

(1909) 06 CAL CK 0046

Calcutta High Court

Case No: None

Jogjiban Ghose and Others

APPELLANT

Vs

Emperor

RESPONDENT

Date of Decision: June 1, 1909

Judgement

1. The three appellants were tried in the Court of the Additional Sessions Judge of Midnapore on charges framed under the Explosive Substances Act, 1908, and they have each been found guilty by the learned Judge who disagreed with both assessors.
2. Jogjiban Ghose was convicted u/s 4 (a), of the Act and has been sentenced to ten years" transportation.
3. Santosh Chunder Das was convicted under Sections 4(a), 4(b) and 5 of the Act and he has been sentenced to ten years" transportation u/s 4(a) and seven years" transportation u/s 5, these sentences to run concurrently.
4. Suredra Nath Mukerji has been convicted under Sections 4, 5 and 6 of the Act and has been sentenced to seven years" transportation. Separate appeals have been preferred and each appellant has been separately represented in this Court.
5. The case for the prosecution, as formulated in the first information dated the 7th September 1908, is that there was " a conspiracy by a secret society working at various places at Midnapore and elsewhere, and having as one of its objects the assassination of the District Magistrate of Midnapore by means of bombs, explosives or firearms." Twenty-three places of meeting are enumerated, and some idea of the suggested extent of the conspiracy may be gathered from the fact that no less than 154 persons are named as implicated, drawn from all classes of society from Raja to beggar.
6. Proceedings before the Committing Magistrate were taken against 27 of these persons, but before the case had proceeded far, the Advocate-General, Mr. Sinha, on the 9th of November withdrew from the prosecution of 24 of the accused

persons who were, thereupon, discharged. Though it may have appeared at the time that the Advocate-General was taking upon himself a serious responsibility, events have amply justified his action and there can be no doubt that the course he took was right from every point of view. Thenceforth the proceedings were continued against the three appellants alone.

7. The prosecution theory has been that the conspiracy charged may be traced back to what has been described in the course of this case as the " spirit of violent hostility against the Government " alleged to have resulted from the agitation to which the Partition of Bengal gave rise, and in support of this a prominent police officer has stated that the Bande Mataram processions, which the prosecution apparently regard as an important element in the conspiracy, went on from the Partition till the house searches at Midnapore in 1908. But it is not until the 8th of June 1908, that we come to the period actually covered by the charges in this case, and it may be noted that the reason for selecting this date as the commencement of the conspiracy charged is that it was on that date that the Explosive Substances Act, 1908, became law. All up to the 8th of June, therefore, must be regarded as the history of events leading up to the alleged conspiracy and relevant only in that sense. Speaking generally it may be said that the evidence bearing on this earlier period is directed to showing that there were in Midnapore, Bande Mataram processions, associations of volunteers and an aggressive system of picketing, that there were meetings advocating hostility to the Government and the use of violent methods, that young men and youths were being trained and drilled to fit themselves for a struggle with authority and that the three appellants in this case were prominent actors in the movement.

8. It is to this earlier period that the greater part of the evidence relates: the direct evidence of the conspiracy and offences charged is relatively small in amount.

9. Before discussing the evidence in this case, the charges of conspiracy call for a word of comment. In each case they are expressed in the same terms, and for the purpose of this comment, we will take that directed against Surendra Nath Mukerjee. It says "That you Surendra Nath Mukerjee on or between the 8th of June, 1908, and 31st July, 1908, at Midnapore unlawfully and maliciously conspired to cause by an explosive substance, namely, a bomb, an explosion in British India of a nature likely to endanger life and thereby committed an offence, etc, etc." A conspiracy, however, requires the agreement of at least two persons and when the Advocate-General was asked with whom the accused was alleged to have conspired, his first inclination was to include a large number of people not only in Midnapore, but also in Calcutta, but by degrees this claim was narrowed until at last it was conceded that the charge must be in each case qualified so as to treat the three accused alone as the conspirators.

10. The direct evidence of the offence charged is in the case of Jogjiban, (1) the confessions of Santosh and Surendra, and (2) the evidence of Abdur Rahman; in the

case of Santosh, (1) his own confession, (2) the confession of Surendra and (3) the alleged discovery of a bomb in the house where he resided; and in the case of Surendra, (1) his own confession and (2) the confession of Santosh.

11. The difficulty in this case is not in appreciating the relevant evidence but in determining what evidence is relevant, for it is strenuously contended that the two confessions of which the prosecution make so much are not legally admissible inasmuch as neither of them is voluntarily made. This has involved an elaborate enquiry only made possible by the chance which brought two documents, Exhibits 56 and G, within the reach of the accused's advisers.

12. Exhibit 56, according to the prosecution, is a record of contemporaneous statements made to the police by Rakhal Chunder Laha, an informer in their employ, which came into the hands of those conducting the defence in the course of the cross-examination of a prosecution witness in the Court of the Committing Magistrate.

13. Exhibit G is document written up in the month of October 1908 by Asadulla, a police officer at Midnapore, for the purpose of assisting the informer in connection with the evidence it was then believed he would give. It was based, it is said by the prosecution, on four note books in the possession of the informer, and after it was written the marginal notes were inserted by Asadulla who at that time had with him the two confessions.

14. As events turned out the informer failed the prosecution and declared the statements in Exhibit 56 to be false.

15. In dealing with these exhibits it has to be borne in mind that the statements they contain are not evidence against the accused, and the documents are only useful in so far as they tend to expose the methods employed in getting up the case and to show what is the foundation on which the story of the prosecution rests, so that they are in no sense constructive, but if anything, destructive of the case against the accused. The main contention advanced by the defence in relation to these documents is that Exhibit 56 was utilized by the police for the purpose of constructing the confessions by Santosh and Surendra and that a comparison of Exhibit G with Exhibit 56 and the confessions serves to confirm the view that the confessions were mere fabrications and not true statements of events. As it is on these confessions that the Advocate-General has principally relied, we propose to deal with them at the outset.

