

# ALLAHABAD HIGH COURT

State

Vs.

Fateh Bahadur

Govt. Cri. Appeal No. 1100 of 1954. , against the order of acquittal passed by Addl. S.J. Bareilly  
(Roy and Sahai, JJ.)

11.02.1954. 18.4.1957

## JUDGMENT

**Roy, J.**

1. This is an appeal on behalf of the State against an order of acquittal of the respondents who are five in number. Fateh Bahadur respondent No. 1 is a boy aged twelve years. He is an orphan and he lives with his uncle Rashik Behari Lal respondent No. 4, Sooraj Prakash respondent No. 3 belongs to the same caste as these two respondents and he is an amateur Homoeopathic practitioner in village Manauna where the respondents reside. Respondent No. 2 is Umrai Gir and respondent No. 5 is Smt. Ram Murti the wife of Umrai Gir.

2. Fateh Bahadur was charged for offences punishable under Sections 302 and 328, Indian Penal Code, in that on the 16th of April, 1953, at about 11 a.m. he committed the murder of Sudarshan Puri by administering a poisonous pera to him knowing that it contained arsenic poison as a result of which Sudarshan Puri died on the same date by about 7 in the evening. The other four respondents were charged for the abetment of the offences under Sections 302 and 328, Indian Penal Code These four were further charged for conspiracy under Section 120-B of the Code read with Section 302 of the Indian Penal Code.

3. The facts on which the case for the prosecution had been founded may be briefly stated. About fifty years ago one Baba Kedar Gir of village Manauna had made Baldeo Puri his chela and had given him the name of Baba Ram Gir. The gaddi of Baba Kedar Gir had devolved on Baba Ram Gir. According to the tradition of that gaddi the incumbent of the gaddi has to observe celibacy and has to remain a bachelor; and it is enjoined that in the event of his marriage, he must appoint a chela who has to remain a bachelor during the lifetime of his guru. The above tradition was not strictly followed, Baba Ram Gir had married about ten or twelve years after he had succeeded to the gaddi. About a year after his marriage, he had appointed Umrai Gir respondent who was then about ten or twelve years of age as his chela. Consequent upon such appointment Umrai Gir renounced his natural parents and treated his guru in somewhat the same fashion as an adopted son treats his adoptive father. After about 5 or 6 years of such appointment Umrai Gir fell into

evil company. He was ultimately involved in a dacoity case and was prosecuted, convicted and sentenced to seven years' rigorous imprisonment. He served out his sentence about fifteen years ago and on his return from jail he lived with Baba Ram Gir for about five years. Ram Gir wanted to bring him to proper course of conduct and to mend his ways, but he failed in his attempt and Umrai Gir did not improve himself. Ram Gir had therefore to revoke his chelaship some time about ten years back. Since then Umrai Gir had been living in the Rath-Khana of Baba Ram Gir which is close to the residential house of the latter. About eight or nine years ago Umrai Gir married Smt. Ram Murti respondent. Baba Ram Gir then made one Randhir Gir aged about seven or eight years as his chela, but this new chela could not live with him for more than two or three years because of the alleged high handedness of Umrai Gir. Baba Ram Gir was then on the lookout for another chela and on the 14th of May, 1952. he formally initiated his daughter's son Sudarshan Puri, who was then about nine or ten years of age, as his chela. It is said that Umrai Gir was not happy over the prospect of Sudarshan Puri being made chela and being finally installed on the gaddi. Notwithstanding the opposition of Umrai Gir. Sudarshan Puri was made the Chela and was given the name of Bhagwan Gir. Baba Ram Gir on account of the association of Umrai Gir with him for a number of years, however, took kindly to him and instead of turning him out from his house, he allowed him to live in his Rath-Khana which was close to his residential house. The relations between the two apparently continued to be cordial. It is, however, suggested that Sudarshan Puri was not looked upon by Umrai Gir with favour and he had to all intents and purposes become an eye-sore to him. It is said that as against that background the present offence had been committed.

