Aher Raja Khima

Vs

The State of Saurashtra

Criminal Appeal No. 64 of 1955

(T. L. Venkatarama Ayyar, N. Chandrashekar Aiyar, Vivian Bose JJ)

22.12.1955

JUDGMENT

BOSE J. -

The only question in this appeal is whether the High Court in mind the principles we have enunciated about interference under section 417 of the Criminal Procedure Code when it allowed the appeal filed by the State against the acquittal of the appellant. It is, in our opinion, well settled that it is not enough for the High Court to take a different view of the evidence; there must also be substantial and compelling reasons for holding that the trial Court was wrong : Amar Singh v. State of Punjab ([1953] S.C.R. 418, 423); and if the trial Court takes a reasonable view of the facts of the case, interference under section 417 is not justifiable unless there are really strong reasons for reversing that view : Surajpal Singh v. State.([1952] S.C.R. 193, 201)

The appellant was prosecuted under sections 302 and 447 of the Indian Penal Code for the murder of Aher Jetha Sida. It is not necessary at the moment to set out the facts. It is enough to say that the High Court based its conviction on a retracted confession plus certain circumstances which the learned Judges regarded as corroborative.

The learned Sessions Judge excluded the confession on the ground that it was neither voluntary nor true. The learned Judge's reasoning about its falsity is weak. We do not think there is material on which a positive finding about its falsity can be reached but when he says that he is not satisfied that it was made voluntarily we find it impossible to hold that that is a view which a judicial mind acting fairly could not reasonably reach.

The facts about that are as follows. The offence was committed during the night of the 18th/19th May, 1952. The police were informed on the 19th morning at 9-30. The police station was only 4 miles distant and they started investigation immediately. The appellant was arrested on the 20th. He says in his examination under section 342, Criminal Procedure Code, that three other persons were also arrested but were later released. They are Bhura, Dewayat and Kana. The investigating officer was not examined, so he could not be asked about this and the point could not be developed further. But the appellant did cross-examine some of the prosecution witnesses about this and elicited contradictory relies. Kana, P.W. 4, said -

> "I was not arrested. Dewayat, Barat Lakhmansingh was arrested first..... All the three of us were released the same evening. We were not put under arrest at all".

Dewayat, P.W. 5, denied that either he or any of the others were arrested and Maya, P.W. 15, said

the same thing but Meraman, P.W. 11, insisted that Dewayat was arrested. In the absence of the Sub-Inspector it is difficult to say definitely that the appellant is wrong. It is evident that the others were at least suspected, especially as one of the points made against the appellant is that he was seen sharpening an axe on the evening of the murder and Meraman, P.W. 11, says that not only was the appellant sharpening an axe but so was Dewayat. If this was a matter of suspicion against the appellant it must equally have been so against Dewayat and accordingly there is nothing improbable in the appellant's statement about these other arrests; and as the Sub-Inspector was not there to clear up the matter it is only fair to accept what the appellant says.

The appellant was sent to a Magistrate at 8 p.m. on the 21st for the recording of a confession but the Magistrate did not record it till the 3rd of June. He was examined as P.W. 21 and explained that he gave the appellant ten days for reflection. The length of time is unusual but no objection about its fairness to the accused could reasonably have been raised had it not been for the fact that the judicial lock-up is in charge of a police guard which is under the direct control, orders and supervision of the very Sub-Inspector who had conducted the investigation and had earlier suspected and, according to the accused, actually arrested three other persons; and two of them are now called as prosecution witnesses to depose against the appellant about a matter on which the prosecution lay great importance, namely the sharpening of an axe. The danger that they might exaggerate their stories or give false evidence in their anxiety to avert further suspicion from themselves is one that cannot be overlooked.

But apart from that. This is the description of the judicial lock-up which the Magistrate who recorded the confession (P.W. 21) gives us :

> "A police guard is on 24 hours duty at the Bhanwad Judicial lock-up. The prisoner is so placed within the compound wall that he can see the police all the 24 hours through the bars and can talk. These police officers are under the police Sub-Inspector. A peon is working as warder. He stays there on duty by day. At night he is not there.
>
> Clerk Jailor does not remain present there. The police lock-up is within the jail itself. Inside the jail gate is the police lock-up. The police can go into the police lock-up when they choose".

Now the appellant repudiated his confession at the earliest opportunity. He told the Committing Court on 12-12-1952 in a written statement that -

> "After my arrest by the police I was sent to jail. At night time the police, having arrived at the jail, threatened me to make confession before Court as they directed. The police frightened me with beating if I did not confess. As a result of which, through fright, I have made a false confession as directed by the police and which I now deny".

And in his examination under section 342, Criminal Procedure Code, he said -

> "I have made the confession because the police were threatening to beat me in the jail".

He repeated these statements in the Sessions Court. He said he was beaten at the time of his arrest and then after he had been sent to the jail he said -

> "I was daily threatened. They said 'confess the offence of murder. We shall get you on remand. You will live as an impotent man'. On the morning of the 3rd date, they took me to a big police officer after administering extraordinary threats. Only now I come to know that he is the Magistrate".