16. Santosh's confession is dated the 29th of July 1908, and in effect it admits that he took part in the gymnastic exercises in an akra in Midnapore until the 14th of January 1908; that he then went to Ranchi and returned again to Midnapore on the 13th of June; that he then attended several meetings of his associates at which the use of bombs was advocated and approved; that among those present were the appellants Surendra and Jogjiban; that he (Santosh) was in possession of a bomb

and after a meeting, on the 7th of July, took it to his home.

17. This statement, as it stands, undoubtedly tends to incriminate Santosh, but the question is whether it can be used against him. At the foot of the confession there is a memorandum signed by the recording Magistrate to the effect that ho believed it was voluntarily made, while the Additional Sessions Judge not only held this to be the case but was also convinced that the statements were true and formed a good basis for conviction. But this does not preclude us from enquiring into the matter for ourselves; on the contrary that is a duty clearly incumbent on us and it will best be discharged by narrating the events which led up to the two confessions as they appear on the record.

18. On the 7th of July on an application to Mr. Nelson, the Joint-Magistrate, a search warrant was issued to Moulvi Mozarul Huq, Deputy Superintendent of Police (to whom we will in future refer as the Moulvi) and to Babu Lal Mohun Guha, Inspector of Police, Midnapore, authorising and requiring them to search for a bomb in the house of Santosh and his relatives and friends and if found to produce the same before the Court. The application for the search warrant is said to have been based on the report of the informer, Rakhal Chander Laha.

19. In the early hours of the morning of the 8th the search was made : an article believed to be a bomb is said to have been found and at 11 A. m. Santosh was arrested. The same day Santosh was sent before the Joint-Magistrate and an application made that he might be retained in hajut until the contents of the bomb were examined and a report, thereon, submitted by an expert. This application was apparently granted. Basanta Kumari, Santosh's mother, states that she subsequently had an interview with the Moulvi who suggested to her that she should go to the thana to see her son. All the Moulvi is able to say is that he does not remember having seen Basanta Kumari after the arrest. We think the lady's version is to be preferred and we feel no doubt that on the 9th July Santosh was visited by his mother. Basanta Kumari's evidence is that she told her son that if he did not follow the Moulvi's advice, their properties would go and his other two brothers and old father would be arrested and they would be in difficulties. Santosh, she says, asked her why she had come and told her she had better go away. On the same day, Santosh was brought before the Joint-Magistrate and in the order-sheet the following entry appears:

9-7-08. Santosh Das makes no confession. He is remanded to hajut, Section 118, Indian Penal Code, till 23rd July 1908. (Sd.) W.H. Nelson.

20. Why this statement as to Santosh making no confession was made, is not apparent, for according to the Joint Magistrate no one had told him that Santosh was going to make a confession but ho seems to have thought that Santosh was probably put up in the hopes that he would confess. On the 10th, Peary Motion the father saw his son in the jail, and Ashu, his brother, who a week before had been

transferred to Mazufferpore, returned to Midnapore.

21. On the 11th the Moulvi applied to Mr. Weston for permission to him and Lal Mohon to have an interview with Santosh in order to question him about the bomb and this was allowed.

22. He was apparently questioned for about 15 or 16 minutes about his possession of the bomb but would give no information. He said he was feeling indisposed and asked them to come again next morning. Peary Mohon also appears to have seen his son on this day.

23. On the 12th the Moulvi and Lal Mohon again saw Santosh but still he would give them no information, but said he would make a statement after consulting his father.

24. We find that on this same day he petitioned Mr. Weston saying- " I beg most respectfully to report to your honour that before I make any statement to your honour I wish to see my father here."

25. Our attention has been drawn to the fact that the paper on which this petition is written is not that ordinarily used for communications by prisoners from jail, and it is suggested that the explanation is that the paper was supplied by the Moulvi and Lal Mohun and that it was under their influence that Santosh acted in this matter. This suggestion is in accord with what was stated by Peary Mohun when he was in the witness-box, and is, we think, well-founded.

26. On the 12th Santosh was again visited by his father who went to the jail accompanied by Ashutosh.

27. After this Peary went to see Santosh on the 15th, 19th, 21st and 22nd of July and during this period the Moulvi and Lal Mohun continued calling on Peary; indeed, according to his evidence, they came to see him almost every day. Peary too was being interviewed by Mr. Weston and his version of their interviews is as follows : I went and saw Mr. Weston one, two or three times. I saw him as he repeatedly called me. Mr. Weston told me, my son was in great danger. He said that bombs had been discovered in the possession of my son and he would be" transported, and he asked me if I wanted my son's good. I said I certainly wanted my son's good but asked him to tell me what I should do. He told me that if I listened to his advice, I would make my son an approver. I asked what benefit my son would derive if made an approver and Mr. Weston said he would be pardoned. He also said there would be no further oppression on any other member of my family." And then the witness goes on to describe an interview with his son who declared that whatever might happen he would not say anything which was not true, and a subsequent conversation with Mr. Weston who, according to the witness, declared that if he could not make his son an approver he would send him, Peary Mohun, to jail. Though we are not prepared to accept this evidence in its entirety as an account,

accurate in all its details of what passed at the interviews, still Mr. Weston admits that he saw Peary two or three times. He declares, however, that he held out no inducement or promise to him for his son's confession. In cross-examination he says that he told Peary that he had received various reports against Santosh and that in answer to Peary's enquiry as to what was the best thing to do, his reply was that if the son was actually guilty and penitent, the best thing for him to do was to advise him to say all he knew.

28. Though when first asked, Mr. Weston denied having been told by Peary that he had had a talk with Santosh who had said he was absolutely innocent, on being further questioned he remembered that he had asked Peary what Santosh had to say and that he was told Santosh had said he knew nothing. We think it may be taken as clearly established that at this time Mr. Weston and Peary did meet and discuss the question of a confession by Santosh; that Mr. Weston was anxious to obtain such a confession; and that without accepting literally Peary's account of what passed at their inter-views, it became apparent to him what Mr. Weston's views and wishes were. And it is idle to suppose that the Moulvi and Lal Mohon were not endeavouring at this time to secure Peary's assistance in obtaining a confession from his son. It is the Advocate-General's contention that the Moulvi and Lal Mohon did not visit Santosh between the 12th and 29th, and it is true that there is no direct evidence that they did. Some light might have been thrown on this had the jail gate register been produced but the Committing Magistrate ruled it out. But though there is this absence of direct evidence as will later be seen, there are strong grounds for concluding that Santosh must have been visited by the police. It would be but natural that the impressions created on Peary by Mr. Weston and the police officers should be reflected in the conversations between the father and the son, and we see no reason to distrust Peary's testimony to that effect.