4. The prosecution alleged that on the 13th or 14th of April, 1953, at about 10 a.m. Umrai Gir, Rashik Behari Lal and Sooraj Prakash accused' assembled at the shop of Sooraj Prakash in the village when the poisoned pera containing arsenic was prepared by Sooraj Prakash in order that the same might be administered to Sudarshan Puri through Fateh Bahadur accused. It is said that on the 14th of April, 1953 at about 3 p.m. this poisoned pera had been handed over at the gate of his house by Umrai Gir to Fateh Bahadur. It is also said that Smt. Ram Murti the wife of Umrai Gir was standing by the side of her husband at that time and Rashik Behari Lai and Sooraj Prakash accused were then sitting on a cot at some distance. The prosecution further alleged that on the 16th of April, 1953, at about 11 a.m. when Sudarshan Puri and Fateh Bahadur were returning from the school in village Manauna - both having been class-mates and were reading-in Class V of the school- and had reached near the shop of Jurri P. W. 2 which is about 500 paces from the school, Fateh Bahadur gave the poisoned pera to Sudarshan Puri. That place is said to have been at a distance of about 50 or 60 paces from the house of Baba Ram Gir. Sudarshan Puri, it is contended reached his house in the process of eating this pera and part of it was still in his hand when he was asked by Smt. Tikam Devi his maternal grand-mother who was drawing water from the well just outside the inner court-yard of the house as to what he was eating. It is said that Sudarshan Puri told her that a pera had been given to him by Fateh Bahadur who was extremely solicitous that he should eat it. The prosecution contended that when this talk was going on between Sudarshan Puri and Smt. Tikam Devi, two of the younger sisters of Sudarshan

Puri, namely, Smt. Pirya Darshani and Smt. Madhuri Devi approached Sudarshan Puri and he divided between them the remaining portion of the pera which they also took. At that time two" elder sisters of Sudarshan Puri, namely, Saroj P. W. 4 and Sarla P. W. 13 were in the house but Baba Ram Gir P. W. 12 was in his Khalyan, which was at a distance of about 150 paces towards the south of his house. Smt. Tikam Devi shortly afterwards asked Sudarshan Puri to have his bath so that he may take his food. Sudarshan Puri, it is said, told her that he was feeling giddy and he stretched himself on a cot. Some time thereafter he started vomiting. Pirya Darshani and Madhuri Devi also became sick and developed similar symptoms. At this stage, the prosecution contended, Umrai Gir and Smt. Ram Murti arrived there and inquired about the welfare of the children. Tikam Devi told them that all the three children had become sick as the result of taking a pera which had been given to Sudarshan Puri by Fateh Bahadur. The three children had become unconscious by this time. Tikam Devi asked Kumari Sarla to go and bring Baba Ram Gir from his Khalyan so that arrangements may be made for the removal of the children to hospital in Aonla, which was at a distance of about 1¼ miles from their house. The prosecution contended that when Km. Sarla had gone to fetch Baba Ram Gir, Umrai Gir accused also went out of the house leaving Smt. Ram Murti there. Presently, it is said, Umrai Gir returned to the house with Sooraj Prakash and Rashik Behari Lai respondents. Sooraj Prakash examined the three children and declared that they were suffering from cholera. Sooraj Prakash administered some medicine to all the three children. By that time Baba Ram Gir also arrived at the house and he was followed by Babu Ram P. W. 14 and Pitam P. W. 15 who are residents of village Manauna. Shortly after Sudarshan Puri had been given the medicine, he is said to have regained consciousness and then Smt. Tikam Devi asked him as to how he was feeling. Sudarshan Puri had then said, as disclosed by the prosecution, that since he had eaten the pera which Fateh Bahadur had given to him he was not feeling well. It was further said that at that stage he had pointed out his finger at Rashik Behari Lai and had disclosed the identity of Fateh Bahadur by saying that Fateh Bahadur was the nephew of this Rashik Behari Lal. The prosecution contended that thereafter Umrai Gir, Rashik Behari Lai and Sooraj Prakash had some consultation between themselves in the court-yard of the house and then the three of them went away but they came back after a short while and then Sooraj Prakash accused had taken out from his pocket a small phial of some whitish medicine and had administered a few drops of it to Sudarshan Puri with the help of a spoon. On taking this medicine Sudarshan Puri complained of great burning sensation in his stomach and had asked for water to drink but Sooraj Prakash discouraged it' and suggested that no water should be taken lest the medicine shall not have its proper effect. Sudarshan Puri had then several purgings and he again became unconscious. The prosecution contended that Tikam Devi and Baba Ram Gir insisted that the children should be taken to the hospital at Aonla, but Sooraj Prakash, Rashik Behari Lai and Umrai Gir discouraged that idea and Sooraj Prakash held out that the children would be cured under his own treatment and that it would be unnecessary to take them to the hospital. Upon further insistence Umrai Gir respondent is alleged to have said that he would fetch the doctor from Aonla, but he never did so with the result that the condition of Sudarshan Puri continued to deteriorate and he expired at about 7 p.m. Umrai Gir and Rashik Behari Lai, it is alleged, returned a little before the death of Sudarshan Puri to say

