

(1961) 09 MP CK 0002

Madhya Pradesh High Court

Case No: Criminal A. No. 67 of 1961 (G)

Sumer Singh

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Sept. 5, 1961

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 374
- Penal Code, 1860 (IPC) - Section 302

Citation: (1964)JLJ 10

Hon'ble Judges: Shivdayal, J; P.R. Sharma, J; A.H. Khan, J

Bench: Full Bench

Advocate: J.P. Gupta, Amicus Curie, for the Appellant; S.T. Mungre, Government Advocate, for the Respondent

Judgement

A.H. Khan, J.

Sumersingh son of Jahan Singh, resident of Tharkheda, has been convicted by the Additional Sessions Judge, Shivpuri under Sec. 302 IPC for the murder of Koksingh and sentenced to death. The accused has filed Appeal No. 67 of 1961, and, the learned Additional Sessions Judge has also submitted the record of the case under Sec. 374 Cr. P. C. for the confirmation of the death sentence which is numbered as Criminal Death Reference No. 2 of 1961. Both the appeal and the Reference are being disposed of by a single judgment.

2. The prosecution story is that Koksingh deceased owned a field which was adjacent to the field of Sumersingh, the present appellant. A few days before this incident, they had had an altercation, because the deceased Koksingh demolished the "Bhanwar" constructed by the accused at his well. The accused complained about this behaviour of Koksingh to Bhagirath, P.W. 11, who tried to pacify the accused by saying that he would get the Bhanwar "repaired". But it seems that the accused was not satisfied with the assurance given by Bhagirath. It is said that on

account of this grudge, which the accused bore to the deceased, in between the night of 12th and 13th September 1960, near about midnight when deceased Koksingh was sleeping on a Machan in his field (it is usual for the villagers to go to their fields in the night in order to guard their crops), the appellant and one Sarnamsingh who later on became an approver and who has been examined as P.W. 9, went to the field of Koksingh, and asked him to come down from the Machan. On Koksingh's alighting from the Machan, Sumer Singh the present appellant is said to have told Koksingh that he wanted to shoot him because he had damaged his Bhanwar of the-well. Sarna usingh, the approver who was with the appellant, is alleged to have also told Sumer Singh to shoot Koksingh. Thereupon Sumersingh shot Koksingh in the abdomen and as a result of the injury he sustained, Koksingh fell down. Accused Sumer Singh then threw down his gun, and, he and the approver both disappeared from the (sic) of the incident. They both remained absconded and it was after about a month, that Sub Inspector Police arrested them on. 6-10-60, from their hideout in the forest of Tharkheda. During the course of investigation Sarnamsingh became an approver and, a chalan was put up only against the appellant for shooting deceased Koksingh with a gun. It is on these facts that the appellant has been convicted for the murder of Koksingh as stated above.

3. The conviction in this case really rests upon (1) the dying declaration which was made by the deceased to the persons who came to see him after he had been shot and (2) the testimony of the approver Sarnamsingh P.W. 9. I shall first deal with the evidence of dying declaration.

4. The most important witness In this connection is Bhagirath (P.W. 11). His field was near the field of the deceased. He has stated that he heard a gun-report which was followed by a shout from the deceased to the effect "Dada daurio Sumersingh no mere Bندوق mardai". Hearing this, he rushed to the field of the deceased Koksingh whom he found lying in a pool of blood. He enquired of Koksingh as to what had happened and Koksingh told him that Sumersingh, the accused had fired a gun at him and that Sarnamsingh (approver) had told Sumersingh to shoot him.

5. Another person named Sundra (P.W. 10) attracted by the loud report of a gun had also come there and when he enquired of the deceased as to what had happened, Koksingh in substance told him what he had earlier said to Bhagirath, P.W. 11. Thereafter this witness went to the village and informed Kosabai, P.W. 6, the mother of the deceased Koksingh and several others of what had happened. Sundra had also gone in another direction to inform the villagers as to what had happened and the villagers on hearing this collected to the spot. I shall deal with the evidence of Sundra later on.

