(1924) 12 CAL CK 0003

Calcutta High Court

Case No: None

Emperor		APPELLANT
	Vs	
Alimaddin Nasakar and Another		RESPONDENT

Date of Decision: Dec. 1, 1924

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 342
- Penal Code, 1860 (IPC) - Section 302

Citation: 85 Ind. Cas. 919

Hon'ble Judges: Mukerji, J; Babington Newbould, J

Bench: Division Bench

Judgement

Mukerji, J.

Alimaddin Naskar, Belat Ali Naskar, Amir Naskar, Boynuddi Naskar, Farazali Naskar, Golam alias Golap Naskar and Dudali Molla were tried by the Second Additional Sessions Judge of/24-Parganas with the aid of a Jury. All of them were tried on a charge under Sections 302/120B, Indian Penal Code, for having conspired to commit the offence of murder of. one Momrej Boddy and other members of his family, and Belatali Naskar was tried also on a charge u/s 302, Indian Penal of Code, for committing the offence of murder by causing the death of one Entaj, Boddy, a son of the said Momrej Boddy. The Jury brought in a unanimous verdict of guilty on both the charges; and the learned Judge, agreeing, with and accepting the verdict, convicted all the accused persons in accordance therewith and sentenced Alimaddin Naskar and Belatali Naskar to death, and the others to transportation for life. The cases of Alimaddin Naskar and Belatali. Naskar are before us on a Reference made by the learned Judge u/s 274, Cr.P.C. as well as on appeals preferred by them.

2. The facts of the case are fully set out in the learned Judge''s charge to the Jury and the occurrence in all its gruesome details is graphically portrayed therein. A bare outline of the main features of the case, however, is necessary iii order to visualize

the evidence that is on the record.

3. In village Daria, within the jurisdiction of P.S. Canning in the District of 24-Par-ganas, there lived two families, the Boddys and the Naskars, Of the seven accused persons named above the first six are brothers and., belong to the family of the Naskars, and the one named last is their servant. The victims of the alleged conspiracy were the members of the family of the Boddys. The homestead of the Boddys was enclosed by a compound wall with two entrances, one on the north-west and the other on the east, and consisted of a number of thatched huts, a kitchen, some sheds for the poultry and several golas or granaries; and just outside the compound and to the south-east of it, there was a khankagaur. To the south-west of the said homestead and separated from it by a big tank were the houses of the Naskars.

4. On the night of Monday the 7th January 1924, at about midnight or shortly thereafter, took place the occurrence out of which the present-case has arisen. At that time five dwelling huts in the homestead of the Boddys were occupied thus. In the western one of the two huts on the north, were Momrej Boddy, his two wives Chandra Bibi and Dasa Bibi, one of whom was pregnant, his sons Jabed Ali, Safed Ali and Yunus, and his grandson (son of his eldest son Entaz) Jiadali, the ages of the four boys varying from ten years to two yeans and a half. On the verandah of that hut slept one Babur Ali Boidya. In the other hut on the north there were Momrej''s mother Bihijan, a son of Momrej named Esherali and his wife Maurjan. In the hut that stood on the west of the homestead there was Entaj Boddy doing some accounts, and his wife Jasimon Bibi was sitting near him preparing betel and smoke for him; and there was also an infant girl of theirs sleeping. The hut to the south which used to be occupied, by another son of Momrej named Montaz and who on that particular night is alleged to have been away at Basanti Abad, was occupied by one Sarafat Naskar, a nephew of Momrej. In the hut on the east there lived one Saira Bibi, who was a relation of Momrej but with her, it is said, Momrej was not on very good terms. In her hut were one Kanch Ali and a servant NesarAli. In the khankaghur just outside the compound and to the south east of it, there were two Muhammadan and four Uriya servants who used to guard Momrej''s paddy in the khamar.

5. The prosecution case, shortly stated, was that suddenly the huts were set fire to, the exits from some of them being barred by chaining them up from outside, or closing them from outside with iron clamps, and the stamp of feet of several persons was heard, as also loud sounds of blows on the doors of the huts of Momrej and Entaz. Entaz called out that there were men on the daba; the reply was received that their jamas (messengers of death) had come. Entaz entreated that their lives might be saved, but he was told in reply that it was not their money but their lives that were wanted. Entaz stepped out with a gun which he had in the hut, after forcing open the door; but while yet on the threes hold the gun was snatched away

from him, he was speared in the leg, and he fell on the courtyard. He tried to crawl and get up but was pressed down, and notwithstanding the entreaties of his wife Jasiman Bibi, was cut on the neck with a dao and killed, his head being almost severed from his body. Jasiman Bibi made entreaties to be allowed to reach her son who was in Momrej''s hut and was shrieking out for her, but was prevented and threatened, and with the child in her arms she ran to the house of a neighbour. Bibijan Bibi succeeding in forcing open the door of the hut in which she was, and on her saying that she had recognised all the accused and that there would be retribution the next day, she was shot dead. Esher'' Ali and Mourjan Bibi managed providentially to escape. Sarafat failing to open the door of the hut he was in made an opening in the thatch and got out through the same. The villagers who came to the spot on hearing the noise of the crackling flames or the reports of guns which were being fired or on seeing the blaze or hearing the cries of others, were scared away.

6. The whole homestead of the Boddys, with the exception of the khankaghur was reduced to ashes. Those who arrived in the early hours of the morning found only ashes or burnt or molten materials there. In Momrej''s hut close to the door were seven charred dead bodies lying in a heap; there were the four boys, the sons and grandson of Momrej, over them lay the two wives, and over them all lay Momrej himself. Entajs dead body was lying near the threshhold partly burnt and his head almost severed from the body. Bibijan was lying dead on the verandah of her hut with her entrails out and blood flowing from the verandah into the yard. The hut in which Saira Bibi used to live was also burnt down, but her property was preserved, being kept on a machari near a tank and even her'' poultry was saved.

7. The motive alleged for the crime is bitter ill-feeling which is said to exist between the families of the Boddys and the Naskars. This enmity is not disputed, and on the other hand is relied upon by the defence as a motive for falsely implicating the accused persons. It would appear upon the evidence that the two families are related to each other, and up till about four years before the occurrence good relations and amity subsisted between, them. As deposed to by P.W. No. 9 Aynaddi Naskar whose house is on the west side of the homestead of the Boddys with a path intervening the quarrel between the two families arose over a small plot of land which belonged to the witness''s uncle. The land adjoins the homestead of the Naskars. It was mortgaged to Entaz, but was subsequently sold for arrears of rent and purchased by, Alimaddin Naskar in the name of his wife, Momrej took up the cause of the witness''s aunt, helped her with advice and money got her to institute a suit for setting aside the sale and himself looked after the litigation on her behalf. From the evidence of P.W. No. 24, the President Pahchayet, P.W. No. 46, Assistant Sub-Inspector Basanta Kumar Singh, P.W. No. 47, Sub-Inspectoi Razai Robbani and P.W. No. 48, Sub-Inspector Soshi Bhusan Rai and the papers produced by P.W. No. 38, the record-keeper of the Magistrate''s Court at Alipui as also other documents proved in the case, it appears that this quarrel led to a series of incidents and cases