that they could not contact the doctor. Notwithstanding " the suspicious circumstances in which the three children, it is said had suddenly got sick and were seized with attacks of vomiting and purging as a result of the taking of the pera. and notwithstanding the effort on the part of the accused to dissuade Baba Ram Gir to get the services of a qualified doctor, it was not considered necessary, surprisingly enough, for Eaba Ram Gir and for his other helper; to send the two girls to the hospital, although Sudarshan Puri was dead and although the police station and the hospital at Aonla were situate within a distance of about 1¼ miles from them and no report of the occurrence was lodged by Baba Ram Gir.

5. It was alleged by the prosecution that at about 7 p.m. on that date Lakhan P. W. 1 who was the Chowkidar of village Manauna had gone to the shop of Babu Ram P W. 14 of the same village where he found Babu Ram and Kashi Ram P. W. 11. Lakhan stated that he learnt from them that Sudarshan Puri had died just then at the house of Baba Ram Gir and that his death had occurred as a result of something which had been given to him to eat. The Chowkidar did not take the trouble of contacting Baba Ram Gir, nor did he care to proceed to acquaint himself with the real facts attending on the death of the boy. According to him he proceeded straight to police station Aonla, reaching there at about 8 p.m. where he orally delivered a cryptic description about Sudarshan Puri's death. At the time of the making of that report the station officer and the second officer both happened to be absent. Sub-Inspector Abdul Majid Khan who was then second officer at police station Aonla and was later on reverted as Head Constable received a copy of that report at about 8-30 p.m. when he was at railway station Aonla where he had gone to hold the inquest on the body of a dead person who had died in a railway train. Abdul Majid Khan proceeded from the railway station to village Manauna, reaching there at about 10 p.m. on the same night.

He found the dead body of Sudarshan Puri lying on a cot at the house of Baba Ram Gir and he also found the two girls Pirya Darshani and Madhuri Devi lying ill and unconscious. He suspected from the information that he gained at the spot that the pera was poisoned and he arranged for the removal of Pirya Darshani and Madhuri Devi to Aonla dispensary for treatment. It is said that after having sent these two girls to the hospital, he held an inquest over the dead body of Sudarshan Puri, recovered the vomited and purged matter and the garments of Sudarshan Puri and he examined a number of important witnesses on the same night by about 2 a. m. Fateh Bahadur is said to have been arrested by him on 17th of April, 1953, at 8 a. m. He arrested the other four accused on the same date. He searched the house of Sooraj Prakash on 17th of April, 1953, at 10-30 in the day and recovered nine phials of drugs one of which bore the label of Liqr. Arsenicalis P. B. I. M. S. Laboratory Limited, Lucknow, and another Phial bore the label of Liqr. Arsenicalis P. B. Verma Medical Stores, Chandausi. On the 17th of April, 1953 he examined some more witnesses and he returned from village Manauna to police station Aonla at 4-30 P. M. with all the five accused and his return was entered in the general diary of the police station at that hour.

6. On the 18th of April, 1953, Fateh Bahadur respondent, when he was still in police custody was

put up before Sri Bhawani Shankar an Honorary Special Magistrate and a statement Ex. P-9 in the nature of a confessional statement was forthwith recorded by him. This confessional statement came in for a lot of criticism by the learned Sessions Judge and the learned Sessions Judge did not rely upon it not only because it was recorded in a most slipshod and unusual manner, but also because the learned Magistrate did not follow the ordinary rule of prudence that the person who is going to make a confession should not have the idea that the influence of the police would be standing against him both at the time of the making of the confession and even thereafter when he would be handed over to the police. The confessional statement is Ex. P-9 on the record and it is recorded in the form of questions and answers. The preliminary questions were directed to indicate that the person making the confession was before a Magistrate; that the confessor was not compelled to give his statement. He was asked as to whether or not he had been induced or coerced by the police and was told that if he made a confession, he will be let off. No warning was given by the Magistrate to Fateh Bahadur at the time of the recording of the confession that if he made a confession, it may be read against him and may be used as evidence against him to secure his conviction. In answer to the last question Fateh Bahadur gave a long statement covering about half a page of the printed paper-book setting out the circumstances in which he had been made to give the poisoned pera to the deceased.

