Satya Vir Vs. State

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Court : Allahabad

Decided On : Sep-25-1957

Reported in : AIR1958All746

Judge : D.N. Roy and ;R.K. Chowdhry, JJ.

Acts : Evidence Act, 1872 - Sections 9, 11, 21, 60, 103, 105, 114, 134, 145, 154 and 157; Code of Criminal Procedure (CrPC) , 1898 - Sections 32, 154, 162, 342, 367, 367(1), 367(5) and 423; Indian Penal Code (IPC), 1860 - Sections 40 and 302; Code of Criminal Procedure (CrPC) (Amendment) Act, 1955

Appeal No. : Criminal Appeal No. 496 of 1957 and Refd. No. 37 of 1957

Appellant : Satya Vir

Respondent : State

Advocate for Def. : R.C. Chaturvedi, Adv. and ;D.P. Uniyal, Dy. Govt. Adv.

Advocate for Pet/Ap. : Jagnandan Lal, Adv.

Judgement :

R.K. Chowdhry, J.

1. Two men, Manno Kumar and Himmat Singh, were shot at, the former fatally and the latter to receive grievous injury, at noon on September 10, 1955, at the

junction of the road from Rangsaz Mohalla and the one running between the Rajwan Bazar and the Saddar Bazar Police Station in the city of Meerut. One Jai Prakash, also shortly described as Jai, is said to have fired the shots from a revolver.

On a charge of the offences having been committed in furtherance of an intention shared by him with the principal offender, the appellant Satyavir, aged 24 years, resident of Mohalla Durga Bari within the said police station, has been convicted by the learned Sessions Judge of Meerut under Sections 302 and 325, read with Section 34, I. P. C., and sentenced to death under the first count and to rigorous imprisonment for 3 years under the second. Satyavir has appealed from that judgment and order, and the proceedings are also before us under Section 374, Cr. P. Code, for confirmation of the sentence of death.

2. The prosecution case was as follows. The deceased Manno Kumar, whose probable age according to the post mortem report was 18 years, and Bir Singh P. W. 1 were students of the S. S. D. College, Meerut. Bir Singh had failed in the 1955 examination and had decided to appear as a private candidate in the ensuing year. He belonged to the neighbouring town of Durala and had come to Meerut on 10-9-1955 to obtain a form of applica-tion for permission to appear in the examination as a private candidate. At 11.30 or 11.45 a.m. he met Mannoo at the Begam Bridge in Meerut.

On being asked by Mannoo where he was bound for, Bir Singh told him that he was going to Amar Vaishnav Hotel to take his food. Mannoo promised to come to the hotel after purchasing something. About half an hour later, as Bir Singh was about to finish his meals, Mannoo arrived at the hotel in a state of fright and informed Bir Singh that he had had a quarrel with Satyavir, Jai and Matroo, that some people had intervened, but that those three had threatened that they would not let him escape that day. Mannoo asked Bir Singh to accompany him to the Saddar Bazar Police Station. The two, accordingly, engaged a rickshaw and proceeded towards the Saddar Bazar. Himmat Singh P. W. 4 was the rickshaw driver. They picked up Kastoori Lal P. W. 8 en route near the Nishat Cinema.

3. When the rickshaw reached the junction of the aforesaid roads in the Saddar Bazar opposite the shop known as the Nehru Store belonging to Basant Lal P. W. 2, the aforesaid three persons Jai Prakash, Matrco and the appellant Satyavir came from the front. Jai was armed with a revolver, Matroo with a hockey stick and the appellant Satyavir with a knife. Matroo and Satyavir stopped the rickshaw by catching hold of its handle and, as the occupants of the rickshaw were getting : down, they asked Jai to shoot.

Thereupon Jair fired several times, the first shot hitting Mannoo on the left side of his chest and one of the subsequent ones hitting the dorsum of Himmat Singh the rickshaw-puller's left foot. Mannoo staggered and fell on the plank of a watch-maker's shop. The three assailants then ran away threatening to shoot any one who came near them.

4. The prosecution and the defence are at one as regards the locus in quo, as will appear presently. And since this spot is at the junction of two roads in the heart of the Saddar Bazar, it is surrounded by a large number of shops. It is further common ground that the incident took place at noon, so that it was but natural that it should have been witnessed by the shop-keepers. Twenty two shops, out of which fourteen were at the time open, have been shown in the site plan, and of the six eye-witnesses produced by the prosecution five-are neighbouring shop-keepers.

The sixth witness is the injured rickshaw-puller, Himmat Singh P. W. 4. One of these shopkeepers was Basant Lal P. W. 2, exactly opposite whose shop, called the Nehru Store, the shooting took place. By means of the telephone at this shop Bir Singh P. W. 1 communicated the following first information report to the Saddar Bazar Police. Station, four furlongs away :

'Just now I, Kasturi Lal and Mannoo Kumar were passing through Saddar Bazar in a rickshaw, Jai Prakash, Matroo Lal and Satyavir surrounded, us here in front of Nehru Store. Satyavir had a knife; Matroo Lal had a hockey stick and Jai Prakash had a revolver. Jai Prakash has shot at Mannoo Kumar. His condition is precarious. The rickshaw-wala too has received one shot. All the three men have run away saying that if any One would go near them, they would kill him, A

number of persons have collected here. You should come at once. A short while ago, these three persons quarrelled with Mannoo Kumar at Begum Bridge.'

The report was received at the police station at 1.20 p.m. by the Clerk Constable Ram Saroop P. W. 18, who registered a case under Section 307, I. P. C., on its basis.

5. As Mannoo Kumar's condition was precarious, his companions Bir Singh P. W. 1 and Kastoori Lal P. W. 8 took him in another rickshaw to the Cantonment General Hospital, 5 furlongs away (vide the inquest report), and Basant Lal P. W. 2 also went with them. By the time they reached the hospital Mannoo Kumar was dead.

6. Sub-Inspector Jai Pal Sharma, P. W. 19, Station Officer of P. S. Saddar Bazar, was present at the police station when the report of the incident was received there by telephone. He alerted various out-posts for the arrest of the accused and then left with S. I. Bir Singh P. W. 9 for the place of occurrence. Himmat Singh P. W. 4, the rickshaw-puller, who was not taken to the hospital as his injury was not serious, and who had left for the police station, was met by the two Police Officers. at the distance of about 100 yards from the police station.

Sub-Inspector Jai Pal Sharma P. W. 19 found him injured and, after interrogating him, sent him to the police station where he reached at 1.40 p. m., as proved by the entry in the General Diary Ex. P-21 made by the Clerk Constable Ram Saroop P. W. 18. From the police station Himmat Singh went to the hospital, and there his injuries were examined by Dr. M. N. Gupta. He purports to have done so at 1.30 p. m. This time differs slightly from the time 1.40 p. m., when, as noted already, Himmat Singh purports to have reached the police station before being sent to the hospital.