between the parties. On the 25th November 1920, when the aforesaid suit was pending Momrej was shot with a gun. In consequence of this occurrence Belatali Naskar and another person were arrested but a final report was eventually submitted by the Police on the 25th January 1921. On the 1st February 1921, Momrej was shot again, this time in his house. For this Alimaddin Naskar was sent up, tried in the Court of Sessions but acquitted on the 24th August 1921. On the 30th May 1922, Alimaddin Naskar was attacked and brutally wounded, receiving no less than 22 injuries on his person. Entaj and two others were tried by the Court of Session for this offence but were acquitted on the 25th April 1923. When this case was pending, on the 22nd June 1922 Amir Naskar lodged an information that Esherali Boddy and Momtaz Boddy had assulted him with knives, but they were not sent up for trial. The prosecution case is that the Boddys were nursing a grudge against the Naskars in consequance of these events and were not unreasonably cherishing in their minds a feeling of despondency begotten of an idea that recourse to law would yield no satisfactory result, and that this conspiracy was hatched to redress the wrongs done to them and put an end to the source of their troubles. The defence on the other hand urges that there is nothing on the, record suggesting any fresh quarrel after April 1923, and that it is not likely that after such a long period as had elapsed since then, the old grievances would burst out. There is, however some evidence on the record that the Naskars used to threaten the Boddys even during this period; but whether we take that evidence to be literally true or not, for it must be admitted that that evidence is not sufficiently specific; it is abundantly clear that the Boddys were mortally in V terror of their enemies, whoever they were, for they fitted corrugated iron sheets against the walls and windows of their huts, removed the rings that were on the doors on their outerside, and kept guards in the house for the nights. The defence contends that the Boddys had other enemies as well. That is undoubtedly so, for it appears that they had litigation with their zemindar one Radhika Mohan Roy, and during the Police investigation into the, occurrence a village Doctor named Jatin Chakravarti and also Saira Bibi were suspected and arrested. It may be that there were reasons for the suspicion; and indeed, so far at least as Saira Bibi is concerned, the treatment accorded to her properties was suspiciously preferential. The whole question however is this: Whether the state of s feeling between the Boddys and the Naskars was such as might induce the latter to commit the offences they are alleged to have committed; and on a careful consideration of the facts and circumstances connected with the different incidents that transpired, I find myself unable to answer this question in the negative. This, in my opinion, is sufficient for our present purposes.

8. The main facts of the occurrence have been deposed to by a very large number of witnesses who, for the sake of convenience, may be classified into three groups, viz., the inmates of the homestead who survived or managed to escape, the villagers who came to the spot at the time when the huts were on fire, and the persons who came there after the occurrence was over and could only see the condition of things

as it was, when they came.

9. Amongst the first group of witnesses, the one who saw the occurrence at its very start, as far as it can be made out upon the evidence is P.W. No. 6 Baburali Boddy. He was on the daba in front of the hut in which Momrej himself was. He says he woke up on hearing Entaz shout and the dum dura noise on the doors. He ran towards Entaj''s daba and was caught by three men who took off his clothes, and tied his hands and feet with it. Of the three men he recognized two, viz. Belat and Boynuddi. They kept him tied in a fowl-shed near Entaz''s daba. He saw Dudali light something long and with it set fire to Entaz''s hut, and some other person then sprinkled something on the thatch. He then saw Dudali proceed to Momrej''s hut and set fire to it. He says he recognized in the, blaze all the seven accused persons, and also saw two others whom he could hot recongnize. He says that Alimaddin had a gun and Belat a chowki. Finding no body hear he untied the fastenings of his hand with his teeth and ran out jumping over the wall near the entrance on the north-west, just outside which he noticed Amir standing. On going out he shouted out to the neighbours and came back with them or followed by them shortly after. At this time Alimaddin, Belat and others came running and shouted mar mar, and Alimaddin fired a gun, upon which all who come retreated. The most important witness of this group is P.W. No. 1 Jasiman Bibi. She states that Entaz was writing up accounts and she was sitting near him giving him betel and smoke, and there was her infant girl in the room. She describes how she heard the sound like the stamp of 8 or 10 men''s feet in the daba, and loud sounds on the door of her hut and that of Momrej. She states that her husband said: "There are men on the daba", and on that Belat''s voice was heard calling out in reply "Your jamas (messengers of death) have come". Her husband then cried out "Belat take our money and everything but spare our lives. Belat said "Are we thieves that we shall take your properties? We want your lives and shall have them". She describes how her husband put cartridges into his gun which was in the room and was about to step out when the gun was snatched away from him and he was speared on the leg, upon which he fell "down from the daba to the courtyard. She came out with her infant in her arms and with the light of the burning thatches of her own hut and that of Momrej she could recognise the seven accused persons and saw two others with their faces covered up. She says how her husband was pressed down and how Belat cut off his neck with a tree tapping dao in spite of her entreaties; and how, as she stooped down and entreated, Entaz''s blood spurted out and fell on her cloth. She then ran towards Momrej''s hut to reach her son who was in Momrej''s hut and was shrieking out for her and entreated Belat with folded hands to take out the son, but Belat prevented and threatened her. She says she was unable to remember what she did next, but that Amir and Alimaddi were shouting, and finding none near the entrance oh the east she rah out with the child in her arms and found herself by the side of the tank there. There she met Mourjan and both ran to the house of the Malis on the north of the tank. P.W. No. 6, 2 is Mourjan aged 13 or 14 years, wife of Esherali, another son

of Momrej. She states who the inmates were of the hut in which she was. She states that Bibijan was anxious to go out, that Esher said; "Dacoits have attacked the house, don''t open, they will kill us", but Bibijan opened the door forcibly and came out. Then some one shouted from the side, of the cock-shed and upon that the accused party ran in that direction. At this time she'' came out and saw Alimaddin, Belat and Boynuddi and others whom she could not recognise. She states she did not look at their'' faces out of fear. She then ran out through the entrance on the east and ran up to P.W. s No. 1 Jasiman Bibi who was then by the side of the tank and caught her by the hand and then they both went to the house of the Malis. P.W. No. 3 Esher Ali is the husband of P.W. No. 2 Mourjan. He got out of the room after Bibijan and Mourjan had come out and recognised Alimaddin, Belat, Boynuddi, Faraz and Dudali going through the courtyard towards Saira Bibi''s hut. He says Belat had a dao and Boynuddi a koch. He ran to the east and scaled over the wall and went to the house of Jamiruddi Gazi, son-in-law of Saira Bibi and remained there for the night. P.W. No. 4 Kanch Ali Naskar, a boy of 12 or 13 years of age, a grandson of Saira Bibi, says that he slept in the hut of Saira Bibi th,at night, and that Nasarali used to sleep in the verandah of her hut at night, but he cannot say where he was that night. He woke up on hearing the sound on the doors of Momrej'' and Entaz, went to the daba and found the huts on fire. He then saw about eight men of whom he recognised Alimaddin, Belat, Faraz, Dudali and Golap. He concealed himself under a gola on the north side got on a neem tree and reached the compound wall, jumped out and ran to the house of the Malis. He states he saw the faces of the five men whom he recognised, that they were between the dabas of Entaz and Momrej. The next witness is P.W. No. 5 Sarafat Naskar who was sleeping in the hut on the south which, is occupied by Monltaz. He says that Momtaz was away at Basanti Abad. He heard the sound of the chains of his hut put up from outside and then he heard dum dum noise. He asked "who is there", and for answer got abuse. He called to Momrej and others and heard them shouting. He opened a window, and saw the huts of Momrej and Entaz on fire. He tried to force the door open but failed. He then got up on a machan, made an opening in the thatch and got out to the roof, and from there got on the roof of a gola. From there he saw Belat with a dao and Boynuddi with a dagger and altogether seven or eight men moving between the dabas of Momrej and Entaz. He then jumped down and ran to the house of Jharu Naskar and remained there for the night.

