(1948) 04 PAT CK 0021

Patna High Court

Case No: None

King Emperor		APPELLANT
	Vs	
Sheo Shanker Singh		RESPONDENT

Date of Decision: April 7, 1948

Acts Referred:

- Evidence Act, 1872 - Section 114
- Penal Code, 1860 (IPC) - Section 302, 380, 396, 398, 412

Citation: (1954) CriLJ 171

Hon'ble Judges: Narayan, J; Imam, J

Bench: Division Bench

Judgement

Narayan, J.
This is a reference for the confirmation of the sentence of death passed on one Sheo Shanker Singh, otherwise known as Sheo Das or Sheo Shanker Das, aged about 25 years, for the murder of one Baba Ramdas Mahant in the night of 18-8-1946 or In the early hours of 19-8-1946 at village Naokothi.

2. The condemned man has sent a petition of appeal from the Central Jail, Bhagalpur, where he is detained at present, and another appeal has been filed on his behalf by Mr. Pitambar Mishra Advocate. The appeals and the reference have been heard together.

3. The appellant, according to the prosecution, was living in the temple attached to the math as a chela of the late mahant and was seen with the mahant even in the evening of 18-8-1946. One Nokhe Dhanuk was menial servant of the mahant and also a choukidar of the math. As usual, he had left the thakurbari in the evening of 18-8-1946 after having finished his daily work, and after his departure, the only two persons left in the math were this appellant and the deceased mahanth.

When Nokhe Dhanuk turned up the next morning at about 7 a. m. for doing his duty, he saw the mahant lying dead in the Jhoolari room, where the appellant used to sleep, with his neck cut and with several other injuries on his face. The appellant had disappeared and there was nobody else in the Thakurbari at the time. There had been profuse bleeding, and Nokhe found a blood stained garansa and a vegetable-cutter near the cot on which the dead body was found. The room in which the mahant used to keep his valuables and other articles had been opened and things were lying scattered in that room. The idols in the temple had been stripped off their ornaments & a wooden box kept in the room had also been opened.

Nokhe ran to Awadh Bihari Singh, the landlord who had made endowment to the temple and he also met the patwari of Ayodhya Babu besides others. The patwari went to the math and saw the mahant lying dead. The daffadar and a few other persons on receiving the information also came to the thakurbari and saw the condition or things there. Nokhe was sent to lodge information at the Bakhri Police station, which is about 9 miles south-west from the place of occurrence, and he-lodged the information at 10 a. m. on 19-8-1946. The Officer in charge of Bakhri Police Station after re- cording the first information report left for the spot. He arrived at the place of occurrence at about 4 P. M. on the same day. He made an inspection of the place of occurrence and when he-went inside the thakurbari, which is in the middle of an orchard and outside the basti, he found all the idols stripped off their ornaments such as mukut, chhatri, etc.

In the northern room he found a wooden box or chest with its contents scattered about a blood? smear on the door sill near the lock. In the room, which is called Jhoolan room, he found the corpse of the mahant on a cot and there was blood on the charpai as well as below it. He scraped the blood stained earth. Near the cot there were also a blood garansa and a ''baithki'' with blood marks. There were a ganja chilam and a pair of Khaduns both near the cot. He held an inquest on the dead body and sent the corpse for post mortem examination. He then examined the villagers and took up the investigation, but up till 8-9-1946 when he got certain information from Monghyr, he was not able to find any definite clue.

4. One Havildar and one constable attached to Purabaarai town outpost, Monghyr, arrested the appellant and one Rajo Dusadh alias Thengar Dusadhi at about 11-30 p.m. on the night of 19-8-1946 in most suspicious circumstances. While these policemen were patrolling near the Jain Dharamsala in Monghyr, they saw these two men in a lane, Rajo was carrying a bundle and both were proceeding towards the main road. When challenged they turned back and ran towards the side from which they had come. They were, however, pursued and captured by these two policemen. They were taken to the town police station where the Sub Inspector opened the bundle, and the bundle Was found to contain certain wearing apparels (four pieces with blood stains), a brass lota with coins of the value of Rs. 210/- in it and silver ornaments about eleven in number. Most of these ornaments were ornaments used

on idols, such as jibbi (a silver bow), and mukuts.

The Officer in charge of the Monghyr Police station started a case u/s 109, Criminal P. C. against the arrested persons and sent enquiry slips to other police stations, including Bakhri Police station. He received information from Bakhri Police station that the captured persons and the articles recovered should be forwarded to them, and this was done, The confession of the appellant was recorded by a magistrate on 16-10-1946, and charge sheet was submitted for his prosecution u/s 302/380, Penal Code, on 28-10-1946.

5. The blood-stained articles were sent to the chemical examiner for analysis of the blood stains and report, it appears from the report of the chemical examiner and the serologist that the khadi dhoties, the khadi chaddar and the mal-mal kurta were found stained with human blood.

6. The post mortem examination on the body of the deceased was held on 20-10-1946 by the Assistant Surgeon of Begusarai, and the following injuries were found.

(1) One oblique incised wound about 3 1/2" x 1/2 x 3/4" cutting the underlying left malar bone for about 1"x 1/6"x 1/10" on left cheek.

(2) One oblique incised wound about 4" x 4" about 3/4" below injury no. 1 partially cutting the left malar bone for about 1 1/4"x1/6"x 1/10" on left cheek extending to left side of nose.

(3) One oblique incised wound about 1 1/2" x 1/2" partially cutting the lower jaw for about 1/2" x 1/16" x 1/10" on lower jaw at left side.

(4) One oblique incised wound about 2 1/4" x 1/4" x Skin deep on chin.

(5) One oblique incised wound with irregular margins at places about 7" x 1 3/4" extending from about 1 1/2" below left ear passing from the left side of the neck to the right side of the neck for about 1 1/2". On dissection the wound was found to cut the larynx and all the larger vessels and other soft tissues of the neck at the left side completely and the underlying vertebra was partially cut for about 3/4 "x1/12"x1/10" at the left side.