Now it may be possible to take views of this statement but there are two important factors in every criminal trial that weigh heavily in favour of an accused person : one is that the accused is entitled to the benefit of every reasonable doubt and the other, an off-shoot of the same principle, that when an accused person offers a reasonable explanation of his conduct, then, even though he cannot prove his assertions, they should ordinarily be accepted unless the circumstances indicate that they are false. What the appellant said in this case is not impossible; such things do happen and it is understandable that the police, frustrated in their endeavour to find the culprit among three other persons, should make an all out endeavour to make sure of the fourth. We do not say that that happened here. But that it might have happened is obvious, and when the police absent themselves from the witness box and forestall attempts at cross-examination, we find it impossible to hold that a judge acting judicially, and bearing in mind the important principles that we have outlined above, can be said to have reached an unreasonable or an unfair conclusion when he deduces from these circumstances that there is a reasonable probability that the appellant's story is true and that therefore the confession was not voluntary.

The only reason that the learned High Court judges give for displacing this conclusion is that

> "in Saurashtra..... though judicial and police lock-ups are placed under a common guard the judicial lock-ups are in charge of Magistrates and are looked after by their clerks and peons, who are assigned the duties of jailors and warders respectively" and they conclude -
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> "It is therefore difficult to say that the police could have effectively threatened him".

But what the learned Judges overlooks is the fact that this control is only effective during the day and that at night neither the peon nor the clerk is there; and even during the day the "clerk-cum-jailor does not remain present there". The appellant said in his written statement that "at night time the police, having arrived at the jail, threatened me, etc.". There is nothing on the record to displace this statement. Had the Sub-Inspector or some policeman been examined as a witness and had the appellant omitted to cross-examine him about this, that might raised an inference that what the accused said was only an afterthought. But here we find that this defence about the involuntary nature of the confession due to threats by the police was raised at the outset, even in the Committing Magistrate's Court, and was persisted in throughout and the appellant did what he could to build up this part of his case by cross-examining the only official witness who did appear, namely the Magistrate who recorded the confession; and he succeeded in establishing that there was ample opportunity for coercion and threat. The fact that this defence was raised in the Committal court should have put the prosecution on its guard and the absence of refutation in the Sessions Court is a matter that can legitimately be used in the appellant's favour. In the circumstances, we do not think the High Court has squarely met the learned Sessions Judge's reasoning and shown that there are compelling reasons for holding that he was wrong; on the contrary, the learned Sessions Judge's hesitation is grounded on well established judicial principles.

Now the law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise.

It is abhorrent to our notions of justice and fair play, and is also dangerous, to allow a man to be convicted on the strength of a confession unless it is made voluntarily and unless he realises that anything he says may be used against him; and any attempt by a person in authority to bully a person into making a confession or any threat or coercion would not at once invalidate it if the fear was still operating on his mind at the time he makes the confession and if it "would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him" : section 24 of the Indian Evidence Act. That is why the recording of a confession is hedged around with so many safeguards and is the reason why magistrates ordinarily allow a period for reflection and why an accused person is remanded to jail custody and is put out of the reach of the investigating police before he is asked to make his confession. But the force of these precautions is destroyed when, instead of isolating the accused from the investigating police, he is for all practical purposes sent back to them for a period of ten days. It can be accepted that this was done in good faith and we also think that the police acted properly in sending the appellant for the recording of his confession on the 21st; they could not have anticipated this long remand to so-called "jail custody". But that is hardly the point. The fact remains that the remand was made and that that opened up the very kind of opportunities which the rules and prudence say should be guarded against; and, as the police are as human as others, a reasonable apprehension can be entertained that they would be less than human if they did not avail themselves of such a chance.

If the confession is excluded, then there is not, in our opinion, sufficient evidence against the appellant on which a conviction can be based.

It will now be necessary to set out the facts.

The murdered man is one Jetha. He married Sunder, P.W. 3, about three years before he was killed, but we gather that she had not gone to live with her husband; anyway, she was living in the appellant's village Shiva with her people at the time of the occurrence and this afforded the pair opportunities for a long continued course of illicit amours, chances which it seems they were not slow to seize. The husband lived in a village Kalawad which is three miles distant. At the time of the murder arrangements were being made for Sunder to go to her husband and preparations for the ceremonial appropriate to such occasions were in the course of progress. The prosecution case is that this was resented by the appellant who wanted the girl for himself; so he went to the husbands village Kalawad on the night of the 18th/19th and murdered him with an axe which the prosecution say belongs to him and which they say he later produced.

Both Courts hold that the motive is proved; and that can be accepted.

Next comes the evidence about the sharpening of the axe on the evening of the 18th at Kana's house in the village Shiva. The axe was produced in Court and Dewayat (P.W. 5) tells us that it was blunt. Now there is nothing suspicious or unusual in a villager sharpening a blunt axe and, as we have pointed out, Meraman (P.W. 11) says that Dewayat was also sharpening an axe at the same time and place; and Dewayat is one of the other three against whom suspicion was directed; also, the fact that the axe was sharpened in this open way in the presence of a number of persons, including two strangers to the village, (the two Satwara witnesses, P.Ws. 9 and 10), points to innocence rather than guilt.

But the prosecution do not rely on this alone. Their witnesses say that when the appellant was asked why he was sharpening his axe (Dewayat does not seem to have been put a similar question though

he was doing the same thing) he replied that he wanted to offer a green coconut to Lord Shanker. All the witnesses are agreed that this has no special significance and that they attributed no sinister meaning to it at the time. It has acquired significance only in the light of after events.

