

Nem Singh and ors. Vs. Emperor

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Court : Allahabad

Decided On : May-01-1934

Reported in : AIR1934All908; 152Ind.Cas.741

Appellant : Nem Singh and ors.

Respondent : Emperor

Judgement :

Thom, J.

1. The appellants, Nem Singh, Karan Singh, Kanwal Singh, Sahib Ram, Sheodan Singh and Mukhtar Singh, have been convicted under Section 302, read with Section 149, Penal Code. Sheodan Singh has been sentenced to transportation for life, and the others have been condemned to death. The appellants were charged in connection with the murder of one Sham Lai. One Chhidda was charged along with them. Chhidda however has been acquitted in the Sessions Court. The charge against the accused was that about 1 a.m., on the night of 24th-25th July 1933, in the village Tarapur, they attacked Sham Lal and inflicted upon him injuries to which he succumbed seven days later. That Sham Lal on the night in question was the victim of an assault, and that he did sustain injuries which eventually resulted in his death is not in dispute. According to the prosecution case, Sham Lal was attacked by a body of ten or twelve men about 1 o'clock in the morning whilst he was asleep on a cot on his ohabutra. The first information report

was made by the witness, Kanwal Singh, a cousin of the deceased, at 2-30 on the morning of the 25th. The police station of Gonda, where the report was made is at a distance of one mile from the village of Tarapur where the crime was committed. The first information report is in the following terms:

Last night my brother, Sham Lal, was sleeping under the thatch in front of his shop in Tarapur, while I was sleeping on a platform close by. At about 1 a.m. 10-12 men approached the charpai of Sham Lal. Out of them four or five men pressed Sham Lal, while he was asleep, two or three of them inflicted injuries with spears. He has received injuries caused by spears on his head at several places. He has received spear cuts on his left riba etc. I recognised Sahib Ram, Kanwal Singh, Nem Singh, Karan Singh, Sheodan Singh and Mukhtar, Jata of Tarapur. Some of them had spears. I called out to remain steady and not to lose courage. On hearing it some of them ran towards the house and some towards an intervening lane in the village. Rshan Lal, Girwar, Bhudeo Brahman were sleeping there close by. They have also seen them committing assault and running away. Investigation may be made. Sham Lal has received serious injuries on account of which I could not bring him. I heard my statement. It is what has been dictated.

2. It will be observed that all the six appellants and no others were named by Kanwal Singh in this report. Further it will be noted that Roshan Lal, Girwar and Bhudeo Brahman were mentioned as witnesses. Roshan Lal and Girwar gave evidence in the Sessions Court against the accused. Bhudeo Brahman was not called as a witness, nor did his name appear in the calendar of Crown witnesses. Further no explanation was tendered to the Court as to why he was not called as a witness. The report of Dr. Asthana, who examined the deceased when he was taken to hospital some time about noon on the 25th, shows that Sham Lal had undoubtedly been the victim of a brutal and determined assault. He sustained in the course of the attack no fewer than nine injuries. All these injuries are described as 'cut wounds,' with the exception of two, one which is called a contusion, and the other a scratch. Seven of the injuries were on the head or face. One, a cut wound, was on the left armpit, and one, a scratch in the left shoulder. Seven of the wounds are described as simple, one as dangerous, and one as grievous. The grievous injury is described as a cut and fracture of the nose bone. The dangerous

injury is described as a cut and fracture of the cranial bone so that the brain matter was exposed.

3. Although Sham Lal had sustained these Injuries, he lived for seven-days. The post-mortem examination of his body was performed by the Civil Surgeon of Aligarh, Capt. Kapur. In his report he describes the injuries referred to in Dr. Asthana's report. He certifies death as having been due to fractures of the skull bone and injury to the brain substance caused by some heavy sharp weapon. The prosecution case is that the murder of Sham Lal was perpetrated by the six appellants. In support of their case the prosecution have adduced two dying declarations, one oral and one written, of Sham Lal, himself, the evidence of three or four eyewitnesses, the evidence of two witnesses who say they saw the accused conspiring together shortly before the murder was committed, and the evidence of certain witnesses who testified upon the question of enmity between the deceased and the appellants.