10. The learned Vakil appearing on behalf of the accused has severely criticised the evidence of the aforesaid witnesses, and has pointed out even the minutest discrepancies that appear in it and has argued generally as to the improbabilities of their version of the occurrence. He has challenged the fact, of recognition by P.W. No. 1 Jasiman Bibi as improbable on the ground that she is a pardanashin woman and for four years she had no opportunity of seeing any of the accused persons. He has commented on the conduct of those witnesses who profess to have seen the occurrence and then left the house and did not return again till the next morning.

He has taken each witness separately and has attempted to make out that from the position in which he or she was at the time it was not possible for him or her to recognise the culprits. Having given the arguments all the serious consideration that they deserve I have come unhesitatingly to the conclusion that there is nothing substantial or tangible either in the evidence or in the probabilities as can throw the least doubt upon the credibility of the evidence given by these witnesses. Moreover there is ample corroboration of the evidence given by P.W. No. 1 Jasiman Bibi. A piece of cloth has been identified as the one she was wearing by P.W. No.''40 Ershed Ali, P.W. No. 42 Abdul Bari and P.W. No. 48 Sub-Inspector Soshi Bhusan Roy. The last mentioned witness took charge of the cloth and the Chemical Examiner''s report, Ex. 16, shows presence of human blood on it. This affords a strong corroboration of her story to the effect that when she stooped down to implore Belat not to cut her husband, the cut was administered and blood spurted out and fell on her cloth. P.W. No. 14 Apal Mali and P.W. No. 15 Nepal Mali both corroborate her as to the manner in which she found her way into their house and prove that she gave the same story to them then, as she gives now and also say that she, said she had recognised all the seven persons. Four other witnesses, viz., P.W. No. 17 Tamijuddin Naskar, P.W. No. 19 Golam Naya, P.W. No. 26 Kokil Mali and P.W. No. 40 Ershad Ali Mandal also speak of the fact that she gave the names of the said persons as having been recognised by her on one or other occasion afterwards and not later than the next morning. As to the recognition of the five men by Esherali, we have the evidence of P.W. No. 27 Jamir Ali and P.W. No. 40 Ershadali Mondal who heard their names from Esher Ali lit the earliest opportunity. P.W. No. 27 Jamiruddin Gazi corroborates the story of Esherali as to the latter coming to his house and giving the names of the five men he had recognised.

11. Next we come to the second group of witnesses. P.W. No. 7 Mojahar Gazi, P.W. No. 8 Kachinuddi Naya and P.W. No. 19 Golam Naya came On hearing the cries of P.W. No. 6 Baburali Baidya and saw Alimaddin with a gun and Belat with a dao near the entrance on the north-west. P.W. No. 7 is the Imam of the local mosque, and says he has no quarrel with Alimaddin who is a near relation of his he says that both the accused shouted out that any one coming near would be shot, and that Alimaddin fired at him and others. P.W. No. 8 also says that both of them rushed out from inside the homestead crying mar mar and Alimaddi fired his gun. P.W. No. 9 Ainuddi Naskar. whose house is on the west of the homestead and not very far speaks of having heard the noise and shouts and having come near the said door and found Alimaddin with a gun and Belat with a dao standing there and says that Alimaddi was asking people to move away threatening them that otherwise he would fire. He also says that subsequently he noticed the said two accused as also Dudali with a gun coming out of the homestead. This witness however is, the person with whose aunt Alimaddin had litigation about the price of land which has been referred to above and it has also been proved that there has been ill-feeling between him and the family of Naskars. His evidence, therefore, must be taken with

some degree of caution, P.W. No. 19 Golam Naya says that on hearing; Baburali''s cries he got tip, saw a glare, noticed Momrej''s house on fire, ran in that direction "but fell back hearing a gunshot. P.W. Mo. 10 Dulal alias Dulo Naya lives on the west of the homestead. On hearing gunshots and shouts he ran up to the north west door and saw Alimaddin with a gun and also Boynuddi and says that both rushed at him, the former saying "Shoot the shala". He is a witness who is related to both the parties. P.W. No. 11 Hanif Molla who Jives to the south also came up and met his cousin P.W. No. 12 Bahar Ali Molla standing near the homestead, had a talk with him and saw the homestead on fire and Alimaddin, Belat Ali, Faraz and Boynuddi came out, Alimaddin with a gun in his hand. P.W. No. 12 Baharali Molla corroborates P.W. No. 11 Hanif Molla as to having met him and as to the conversation that he had with him and says he saw the fire roaring and saw Alimaddin, Belat, Buynuddi, Faraz, Dudali, Golap, Amir and two or three others whom he did not recognise come out of the Boddy''s house. Then there are two witnesses P.W. No. 13 Bharat Haldar and P.W. No. 18 Durga Charan Baniya. P.W. No. 13 says that he woke up on account of the illness of his boy servant and went to P.W. No. 18 and from the bank of a tank near the latter''s house saw the conflagration. They both saw Alimaddin with a gun and Belat and Faraz come rushing at them. Belat was a pupil, of V. W. No 18 Durga Charan Baniya at his pathsala, P.W. No. 20 Nanoo Naskar came to the spot on hearing the shouts of Sharafat, saw the fire and heard a gunshot inside the homestead and ran away. P.W. No. 29 Fakir Ali is one of the servants sleeping in the khanka. He woke up on hearing cries and gunshots, saw a blaze all round and feeling afraid ran away.

12. The next class of witnesses are those who came to the spot some time after and towards dawn or thereafter. P.W. No. 14 Apal Mali and P.W. No. 15 Nepal Mali and their father P.W. No. 26 Kapil Mali are persons to whose house Jasiman and Mourjan were helped to go to P.W. No. 27 is Jamir Gazi who says that he woke up on hearing gunshot and cries, ran towards Momrej''s house, saw the house burning, heard reports of gun and came back. Then there are two other witnesses whose evidence needs special mention; they are P.W. No. 16 Durgapada Dhali CKowkidar and P.W. No. 17 Tomijuddin Naskar. The latter is the father of Mourjan and lives a few rashis to the west. He says he woke up hearing a gunshot, went out and saw a glare to the east. He advanced and saw Morhrej''s house on fire. He went near the house; felt frightened and returned home. He again went to the spot before dawn. After him he says, Golam Naya, Nanu Naskar, Samir Mondal, Jaker and Kopil Mali came. He saw the nine dead bodies, and was talking to Jaker when the chowkidar arrived at the. spot. He abused the chowkidar for turning up Jate and the latter explained that he was ill, and he then sent the chowkidar to the thana. The chowkidar, P.W. No. 16, gave similar evidence, and speaks to having lodged the first information, which was, recorded at the thana 12 miles off at 10 A.M.

