

Dr. Jainand Vs. Rex.

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Court : Allahabad

Decided On : Oct-08-1948

Reported in : 1949CriLJ498

Judge : Bhargava, J.

Appellant : Dr. Jainand

Respondent : Rex.

Judgement :

Bhargava, J.

1. Dr. Jainand Taga, a Homeo, path, and his compounder, Kali Charan Brahman, were tried by the Additional Sessions Judge of Meerut for offences punishable under Sections 302/34 and 201, Penal Code. The charge against them was that, in furtherance of their common intention, they had, on the night between 19th and 20th May 1947, committed the murder of Karan Singh at the residence of the doctor in Collectorganj, Hapur, and, on the following morning, they had removed his dead body to Kalinadi bridge at Samrauli for disposal, in order to cause the evidence of the commission of murder to disappear with the intention of screening the offender. The learned Sessions Judge found Jainand alone guilty of murder and convicted and sentenced him to death under Section 302, Penal Code. He also found both Jainand and Kali Chacan guilty under 8. 201, Penal Code, but in view of his conviction under Section 302, Penal Code, Jainand was not convicted

under Section 201, Penal Code, and Kali Charan alone was convicted thereunder and sentenced to rigorous imprisonment for three years. Jainand and Kali Charan have preferred an appeal and the reference made by the learned Sessiona Judge for the confirmation of the sentence of death imposed upon Jainand is also before us.

2. Karan Singh deceased and his brothers Kanwal Singh, Kirpal Singh and Brijpal Singh lived in village Bigas, where they had their anoescral house and landed property. Karan Singh was married to Srimati Parmeshri Devi, daughter of Srimati Hukumdevi, and they had two daughters. Hukumdevi lived in village Phuldera. Karan Singh came into contact with Jainand appellant in connection with the treatment of his wife and daughter and eventually they became friends, and members of the two families off and on exchanged riatis. In November 1946, Karan Singh came to Hapur with his wife and children and stayed with the appellant Jainand at his house until about the middle of April 1947, when he went to live with his mother-in-law in Phuldera. He took up service as a clerk on daily wages at the Government Live-Stock and Dairy Farm at Babugarh. Sometimes he used to stay at the farm and at other times he used to return to Phuldera in the evening. It is said that on the morning of 19th May he was at Phuldera and left that place the same day. He was on duty at the farm for the last time on 19th May. He was not seen alive after that date.

3. The prosecution story begins with the discovery of a dead body tied in a piece of gunny bag, lying in the drain of a field near the Kalinadi bridge, close to the Nikai Park Road, within the boundary of the jungle of village Samrauli, and the recovery of a khaki jhola containing a ball of moonj string and one dirty dhoti of thin border, lying at a distance of 8 or 10 paces from the dead body. The bridge was under repairs and a large number of labourers used to work on the bridge from early morning till about 4 P. M. One of the labourers, Murli, (p. W. 8) noticed the bundle containing the dead body when he had gone to ease himself, at about 2 or 2-30 P. M. on 20th May 1947, lying in a ditch 20 or 25 paces from the bridge and the jhola waa lying some distance away from the bundle. He informed the beldar, Dal Chand (P. W. 27), who in his turn informed the 'Babu' there, who sent for Ganga Saran Mukhia (p. w. 9). The Mukhia called Inderjit Singh Chowki-dar (P.

W. 2), who lodged the report at Police Station, Hapur, at 5-30 p. M. on the same day, viz., 20th May 1947, (ex. p-4).

4. Sub-Inspector, Ram Ohander Singh, the Station Officer of Hapur Police Station was present when the report was made; and he proceeded to the place where the dead body was found. He found the bundle lying in a khai on the border of a field. The bundle was brought to the road and it was opened there. There was a dhoti wrapping the bundle; inside the dhoti was a gunny bag tied with a rope; inside this gunny bag was found a smaller gunny bag; inside the smaller gunny bag was the dead body wrapped up in a dutahi and tied with a rope; and inside the dutahi were found two chadars, a pillow with a cover and a dart piece with the dead body on which there was a blue knicker and a hanyain. He prepared a recovery list of these articles (Ex. P-5). He held an inquest on the dead body and then sent it to Meerut for postmortem examination with Munshi Singh Constable. He tried to have the dead body identified but no one present there could identify it. So he submitted a report (Ex. p. 40) requesting the Deputy Superintendent of Police at Meerut to have the dead body photographed, He also made a report that the finger prints of the dead body be taken.