(6) One oblique wound about 2 1/2" x 1/2" x 3/4" on left shoulder.

7. There were extravasation of blood in the sub-tissues at the sites of the injuries. The doctor was of the opinion that death was due to shock and haemorrhage from injuries received particularly from the injury in the neck. There can be no doubt that this was a case of a very brutal murder, whoever may be the murderer.

8. The police Sub Inspector seized the dhoti of the accused when he interviewed him in TMonghyr Jail because the dhoti was suspected to Contain blood marks, and this dhoti was sent TO the Chemical examiner. But from the report it does not appear

that human blood was found on this particular dhoti.

9. The evidence unmistakably goes to show that this appellant was living in the mahant''s thakur-bari as one of his chelas. Nokhe says that the appellant was at the thakurbari for about two months before the murder, and that at that time he, was the only chela of the mahant. P. W. 3, a woman, aged about 60 years, used to borrow loans from the mahant. She also had seen the appellant at the thakurbari. According to her statement, the appellant was not only the chela of the mahant but also used to cook his food. Her statement that the appellant used to cook the mahant''s food finds corroboration from the petition of appeal which the appellant has sent from jail. In this petition of appeal the appellant has stated : "There is no reason why a cook will take such a rash course of murder when he can easily murder by poisoning". The patwari of Babu Ajodhya Singh has also deposed that he had seen the appellant at the thakurbari for about two months before the murder. The appellant''s learned lawyer ultimately conceded that the appellant was in fact living with the mahant as his chela.

10. On the statement of Nokhe we can safely hold that the appellant was seen at the thakurban. in the evening of Sunday 18-8-1946. There is slight inconsistency in his statements as to the time when he left the thakurbari in the evening of Sunday. His statement before the committing court was that he worked in the thakurbari up to little before sunset but his statement before the Sessions Judge was that he left the temple at about 7 or 8 p.m. on that Sunday after finishing his work. The inconsistency cannot be regarded as a material one when on the whole the evidence goes to show beyond all doubt that the appellant was living in the thakurbari as one of his chelas and that he was there even in the evening of Sunday. The patwari also has deposed to that effect although before the police and the magistrate he did not state that he had gone to the thakurbari in the evening of Sunday.

If it is found, as it must be found, that the man was living in the thakurbari but that he suddenly disappeared after the occurrence, this circumstance alone speaks a volume against the appellant. The condition of things as found by the Sub Inspector when he inspected the thakurbari and by the witnesses when they went to the place of occurrence in the morning of 19-8-1946 leaves no room for doubt that this is not a simple case of murder. It appears that a number of persons had been brought to the thakurbari with the intention of committing theft, robbery and dacoity, and they not only committed theft of articles but also killed the mahant. People living in the thakurbari must have been roused from their sleep on account of The noise and disturbances created, and the appellant, if he was there, could not have remained sleeping after an incident of this nature, and even assuming that he was not roused from his sleep in spite of the serious disturbances, there was no reason why he should have run away in the morning.

Nobody could ordinarily suspect him and it is he who should have lodged the first information report in the morning about the theft and the murder of his guru. While

we cannot hold the appellant guilty u/s 302 or Section 396, Penal Code, merely because of his disappearance the next following morning, this is a circumstance which stands against him and it has to be considered along with the other circumstances & the direct evidence forthcoming in this case. The appellant was arrested along with Bajo Dusadh at about 11-30 p.m. in the town of Monghyr, and his companion Bajo was carrying a bundle which, after it was opened, was found to contain ornaments of the thakurbari and blood-stained clothes. The Sub Inspector has given a list of the articles which the bundle contained. & as I have already said ornaments such as Jibtaa and mukut were found and they are certainly ornaments belonging to a thakurbari.

Unfortunately, no test identification parade with regard to these articles was held, but there is no reason for discarding the evidence of Nokhe (P.W. 7) and Awadh Bihari Singh (P.W. 12) that these were articles belonging to the math of the deceased, p. W. 7 is an old servant of the math. He used to wash the utensils and sweep the floor of the thakurbari. He was certainly in a position to identify the ornaments of the idols and he has described how some of these ornaments were used, for example, he says that exhibits VI and VII are the silver umbrellas of the idols, exhibits VIII and IX are one pair of kangan, exhibits X and XI are bajus of Sitamai and Exhibits XIII and XIV are ornaments of the idol Ramji. P. W. 12 Awadh Bihari Singh claims to be one of those persons who have made endowments to the thakurbari, and certainly he is a man interested in the thakurbari. He also has identified these ornaments as properties of the math and has given details as to how some of them were used. P. W. 8 the woman who used to borrow money from the mahant after pledging ornaments, has identified the hansuli and the haekal as articles which she had pledged with the mahant. Another woman, Lalpari (P. W. 17) has stated that the pahunchi (exhibit XIX) had been pawned by her with the mahant. There is no reason for discarding the evidence of these witnesses, and the appellant''s learned lawyer had to say nothing against them.
It, therefore, comes to this that articles belonging to the math, which had been removed during the course of the theft or the dacoity, committed In the night of 18-8-1946, were found with the appellant and Rajo Dusadh. on the night of 19-8-1946 when they were arrested at Monghyr. They, as already pointed out attempted to run away as soon as they were challenged, but the policemen succeeded in capturing them.

It has been contended that the articles were found with Rajo and that Rajo''s evidence should be discarded as he is in the position of an accomplice. An absolutely disinterested witness, P. W. 14, Jago Singh, has come forward to say that on the morning of Monday, that is on the morning of 19-8-1946, while he was at his darwaaa, this appellant came to him and told him that he had some things to be carried and that he would require a coolie. This Jago Singh did the appellant a service by procuring a labourer for him, & this labourer was none else than Rajo

Dusadh. Rajo started with the bundle for Balia station in the presence of this witness. Rajo corroborates the statement of Jago, and it further appears from his evidence that when at Balia he asked for his wages the appellant asked Mm to carry the bundle up to Monghyr, and threatened that otherwise he would not give him anything. Rajo had, therefore, no other alternative but to carry the bundle to Monghyr where he along with the appellant was caught near the Dharamsala.