Even here, there seems to us to be some danger that what the appellant really said has got mixed up with what these witnesses say and, no doubt, honestly believe he said. We say this because Sunder, P.W. 3, and her mother Vali, P.W. 2, tell us that the appellant came to the mother that evening and offered her eight annas in lieu of a coconut. It seems that this is a customary offering given by relatives when a daughter leaves her parents' home for her father-in-law's place. The appellant is distantly related to Sunder and so such an offering would be normal, and as it was made the same evening, apparently shortly after the other incident, we think there is a strong probability that his remark about the offering of a coconut had reference to this and was later thought to have reference to a vow : the sort of mistake that the persons reconstructing a crime might easily make and then honestly believe; and we are the more prone to think that this was what probably happened because the conduct attributed to the appellant is so unlike that of a murderer deliberately planning a cold blooded crime while, on the other hand, it is wholly consistent with innocence. A reasonable doubt arises and the appellant is entitled to its benefit.

Next comes the evidence of Samant, P.W. 16, who says that he saw the appellant that night on the outskirts of Kalawad where the murder was committed. He was wearing a false beard and a mask. That of course is an important piece of evidence but the danger of mistaking the identity of a man so disguised at night cannot be disregarded, especially as this witness qualified his statement at the end of his cross-examination by saying : "The person was just like him". It is evident to us that his statement about identity is not based on his recognition of the appellant but on the fact that he saw a man who looked like the appellant and so, when he found that the appellant was under suspicion, he inferred that the man must have been the appellant. But that is the very question that the Court has to decide. The only fact that this witness can be said to prove is that the saw a man that night wearing a false beard and mask who looked like the appellant.

Then we come to the recoveries. The false beard and mask were found buried in the grounds of Dewayat's house and the appellate is said to have recovered them in the presence of panchas. But those discoveries are inadmissible in evidence because the police already knew where they were hidden. Their information was not derived from the appellant but from Dewayat (one of the other suspects). The way the police came to find this out was this. Dewayat says that the appellant confessed the murder to him and told him that he had gone there wearing a false beard and a mask and that he had buried these articles under the Shami tree in the grounds of Dewayat's bada. Dewayat says -

> "Next the police called me to go to Kalawad. At that time Raja had been arrested..... I was interrogated. I spoke about the beard at that time. Then the police came to my field with Raja".

If Meraman (P.W. 11), read with the confused statement of Kana (P.W. 4), is to be believed, Dewayat was also under arrest either at the time or on the day before. As the Sub-Inspector was not examined, we are unable to clear this up and so are bound to give weight to the criticism of the Sessions Judge where he says -

> "However, Dewayat confesses that his statement was not recorded on the 19th of May 1952 but was recorded on 20-5-1952 only after he was questioned by the

police".

In our opinion, not only is this evidence about recovery not admissible but the danger that Samant (P.W. 16) mistook Dewayat, who was also under strong suspicion, or someone else who looked like the appellant, for the appellant, has not been excluded.

Lastly, there is the recovery of the axe. But this was not hidden. It was kept behind an earthen jar in the appellant's house just as an axe might be normally kept in any average household. The only point of suspicion is that the axe had stains of human blood on it. But the difficulty we are faced with there is that the extent of the stains and their position is not disclosed. We have had occasion to comment before on the very slovenly and ineffective way in which some Chemical Analysers do their duty. This is another case in which what might otherwise have been a valuable piece of evidence has to be disregarded. The axe was not recovered till the 21st and was standing where it could have been handled by other members of the household. In any case, villagers frequently have slight cuts or scratches or a prick from a thorn on their persons and a few drops of blood could easily be transferred to an article like an axe without anybody noticing or knowing. The important thing in a case like this, where everything is now seen to hang on this one fact, would be the extent of the blood and its position. The post-mortem reveals that the injuries were incised and that the bleeding was profuse. If therefore there was blood all along the cutting edge and around it, that would have been a strong circumstance; but if there was only a small smear of blood, say, on the back of the axe and none on or near the edge, then that would have been a circumstance for complete exoneration. When everything hangs on this one point, we cannot assume without proof that stains which might be compatible with either guilt or innocence must have been of what we might term the guilty kind.

On a careful examination of the evidence in this case, we are not satisfied that the circumstances disclose "strong and compelling reasons" to set aside the acquittal.

The appeal is allowed. The conviction and sentence are set aside and the appellant is acquitted.

VENKATARAMA AYYAR J. ◆

I regret I am unable to agree with the judgment just delivered.

The appellant belonged to the village of Katkora, and developed intimacy with an unmarried woman called Sunder in the neighbouring village of Shiva. Subsequently, Sunder was married to one Jetha of Kalawad, a village about 3 miles distant from Shiva. It had been arranged to take Sunder to her husband's house on the 19th May, 1952, and for that purpose, Sida, the father of Jetha, had come to Shiva on the 18th. The case of the prosecution was that the appellant was determined to prevent Sunder from joining her husband, and with that object he went to Kalawad on the night of the 18th, and killed Jetha with his axe, when he was asleep. The murder came to light next morning, and the matter was reported to the police. The appellant was arrested on 20-5-1952. On his information the police recovered from his house at Katkora an axe, and the panchnama discloses that it then had stains of blood which was subsequently found by the Chemical Analyst to be human. The appellant next showed to the police a false beard, which was buried under a tree in the village of Shiva. It is alleged that this was worn by the appellant at the time of the murder.