This witness continued and said that Koksingh had not died yet and he was put in bullock cart and while being taken away to the Police Station he died on the way. Bhagirath lodged the F.I.R. and in which, after relating the incident, he said that the

deceased had made a dying declaration to him and others in which he named the present accused, Summersingh and Sarnamsingh (the approver). The names of the two accused in fact appear in the F.I.R. On the basis of the Dying Declaration made to Bhagirath, Dr. L.S. Bhatnagar P.W. 13 who performed the post mortem has deposed that the deceased must have been alive after the gun shot injury for an hour or so and that he should have been conscious also for sufficiently long time. After reading his statement carefully there is no reason to disbelieve this witness. The trial Court has also placed credence in his testimony. The only criticism made against this witness is that he is related to the deceased but that is no reason for disbelieving him. The site-plan shows that the field of this witness was near the field of the deceased. In the circumstances there is nothing surprising if he heard the report of the gun and also the shout of the deceased. In the circumstances, it is most natural for a relative to run for rendering such help to the deceased as may be possible. The criticism I am afraid is not well founded.

5. The next witness of the dying declaration is Sundra P.W. 10 who also reached the spot after hearing the gun shot. He was the second man to arrive there, the first being Bhagirath whose statement has been discussed above. He also asked deceased Koksingh as to what had happened and according to this witness he did not merely say that Sumer Singh had shot him at the instance of Sarnamsingh (approver) but he also adds that the deceased told him that Sarnamsingh (approver) also uttered "lage batichod ke isna teri bhanwar tod di hai". There is no doubt that there is this addition. But in substance this witness says that the deceased named the present appellant and the approver as the culprits. The trial Court which had the benefit of observing the demeanour of this witness has relied upon his testimony. Even if we leave him out, because of the additional words he has imputed to the deceased, it would not make any difference, so far as the result of this case is concerned. The reason is that other witnesses of the dying declaration to whom I shall refer presently, corroborate Bhagirath P.W. 11, the first witness to whom dying declaration was made at the earliest.

6. The next important witness is Mst. Kosa Bai P.W. 6. She is the mother of deceased Koksingh. She said that her son had gone to look after the field of Kuka in the night as usual. While she was sleeping in her house, Bhagirath (P.W. 11) came near about mid night and informed her about the incident. He asked her to go to the field, while he proceeded to call other villagers. She, on hearing the news rushed to the field, where she saw her son lying on the ground and blood was coming out She wept. Other people had also reached there by this time. She and also others asked Kok Singh as to what had happened The deceased replied "Sarnamsingh (approver) told Sumer Singh (accused) to shoot me, where upon Summersingh fired at me." On reading the statement of the mother, there is no artificiality about it and I see no reason to disbelieve her. Her evidence is also attacked on the ground that she is the mother of the deceased. There is no substance in this criticism. The evidence of relative if it is otherwise reliable and trustworthy cannot be rejected on the ground

of mere relationship. This point is well settled by the decision of the Supreme Court in [Dalip Singh and Others Vs. State of Punjab,](#).

7. The third witness of the dying declaration is Narain Singh P.W. 5. He is also one of those, who on hearing the news, went to the field, where the deceased Koksingh was lying injured. On being asked by him and other villagers, who had gathered together there Koksingh said "Sarnam Singh asked Sumer Singh to shoot whereupon Sumer Singh fired at me". He is the person, who took away Kok Singh to the Thana in his bullock-cart. It is said that this witness is also a relative of the deceased, but as I have observed earlier, that fact alone is not enough to discredit the testimony of a witness.

8. I shall not discuss the evidence of Bharosilal P.W. 7 and Bhura P.W. 8. Their evidence is free from the criticism that they are in any way related to the deceased Koksingh. They are independent witnesses.

9. Bbarosilal P.W. 7 has stated that while he was sleeping at his house, he heard the crying of Mst. Kosa Bai, the mother of the deceased. He got up and on learning of the incident, he went to the spot Koksingh on being asked said that Sarnamsingh and Sumer Singh had come to him, that Sarnamsingh said to Sumersingh "ki lage sale ko", thereupon Sumer Singh fired at him.

10. Bhoora P.W. 8 corroborates Bharosital, P.W. 7. The trial Court, who had the advantage of observing their behavior has relied upon their testimony and there is no reason to disbelieve them.

11. Thus from the evidence of all the above witnesses, the fact is overwhelmingly established that Koksingh, the deceased before he passed away, told several persons that he was shot by Sumer Singh at the instance of Sarnam Singh the approver.