Either the clock at the police station was running too fast or that at the hospital too slow. In any case, as the timing at the police station was on the faster side it could not be insinuated that there was any aflempt on the part of the police to make a show of things having happened later than they did. In other words, there was no attempt at gaining time, and judged by the timings noted at the police .station, the

various events noticed already, and to be noticed presently, appear to have happened in one natural sequence.

7. To revert to the chronology of events, Dr. M. N. Gupta found a gun-shot wound of entry .1/6' x 1/6' with inverted margins on the dorsum of the left foot of Himmat Singh. The wound ran through the soft tissues and bones towards the sole, communicating with the wound of exit 1/4' x 1/4' with everted margins in the sole. The margins were not blackened. The wound was bleeding and appeared, in the opinion of the doctor, to be of about an hour's duration and to have been caused by some fire-arm.

8. On reaching the scene of occurrence S. I. Jaipal Sharma P. W. 19 learnt that Mannoo Kumar had already been taken to the hospital. On interrogation of witnesses he learnt that Mannoo Kumar had died. He therefore sent a note, Ex. P-22, to the police station to convert the case from one under Section 307 to one under Section 302, I. P. C., and to send the inquest register and the corpse box to the hospital. This note was received at the police station by Clerk Constable Ram Saroop at 2 p, m., as shown by the entry Ex. P-20 made by him in the general diary.

After sending the note the Station Officer interrogated some more witnesses, including the two eye-witnesses Dwarka Nath Saigal P. W. 5 and Mushtaq P. W. 6, and then went to the Cantonment Hospital and held an inquest there on the dead body of Mannoo Kumar at 2.55 p. m. He found Bir Singh P. W. 1, Basant Lal P. W. 2 and Kastoori Lal P. W. 8 present in the hospital and interrogated them there. He sent the dead body to the mortuary for post mortem.

The Station Officer then returned to the scene of incident where he prepared a site plan and took in his possession a blood-stained stone and the rickshaw. Post mortem was conducted the same evening at 5 o'clock by Dr. M. Prakash, Medical Officer in charge of the P. L. Sharma Hospital at Meerut. According to the doctor, the probable age of the deceased was 18 years and the probable time since death about four hours. The doctor found a gun-shot wound of entrance 1/4' x 1/4' with blackening round it and inverted margins on the left side of the chest 1 1/2' below and to the inner side of the left nipple.

The bullet, after piercing the liver, had got lodged in the right side of the vertebral column in mesentery at the region of the first lumber veitebra. In the doctor's opinion, death was due to shock and haemorrhage following rupture of heart and liver caused by gun-shot. The doctor stated in cross-examination that the bullet might have been fired 'from within a range of one yard', and that the assailant might have fired the bullet from the left side and the barrel of the firearm might have been pointing downwards.

9. On 12-9-1955 the Station Officer made a report for proceedings being taken under Sections 87 and 88, Criminal Procedure Code. The appellant's property was attached by S. I. Bhagwan Singh P. W. 9 on 16-9-1955. On 17-11-1955 the Station Officer submitted a charge sheet to the Circle Officer against all the three accused as absconders. The charge sheet was kept pending in an effort to trace the accused, but on 31-12-1955 the Circle Officer directed it to be submitted to Court through the Public Prosecutor.

There is an endorsement on the charge sheet dated 5-3-1956, presumably by the District Magistrate, directing the charge sheet to be sent to the Court of the City Magistrate Meerut for disposal according to law. On 6-1-1956 the City Magistrate transferred it to the Court of Sri J. K. Pandey a Fiuf Class Magistrate for disposal. On the same date, viz. on 6-1-1956, the appellant surrendered in the Court of the City Magistrate, and, while doing so, he filed an application through two lawyers praying that he be immediately sent to jail as he had learnt that the police wanted to put him up for test identification and he apprehended that he may be shown to witnesses as the case was a local one. The Magistrate directed him to be taken in custody and sent to jail.

10. It was mentioned in the charge sheet that as it was sought also to have a test identification in respect of the accused their hulia, or physical features, were not being mentioned. The prosecution appear, however, to have taken no step to hold a test identification. On an application (Ex. P-36) made in that behalf by a counsel of the accused himself on 25-1-1956, a test identification was eventually held on 9-3-1956 in the district jail of Meerut, the proceedings having been conducted by Sri Raghuraj Singh P. W. 10, A First Class Magistrate. All the six eye-witnesses

produced by the prosecution identified the appellant without committing any mistake.

11. The defence taken by the appellant appears in the statements made by him at the test identification and in the two Courts below and in the statement of the defence witness Nand Ram, At the test identification the appellant made the statement that the two witnesses Kastoori Lal and Bir Singh might be knowing him as he was a student; that although at the time of his surrender on 6-1-1956 the City Magistrate had ordered that he be taken to jail at once, he was removed there with delay; and that he was shown to witnesses at the jail and at the police station of Civil Lines and Lal Kurti that evening.

In the Court of the Committing Magistrate as well as in the Sessions Court he denied his complicity in the shooting affair in the Saddar Bazar and in the earlier affair of the quarrel which is said to have taken place at the Begum Bridge. Asked as to why he had been prosecuted, he made the following statement in the Magistrate's Court :

'I have enmity with the boy, namely Omkar, who belongs to the party of Mannoo Kumar. I and Omkar were reading in the D. N. Inter College in 1950-51. He was in II year Class while I was in I year Class. On 8th Septemper, 1955 I went to Jhansi. I was not present here on the date of occurrence. I took over charge in the Canal Department on 9th September, 1955. On that very date I got myself insured also.'

His statement in the Sessions Court will appear from the following questions put to him and answers made by him :

'Q. : The prosecution evidence is that after the occurrence you absconded from Meerut and were not found at the place in Jhansi where you were employed. What have you got to say about it?

A. : It is wrong. I fell ill on 15th September, 1956 at Jhansi and went on medical leave till 5th or 6th January, 1956. In this period I remained at Allahabad with my Mausi and at Mena Khalan-garhi, Khurja.