On 21-5-1952 the police sent the appellant to the First-Class Magistrate (P.W. 21), with a letter stating that he wanted to make a confession. The Magistrate, however, decided to give him time "to

cool down", and put him in judicial lock-up. He then went on duty to another place, and on his return, recorded the confession of the appellant, which is as follows :

> "I, having gone to his Wadi, have killed him. I have killed him with axe. I have killed him for the sake of Sunderbai. Sunderbai is the wife of Jetha. I had illicit connection with her. I have murdered Jetha Sida with the idea of marrying Sunderbai. I gave him an axe-blow on the neck. At that time I had put on a tunic and a pair of trousers. I had a turban on my head. I had worn artificial beard. After the murder, the artificial beard buried in the field of Dewanand Mope. I took the axe to my house".

The appellant retracted this confession before the Committing Magistrate, as made under police beatings and threats. He was then sent up to the Sessions Court, Halar, to take his trial, which took place with the aid of four assessors.

There was no direct evidence that the appellant had committed the murder. The circumstantial evidence on which the prosecution sought to establish his guilt consisted of a confession made by him to the Magistrate, the recovery of the axe and the false beard, and the existence of strong motive. There was, besides, a considerable body of evidence that on the 18th May the appellant was haunting the village of Shiva where Sunder was residing, with an axe in his hand and threats in his tongue. The assessors were unanimously of the opinion that the appellant was guilty, but the Sessions Judge disagreed with them, and held that the confession was neither true nor voluntary, and that though there were strong grounds for suspecting him, the evidence was not sufficient to convict him, and so acquitted him.

There was an appeal against this judgment by the State to the High Court of Saurashtra. The learned Judges, differing from the Sessions Judge, held that the confession was true and voluntary, that there was ample corroboration thereof, in the evidence, and that even apart from it, the other facts proved by the prosecution were sufficient to establish the guilt of the appellant. They accordingly set aside the order of acquittal passed by the Sessions Judge, convicted the appellant under section 302 and sentenced him to transportation for life. It is against this judgment that the present appeal by special leave has been brought.

The question is whether having regard to the principles on which this court exercises its jurisdiction under article 136, there are grounds for interference in this appeal. Those principles are well-settled and may briefly be recapitulated. Prior to the abolition of the jurisdiction of the Privy Council, the law of this country did not in general provide for appeals against judgments of the High Courts in criminal matters. Indeed, the policy of the legislature as expressed in sections 404 and 430 of the Code of Criminal Procedure and departing in this respect from that adopted in the Civil Procedure Code, has been that decisions of courts passed in criminal appeals should be final and subject to specified exceptions, not open to a further appeal on facts. So far as judgments of the High Courts are concerned, the limitation on further appeal imposed by the Indian statutes could not affect the jurisdiction of the Privy Council to entertain appeals against them in the exercise of the prerogative of the Crown. That was a power which the Privy Council possessed in respects of orders passed by the Courts all over the Dominions, and the limits within which the Judicial Committee exercised that power were thus stated by Lord Watson in In re Abraham Mallory Dillett ([1887] 12 A.C. 459, 467) :

> "The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it

> is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done".

These principles were followed in quite a number of appeals against judgments of Indian courts in criminal matters. In Dal Singh v. King-Emperor ([1917] L.R. 44 I.A. 137, 140), the Privy Council, stating the practice of the Judicial Committee in dealing with an appeal in a criminal case, observed :

> "The general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases, in the free fashion of a fully constituted court of criminal appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below".

In Taba Singh v. Emperor ([1924] I.L.R. 48 Bom. 515), Lord Buckmaster observed that the responsibility for the administration of criminal justice rested with the courts in India, and that the Board would not interfere "unless there has been some violation of the principles of justice or some disregard of legal principles". In George Gfeller v. The King (A.I.R. 1943 P.C. 211), which was an appeal from the Supreme Court of Nigeria, Sir George Rankin Observed :

> "Their Lordships have repeated ad nauseam the statement that they do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice : per Lord Dunedin in Mohindar Singh v. Emperor ([1932] L.R. 59 I.A. 233, 235). Cf. Muhammad Nawaz v. Emperor ([1941] L.R. 68 I.A. 126, 129)".

On these principles, the Privy Council refused in Macrea, Ex parte ([1893] L.R. 20 I.A. 90) leave to appeal on the ground of misdirection to the jury and in Mohindar Singh v. Emperor ([1932] L.R. 59 I.A. 233, 235) on the ground that a wrong view had been taken of the law.

Thus, the law was well-settled that the Privy Council would not entertain appeals against judgments in criminal cases, unless there was an error of procedure or disregard of legal principles amounting to a denial of fair trial and resulting in grave injustice. Under the Constitution, the position of the Supreme Court which has taken the place of the Privy Council is this. Its jurisdiction as that of the Privy Council in respect of criminal appeals may be classed under two categories, cases where a right of appeal is expressly granted by the Constitution or by the statutes, as for example, articles 132(1) and 134(1) of the Constitution or section 411-A(4) of the Code of Criminal procedure, in which the scope of the appeal would depend upon the terms of the enactments which confer the right; and cases where it is called upon to exercise its powers under article 136, which corresponds substantially to the prerogative jurisdiction exercised by the Privy Council with reference to which the practice of the Judicial Committee might usefully be referred to for indicating the area of interference.