12. The motive of the offence seems to be that a few days prior to the incident, the deceased was using the Persian wheel of accused Sumersingh at the well. The accused came there and stepped him from using it. When upon the deceased, Koksingh removed some of the stones of the Bhanwar, thus rendering the use of the wheel impossible. Sundara, P.W. 10 was present when this incident took place. It is also on the record that the accused Sumersingh complained about it to Bhagirath, P.W. 11 and told him that he would kill Koksingh for the damage he has caused to his Persian wheel. Bhagirath tried to pour oil on troubled waters and assured the accused that he will speak to Koksingh and get the Bhanwar repaired, but evidently nothing was done, because when the Sub-Inspector Shivnarain P.W. 16, soon after this murder inspected the spot, he found that "Bhanwar" at the well of the accused was in a demolished condition.

13. It has been contended by the learned counsel for the accused appellant that no conviction can rest merely on the evidence of dying declaration and that it requires

corroboration. I do not think that this argument represents the correct position of law and I feel further fortified in my opinion by the observations of their Lordships of the Supreme Court in [Khushal Rao Vs. The State of Bombay](#). Their Lordships observed that "it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated, each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made. It cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence. A dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of the surrounding circumstances."

14. Their Lordships further laid down the tests of the reliability of the dying declaration. They observed that a Court should keep in view:

- (1) the circumstances like the opportunity of the dying man for observation;
- (2) whether the capacity of the man to remember facts has not been impaired at the time of making the dying declaration.
- (3) that the dying declaration has been consistent throughout if he had several opportunities of making the dying declaration.
- (4) that the statement is made at the earliest opportunity and was not the result of tutoring by interested persons.

Judged by these tests, I find that according to the statement of Sarnamsingh, approver, P.W. 9, when the accused and the approver reached the Machan, where the deceased was sleeping, the deceased was asked to come down and that when he climbed from the Machan a gun was fired at him. It is therefore obvious that the deceased had a talk with the accused persons and he had an opportunity to observe who the accused persons were.

15. From the Doctor's report and his deposition it appears that the deceased must have lived for about one hour after shooting and, that he must have been also conscious. In the circumstances, there is no question of his memory being impaired. Moreover, the deceased sustained an injury not in the head but in the abdomen.

16. The deceased told more witnesses than one (their evidence has been discussed above) and substantially he was consistent in his statement (the dying declaration) throughout.

17. Lastly Bhagirath and Sundra arrived at the spot soon after hearing the gun shot. Bhagirath arrived there earlier on hearing the gun shot. He also heard the deceased's shouting that Sumersingh had fired a gun at him. Each witness rushed to the injured person and the possibility of any tutoring must be ruled out. There is one thing very significant and it is this Sarnamsingh the approver was related to the deceased and also to Bhagirath, Bhagirath had no reason whatsoever to implicate

Sarnamsingh. He mentioned the name of Sarnamsingh in the F.I.R. because the deceased told him. Judged by the test laid down by the Supreme Court, there is no reason whatsoever to brush aside the dying declaration.

18. In the words of the Supreme Court (*supra*) where a Court has come to the conclusion that the dying declaration was truthful version as to the circumstances of death of the victim, there is no question of further corroboration.

19. The dying declaration is a sanctified statement, because the sense of impending death creates a sanction equal to the sanctity of an oath. It is said that where a person is on the verge of death, the motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak nothing but the truth. No doubt sometimes a dying declaration is not to be trusted but each case must be determined on its own merits.

20. If the prosecution were in a mood to concoct the area, they could have very well said that when Bhagirath and Sundra arrived at the scene of incident, they saw the accused there either standing or running away. But no attempt has been made to introduce any false evidence.

21. Thus I am of the opinion that the dying declaration in this case alone can form the basis of conviction.

22. I shall now examine the evidence of the approver. The first objection about Sarnamsingh approver P.W. 9 is that the District Magistrate should not have given him pardon, because Sarnamsingh in his confession did not implicate himself to the same extent as the present accused. But there is no substance in the objection. The basis of granting pardon is not the extent of complicity of the person to whom pardon is given. The principle behind this is to prevent the escape of offenders from punishment in grave cases for lack of evidence by grant of pardon to an accomplice, and all that section 337 of the Cr. P. Code, under which pardon is granted, requires is that pardon may be tendered to any person "supposed to have been directly or indirectly "concerned in or privy to the offence."

23. In the instant case the approver had been named in the F.I.R., and in the dying declaration he has also been mentioned as an accused. Thus there is sufficient reason for supposing that Sarnamsingh was directly or indirectly involved in the case, and, the tender of pardon to him is not unjustified.