4. It is unnecessary to say much upon the question of enmity. It is common ground that there was enmity between the deceased and the accused. The deceased was a Brahman, and the accused Jats, and there can be no doubt, on the evidence, that for some considerable time there had been bad feeling between the Jats and the Brahmans in the village of Tarapur. Sham Lal had anticipated trouble from his enemies and he had made several complaints shortly before his murder to the police against some of the accused, in which he stated that he anticipated that an attack would be made upon him by them. In one of his reports he states that he actually had been surrounded and attacked by a body of men, which included some of the accused. Furthermore, it is clear from the evidence that Sham Lal was a police informer who had given information in the past against some members of the party to which the accused belonged. There was ample motive therefore for the murder of Sham Lal by the accused. I proceed now to discuss the evidence of the eye-witnesses who have been produced by the prosecution in the Sessions Court. These witnesses are five in number: Kanwal Singh, Narain, Girwar, Roshan Lal and Har Prasad. Kanwal Singh was the man who made the first information report. He states in the course of his evidence that he knows all the accused, and that there was enmity between them and the deceased, Sham Lal. He says:

About 4 1/2 months ago Girwar, Roahan, Bhudao and I were sleeping on another platform at a distance of about 1 or 1 1/2 yards. Sham Lal was sleeping on the other platform under the chhapper in front of his shop. No other person was sleeping near about. At about 1 a.m. after midnight Sham Lal cried. I woke up. I saw 10 or 12 persons beating Sham Lal. Four or five persons were pressing down Sham Lal and 3 or 4 persons were beating Sham Lal with spears. I recognised Nem Singh, Karan Singh, Sahib Kam, Kanwal Singh, Mukhtar and Sheodan. (The witness identified the accused named above.) A lantern was burning in the chappar. I recognised these persons in its light. It was a dark night. The moon had not risen. Bhudeo Girwar, Roshan and I raised an alarm. Some persons ran away into the lane towards the village and some towards the western side towards Garhi. After these persons ran away I went to Sham Lal. Sham Lal had several injuries and was unconscious. Durga came there. Durga asked me to go and make a report. I went to the thana and made report Ex. 1 read out to me.... Sub-Inspector sent Sham Lal to Iglas hospital. Sham Lal was unconscious. Girwar had told me before I went to the thana for report that he had recognised Chhidda also. I did not mention Chhidda's name in the report. I mentioned the names of persons in the report whom I had re-cognized.

5. In cross-examination this witness says that he does not know whether a lantern burns at night at any other place in the village; he had not seen a lantern burning in any other house in the village; it was rainy season and there were lots of insects. He states however that there was a lantern hanging in the chappar 4 cubits from Sham Lal's cot, and that it was in the light of this lantern that he recognised the accused. He further states that he did not see any other weapon except spears with the assailants. He declares also that he had no talk with Sham Lal till his death. In other words, according to this witness, Sham Lal was unconscious when the witness reached his cot, and he had no conversation with him before his death.

6. Prosecution witness 4, Narain, states that he was sleeping at a distance of 15 or 20 paces from Sham Lal. About midnight, he says, he saw four or five persons running away from Sham Lal's shop. He was aroused by the sound of their feet and he recognised two persons, Karan Singh and Nom Singh, out of them. Both

these persons had spears. They ran away towards Garhi. In cross-examination this witness admits that there was no light at the place where he was sleeping or near his cot. He was sleeping outside on the ground. He went to Sham Lal's cot after his assailants had run away, and there, he says he told Kanwal Singh, Girwar and Roshan Lal the names of the persons whom he had recognized. According to his answers to questions put by the Court, it is clear that this witness was wakened up suddenly by the noise of persons running past the place where he was sleeping, and despite the darkness of the night, he alleges he was able to recognize two of the accused, namely, Karan Singh and Nem Singh.

7. Prosecution witness 5, Girwar, states in the course of his evidence that he knows all the accused. He was sleeping on the night in question at a distance of 3 or 4 paces from Sham Lal, Kanwal Singh, Sham Lal's cousin, and Bhudeo were also sleeping with him on the same platform. He was aroused by a shout from Kanwal Singh that Sham Lal had been murdered. He saw the accused Kanwal Singh, Sahib Bam, Nem Singh and Sheodan Singh beating Sham Lal with spears whilst Karan Singh, Mukhtar and Chhidda pressed him down. Altogether there were ten or twelve persons. It was a dark night, but a lantern was burning which was hanging in the chappar. Five or six persons ran away towards Garhi and five or six into a lane. He went to Sham Lal and found him unconscious.