The question was considered by this Court in Pritam Singh v. The State ([1950] S.C.R. 453, 458), where the law was thus laid down :

> "On a careful examination of article 136 along with the preceding article, it seems clear that the wide discretionary power with which this Court is invested under it is to be exercised sparingly and in exceptional cases only.... The Privy Council have tried to lay down from time to time certain principles for granting special leave in criminal cases, which were reviewed by the Federal Court in Kapildeo v. The King (A.I.R. 1950 F.C. 80). It is sufficient for our purpose to say that tough we are not bound to follow them too rigidly since the reasons, constitutional and administrative, which sometimes weighed with the Privy Council, need not weigh with us, yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of this Court in granting special leave. Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against".

The preceding article referred to in the opening passage is clearly article 134. Article 134(1) confers a right of appeal to this Court in certain cases, in terms unqualified, on questions both of fact and of law, and if the scope of an appeal under article 136 is to be extended likewise to questions of fact, then article 134(1) would become superfluous. It is obvious that the intention of the Constitution in providing for an appeal on facts under articles 134(1)(a) and (b) was to exclude it under article 136, and it strongly supports the conclusion reached in Pritam Singh v. The State ([1950] S.C.R. 453, 458) that like the Privy Council this Court would not function as a further court of appeal on facts in criminal cases.

Having regard to the principles enunciated in this decision, the question is whether there are sufficient grounds for interfering with the judgment of the High Court in the present appeal. The point which the learned Judges had to decide in the appeal was whether it was the appellant who had murdered Jetha. That is a pure question of fact turning on appreciation of evidence. The High Court has gone into the matter fully, examined the entire evidence exhaustively, and in a judgment which is as closely reasoned as it is elaborate, has come to the conclusion that the guilt of the appellant has been established beyond all reasonable doubt. Does that decision call for our interference in special appeal ? No, unless this Court is to function as a court of appeal on facts.

But then, it is argued that the appeal before the High Court was one against acquittal, that such an appeal was subject to the limitation that there should be compelling reasons for reversing an order of acquittal, and that it would be open to this Court in special appeal to consider whether that limitation had been duly observed. On this contention, two questions arise for determination : (1) what are the powers of a court which hears an appeal against an order of acquittal ? And (2) what are the grounds on which the decision of that court can be reviewed by this Court under article 136 ?

The right to appeal against an order of acquittal is conferred on the State by section 417 of the Code of Criminal Procedure, and is in terms unqualified. Nevertheless, the view was taken at one time in some of the decisions that appeals against acquittals were in a less favoured position than appeals against convictions, and that an order of a acquittal should not be interfered with in appeal except "where through the incompetence, stupidity or perversity of certain tribunal such unreasonable or

distorted conclusions have been drawn from the evidence so as to produce a positive miscarriage of justice"; or where "the lower court has so obstinately blundered or gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public". Vide Empress v. Gayadin ([1881] I.L.R. 4 All. 148), Queen-Empress v. Robinson ([1894] I.L.R. 16 All. 212), Deputy Legal Remembrancer v. Amulya Dwan ([1941] 18 C.W.N. 666) and King-Emperor v. U San Win ([1932] I.L.R. 10 Rang. 312). In Sheo Swarup v. King-Emperor ([1934] L.R. 61 I.A. 398, 403, 404), the question was raised for determination by the Privy Council whether there was legal basis for the limitation which the above decisions had placed on the right of the State to appeal under section 417. Answering it in the negative, Lord Russell observed that there was "no indications in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". He went on to remark at page 404 that,

> "The High Court should and will always give proper weigh and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses".

These observations, however, do not mean that the scope of appeals against acquittals is different from that of other appeals. They merely embody the principles applicable to all appeals, civil and criminal, to appeals alike against conviction and acquittal. Thus, if A files a suit on a promissory note against B and the latter denies execution, the burden is on the plaintiff to establish its genuineness. If the trial Judge does not accept the evidence adduced by him and dismisses his suit and the appeals, he has the burden still on him to prove on the evidence adduced that the promissory note is genuine, and in discharging that burden he has to show that the judgment appealed against is clearly wrong. In Naba Kishore Mandal v. Upendra Kishore Mandal, ([1921] 42 M.L.J. 253, 257 (P.C.) Lord Buck master stated :

> "The only further observation that their Lordships desire to make is to call attention once more to the fact that in appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded".

Adapting these observations to criminal trial, when the State appeals against an order of acquittal, it has to establish on the evidence that the accused is guilty, and to establish it, it has to satisfy the court that the judgment of the trial court is erroneous. The oft-repeated observation that on acquittal the presumption of innocence becomes reinforced is merely this principle stated in terms of criminal law. Likewise, the weight to be attached by an appellate court to a finding of the trial court based upon appreciation of oral evidence is the same whether it is given in a civil litigation or a criminal trial. Dealing with the position of an appellate court hearing a civil appeal, the Privy Council observed in Bombay Cotton Manufacturing Co. v. Motilal Shivlal ([1934] L.R. 61 I.A. 398) :

> "It is doubtless true that on appeal the whole case, including the facts, is within the jurisdiction of the Appeal Court. But generally speaking, it is undesirable to interfere

> with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses..... In making these observations their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence".

It is clearly these principles that Lord Russell had in mind when he made the observations at page 404 in Sheo Swarup v. King-Emperor ([1934] L.R. 61 I.A. 398) quoted above, and that will be clear from the observation next following :

> "To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well-known and recognized in the administration of justice".