24. Sarnamsing the approver (P.W. 9) has deposed that on the night of occurrence near about midnight, accused Sumer Singh armed with a gun (Art. "A") came to his field, woke him up. and asked him to accompany the accused to the field where Koksingh was. He went with the accused to the field where Koksingh was sleeping on the Machan. The accused called out to Koksingh to come down, and when he came down accused Sumersingh told him that because he had damaged Bhanwar he would now finish him up. At this stage, the approver has stated that he also told

Sumer Singh (accused) that because Koksingh had demolished his Bhauwar, he should be shot. Thereupon accused Sumersingh, who was carrying the gun, fired at Koksingh, who at one fell down and that accused Sumersingh threw down his gun on the spot, and that he and Sumersingh both ran away. This in short is what the approver has stated.

25. This statement of the approver is mainly attacked on two grounds:

First, it is said that the approver in his confession from A1 to A2 has said:

Mujhse bola men jay Bandook det hon; mene hanshi hanshi men kahdai. lage." Men yai nahi janta tha ki boh Bandook de dega.

In his confession he stated that he told the accused by way of fun to shoot the deceased. But before the trial Court, he said that it was out of fear that he chimed in with the suggestion of the accused Sumersingh to shoot Koksingh. There is no doubt that there does exist this discrepancy in the two statements of his. But the question is whether this variance is so material as to incline one to reject his evidence totally. I do not think that on this ground a one his evidence should be totally rejected. His evidence must be seen with caution and it is for this reason that the evidence of an approver is to be corroborated before it is actually acted upon. I shall refer to corroboration later on.

26. The second attack on the evidence of this approver is that he has assigned no reason why he accompanied the accused to the Machan and did not enquire before going there why he was being asked to go. It is true that the prosecution did not put any question in this respect to the approver, but it is also significant that although the accused had an opportunity to cross-examine him on this point, yet no question was put to him about it.

27. After reading the entire evidence of the prosecution I find that no question was put to any of the other witnesses to elicit the reason why the approver accompanied the accused. Although the reason is not disclosed out there must be some reason why he went with the accused. The approver was named by the deceased in his dying declaration and there is no reason to suppose that he was not there. Although it is not apparent why the approver accompanied the appellant, yet since I believe the dying declaration, his presence is established beyond doubt. The approver is admittedly a cousin of the deceased and the deceased would not have named him in the dying declaration if he was not there.

28. Their Lordships of the Supreme Court in [Sarwan Singh Vs. The State of Punjab](#), has laid down a double test for the evidence of an approver. The first test is whether he is reliable and that is a test which is common to all witnesses. The second test is whether the approver's evidence has received sufficient corroboration.

29. The corroboration of the evidence of the approver is first of all to be found in the dying declaration in which his presence has been stated and has been held by me to

be correct.

30. The second piece of corroboration is the recovery of the gun from the place of occurrence which according to the approver, the accused after firing it had thrown it away.

31. Another fact, which although may not strictly be said to be the corroboration of the evidence of the approver, yet it may be considered in this connection. The approver has said that after firing, he and the accused both ran away together. They had both absconded and that after a search for about a month Shivanarain Sub-Inspector arrested both of them together from their hide-out in the forest of Tharkheda on 6-10-1960.

32. In his defence the accused has denied the commission of the offence and has stated those three days before the incident he had gone away from the village to Mouza Charkhari and he has further stated that the witnesses for prosecution bear a grudge to him. In his committing Court statement he said that there was enmity between him and the prosecution witnesses on account of buffaloes. Before the Sessions Court he has not given any reason for the grudge which the prosecution witnesses bore to him. The accused has examined three witnesses Kalyansingh D.W. 1, Kaluram D.W. 2 and Balwansingh D.W. 3. None of these witnesses has stated that three days before the incident the accused had left the village and gone to Mouza Charkhari. They have neither said anything about any enmity between the prosecution witnesses and the accused. The trial Court has rejected the evidence of defence and after carefully going through it. I do not find any substance in it either.