13. The evidence of all the above witnesses has been criticised in great detail and points have been sought to be made out showing the improbabilities therein. The

conduct of the witnesses who came to the spot and went away without doing anything or rendering any help has been severally commented on. The discrepancies in the evidence have been fully laid bare. Taking into account, however, all that has been said in this respect on behalf of the accused I have not been able to discover anything upon this evidence which may make me feel doubtful as to its truth. The evidence of each one of the witnesses is full of circumstantial details and there is a ring of truth that; pervades their testimony.

14. Some points have been sought to be made out of the first information and they de-serve special mention. In the first information, the chowkidar stated that at the spot he met Momtaz Boddy, Tomizuddy Naskar. Hamiz Boddy, Golam Naya, Samir Mondal, Nanu Naskar and many other persons and that he did not enquire whether any one was seen setting fire to the house and whether any one was suspected by any body but that Momrej Boddy had bitter quarrel with Ahmaddi Naskar and his brothers, and therefore it was suspected by the chowkidar that they may have been implicated in the matter. In his evidence the chowkidar said that he had met five or six men on spot and named. Tomijuddi Naskar, Nanu Naskar, Golam Naya, Samir Mondal, Kopil Mali and a dark boy. It has been urged that the suppression of the name of Momtaz was deliberate and false, and that it was highly unlikely that if the chowkidar stayed on the spot for half an hour, as it is said that he did, he could not have ascertained the names of the accused. It will be seen however that of the witnesses Tomijuddi Naskar, Golam Naya, Nanu Naskar, Samir Mondal, Kokil Mali and Jaker Ali Sheikn none had seen the accused or met any one who had seen the accused at the occurrence. It will also be clear upon the evidence of P.W. No. 17 Tomijuddi P.W. No. 29 Jaker Ali, and P.W. No. 32 Masoruddi and P.W. No. 35 Safar Ali and of P.W. No. 25 Momtaz himself that Momtaz was absent at Basanti Abad and information of the occurrence was conveyed to him there the next day. It is evident also that the chowkidar''s explanation that he mistook Jaker Ali for Momtaz is true.

15. The non-examination of witnesses by the prosecution has also been made a ground on behalf of the accused. Saira Bibi and Nesar Ali have not been called. It may be assumed that if called they would not have supported the prosecution. As to Saira Bibi, suspicion attaches to the manner in which her property and poultry came to be preserved. It is not clear whether Nasarali was actually in the homestead that night, but any way he was suspected of having been concerned in the crime. Hamja Boddy''s name is in the first information but there is evidence that he is siding with the accused. Of the two Muhammadan servants in the khanka one appears not to have been called, but the point has not been made clear as to who he was. Of the four Uriya servants who were in the khanka, one was called in the Court of the Committing Magistrate but it is said has disappeared since then. Making every allowance for the presumption that may arise from the non-examination of the available witnesses, it is difficult to hold that that can at all outweign the mass of unimpeachable evidence that is already on the record.

16. There is on the record the retracted confession of the accused Amir. That is of no value as against the two accused with whom we are concerned. The evidence relating to the said confession and that relating to finding of the gun at the spot in a tank pointed out by Amir has been discussed in detail before us for the purpose of showing that the conduct of the Police was not satisfactory. It is sufficient to say that I have "not been able to discover anything in connection with this matter which may lead me to suspect that there was any un fairness of concoction on the part of the Police in this case.

17. After the occurrence two big iron clamps were found one in front of Momrej''s door. and another in front of Entaz''s door, and a. spade head was also found in front of Momrej''s door. The evidence is that the doors of Momrej and Entaj had no rings or chains on the outside and the prosecution case is that the clamps were used for preventing the doors from being opened. The clamps were identified, by P.W. No. 30 Ambika Charan Karmokar as having been made for. Alimaddin about a week before the occurrence. The witness was able to recognise the clamps as they were somewhat out of the ordinary and were prepared by him from iron supplied by Alimaddi. Mention may also be made of the fact that in the course of search of the house of the accused amongst other things a koch with fresh blood on it was found. There is evidence also that on the night of the occurrence the thatches of Alimaddin''s house were covered with coarse mats and quilts, suggestng that precaution was taken that the thatches might not catch the fire.

18. It is unnecessary to refer to the other evidence that is on the record. The evidence referred to above and which, as I have said, there is no reason whatever to disbelieve or discard, leaves no room for doubt as to the presence of the two accused persons at the homestead of Momrej Boddy at the time of the conflagration, and as to their participation in the acts that have been ascribed to them by the witnesses who have deposed in. the case. Speaking for myself, am not inclined to attach much importance to the evidence of the blacksmith P.W. No. 30 or the finding of the bloodstained koch, not that I do not believe that evidence, but because even apart from that evidence the guilt of the accused, to my mind, seems to be perfectly clear. Their presence at the spot, coupled with the acts attributed to them leaves no room for doubt in my mind that they came there in pursuance of a conspiracy to murder Momrej Boddy and other members of his family by setting fire to his homestead. The conduct of the persona involved in the occurrence also suggests that the lives of Momrej and Entaz were the chief objective of the conspirators, and the others perished because they happened to be in the same huts with Momrej. This would explain why Jasjman and her child and Mourjan and Esherali succeeded in escaping. As to Bibijan she was kilted probably because of the threat that she uttered. I see no reason to disbelieve the evidence of Jasiman as to how Entaz was killed, and on that evidence I consider that the offence of murder as regards Belat Ali has been satisfactorily established.

19. There remain now for consideration a few other arguments that have been put forward on behalf of the defence.

20. Objection has been taken to the admissibility of the statement contained in the first information to the effect that Alimaddi was a Criminal Tribe convict. It is said that this statement is inadmissible in evidence as being evidence of bad character of the accused and should not have been let in, but should have been expressly excluded when the first information was proved in evidence; and that in any event, the learned Judge should have directed the Jury to leave it out of consideration or to use it only for the limited purpose for which the defence used it in the cross-examination of the chowkidar P.W. No. 16. Now, the expression used in the first information is "Criminal Tribes Act Dagi". It is not very clear whether by it was meant that Alimaddi was a convict or that he was merely a member of a Criminal Tribe and so came under the purview of the Criminal Tribes Act and was thus a Dagi in the sense of a branded person who is looked up by the Police during nights. If used in the latter sense, it would not necessarily imply that he himself was of bad character. Be that what it may the first information was proved in evidence during the examination-in-chief of the chowkidar and was presumably read out to the Jury. In cross-examination, the defence made the fact clear and evidently relied upon it as would appear from the following answers of the witness "Alimuddi is a Criminal Tribes Act Dagi. I used to look him up every night, but on the night of the occurrence, I did not look him up". After this cross-examination I do not think the learned Judge need have given any special directions in this matter, and in any event, I have no reason to think that in this case, this statement in the first information affected the verdict of the Jury in a way prejudicial to the accused.