The scope of the decision in Sheo Swarup v. King-Emperor ([1934] L.R. 61 I.A. 398) with special reference to the observations discussed above was thus explained by the Privy Council in Nur Mohammad v. Emperor (A.I.R. 1945 P.C. 151) :

> "Their Lordships were referred, rightly enough, to the decision of this Board in the case in Sheo Swarup v. King-Emperor ([1934] L.R. 61 I.A. 398), and in particular to the passage at p. 404 in the judgment delivered by Lord Russell. Their Lordships do not think it necessary to read it all again, but would like to observe that there really is only one principle, in the strict use of the word, laid down there; that is that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed".

These authorities establish beyond all controversy that an appeal against acquittal under section 417 stands, as regards the powers of an appellate court, on the same footing as appeals against conviction.

If that is the true scope of an appeal under section 417, where then does the doctrine of "compelling reasons" come in ? And how do we fit it among the powers of a court under that section ? The words "compelling reasons" are not a legislative expression. They are not found in section 417. As far as I have been able to discover, it was first used in Surajpal Singh and others v. The State ([1952] S.C.R. 193, 201), wherein it was observed :

> "It is well established that in an appeal under section 417 of the Criminal Procedure Code, the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well-settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons".

Do the words "compelling reasons" in the above passage import a limitation on the powers of a court hearing an appeal under Section 417 not applicable to a court hearing appeals against conviction ? If they do, then it is merely the old doctrine that appeals against acquittal are in a less favoured position, dressed in a new garb, and the reasons for rejecting it as unsound are as powerful

as those which found favour with the Privy Council in Sheo Swarup v. King-Emperor ([1934] L.R. 61 I.A. 398) and Nur Mohammad v. Emperor (A.I.R. 1945 P.C. 151). But it is probable that these words were intended to express, as were the similar words of Lord Russell in Sheo Swarup v. King-Emperor ([1934] L.R. 61 I.A. 398), that the court, hearing an appeal under section 417 should observe the rules which all appellate courts should, before coming to a conclusion different from that of the trial court. If so understood, the expression "compelling reasons" would be open to no comment. Neither would it be of any special significance in its application to appeals against acquittals any more than appeals against conviction. But the expression has been quoted in later judgments, especially of the courts below, as it laid down that in appeals against acquittal, that standard of proof required of the appellant was far higher then what the law casts on appellants in other appeals, and as the words "compelling reasons" are vague and indefinite to a degree, the result has not seldom been that even when Judges hearing appeals under section 417 were convinced of the guilt of the accused, they refrained from setting aside the order of acquittal owing to the dark and unknown prohibition contained in the expression. That is the impression which I have formed in the appeals which have come before me in this court. There is always a danger in taking a phrase, attractive and telling in its context, out of it, and erecting it into a judicial formula as if it laid down a principle universal in its application. And this danger is all the greater when the phrase is of undefined import, and relates to appreciation of evidence. It is in the interest of the public that crimes should be punished, and it is with this object that section 417 confers on the State a right to appeal against acquittal. To fetter this right through such expressions as "compelling reasons" would not merely be to legislate but to defeat the plain intention of the legislature that an accused in an appeal against acquittal should have only those rights which the State in an appeal against conviction or a respondent in a civil appeal has, and that he is to enjoy no special protection. The fundamental objection to regarding the expression "compelling reasons" as a rigid formula governing the decision of an appeal under section 417 is that it puts a judgment of acquittal, however rendered, in a position of vantage which the law did not accord to it, and throws around the accused who gets an order of acquittal in the trial court a protection which the law did not intend to give him. In my judgment, this is a situation in which great mischief must result, and the interests of the public must suffer.

If the expression "compelling reasons" does not impose a restriction on the powers of a court hearing an appeal under section 417, and if its true scope is to guide it in arriving at a decision, the question whether this Court can interfere with that decision on the ground that it is erroneous presents no difficulty. The decision would then be one on a question of fact depending upon the appreciation of evidence, and this court cannot, on the principles enunciated in Pritam Singh v. The State ([1950] S.C.R. 453) interfere with it. This position is, in fact, concluded by the decisions in Sheo Swarup v. King-Emperor ([1934] L.R. 61 I.A. 398) and Nur Mohammad v. Emperor (A.I.R. 1945 P.C. 151). In Sheo Swarup v. King-Emperor ([1934] L.R. 61 I.A. 398), the Sessions Judge had characterised the prosecution witnesses as liars, and disbelieving their evidence had acquitted the accused. On appeal, the High Court reviewed the evidence, and differing from the trial court as to the weight to be attached to it, convicted the accused. Declining to interfere with this judgment, the Privy Council observed that even though there was no express mention in the judgment of the High Court that it had considered all the particulars which an appellate court should consider in deciding an appeal, there was "no reason to think that the High Court had failed to take all proper matters into consideration in arriving at their conclusions of fact". In Nur Mohammad v. Emperor (A.I.R. 1945 P.C. 151), the judgment of the High Court did not disclose that it had considered the matters mentioned by Lord Russell at page 404 in Sheo Swarup v. King-Emperor ([1934] L.R. 61 I.A. 398). Nevertheless, the Privy Council dismissed the appeal observing :

> "In the present case the High Court judgment shows that they have been at pains to deal in detail with the reasons given by the Sessions Judge for disbelieving the group of witnesses, the Patwari and the other three alleged eyewitnesses. They have dealt in detail with them, showing on the face of their judgment that there is no necessity to presume in this case that they have not done their duty..."