33. There is one more incident which occurred during the trial, to which I should like to refer. It appears from the record that after the trial Court had heard arguments in this case and after the case has been reserved for judgment, but before the judgment was delivered on 3-3-61 an application was moved on behalf of the accused appellant to the effect that it had come subsequently to his knowledge that the Machan on which the deceased had been sleeping was found to be smeared with blood and this fact shows that the deceased had been shot while he was on the top of the Machan and not on the ground as alleged by the prosecution. The defence requested the Court to examine Daulatsingh and Kammoda about this fact. Considering the importance of the matter the trial Court examined these two persons as Court-witnesses. The first Court witness, Daulatsingh told in the Court that one Baijoo told him that the poles of the Machan on which Koksingh was sleeping had blood stains. But this witness admits that he did not go to the Machan to verify this fact. His evidence in consequence is hearsay and is inadmissible.

34. The other Court-witness Kammoda has deposed that he was one of the Panch witnesses, of Ex D-1 (a Panchnama) which he has produced. He says that 15-20 days before his, evidence (it was recorded on 14-4-61) they went to the field of deceased Koksingh and there were other Panchas with him also. They ascended the Machan

and there they saw red, yellow and brown colour on the leaves. He does not know whether it was blood or not. "Beneath the Machan there was no blood. He produced Ex D-1, which a document is prepared by the Panchas of Gram Panchayat of Tharkheda. It is dated 3-4-61 whereas the incident under consideration took place on 1(sic)th September 1960, This Panchnama was thus made seven months after the murder by the Panchas, who may be styled self appointed guardians of law. A look at it and also the statement of this Court witness does not only not prove that the murder was committed when the deceased was on the top of the Machan, but on the contrary his statement to the effect that there was no blood directly beneath the Machan goes to show that the deceased was shot, when he had alighted from the Machan and was by the side of the Machan. The evidence of these witnesses does not assist the accused in the least.

35. On a review of the entire evidence, which the learned Additional Sessions Judge has elaborately discussed, I find that the guilt is brought home to the accused and that there is no substance in the appeal he has preferred.

36. Regarding the sentence, the record shows that at dead of night the murder has been committed by shooting a man in the abdomen. The whole thing has been done in a cruel and revolting manner. There is not a single extenuating circumstance, nor has the accused proved that he is entitled to any of the general exception of the Indian Penal Code. When a man fires a gun at such a vital part of the body as the abdomen, there is no doubt that his intention was to cause death. A person who intentionally causes death with a gun is far worse and more dangerous a member of society than the one who resorts to the mere use of lathi. On account of the mode in which the fatal injury is caused, the case calls for a deterrent sentence. Of late in this part of the State I have detected a tendency to resort to shooting one's adversary on the slightest pretext. This tendency must be curbed and punishment must be exemplary. In this view of the matter, there is no reason to interfere with the sentence of death passed by the learned Additional Sessions Judge, Shivpuri.

37. For reasons stated above Appeal No. 67 of 1961 is disallowed and allowing the Reference No. 2 of 1961, the sentence of death passed by the learned trial Court is confirmed.

Shivdayal, J.

38. An approver is duty bound to disclose the whole truth before the Court. He does not fulfill his undertaking if he suppresses any material fact. In the present case it was well expected of the approver that he should have disclosed certain things which were not known to anyone else. In all his statements, the approver admitted that he was called by Sumer Singh from his house and was asked to accompany him and that he did accompany him. But he has not disclosed the reason for which Sumer Singh requested him for his company whether to assist him in committing

murder or for any other reason. He did not disclose whether he asked Sumer Singh, which in the natural course of human conduct he must have, why and where he was to accompany Sumer Singh. This casts a cloud on the veracity of the approver. The statements made by him before different authorities are not quite consistent; they are discrepant on several points. His statement was self-exculpatory. Although he admitted that he said to Sumer Singh to fire yet he did so only as a fun and without the apprehension that Sumer Singh would actually fire. This explanation is far from satisfactory and it only points towards the cleverness of the accomplice. Furthermore according to the approver's narration of events when Sumer Singh and he reached the place where Kok Singh was sleeping, Sumer Singh asked him to come down from the Machan (scaffold; a bed fitted to a raised platform on which a watchman sits to scare away birds from a corn field). When he descended, the accused told him that he had come to kill him. This again is most unusual. If Sumer Singh had gone to commit the murder with a [pre-determination and he found his enemy sleeping, he would not call him as if to give him a notice, so as to say, unless as a chivalrous person he would give an opportunity to the opposed to arm himself and then to have a battle.