21. It has been argued that believing all the evidence as to the occurrence the case would not go beyond a conspiracy to commit the offence of culpable homicide, and that it has not been proved that the object of the conspirators was to commit murder. This argument overlooks some very important circumstances which appear in the case. It is quite clear even discarding the theory of the prosecution as to the clamps having been put on the doors of Momrej and Entaz that the egress of the inmates out of the said two huts was barred, and Entaz when he got out and even after the gun was snatched away from him and he was powerless and was killed, and the position of the seven dead bodies in Momrej''s hut indicated not confusion but deliberation due to despair on the part of inmates when they had failed to get out after making all possible endeavours for the purpose. There is also the fact that Jasiman was: prevented from rendering assistance to her son who was in Momrej''s hut, and that the chains of the door of the hut in which Sarafat was at'' the time, were put up to prevent his exit. These facts to my mind conclusively prove that the intention of the conspirators was lo burn the inmates to death and that is nothing less than the offence of murder.

22. Lastly, it has been contended that there has been no adequate examination of the accused under the mandatory provisions of Section 342, Cr.P.C. The matter is one of considerable importance and is constantly coming up before the Court and I desire to deal with it here.

23. Section 342, Sub-section (1) is divided into, two parts. The opening words of the sub-section: "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him" governs, both the clauses that follow. It is-with the latter clause, which is mandatory with which we are concerned here. Reading the aforesaid words into this clause in the place of the words for the purpose aforesaid" the clause would run thus: "The Court shall for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him question him, generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence." The precise question for consideration is what is the nature of this questioning that the Legislature had in view.

24. Under Act XXV of 1861 and Act VIII of 1869 the examination of the accused person was discretionary with the Court. Section 202 of Act XXV of 1861 which appears in the Chapter headed "On preliminary enquiry by the Magistrate in cases triable by the Court of Session" ran thus: "It shall be in the discretion of the Magistrate, from time to time, at any stage of the enquiry to examine the accused person, and to put questions to him as he may consider necessary. It shall be in the option of the accused person to answer any such question." Section 373 of Act XXV of 1861 which was in the Chapter headed "Trial before the Court of Session" ran thus: "The Court, at the close of the evidence on behalf of the accused person, if any evidence is adduced on his behalf, or otherwise at the close of the case for the prosecution, may put any question to the accused person, which it may think proper. It shall be in the option of the accused person to answer such question." In Act VIII of 1869 a slight variation was made, Section 203 of the earlier Act being left untouched and Section 373 being altered as follows: "The Court at the close of the case for the prosecution and at the close of the evidence on behalf of the accused person (if he produces any evidence), may put any question to the accused person which it may think proper. It shall be in the option of the accused person to answer to such questions, and after such questions shall have been answered by the accused person, he or his Counsel or agent may address the Court on the subject thereof." Anew section, namely, Section 262A was also introduced which provided that the Magistrate might examine the accused person subject to the provisions of Sections 202, 203, 204 and 205. The discretion thus vested in Courts was often not exercised and this led to the following instructions being issued by this Court by a letter dated 28th July 1864: "Although the Cr.P.C. does not make it imperative on a Magistrate to examine an accused person at any stage of the enquiry before; committing him to stand his trial at the Court of Session, the Court thinks it necessary to impress upon all Magistrates the expediency of the general adoption

of this course at some stage or other of the enquiry. In those few and exceptional cases, in which the guilt of an accused may be beyond reasonable doubt, the practice in force may be permitted without risk; but inasmuch as it is discretionary with a Magistrate to discharge or commit an accused person, according as he finds that the evidence is, in his opinion, sufficient for his conviction by the Court of Session or otherwise, it is obvious that the, truth, of any ordinary case will be best elicited and obscure points will be cleared away by any explanation that the accused may wish to give, when," after hearing all the evidence against him or at any time in the discretion of the Magistrate he may be subjected to an, examination before the Magistrate on points requiring elucidation, it being clearly explained to the accused that it is his option to answer such questions or not. The Court, however, desires to explain that in issuing these directions, it in no way sanctions any proceedings of an inquisitional nature." The italics in the above extract are mine. It is clear upon the words that the examination was to be on points requiring elucidation, was not to be of an inquisitional nature, and the object aimed at was to elicit the truth by enabling the accused to explain matters and also clearing up obscure points by means of such explanations.

25. Then came Act X of 1872 in which the discretionary nature of the examination was retained so far as enquiries into, cases triable exclusively by the Court of Session were concerned, and in the trial of these cases the examination was also made compulsory and a provision was introduced allowing a discretion in Courts for the examination of accused persons in all other enquiries and trials. The relevant sections in. that Act were as follows:

Section 193 in the Chapter "Of enquiry into cases triable by the Court of Session or High Court" ran thus: "The Magistrate may from time to time at any stage of the enquiry and without previously warning the accused person, examine him and put, such questions to him as he considers necessary. The accused person shall not render himself liable to punishment for refusal to answer such questions, or for giving false answers to them, but the Magistrate shall draw such inference as may to him seem just from such refusal." To this there was an explanation in these words "The answers given by can accused person may be put in evidence against him not only in the case under enquiry, but also in trials for any other offences which, his replies may tend to show he has committed.

26. Section 214 in the Chapter "On the trial of Warrant Cases by Magistrates" made the provisions of Section 193 to apply to trials conducted under that Chapter.

27. Section 250 in the Chapter headed "Trial by Court of Session" ran in these words: "The Court may from time to time at any stage of the trial, examine the accused person, and shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

28. Section 312 in the Chapter headed "Evidence how taken" was in these words: "In all inquiries and trials a Criminal Court may from time to time, and at any stage of the proceedings, put any questions to the accused person which such Court may think proper."

29. Section 343 ran thus: "The accused person shall not be liable to any punishment for refusing to answer or for answering falsely questions asked u/s 342 but the Court shall draw such inferences as seem just from such refusal."