Q. : Why have you been implicated in the case and why do the prosecution witnesses name you?

A. : Omkar Singh, Bir Singh and Kamal Singh had one party. I had ranjish against Omkar Singh. Omkar Singh was living at Daurala since his childhood. Bir Singh and Kamal Kana also lived at Daurala. Omkar Singh and Kamal Kana were accused in the Rama Hotel Case of Meerut. I have learnt that in 1947-48 Bir Singh and Kamal Kana were sentenced to jail in connection with a mosque case. I was in Jhansi Government service for 3 or 3 1/2 years before the occurrence. I had received a telegram from Meerut about the death of my sister's son. I had thought that my sister Smt. Vidya whose son had died would be in Meerut because Jasutan on 4th September, 1955, had to take place at the house of my brother. I took leave from 2nd September, 1955 to 7th September, 1955 and came to Meerut. I learnt at Meerut that my sister Vidya's son had died in Rajasthan on 28th of August, 1955. I also learnt that she was coming to Meerut on 8th of September, and so I stayed at Meerut in order to see her. I left for Jhansi in the evening of 8th September, 1955. I reached Jhansi on 9th September, 1955. I met an Insurance Agent on that day. He asked me to fill an Insurance Form which I did. As it was late I could not be medically examined for insurance on that date. I went to Dhamna camp which was 10 or 12 miles from Jhansi and where I was posted. I made a joining report at Dhamna camp on 3th September, 1955. I had put my joining report on the table of the overseer who had gone on tour. I received a note on his table directing me to go to Barva Sagar Railway Station to measure the coal stock there. I went to Barva Sagar on the morning of 10th September, 1955, dropped a letter to Meerut from Jhansi on 10th September, 1955. I, returned to Jhansi from Barva Sagar on cycle on the same day. Then on 10th September, 1955 I was medically examined for the insurance purposes. As I had taken bath while perspiring therefore I fell ill and had to go on leave from 11th September, 1955. On llth September, 1955, I made a compliance report and a report of my sickness. On 13th September, 1955, I applied for medical leave and for permission to leave the station. Then I went to Allahabad and got myself treated there.

Q. : Why have you been implicated in this case?

A. : Omkar Singh has ranjish with me and the witnesses are under the influence of the police.

Q. ; You were put up for identification in the district jail and were identified by some witnesses? Can you give any account how they did identify you?

A. : I have learnt that in the search of my house the police had taken my photo. I had also got myself photographed at Meerut many times and negatives of those photos were with the photographer. The police might have gathered those photos and shown them to the witnesses. In the parade villagers were mixed with me. I had written a post card to my house telling about it. I had submitted myself in Court at 2 p. m. and I had made an application to the Court for being sent to jail at once because I was afraid that the police would show me to the witnesses. Even then the police delayed in taking me to the jail deliberately. There were 30 or 32 undertrials in the police van in which I was taken to jail. 5 or 6 persons were standing at the jail gate in order to see me. They were standing at some distance. All of us were taken down from the lorry and after some time we were made to sit in it again. Those persons followed the lorry in a rickshaw. I was shown to about 10 persons at Civil Lines Police Station. Then I was taken in police car to P. S. Lal Kurti. I was shown to 5 or 6 persons more at Lal Kurti. Then my Vakil gave application to the A. D. M. and then I was sent to jail. I have learnt that S. O. Sri Rameshwar Singh and Dharmpal Chaddha have gone to Jhansi twice.'

The appellant's defence therefore was that he had been falsely implicated by his enemy Omkar Singh and by the Police, and that his identification by prosecution witnesses was worthless as he and his photographs had been shown to them. He also pleaded alibi.

11a. The defence witness Nand Ram has given an eye-witness counter version of the incident. He is a private tutor by profession and teaches pupils in the quarter of the city to which the appellant belongs. He therefore professes to know him, There is this much in common between his statement and the statements of the prosecution witnesses that the incident of shooting took place on 10-9-1955 in front of the Nehru Store. The time of the incident given bv him also spproximates with that disclosed by the first information report; there is a difference of only 10

minutes since, according to him, it took place at about 1.30 p. m.

According to this defence witness also two persons were hit by pistol fire, a boy and a rickshaw-wala, and the former fell on the plank of a shop on being hit and was thereafter taken away by his associates. The defence witness, however, speaks of the rickshaw-wala having been hit as he was only passing that way; the account he gives rules out the theory of the rickshaw-wala having brough? the boy who was shot at or his companions. His version of the incident, in his own words, is the following :

'It was about 1.30 p.m. I was going to Saddar Post Office to purchase two post cards. When I came out of the post office, I saw some boys coming from Rambazar Mohalla and some from Bombay Bazar side. 4 boys had come from Rangsazan Mohalla and one of them had a brass panja. That boy attacked a boy of the other party with his panja. That boy took out a pistol and fired two or three times. It hit the boy with panja and a rickshaw-wala who was passing that way. The other boys who were with pistol boy, had nothing in their hands. I did not see Satyavir accused there.'

The statement of the defence witness therefore seeks to make out (1) that the boy who resorted to firing did so in exercise of the right of private defence of person, (2) that the appellant was not present at the time of the occurrence and (3) that the rickshaw-wala, being a mere passer-by, was not expected to know the members of either of the two contending parties of boys.

This witness was disbelieved by the learned Sessions Judge and there was no attempt at a resuscitation of his evidence in this Court, so that the alleged culpability of the appellant would ultimatey depend on whether the eye-witnesses produced by the prosecution were worthy of credence. It may be stated here in passing that one more defence witness, Mahesh Chand, a press correspondent, was produced to lend support to the version of Nand Ram witness. His evidence was however mere hearsay, and the learned Sessions Judge therefore rightly discarded it on that ground. Four defence witnesses were produced to prove certain documents and four were produced to prove alibi.

12. Now, where an alleged offence has been committed, and the prosecution accuses a person of having committed the same, it would be a complete answer to the accusation for that person to plead that he was at that time elsewhere. This has, of course, no reference to offences in which time and place are not material factors. And it that person succeeds in establishing that plea, technically called the plea of alibi, he will be entitled to an acquittal.

Of course, for the purpose of arriving at that conclusion, namely, the conclusion that the plea of alibi has been established, not only the defence evidence in support of the plea, but also the prosecution evidence in support of the accusation should be examined. The reason is that what may appear on an examination of the defence evidence alone to be proved, may turn out really not to be so, viewed in the light of the evidence to the contrary adduced by the prosecution.

On the other hand, even though the defence evidence may by itself fail to reach the standard of positive proof, that evidence taken along with the evidence led by the prosecution may raise a reasonable doubt as to whether the accused was really present at the time when, or the place where the offence was committed, in which case the accused would still be entitled to an acquittal. Woolmington v. Director of Public Prosecution, 1935 A. C. 462 (A), and Parbhoo v. Emperor : AIR1941 All402 . That being so, where an accused pleads alibi, it would be taking things in their natural sequence to examine the defence evidence relating to that plea first,

13. There were two categories of defence witnesses produced in the present case in support of the plea of alibi, one relating to the duration of the appellant's presence in Meerut and the other to his activities on arrival at Jhansi. (After-discussion of some evidence the judgment proceeded) : All this defence evidence relating to insurance of the appellant's life immediately on reaching Jhansi appears to be false and concocted evidence. The learned Sessions Judge was therefore quite right in discarding that evidence. He also discarded the post-card Ex. D4 after examining the itinerary given by the appellant before posting, it, holding that it could not have been posted at Jhansi on 10-9-1955 and that it had been manufactured to create evidence of alibi. In the light of the defence evidence just

noticed and the prosecution evidence and the circumstances of the case to be noticed presently, it was no difficult matter to forge post-marks on the post-card.