There is no reason for disbelieving the evidence of this man that he never thought that the bundle contained stolen properties. It would be, to ray mind, preposterous to contend that this witness is in the position of an accomplice when he had neither a guilty knowledge nor a guilty conscience. It is really the appellant who was carrying these articles and the witness had been merely engaged as a labourer to carry the articles. The articles stolen from the math were in the possession of the appellant and he was found in possession of them within 24 hours of the theft and hence a presumption u/s 114, Evidence Act, must be drawn against him. Illustration to Section 114 says that the-court may presume that a man who is in possession of stolen goods soon after the theft is either a thief or has received the goods knowing them, to be stolen unless he can account for his possession. In a case in which murder and robbery have been shown to form part of one and the same transaction, a recent and unexplained possession of the stolen property will be presumptive evidence against the prisoner on a charge of robbery and would, similarly, be evidence against him on a charge of murder. I am supported in this view by a decision of the Madras High Court in, - ''Queen Empress v. Sami'' 13 Mad 426 (A). The fact, therefore, that this appellant was found with blood-stained clothes and articles stolen from the math soon after the murder, is a strong circumstance against him and I should say a conclusive evidence for establishing his guilt.

It is true that the fundamental principle of circumstantial evidence is that the inculpatory facts must be absolutely incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused. To my mind, the inculpatory facts found in the case are absolutely incompatible with the innocence of the accused & incapable of explanation upon any other hypothesis than his guilt. I need not repeat that the murder and the theft had taken place in the night of 18-8-1946 or in the early hours of 19-8-1946. The appellant was found at a place called Katarmala, police station Balia, in the morning of 19-8-1943. He had to cross the ghat there, and it is there that he sought the help of Jago Singh who supplied him with a labourer for carrying his bundle. We have examined the map of that thana and we find that that was the way by which the appellant could have proceeded to Monghyr, I am inclined to agree with the learned Government Advocate that the circumstances are too strong in this case for bringing home not only the offence u/s 412 but also the offence u/s 302 to this appellant, and even if we discard the confession, regarding which the much debated question arises as to whether it is admissible or not, we would be justified in convicting the appellant u/s 302, Penal Code, on the basis of the circumstantial

evidence referred to above.

11. It is true that for establishing the charge u/s 396, Penal Code, there is no other evidence against the appellant except his own confession, raid with regard to his confession the question arises whether the magistrate has complied with the requirements of Section 164, Criminal P. C. in order to make this confession admissible. Before I discuss the question whether the confession is admissible or not, I cannot help referring to an observation of Agarwala, J. (as he then was) In - Baldeo Musahar Vs. Emperor, . I am referring to this observation with a view to emphasise once more that some magistrates of this province have shown a callous disregard for the important instructions given and the observations made in several judgments as to the manner in which a confession is to be recorded.

The observation runs as follows:

As is usual, however, the Ignorance or carelessness of the Magistrate who recorded the confession, Mr. Shafi, renders the document inadmissible in evidence. Although this is by no means the first time that this Court has found it necessary to invite the attention of the magistracy to the provisions of B. 164, Criminal P. C., I will do so in some detail once more.

It need not be said that much of public time would be saved if the magistrates are careful enough to follow the instruction given from time to time and let us still hope that a day will come when they may think of following the instructions.

12. Coming to the case law, I am of opinion that on an examination, of the authorities it appears to me that this is a fit case in which the confession should not be discarded as inadmissible. The first case which I should like to refer is the case of - ''Ghinua Oraon v. Emperor'' AIR 1918 Pat ITS (FB) (C). This is a Pull Bench decision, and while referring to this case Manohar Lall, J. in - Emperor Vs. Dubai, , observed as follows:

It is enough in the present instance to point out that in the decision of this Court in the Full Bench case in AIR 1918 Pat 179 (FB) (C), the matter with which we are concerned was considered where the learned Chief Justice who delivered the judgment of the Full Bench pointed out, if I may say so with respect, the correct view of the matter at page 183:

The last objection that tile confession was on the face of it bad as it did not disclose all the questions and answers put and received must also fail. No form of questions is prescribed by Section 164(3) from which the Magistrate must satisfy himself that he believes the confession was made voluntarily. The questions recorded as having been put and the answers given as well as the demeanour of the appellant may well have convinced the Magistrate that the confession was a voluntary one, and there is no reason to suppose that the recorded statement does not record all the questions put.

I have particularly referred to this decision of Manohar Lall, and Rowland, JJ. because it was expressly laid down in this case that the authority of the Full Bench decision had not been shaken at all by the Privy Council decision in - ''Nazir Ahmad v. King Emperor'' AIR 1933 PC 253 (E).

13. The next decision which should be referred to in this connection & which as far as I know has never been dissented from, is the decision in - Thibu Bhogta and another Vs. The King Emperor , Sir Dawson Miller C. J., who delivered the judgment in this case, observed that it would be a very dangerous rule to lay down that any particular form of questioning was necessary and that While it was clearly desirable that a magistrate should always put such questions as might be necessary to enable him to determine whether the confession was voluntary, there was no reason why a comprehensive question such as that objected to by Roe, J. in - Ragho Laya and Others Vs. Emperor, , should not be sufficient in certain cases. The question that had been put to the accused in this case was as follows - If it can at all be deemed to be a question:

I am a hakim; you may make your statement if you so wish!.

His Lordship, with whom MulHck, J. agreed, was satisfied that the confession was a voluntary one and did not discard it as a document inadmissible in evidence.