29. But for all this Santosh still refused to make an incriminating statement. The mother's interview, the father's persuasions and the Moulvi and Lal Mohon's efforts produced no result.

30. Then on the 23rd of July Peary was arrested and this is the description of what happened. I went to Court on the 23rd, the day fixed for the hearing of the case. On that day, 23rd, I was looking after the case in Court and a warrant was shown me. I was practically arrested in the Court-room and taken to the Court Sub-Inspector's room. I did not know what the charge against me was. The Police knew. I saw Santosh weeping when he found I was arrested. I was taken to "hajut" in the jail. I was in "hajut" for one month and seven days. I was arrested on 23rd July and released on 31st August. During this time I was produced in Court only on 31st August, the day I was released." And then he goes on to state that while in jail he was visited several times by the police officers and once by Mr. Weston. Now why was Peary arrested at this time and in this manner? The police had made no report against him; they apparently did not suspect him of complicity in any offence nor did

they make any suggestion for his arrest. It was Mr. Weston and he alone who, on his own admission, was responsible for this. This is what he has to say on this matter. In the visits I received from Peary, I never told him he was likely to be arrested in connection with this case. Peary was arrested at my suggestion. I don't remember the date. I believe he is the owner of the house where the bomb is said to have been found. I can't give any reason why he was not arrested on the day the bomb was found. Q. During the time he was visiting you, you had a mind to have him arrested?--That depended on the examination of the so called bomb." This cannot be regarded as a satisfactory explanation in the light of the known facts, and then we have the significant circumstance that no sanction for his prosecution was ever obtained, or, so far as the evidence discloses, was ever sought from Government. What then was the purpose of this arrest? That it might have important collateral results is obvious; its immediate effect on Santosh is known to us; and that it would exert on him a most powerful influence towards procuring his compliance with the desire for an incriminating statement from him, there can be no question. It is difficult to avoid the conclusion that the arrest was a move towards getting from Santosh the statement he had hitherto withheld. And if that was the purpose, then it met with success, for on the 29th of July Santosh made his confession.

31. In the morning the police came to Mr. Weston and said that Santosh wished to make a statement to him. He was then brought from the jail to Mr. Weston's house and was asked by Mr. Weston whether he wished to make a statement and whether he made it willingly. He replied in the affirmative, and Mr. Nelson, the Joint Magistrate was sent for and came to Mr. Weston's house. Mr. Nelson says he waited a little time and then the accused was brought in police custody.

32. Section 164 of the Criminal Procedure Code under which this confession is said to have been recorded provides that no Magistrate shall record any confession unless upon questioning the person making it, he has reason to believe that it was made voluntarily, and so much importance is attributed to this that the section requires that there should be at the foot of the record a statement of the Magistrate's belief that the confession was voluntarily made. Yet so far as the record of the confession discloses the nearest approach to the preliminary questioning so enjoined is this : Do you know who I am?--Yes. Any statement you, make will be of your own free will. You are under no compulsion.--I understand. What do you wish to say "?

33. In his evidence Mr. Nelson says : "I satisfied myself to the best of my ability that it was voluntarily made. I recorded the question which I put to ascertain whether it was voluntarily made and the answers he gave."

34. And so it appears that there was no questioning beyond what is indicated in the record of confession; in fact it would seem that there was no compliance either with the letter or the spirit of the law on this vital point. Then not only was the confession recorded in Mr. Weston's presence, but we find him actively intervening by patting

and suggesting questions on the strength of documents and information with which he had been previously furnished. What precisely these documents contained we do not know, for they are not forthcoming. The Advocate-General's attention was invited to these questions and though no one could have been more strenuous than he in defence of those engaged in the investigation of this case, he had to concede that there was hardly a question which had not an incriminating tendency and in his view an "objectionable practice" had been pursued. In this he certainly did not err in over-statement. And our difficulty is increased when we find ample internal evidence that more than one incriminating statement recorded in the narrative form must have been elicited by means of questions put to the accused. Turning to the confession itself, we find much in it that is difficult to reconcile with the prosecution theory that it was spontaneous. To discuss all the signs it bears of external influence would occupy too much time, it will suffice to point to few.

35. The occasion of Santosh's arrest was the possession of a bomb, and instead of proceeding directly to deal with this circumstance, his confession commences with a history of events which led up to the conspiracy; going back to the akra exercises at the close of 1907, and the early part of the following year. He even refers to the "potta" of the land with the circumstance and precision that would have been commendable in counsel opening the case for the prosecution. True it is that the Advocate-General's astuteness perceives in this "potta" one of the germs that later developed into the conspiracy, but how did it occur to Santosh to bring out unaided what detective ingenuity has now elaborated? It is not impossible, but it is remarkable. Then is it mere coincidence that in describing the meeting on the 30th June at the house of the Dutts, Santosh should have named in the order given in Exhibit 56 the first four persons who, he says, were present? It is to be noted that this is the first list of names given in his confession. And how did Santosh, on the 29th July remember that he attended a meeting on the 30th June when in fact, he did not? We now know that though the date of this meeting is given in Exhibit 56 as the 30th June, Lal Mohun has since discovered it was held on the 29th. There is, of course, nothing conclusive in this, but it is a circumstance which suggests strongly the connection between the confession and Exhibit 56. This, at any rate, was the argument for the defence, and the Advocate-General vouchsafed no sort of answer to it, indeed, he made no reference to it, and doubtless for a very good reason.