30. The above was the law introduced by Act X of 1872. To say the least the wording of the Statute was dangerously wide. For some time it went on being administered in the Courts producing all the consequences that the daparture from the general policy of the English Criminal Law was bound to bring on and more than fulfilled the expectations embodied in the view of Sir George Campbell as contained in his reported speech on the Bill. He is reported to have said as follows: "Not only were these provisions (meaning the rules of English Law) now unnecessary in England but they are specially out of place in a country where it was not pretended that the subject enjoyed that liberty which is the birth-right of an Englishman; and it was not intended to introduce rules into the Criminal Law which were designed with the object of securing the liberties of the people. That being so, His Honour thought that they might fairly get rid of some of the rules the object of which was to secure for the people that jealous protection which the English Law gave to the accused. It seemed to him that they were not bound to protect the criminal according to any code of fair play, but that their object should be to get at the truth, and anything which would elicit the truth was regarded to be desirable for the interests of the accused if he was innocent, for those of the public if he was guilty. That being so, he would say that he had no sympathy whatever for those things which his Hon''ble friend Mr. Stephen had called superstitions. For instance, His Honour did riot see why they should not get a man to implicate himself if they could, why they should not do all they could to get the truth from, him; why they should not cross-question him; and adopt every other means short of "absolute torture to get at the truth." The way in which the law was administered was fraught with dangerous consequences and was found unsuitable in course of time and, the different High Courts laid down a series of rulings in which it was held that, the power that the law gave should be used to ascertain from the accused how he can explain the facts adduced in evidence against him and not to drive or entrap him into making self-incriminating statements, and it was enjoined that questions must not be put to the prisoner when there was nothing against him on the evidence, adduced by the prosecution or in the middle of the case for the prosecution, so as to make out a case against the accused when there was none or so as to supplement the case for the prosecution when it was defective. These series of rulings made it necessary to amend the law when the Code was revised in 1882. In the amendment made by Act X of 1882 the provisions relating to the examination of an accused person, which were scattered in different Chapters in the previous Acts were removed from those

Chapters and brought under the Chapter headed "General provisions relating to inquiries and trials." One noticeable alteration was made by the addition of. the words "for the purpose of enabling; the accused to explain any circumstances appearing in the evidence against him;" another was the substitution of the word "may" for the word "shall" as regards the drawing of inference against the accused; and there were other changes made as well. The result of the amendment was to frame the scattered provisions into one comprehensive section, i.e., Section 342 of Act X of 1882 and it has retained its shape, in Act V of 1898 and has not been affected by the Amending Acts of 1923. The object of the amendment is stated in the following extract from the report of the Select Committee on the Bill of 1882: "We think that the present law gives too great a latitude to the Courts with regard to the examination of an accused person. The object of-such an examination is to give the accused an opportunity of explaining any circumstances which may tend to criminate him, and thus to enable the Court, in cases where the accused is undefended, to examine the witnesses in his interest. It was never intended that the Court should. examine the accused with a view to elicit from him some statement which will lead to his conviction. We have, therefore, limited the power of interregating the accused by adding to the first paragraph the words, "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him." "We think the accused-should always have this opportunity of explaining and we have, therefore, required the Court to question him generally for the purpose before he enters on his defence."

31. The section as it stands is undoubtedly for the benefit of the accused, the provisions embodied in it enable him to explain the circumstances appearing against him in the evidence. I cannot, however, concur in the view that it is intended merely for his benefit. It is a part of a system for enabling the Court to discover the truth and it constantly happens that the accused''s explanation or his failure to explain, is the most incriminating circumstances against him. The result of the examination may certainly benefit the accused if a satisfactory explanation is offered by him; it may however be injurious to him if no explanation or a false or unsatisfactory explanation is given. These conclusions, to my mind, follow from the words "without previously warning the accused" which appear in the first part of Sub-section (1) and the provision as to the drawing of inference contained in Sub-section (2). If that be the intention of the Legislature, as I have no doubt it is upon the words of this section it inevitably follows that the Court should not only have the power to point out to the accused the circumstances appearing in the evidence which require explanation, but that it must out of fairness to the accused exercise that power in such a way that the accused may know what points in the opinion of the Court require explanation, failure or refusal to give which will entitle the Court to draw an inference against him.

32. To this interpretation three main objections are suggested. It is said that the expression "question him generally" indicates, as contra-distinguished from the

expression "put such questions to him as the Court considers necessary," that the points need not be put to the accused but a general, question will suffice. In my opinion the word "generally" does not limit the nature of the questioning to one or more questions of a general "nature relating to the case" but it means that the questions should relate to the whole case generally and should not be limited to ally; particular part or parts of it. It will be seen that the word "generally" appeared in Section 250 of Act X of 1872 when the intention of the Legislature was quite clear as to why they were departing from the English rules or procedure. There is no foundation for the argument that the word "generally" was put in out of solicitude for the accused with a view to protect him against a detailed examination by" the Court; and indeed when a detailed examination "is permissible under the first" part of the section, even without previously warning the accused there is no ''reason'' why it should not have been intended in the latter part as well. A second argument relates to the provision enabling the Court and the Jury, if any to draw an inference. It is contended that the expression "circumstances appearing in the evidence" mean those that appear to the accused, and it is argued that there is no point in requiring the Court to point out to the accused what appears to>it as calling for explanation, for in a trial with the Jury, the Jury will also be entitled to draw, inferences against the accused if the circumstances are not explained, and it is asked how can a Judge be expected to put to the accused what circumstances are, weighing in the mind of the Jury. At first sight, this seems to be a difficulty but it will be observed that Sub-section (2) provides for inference being drawn from the refusal to answer the questions and also from the answers given to the questions themselves and not from the omission to explain the circumstances. The Court can always frame questions "dealing with such salient points in the case as in its opinion call for explanation. Lastly it is argued that it will be extremely difficult to frame questions such as would not elicit incriminating answers or the questions of a catching nature. To this the answer is that the in competency of a Tribunal, in administering the law or the difficulty in administering it is no ground; for whittling down its provisions. Besides, I do not see why it would not be possible to put before the accused the salient facts and circumstances as, they appear, in the evidence against him and ask him if he has any explanation to offer. There is scarcely any reported decision which directly bears upon the question of sufficiency of an examination under the mandatory provisions of -a. 342, Cr.P.C.

33. There are three unreported decisions of this Court to which I shall presently refer. In Criminal Revision No. 237 of 1924 decided on the 24th June 1924, where it appeared that the question put to the accused was "what is your defence? " it was argued that the question was not of the nature contemplated by the section. This Court (Newbould and Chakravarti, JJ.,) refused to follow the decision of a Single Judge of the Patna High Court in the case of Bokhari Singh v. Emperor 81 Ind. Cas. 199 : (1924) Pat. 198 : 5 P.L.T. and held that the question was sufficient. In Criminal Revision No. 182 of 1923 decided by this Court on the 19th December 1923 the

question put to the accused was "what is your defence? "In that case Greaves, J., (Panton J., concurring) observed as follows: "I think there is no doubt that the proper method u/s 342, Cr.P.C. is to put at the close of the prosecution case and before the accused enter on their defence shortly and succinctly the main points which appear upon the prosecution evidence bearing against the accused. But what we have got to consider in this case is whether what has been done is sufficient compliance with Section 342 or whether Section 342 has been complied with. We do not for a moment suggest that the course adopted here is a desirable course and we think that the Magistrate should have followed the course which I have already indicated. But we are not prepared to interfere in the present case on the ground that Section 342 has not been complied with, for all the accused had an opportunity of stating what their defence was upon the evidence as given, and it was open to them to do as they have done and instead of answering the general questions put to them to rely on the written statements for the purpose of meeting the case for the prosecution." In Criminal Appeal No. 547 of 1913 Shamlal Singh v. Emperor decided by this Court on the 15th January 1924 Since reported as 85 Ind. Cas. 716--[Ed.], the accused had been asked if they desired to make any further statement to what they, had done before the Committing Magistrate and they refused'' to do so. Greaves and Panton, JJ., observed thus in their judgment in that case: "Now we have had occasions to point out more than once that the proper method of applying Section 342 is to bring to the attention of the accused specific matters which appear in. the evidence against them and that merely questioning them generally as to whether they have anything to say or anything to add to what was said before the Committing Magistrate is not a satisfactory method of applying Section 342 and we hope that the Courts in future will bear this in mind when the time comes to question the accused under the provisions of Section 342 but we are not prepared to say that what was done in this case necessitates: a new trial.