14. Apart from getting his life insured, the appellant professes to have done one other thing on return from Meerut to Jhansi on 9-9-1955. After reaching Jhansi on 9-9-1955 he professes to have proceeded to a camp 10 or 12 miles distant from Jhansi, known as the Dhamna Camp, and to have made a joining report there on the same date.

Significantly enough, he does not profess to have personally handed that report over to his immediate superior officer, the overseer, but only to have put it on his table, because, the appellant says, the overseer was on tour. The appellant also professes to have received a note on the overseer's table, directing him to go to the railway station at Barwa Sagar to measure the stock of coal there, and to have accordingly proceeded to Barwa Sagar on 10-9-1955. No evidence in support of this part of the plea of alibi was, however, produced although, consisting, as it would have, of official records, it afforded the appellant the best means of proving his plea.

He could easily have summoned and produced his joining report of 9th September, the overseer's-note directing him to go to the railway station at Barwa Sagar, and the record of his stock taking at that place in compliance with that note, to say nothing of his own office staff and the railway staff who should have been privy to his joining at Jhansi and stock taking at the railway station of Barwa Sagar. The omission on the part of the appellant to produce all this important evidence which could easily have been produced raises the presumption against him under illustration (g) to Section 114, Evidence Act, that, it would, if produced, have been unfavourable to him.

15. The learned Sessions Judge's finding with regard to the plea of alibi is that it was altogether false. From all that has gone before that finding appears to be well founded. The learned counsel for the appellant did not in this Court make any attempt to revive the plea of alibi : what he argued was that the defence had in the course of the trial made the allegation in an application dated 26-11-1956 that Rameshwar Singh Station Officer of the Saddar Bazar Police Station and

Dharampal Chadha brother of the deceased had gone to Jhansi in September and October, 1956 and tampered with the defence witnesses, and that, therefore, it was for the prosecution to prove that the appellant was absent from duty on the date of the occurrence.

Now, as the appellant wished the Court to believe that at the time of the occurrence he was at Jhansi the burden of proof of that plea of alibi lay on him. The second illustration to Section 103, Evidence Act is specifically on this point. It is not correct to say therefore that it was for the prosecution to prove that the appellant was absent from duty on the date of the occurrence. Of course, if there were anything on the record to support the aforesaid allegation of the prosecution having tampered with the defence witnesses, that, taken along with the other facts and circumstances of the case, might well have raised a doubt, on the princi-pie laid down in : AIR1941 All402 , that after all the plea of alibi may be well founded, and, in that case, the defence would be entitled to the benefit of that doubt. But a mere allegation in an application without any evidence in support of that allegation is of no consequence whatsoever.

Not only did the defence lead no evidence in support of the aforesaid allegation, but it was not even put in cross-examination to the appropriate prosecution witnesses. Neither of the two persons against whom the allegation was made was a witness for the prosecution, but that did not absolve the defence from putting questions relevant to the allegation in the cross-examination of S. I. Jai Pal Sharma P. W. 19 who made the investigation and another Sub-Inspector, Him Singh P. W. 16, who had gone to Jhansi in search of the appellant. No such question whatsoever was put to the latter and the only question put to the former was whether he had gone to Jhansi, to which the witness replied in the affirmative. The learned Sessions Judge's finding regarding the appellant's plea of alibi appears therefore to be quite correct.

16. The main argument of the learned counsel for the appellant was that the eye-witnesses produced by the prosecution were unworthy of credence. The various submissions made by him in that connection will be considered presently. There is however an aspect of the prosecution, and a very important aspect at that, which

did not evoke any criticism at the hands of the learned counsel, but which appears to lend great support to the truthfulness of the prosecution case.

17. That aspect of the prosecution concerns the probative valus of the first information report. The use of a first information report no doubt lies within a limited compass in that it cannot be used as substantive evidence but only to corroborate or contradict the maker of it; but where it is lodged by an eye-witness, and lodged promptly and without anybody intermeddling with it, so that there has been no time to forget or opportunity to embellish the facts, and the testimony of its maker has not been shaken by contradiction or otherwise, the report can be a strong piece of corroborative evidence under Section 157 of the Evidence Act.

This appears to be pre-eminently true of the report lodged, in the present case. It was lodged to begin with, by an eye-witness of the occurrence. That eye-witness, moreover, was one who was in the closest proximity to the deceased, having reached the scene of the occurrence in the same rickshaw with him. That is a qualification possessed by two other witnesses, Kasturi Lal P. W. 8, the man who had been picked up at the Nishat Talkies, and Himmat Singh P. W. 4, the rickshaw-puller but, in connection with the point under consideration, only Bir Singh's testimony is relevant.

From the admitted time of the occurrence, from the checks and counter-checks relating to the correctness of the time as provided by the entries in the general diary at the police station and the records of the injury and inquest reports prepared at the hospital and the interrogation of this witness at that place, and from the natural sequence in which, as noticed already, the events of that stage happened, there can be no doubt whatsoever that the report was lodged by Bir Singh promptly and without intermeddling on the part of anybody. Indeed, there is no suggestion of working of any outside influence in the course of the cross-examination of the police witnesses or any other witness.

18. It only remains, in the present context, to sec whether the testimony of Bir Singh, the maker of the report, has been shaken by contradiction or in any other manner. The defence sought to contradict him in regard to four matters of detail by his first information report namely, (1) that it contained no allegation about a threat

having been held out at the earlier incident of quarrel at the Begum Bridge, (2) that it made no mention of the deceased having asked Bir Singh to accompany him to the Saddar Police Station, (3) that it did not speak of the appellant and Matroo having stopped the rickshaw, and (4) that it also made no mention of the shooting by Jai having been done at the bidding of these two.

It will be noticed that all these so-called contradictions are contradictions by omissions. That being so, it will have to be seen whether any of these omissions was so material as to amount to a contradiction. An examination of the alleged contradictions should also be prefaced with the remark that for a correct appraisal of those contradictions, particularly contradictions in the nature of omissions, it is essential to keep in view the circumstances in which the report was lodged.

For instance, an omission in a report hurriedly; lodged under the press of events should not have the same significance as one in a report lodged after cool calculation. And in every case there should be nothing in the mere existence of a contradiction in regard to a detail unless it be a contradiction which, on a fair and reasonable interpretation of it, points to a falsity of that detail or at least to the raising of a doubt as to its correctness.