14. Even in - Emperor Vs. Kommoju Brahman, , which is often cited at the Bar on behalf of the accused Meredith, J. observed that it would be going too far to say that the question must be in any special form for the simple reason that Section 164 did not prescribe any special form.

15. The case of - Suker Dusadh and Another Vs. Emperor, , contains some important observations in this connection. In this case it was laid down that a voluntary and genuine confession was legal and sufficient proof of guilt and that there was no rule of law that an accused person cannot be convicted on a confession made and subsequently retracted without independent corroborative evidence.

16. In - Emperor Vs. Dubai, , Rowland J. considered how far the Privy Council decision Sn. - AIR 1936 253 (Privy Council) , had shaken the authority of the Full Bench decision already referred to, and also the authority of another decision reported in - Emperor Vs. Ramsidh Rai and Another, . In the latter case Mohammad Noor, J. had observed as follows:

In recording the confession in this case the learned Magistrate omitted to put any question to the accused whether he was confessing voluntarily. No doubt the learned Magistrate gave him a warning ....but the Courts before whom the confession is used have materials on which they can be satisfied that the confession was. in tact voluntary. In the present case the record does not show that any question was asked by the Magistrate in order to ascertain that the confession was made voluntarily. It appears, however, that in giving answer to the warning of the

Magistrate, Jagdish himself stated that he was making the statement voluntarily; and the Magistrate has in his evidence stated that he was satisfied that the confession was voluntary.

His Lordship pointed out that the effect of this and the previously cited decisions was that it was a question of fact for the trial court whether a confession was voluntary or not. He further said that the law was authoritatively stated in the Full Bench decision in - AIR 1918 Pat 179 (C), cited above, and that there was nothing in - AIR 1936 253 (Privy Council) , and the subsequent decisions to detract from this authority. With his Lordship''s observation I respectfully agree. It was further pointed out in this case that the observation of Meredith, J. in - Emperor Vs. Kommoju Brahman, , that because the magistrate did not comply with the mandatory provisions of the second part of Section 164, he had no jurisdiction to say that he was satisfied that the confession was voluntary was obiter dictum.

17. There is another case reported in - Jhiktu Bhogata Vs. Emperor, , decided by Varma and Rowland, JJ. In this case the questions put to the accused by the magistrate were as follows:

The statement that you will make before me will be taken in evidence against you and you may be convicted thereon. You are not bound to make any statement. Do you understand? If you want to make any statement voluntarily you may make it.

The reply of the accused was that he was making a true statement voluntarily. Their Lordships held that the statement was voluntary and that it was not necessary for the magistrate to put any further question to the accused. This case appears to me to be a case quite in point, and it can be relied on as an authority in this case because almost the same sort of questions had been put by the Magistrate who recorded the confession in this case.

18. The appellant''s learned lawyer, however, relied on two recent decisions of this Court, - Punia Mallah and Others Vs. Emperor, and - Baldeo Musahar Vs. Emperor, . With all respect for the learned Judges who decided the case in - Punia Mallah and Others Vs. Emperor, , I am not able to agree with any observation made by their Lordships which may conflict with the view taken in the earlier decisions which must still be regarded as good law.

Moreover, from a perusal of the judgment of Bay, J. it appears that in the case before their Lordships none of the three requirements as laid down Jay Section 164, Criminal P. C. had been complied with. The magistrate who had recorded the confession in that case had stated on oath that he had not given the warning to the accused that he was not hound to make a statement. In my opinion, the facts of this reported case are clearly distinguishable from the facts of the present case before us.

The facts of the other case, namely the case re-ported in - Baldeo Musahar Vs. Emperor, , are still more distinguishable. We have examined the paper book of this case and it appears that no question had been put to which the deponent could be deemed to have given the answer "I have said finally I would voluntarily make a statement". Moreover, in this reported case, the confession of another accused was being sought to be used against the accused, whose case their Lordships were considering. I must agree with the appellant''s learned lawyer that the magistrate who recorded the confession in this case before us ought to have put some further questions with a view to test whether the confession was a voluntary one, and it is therefore, that I have adopted with respect the observations of his Lordship, Agarwala, J. (as he then was) in the case reported in - Baldeo Musahar Vs. Emperor, .

But after an examination of the questions which have been put in this case and the answer given by the accused we feel satisfied that the learned Magistrate has substantially complied with the provisions of Section 164. The questions and the answers taken together go to establish that this confession was a voluntary one. The magistrate went to the length of dissuading the deponent from making a confession and he distinctly told him that he should not make a confession at the instigation or inducement of others. Evidently, he meant that the deponent was not bound to mate a confession, and further he told him that he was a magistrate and that any confession made by him would be used against him and he would be convicted as a result of that confession. Still the man replied that he was making a voluntary statement of his own accord and that he was not doing so at the threat, inducement or instigation of others. The confession contains details which certainly go to show that it was not the result of any tutoring. The accused has been careful enough to state that though he had brought the miscreants for committing the dacoity or robbery, he had asked them not to murder the mahant. Certainly, if under police influence the man was making this confession, he would not have made this exculpatory statement at least so far as the charge u/s 302 is concerned. In my opinion, it is a confession which must be regarded as a voluntary one, it being another matter that it contains certain statements which may not be regarded as absolutely correct. There is no reason why on the basis of this confession the accused should not be held guilty u/s 396, Penal Code.

It appears from the confession that he had brought a number of persons, certainly more than ''5, for committing theft in the math and that it is they who killed the mahanth. It was -argued by the appellant''s learned lawyer that having regard to the statement of this man in the confession that he had asked the other dacoits not to murder the mahant, the extreme penalty of law should not be inflicted on him. But it appears from the confession that he had entered the service of the mahant with the intention of having a dacoity committed and that he got the dacoity committed after the mahanth had began to confide in him and after he was able to know all the details with regard to the math. Section 396, Penal Code, lays down

If anyone of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years.