5. On the report (ex. p-40) there is an endorsement, which purports to have been made by Abdul Haq, who described himself as the photographer of District Intelligence Staff, Meerut, to the effect that the photo of an unidentified body had been taken and there was nothing in particular. But the endorsement is undated; and has not been proved. Munshi Singh had started from the place where the dead body was recovered at about 6-30 or 6 P. M., on 20th May 1947. The constable had to cover a distance of about 18 or 20 miles. So by the time the dead body reached Meerut and some arrangement was made for photograph being taken it must have been dark and the photo could not have been taken on that day. Apparently, therefore, the photo was taken on the next day, viz., 21st May 1947. It is said that Ex. P-2 is a print of the photo which was taken. The appellants deny that this is the photo of Karan Singh. Another photo (ex, p-2), which is said to be of Karan Singh, has also been produced. We do not know if any finger prints were taken; at least none have been produced in this case.

6. The post mortem on the dead body was conducted on 21st May 1947, at 9.30 a. m. and it revealed that the dead body was of a well-nourished person, that the face was bloated and dark and blood was sticking to the nostrils and that there were two incised wounds ; (1) incised wound 5 1/2' x 1 1/2' x 1 1/2' on the left side neck; the inner end of the wound being 3' above the inner end of the clavicle; and (2) incised wound 4' x 1 in depth joining wound NO. 1 and separated on surface by a bridge of skin 1' wide. In the opinion of the Civil Surgeon, who conducted the post mortem examination, the injuries might have been caused by a sharp-edged weapon, which may be a gandasa or an axe; that they could also have been caused by a sharp-edged and heavy hallam that death should have occurred within a few minutes of the attack; that the deceased might have cried once; and that the deceased might have taken his meals 4 or 5 hours before he was murdered.

7. On 23rd May 1947, at 6-30 p. m., Parmeshri Devi appeared at Police Station, Hapur. She was accompanied by her mother, Hukamdevi of Phuldera, Kirpal Singh and Kanwal Singh her husband's brothers, Sarup Singh Jat of Phuldera, her own maternal uncle, and Hukam Singh Mukhia of Kunia Kaltanpur. She made a statement before Sub-Inspector Ram Chander Singh and expressed her

strong suspicion that her husband Karan Singh had gone to Dr. Jainand on Monday by the evening train and had put up with him during the night and that Dr, Jainand had killed him in that very night and had got his dead body thrown at the place, from where it had been recovered.

She further stated that 'she had come to make a report and that she wanted an enquiry to be made.' (ex. p. 16).

8. On the same day, viz., 23rd May 1947, Parmeshri Devi identified the blue knicker, the banyan of khaddar cloth, the canvas jhola, and the dhoti of thin border recovered from the dead body and said that they belonged to her husband Karan Singh (ex. p- 42).

9. Deep Chand, Cultivation Supervisor of the Farm at Babugarh, produced certain articles purporting to belong to Karan Singh. They were 24 in number. Sub-

Inspector Bam Chander Singh retained out of them one pillow stuffed with cotton with cover of garha cloth, one banyain of garha cloth sewn with machine, and one san-dow-out banyain of garha cloth. Best of the articles were handed over to Kirpal Singh, brother of Karan Singh (Ex. F-6).

10. The house of Jainand appellant was searched on the 24th May- it appears from the statement of Sub-Inspector Bamchander Singh that the search was conducted between 9 and 11 A. M.-and the following articles are said to have been recovered:

(1) One worn out piece of duree, about one yard long and half a yard broad, torn in the middle having broad and zigzag stripes of blue colour;

(2) One duree having broad and zigzag stripes of blue colour of the same design as No. 1.

(3) One bayonet with sheath, belonging to the Government, being of army design, with letters 'G. R. J, 1907/17 R. F. I.' and a crown engraved over it, with canvas khosta (cover); and

(4) One new kirpan, having white handle of white bone, 10 fingers' breadth long, with a brass chain fixed in the handle, with a leather sheath of black colour, being of net work.' (Ex, P-3).

The search is said to have been carried 'out in the presence of Ishtiaq and Faqira, the tonga drivers, who happened to be present with their tongas in Collectorganj and who were called by Sub-Inspector Earn Chander Singh. Both Ishtiaq and Faqira live in another locality and according to the statemant of Ishtiaq no person of the locality Was present at the time of the search.

11. Jainand and Kali Charan were both arrested on 24th May 1947, and on the same day a ganda&a; is said to have been recovered from the house of one Kirpa Shankar, which is close to that of Jainand. It appears that the gandasa was handed over by Kirpa Shankar, in the presence of Shamsuddin and Baley, both of whom are residents of a different locality. It is said that there was blood on the gandasa (Ex. P-12).

12. It is said that on 24th May 1947, Sub-Inspector Bamchander Singh came across a tonga driven by one Ibrahim on which the dead body of Karan Singh was said to have been removed from the house of Jainand to the Kalinadi bridge. It is also said that there were 'a few marks resembling those of blood on the Kashti (hollow portion of the tonga, in front of the front seat) where passengers of the front seat put their feet'. The planks of the Kashti bearing the marks are alleged to have been taken possession of by Sub-Inspector Bam Chander Singh in the presence of Shamsuddin and Baley aforesaid (Ex. P-13).