19. There can be no gainsaying the fact that Bir Singh lodged the report under a great press of events. His companion Mannoo Kumar, who had just been shot at, hovered between life and death. In fact, it appears from his statement that Mannoo Kumar died while he was being taken to the hospital. It was a matter of the greatest urgency therefore that Mannoo Kumar be removed to the hospital. It was all that Bir Singh could therefore do to telephone a hurried report from the shop of Basant Lal P. W. 2 opposite which, it is common ground, the shooting had taken place. The following statement of clerk constable Ram Saroop P. W. 18, who received the message at the police station Saddar Bazar, is very significant in this connection :

'Bir Singh had at first cried in the telephone that a murder had taken place. I required him to tell the facts in detail. Then he narrated the events and I took them down.'

It would thus appear that the only message that Bir Singh phoned at first was the bare information that a murder had been committed, aud that he had to be coaxed into giving whatever details he did. It would be unnatural in these circumstances to expect a precise and detailed plaint of a report from Bir Singh. In fact, all that detail and precision would have been a badge of its unreality and untruthfulness. Keeping these observations in view, it cannot be said that there is really any omission in regard to the first three details.

There is mention of an earlier quarrel at the Begam Bridge, and it is immaterial if the particular detail of a threat having been given on that occasion was not given. There is also mention of the material fact that they were passing through the Saddar Bazar where the shooting took place. It was immaterial what their destination was, particularly when that destination was the very place to which the telephonic report was being transmitted.

Likewise, the report does speak of all the three assailants having surrounded them while they were going in a rickshaw, which implied that their further progress in the rickshaw was impeded before Mannoo Kumar was shot at. In regard to the first three details therefore there would appear in point of fact to be no omission. The fourth detail no doubt finds no mention in the report. But, in view of the circumstances, noticed already, attending the lodging of the report, the omission is really not material in that it could not be said necessarily to weaken its evidentiary value. The only effect of the omission should be that other corroborative evidence in regard to that detail, if there be any such evidence should be examined with more than ordinary caution.

20. The testimony of Bir Singh, the maker of the report, would not therefore appear to have been shaken by any contradiction in his statement in Court and the first information report. Can it be said that it has been shaken otherwise? Now, the main ground on which the learned counsel for the appellant sought to discredit this witness was that certain statements made by him stood contradicted by his report and by his statement under Section 161, Cr. P. C. This criticism, so far as it relates to contradiction by report, has aready been dealt with and found wanting. So far as contradiction by the statement under Section 161, Cr. P. Code, is concerned, the

following points have been elicited :

(1) The witness has deposed in Court that after Mannoo Kumar had come to him at the Vaishnav Hotel and related to him what had happened at the Begam Bridge, he asked him to accompany him to the Saddar Bazar Police Station. In his statement under Section 161, Cr. P. Code, he does not purport to have said that Mannoo Kumar, had asked him to take him to the police station but only that he (the witness) should escort him. It could not therefore be said that there was really any omission. The omission, if any, would also appear to be immaterial since it is a fact that the spot where the shooting took place lay on the way to the Saddar Bazar Police Station.

(2) The statement of the witness in Court was that both Matroo and the appellant stopped the rickahaw, but his statement before the investigating officer was that Matroo had caught hold of the same. As one statement speaks of stopping and the other of catching hold of the rickshaw, and as it was not elicited further that the witness had not spoken of the appellant having stopped the rickshaw in his statement under Section 161, Cr. P. Code, there was really no contradiction. On the other hand, the aforesaid statement of the witness in Court stands corroborated by the first information report where he spoke of the rickshaw having been surrounded by all the three culprits.

21. Bir Singh's testimony thus stands unshaken by any contradictions. There was no other argument advanced in this Court to discredit this eye-witness who was also the maker of the report. The appellant's defence is that one Omkar Singh was his enemy and that he was responsible for his false implication. He stated further in the Sessions Court that Bir Singh was one of the members of Omkar Singh's party.

According to the defence witness Dharam Vir, appellant's own brother, when the appellant was reading in school his relations with Omkar Singh were strained. In cross-examination he stated that there were parties in school. All these were mere vague statements which hardly threw any light on the nature and extent of the allegedly strained relations, and suggestions thrown to Bir Singh in that connection were categorically repudiated by him. Nor does it appear that Omkar Singh did, or

even could, bring any influence to bear upon Bir Singh or any other prosecution witness. In fact, this defence plea was as baseless as was the plea of alibi.

22. As noticed already, there was a test identification held at the instance of the appellant himself in which he was identified by all the eyewitnesses without a mistake. The sheet-ancbor of arguments on behalf of the appellant in this Court was that the circumstances in which the identification was held showed that the witnesses really did not know the appellant, and that the reason why the witnesses were able to identify the appellant so infallibly was that the appellant had been shown to them.

Whether others abide that criticism will be considered presently, but Bir Singh in any case is free from that criticism. Not only was Bir Singh's cross-examination on that score most ineffectual, but appellant's own statement regarding Bir Singh belonging to the party inimical to him amounted at least to a tacit admission that the two knew each other well. Bir Singh's testimony therefore emerges unscathed by any criticism.

It is the testimony, moreover, of a most natural witness, and an independent witness and it stands corroborated by a first information which is equally irreproachable. That being so, even if there were no other evidence but the solitary statement of Bir Singh, that by itself would suffice to bear out the prosecution case since under Section 134 of the Evidence Act; no particular number of witnesses shall in any case be required for the proof of any fact.

In a recent decision, reported as Vadivelu Thevar v. State of Madras : 1957 CriLJ1000 , their Lordships of the Supreme Court have classified witnesses into three categories, namely, (1) wholly reliable, (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. They laid down further that in the first category of proof the Court should have no difficulty in coming to its conclusion either way -- it may convict or may acquit on the testimony of a single witness if it is found to be above reproach or suspicion of interestedness, incompetence or subordi-nation. Bir Singh's testimony would clearly seem to fall in this category of wholly reliable witness. The conviction of the appellant may therefore be maintained on his testimony alone.

23. As noticed already, however, Bir Singb is not the only eye-witness who supports the prosecution. That would really be unimaginable in the case of an incident which happened in broad day light in the heart of a busy bazar. There is therefore the further evidence of three neighbouring shopkeepers, Basant Lal P. W. 2, Dwarkanath Sahgal P. W. 5 and Mushtaq Ahmad P. W. 6 besides that of the rickshaw, driver Himmar Singh P. W. 4, and one other companion of the deceased, Kastoori Lal P. W. 8. The main argument of the learned counsel for the appellant, noticed in the next proceeding paragraph and found ineffectual in the case of Bir Singh, may now be considered with reference to these remaining witnesses. That argument was built upon a note of the investigating officer appearing at the end of the list of witnesses in the charge sheet. That note has been converted into substantive evidence by being brought out in the cross-examination of that officer.