39. It was a very significant matter to be disclosed by the approver what actually-happened at the scene of occurrence. If I disbelieve the approver, as I do, that Sumer Singh merely asked Kok Singh to come down from the Machan just to be told that he was going to be killed soon whereafter he fired, it would remain shrouded in mystery what actually transpired between the accused and the deceased and how the unfortunate event developed and what part was played by the approver. The approver was the only eyewitness to the occurrence. If he suppressed this material point, no useful purpose was served by granting him pardon because the bare fact that Sumer Singh killed him and that the approver was also present on the scene were facts contained in the dying declaration of the deceased which was made before a number of persons. Having perused the statements of the approver I am clearly of the opinion that his testimony cannot, be safely relied on in toto.

40. Shri Gupta strenuously endeavored to show that the dying declaration was also not reliable. After giving a considered thought to the arguments advanced in this behalf, I find that I am unable to accept the contention. In the present case it is at once noteworthy that the deceased did not name Sumer Singh alone but he also mentioned the presence of the approver. A number of witnesses before whom the deceased related how he was shot at were examined. They were asked in what words the deceased made the dying declaration before them. The words as given out by them are substantially the same. The first information report which was promptly lodged corroborates the statements of these witnesses as in respect of the dying declaration. I, therefore, agree that the dying declaration is proved, that it is worthy of credence and that it is sufficient to maintain the conviction. In this context the absconsion of the accused is not insignificant.

41. For these reasons I would uphold the conviction under Sec. 302 of the Penal Code

42. Regarding sentence, it weighs upon my mind that a complete picture of what actually happened at the scene of occurrence is not before the Court. As already indicated, I am not prepared to believe the approver's version on its face that the deceased was just asked to come down and was shot at after being given a surprise notice. Undoubtedly something else must have happened and the approver alone was in a position to bring it to light. It may be mentioned, however, that the accused did not plead self-defence nor did he state any circumstances which would have set us a thinking in that direction. He simply pleaded alibi. The question of self-defence does not arise. All the same, because of the approver suppressing the material fact which perhaps would have been an irrigating circumstance regarding the sentence, I would not confirm the extreme penalty proposed by the learned trial judge. I am of the opinion that in this particular circumstance, ends of justice would be served if the accused is awarded imprisonment for life.

43. Before I leave this case I must observe that the Patel, the Sarpanch, and the Chowkidar were yet other persons before whom the deceased had stated, the cause of his death but they were not examined by the provision in the trial Court. They were named in the list of witnesses, and they appeared in the Court but were eventually abandoned without assigning any reason. It is true that the prosecution has the choice to produce such witnesses as it likes, but it must never be forgotten that the ultimate aim of the prosecution must be to give its best assistance to the Court in ascertaining the truth and for that purpose to place before it all materials available. Here, although the prosecution produced as many as six witnesses to prove the dying declaration, curiously enough these three important and seemingly impartial and independent witnesses were withheld. If this was done just to avoid multiplicity of evidence, why as many as six others were produced? The prosecution has exposed itself to serious comment because of this conduct and it has created an impression that the prosecution was not keen and conscientious in rendering its best assistance to the Court in the administration of justice.

44. In the result I would uphold the conviction under Sec. 302 of the Penal Code but would reduce the sentence to that of imprisonment for life. The reference is rejected.

P.R. Sharma, J.

45. Accused Sumersingh was convicted of the offence of murder under S. 302 IPC and sentenced to death by the Addl. Sessions Judge Shivpuri. The appeal preferred by him along with the reference for confirmation of the death sentence were heard by the Division Bench consisting of Khan and Shiv Dayal JJ. The learned Judges constituting the Bench agreed to uphold the conviction of the appellant under S. 302 IPC, but differed on the question of confirmation of the sentence of death. My

learned brother Khan J. was of the opinion that the sentence of death ought to be confirmed; whereas Shiv Dayal J. was of the opinion that since the approver Sarnamsingh had not given out a complete picture of what actually happened at the scene of occurrence and the material facts suppressed by the approver might perhaps have furnished a mitigating circumstance" the sentence of death ought not be confirmed.