13. Kali Charan appellant made a confession on 27th May 1947, before a Magistrate of the First Class. On the very next day Kali Charan sent an application from jail that he was forced by the police to make the confession. The confession was to the following effect; Kali Charan had been in the service of Jainand and lived with him for about 9 months before the occurrence. Jainand treated Parmeshri Devi for about 9 months and there arose an illicit intimacy between them and they started visiting each other. There was a dispute between Karan Singh and his brothers in consequence whereof Karan Singh came, to Hapur with his family and stayed with Jainand at his house. On her arrival Parmeshri Devi handed over her ornaments to Jainand for safe custody. Jainand took all the money which Karan Singh had for purchasing a truck, but he never purchased any truck. This led to a quarrel between Jainand and Karan Singh and the latter left the house of Jainand with all his belongings and went to live with his father-in-law in Phuldera. Karan Singh continued visiting Jainand to demand his money and he went to see him on Saturday 17th May 1947, when Jainand asked him to come 'ojar' following Monday, i. e., on 19th May. Karan Singh came to Jainand's house on the evening of 19th May and stayed there for the night. In the night at about 8 A. M. Jainand called out to Kali Charan and said there was a serpent and asked him to flash his torch. When Kali Charan flashed his torch. Jainand first struck Karan Singh on the neck with a gandas and then with an axe. On Kali Charan asking him what he had done, he silenced him by threats. Then Jainand and Kali Charan tied up the dead body into the form of a bundle and in Karan Singh's jhola Jainand put his pair of shoes, a shirt, a cap, trouser and a knife. Jainand took the jhola somewhere and concealed it and after ten minutes he brought the tonga of Ibrahim from the station. The tonga-driver was sent to the station to bring betels

and in his absence the bundle was placed in the tonga. Then they proceeded to Kalinadi bridge and reached there by 8. 80 A. M., the place being three miles away. The tonga-driver was then sent to call Bhagwati to take away his goods. While the tonga-driver was away the bundle was taken out of the tonga and it was placed on the ground. The tonga-driver returned, and he was asked to go away without any payment. Jainand and Kali Charan returned home on foot by 9-15. A. M. In the evening Jainand took Kali Charan on his cycle to 'chhaoni' to throw the dead body in the river, but the police had already discovered the dead body. Jainand sent Kali Charan to see what was there and he found that it was the dead body of Karan Singh. He returned and told Jainand about it. Jainand asked him not to tell anybody about it. He did not mention the incident to any one as the Sub-Inspector of Hapur was his friend and the other policemen had also known him and one of his relatives was a Deputy Collector at Meerut. At the time the dead body was recovered the wife of Karan Singh identified the clothes of Karan Singh as well as of Jainand. When the Sub-Inspector made enquiries from him, he narrated the whole story, (ex.p-8).

14. The articles recovered by Sub-Inspector Bam Chander Singh on the 24th May-1947, remained in the police malkhana at Police Station Hapur until 16th June 1947. They reached the sadar malkhana at Meerut on the 18th June 1947, in three sealed bundles and one unsealed bag. The bag contained 'several bloodstained clothes'. One of the sealed bundles contained wooden planks, said to have been taken from Ibrahim's tonga. They were taken to the Tahsildar of Hapur and he got the portions bearing blood marks cut and they were sealed. The second sealed bundle contained the gandasa and the third contained the axe. The contents of the sealed bundles only were sent to the Chemical Examiner and the Imperial Serologist and it appears from their reports that there were blood-stains on the gandasa and the planks, but not on the axe (exs. p-16 and P-46).

15. The appellants denied having committed the murder or having disposed of the dead body in the manner alleged by the prosecution. Jainand also denied the ownership of the articles said to be his and recovered from the dead body or from his house. He stated that Kirpal Singh had got him falsely implicated in this affair. Kali Charan stated that he was coerced by the police to make the confession. He

denied the recovery of the gandasa at his instance. In the Court of Session Jainand made a long statement in which he stated how he came into contact with Karan Singh and his brothers, how disputes arose among the brothers in consequence whereof Karan Singh came to his house with his family, how Karan Singh left his' house with his family on being persuaded by his brothers on 18th April 1947, and how he was arrested on 24th May 1917. He admitted having identified Karan Singh when he withdrew money from the post office in December 1946. Ha also admitted that on 12th May 1947, he had made an application to the Superintendent of Police, Meerut. In that application he stated that there was some misunderstanding between him and Karan Singh and, in spite of his best efforts to clarify the position, he bore an anohor of hatred for him; that on the noon of 18th April when he was accompanying Karan Singh to the lorry stand to see his family off for Baksar he collected some 20 persona from Shankerganj, Hapur, and incited them to kill him; that in spite of all this he welcomed Karan Singh when he came to his house subsequently on three occasions and that he (Karan Singh) was colluding with his brothers in order to take his life.