The note was : 'As test identification has also to be conducted, the hulia (physical features) of the accused are not being described'. The prosecution however took no steps to hold a test identification and one was eventually held on 9-3-1956 in pursuance of an application in that behalf (Ex. P-36) filed by the defence on 25-1-1956.

From this conduct of the investigating officer it was sought to be inferred that the assertion of the prosecution witnesses that they knew the appellant was false, and that the reason why they were able to pick out the appellant in the test identification was that the appellant had already been shown to them. This line of defence, initiated in the trial Court, would however appear to be more ingenious than of any substance.

There were in fact three witnesses of the occurrence, Mushtaq Ahmad P. W. 6 being one of them, who, as given out in the list of witnesses dated 3-2-1956 filed in the Court of the Commit-ing Magistrate, did not know the appellant. It is significant that none of them was cited as a witness, in the charge sheet.

That omission was quite in order since, at the stage when the charge sheet was submitted, the investigating officer was still thinking of having a. test identification held. A test identification is a part of investigation. Lajja Rani v. State, : AIR1955

All671 . In fact, as noticed already, the charge sheet was kept pending from 17-11-1955 to 31-12-1955 on which latter date the Circle Officer directed it to be submitted to Court as, presumably, the accused were still untraceable.

In the circumstance, omission in the charge-sheet of the names of witnesses who did not know the accused and were therefore subsequently to be produced at the test identification was quite natural since, among other things, the.setting forth of the names of witnesses in the charge sheet under Section 173 (2) is required to be done only when the investigation is completed.

The defence, though seeking to take advantage of the omission on the part of the investigating officer to hold a test identification put no question in the course of his cross-examination as to the reason for the omission. The reason, however, does not appear to be far to seek; the number of eye-witnesses who knew the accused far out-numbered that o the witnesses who did not know him.

In fact, the investigating officer has, in effect, offered that explanation in his examination-in-chief for he stated : 'Out of the eye-witnesses examined by me only three witnesses, Harbans Lal, Shankar Lal and Mushtaq, required identification of the accused person, the remaining witnesses had named the accused persons.' That statement was not subjected to any cross-examination.

Subsequently, when a test identification was held at the request of the accused -- a request which the prosecution would have only turned down at their peril, vide the : AIR1955 All671 , just cited, the prosecution produced Mushtaq. It was not necessary for the prosecution to produce in the test identification witnesses who knew the accused, but it was compelled to do so in compliance with the prayer of the accused in his various applications.

The facts and circumstances just noticed make it abundantly clear therefore that there was really no foundation on which the defence could validly build the aforesaid argument. From what is going to follow it would, however, appear that the 'heads-I-win-tails-you-lose' argument about the witnesses having not known the appellant, otherwise the appellant having been shown to them, has no substratum of truth in it,

Witnesses who profess to have known the appellant were quite correct in that profession of theirs, and those who did not know him picked him out in the test identification without the appellant having been shown to them. The testimony of each of the remaining witnesses may now be examined with particular reference to the above argument and also generally. (After discussion of evidence His Lordship proceeded :)

24. The defence witness Dharam Vir has stated that at the time of the appellant's house search on 10-9-1955 a photograph of the appellant was taken away by the police. The suggestion was that the photograph was taken away to be shown to witnesses. The defence case further was that on 6-1-1956, between the time when the appellant and other undertrials could not be admitted in jail due to their having reached there late and the time when later the same night the appellant was admitted in jail under a special order of the Additional District Magistrate, he was shown to witnesses by the police.

Now, it has already been seen that the four witnesses, Bir Singh, Basant Lal, Himmat Singh and Kastoori Lal, whose testimony has been found to be worthy of reliance, knew the appellant. That being so, there would be no point in the police having been at pains to show the appellant to them in order that they may be able to pick him out in the test identification.

Moreover, the prosecution had given up the idea of holding a test identification and one was held on 9-3-1956 only on the application Ex. P-36 made on behalf of the appellant on 25-1-1956. That being so, the police had no interest in showing the appellant or his photo to witnesses. It is significant that no allegation about the appellant having been shown to witnesses was made in the application Ex. D-9 that was presented to the Additional District Magistrate on foot of which the latter passed a special order for the appellant being admitted into jail several hours after jail-closing hour on 6-1-1956.

All that was said, in a tentative manner, was, that some witnesses were near the jail. By that time it had not struck the defence to come out with the bold allegation that the appellant had been actually shown to witnesses. Moreover, it is admitted that ever since the appellant presented himself in Court at the aforesaid date he

was taking precautions to keep his face concealed.

His face could not therefore have been shown to anybody at the jail gate or at any of the subsequent stages that evening without the covering cloth being removed by force from his face. There is no such complaint even in the appellant's statement, and his brother Dharam Vir has stated that so far as he knew, the appellant had not forcibly been shown to anybody.

No complaint was made about the appellant having been shown to witnesses even in the application Ex. D-31, which was preferred on his behalf before the Superintendent of Police on 23-1-1956. Exception was taken in this application to the conduct of the police in having held no test identification and in having delayed despatch of the appellant to jail on 6-1-1956.

It is significant that, while all this conduct of the police was attributed to the police manipulating to alter statements of witnesses recorded under Section 161, Cr. P. Code, in such a way that from 'not-knowing' witnesses they be converted into 'knowing' witnesses, there was no complaint made about the appellant having been shown to witnesses, although such a complaint, if it had any foundation, would have been most natural in view of the allegations on which the application proceeded.

Sheoraj Singh P. W. 13, Court Moharrir of the City Magistrate in whose Court the appellant had presented himself, Head Constable Deshraj Singh P. W. 14, who took charge of the appellant from the former, took him to jail, brought him back from there to the police lock-up at the Civil Lines Police Station and again took him to jail later the same night when the appellant was eventually admitted there, and Head Constable Aun Mohammad P. W. 15 of the Civil Lines Police Station, have deposed that every precaution was taken throughout for the concealment of the appellant.

It was only on 25-1-1956 that the defence came out for the first time with its allegation about the appellant having been shown to witnesses in the application Ex. P-36 by which the Committing Magistrate was moved to hold a test identification. It would appear therefore that this allegation was put forward merely

by way of an afterthought.

The defence contention regarding a photograph of the appellant having been taken away by the police at the time of house search on 10-9-1955 is of a piece with that allegation. Dharam Vir D. W. 1 says that all the articles which the police had taken away had been returned except the photograph. If so, he should have moved the authorities tor its return. But no such application was ever made.

What is more, as noticed by the learned Sessions Judge also, in the bail applications moved on 2-6-1956 and 30-6-1956 the only allegation was that the police were trying to procure group photographs, but not that the police had any photograph of the appellant in their possession. It was objected in this Court that these bail applications were inadmissible since they were not put to the appellant in his examination under Section 342, Cr. P. Code.

