

ALLAHABAD HIGH COURT

Lal Singh

Vs

Emperor

(Bennet, J.)

10.06.1938

JUDGMENT

Bennet, J.

1. This is a reference by the learned Sessions Judge of Agra of a sentence of death passed on Lal Singh Thakur, a resident of Gwalior State, under Section 396, I.P.C., for taking part in a dacoity in which murder was committed. It is not held by the lower Court that the murder was committed by the present appellant. The first report was made on 15th March 1935 at 5 A.M. in Thana Bah in Agra District stating that on the previous night at midnight there had been an armed dacoity at the house of Gopi Bania in Mauza Khilla. The actual person who made the report was one Kanhai Singh Thakur, and his' brother had been with the villagers outside the house who attempted to intervene and had been shot by some dacoit unknown. The first report was very brief. The witness P.W. 43, Sub-Inspector Daniells, states that he went to the place and inspected the house and found property lying about and the usual signs of a dacoity, and Bachan Singh had wounds in his leg and was sent to the Thomason Hospital in Agra where he died. Gopi, the owner of the house, gave him a list of property, Ex. B, which had been stolen. None of the dacoits had been recognized. Some time later, on 28th June 1935, the present accused Lal Singh was arrested in Gwalior State which lies to the south of Tahsil Bah separated from it by the river Chambal and a great area of ravine country. Now the proceedings of identification of this accused were taken and six witnesses were sent down to Gwalior and in Gwalior State identification proceedings were taken before Mr. R. Ganesh Bapuji. Of these witnesses three persons identified Lal Singh, Mathura Singh, Gopi and Chotey. Mathura Singh made no mistake; Gopi picked out one wrong person also, and Chhotey made no mistake. The identification list is on p. 13 and the evidence of the Magistrate who conducted the identification is on p. 25. We may note that p. 13, line 33 gave the date in our translation of 8th October 1935. We have consulted the Hindi original and the date is given as 10th August 1935 and this is also the date on p. 14, line 5 and on p. 14, line 15 there is the date of 11th August 1935 for receiving a copy of the identification proceedings. It was merely by misreading the original that the date was taken wrongly as 8-10 instead of 10-8.

2. Now as regards the value of the identification evidence there is the statement of Mathuri Singh, P.W. 5, on p. 50. He says that he went to Porsa Jail and identified a dacoit and he picked this man out in the lower Court and in the Court of the Magistrate, and he said this man had a gun with him. Now Mathuri Singh says that it was a moonlight night and he could see the faces of the dacoits clearly. This witness and his brother Bachan Singh advanced towards the dacoits and then the dacoits fired at Bachan Singh and wounded him after some abuse. On p. 16 there is a table of identification proceedings on a later date in connexion with this case on 15th September 1936, and on that occasion Mathuri Singh picked out two persons who were accused Fringi Singh and Raghubar Singh and also three persons who were not accused. But it must be remembered that this later identification was a year and a half after the dacoity and therefore the memory of Mathuri Singh must have become inaccurate in that period. The earlier identification in August 1935 when he picked out the present appellant Lal Singh was within five months of the dacoity and his memory was much fresher. The witness Gopi, the owner of the house, was inside the house and the dacoits came in and beat him and were inside with him for half an hour before he got a chance, and ran out. During the period he was inside with the dacoits, he could see their faces clearly as it was a moonlight night and there was a lantern. He therefore had a good opportunity to see the accused. He also on a later identification, a year and a half after the dacoity, on p. 16 picked out one accused person and two other persons.

