mt. Alladi, who now stands convicted u/s 411, I.P.C., we shall sentence her to undergo rigorous imprisonment for a period of three months.

4. All sentences will run concurrently. Those respondents who have been convicted by us and those whose sentences have been enhanced must surrender to their bail. The bail bonds of the others are cancelled.