16. The learned Additional Sessions Judge found that Karan Singh was actually murdered and the dead body found at the Samrauli bridge of the Kalinadi in the afternoon of 27th May 1947 was that of Karan Singh. He also found that on the evening of 19th May 1947, Karan Singh had gone of Hapur and was received at the railway station by Jainand, who had taken him towards his house, and after that Karan Singh was not seen alive. He expressed the view that Jainand having failed to offer any explana-tion a to what happened to Karan Singh after he was last seen alive with him, the conclusion was irresistible that he (Jainand) had murdered him and he had strong motive to do so; and he was seen on the very next day carrying on a tonga a bundle, which was eventually found to contain the dead body. He further found that some of the articles recovered from the dead body were shown to be the property of Jainand or those which had been left by Karan Singh at his (Jainand's) house, He held that the confession was admissible in evidence against both the appellants as it was voluntary and had been corroborated in material particulars by other evidence on the record. He summarised his conclusions thus:

although there are no eye-witnesses of the murder yet there is sufficient circumstantial evidence on the record to establish that the murder must have been committed by Dr. Jainand, though I am not satisfied that Kali Charan accused had any hand in this murder, No doubt the prosecution evidence shows that Kanwal Singh was not quite satisfied with Karan Singh and Mt. Parmeshri, and he took objection to the presence of Dr. Jainand accused inside the zanjana portion of the residential house at Bigas and also demanded a partition of the joint family property, but in my opinion any differences that Earan Singh may have had with Kanwal Singh etc., were not so acute as could have actuated Kanwal Singh etc., to murder Karan Singh. The motive proved on behalf of the prosecution for Dr. Jainand to murder Karan Singh was far stronger and was quite adequate to actuate Dr. Jainand to commit the murder.

17. The learned Counsel for the appellants has, in the first pljoe, argued that it has not been proved that Etftran Singh is dead or that Ex. P-2 is the photo of his dead body, He has also argued that the photo, Ex. p-2, has not been proved in accordance with law. It is true that when the dead body was recovered near the bridge no one was able to identify it; but that is not of much consequence as at that time it was not known whose dead body it was and consequently no relations or friends of the deceased could be called to identify it. The dead body was sent with Munshi Singh constable for being photographed and also for post-mortem examination. We have the sworn testimony of Munshi Singa (P. W. 6) that the dead body was photographed in his 'presence. This statement of his was not challenged in cross-examination, He had seen the dead body and was in a position to say if the photo (Ex. p. 2) was of the dead body; and he stated that it was the photo of the dead body. His statement on this point is corroborated by Sub-Inspector Bam Chander Singh (p. w. 88), who had also seen the dead body, and has stated that 'he received the photo Ex. P-9 of the dead body on 25th May 1947'. The Sub-Inspector was -also not cross-examined on this point.

18. The only thing pointed out against Munshi Singh was that he had stated that he had identified the dead body before the Civil Surgeon, while the latter had stated that it was identified by another constable named Jang Bahadur. There can be no doubt that Munshi Singh accompanied the dead body from the place of its

recovery up to the mortuary at Meerut. Paragraph 139 of the Police Regulations is as follows:

139. The following procedure shall be observed when a body is sent for post mortem examination:

(2) The body shall be accompanied by a police constable and a chaukldar. If the then is over 20 miles distant from the medical officer, the constable and cbaukidar may be relieved at one or more intermediate stations; but the number of reliefs should be kept as low as possible.

(5) The constable shall be instructed by the Officer sending in the body to make it over to the medioal officer with the usual requisition; he will remain in charge of the body until the medioal officer has completed the examination, and will arrange for the disposal of the remains in the absence of relatives of the deceased.

(8) The constable and chaukldar shall identify the body in the presence of the medical officer before the post-mortem examination is made.

Police Station Hapur was not over 20 miles from the mortuary at Meerut. Hence it was not necessary to depute another constable to relieve Munshi Singh. Munshi Singh must, therefore, have handed over the dead body to the Civil Surgeon; he must have remained in ocharge of the same until the post mortem examination was completed and he must have made arrangements for its disposal. If Munshi Singh had been asked to explain this discrepancy he might have been able to explain it. Therefore, we do not consider the discrepancy, which could have been easily explained, as sufficient to discredit the entire evidence of Munshi Singh.

19. No doubt the prosecution ought to have examined the photographer; but the failure of the proseoution to do so, in the circumstances of the present case, is not a fatal defect. In view of the evidence of Munshi Singh and Sub-Inspector Ram-Chandra Singh, read with the report, Ex. P-40, we have no reason to doubt that Ex, P-a is the photo of the dead body which -was recovered near the Kalinadi bridge on 20th May 1947.