36. Then the confession purports to disclose a meeting held three or four days later at Upendra Maiti's house. "This was a large meeting," the confession states, "it was held at evening. Present were Upendra Maiti, Sachindra Lal Sarbadhikari, Gosto Behari Chandra, Nikunja Behari Maiti, Rash Behari Bose, Deb Das Karun and others." A meeting on the 30th June in Upendra Maiti's house is also recorded with considerable elaboration in Exhibit 56 and it is evidently to this that the confession refers. If this part of the confession is true, and Exhibit 56 believed, Upendra Maiti was seriously involved in a wicked conspiracy that must command the condemnation of every right thinking man. But Upendra Maiti is apparently a man

of excellent character and high standing at Midnapore. Though originally placed before the Magistrate as one of the conspirators, the Advocate-General, Mr. Sinha, withdrew from the charges against him. The Additional Sessions Judge, in his judgment, has stated that in his belief Upendra Maiti had not done and said what was alleged against him. And before us, the Advocate General, Mr. Gregory, has conceded that the story of the meeting at Upendra Maiti's house must be discarded as false. And so we have the confession of that which admittedly had no foundation in fact.

37. Santosh's version of what happened on the 7th July is in substantial though not complete agreement with what is recorded in Exhibit 56. But the story told is of such an extraordinary character that it is difficult to persuade oneself of its possibility. It is the Raja of Narajole that set things in motion, and without him the bomb would have passed the day unnoticed. But we are asked to believe that this gentleman's curiosity got so much the better of his discretion that though the town was full of police, imported, by reason of the suspected conspiracy, it became necessary to have the bomb brought to Jamini Mullick's house for his inspection. Why he should have wanted to see it we are left to guess as best as we can, nor is it apparent why the Raja's agreement should have been sought to the bombs being used by Surendra Nath Mukerjee on the Magistrate. But still this is the story we are asked to believe. Even the Advocate-General concedes that unless the Raja was a conspirator, the whole story is incredible and there certainly is no evidence that he was. We have not attempted to deal with all the particulars in the confession, which, it is contended, go to show that it cannot be accepted as a true and spontaneous statement of actual occurrences, for the instances selected suffice to show the grave difficulties there are in the way of treating the confession as genuine and voluntary. Then it has been argued that though Santosh was not in prolonged police custody still, in estimating his capacity to resist the pressure put on him to confess, it is not immaterial to notice the treatment to which he had been subjected in jail. It is pointed out that he had been in custody for three weeks, that for six or eight days he was kept in the under-trial ward, and was then placed in a separated cell of small dimensions where he was in effect kept in solitary confinement, a form of prison treatment which is by law strictly limited even in the case of convicts, and is not in compliance with the provisions of the Jail Code; and that in common with all who are kept in these condemned cells, as they are culled, he was awaked every three hours. This harsh and apparently unusual treatment, it is contended, and not unreasonably, cannot have been without its effect on Santosh.

38. We will now pass on to the events subsequent to the confession.

39. On the 31st August Santosh presented a petition in the Court of the Joint-Magistrate in which he respectfully insisted that an opportunity be offered him to make a statement which would disclose the circumstances under which he was, by threat, inducement and persuasion compelled to make a statement which was

being treated as a valid confession. The Advocate-General has suggested before us, to use his own expression, that this petition was smuggled into the record," adopting as his own the theory advanced by the Moulvi. This suggestion involves a serious imputation both on the counsel concerned, and the Court officials, but after careful consideration we are convinced that it rests on no solid foundation. It is established beyond question that the petition was in existence on the 31st August, and was in Court, and Lal Mohun states that it was presented in his presence. We learn from the Bench Clerk, Lakhi Narain that on the 31st August petitions were filed on behalf of the accused, but they were taken by the Court Inspector and remained with him. It is also clear that Mr. Nelson heard of the petitions from a police officer that very evening.

40. Now to appreciate the bearing of this retention by the Court Inspector of these petitions, it has to be noted that he was not a Court official in any sense, but a police officer deputed to conduct cases in Court. We have not been shown anything that could have justified the possession and retention by the Court Inspector of these petitions. What the Court Inspector did with these petitions the evidence does not disclose, but there can be no question that his action was most irregular, and an examination of the register, Exhibit B, discloses that this was not an isolated irregularity in relation to petitions filed by the accused. The Court Inspector's possession affords a complete answer to the suspicions suggested by the prosecution and we hold that the imputation made against counsel for the defence and the Court officials is unsupported by any evidence, and is without foundation.

41. We cannot leave this part of the case without observing that in the Court below, the Moulvi, while in the witness-box was allowed to make unfounded imputations against the counsel for the defence. Impropriety of this kind on the part of the witness should have been firmly checked by the Court.

42. Why the accused was not given immediate opportunity of retracting his confession does not appear, but the fact remains that he was not brought before the Magistrate for this purpose until the 7th September, the day fixed for the commencement of the Magisterial inquiry. The defence contend that the reason for this delay was that efforts were being made to induce Santosh not to retract, and at any rate to secure that there should be no retraction until the confession had been put in evidence, and it is made a matter of serious complaint by the accused, in this connection, that during this interval obstacles were placed in the way of interviews between Santosh and his retained legal advisers. It is, we regret to say, impossible to regard this complaint as having no basis.

43. On the 7th September Santosh, under the direction of the Magistrate, wrote out a retraction of his confession, with a detailed explanation of how he came to make it.

44. The Advocate-General urged us to treat this retraction as entitled to no weight; he maintains that it was not made on Santosh's initiation, but at the instigation of his legal advisers, by whom he was furnished with the necessary materials. As the Advocate-General's argument was presented to the Court, its implication was understood to be that this instigation proceeded from the counsel who had interviewed Santosh with the Magistrate's permission on the 7th. But the Advocate-General has disclaimed any intention of making any imputation against these members of the Bar, and apparently he so disclaimed, because they were members of the Bar.