3. The same reasoning applies to this later identification. The witness Chhote, P.W. 7, on p. 52, is the servant of Gopi, the owner of the house, and he climbed on to the roof of a kachcha house which also belongs to Gopi and adjoins the pakka house into which the dacoits entered. He saw five or six dacoits inside the pakka house, one of them with a gun. He pointed out Lal Singh as the man whom he saw with a gun. He was on the roof for about an hour. This witness clearly had ample time to recognize these dacoits. He made no mistake at the identification of Lal Singh and he did not go on a later occasion. There is no doubt that the evidence of identification is of considerable weight. The next piece of evidence is a confession on pp. 19 and 20 recorded in Gwalior State on 20th August 1935, that is, shortly after the identification by the witnesses from this dacoity. The same Magistrate at Amba recorded the confession whose name is given as G.B. Dhekne, that is, Mr. Ganesh Bapuji, Judicial Officer, who gives his evidence on commission on pp. 23 and 24, and he has proved that he made this record of the confession of Lal Singh. The confession of Lal Singh sets out a number of offences mostly kidnapping for ransom in Gwalior State and on p. 20, line 35 there is a translation of a confession of the present dacoity as follows:(Having seen the 14 lachhas of silver, said) these ace of the dacoity committed at Klierla. Maharaj Singh, Barnam Singh, Cohhe Singh of Kawatki, Firangi Singh of Nagra, Shambhu Singh of Nagra, Eaghubat Singh of Nagra, Beni Singh of Nagra, Madan Singh of Nagra, Heera Thakur of Nagra, Kanhai Singh of Kichol, Bharat Singh of Lakhan-ka-pura, and myself took part in it. We committed the dacoity at the house of a Baniya. I got this property recovered from my house.

4. It will be noticed that in this translation the place of dacoity is given as Kherla. We have examined the original document in Hindi and the letters at the end are two letters "I" and not "rl". Apparently the word "Khilla" is meant and there is the statement of Sub-Inspector Murari Lal, formerly of Porsa Thana, Gwalior, on p. 54 to the effect that the accused handed him Exs. 1 and 2 in connexion with a dacoity at Khilla and he made the recovery list Ex. H and had it signed by witnesses. These articles Exs. 1 and 2 were what are mentioned by the accused on p. 20, line 35 as 14 lachhas of silver which he said he had taken at this dacoity. Now the Magistrate was asked various questions in regard to this dacoity and on p. 24 he stated as follows:

Q. Did you take all necessary precautions?

A. Yes.

Q. Did you satisfy yourself that the confession made by Lal Singh was true and voluntary?

A. Yes.

In cross interrogatories on behalf of some accused he was asked:

1. Was Lal Singh put up before you for confession by the police? Yes.
2. Was he put up before you from police custody? I do not re-member correctly.
3. Was any police officer present when the confession was recorded? No.
4. The confession of Lal Singh was not recorded by you in your own hand-writing? No. It was recorded by me personally in my own hand-writing.
5. Did you explain to Lal Singh before recording his confession that he was not bound to make it and that any confession made by him would be used against him? Yes. I did explain to Lal Singh these things.
6. You did not make a note of having told Lal Singh so in your foot-note at the end of the confession? As it was not necessary, I did not make such a note.

5. A further question was asked on p. 25 in regard to Ex. K, this confession of Lal Singh, and the

Magistrate said it was recorded by him. Now there is also the evidence of the finding and identification of these ornaments. For the finding of the ornaments given up by accused there is the evidence of Murari Lal and Raghunandan on p. 31. Raghunandan stated to the Magistrate that he is a resident of a village Tarsawan in Thana Porsa, Gwalior State, and this is the village of the accused Lal Singh. He says that the Sub-Inspector called him and Lal Singh accused brought lachhas from his house and handed them to the Sub-Inspector. This was about two years previous to the case. The lachhas he identified as Exs. 1 and 2 and he put his thumb impression on a list Ex. H. On p. 59 it is stated that as Baghunandan had not come to Sessions, although summoned, his evidence was admitted under Section 33, Evidence Act. In regard to the identification of these ornaments there is on p. 15 a memorandum of proceedings of the identification of property before a Magistrate and Mt. Mahadevi, wife of Gopi Bania of Khilla identified five lachhas and six murras of silver worn on the feet. This witness gave evidence on p. 52, and she stated that she identified these articles Exs. 1 and 2 when they were mixed up with other jewellery. She states that they were worn by her niece Mt. Katori and that her parents-in-law had given them to her. She stated that the ornaments were mixed up with other ornaments, not lachhas or murras, when she made her identification at Amba. Mt. Katori failed to identify these articles at Amba. She is a girl 20 years of age and was perhaps nervous and therefore she was merely tendered for cross-examination in the Sessions Court on p. 53. It appears to us however that the evidence of Mt. Mahadevi is sufficient for the identification of these articles taken with the fact that the accused Lal Singh himself admitted that the articles were taken in this dacoity when he handed them up and he has not claimed later that the articles were his. It is also to be noted that in the list given by Gopi to the Sub-Inspector shortly after the dacoity there were a number of lachhas and murras mentioned as stolen in three places in the list. These details are:

No. 3. Silver lachhas, 24, for the feet, weight 48 tolas.