20. Another question which arises for consideration in this connection is whether the identity of the dead body and Karan Singh has been established. The identity was sought to be established by proving that some of the clothes recovered from or near the dead body were those of Karan Singh. These clothes after their recovery were not sealed. This was a serious omission on the part of the investigating officer. In view of the provisions of para. 142 of the Police Regulations, the clothes should have been sent in a sealed cover with the contents noted outside. (After further considering the question, his Lordship held that no reliance could be placed upon the evidence furnished by the recovery of these clothes. On consideration of other evidence, however, his Lordship held that the identity of the dead body as that of Karan Singh was established beyond doubt. His Lordship then proceeded): Accordingly we hold that the finding of the learned Sessions Judge that Karan Singh was actually murdered and his dead body was found at the Samrauli bridge of the Kalinadi on the after-noon of 20th May 1947, is correct.

21. In the next place, it has been contended by the appellants' learned Counsel that the retracted confession of Kali Chagrin could not be used in evidence against any of the appellants as it was false and self-exculpatory. In *Shambhu and another v. Emperor* : AIR1932 All228 , it was observed;

The evidentiary value of a retracted confession is very little and It is a rule of practice, as also a rule of prudence, that it is not wise to act on a retracted confession of an accused person unless it is corroborated in material particulars.

This is all the more necessary when the confession is sought to be used against a co-accused. We do not find such a corroboration of the confession in this case. On the other hand, we find that there are certain glaring falsehoods in the confession. In the confession we find it stated that at the time the dead body was recovered the wife of Karan Singh identified the clothes of the doctor as well as of Karan Singh. The wife of Karan Singh was, however, not present when the dead body was recovered. The statement that the doctor had put in the jhola of Karan Singh a pair of shoes, a shirt, a trouser and a knife is also untrue because no such things were found in the jhola. Again it seems ridiculous that if Jainand wanted to commit

the murder of Karan Singh he would have asked Kali Charan to flash a torch and then attack him. The axe with which the Becond blow is said to have been given by Jainand had no bloodstains on it. If Jainand had in Ms possession a bayonet and a new kripan, it is difficult to believe that in order to commit a murder, he would borrow a gandasa from a neighbour. The statement that Jainand had hired the tonga of Ibrahim also appears to be a pure concoction If Jainand had gone to the railway station to hire the tonga, then his sending the tonga-driver again to the station to purchase betels would have roused his suspicion. Then, it is incredible that Jainand would ask the Tonga driver to go away without payment of any hire. It may be noted here that Ibrahim has stated that he got Rs. 2 as tonga hire; and thus the statement to the contrary made in the confession was clearly false. There is another absurdity in the confession, namely, the visit of Jainand and Kali Charan to the bridge in the evening. Even if Jainand had asked Kali Charan to go to see what the police had discovered it is difficult to believe that Kali Charan, with a guilty oonsoience, would have gone there. Having concealed the dead body in the ditch the culprit would never have gone near the dead body again. We find it stated in the confession that a jhola belonging to Karan Singh had been lying at the place of Jainand from before and that inoonj string of the bed had been kept in that jhola, whioh was thrown in a bush under the bridge. According to the statement of Hukumdei (p. W. 28) and Parme3hri (p. w. 37) Karan Singh had taken the jhola with him. The allegation that Parmeshri Devi had handed over the ornaments to the doctor for safe custody also appears to be untrue. Swarup Singh and Har Bhajan Singh, in whose presence the ornaments are said to have been given to Jainand, have not been examined; and if Saroop Singh (p. w. 15) and Hari Bhajan Prasad (Singh ?)(p. w, 7) are the persons in whose presence the ornaments are said to have been handed over, they have not made any statement on this point. Beading the statement of Jainand in the application, dated 12th May 1947, to the effect that he attempted to remove the misunderstanding between him and Karan Singh ancf to clarify his position, along with the statement in the confession that there was illicit intimacy between Jainand and Karan Singh's wife and the departure of Karan Singh from the house of Jainand on 18th April 1947, it is difficult to believe that he had left because of any dispute over the money and the ornaments.

22. As we have already seen, Kali Charan was arrested on 24th May 1947, but he was not sent to jail until the morning of 26th May. The confession was made on 27th May and it was retracted on the following day. In the circumstances there can be little doubt that the confession was made under some pressure brought to bear upon him, while he was in police custody.