34. As I have said there is no reported decision in which the question directly arose for consideration but there are a series of cases in which the section has been interpreted by the different Courts which have had occasion to administer it, and though most of these decisions are not to be treated as binding on us, it is not undesirable to refer to them as they throw some light on the question. In the case of Hossein Buksh v. Empress 6 C. 96 : 6 C.L.R. 529 : S L.R. Cr. R. 39 : Ind. Dec. (N.S.) 63 in dealing with Section 250 of Act X of 1870 quoted above Prinsep, J., observed (Morris, J., concurring) that the real object in the power given to the Court was to elicit from the accused how he proposes to meet such portions of the evidence which, in the opinion of the Court, implicates the accused, in the commission of the offence with which he stands charged. In the case of Queen-Empress v. Hargobind Singh 14 A. 242 : A.W.N. (1892) 83 : 7 Ind. Dec. (N.S.) 525 Sir John Edge, C.J., and Tyrell and Knox,, JJ., observed that it required no knowledge of law to understand the section and to understand that it is not for the purpose of ascertaining what, ''Witnesses the accused intends to call, or what evidence they will give or what his defence is, that a

Court is justified or authorised in examining an accused under that-section. In the case of Raghu Bhumij v. Emperor 58 Ind. Cas. 49 : 21 Cri.L.J. 705 : 1 P.L.T. 241 : 5 P.L.J. 430, Sultan Ahmed, J., observed thus: "The real object of the latter part of Section 342, Clause (1) is to ascertain from the prisoner how he can meet what the Judge may consider to be damnatory evidence against him." The same view has been taken by a later decision of this same Court in the case of Bhokhari Singh v. Emperor 81 Ind. Cas. 199 : (1924) Pat. 198 : P.L.T. 445 : 25 Cri.L.J. 711 : AIR (1924) (Pat.) 791 in which Kulwant Sahay, J., observed that it was compulsory for the Court u/s 312 to question the accused in such a way as to enable him to explain any circumstances which appear in the evidence against him. It was held in that case that the mere asking the accused as to whether he has anything further to say is not a sufficient compliance with the second part of the section, and that the questions must be framed in such a way as to enable the accused to know what he is to explain and as to what are the circumstances against him and for which an explanation is needed. In another case of the same Court, namely, the case of Panchu Choudhunj v. Emperor 66 Ind. Cas. 73 : 23 Cri.L.J. 233 : 3 P.L.T. 649 : AIR (1923) (Pat.) 91 in which the Committing Magistrate had put a specific question to the accused as to whether he had committed the offence and the accused answered in the negative, and then in the Trial Court he was asked whether he wished to add anything to the statement. which he had made before the Committing Magistrate, Bucknill, J., observed as follows: "It can easily be seen that if it is to be said that a Judicial'' Officer must ask this or that question or this or that series of questions under the provisions of Section 342, Cr.P.C., the practical effect of the working of that section could be criticised in revisional applications on every possible occasion. I can well understand that, where an accused is undefended the Tribunal may well point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation but where an accused is defended by a legal practitioner, it would, I think, be altogether impossible to expect, or desirable to contemplate, a Tribunal entering upon a lengthy examination of an accused person which might easily develop into a recounting of the history of the whole case or into, what would be far worse, some sort of cross examination." With all deference to the learned Judge, I should observe that this distinction between. a defended and an undefended case ignores the object of the section itself which has been so forcibly, pointed out by Rankin, J., in his judgment in the case of Promotho Nath Mukhopadhya v. Emperor 71 Ind. Cas. 792 : 27 C.W.N. 389 : (1923) AIR (C.) 470 : 24 Cr.L.J. 248 : 50 C. 518 that this examination is a matter-entirely between the accused and the Court and that the legal advisers do not come in or count in this examination at all. In another case of the same Court, namely, that of Fatu Santal v. Emperor 61 Ind. Cas. 705 : 22 Cr.L.J. 417 : 2 P.L.T. 288 : 6 P.L.J. 147, Sir Dawson Miller, C.J., and Adami, J., observed as follows: "In the present case it does not appear that any question whatever was asked of him or that his attention was directed to any portion of the evidence which might appear to call for an explanation and, in these circumstances, it seems to us that the trial was entirely irregular, and that the

verdict cannot stand." In this case, the accused had been examined by the Committing Magistrate but there was no examination by the Trial Judge. The Lahore High Court in the recent case of Harnama v. Emperor 60 Ind. Cas. 676 : 22 Cr.L.J. 276 : 3 U.P.L. (L.) 34 had to deal with the effect of non-examination of the accused when he filed a written statement and declined, when asked, to add anything to it. Broadway, J., while holding that the omission ''was not fatal, observed as follows: "Although it would have been better for the Magistrate to have put definite questions to the appellants, I am unable to hold that the procedure actually adopted in the case was so illegal as to vitiate the whole trial." In the case of In re Basru Venkata Row 14 Ind. Cas. 418 : 13 Cr.L.J. 226 at 233 : 11 M.L.T. 93 : 22 M.L.J. 270 : (1912) M.W.N. 125 : 36 M. 159 of the Madras High Court, Spencer, J., dealing with a letter from which an inference adverse to the accused was drawn by the Court observed as follows: "If it was intended to treat this letter as a circumstance appearing against the first accused and to draw inferences from it against him it would have been a fair and natural procedure for the Judge, in the exercise of the power which he had under Sections 289 and 342, Cr.P.C., to examine the accused about it and put him such questions as would enable him to explain its significance. As it was he was asked no question and he made he statement relative to this document." The precise point came up for consideration in a case in the Central Provinces, where the procedure seems to be well settled, in the case of Tani v. Emperor 48 Ind. Cas. 487 : Cr.L.J. 12 in which Batten, J.C., and Kotwal, A.J.C., following an earlier decision of the Nagpur Judicial Commissioner''s Court Emperor v. Katay Kisan 17 C.P.L.R. 113 held that the object of Section 342, Cr.P.C. is (1) to communicate to the accused, to the full extent what may be found necessary in each particular case, what is alleged against him in the evidence, for the prosecution, and (2) to ascertain from him what explanation or defence in law or in fact, he wishes to put forward, in respect thereof. It was expressly laid down by the Court that it is necessary that the attention of the accused should be drawn to all the vital parts of the evidence against him and that it was not a sufficient compliance with the provisions to ask the accused the general question. "Have you anything more to say in this case?" or "You have heard the prosecution witnesses against you: what have you to say?" I have not been able to find any opinion of the Bombay High Court in this matter, but specimens of examinations that are to be found in some of the reported cases point to a detailed examination being the practice that obtains in that Presidency. In one of the cases in that Court viz., Basapaningapa v. Emperor 31 Ind. Cas. 365 : 16 Cr.L.J. 765 : 17 Bom. L.R. 892 Hayward, J., characterised the examination of the accused person held by the Committing Magistrate as perfunctory, indicating that something more than a general question is necessary and observed that the law requires that an opportunity shall be given to the accused himself to explain and not that this important step in the procedure should be left to his Pleader. The same view has been endorsed by the Courts in Burma. In the Court of the Judicial Commissioner of tipper Burma Riggs, J. C, in the case of Nga San Nyein v. Emperor 41 Ind. Cas. 150 : 18 Cr.L.J. 774 : 3 U.B.R. (1917) 3 : 11 Bom. L.T. 140