45. But he did not relinquish his argument and he merely shifted the imputation to Peary Lal Ghosh, a member of the pleaders' bar, in whose favour he considered the same grounds of disclaimer did not exist. And yet, it has to be admitted not merely that there is no evidence of tutoring on Peary Lal Ghosh's part, but that the record does not show that this gentleman had any opportunity of tutoring Santosh except during the three minutes or so when he saw him in the jail. It may here be pointed out that a similar charge was made against Peary Lal Ghosh of tutoring Surendra although it had to be admitted that with him the pleader did not even have the opportunity of the three minutes' interview. It is not as if the prosecution could not have called evidence on this point, for the interview at which counsel were present was expressed to be allowed "" with certain precautions " and we have been told that in accordance with this direction, police officers were near all the while the interview lasted. This charge, therefore, against Peary Lal Ghosh was made without a tittle of evidence to support it, and we regret that the Advocate-General should have seen fit to persist in it even after this absence of evidence was brought to his notice; it was no answer at this stage to rely on instructions.

46. These then are the facts on which we have to determine whether or not the confession was voluntary. After his arrest we find Santosh visited once by his mother and repeatedly by his father and brother. Though the prosecution would have it that no police visit to Santosh, between the 12th and 29th July, is shown and the absence of proper jail-record makes it impossible to meet this argument by direct proof to the contrary, the confession itself shows that those in possession of Exhibit 56 must have had access to Santosh and there can be no doubt that the desirability of a confession was being continually pressed on him as a means of saving his relatives from the risk of being apprehended and even threatened pains and penalties and possibly of securing advantage to himself.

47. There was the arrest of his father, for which he must have regarded his persistent silence as responsible. Then there is the confession itself, recorded without the precautions prescribed by the Code, and made in the presence of Mr. Weston, who was practically, as he himself says, the head of the police and was interested in the case not merely officially but personally too, for he believed that the plot was directed against his own life. Nor can the part Mr. Weston took in the

amplification of the confession be left out of account.

48. Finally we have the petition for retraction on the 31st August, the reluctance and delay in giving effect to the petition, and the retraction itself, now freed from the imputation directed against Santosh's legal adviser.

49. The conclusion to which we come on a careful consideration of all these matters is that the recording Magistrate failed to take the precautions prescribed by the Code for ascertaining whether the confession was voluntary; that the confession, in fact, was not voluntary, and that it was improperly admitted in evidence.

50. We now proceed to consider Surendra's confession, dated the 15th August, and he, like Santosh, starts with an account of the akra and its frequenters, and then he goes on to describe meetings where the throwing of bombs was the topic of discussion, incriminating himself and 46 others in the conspiracy of which he now stands convicted. As in the case of Santosh, so here, we have to see whether this confession is legally admissible in evidence.

51. Surendra was arrested on the 31st July, and was not again brought before the Magistrate until the 31st August, but was kept in confinement during the whole of this period, part of the time in jail in solitary confinement, and part of the time in police custody.

52. On the 5th August an application was made by the Moulvie through the Superintendent of Police to the Joint Magistrate in charge that Surendra, being "required to be examined on various points in connection with the case, and to verify his movements," should be remanded to police custody for seven days. An order was made by Mr. Nelson as prayed. Until the 13th August, Surendra appears to have maintained that he was innocent, and in these circumstances Lal Mohon on that day determined to confront him with Santosh who, Surendra was told, had confessed and implicated him.

53. This confronting was possible, because the police had somehow managed to obtain an order for the remand of Santosh also to police custody.

54. By mistake, it is said, Surendra had been taken to jail on the 13th, but he was brought back that evening and kept in the thana that night.

55. On the 14th he was confronted with Santosh, and these two were together for two hours. At first Surendra still refused to confess, but at last he yielded, and his statement was taken down by Lal Mohon.

56. On the morning of the 15th Surendra was taken before Mr. Surendranath Chuckerbutty, a Magistrate of the first class, who had been requested by Mr. Weston to record the confession carefully in the presence of Mr. Nelson. A paper was handed over by Lal Mohon and was read by the recording Magistrate before he began to question Surendra. It is described as a police report. It apparently was the

record made by Lal Mohon of Surendra's statement to him, and was evidently a lengthy document, as it took the recording Magistrate 15 minutes to read it. We agree with the opinion expressed in Emperor v. Radhe Halwai 7 C.W.N. 220 at p. 223 that the procedure was highly irregular.

57. The confession which was recorded by Mr. Chuckerbutty in the presence of Mr. Nelson, to whom the police report had been handed, shows that the recording Magistrate, at the outset, put a series of questions to Surendra with a view to assuring himself that the confession was being voluntarily made, but omitted to put the question which would have elicited the answer that from the 7th August Surendra had been in police custody and was not brought from jail, as the Magistrate has since said he understood to be the case. In fact before the Committing Magistrate, Mr. Chuckerbutty indicated that but for his so understanding he would have questioned Surendra on this point. How the recording Magistrate could have continued under this misimpression after becoming aware of the police report of the confession, we do not " know, still that is what he avers.

58. The fact and duration of police custody is very properly regarded as having a material bearing on the question whether a confession is voluntary or not. What would have been Mr. Chuckerbutty's opinion had he known as we do, that Surendra had been in prolonged police custody, and had been subjected to the treatment which has now been disclosed, we do not know. But in the absence of that knowledge, he signed the memorandum at the foot of his record.

59. It is noteworthy that Surendra follows Santosh's suit, and instead of going at once to a definite statement of his participation in a conspiracy he gives the early history of the movement and traces the connection between the akra and the criminal association which, according to the police theory, grew out of it.

60. He purports to furnish an account of no less than nine meetings, of which can we trace the counterpart with more or less accuracy in exhibit 56.

61. Names are given of persons alleged to have been present at these meetings and where Surendra's memory fails him, he is assisted by the Joint Magistrate. Thus he mentions a meeting at the Rasmancha of the Mullicks, but admits : I do not exactly remember who were present at that meeting. Jyoti Das, Jamini Mulick and Mati Babu were there. Hem Chundra Kundu also was there. Abhoy Chundra Kundu too was present. It might be 25 or 30 persons in all. I can say if names are mentioned to me." Q. "Was Jogendra Mullick there? " A. Yes. Jogendra Mullick, Gobinda Pal, Hara Kristo Patal, Rakhal Chundra Pal, Ashutosh Kundu, Ashutosh Das, all these persons were there." The questions which elicited these names were put by the Joint Magistrate from the police report, and in the case of this confession, as in that of Santosh, we have to state that we know of no warrant or justification for the intervention of a third party as a questioner, directly or indirectly, of a confessing prisoner.