If a dacoit in the progress of, and in pursuance of, the commission of a dacoity commits a murder, all of his companions, who are participating in the commission of the dacoity may be convicted under this section, although they may have no participation in the murder beyond the fact of participation in dacoity.

In - ''Punjab Singh v. Emperor'' AIR 1933 Lab 977 (M), a Division Bench of the Lahore High Court laid down that in order to render the other dacoits liable u/s 396, Penal Code, for the act of one of their associates it is not necessary that murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in or abetted its commission. Indeed, they may not have been present at the scene of murder or may not have even known that murder was going to be committed or in fact had been committed. It is, therefore, manifest that this appellant cannot escape liability u/s 398, Penal Code, and in view of the fact that it is he who had brought these dacoits, I do not think we should inflict upon him the lesser penalty, namely transportation for life. Unfortunately this man appears to be a most evil minded man, and for this heinous and dastardly crime he appears to be solely responsible. All the assessors who had assisted at the trial were of the opinion that the accused was one of the murderers, and one amongst the dacoits, and that the articles recovered were in his or in his servant''s possession.

19. The reference is, therefore, accepted, and the sentence of death passed on the appellant is confirmed. The appeals are dismissed.

Imam, J.

20. Three charges were framed against the accused Sheo Shanker Singh : (1) for murder of Mahant Ram Das, (2) for an offence u/s 396, Penal Code, in circumstances indicating that a murder was committed in the course of the dacoity at the thakurbari of Ramdas, and (3) for being in possession of property transferred by the commission of the dacoity, and therefore, guilty of an offence punishable u/s 412, Penal Code. The case of the prosecution rests on circumstantial evidence and the confession of the accused recorded by a magistrate under the provisions of Section 164, Criminal P. C. on 6-10-1946. As to the confession, this is a subject with which I shall deal later on.

21. The circumstantial evidence in the case is, in my opinion, so strong that no man with any reason could have any room for doubt that it was the appellant who was guilty either directly or constructively of the murder of the deceased mahant Ram Das. It has been established by evidence beyond question that shortly before the murder, the accused and mahant Ram Das were the only occupants of the math.

The mahant employed a servant to attend on them for the purpose of sweeping the rooms and cleaning the utensils. This man is Nokhe Dhanuk (P. W. 7). According to his evidence, he left the appellant and deceased mahant together in the math somewhere about 7 to 8 p.m. His evidence is positive that, apart from these tyro persons, there was no other occupant of the math. When he left, the anahant was with the accused in the Jhoolan room. The, evidence of this witness further shows that the Jhoolan room was the room occupied by the accused where he used to sleep and that the mahant used to sleep in a separate room known as the northern room. It will therefore, be seen from the evidence of this witness that the last person to be seen with the mahant, while alive, was the accused, and this was in the evening of 18-8-1946.

The learned Advocate for the accused had pointed out a discrepancy as to the time stated by this witness when he left the mahant and the accused together in the thakurbari. Before the committing Court, he appears to have stated that it was a little before sun-set, whereas in the court of session, he stated that it was about 7 to 8 p.m. The statement made before the committing magistrate was on 10-2-1947, and the statement made in the court of session was on 28-1-1948. Whatever the discrepancy between these two statements may be, the first information report lodged by the wit-ness at the police station on 19th of August at 10. A.M. states that he had seen the accused and the mahant until 9 p.m. It seems to me that the time given in the first information being nearest to the event was more likely to be correct. It cannot, however, be used as substantial evidence.

There is, however, one statement of Nosha which, in my opinion, carries the matter beyond doubt that the statement before the court of session ab to the time is more accurate than what he had stated before the magistrate. He had stated in the court of session that he had waited until the lamps were lighted and then left, and he could not recall if he had stated before that he left before sun-set. The lighting of lamps must have been an incident which he could well recollect, whereas he might have made a mistake in giving the time as if from a watch or a clock. I see no reason for myself why this witness should be disbelieved when he has stated in the court of session that it was somewhere between 7 to 8 P.M. that he left the deceased and the accused together in the thakurbari. I have examined the calendar, and I find that the sun-set was in fact 6-33 p.m. on 18-8-1948. The difference in time is not of such importance. The more important question is that the last time the deceased mahant was seen alive was in the company of the accused.

That the accused was at the thakurbari in the evening of 18-8-1948 is well proved and one finds from the evidence of Gangadhar Patvvari (P. W. 13), who is an employee of the math, from a very long period, that he saw the accused at the thakur-bari at 4 p.m. When Nokhe Dhanuk arrived at the thakurbari on the morning of 19th of August at about 7 or 8 a.m. he found the mahant lying in the Jhoolan room on a cot with his neck & face cut and that he was dead. There was blood

underneath the cot. A blood-stained garansa was lying there as well as a baithi (vegetable chopper), but the accused was not there. It is a circumstance which requires explanation on the part of the accused as to what induced him to disappear from the thakurbari after 7 O''clock in the evening. The accused has nowhere suggested either in his examination or in his written statement that there was any particular reason for him to have left the thakurbari in the evening of 18th of August. At about sun-rise on 19th of August, at a village called Katarmala, which is roughly about 4 to 5 miles south-east of Naokothi, the village of occurrence, the accused was seen near the ferry by Jago Singh (P. W. 14). The accused asked him as to whether he could get him a coolie to carry some of his things. Jago Singh then obtained a labourer, namely Rajo Dusadh alias Thengal Dusadh (P. W. 15). The two then left together.