After having gone through the statement of the learned Magistrate who recorded the confession, and after having looked into the circumstance that this confession had been retracted by Fateh Bahadur, and also having carefully considered the facts and circumstances of the case and the evidence on the record we are of opinion that the learned Sessions Judge was right in not attaching any importance to this alleged confession and in not relying upon it in support of the charge. A prisoner in police custody brought before a Magistrate for the purpose of having his confession recorded does not cease to be in the custody of the police merely because the police officer waits outside the room when the statement is recorded. In recording the confession of a prisoner fresh from the hands of the police the Magistrate should have done well by exercising a sound discretion if before recording it he were to give the accused a short time to enable him to think over the question independent of any influence of the police and to decide whether or not he would make a confession. When a request is made by the police to a Magistrate to record the confession of an accused under Section 164 of the Code of Criminal Procedure it is the duty of the Magistrate to remove the accused from all police influence, to warn him that his statement will be used against him, to give him time to think over the consequences of such a confession and to satisfy himself that the statement made was a voluntary one. Not only does the law impose a responsibility upon the Magistrate to follow these rules, but also as a matter of prudence a grave responsibility is cast on Magistrates to act with reasonable care and caution in the matter of recording the confession of an accused person, more especially the statement of a child who was barely twelve years of age on that date. The Magistrate did not make any attempt to find out as to how long Fateh Bahadur had already remained in police custody. The confession is a long narrative of facts and contains a wealth of details and according to the Magistrate himself it gave him the impression that the boy had been tutored to make the statement. That was evident from the artificial make-up of that statement. It was on that account that the Magistrate recorded a note

at the foot of that confession by saying that at first, it was thought that the statement was crammed. According to the Magistrate the boy proved to be very intelligent and when the Magistrate tried to test the veracity of the statement by reversing the sequence of things the Magistrate gained the impression that the statement that he gave was without any undue pressure or inducement. The contention that was advanced on behalf of Fateh Bahadur was that he had been beaten and coerced by the police to make that statement.

Why he wanted to make a confession was not easy to comprehend. After having given our earnest consideration to the method and the manner in which the alleged confession was recorded we are driven to the conclusion that the value of the confession was nil.

7. Coming now to the medical evidence on the record it appears that Dr. Israr Ahmad the Medical Officer of Aonla dispensary examined Pirya Darshani and Madhuri Devi on 17th of April, 1953, at about 8-30 in the morning and he suspected that the two girls were the victims of poisoning. He sent the stomach wash of the two girls in two sealed bottles to the Station Officer of police station Aonla on the same date.

The Chemical Examiner's report indicated that no poison was detected in the stomach wash of the two girls.

8. The Civil Surgeon of Bareilly conducted the post-mortem examination on the dead body of Sudarshan Puri on 18th of April, 1953, at 9-55 in the morning. He found the nails of thumbs and fingers blue. The skin at tips of fingers and thumbs was cyanosed. The membranes of the brain were hyperaemic. Both lungs were congested. Both sides of heart contained blood and ecchymosis under the endocardium and in the muscles of the left ventricle. The liver, the spleen and the kidneys were congested. ,

Examination of the stomach revealed that the mucous membrane was swollen and softened and there were patches of congestion. The stomach had four ounces of brownish watery fluid with flakes of mucous and gritty whitish sandy particles which were also embedded in the mucous membrane. The small intestines showed that mucous membranes were swollen, flabby and congested. The viscera was preserved by the Civil Surgeon for examination by the Chemical Examiner. In the opinion of the civil Surgeon death was due to arsenic poisoning.