23. Coming to the question whether the confession made by Kali Charan was self-exculpatory and on that ground it could not be used against Jainand, it has been pointed out by the learned Counsel, holding the brief of the Government Advocate, that the maker does inculpate himself as far as the offence under 8. 201, Penal Code, is concerned and that it was not necessary that he should have implicated him equally with the co-accused. Reliance has been placed on a ruling reported in *Mirza Zahid Beg and others v. Emperor* : AIR1938 All91 . In that case while dealing with the terms of Section 80, Evidence Act, Allsop J., observed:

I think it must be conceded that there is nothing in those terms which suggests that a confession is not admissible in evidence against a person who is being tried jointly for the same offence with a man who has made the confession if the confession minimises the guilt of him who makes it and exaggerates the guilt of the other. The section says that the confession must affect them both. It does not say that it must affect them both equally. Where there is authority for the interpretation of some part of a statute which is susceptible of more than one interpretation, authority must be followed, but where there is no ambiguity, it seems to me that dicta which might suggest that a meaning is imputed to a statute which it cannot bear must be read in connection with the facts of the case in which they are expressed. There is no doubt a fundamental difference between the admissibility and the credibility of evidence, but for all practical purposes if it is said that evidence cannot be believed, it may just as well be said that it is not admissible.

In *King Emperor v. Shambhu*, 1982 A. L. J. 162:

: AIR1932 All228 , Hays J. and Sen J., observed: - 'The incriminating statement of a co-accused is no more than the tainted testimony of an accomplice. The statement is without the safeguards of either oath or cross-examination; When an

accused person in his statement or confession, imputes the commission of the offence to his co-accused, but does not implicate himself as fully and substantially as he does his co-accused, the said statement cannot be used as evidence against the co-accused.

Allaop J., in *Mima Zahid Beg's case* : AIR1938 All91 , interpreted these observations in this way:

I think the; must have meant that such confessions, if uncorroborated, were of practically no value and should be ignored.

We are, however, not prepared to place such an interpretation on the observations of Hears C. J., and Sen J.. quoted above. Section 30, Evidence Act, runs thus:

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

The words 'affecting himself and some other of such persons' are important and do suggest that before the confession made by one person can be taken into consideration as against other persons, who are being tried jointly with him for the same offence, 'it must affect the maker as well as others. If the statement does not affect the maker thereof or only ascribes to him a part not sufficient by itself to justify his conviction for the offence for which he is being jointly tried with others, it will not be a confession of the nature contemplated by Section 30. The underlying principle was thus explained by Straight J. in *Queen-Empress v. Jagrup*, 7 All. 646 : (1885 A.W.N. 131):

What was intended was, that where a prisoner-to use a popular phrase - 'makes a clean breast of it', and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of

sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists, and for this reason the word 'confession' in Section 30 cannot be construed as including a mere inculcator admission which falls short of being an admission of guilt.

24. Where more persons than one are being tried jointly for offences, one of which is major and the other is minor offence, and those offences are inter-connected, if the person who makes the confession does not incriminate himself so far as the major offence is concerned, it cannot be said that the confession affects him as well as others. It could not be the intention of the Legislature that if the confession affects the maker thereof only to some extent while it affects the co-accused to a larger extent, it should be used against both of them. If we may say so with respect, the view taken in *Emperor v. Shambhu* : AIR1932 All228 , is the correct view and we do not approve of the view expressed in *Mirsoo*, *Zahid Beg's case* : AIR1938 All91 .

25. We are, therefore, unable to uphold the finding of the learned Sessions Judge that the confession was voluntary and was supported in material particulars by the evidence on the record. As Kali Charan did not implicate himself to the same extent as Jainand and as it was not voluntary and had been retracted the very next day, the confession had no evidentiary value against either of the appellants.

26. In the third place, the learned Counsel for the appellants has contended that the searches during the course of which the incriminating articles are said to have been recovered were not conducted in accordance with the provisions of Section 103, Criminal P. C. That section lays down:

103. (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue as order. In writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the plans in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses;....

When the house of Jainand appellant was searched and also when the gandasa was recovered-from the house of Kirpa Bhanker, both houses being in Collectorganj, Hapur, not one respectable inhabitant of the locality was present. We have it from Sub-Inspector Bam Chandra Singh (p. w. 88) that many Government servants live in Collectorganj and there are some offices also. Faqira (p. w. 19) has stated that there are the marketing and rationing offices there. On 24th May 1947, there was a public holiday on account of the-'Empire day'. There were other respectable persons living in the locality. The search of Jainand's house was-, however, witnessed by two-tonga-drivers, Ishtiaq and Faqira. Ishfciaq lives in Purana Bazar of Hapur, while Paqira lives in Nai Abadi of Hapur. Ishtiaq protested when he was called to witness the search. There is a difference between the ink of his thumb-impres-sion and the ink of the writing of the search list. We have it from Ishtiaq that he had taken one-T, T. I. Maharaj Singh from the station to Collectorganj but Maharaj Singh, who was examined as-D. w. 2, gives a lie to his statement. Thus his-presence at the time of the search becomes doubtful.