62. A critical examination of the confession discloses much more that calls for comment, but it will be enough to refer to a few points, and to them briefly, in view of the full discussion of Santosh's confession, much of which applies equally here.

63. One of the many meetings described in the confession is evidently that indicated as having been held on the 23rd of May and we find Surendra asserting that it was attended by Santosh and Satyendra, though we know that Santosh was not then at Midnapore and that Satyendra was in hajut. Then it is significant that Saday Jana is silent in the Sessions Court as to the meeting of the 11th June at the house of the Raja of Mahisadal, to which Surendra's confession refers; but in view of the explanation offered by the Advocate-General, it would be well not to make too much of this. Then we have the meeting at Upendra Maiti's house mentioned, though it is now conceded that this is nothing but a myth. And then we have an account of the improbable meeting at Jamini Mulick's house on the 7th of July with which we have already sufficiently dealt. If this meeting had been a reality, the one thing which Santosh and Surendra would have undoubtedly remembered would have been which of them it was that carried the bomb back to Santosh's house, but what we find is that Santosh in his confession declares that it was he who carried the bomb home and he does not even name Surendra in this connection, while Surendra in his confession declares that on the way home, Santosh handed the bomb to him and that he took it to Santosh's house and kept it there. Is it likely that there could be this difference of version, if there was any truth in the story that was being told? No doubt Santosh does mention an occasion when Surendra brought the bomb to his home, but that was on the 30th of June and this is also mentioned in Surendra's confession, so that in explanation of the divergence to which we have referred, it cannot be said that Surendra was mixing up the two dates, nor indeed, was this explanation suggested by the Advocate-General. The confession having been made on the 15th August, Surendra petitioned on the 31st of August to be allowed on bail after the Magistrate's ascertaining the real state of affairs by allowing him to make a statement." This clearly pointed to a statement in contradiction of his recorded confession. In reference to this petition too, the Advocate-General has advanced the theory of its being "smuggled into the record," but this theory, for reasons already given, is wholly untenable. Comment has, in an earlier part of this judgment, been made on the apparent-reluctance to give Santosh an opportunity of carrying into effect his desire to retract. Surendra's case is equally open to the same comment, for it was not until the 7th of September that Surendra was given the chance of formally retracting his confession. He was then required by the Magistrate to write out his retraction and this he did on the 7th and 8th of September at considerable length and with minute details as to how he came to make his incriminating statement.

64. Here too the Advocate-General urged that his retraction was not spontaneous, and was prompted by Surendra's legal adviser, but it has already been shown that the imputation on which the argument rests has no foundation to support it.

65. We have now discussed the events that led up to the confession of the 15th of August, the contents of the confession and the circumstances attending it and its ultimate retraction, and the question arises whether it was voluntary. We have pointed out that in coming to his conclusion that the confession was voluntarily made, the recording Magistrate was ignorant of the all important fact that Surendra had been from the 7th of August in police custody and of the methods employed to procure his statement. His belief, therefore, was founded on insufficient materials and his assertion of it is not in these circumstances convincing. To the Additional Sessions Judge it appeared to be a very difficult matter to decide whether this confession of Surendra was voluntarily made, and his conclusion in its favour is expressed in terms that do not bespeak confidence.

66. On a full and careful consideration of all the circumstances we hold that the confession was not voluntary, and that it should not have been admitted in evidence.

67. In the view we take of the confession it becomes unnecessary to consider M. Sanyal's contention, that they were not admissible inasmuch as they were not made in the course of an investigation under Chapter XIV of the Criminal Procedure Code. But if the confessions be eliminated, what is there left that is relevant to the charges under which the appellants have been convicted, in other words what evidence is there of any offence committed by them or any of them on or after the 8th of June?

68. As against Surendra there is not an iota of evidence direct or indirect, for obviously the evidence relating to the period anterior to the 8th of June cannot alone serve to convict him of an offence alleged to have been committed after that date. Surendra's conviction, therefore, cannot stand.

69. Against Jogjiban, who has been convicted, u/s 4(a) of the Act, of conspiring to cause by an explosive substance an explosion in British India of a nature likely to endanger life, and sentenced to ten years' transportation, the only evidence relating to the period covered by the charge is that of Abdur Rahman.

70. Jogjiban, who has been described as a leading spirit among the conspirators," was, according to his father's evidence, considerably under 16 in December 1907, the time to which the prosecution traced the commencement of the conspiracy with which he is now charged, and he was then still pursuing his studies. There can be no question that he was keen and skilful in his gymnastic exercises, and that he joined the Bande Mataram processions and picketing operations at Midnapore. But from this to the very serious conspiracy with which he is charged is a far cry.

71. Now Abdur Rahman's evidence is this:

I remember a case in which Jogjiban was accused, and was admitted to bail. I saw him; he was on bail. I had talk with him" He said that a bomb must be made, and Mr. Weston must be killed. He said I must collect the materials, a centigrade

thermometer and a flask glass. It is a glass which can be used for heating things and other things, which I do not remember. He said, bombs must be made for killing the English. Jogjiban said this, and Sarat Chandra Chattopadhyay, I informed the Moulvie and he said I must not let them make bombs, but must learn how to do it. Jogjiban and Sarat said that I must prepare them in the upper story of my house. I said I had females and children there and it would not be convenient to prepare them there. They said arrangements would be made for another place, and meanwhile I should collect materials. I agreed. This talk was at my house. This talk all took place on one occasion, (adds)--there was talk on several occasions, two or three, but that talk which I made a note of was on one occasion. What I made a note of was this. Sarat read out in English and Jogjiban explained to me in Bengali, and I wrote it down, it was how to make bombs.

72. In cross examination he stated : " Jogjiban said it was a ghee which would not burn, if things were heated in it, I have not seen one.

73. There are dispensaries here and can be bought here.

74. I agreed to get the things. At first I said, I would, but when the police Moulvi said I should not let the bombs be actually prepared, I said I would not, as the women and children were there.

75. I informed them the next day, that it should not be at my house. They came to my house after I had said they should not be made there.