9. The report of the Chemical Examiner indicated that arsenic was detected in portions of viscera of Sudarshan Puri and traces of arsenic were also discovered in the vomits of Sudarshan Puri. Traces of opium were also discovered in portions of the viscera of Sudarshan Puri. Arsenic was also detected by the Chemical Examiner in two of the phials bearing the labels Liquor Arsenicalis P. B., I. M. S. Laboratory Limited Luck-now, and Liq. Arsenicalis P. B. Verma Medical Stores Chandausi, and opium was detected in one of the phials marked as Tinct. Opii Camphoreta B. P. 48 Bengal Chemical and Pharmaceutical Works Limited, Calcutta. The report of the Chemical Examiner did not disclose any result on the basis of a quantitative test.

10. As has been observed by Modi in his "Medical Jurisprudence", Twelfth Edition (1955") at page 513, when administered in a soluble form by the mouth, arsenic gets absorbed into the

blood almost in a few minutes, but when taken in solid lumps, it may not be absorbed by the stomach and sometimes passes out with the faeces without producing any poisonous symptoms. The report of the Chemical Examiner in our opinion is wholly insufficient to prove that the cause of death of Sudarshan Puri in this case was arsenic poisoning. A very small and harmless quantity of arsenic can be detected by the Reinsch or Marsh test. As far back as 1930 a Bench of this Court held in *Emperor v. Sikandar*<sup>1</sup>, that it is of the utmost importance in a case of arsenic poisoning that the prosecution should prove that a lethal dose of arsenic, that ; is, two grains or upwards, had been administered. In India arsenic is used as a medicine in all

<sup>1</sup> AIR 1930 All 532

manner of diseases. It is therefore impossible to take the mere evidence that arsenic was detected as sufficient to prove conclusively that death was from arsenic poisoning. It is of the utmost importance before a Court can find any individual guilty of murder by the administration of arsenic that a very much more complete analysis should be made than as in this case. That such analysis has been made in India in the past is clear from a reference to Dr. Cheyer's Medical Jurisprudence published in 1870, where he observed at page 116:

"Dr. Macnamara discovered considerable quantities of arsenic in both stomachs."

Given the necessary knowledge and the necessary instruments, modern science has no difficulty in coming to a conclusion as to the approximate quantity administered.

11. A similar question came up for consideration by another Bench in *Happu v. Emperor*<sup>2</sup>, and there too it was observed that if the prosecution wishes to establish that the deceased died of arsenic poisoning by means of the Chemical Examiner, and weight is to be attached to his evidence, it must be proved that at least two grains of arsenic were administered to the deceased before death. He can do this by proving the discovery of this amount in the body of the deceased or by accounting for its absence in part. He may attribute the loss to vomiting, purging or the natural elimination of the poison from the body before death. It was further observed in that case that where a man's life is in the balance and where the whole case depends upon an answer to the question whether a fatal dose was or was not administered to the deceased, it is a matter for consideration whether the Sessions Court should not, whenever it is of opinion that such action is necessary for the ends of justice, exercise its right to call the Chemical Examiner so that he may be examined on oath and subjected to cross-examination; and that when a report is received from the Chemical Examiner containing a quantitative analysis it should be shown to the medical officer who conducted the post-mortem examination so that he will be in a position to state what are the medico-legal inferences to be drawn from the report. In the present case there is complete absence of evidence on the point.

12. Before we deal with the other evidence on behalf of the prosecution we will briefly state as to what was the defense of the accused. All of them pleaded that they were innocent. Fateh Bahadur denied that he had given any poison to Sudarshan Puri. About the confession Ex. P-9 he stated that

he was beaten by Sub-Inspector Jagat Singh and Sub-Inspector Abdul Majid and they had threatened him with dire consequences if he did not make a confession. Umrai Gir Smt. Ram Murti, Rashik Behari Lai and Sooraj Prakash denied that they hatched any conspiracy to bring about the death of Sudarshan Puri. Umrai Gir admitted that Baba Ram Gir had appointed him as his chela about thirty years ago but he denied that he was ever removed from the chelaship. He admitted that Baba Ram Gir appointed Sudarshan Puri as his chela on 14th of February, 1952, but he denied that he had ever offered any opposition to the appointment of Sudarshan Puri as such. He denied that any pera was ever prepared in his presence at the shop of Sooraj Prakash accused or that he ever gave it to Fateh Bahadur for any purpose whatsoever.