27. The gandasa is said to have been re-covered from the house of Kirpa Shanker in the presence of Shamsuddin, who lives and works as a tailor in mohalla Qaziwara, Hapur, and Bailey who has a bakery at the tahsil near the police station. These persons are also witnesses of the recovery of blood, stained plauks from the tonga of Ibrahim, Sub. Inspector Earn Chandra Singh has stated that after recovering the gandasa from the house of Kirpa Shanker he left for the police station along with the appellants and the gan. dasa, the police station being about three fur. longs away from Kirpa Shanuer's house, and that on the way the appellants pointed out to him a tonga going on the road and that he took the tonga and its driver, Ibrahim, to the police station where on examination of the tonga he found the blood-stains on its planks. In other words, the recovery of the planks took place at the police station and Shamsuddin and Bailey were present there, On the strength of this fact it has been argued by the learned Counsel for the appellants that Shamsuddin and Bailey were tools in the hands of the police and

the searches were not at all genuine. There appears to be considerable force in this argument, In *Panda Inderjit v. Emperor A.I.R.* (84) 1947 ALL. 165 : (48 cr. L, J. 611), the search witnesses were residents of different localities and the officer conducting the search had made no attempt to secure the presence of respectable persons; and there it was held that the search was not a good search and it could not be made the basis of a successful prosecution. We, therefore, hold that the searches in the present case were not conducted in the manner provided by law.

28. In the fourth place, it has been contended by the learned Counsel for the appellants that the alleged motive for the crime has not been established. It is said that Parmeshri Devi had entrusted her ornaments to Jainand and Karan Singh had entrusted to him the money which he obtained from the Post Office in December 1946, during his stay at Jainand's house, for the purchase of a truck. On this point, there is the evidence of Parmeshri Devi; but it is not possible to place implicit reliance upon her statement. It seems to have been impressed on her mind that Jainand had committed the murder, so she was prepared to say anything. She was purposely examined at the far end of the trial. It appears from the statement of Kirpal Singh (p. w. 17) that before Karan Singh left Bigas with his family, 'there was a quarrel between him and his brother, Kanwal Singh, in connection with the presence of Jainand in the house; that Kanwal Singh had asked for the partition of his share when the dispute had taken place; and that after Karan Singh left for Hapur he (Kirpal Singh) and Kanwal Singh went to Hapur and learnt from Karan Singh that he was doing business jointly with Jainand. Kanwal Singh (P. w. 85) has also stated about his objecting to Jainand -staying inside their house. He has further stated that when he asked Karan Singh the reason why he had left Bigas, he replied that he would start some business at Hapur he did not say about his starting some business with Jainand. Karan Singh was employed at the Babugam Farm before he left Bigas; and then left the service, obviously to resume the arath business which he had been carrying on at Hapur. This leaves no room for doubt that Karan Singh had left his ancestral house in Bigas on account of the quarrel between him and his brothers and that he had started some business at Hapur.

29. Karan Singh only had about B9. EOOO with him; and it would not have been easily possible to obtain a permit for the purchase of a truck or to start the

transport business with such a small capital. Moreover, out of the amount at his disposal he had to maintain himself and his family. Kanwal Singh (p. W. 35) would have us believe that Karan Singh left service as well as his residence at Bigas "because of his business at Hapur." It is no longer a secret why Karan Singh left his ancestral house at Bigas; and the 'business' mentioned by Kanwal Singh must be some business other than the transport business about which the talk is said to have started after Karan Singh's arrival at Hapur. The money was actually withdrawn from the Post Office in the last week of December, while Karan Singh left Bigas towards the end of November.

30. Lakhu Singh (p. W. 20) has stated that Karan Singh had told him that Jainand had obtained from him cash certificates worth RS. 5S53 or Bs, 65S6 and had also taken from him all his ornaments, saying that he would get a permit for a motor truck and purchase a truck and that Jainand was not purchasing the truck nor was he returning his money and ornaments. An objection as to the admissibility of this and similar statements, said to have been made by Karan Singh, was raised in the trial Court; but the Court merely noted the objections without deciding the question of admissibility of the statements at the time when it was raised, especially when it was clear that similar objections would be raised day after day. Section 7, Evidence Act, lays down:

Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for the occurrence or transaction, are relevant.

The fact in issue was whether Jainand had committed the murder of Karan Singh. The facts that Jainand had taken money and ornaments from Karan Singh and that Karan Singh had on the day of murder gone to Jainand to demand the money and ornaments are relevant facts showing occasion, cause or effect of the fact in issue. Under Section 82 of the Act.