The argument has no force since these applications could not be said to constitute, within the intendment of that section, 'a circumstance appearing in the evidence against him'. On the contrary, they formed an admission made by the appellant himself, which admission, not being shown to be hit by any of the provisions of the Evidence Act or the Criminal Procedure Code rendering statements of the accused inadmissible, the prosecution was certainly entitled to cite against the appellant.

Much was sought to be made of the circumstance that the recovery memo which was prepared by S. I. Bhagwan Singh P. W. 9 at the time of the house search was not forthcoming. That officer professes to have handed it over to the investigating officer Jaipal Sharma P. W. 19, but the latter has denied it. As nothing incriminating was found in the search, as elicited in the cross-examination of S. I. Bhagwan Singh, it is conceivable that no importance was attached to the memo and it was lost or misplaced.

But in view of all that has gone before, it does not seem to be possible to hold that the memo was being withheld because it made mention (supposing the police were foolish enough to make mention in it) of the photograph. The defence plea about the appellant or his photograph having been shown to witnesses would

appear therefore to have no force whatsoever.

25. The plea about the appellant having been shown to witnesses is therefore not available even against the only witness Mushtaq P. W. 6 who says he did not know the appellant. He has a sewing machine repairs shop close at the scene of the incident. He is also therefore a natural and an independent witness, and he has supported material details of the prosecution version of the incident in full.

It was brought out that while at the trial the witness spoke of the companions of Jai having exhorted him to shoot with the words, 'Goli Maro Saley Ko', the exhortation, according to his statement in the Committing Magistrate's Court was, 'Maro Sale Ko'.

But the only natural way in which a man armed with a pistol could be incited to assault was by shooting, the so-called difference between the two exhortations is without a distinction. Another discrepancy elicited was regarding omission of mention of the appellant having been armed with a knife in the statement of the witness under Section 161.

The emphasis having naturally been as to how Mannoo Kumar met his death, omission of mention at that stage of the weapons in the hands of the companions of Jai should not be taken to be a material omission. In no other way was it sought to challenge the testimony of this witness.

26. There ware three further arguments put forward by the learned counsel for the appellant. One related to the test identification itself. It would therefore only affect Mushtaq Ahmad P. W. 6, if at all, since the other witnesses knew the appellant and, but for the appellant's insistence, need not have been put to the test of an identification parade.

It appears that there was a move on behalf of the appellant that his pairokars should be allowed to supply the persons to be mixed with him at the test, and that this request was turned down. The first class Magistrate, Sri Raghunath Singh P. W. 10, who conducted the test identification, has deposed that nine undertrials were : mixed with the appellant, and that they were similar to the appellant in

appearance, etc.

The appellant was represented by two counsel at the time of the test, and it appears that an application Ex. D-8 reiterating the request was at that time preferred before the Magistrate, but the application was again rejected. It was argued that the contents of this application supported the defence plea that the undertrials mixed with the appellant were not of his 'status, class, physique and personality, thus rendering the purpose of identification proceedings infructuous'.

But, as rightly pointed out by the learned Sessions Judge, this application had already been prepared several days before 9-3-1956. It could not therefore be taken as amounting to a protest against the actual state of affairs at the time of the identification parade. The identification memo Ex. P-9 contains a lengthy objection of the appellant about his having been shown to witnesses.

There is however not a word of objection in it against the undertrials mixed with him. Nor was any cross-examination directed against the aforesaid statement of the Magistrate that the 9 undertrials mixed with the appellant were similar to him in appearance, etc. The allegations in the aforesaid application Ex. D-8 were therefore merely anticipatory in character and, like a number of other allegations contained in carefully prepared applications, without any basis. The identification proceedings cannot therefore be said to be defective.

27. The next argument sought to find a conflict between the eye-witness account and the site plan. According to the former after receiving the shot Mannoo Kumar staggered and fell on the plank of a watch-maker's shop. That should naturally mean a watch-maker's shop in close proximity to the spot where Mannoo Kumar was shot at. But that spot has been shown in the site plan prepared by the investigating officer at point No. 4, seven or eight shops removed from the said spot. Now, anything depicted which is not based on the officer's personal observation but on information received from others would be inadmissible in evidence as being hearsay and as being hit by Section 162, Cr. P. C., unless deposed to in Court as an independent fact and not as information imparted to the investigating officer. Santa Singh v. State of Punjab : 1976 CriLJ1875 . The description in the site plan of what is said to have happened at point No. 4 was not

based on the investigation officer's own observation but on information received from others. It is therefore inadmissible in evidence. As noticed already the evidence of none of the eye-witnesses supports the theory of Mannoo Kumar having traversed all the distance upto point No. 4 before falling on the plank of the watchmaker's shop shown at No. 25 near point No. 4. A reference to the site plan will show that there is another watch-maker's shop at No. 21 close to the spot where Mannoo Kumar was hit. This is admissible in evidence as based on the investigating officer's personal observation. Evidently, the witnesses meant this shop and the investigating officer misinterpreted the witnesses when he showed that spot at point No. 4 near the other watch-maker's shop at No. 25. There is therefore no conflict between the testimony of eye-witnesses and the site plan. On the contrary, the site plan would appear to corroborate their evidence.

28. The third argument was that the alleged motive of the murder had not been established inasmuch as there was no evidence relating to the earlier quarrel at the Begam Bridge. In the first place, while proof of motive lends additional support to the finding of the court that the accused was guilty, absence of its proof did not necessarily lead to the contrary conclusion and could only have the effect of necessitating a closer scrutiny of the other evidence bearing on the guilt of the accused. Atley v. State of Uttar Pradesh : 1955 CriLJ1653 . The direct evidence bearing on the guilt of the appellant has been found to be irreproachable upon what may be presumed to be a close scrutiny of the same. In the next place, it cannot be said that evidence regarding motive is wholly wanting.

Except for the minor difference as to whether the deceased had also complained to Bir Singh P. W. 1 and Kastoori Lal P. W. 8 that he had been beaten at the Begam Bridge, they have both deposed to the deceased having told them of his quarrel there with Jai, Matroo and the appellant and of these three having held out the threat to him that they would not let him escape that day. The earlier quarrel, which constituted the motive for the crime, therefore, stood proved by the dying declaration of the deceased. True, four witnesses, Jagan-nath Dwarkanath (not Dwarkanath Sahgal P. W. 5), Chiranji Lal and Amarnath, were cited in the aforementioned list of witnesses Ex. P35 dated 3-2-1956, and none of them was produced by the prosecution. But the identification memo shows that, except for

Jaganuath, the other three did correctly identify the appellant. It could not therefore be said that the prosecution had suppressed that evidence out of oblique motive. The prosecution could not therefore be charged with having adduced no evidence of motive but only of not having adduced better evidence. The evidence of motive actually produced, such as it was, would, however, appear, in the light of the other evidence relating to the occurrence itself, to be worthy of belief.