<sup>2</sup> AIR 1933 All 837

He admitted that on 16th of April, 1953, at about noon he had gone to the house of Baba Ram Gir where he found his wife Smt. Ram Murti present. He noticed Sudarshan Puri and his two sisters lying sick and vomiting and purging. He went to the Khalyan of Baba Ram Gir, fetched him and he suggested to him that the Children should be removed for treatment to the hospital in Aonla, but that suggestion was not accepted and they said that they would first try Sooraj Prakash accused who was practicing in medicine in the village. He denied that he discouraged Ram Gir or his wife from taking the children to the hospital. Smt. Ram Murti's defence was in line with that of Umrai Gir. Sooraj Prakash denied that he had prepared any pera at his shop on the 13th or 14th April, 1953, or at any other time. He further denied that any pera was given in his presence by Umrai Gir to Fateh Bahadur. He contended that he was amateur Homoeopathic practitioner and he treats such patients who come to him voluntarily. He stated that on 16th of April, 1953, at about 1 p. m. Kumari Sarla P. W. 13 came to his house to take him to the house of Baba Ram Gir. When he went there he found Sudarshan Puri, Pirya Darshani and Madhuri Devi lying ill and they were vomiting and purging. He was asked by the wife of Baba Ram Gir to treat the children and to give them some medicine. He was not told that the children got ill after taking a pera. He found that the symptoms were akin to the symptoms of cholera and on that assumption he treated them till about 3 p. m. As he found that their condition was deteriorating, he advised them that a doctor from Aonla should be summoned. No doctor, however, came and the boy expired at about 7 p. m. As regards the recovery of the bottles of medicine Exs. 4 to 12, Sooraj Prakash admitted the recovery of some of them in his absence from his shop, but he denied that the bottles with the labels mentioned above were at his shop or had been recovered from there. Rashik Behari Lai too denied that any pera was ever made in his presence at the shop of Sooraj Prakash or that such a pera was ever given by Umrai Gir to Pateh Bahadur in his presence. He admitted that upon hearing that Sudarshan Puri and his two sisters had become ill, he had gone to the house of Baba Ram Gir at about 1-30 p. m. in the day on 16th of April, 1953, but he contended that he stayed there for about five minutes only when he returned to his house.

13. In order to support the contention that the pera had been prepared with the poison by Sooraj Prakash accused at his shop in the presence of Umrai Gir and Rashik Behari Lai accused at about 10 a. m. on 14th of April, 1953, two witnesses were examined on behalf of the prosecution, namely, Behari Lal and Ram Sarup. Behari Lal stated that about nine months ago at about 10 a.

m. he had pain in his stomach and he had gone to the shop of Sooraj Prakash in order to obtain medicine for himself.

On reaching the shop of Sooraj Prakash, he found that Sooraj Prakash, Umrai Gir and Rashik Behari Lal were sitting and Sooraj Prakash was holding a tray in his hand and there was a pera on top of the tray. Sooraj Prakash was then spreading a whitish powder over the pera. The witness asked Sooraj Prakash to give him medicine for his pain, but Sooraj Prakash told the witness to come back after about an hour. The witness left the place quietly and as he was returning from the shop of Sooraj Prakash he had seen Ram Sarup P. W. 17 in front of that shop. This Ram Sarup resides in village Kasumra and was apparently suffering from eye-trouble. Behari Lal witness admitted that he had never before that day gone to the house or shop of Sooraj Prakash and that he did not again go to him on that day to obtain any medicine. As has been observed by the learned Sessions Judge the evidence of this witness was exceedingly lame, halting and unconvincing. It sounds improbable that the three accused would have allowed themselves to prepare a poisoned pera in so open and reckless a manner as was suggested by this witness. There is another very important factor in the evidence of Behari Lal which goes to show that he is not a truthful witness. He stated that on the very next day after he had seen the three accused engaged in the making of the pera he had learnt at about sunset that Sudarshan Puri had died. As a matter of fact Sudarshan Puri died, according to the prosecution story, not on 15th of April, that is one day after the making of the pera, but on 16th of April. Ram Sarup P. W. 17 who tried to support the evidence of Behari Lal, was not able to convince the Sessions Judge, and we think rightly, that he had gone to Sooraj Prakash on that date from his village Kasumra for medicine for his eye. There were two practising Hakims in his own village and he did not care to consult them or anyone else nearer home after his unsuccessful visit to Sooraj Prakash on that date. The evidence on the question of the preparation of the pera was therefore much too unconvincing.