76. They wanted me to collect the materials. They used constantly to come after one day or two days. I can't say about how many months ago that was. It was after Jogjiban was released on bail, but I can't say on what date or month, they were released on bail."

77. Why Sarat should have read in English and Jogjiban have explained in Bengali and Abdur Rahman have written his note is not obvious, and if there ever was a note, it certainly is a matter for comment that it was not produced. Then no indication is given of when this all occurred beyond the statement that it was after Jogjiban was released on bail: The witness cannot give the date or even the month.

78. But Jogjiban was twice released on bail, first on the 20th of June, and secondly on the 18th of July, and Abdur Rahman cannot state which bail he means. Before the Committing Magistrate he asserted that the first bail was in July, while in the Sessions Court he deposed that he did not know which period of bail it was. The Judge in the Sessions Court on this says: "The prosecution has omitted to give the time or date of his alleged request of Jogjiban that bombs should be made in his house. I cannot find it anywhere in the evidence, except that it was when Jogjiban was on bail. That brings it within the period covered by the charges." But a finding of this vagueness is fraught with grave danger, especially as the period covered by the charge extended from the 8th of June to the 31st of July 1908.

79. We may also mention that some attempt was made to connect Jogjiban with a revolver said to have been found in the possession of one Khudiram Bose, who killed two ladies at Mozufferpore in the beginning of May. But the evidence of identification is wholly unsatisfactory, and no reliance can be placed upon it. And yet this is literally the only evidence there is against Jogjiban of conspiracy during this period. How is evidence of this kind to be met by an accused person? And who would be safe if he were liable to be convicted on a charge so wide and supported by evidence so indefinite? Nor can it be claimed that if Abdur Rahman is vague, at any rate, he is reputable. Though he describes himself as having been a trader in cloth and other things, " he was in truth a hawker, and there is evidence that he was at one time a butcher. Later he developed into a teacher of lathi play and similar exercises in the akra, and in December 1907, he was employed by the Moulvie as paid police informer on Rs. 25 a month. The Sessions Judge does him no injustice when he remarks that he is not a man of social position." There is also some evidence to show that in December 1907, there was a dispute between Abdur Rahman and Jogjiban, as a result of which, it is not unlikely, there would be ill-feeling between them. But whatever his failings be, he certainly showed himself a most willing witness while under examination, and one who knew what he was expected to say, for, in the record of his deposition, there is the note that the witness several times said that things were being omitted and had been omitted. So that even if the argument derived from his refusal to depose in Jogjiban's favour in the Arms Act case be put on one side as resting on debatable ground, there still is every reason to regard with distrust evidence of this sort given by a witness of this character. Indeed, the Advocate-General did not seriously press the case against Jogjiban, and in this, we think he exercised a wise discretion. In our opinion it would be most unsafe to rely on the unsupported testimony of Abdur Rahman for the purposes of upholding the conviction of Jogjiban, and his conviction cannot be upheld.

80. It only now remains for us to consider the case against Santosh, who has been convicted u/s 4 (a) of conspiracy, and under Sections 4 (6) and 5 of having a bomb in his possession with the intent or knowledge indicated in these sections. The only evidence against him is the alleged discovery of the bomb and his conduct at the time of that discovery.

81. Obviously this cannot establish the charge of conspiracy against him so that, on that ground, as well as by reason of the failure of the charges against the other alleged conspirators, the conviction u/s 4 (a) cannot be sustained. Then is this finding of the bomb, coupled with Santosh's conduct, sufficient evidence of possession of the nature charged? Here, it becomes necessary to see what the evidence on this head is.

82. Lal Mohon says : " The house of Peary Das was searched.... We found Peary and Santosh there, and a servant.... On seeing us as we entered, Santosh went inside the courtyard. A servant was going out and we stopped him and put him in custody of

constables. Peary Das is the father of Santosh. At first we had knocked at the door, and some one inside asked who we were, and we said we were the police. It was just at daybreak. Then, after some conversation, the door was opened. Then we went inside the biatakkhana, and found Santosh's father at the door. A boy servant was sitting on his bedding on the floor of the baitakkhana. Santosh was coming into the baitakkhana. Seeing me, Santosh went back into the courtyard, and the servant was hurrying to go outside. We stopped him and kept him in custody, seated in the baitakkhana." Then, after describing how a guard was placed round the house and a search made for two hours, he tells us that on their return to the baitakkhana the bomb was found there.

83. It is perhaps remarkable that the search was not commenced there, for the information on, which the search was made did not trace the bomb beyond the baitakkhana. It was found behind a palki and a heap of wooden frames, and loose pieces of wood, which had to be removed before it could be seen. This, according to Lal Mohon, is what happened: "The thing was about the size of a hockey-ball. When we first saw it, Santosh went to pick it up, saying, it is a lingota. He was not allowed to pick it up, the Moulvie stopped him. Mr. Brett was then inside the house. He was coming on hearing something had been found. Santosh then made a second attempt to pick it up, saying it is a benati."

84. It will be noticed that Lal Mohon describes the house as Peary's and Peary's own evidence is to that effect; so we may take it that the house belonged to Peary and not to Santosh, though Santosh was at the time passing his vacation there, and had a room of his own in it. Now, on this evidence, can it be held consistently with legal principles that it has been proved that Santosh was in possession of the bomb? It is well established and is an elementary rule founded on common sense that where the place in which an article is found is one to which several persons have equal right, of access, it cannot be said to be in the possession of any one of them. And so it has been laid down in proceedings under the Indian Arms Act, 1878, that, where weapons are found in a house occupied by a Hindu family living jointly, to establish that possession and control are with some member of the family other than the managing member, there must be good and clear evidence of the fact. *Queen Empress v. Sangam Lal* 15 A. 129 at p. 131. Had the bomb been found in Santosh's room when the search was made there, this might have been fair ground for imputing to him possession or control within the meaning of the Act. But the discovery in the baitakkhana, a place equally open to others taken by itself, points no more to possession or control in Santosh than in the others, who had equal access with him to this place.