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which

under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

The delivery of the money and ornaments by Karan Singh; the demand by Karan Singh for their return and Jainand's promise to return on a particular day; the going of Karan Singh from Babugarh to Hapur to receive the money and ornaments; the visit of Karan Singh to Jainand's house on the day of murder; and the murder of Karan Singh as alleged by the prosecution are all 'circumstances' relating to the same transaction. The statements made by Karan Singh in respect of these 'circumstances' will all be relevant facts. Karan Singh being dead, the verbal statements could be proved under Section 60 of the Act, by the oral evidence of persons who heard them; in other words, by the persons to whom they were made. Therefore, the statement made by Lakhu Singh was admissible in evidence.

31. The evidence of Lakhu Singh, however, appears to be untrue. Karan Singh could not have told him that Jainand had obtained all his ornaments as, according to her statement, Parmeshri had deposited them with Jainand for safe custody. It is difficult to believe that a man who had given shelter to the family and who had started maintaining them would commit such a breach of faith. The very attempt made by interested persons to prepare a draft of a complaint which, it is alleged, was going to be filed for the recovery of money and ornaments shows that the whole story was bogus. This draft is said to have been prepared in March 1947; but we find that Karan Singh continued to live with Jainand until the middle of April. The draft contains an obviously false statement that the ornaments were deposited in the presence of Sarup Singh and Har Bhajan Singh, who have not come

forward to prove that fact.

32. It is, therefore, not possible to believe the story that Karan Singh or his wife had deposited ornaments or handed over cash to Jainand for the purchase of a truck. No other motive for the crime has been alleged or proved. The finding of the learned Sessions Judge that Jainand had a strong motive for committing the crime cannot, therefore, be upheld.

33. In the fifth place, the appellants' learned Counsel has contended that the story, of the appellants carrying the bundle containing the dead body from Jainand's house to the bridge is highly improbable and has not been proved by any satisfactory evidence. The confession having been rejected, there remains the evidence of Ibrahim tonga-driver. (His Lordship considered the evidence of Ibrahim and proceeded). Ibrahim seems to be a got-up witness; and no reliance can be placed upon his evidence. In view of this conclusion, the finding of the learned Sessions Judge that the appellants had carried a bundle, which was eventually found to contain the dead body of Karan Singh, has to be rejected.

34. In the sixth place, the learned Counsel for the appellants argued that the finding of the learned Sessions Judge that on 19th May 1947, Karan Singh had gone to the house of Jainand is not correct. (His Lordship considered the evidence in this respect and continued.) Thus, there is no reliable evidence on the record to show that Karan Singh had gone to the house of Jainand on 19th May 1947; and the finding to the contrary recorded by the learned Sessions Judge on the point cannot be sustained.

35. Lastly, it was contended on behalf of the appellants that the trial Court was wrong in using the statement of Parmeshri made on 28th May 1947, as it was not admissible under 8.162, Criminal P. C. The statement of Parmeshri was treated as a first information report. As we have already seen a first information report had already been made on 20th May 1947, at 5-30 P. M. by Inderjit Chaukidar. After the report was made Sub-Inspector Ram Chandra Singh proceeded to the scene of the recovery of the dead body and he held proceedings to collect evidence of the crime. He prepared recovery lists of the articles found on the dead body or lying near it. He held inquest and then sent the dead body to Meerut for post mortem

examination. In our opinion, the investigation had already started and the statement which was made by Parmeshri on 28rd May 1947, was a statement in the course of investigation and as such it was not admissible under S 162, Criminal P. O. This view is supported by a decision of this Court reported in *Moti Singh v. Emperor* : AIR1948 All289 that.

if the circumstances indicate that after receiving some information however incomplete the police offiosr had commenced - his invent Btfgafidn 'of subsequent information given to him about the offence by any other person cannot be regarded as the first information report in the case and would not be admissible under Section 162, Criminal P. C.

36. The circumstantial evidence relied upon by the proseoution was not of a conclusive nature and it did not exclude the possibility of some person other than Jainand having committed the murder. On behalf of the appellants it was suggested that Kirpal Singh or Kanwal Singh, the brother of Karan Singh, who were not pleased with the deceased, might have committed the, murder. It was pointed out that there was dispute among the brothers; that the dead body was found lying about three miles away from Biogas that Kirpal Singh had reached Meerut on the. morning of 21st May 1947, when the dead body was aunt there for post mortem examination; and that he was going about telling the people about the murder/even before the identity of the dead body was established. But, in the view that we have taken of the circumstantial evidenoe, it is not necessary to discuss this matter.

37. In our opinion, therefore, the case against the appellants had not been established beyond doubt and they are entitled to the benefit of that doubt. Accordingly, we allow the appeal, set aside their conviction and the sentences imposed upon them. They will be released forth, with unless required in some other connection. The, reference for confirmation of the sentence of death is rejected.