14. In order to support its suggestion that Umrai Gir accused gave the pera to Fateh Bahadur accused for administration to the deceased boy, two witnesses namely, Mehdi Hasan P. W. 18 and Abdur Rahim P. W." 19 were produced. Both of them stated that about nine months earlier at about 3 p. m. when they were returning from their fields and had reached the gate of the house of Umrai Gir they had seen that Umrai Gir and his wife and Fateh Bahadur accused were standing at the gate and they also saw Umrai Gir giving a pera to Fateh Bahadur. According to them they had also seen Sooraj Prakash and Rashik Behari Lal sitting on a cot further inside the gate. According to these two witnesses they never stopped at the gate of Umrai Gir. It appears highly improbable that whilst they were passing on the road as simple way-farers they should have noticed with great precision the various details to which they have made reference in their statement particularly when they are alleged to have seen a matter which was a matter of no importance or interest to them. Their evidence on intrinsic merit was not worthy of reliance. Moreover, Abdur Rahim witness admitted that he had a quarrel with Umrai Gir the accused on the occasion of Moharram about three years ago. The other witness Mehdi Hasan is a cousin of Abdur Rahim. Upon his own showing Abdur Rahim appeared in a number of police challaned

cases. No reliance can therefore be placed with safety upon the testimony of such witnesses.

15. The next witnesses who come in the sequence of events are Natthu Lal P. W. 3 classmate of Sudarshan Puri deceased and Fateh Bahadur accused and Sri Ram Prasad the Head Master of the Primary School at Manauna. According to the evidence of Natthu Lai, he had found a pera wrapped in a piece of paper in the upper pocket of the shirt of Fateh Bahadur on the very day at 11 a.m. and the same evening after sunset he had learnt that Sudarshan Puri had died.

It is said that on the following day he conveyed the information to the Head Master that he had noticed the pera in the pocket of Fateh Bahadur. The learned Sessions Judge was right in observing that it would require an uncanny and super-human sense to detect what contained in the paper inside the pocket and that it was nothing else but a pera.

16. Next in point of time comes a set of two witnesses, namely, Jurri and Chhadammi Singh who have deposed about their having seen Fateh Bahadur accused giving the pera to Sudarshan Puri. Jurri has a grocer's Shop which is about 500 paces towards the south of the school and about 50 or 60 paces off from the house of Baba Ram Gir. He stated that on the day of occurrence, that is, on 16th of April, 1953, at about noon he was sitting on the open Chabutra in front of his shop when Chhadammi came to make some purchases from him, and he saw Sudarshan Puri and Fateh Bahadur coming from the side of the school and when these two boys had reached near his chabutra he found Fateh Bahadur giving a pera to Sudarshan Puri and then the two boys ran away towards the house. According to him the two boys had not stopped near his shop when the pera was handed over. He also stated that Fateh Bahadur had two peras. Chhadammi Singh tried to corroborate the simple story given by Jurri, but he contradicted him in various details. He stated that he had seen Fateh Bahadur taking out a pera which was wrapped in paper; that the paper wrapping was ripped open and the paper was thrown down on the ground. He further stated that Fateh Bahadur had drawn out only one pera and not two from his pocket and he contradicted Jurri on that point. Apart from the circumstance that in a hot month in the middle of April it was not possible for these two persons to sit in the open sun on a chabutra in order to detect the facts stated by them, the contradictions which were brought out in the evidence of these two witnesses robbed their testimony of truth.

17. The other set of witnesses who stated about what happened after the pera had been eaten by the deceased and had been passed on to the two sisters was vouched to by Kumari Saroj, Smt. Tikam Devi, Baba Ram Gir, Kumari Sarla, Babu Ram and Pitam. Their evidence appears to us to have been properly appraised by the learned Sessions Judge and no reliance could safely be placed upon them on account of the unnatural story told by them. It was admitted that soon after the death of Sudarshan Puri hundreds of persons of the village had gathered in the village at the house of Baba Ram Gir. Sub-Inspector Abdul Majid had arrived at the house of Baba Ram Gir at about 10 p.m. on 16th of April, 1953, upon receipt of the cryptic information conveyed in the report made by Lakhan Chowkidar. The primary object of the visit of Sub-Inspector Abdul Majid Khan was to hold an Inquest over the body of Sudarshan Puri who was suspected to have died of

poisoning and to make an informal probe, in the nature of an inquiry, into the circumstances pertaining to the death of the boy.