46. At the outset I would observe that I agree with both my learned brothers that the evidence regarding the dying declaration made by the A ceased to P.W. 11 Bhagirathsingh, P.W. 5 Narainsingh, P.W. 6 Kosabai, P.W. 7 Bharosilal and P.W. 8 Bhoora is worthy of credit. The injury sustained by the deceased being on the abdominal region, the deceased would in the ordinary course retain consciousness till almost the end. The Medical evidence also goes to show that the deceased could have lived for an hour after he sustained the fatal injury. The first information-report lodged by Bhagirath makes mention of the fact that the deceased had immediately after the occurrence stated that the accused had fired his gun at him on being told to do so by Sarnamsingh. There was no reason for the deceased or Bhagirath to falsely implicate Sarnamsingh who was related to them. The fact that the accused as well as Sarnamsingh both disappeared from the village immediately after the incident and were arrested about a month later by P.W. 16 Shivnarain S.I.P. from their hideout in the Tharkheda forest also points to their complicity in the crime.

47. Sarnamsingh admitted in his confession as well as in his subsequent statements the facts that he had at the invitation of the accused accompanied the latter to the deceased's field and (2) had told the accused to fire at the deceased. The reasons which led my learned brother Shiv Dayal J. to doubt Sarnamsingh's testimony are (1) "that he has not disclosed the reason for which Sumersingh requested him for his company, whether to assist him in committing the murder or for any other reason," (2) he did not disclose whether he asked Sumersingh why and, where he was to accompany Sumersingh, (3) Sarnamsingh tried to suggest in his confession that when the accused told him that he would shoot at the deceased he (Sarnamsingh) did not actually believe that the accused would do so and, therefore, out of fun he (Sarnamsingh) told the accused to fire his gun. In the trial Court the approver stated that it was out of fear that he agreed with the suggestion of the accused to shoot at the deceased; (4) it was highly improbable that the accused would call the deceased down from the "Machan" in order to shoot at him and (5) that the approver had suppressed the details as to what passed between the accused and the deceased before the gun was fired.

48. Since both the learned Judges have relied on the dying declaration made by the deceased soon after the incident, and in view of the fact that both Sarnamsingh and the accused absconded from the village after the commission of the offence, and were arrested while they were biding in Tharkheda jungle, there can be no doubt about the fact that Sarnamsingh was present at the scene of occurrence at the time

when the accused fired his gun at the deceased.

49. P.W. 16 Shivnarin has deposed that the earth at the scene of occurrence was blood stained. No suggestion was made to him in cross examination that the "Machan" was stained with blood. The deceased was sleeping on the "Machan" prior to the occurrence. It would therefore, be proper to assume that the deceased had come down from the "Machan" before he was shot at. I do not, in the circumstances, see any reason to disbelieve the approver's testimony to the effect that the accused called out to the deceased to come down from the "Machan". There could be so many reasons for the accused not to have climbed up the "Machan" in order to shoot at the deceased while he was sleeping. He could not know if the deceased was in fact sleeping there and in climbing up the "Machan" the accused himself would have been in a very vulnerable position. One has to remember that the accused went with the determination to kill the deceased and having armed himself with a gun had nothing to fear from the deceased, who would have come down from the "Machan" armed at the most with a stick. There is, therefore, nothing inherently improbable in the version of the approver that the deceased came down from the "Machan" on being called by the accused; nor does the approver's version that the accused declared that he would kill the deceased because he had pulled down a portion of the platform constructed by the accused for the use of his Persian wheel, appear to me to suffer from any inherent improbability. Persons who are about to commit a heinous offence like murder do not always act in a strictly rational manner. In their excited state of mind they often do things which a normal man would on cool analysis find to be logically inexplicable.

50. Sarnamsingh deposed in para 1 of his deposition before the trial Court that when Sumersingh came to his well on the fateful night he had asked the witness to accompany him to Koksingh's field. Sarnamsingh, therefore, very well knew where Sumersingh wanted to take him. In cross-examination the witness stated that he did not ask Sumersingh as to why he was taking him to Koksingh's field. The cross-examination was not pursued further and the witness was not asked as to why he did not do so. For aught that one may know Sarnamsingh might already have been aware of Sumersingh's intention to kill the deceased. I am of the opinion that it is not permissible to draw any inference from the omission on the part of the witness to question Sumersingh why he wanted to take him to Koksingh's field without giving him an opportunity to explain the reasons for his not questioning Sumersingh on the point. Sarnamsingh did not deny that when Sumersingh declared at the spot that he wanted to fire his gun at Koksingh he told Sumersingh to do so. The question as to why Sarnamsingh participated in the murder of his cousin Koksingh with whom he had no enmity can be answered only partially. Only those motives could be brought to light which appear in the conscious portion of the individual's psychic apparatus. In the words of Franz Alexander, M.D., "The unconscious motives which not infrequently exert a greater dynamic influence on

our actions remain unknown. That is why it is even impossible for the offender to give a really valid, casual explanation of his acts."