85. This much was in fact conceded by the Advocate-General, but he maintained that the accused's conduct, coupled with the discovery of the bomb, was sufficient to support the conviction. Now, before considering that conduct it is important to realize what it is that we know of Santosh, now that the confessions go out of the

case, and as best as we can, we must free our minds of any prejudice that might be created by those statements. All we know of Santosh from the evidence is that in January he went to Ranchi, and that, prior to that, he was a volunteer, took part in Bande Mataram procession, and picketing operations, and was a captain of the akra. " But " in the language of the Sessions Judge, " he does not appear in the evidence of the talk and doings of the conspirators." In January he went to the Government Training School at Ranchi as a probationary Sub-Inspector of Police, and did not return to Midnapore for a single day until the 13th, 14th, or 15th of June, when the college closed for the summer vacation. Apart from the matters now under discussion there is not a word in the evidence that connects Santosh in any degree either before or after the 8th of June with bombs or with any conspiracy for this use. Lal Mohon admits that before the 8th July he had no direct information to connect Santosh with the manufacture of bombs, and that he had no evidence in his possession before that date that Santosh was attending secret meetings. All this has to be borne in mind when considering how far Santosh's conduct can be taken as evidence of guilt. Then what is the conduct that has such vital consequences? The expressions used by Santosh when the bomb is said to have been found and his repeated endeavour to pick up the article found! The Advocate-General conceded that he could not suggest that the article found did not resemble a lingota or benati; even Captain Weinman thought it might be a hoax or a playing ball; and we find Santosh still maintaining before the Magistrate on the 9th of July that the article found was not a bomb, but a ball of cloth wrapped in a string for fixing on a benati. But is this conduct, even when coupled with the alleged discovery, enough to constitute proof of guilt? Can it be fairly said that this conduct makes Santosh's guilt so probable that a reasonable man ought, under the circumstances, to conclude that he is guilty, when apart from this there is absolutely nothing that is even suggestive of his guilt? We think decidedly not. It has been justly observed that evidence of this class is in fact a make-weight and nothing more; and care must always be taken that mere makeweights are not allowed to have an exaggerated effect. To us it appears that Santosh's conduct is at least as consistent with his innocence as with his guilt. Who can with confidence assert how an innocent of guilty man would be likely to act in Santosh's situation? It would depend on temperament, surroundings and other circumstances, which combine to form a most fallacious basis for assured conclusion.

86. Indeed in this case the Advocate-General based his argument almost wholly on the assumption that Santosh must have been confused. And yet he could not have been taken by surprise. If he knew the bomb was there, he had full two hours and more to determine what to do and say, and there certainly is no evidence of that confession on which the Advocate-General's speculation rests. But these are not the only obstacles in the way of accepting the prosecution theory; there are other matters which give rise to grave doubt as to whether the discovery was really genuine.

87. This is not the only bomb that has been found; there was one brought to light as the result of the search in the house of Saroda and Baroda Dutt. The Advocate-General has stated before us that he places no reliance on this bomb, and has refrained from discussing its discovery. But if, as we hold, there is strong reason to doubt the genuineness of that discovery, it must affect our attitude towards the evidence which relates to the bomb in Peary's house.

88. The search originated, it is said, from the informer's statement as recorded in Exhibit 56, but this document and its contents are absolutely untrustworthy.

89. It is not borne out by evidence in any particular; much of it has been actually disproved; and the informer himself has now declared that it is all false.

90. Without discussing all its intrinsic indications of falsity, it will suffice to draw attention to one which directly concerns this bomb, and that is the impossibility of reconciling the words put in Jamini's mouth on the 13th July with the part attributed to him on the 7th of the same month.

91. But, if Exhibit 56 is not a true record, then we have no clue as to how the search in Peary's house came to be made, for we have to reject the only account that has been given.

92. Exhibit " G " is not without its bearing on the matter now under discussion, for if the informer was present at the meeting of the 7th of July, as Exhibit 56 states, how is it that this is not mentioned in Exhibit " G " which is said to have been prepared from the informer's note-books?

93. Then comment has been made on the conduct of the police. Thus it has been asked why did the police procure Ashutosh's transfer just before the search was made? Why on the information they are supposed to have received, was the search not commenced in the baitakkhana? Why was Bonomali kept in custody in the baitakkhana? And what enabled Asadulla at once to tell Mr. Brett gulika chiz paia gia? Though these matters do not carry much weight in themselves, it cannot be said that they are without significance.

94. Then we doubt the probability of Santosh having placed and kept the bomb in the baitakkhana, a place open not only to all the inmates, but also to all visitors to the house. The charge against him assumes that he knew the dangerous character of the bomb, and is it probable that he would have kept it for days in a place where it was liable at any time to be handled in such a way as to cause a serious explosion in his father's house? Would he not have been more likely, as a measure of ordinary precaution, to have kept it in his own room, where he had his boxes, and where the lists of volunteers, the Bande Mataram flags and badges and the written lease of Basanta Malati Akra were found? It is difficult to see what could have been Santosh's object in placing the bomb in the baitakkhana, seeing the grave risk to himself, to his family, and to his father's house that was involved, for it has not been

suggested that he did it to shift suspicion from himself to his father, or to other members of his family. Moreover, the case for the prosecution is that this bomb, before finding a resting place in Peary's baitakkhana, was carried about from meeting to meeting, where it formed the subject of discussion: but it has to be remembered that at this time Midnapore was full of police drafted into the town on account of the suspected conspiracy.

95. The defence stoutly maintain that the bomb was placed there, by or at the instigation of, the police, and they have called direct evidence that Bonomali was employed for this purpose. Though this evidence does not enable us to pronounce a positive opinion in favour of the defence story, we are by no means prepared to waive it aside as absolutely worthless, especially in view of the methods that have been exposed in the course of the hearing before us. And the result is that we are confirmed in our view that the prosecution have failed to prove that Santosh was in possession, as charged, of the bomb alleged to have been found in his father's house so that, in our opinion, the conviction against him under Sections 4(6) and 5 is erroneous.

96. It follows from the conclusions at which we have arrived that the convictions and sentences must be set aside against the three appellants, and we direct them to be released from custody.