These decisions are authorities for the position that when in an appeal under section 417 the court considers the evidence and comes to its own conclusion, the findings recorded by it are not, even when they result in a reversal of the order of acquittal, open to interference in special appeal. Different considerations would have arisen if the law had provided a further appeal on facts against those orders of reversal, in which case the appreciation of the evidence by the appellate court would be a matter open to review in the superior court. That, as already stated, would be the position in an appeal under articles 132(1) and 134(1)(a) and (b), but where, as in the present, no appeal on facts is provided, the decision of the High Court is not open to review by this Court under article 136 on the ground that there were no compelling reasons for the learned Judges to reverse an order of acquittal.

This is sufficient to entail the dismissal of this appeal. But, having gone through the evidence, I am of opinion that even on the merits the decision of the High Court is correct. The evidence against the appellant is wholly circumstantial, and consists mainly of (1) the existence of a strong motive, (2) the conduct of the appellant on the day when the murder was committed, (3) the recovery of a bloodstained axe and a false beard at the instance of the appellant, and (4) a confession made by him before the Magistrate, P.W. 21, on 3-6-1952. Taking the above items seriatim, it is the case of the prosecution that the appellant was living on terms of intimacy with Sunder, and as she was to be taken on the 19th May, 1952 to Kalawad to join her husband, he wanted to do away with him. The appellant admitted that he had illicit connection with Sunder for some years, and the Sessions judge also found, basing himself on the prosecution evidence, that the appellant was very much agitated on the night of the 18th. A number of witnesses deposed that they saw him on 18-5-1952 at Shiva sharpening his axe, and that when questioned, he stated that he was going to offer a green coconut to Mahadevji, "an expression" say the learned Judges "which in common parlance means sacrifice of a head". The appellant denied that he went to Shiva on the 18th, but his statement was disbelieved by the Sessions Judge who was impressed by the quality and number of the prosecution witnesses, and both the courts have concurred in accepting their evidence on this point.

As for the recovery of the axe, the appellant admitted it, but he stated in his examination under section 342 that there was no blood on it when he showed it to the police. The Sessions Judge was not prepared to accept this statement and observed :

> "Accused admits that this is his axe. In light of chemical analysis, there is no doubt that there were stains of human blood on the axe. It is also mentioned in the Panchnama, Ex. 21 itself that the Panch had suspected that there were marks of human blood on this axe".

But all the same, he discounted the value of this evidence, because according to him, in view of certain circumstances "the presence of human blood on the axe is by no means conclusive", and that "at best it raises a suspicion against the accused". Those circumstances are three : Firstly, the panch who witnessed the recovery at Katkora belonged to Kalawad, and the criticism is that a local panch ought to have been got to witness the same. The learned Judges of the High Court did not think much of this criticism, as the recovery at Katkora had to be made in pursuance of the statement given by the appellant at Kalawad, and the police might have reasonably thought that the same

panch should be present at both the places. As the Sessions Judge has accepted the evidence of the panch that there were blood stains at the time of the recovery of the axe, his criticism on this point lacks substance. Secondly, though the recovery was made on 21-5-1952, it was sent to the medical officer for report only on 27-5-1952, and the delay is suspicious. It is difficult to follow this criticism. When once the conclusion is reached that there was blood on the axe when it was recovered, this criticism has no meaning unless it is intended to suggest that the police required some time to wash the blood which was on axe at the time of its recovery and to substitute human blood therefor. There is nothing in the evidence to support a suggestion so grotesque, and as observed by the learned Judges, if the police wanted to substitute blood, they would not have taken so much time over it.

Thirdly, in despatching the blood to the Chemical Analyst, the medical officer sent the parcel containing the blood scrapings to the railway station, not through his own peon or the compounder in the hospital but through the local police, and that, according to the Sessions Judge, is a suspicious circumstance. As the parcel was received intact by the Chemical Analyst at Bombay, it is difficult to see what the point of the criticism is. The Sessions Judge himself observes :

> "I do not believe that the police have intercepted this parcel and they deliberately sent an axe with human blood. However, there is no doubt that the procedure adopted by the doctor is wrong, and is capable of mischief".

It has not been explained and is not possible to divine what that mischief could have been in this case. And who could have been the mischief-maker unless it be the police ? The Sessions Judge stated that he did not believe the suggestion made against the police, but that nevertheless is the assumption underlying his comment. "Anxious to wound, afraid to strike" would appropriately describe the situation. The learned Judges disagreed with the reasoning of the Sessions Judge, and held that as the appellant had admitted the recovery of the axe and as there was human blood on it at that time, it was clear and cogent evidence pointing to his guilt. I am unable to find any answer to this reasoning.

Pausing here, it will be seen that in discussing the question of the recovery of the blood-stained axe, as indeed throughout the judgment, the learned Sessions Judge has taken up an attitude of distrust towards the police for which it is difficult to find any justification in the evidence - an attitude which, I regret to say, is becoming a growing feature of judgments of subordinate Magistrates. When at the trial, it appears to the court that a police officer has, in the discharge of his duty, abused his position and acted oppressively, it is no doubt its clear duty to express its stern disapproval of his conduct. But it is equally its duty not to assume such conduct on the part of the officer gratuitously and as a matter of course, when there is, as in this case, no reasonable basis for it in the evidence or in the circumstances. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefor. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration.