29. It only remains to see whether the ap-pellant has been rightly convicted with the help of Section 34, I. P. C., for the murder actually committed by Jai. In this connection the evidence against the appellant is as follows : (1) the earlier quarrel at Begam Bridge which was the cause or the motive for the murder took place with the appellant as well as Jai and Matroo; (2) not long after that quarrel the deceased was intercepted by all the three in the Suddar Bazar and prevented from proceeding to the police station; (3) at the time of this interception all the three were armed, the appellant being armed with a knife, (4) Jai shot at Mannoo Kumar on being incited to do so by the appellant and Matroo; (5) after Mannoo Kumar was shot all the three threatened the bystanders with death if any of them dared to approach them; and (6) after giving out this threat all the three ran away together.

30. Discrepancy by omission in respect of the manner of interception, i.e. whether it was by catching hold of the rickshaw, has been found to be a material discrepancy. That would not however take away from the fact that the appellant was one of the persons who prevented the rickshaw carrying the deceased and his companions from proceeding further, whatever may have been the man-Tier of that intervention. The aforesaid discrepancy does not therefore affect the unanimous prosecution evidence about the appellant having appeared along with Jai and Matroo at the junction of two roads where the occurrence took place and prevented the deceased from proceeding further in order that he may be shot at. The only other circumstance in regard to which there is discrepancy by omission in the statements of three out of the five witnesses relied upon is that of the appellant having carried a knife.

It would be safer therefore to discard that circumstance. There is unanimity in respect of the fourth circumstance. That being so, its omission from the first

information is immaterial in view of the circumstances, noticed already, in which the report was lodged. The evidence as regards the fifth circumstance should also be accepted since out of the five witnesses relied upon there is discrepancy by omission in the statement of only one of them, Basant Lal P. W. 2. All the witnesses are unanimous without a discrepancy in regard to the sixth circumstance. The first circumstance of motive in which the appellant figured along with the other two has also been found to be well-founded.

31. The picture of the appellant's participation in the occurrence is therefore as follows. On account of an earlier quarrel of the deceased with the appellant, Jai and Matroo at the Begam Bridge at about 12 in the noon, he and the other two intercepted the deceased in Suddar Bazar as he was proceeding to the Suddar Bazar police station a few minutes before 1.20 p. m., and Jai shot at and killed Mannoo Kumar at the instigation of the appellant and Matroo, and thereafter all the three ran away together after threatening the onlookers that if any of them approached them he would be killed. That is not the picture of a mere automaton, or of one tied, as it were, to the apron strings of Jai and Matroo, but of one voluntarily and intelligently acting in unison with them in execution or a plan formulated by a prior meeting of the minds of all the three. Prior concert or prearranged plan, which it is necessary to prove to hold an accused liable vicariously with the help of Section 34, I.P. C., stands established against the appellant by the proof of motive which was shared by the appellant with Jai who shot Mannoo dead. It also stands established by subsequent conduct as evidenced by the systematic plan of campaign unfolding itself in the course of the action. All these circumstances constitute also circumstances which necessarily lead to inference of prior concert since they are incapable of explanation on any other reasonable hypothesis. Pandurang v. State of Hyderabad, (S) AIR 1955 S. C. 210 (G). That inference is confirmed if confirmation were at all necessary in a clear case conclusively proved by direct evidence like the present, by the various false pleas taken by the appellant, particularly the plea of alibi. From what has been adverted to already, it is not that , that plea has simply not been proved, but that it has broken down completely. The inference in the circumstance should be that the accused had falsely tried to wriggle out of a situation in which he was guiltily conscious of his involvement. The appellant's conviction under Section 302,

read with Section 34, I. P. C., is therefore well-founded.

32. The last submission made by Sri P. C. Chaturvedi, learned counsel appearing for the appellant, was that the appellant did not deserve the extreme penalty provided by the law. Now, determination of the right measure of punishment, not, being subject to any rule, is necessarily a matter1 of discretion. It is therefore a matter within the province of the trial court. That being so, appellate court's interference in that regard would only be justified on exceptional grounds-One such ground may be, that the trial court proceeded on a wrong principle and that, as a consequence thereof, it committed an error in imposing the sentence it did. In this case the learned Sessions Judge took into consideration a number of circumstances and remarked with respect to one of them that it could not be taken as an extenuating circumstance. Obviously therefore he was at pains to find if there was anything which tended to lessen what, in his view, was the normal magnitude of the offence.

In other words, he proceeded on the assumption that the sentence of death was the normal penalty for murder and imprisonment for life the exception which had to be justified by some reason, ait assumption based on the law as embodied in Sub-section (5) of Section 367, Cr. P. Code, before its repeal by the Code of Criminal Procedure Amendment Act XXVI of 1955 with effect from 1-1-1956.

Since the omission of that sub-section, the question of proper sentence where the accused is convicted of an offence punishable with death is to be decided, not on any assumption of that nature, but like any other point for determination with the decision thereon and the reasons for the decision, as provided by Sub-section (1) of that section. One of the observations made by the learned Sessions Judge in this connection was that the age of the appellant could not 'be used as an extenuating circumstance'.

The correctness of that view appears to be open to doubt, but it is not necessary to express any opinion on that point, since his view on another circumstance, which would appear to be .a material circumstance in connection with the matter under consideration, is obviously wrong. That view of the learned Sessions Judge was that the motive for the commission of the offence had not been revealed, and

that the cause of enmity was not known. The first is a wrong inference since, as noticed already, the motive was the earlier quarrel at the Begum Bridge, and the second is exactly the reason for which the lesser penalty should have been imposed.

33. Now, there is no doubt that the aforesaid motive being established, the offence was a pre-planned or pre-meditated one in the legal sense of pre-mediation required for purposes of the application of Section 34, I. P. C. At the same time, no details of the previous quarrel having been proved by reason of the failure of the prosecution to produce the eye-witnesses of that incident, it cannot be said that the murder was a pre-meditated one in the sense of what is often described as 'a cold-blooded, calculated, deliberate and callous homicide'. It may well be therefore that the behaviour of the deceased in that earlier quarrel was such as to have brought about the incident which took place shortly after that quarrel and which cost him his life. That matter of course has remained in doubt, and the appellant is entitled to the benefit of that doubt. In the circumstance, the proper punishment, that is, which bears a proper proportion to the offence committed, would appear to be the punishment of imprisonment for life.

34. In the result, therefore, the appeal is dismissed subject to the modification that whereas the conviction of the appellant under Sections 302 and 325, read with Section 34, I. P. C., and the sentence of3 years R. I. under the latter count are maintained, the sentence of death passed on him underthe first count is reduced to one of imprisonmentfor life. The sentences will run concurrentlyThe reference for confirmation of the sentence ofdeath is rejected.