According to Rajo Dusadh, he carried the bundle which the accused gave him to the railway station Balia where he demanded his wages from the accused. The accused told this witness that he must reach him with the bundle to Monghyr, otherwise he would not get anything. At Monghyr, they ate at a hotel near the Dharamsala, and in the night they were arrested by the police. The witness does not profess to have opened the bundle. It will be seen from the evidence of these two witnesses Jago Singh (P. W. 14) and Rajo Dusadh (P. W. 15) that early in the morning of 19th of August the accused was going away from Naokothi with a bundle whereas one should have expected him to have been at the thakurbari at Naokothi. The arrest of the accused and Rato Dusadh at Monghyr was effected by sheo Pujan Havildar (P. W. 10) who says that on 19-8-1946 at about 11-30 in the night he saw these two persons near the Jain Dharamsala, that one of them, namely Rajo Dusadh had a bundle, ana that he asked them who they were, when the two men ran back in the same direction as they had come.

The Havildar chased them and with the help of a police constable these persons were caught. According to the Havildar, when he first saw these two people they were one or two paces behind each other. The arrested men were taken to the Monghyr Police station and a sanha was recorded. The officer in charge of the police station, was Mohammad Majiduddin (P. W. 9). According to him, the bundle contained four pieces of wearing apparel with blood-stains, a brass lota containing coins of the value of Rs. 210 and a number of silver ornaments eleven items in all - some of these items contained several pieces. It is to be remembered that the arrest of these two people with the articles found had taken place at a time when the police Officer in charge of the Monghyr police station apparently had no knowledge of a murder having been committed at village Naokothi. These ornaments, although not the four pieces of wearing apparel, were identified as the properties which belonged to the mahant, some of the ornaments being the ornaments which decorated the five idols in the math arid some ornaments which had been pawned with the mahant by certain persons. There can be no doubt from the nature of the ornaments that several of them were of a kind which would be used only for the

purposes of adorning an idol.

The evidence is clear that the five idols In the math were deprived of their ornaments. Although there was no test identification parade held, there seems to me to be 110 reason to disbelieve Nokhe, the servant of the thakurbari, or Gangadhar Patwari, who have identified the ornaments belonging to the idols, nor is there any reason to disbelieve'' Awadh Bihari (P. W. 12) who was one of the persons who had endowed the Naokothi math. The witness had also identified several of the ornaments as ornaments which were put on the idols in the thakurbari. According to the Sub Inspector, the reason why no test identification parade could be held was that it did not materialise because some; times the magistrate had no time, and again, the witnesses did not turn up. Of course, it would have been better to have a test identification parade in order to obviate the argument which has been raised in this case namely that the evidence of identification without such a parade is value-less. Because there was no test identification parade, it does not follow that the court is disentitled to do that which the law permits, namely to believe or disbelieve a witness. As I have already pointed out, the nature of the articles were such that they were capable of identification by people who had seen them for years at the math and as ornaments which had adorned the Idols in the building. The consistent evidence of Nokhe, Gangadhar Patwari and Awadh Bihari leaves no room for doubt that in the bundle which was opened by the police officer of the Monghyr Police station on the night of 19-8-1946, ornaments be-longing to the idols of the math were found.

As to the other articles, there is the evidence of Mt. Sarbatia (P. W. 8) who speaks of having identified two of them, the hansuli and the haekai, as belonging to her which she had pledged with the deceased mahant. Similarly, Lalpari (P. W. 17) claimed the pair of pahunchis as pawned by her with the mahant and as belonging to her. The reason given by the witness for recognising the ornament is by its appearance and pattern and because of a certain repair. For myself I see no reason to disbelieve these two witnesses either. But independently of their evidence, the evidence of the three persons who ought to know a good deal about the math and the ornaments which adorned the idols, proved that the ornaments of that place were found in the bundle which was opened by the police at Monghyr on the night of 19-8-1940. This bundle, containing these properties had been given by the accused to Rajo Dusadh near village Katarmala to carry for him from that place to Balia railway station and subsequently to Monghyr. The possession of Rajo Dusadn, therefore, must he deemed to be the possession of the accused, from the evidence so far indicated, it proved that the accused was the only companion of the deceased mahant in the thakurbari, that the deceased mahant, was last seen alive not only in the company of the accused but in the room where the accused used to sleep and that about sun-rise in the morning of 19-8-1946 some four or five miles away from the village the appellant was found in possession of a bundle, a bundle which contained ornaments belonging to the deceased mahant and properties of the math along

with four wearing apparels stained with blood, which has been proved by the report of the chemical examiner to contain stains of human blood.

To any man with common sense this circumstantial evidence would prove beyond reasonable doubt that in the circumstances the appellant was either the murderer of the mahant himself or he had actively participated in his murder. I venture to suggest that even in the disposal of a case of such a grave nature as this, there is no call upon the court to abandon common sense in dealing with the guilt or innocence of the accused.

In this connection, I would refer to the decision of Sir Lawrence Jenkins in the - The Emperor Vs. Sheikh Neamatulla . My learned brother has already referred to a Madras case. I am referring to the decision of Sir Lawrence Jenkins, for, in my opinion, the words of that learned Judge carry a weight of their own in the Judicial history of this Country. In the Calcutta case, a woman was murdered in an empty house at 115 Russa Road South and she was wearing certain ornaments at the time. It was the prosecution case that the accused Neamatulla was seen entering this empty house at 115 Russa Road South by Nannay Khan and that he made certain statements to Nannay Khan and one Muhammad Ashraf, The story told by Nannay Khan and Muhammad Ashraf was disbelieved by the jury and the trial Judge although the learned Counsel for the Crown pressed upon the court the truth of the story told by these two men.