No case had been registered till then in connection with the death of Sudarshan Puri. Baba Ram Gir stated that he did not make any attempt to send any information about this incident to the police station before the arrival of the Sub-Inspector at his house at about 10 or 11 in the night. He had also made no attempt to send Pirya Darshani and Madhuri Devi to the hospital even after the death of Sudarshan Puri. The two girls it must be remembered, had been sent to the hospital after the arrival of the Sub-Inspector. Baba Ram Gir also admitted that the Chowkidar of his village had never come to his house and that he learnt for the first time from the Sub-Inspector of police after he made his appearance at the spot of that the chowkidar had made report about the death of Sudarshan Puri at police station Aonla. Having regard to all the surrounding circumstances of the case it was difficult to place implicit reliance upon the testimony of these witnesses.

18. Some comment was made by the learned Sessions Judge regarding the investigation of the case and he was of the opinion that the conduct of Sub-Inspector Abdul Majid Khan was not above board. In coming to that conclusion the Learned Sessions Judge from a perusal of the case-diary after arguments discovered that in that case-diary just after the entry of the report by Lakhan Chowkidar there was the next entry of report made by the Sub-Inspector himself at the Thana on 17th of April, 1953, at about 4 p. m. indicating that he had returned to the Thana at that hour after concluding the investigation up to that time. The learned Sessions Judge stated in his judgment that this aspect of the case-diary was discovered by him when he subjected it to close scrutiny some time after he had obtained the opinion of the assessors in the case and therefore Sub-Inspector Abdul Majid Khan could not be confronted with that fact after he was in the witness-box. The learned Sessions Judge was, however of the opinion that the provisions of Clause (2) of Section 172 of the Code of Criminal Procedure empower a criminal court to use the police diaries of a case under enquiry or trial before it, not as evidence in the case, but to aid it in such enquiry or trial, and that although the power should be sparingly used, but there cannot be a more legitimate use of this power than in the present case Section 172 of the Code of Criminal Procedure does not give a criminal court an unfettered right to make such use of a case diary. Sub-clause (2) of Section 172 says that any Criminal Court may send for the police diaries of a case under inquiry trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. It further says that neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police-officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer the provisions of the Indian Evidence Act, 1872, Section 161 or Section 145, as the case may be, shall apply. The words

"if the Court uses them for the purpose of contradicting such police-officer, the provisions of the Indian Evidence Act, 1872, Section 161 or Section 145,' as the case may be, shall

apply"

are important and they regulate the procedure and the power which can be exercised about the matter. In *Habeed Mohammad v. State of Hyderabad*<sup>3</sup>, the Supreme Court has laid down that a Judge is in error in making use of the police diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in those diaries; and that the only proper use he could make of these diaries is the one allowed by Section 172.

The learned Sessions Judge relied upon a decision of the Calcutta High Court in *Peary Mohan Das v. D. Weston*<sup>4</sup>, in support of his view that the case diary could have been used by him in the manner that he has done. We have looked into this decision and we do not think that it goes that length, it only says that the object of recording case-diaries under Section 172 Criminal Procedure Code, is to enable Courts to check the methods of investigation by the police, and if this object is defeated in the case and if the recording of the matter in case-diaries from day to day is deliberately disobeyed by the police during the most important period of the investigation, it is a

<sup>3</sup> AIR 1954 SC 51

<sup>4</sup>16 Cal WN 145

circumstance which is to be reckoned with. This decision nowhere lays down that without confronting the police officer who had prepared the case-diary in terms of Section 161 of the Indian Evidence Act the case-diary can be used, in the manner in which it has been made use of in the present case. The use made of the police diary by the learned Sessions Judge was therefore inconsistent with Section 172, sub-clause (2) of the Code of Criminal Procedure and was improper. Having regard, however to the other circumstances and to the evidence on the record and looking to the proceedings as a whole we are of opinion that the ultimate decision of the case by the Sessions Judge was correct and that the evidence that was produced on behalf of the prosecution did not at all support the charge against the respondents.

19. After having carefully gone through the evidence and after having given a patient hearing to counsel for the parties we are of opinion that there are no compelling reasons to drive us to the conclusion that this State appeal should be accepted. Accordingly we dismiss this appeal.  
Appeal dismissed.