No. 6. Laohha sada amethia, 32, weight 161/2 tolas.

No. 6. Laohha amarti, 20, for the feet, weight 40 tolas.

6. There were therefore a large number of articles of this kind stolen. Now the questions which have been argued most in the present case are in regard to the admissibility or otherwise of the confession. It has not been explained on behalf of the accused or by the accused what proceedings took place in Gwalior in regard to the crimes of which he made a confession on this occasion. A great deal of time has elapsed between the date of confession on 20th August 1935 and the production of the accused in Agra District for his trial in regard to this case and presumably this time was occupied in some criminal proceedings in Gwalior in connexion with the offences in Gwalior mentioned in the confession. Learned Counsel for the accused laid stress on a statement of a Gwalior witness, head constable Abdul Shakur, on page 56 that "he had been promised a pardon." It is not clear to what the witness alludes other than that the word "pardon" is used in the ordinary sense and that he means some Magistrate or Sessions Judge in Gwalior offered a pardon to Lal Singh on condition of his giving evidence in regard to the offences in Gwalior. If that is so, the offering of a pardon has no bearing on the admissibility of

the confession in the present case, because it is not open to the Gwalior authorities to make any offer of pardon for an offence committed in British India. Learned Counsel however desired to place the construction on these words that the police had offered some inducement to Lal Singh to make a confession. The words cannot bear that meaning and no such suggestion appears to be intended by the witness, nor has the accused ever said that he was offered any inducement except on p. 61 to the Sessions Court he stated: Murari Lal, the station officer and Pancham Singh of Garh got me arrested at the District Magistrate's house and told me to make a confession. They said that if I confessed I should be released.

7. Now it is obvious that the head constable cannot be alluding to this matter when he speaks of a pardon. The accused did not accept the suggestion if any such were made as he states "I said I had taken no part in any dacoity". Obviously therefore, there was no influence of this sort at work on the mind of the accused and if the accused had received such a suggestion he would naturally have said to Murari Lal "place me in front of the District Magistrate and let him make me the offer," as it is said the suggestion was made at the house of the District Magistrate. That nothing of this sort was done indicates that there is no truth in the allegation of the accused. Later, in the same statement the accused says that Murari Lal shut him in the lock-up and fettered him and made him stand throughout the night and therefore he made the confession. Now there is no evidence to confirm this statement of the accused which was put forward after great delay. We have also no information from the accused as to what he was doing in regard to the other parts of the confession and the cases which may have been founded on them. In the meantime before he made this allegation in 1937 the accused has not told us whether he appeared as a witness for the prosecution and confirmed what he said in his confession or whether he was treated as an accused and sentenced in Gwalior for the offences indicated. We therefore fail to find any evidence which would indicate that the confession was induced by any suggestion of favour or by any ill-treatment of the accused. The fact that the confession had been made after the accused had been identified by three witnesses for this dacoity supplies a reason as to why the accused might have made a confession, because the accused was one of a number who were arrested and tried for this dacoity. Now the main arguments against the admissibility of this confession are legal. In the first place we were told that the confession had not been properly recorded under the Gwalior Criminal Procedure Code. The certificate at the foot of the confession is as follows: I believe that this confession of the commission of crimes was made without any compulsion or coercion. It was taken in my presence and hearing, and on being read over to the person making it, it was admitted by him to be correct. It contains a full and true account of the statement made by him.

8. This is in the form that was required by the Criminal Procedure Code in British India in Section 164, Sub-section (3) up till the year 1923 when there was an amendment by Act 18 of 1923 and the following words were added to the beginning of the certificate:

I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him.