held that the object of examining an accused person is to afford him an opportunity of explaining away evidence against him, that each point appearing in evidence should be put to him and he should be invited to offer. his explanation or comment in it, anything in the nature of cross-examination being avoided. The Burma High Court, in the case of Mating Hman v. Emperor 77 Ind. Cas. 887 : 25 Cr.L.J. 487 : 2 Bur. L.J. 238 : I.R.AIR (1924) (R.) 172 had to deal with this question very. recently and May Oung, J., held in that case that a Judge or Magistrate should, note every point which he thinks he will have to put into the scale against the: accused and then question him on each point, otherwise it will be impossible for the accused to know what is in the Court''s mind and he cannot be reasonably expected to explain it, and that it is not sufficient to put a general question to the accused such as. "What have you to say regarding the statement of the compainant''s witnesses."

35. In the present case Alimaddin Naskar was asked by the Committing Magistrate "What is your defence?" he replied "I am innocent, what I have to say I shall say hi the Sessions Court". In the Court of Session the said statement was read to him and he was then asked "Do you wish to say anything more?" He then made a statement. Belatali Naskar was put the same question in the Committing Magistrate''s Court and he gave the same reply a Alimaddin Naskar. He was asked by the'' Judge the same question that was put to; Alimaddin Naskar and he then made a statement. I am of opinion that the examination of the two accused persona, was perfunctory and hot a sufficient compliance with the provisions of the law. In my opinion the law intends that the salient points appearing in the evidence, against the accused must be pointed out to him in a succinct form and he should to asked to explain them if he wishes to do so. It may be that when a general question: as to. whether he wishes to say anything is asked, he will reply in the negative. If he does so, it will be of no use asking him; any further question. If on the other hand, it does not appear that he would refuse to answer questions put to him,, or it appears that he desires to respond-his attention should be called to the salient points appearing against him, so that an opportunity is really afforded to him to explain them, if he can do so. In, such examination every precaution should be taken not to entrap him to make incriminating answers and all question''s in the nature of cross-examination should be avoided. In my opinion it is not impracticable to conduct the examination in the manner indicated above.

36. Though the examinations of the accused persons have not been adequate, the statements made by them indicate that they were not altogether ignorant of some of the salient points appearing in the evidence against them. Alimaddin endeavoured to explain that he had no motive, that he was not concerned in the earlier incidents, that the Naskars were named as accused out of enmity and that at a subsequent stage, and that the prosecution witnesses were relations and servants of Momrej. He also wanted to create an appearance in his favour by stating that the Naskars spent the whole day after the -night of the occurrence at the spot but none named them then. Belatali stated that he was absent from the village and was

falsely implicated. In the present case 1 am unable to hold that there has been any prejudice to the accused persons. A refusal to give the accused an opportunity to make a statement at a stage when the mandatory part of Section 342, Cr.P.C., is operative vitiates the trial, but an insufficient examination at that stage does-not necessarily invalidate it.

37. For the above reasons, I am of opinion that the two accused persons have been rightly convicted. I accordingly uphold the conviction of Alimaddin Naskar and Belat Naskar under Sections 302, 120B, Indian Penal Code, and also the conviction of Belat Nasker u/s 302, Indian Penal Code.

38. As to the sentences, giving the matter my most anxious consideration and taking into account all the circumstances of the case, I am unable to find any reason for passing a lesser sentence on either of the two accused than the maximum penalty which the law provides for the offences of which they are guilty. The offences committed by them are most diabolical in their conception and brutal in their execution, and I accordingly confirm the sentences of death passed on the two accused and dismiss their appeals.

Newbould, J.

39. My learned brother in his judgment which he has just delivered has dealt, fully with the facts and the evidence in this case. It is sufficient for me to say that I am in entire agreement with his finding that the Convictions of Alimaddin Naskar and Belat. Naskar u/s 302 read with Section 120B, Indian Penal Code and of Belat Naskar u/s 302, Indian Penal Code are right and that the sentence of death are necessary. The appeals are accordingly dismissed and the sentences of death are confirmed.

40. As regards the point of law that, was raised in this case that there has been inadequate examination of the accused u/s 342 of the Cr.P.C. we are in agreement that the trial has not been vitiated by any failure, to comply with the mandatory provisions of this section. But with the utmost respect for the opinion.-of my learned brother I am unable to agree with him that the examinations of the accused persons at the present trial were not adequate. I adhere to the view expressed by Chakravarti, J., and myself in the unreported case Rez Mahamed Sheikh v. Emperor Criminal Revision No. 237 of 1924, decided on 24th June 1924. We there, held in agreement with the decision of Rankin, J., in Promohta Nath Mukhopadhya v. Emperor 71 Ind. Cas. 792 : 27 C.W.N. 389 : AIR (1923) (C.) 470 : 24 Cr.L.J. 248 : 50 C. 518 , that, what is necessary is that the accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence if he is willing to make one with his own lips. We further held that the question put in that case "What is your defence" was a sufficient compliance with the mandatory provisions of Section 342, Cr.P.C. One of the reasons given for this decision was that for, many years it had been the more usual practice for Courts when examining an

accused under this section to put to him questions of a formal nature in words similar to those which had been used, in that case and we applied the maxim optima legis interpres consuetudo.

41. I still think that a formal question in general terms which gives the accused an opportunity of making a statement of his defence with his own lip is a sufficient-compliance with the mandatory provisions, of Section 342, Cr.P.C., since it enables use accused to explain, any circumstances appearing in the evidence against him. To what extent the Court, when complying with the mandatory provisions of the section, should also exercise its discretionary power under the other provisions of the section is a different question. The exercise of this discretion must vary with and depend on the circumstances of each particular case. But in the majority of cases it is, in my opinion, neither necessary nor desirable that there should be any detailed questioning of the accused. The point at which the Court is bound to question the accused is after the witness for the prosecution have been cross-examined. From the cross-examination it will usually appear that the accused understands what are the circumstances appearing in the evidence which require explanation. If this is apparent it is unnecessary for the Court to tell the accused what those circumstances are. The superior Courts of this country have repeatedly emphasized that the examination of the accused under this section should not be of an inquisitional nature. There is great danger, if the lower Courts are required to depart from the usual practice of putting a formal question and in all cases to specify the circumstances appearing in evidence against the accused, that something of the nature of cross-examination will frequently result. There is a very thin line of distinction between stating the circumstances which require explanation and asking the accused to explain those circumstances.