Sir Lawrence Jenkins, however, convicted the accused on the following circumstantial evidence, namely that the ornaments found in possession, of Neamatulla had traces of blood as well as on the clothing which the accused was wearing at the time of his arrest. Sir Lawrence Jenkins observed that these were indications of guilt on which Courts constantly rely and he cited the case of the - ''Queen v. White'' (1847) 2 CCC 192 (O). His Lordship then went on to observe:

Section 114 of the Evidence Act provides that, ''the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, numan conduct and public and private business, in their relation to the facts of the particular case''. By way of illustration to that section it is said that the Court may presume that a man who is in possession of -stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The matter does not rest there, because it is a matter of common procedure to utilize evidence of this kind and the presumption such as this in connection not only with theft and receipt of stolen goods but more aggravated offences : and it is stated in Wills on Circumstantial Evidence that ''the possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft. This particular fact of presumption commonly forms also a material element of evidence in cases of murder; which special application of it has often been

emphatically recognized''.

His Lordship, accordingly, felt that there had been misdirection in the charge to the jury by the learned trial judge and concluded that the evidence as a whole, coupled with the facts to which he had drawn attention, showed beyond any reasonable doubt that the accused Neamatulla was guilty of the murder of the woman.

22. When the accused was examined in the court of session u/s 342, Criminal P. C., he was informed that the charge against him was that on the night of 18-8-1946 he had murdered or abetted the murder of his guru, Mahant Ramdas, and looted his properties and that on the night of 19-8-1946 the following stolen properties were recovered from him. He was accordingly asked! as to whether he had anything to say. To this the accused replied that he did not commit murder nor did he loot the properties; he had come to Monghyr from Ithari on a Sunday and was returning from the cinema when he was arrested by the constable on curfew duty, and that he shall file a written statement. The written statement, as usual, is more in the nature of an argument which probably was drafted by the lawyer defending him. In para. 7 of the written statement it Is stated that the accused did not come to Monghyr Dharamsala with Rajo Dusadh, that he happened to be near the Dharamsala and he was arrested by mistake.

As I have already pointed out from the evidence, the accused has not been able to give any reasonable explanation for his absence from the thakurbari and his presence at Katarmala with the ornaments and the blood-stained wearing apparels - ornaments belonging to toe deceased mahant and the idols of the thakurbari. He has on the contrary attempted to inform the court that he had come to Monghyr from a place called Ithari. The District map of Monghyr shows that this place Ithari is on the Monghyr side of the river Ganges and is towards the east of Monghyr on the railway line between Monghyr and Sultanganj. He has, therefore, offered a false explanation for his presence in Monghyr. The evidence on the other hand clearly shows that from a place only 4 to 5 miles from the scene of murder, the accused was proceeding to railway station Balia and to Monghyr in the company of Rajo Dusadh (P. W. 15). Mr. Das has urged that this witness was an accomplice and his evidence should not be relied upon unless at least corroborated. In fact there is corroboration of Rajo Dusadh''s evidence in the evidence of Jago Singh, prosecution witness No. 14, for it is Jago Singh who asked Rajo Dusadh to act as a coolie for the accused. But so far as Jago Singh is concerned, Mr. Das argued that he was examined a month after the occurrence.

That may well be, for it was not until the police officer of Bakhri got clue as to what had happened at Monghyr that he had any occasion to record the statement of Jago Singh. There is no reason to suppose that Jago Singh had any motive for deposing falsely against the accused. Indeed, the witness appears to be a quite respectable person and it does not seem to me at all likely that he would have come to make a statement falsely. But independent of the evidence of Jago Singh, I decline to accept

the argument that Rajo Dusadh was in fact an accomplice. The evidence is quite clear that he only carried the bundle as a coolie for wages without knowing its contents or that the contents were subject of an offence having been committed. One may answer the contention of Mr. Das by asking the question that if a person goes to the railway station with a box and hires a coolie to carry that box to the railway carriage, and that when box is opened by the police and found to contain incriminating articles, would the coolie In such circumstances be regarded as an accomplice? The answer clearly must be ''no''. There is one further circumstance to be considered. When Nokhe Dhanuk left the accused and the mahant at the thakurbari on the evening of 18-8-1946, he had seen them together in the Jhoolan room, that is to say in the room where the accused used to sleep. There is evidence that the mahant used to smoke ganja, and this is proved by the evidence of Awadh Bihari (P. W. 12) that near the. cot on which the dead body was lying there was a ganja chilim. The Sub Inspector also saw it.

One of the questions raised by Mr. Das was as to why the mahant should have gone to the room of the accused as the usual place where he used to sleep was the northern room. It is impossible to answer queries of this kind. The evidence is clear that the deceased and the accused were last seen together in the Jhoolan room. It is just possible that the deceased had begun to smoke ganja and that when he was under its effect, the accused committed the murder and the theft of the ornaments. I have no doubt in my mind that the circumstantial evidence proved in the case leads to no other conclusion than this that either the accused himself committed the murder or took an active part in it and in the theft which took place at the thakurbari.

23. There is the confession next to be considered. Mr. Das relied upon various authorities and mainly upon the cases of - Punia Mallah and Others Vs. Emperor, , & - Baldeo Musahar Vs. Emperor, . Section 164 Sub-section (3) states that a magistrate shall before recording any such confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him, and no magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. These words clearly indicate that there are two functions for a magistrate to perform before he records a confession. The first function which he has to perform is to inform the person about to make a confession that he is not bound to make a confession and that if he does so it may be used as evidence against him.

The magistrate who recorded the confession in this case as to this told the accused as follows:

Q. I am a Magistrate. If you make any statement before me, you may be convicted on your own statements. Do you know it?

To this the accused answered : "Yes sir. I know it". It is clear, therefore, that so far as the first function of a magistrate is concerned, it was performed in accordance with the provisions of Section 164, Criminal P. C. When examined at the trial he stated:

I warned him that he was not bound to give a statement and that if he did it might be used as evidence against him. I gave half an hour to think calmly about what he was to do. He said, in spite of my repeated cautioning that he was repentant, and must confess. It was voluntary. I was satisfies that it was voluntary.

The magistrate gave the usual certificate at the end of the confessional statement and gave reasons for being satisfied that the confession was voluntary, in column 7 of the form for recording confession.