It is the case of the prosecution that the appellant unearthed a false beard, which he had buried underneath a shami tree in Shiva, and that he had worn it at the time of the murder. The appellant did not deny the recovery, but stated that it was not he that had uncovered it but the jamadar. Both the courts below have accepted the version of the prosecution as true, but while the sessions Judge held that it was not sufficient to implicate the appellant, the learned Judges held otherwise. P.W. 16 deposed that he saw the appellant at midnight on the 18th May on the outskirts of Kalawad wearing

a false beard, and the comment of the Sessions Judge on this evidence is :

> "I do not see how this evidence will prove the prosecution case beyond reasonable doubt. At best, it will suffice to raise suspicion against the accused".

But if the beard was discovered by the appellant, then surely it is a valuable link in the chain of evidence against him.

Then we come to the confession made by the appellant to P.W. 21. The Magistrate has deposed that he had satisfied himself that it was voluntary, before he recorded it. The Sessions Judge did not discredit his testimony, but was of opinion that in view of certain circumstances the confession was not voluntary. Now, the facts relating to this matter are these : The appellant was, as already stated, arrested on the 20th May and discoveries of the axe and the false beard were made through him, and on the 21st he was sent to the Magistrate with a letter that he desired to make a confession. The Magistrate has given evidence that he did not record the confession at once, as he wanted the appellant "to cool down", and accordingly gave him ten days to reflect, and committed him to judicial lock-up. There is nothing improper in this, and indeed, it is a commendable precaution for ensuring that the confession was made voluntary. From 21-5-1952 to 3-6-1952 the appellant continued in judicial lock-up, and this is a circumstance which normally should negative the possibility of there having been a threat or inducement. But the Sessions Judge declined to attach any weight to it, because both the police lock-up and the judicial lock-up were situated in the same compound, separated by a distance of 20 feet, and were guarded by the same police officers, and though the judicial lock-up had its own warder and clerk jailor, they kept watch only during daytime, and therefore even though the police could have had no access inside the lock-up, they had "every opportunity to threaten and bully the accused". The Sessions Judge accordingly held that the confession was not voluntary. On appeal, the learned Judges came to a different conclusion. They considered that the possibility of threats having been uttered through the bars was too remote and unsubstantial to form the basis for any conclusion, and that all the circumstances indicated that the confession was voluntary. These are the salient points that emerge out of the evidence.

The position may be thus summed up :

> (1) No special weight attaches to the findings of the Sessions Judge on the ground that they are based on the evidence of witnesses whom he had the advantage of seeing in the box, and believed. The oral evidence was all on the side of the prosecution, and that was substantially accepted by the Sessions Judge. His judgment is based on the probabilities of the case, and of them, the learned Judges were at least as competent to judge, as he.
>
> (2) The finding of the Sessions Judge in so far as it related to the recovery of bloodstained axe was clearly erroneous, as it did not follow on his reasoning.
>
> (3) As regards the confession, the conclusion of the Sessions Judge rests on nothing tangible, and is largely coloured by a general distrust of the police, not based on evidence or justified by the circumstances.
>
> (4) The learned Judges were of the opinion that even excluding the confession, the other evidence in the case was sufficient to establish the guilt of the appellant.
>
> (5) All the four assessors were of the opinion that the appellant was guilty.

Now, returning to the two questions which have formed the basis of the preceding discussion, (1) what is it that the High Court has to do in exercise of its powers under section 417, having regard to the findings reached by it and set out above, and how does the doctrine of "compelling reasons" bear upon it ? (2) What are the grounds on which we can interfere with its decision ? A court hearing an appeal under section 417 might be confronted with three possibilities : (i) It might come to the same conclusion as the trial court on the questions in issue, in which case, of course, it should dismiss the appeal; (ii) It might consider that the evidence was not clear and conclusive one way or the other, in which case its duty as an appellate court would be not to interfere with the judgment appealed against; and (iii) it might come to a conclusion on an appreciation of the evidence opposite to that reached by the court of first instance, in which case it would clearly __be its duty in exercise of its powers under section 417 to set aside the order of acquittal. Wherein does the theory of "compelling reasons" come in the scheme ? There is no need for it in the second category, because even apart from it, the same result must, as already stated, follow on the principles applicable to all courts of appeal. Then, there remains the third category of cases. If the High Court comes to the conclusion on an appreciation of the evidence that the appellant is guilty, has it, nevertheless, to confirm the order of acquittal on the basis of this theory ? Surely not, as that would render the right conferred by section 417 illusory. Thus, the doctrine of "compelling reasons" would appear to have use only as a guide to the appellate court in determining questions of fact. It has no independent value as bearing on its powers under section 417. If that is the true position, it follows on the principles laid down in Sheo Swarup v. King-Empero([1934] L.R. 61 I.A. 398) and Nur Mohammad v. Emperor (A.I.R. 1945 P.C. 151) and in Pritam Singh v. The State ([1950] S.C.R. 453) that this Court cannot interfere with the orders passed under section 417 merely on the ground that the findings of fact were not justified having regard to the doctrine of "compelling reasons".

In my opinion, this appeal ought to be dismissed.

ORDER

BY THE COURT.

In accordance with the Judgment of the majority this Appeal is allowed. The conviction and sentence are set aside and the Appellant is acquitted.

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