9. We were told by learned Counsel for accused that the Gwalior Code had also been amended to the same effect and that when this confession was recorded on 20th August 1935 the Magistrate should have followed the amended form. We therefore sent to the Gwalior State for a copy of the Criminal Procedure Code of Gwalior in force on 20th August 1935 and we find that that Code has a form of certificate which is exactly the one which the Magistrate has used. This is laid down in Section 79 of that Code. The Magistrate has also given evidence as already noted to the effect that the further additions to the certificate suggested were not necessary. It is then argued that the Magistrate should have asked questions from the accused and recorded the answers to show that the confession was made without any compulsion or coercion. Now even in British India in Section 164 there is no provision that the questions and answers should be recorded. Now the Magistrate has, as we have noted, been questioned on the point and he has stated that he did ascertain from the accused that the confession was voluntarily made. This is what he has certified in his certificate. We think that the certificate fully complies with the provisions of the law of Gwalior laid down in Section 79, Criminal P.C. Now a further argument was made by learned Counsel to the effect that although this might be so, still for use in British India these certificates should be in the form for British India. This seems to be a peculiar doctrine. There are a number of rulings of this Court to the effect that a confession recorded in Gwalior can be used in British India under the provisions of Section 80, Evidence Act. These rulings are *Queen-Empress v. Sunder Sing*¹ *Emperor v. Hulasi*² and of other High Courts we have *Emperor v. Shafi Ahamd*³ *Queen-Empress v. Nahla Kala*⁴ and *In re Panchanatham Pilai*⁵ Now these rulings lay down that the confession in an Indian State may be accepted as admissible for prosecution in British India. The person making the confession was a subject of Gwalior and if the confession was recorded in Gwalior and it was recorded according to the provisions of the Criminal Procedure Code in Gwalior, it seems to us incorrect to lay down that the form of certificate should have the additional words now added for such certificates in British India. But there is a further point to be noted. When the Legislature made the amendment of the Criminal Procedure Code in 1923 the Legislature no doubt laid a certain duty on a Magistrate recording a confession in British India under Section 164 and a Magistrate is bound to act accordingly. But it was open to the Legislature to repeal the provisions of Section 29, Evidence Act, in this matter and the Legislature did not do so. This Section is as follows:

29. If such a confession is otherwise relevant, it does not become irrelevant because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

10. The question before us now is the admissibility of a confession and the point is taken that the certificate does not contain these two points, that is, that he was not bound to make the

confession and that if he does so any confession he may make may be used as evidence against him. When the Legislature directed that these matters should be added to the certificate, the Legislature did not provide that if the matters were not added to the certificate then the confession would be inadmissible. On the contrary the provision of Section 29, Evidence Act, still stands good that not merely if these points are not added to the certificate but if the questions are not even asked the confession does not become irrelevant. The question of relevancy or irrelevancy is determined by the special Act which is the Evidence Act. Therefore we must follow the provisions of Section 29. We may also refer to the provisions of Section 533, Sub-section (1), Criminal P.C., where it is laid down as follows: If the Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such Section have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded ; and, notwithstanding anything contained in the Evidence Act, 1872, Section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

11. This clearly authorizes the evidence of the Magistrate as taken in the present case, because it cannot be said that any error in the form of recording or not recording questions or in the form of the certificate is a matter which had injured the accused as to his defence on the merits. Now learned Counsel for the appellant relied on two rulings, one reported in *Emperor v. Patey Singh* (1931) 18 A.I.R. All. 609(Supra). That was a case in which a Bench of this Court referred to the provisions of the Manual of Government Orders, Para. 853-A, Clause (d) where it was stated that the Magistrate should add certain things to the certificate under Section 164, Criminal P.C. The Bench did not hold that the failure of the Magistrate to add these extra observations to the certificate prescribed by law would have any result to make the confession not admissible in evidence. Now we may point out that there is no Section of the Criminal Procedure Code which gives the Executive Government power to make rules to supplement the Code, and whatever value may be attached to the Paragraph in the Manual of Government Orders it cannot have any legal effect as regards the admissibility or inadmissibility of the confession. The next ruling is reported in *Emperor v. Shambu*⁶ In that case the Bench observed that there should be something in addition to the usual stereotyped questions and reference was made to the first ruling referring to the Manual of Government Orders. The same remarks apply. The Bench did not suggest that these matters would have any bearing on the question of admissibility but stated that there would be some effect on the opinion that the Bench would form about the voluntary nature of the confession. Now these two rulings have been considered and commented upon in a Pull Bench ruling of this Court reported in *Muhammad Ali v. Emperor*⁷ This Full Bench ruling dealt with the first case quoted on p. 1555 and with the latter case on pages 1556 and 1557. It was laid down by the Full Bench that where a confession has not been duly recorded the error can be cured by calling evidence under Section 533, Criminal P.C., to show that the confession was duly made, provided that the error has not injured the accused as to his defence on the merits. We are bound to follow this Full Bench ruling as it is dealing exactly with the point which has been raised

before us, and we therefore consider that the Court below was correct in admitting the evidence of the Magistrate on these points. Now reference has been made to a ruling of their Lordships of the Privy Council reported in *Nazir Ahmad v. Emperor*⁸ That was a case in which their Lordships explained on page 899 as follows:

In this case no question of the operation or scope of Section 533 arises and their Lordships desire to express no opinion on that matter. It is here conceded that the Magistrate neither acted nor purported to act under Sec 164 or Sec 864 and nothing was tendered in evidence as recorded or purporting to be recorded under either of those Sections. The matter to be considered and decided is one of plain principle and first importance, namely, is such oral evidence as that of the Magistrate, Mr. Vasisht, admissible?

12. It is clear therefore that the ruling of their Lordships has no application to a case like the present which is one where the memorandum of a confession purporting to have been taken by a Magistrate under the provisions applicable has been tendered on behalf of the prosecution. Learned Counsel for the accused argued that because their Lordships had referred to Sections 164 and 364, Criminal P.C., there fore they would exclude a case like the present where the confession was recorded under Section 79, Gwalior Criminal P.C. We are quite convinced that learned Counsel is mistaken in this argument and that their Lordships meant that their judgment did not refer to cases where a memorandum of the confession purporting to be recorded by a Magistrate in accordance with law was tendered on behalf of the prosecution. What was tendered before their Lord-ships was the evidence of the Magistrate orally, and instead of making a memorandum he had taken rough notes for his own benefit and had not read them over to accused but had been conducted by the accused to various places where things had been pointed out and on his return the Magistrate had had a memorandum made from his notes and had then torn up his notes. That was quite a different case from the case before this Court. On page 900 of the ruling, their Lordships lay down a distinction as regards the difference between a Magistrate and a private person and they point out that whereas a private person might prove a confession orally if made to him, a Magistrate was precluded from doing as and must record the confession under Sections 164 and 364. We consider therefore that the ruling of their Lordships does not in any way refer to a case like the present. At most it may be said that their Lordships made a reference on p. 899 to the Full Bench ruling of this Court and said it was a very wide view. That may be so. But their Lordships did not purport in any way to dissent from it. Accordingly therefore, we consider that the confession as recorded by the Magistrate in Gwalior is admissible in evidence.

13. We have therefore in the present case three matters on which the prosecution rests. Firstly we have the identification of the accused by three witnesses in Gwalior within five months of the dacoity. Those witnesses had ample opportunity to see the accused for long periods at night, both by moonlight and by the light of a lantern, and they were comparatively close to the accused, one of them, the owner of the house, being actually beaten by those dacoits including the accused who entered the house. We have secondly the evidence of the ornaments which were given up by

the accused in Gwalior to the police officer and another witness as part of the property he had stolen in this dacoity. We have thirdly the evidence of the confession of the accused which was eventually retracted by the accused in the Court of the Magistrate and in the Sessions Court. Having regard to this evidence, we consider that the conviction of the accused under Section 396, I.P.C., was correct.

14. There remains the question of sentence. It is true that a man was wounded in this dacoity and eventually died. It is also true that the accused carried a gun in this dacoity. But it is stated that there were several guns carried in this dacoity and none of the witnesses say that the accused was the man who fired the shot which had fatal effects. We do not consider that as a general rule a sentence of death should necessarily follow a conviction under Section 396, I.P.C, and this Section differs from Section 302, I.P.C., in that respect. The rule is under Section 302 that a sentence of death should follow unless reasons are shown for giving a lesser sentence. No such rule applies to Section 396, I.P.C. Accordingly we find no reason in this case why the sentence of death should be imposed. We therefore maintain the conviction of Lal Singh under Section 396, I.P.C., and we reduce the sentence from a Sentence of death to a sentence of transportation for life.

Cases Referred.

- 1(1890) 12 All. 595
- 2(1933) 20 A.I.R. All. 286
- 3(1925) 12 A.I.R. Bom. 529
- 4(1898) 22 Bom. 235
- 5(1929) 16 A.I.R. Mad. 487
- 6(1932) 19 A.I.R. All. 228
- 7(1934) 21 A.I.R. All. 81
- 8(1936) 23 A.I.R. P.C. 253