The question which has been raised by Mr. Das is as to whether the second function, namely before recording such a confession the magistrate had put questions to the person making it in order to be satisfied that it was voluntary as required by the Code. As to this the magistrate told the accused. "Q. Do not make any statement at the instigation & inducement of others. You may make. voluntary statement". To this the accused answered : "I make voluntary statement of my own accord after due consideration. I am not making statement at the threat, instigation and inducement of others". Later on immediately before recording the statement the magistrate put the following question "Q" Whatever you have to state you may voluntarily state". The accused then proceeded to make his statement.

Mr. Das has argued that this Is no compliance with the provisions of the Code as there has been no questioning of the person making a confessional statement. I think for myself that every case has to be decided on its own facts as to whether actually the provisions of the Code have been observed or not. In Baldeo Musahar Vs. Emperor, the manner in which the confession was recorded led their Lordships to conclude that in fact no questions were put to ascertain if the statement about to be made was a voluntary one and, therefore, the second function required u/s 164(3) had not been complied with, and, therefore, the statement was inadmissible. We sent for the paper-book of the appeal and looking at the confession which is to be found in that book, it is quite clear that apart from the first function, namely the warning, the magistrate had not put any question of a nature to ascertain whether the statement about to be made was a voluntary one.

In - AIR 1948 Pat 169 (L), it would appear from the decision that the magistrate who recorded ,the confession had, in his evidence at the trial clearly stated that he had put no questions to the person making the confessional statement as to whether the statement which he was going to make was a voluntary one. In my opinion, these two cases were decided On their own facts. Section 164 does not in itself indicate as to what is the nature of the question or what is the form in which it is to be put to a person about to make a confession in order to ascertain whether it was a voluntary statement.

The real purpose of Section 164, In my opinion, is twofold : (1) that the person about to make a confession should be timely warned that he is not bound to make a statement and that if he does, it may be used against him and that he may be convicted on that statement, and (2) to convey to the mind of the person making the statement the fact that his statement must be a voluntary one, and in order to ascertain whether the person has understood this, question or questions in some form or other are to be put in order that the magistrate may be satisfied that the statement about to be made is really a voluntary one. The question which the magistrate put to the accused regarding the voluntary nature of his statement is in the form of a question though in substance it may appear at first sight to look as if it were a caution. I think the words which I have quoted above mean that he was asking the accused as to whether he understood that the statement which he was to make must be a voluntary one and not one at the Instigation or inducement of others. That the accused understood the magistrate well enough appears from the answer which I have already quoted. The magistrate was not satisfied with this merely, but immediately before recording the statement he again put to him the question : "Whatever you have to state you may voluntarily state".

It seems to me that although the magistrate may not have said "why do you make a statement"? the effort made by him was to ascertain in the circumstances of this case as to whether the accused was making a voluntary statement, and with that end he emphasised to him more than once that his statement should be a voluntary one. When the accused persisted in his attitude that he was willing to make a statement and that it was a voluntary one, I can see no reason why the magistrate was precluded from proceeding to record the statement. In my opinion on the facts of this case, there was a sufficient compliance with the provisions of Section 164, Criminal P. C. and the statement was admissible.

As to how much reliance one can place upon the statement, it is necessary to point out that the accused has made attempts in the statement itself to minimise his part in the crime. He stated that he bad told the dacoits to take the properties but not to kill the mahant. He, however, states towards the latter part of his confession that he took away Rs. 900 from under the rice which was kept in the box, and also two ornaments, a hansuli and another which he could not name, and that he fled away from there. He confesses of his arrest by the havildar at Monghyr, but alleged that three ten-rupee currency notes were taken by the havildar saying that he would get him released by the Sub Inspector. The havildar took him to the house of the Sub Inspector, and the Sub Inspector also took from him whatever money and ornaments he possessed. In fact, as I have already said, Rs. 210/.- was found in cash in a lota in the bundle and more than two ornaments were found in that bundle. But the accused, on his admission, was taking away the stolen property and admitted his flight from the thakurbari as well as his arrest at Monghyr, It is true that his allegation that he took Rs. 900/-, may be incorrect as only Rs. 210/- was found at the time of his arrest, but that would not prevent the court from relying upon his

statement as a whole that he had taken out some of She money and ornaments from the thakurbari and fled away with it. The confession in addition to the circumstantial evidence concludes the matter entirely. I have, however, laid great stress upon the circumstantial evidence in the case, and I have no hesitation in expressing my own view that Independent of the confession recorded by the Magistrate, the circumstantial evidence in the case is conclusive regarding the guilt of the appellant with reference to the murder of the deceased mahant.

24. Mr. Das had urged the question of sentence on the ground that the accused was a young person. I must point out that so long as the law enjoins the sentence of death to be the primary sentence it is the business of the court to impose it unless there appear mitigating circumstances or grounds for the exercise of a judicial discretion in the matter. In some cases, youth has been considered as a ground for mitigation. In this case, the accused is between 22 years as recorded by the committing magistrate and 25 years as recorded by the judge. It has been pointed out that the magistrate who recorded the confession estimated the age of the accused as 19. It seems to me that the accused must be somewhere in the neighbourhood of 22 or 23 years of age. While he is young, it cannot be said that his youth is such that that in itself is a ground for reduction of the sentence.

On the other hand, it is to be remembered that the murder of the mahant was a brutal one. He was butchered by the accused, a betrayer of a benefactor. If a murder of this horrible nature can be committed, and the court be asked to impose the lesser sentence on the mere ground that the accused is a youthful person, it seems to me that one would be exercising a wrong discretion Judicially, if one imposes the lesser sentence merely on that ground. There is another forum whose prerogative of mercy is far wider than ours. That forum need not give any reasons for reduction of the sentence, but as a Court one is bound to give judicial reasons for it. I can find none in this case.

25. I agree that the appeals be dismissed, the reference accepted and the sentence of death confirmed.