51. Sarnamsingh on his own admission accompanied Summersingh who was armed with a gun at an odd hour of the night to the place where Koksingh was sleeping on his "Machan". Sarnamsingh could not but have guessed the object of their visit to Koksingh's field. Sarnamsingh did not make any attempt in any of his statements to minimise the part played by him in the entire incident. Why he played that part is not material for the purpose of determining whether he intentionally co-operated with Summersingh in the commission of the murder. Sarnamsingh may have had his own reasons or he may have joined Sumer singh out of a subconscious sadistic urge of his which he may not be in a position clearly to discern. It may be due to this reason that he at one time thought that he did not believe that Summersingh would fire his gun and, therefore, agreed with his suggestion purely out of fear and on a later occasion imagined that he had fallen in line with Summersingh's proposal out of fear. The question as to why he agreed with Summersingh's suggestion to fire his gun at the deceased involves a process of introspection on the part of the witness as to the inner working of his mind which resulted in his giving his assent to Summersingh's proposal. It is difficult to expect an average person to give a clear picture of the forces which worked on his mind to produce the admitted result; namely his telling Summersingh to fire his gun at the deceased. This discussion will, I hope, make it clear that too much significance cannot be attached to Sarnamsingh's contradictory versions on this point.

52. The only motive for the accused to commit the offence lies in the fact that the deceased had a few days prior to the incident demolished a portion of the platform which the accused had constructed for the use of his Persian wheel. That Summersingh should for such a paltry reason have decided to kill Koksingh points to his diabolical nature. The Sessions Judge who tried this case was, therefore, right in awarding the extreme penalty to him.

53. After the repeal of sub-section 5 of S. 367 of the Code of Criminal Procedure by Act No. XXVI of 1955 the question of sentence where a person is convicted of murder is left to the discretion of the Court, The discretion, has, however, to be exercised not in an arbitrary but a judicial manner. The reasons for which the lesser penalty is imposed must be such as can be said to be in accord with the established legal principles. The accused in the present case having gone to the deceased's field at the dead of the night armed with a gun, his act must be held to be pre determined. What passed between the deceased and Summersingh after the former had come down from his "Machan" and was told by the accused that he wanted to shoot at him could in no case furnish a mitigating circumstance for the murder of a defenseless person committed in a cold blooded manner.

How the deceased reacted to the declaration made by the accused to the effect that he wanted to kill him is to my mind wholly immaterial to the question as to whether

he deserves to be awarded the lesser penalty.

54. In the case, of [Ram Singh Vs. State](#), it was observed by Dhavan J. that though the Court has the discretion to award the lesser penalty in suitable cases, the discretion must be exercised judicially and not arbitrarily or on irrelevant considerations. It was held by the learned Judge that where the murder is brutal and cold-blooded the mere youth of the accused would be no extenuating circumstance.

In the present case nothing which passed between the deceased and the accused after the deceased had come down from the "Machan" and had been apprised by the accused of his intention to kill him could possibly mitigate the enormity of the crime committed by the accused.

55. It was argued by the learned counsel for the accused on the authority of the decision in [Pandurang, Tukia and Bhillia Vs. The State of Hyderabad](#), that where there is a difference of opinion between the two learned Judges who heard the appeal on the question of sentence in a case of murder the lesser penalty should be awarded. In the case before their Lordships of the Supreme Court the learned Judges who heard the appeal and the confirmation proceedings differed not only on the question of sentence but also with regard to the guilt of the accused. Their Lordships further observed that when the appellate Judges who agreed on the question of guilt differed on that of sentence it is usual not to impose the death penalty unless there are compelling reasons. I am of the opinion that there are compelling reasons in the present case as shown by me above which call for the imposition of the death penalty. It has been observed by my learned brother Khan J. that he has of late detected a tendency in this part of the State to resort to shooting one's adversary on the slightest pretext. I agree with my learned brother Khan J that this tendency must be curbed and the punishment in such cases must be exemplary in nature.

56. For the reasons stated above I would, agreeing with my learned brother Khan J., confirm the sentence of death in the present case.