8. In cross-examination this witness says that he knows that lanterns are burnt at night in Bhudeo's house and Durga Singh's house and in other places in the village. Sham Lal's lantern was hanging, he says, in the centre of the chappar and Sham Lal's cot was under the chappar about 3 or 4 cubits from the lantern. The evidence of this witness has been rejected by the learned Sessions Judge on the ground that; his statement under Section 164, Criminal P.C., does not square with his statement in the Sessions Court. In his statement under Section 164 he states that he got up and saw 4 or 5 persons pressing down Sham Lal and 3 or 4 persons beating him with spears, and that he recognized them when these persons ran away jumping down from the platform. His evidence in the Sessions Court on the other hand is to the effect; that he recognised the accused before they left the chappar when in fact they were actually engaged in holding Sham Lal down and beating him. There is no doubt that this witness has changed his

statement. It may be because he thought that it would be difficult for the Court to believe that he succeeded in recognising the accused, some of whom at least must have had their backs turned to him when they were engaged in assaulting Sham Lal. Whatever be the reason, the learned Sessions Judge has not relied upon his testimony.

9. Prosecution witness 6, Roshan Lal, states that he knows the accused. On the night of the attack on Sham Lal he was aroused by the alarm which was given by Kanwal Singh and Girwar. He saw 10 or 12 persons round the platform on which Sham Lal was sleeping. He saw Karan Singh standing under the platform, and Nem Singh, Kanwal Singh, Sahib Bam, Sheodan and Mukhtar descending from the platform. Although there were other persons there, he did not recognize them. This witness states further that it was a dark night, but there was a lantern burning in the chappar of Sham Lal. It was hanging in the centre of the chappar and Sham Lal's cot was about a cubit removed from the lantern. He recognised the accused in the light of the lantern. The accused had spears. Prosecution witness 8, Har Prasad, is a teacher. He states that on the night of 24th July 1933 between 12 and 1 a.m., he was sleeping on his platform in front of his house about 35 or 40 yards from Sham Lal's platform. He was aroused by the noise of some persons running away. He got up and saw 4 or 5 persons coming running from the side of Sham Lal's shop. They had spears in their hands. He recognised Sahib Bam and Kanwal Singh. Two of the others looked like Sheodan and Mukhtar, but he could not be certain. After he had seen these persons running past he heard cries coming from the side of Sham Lal's shop. The witness states further that he enquired from Kanwal Singh and Sahib Ram as to why they were running away, but he got no reply. The witness went to Sham Lal's chabutra where he found Sham Lal injured and unconscious. This witness has been disbelieved by the learned Sessions Judge. In the course of his judgment dealing with his evidence the learned Judge states:

Similarly Har Prasad, P.W. 8, stated here that he was sleeping in front of his house and was aroused by the noise of some persons running away. He got up and went to the entrance of the lane through which some persons were coming running out, of whom he recognised Kanwal Singh and Sahib Ram, accused. He

has also stated that he could not have recognised any person from his cot. He stated in the lower Court that he got up and sat up on his cot and recognised two persons out of them. The contradiction in his two statements and the admission that he could not have recognised while sitting on his cot, make his statement in this Court that he went to the entrance of the lane and recognised the persons there doubtful.

10. Evidently this witness changed his statement because he realised the difficulty of convincing the Court that it would have been possible for him to have recognised any of the accused from his cot owing to the darkness of the night. Both Girwar and Har Prasad have altered their statements obviously for the same reason, and I am of opinion that the learned Sessions Judge was right in refusing to place reliance upon their testimony. The witnesses who speak to having seen the accused in close and confidential conference shortly before the commission of the crime are Lakshmi Narain and Reoti Lal. Lakshmi Narain states that he is a teacher and a resident of Tarapur, and that he knows all the accused. On the night of the murder of Sham Lal about 10 o'clock he saw in the enclosure of Padam Singh, who is the father of the appellants, Sheodan Singh and Mukhtar Singh, 12 or 5 persons from the wall of the enclosure. A lantern was burning in the enclosure, and he was able to recognise Karan Singh, Nem Singh, Sahib Ram, Kanwal Singh, Chhidda, Teja, Mukhtar Sheodan and Padam Singh. He states 'They were conspiring something'. He further declares that he took the witness Reoti Lal with him near the wall of the enclosure and pointed out these persons to him. In cross-examination he admits that he stated to the Sub-Inspector that he had gone to sleep and that he got up to case himself at about 10 p.m. He made a similar statement in his evidence under Section 164. He admits that he does not generally case himself at that time of night. This witness has not been relied upon by the learned Sessions Judge. In his statement under Section 164 it appears that he had said that he had gone to sleep, and thereafter he got up to case himself and it was then that he had seen the accused.

11. I am of opinion that little reliance can be placed upon the evidence of this witness. But it is important to note, in view of what I shall have to say upon the question of the accused Kanwal Singh's plea of alibi that he says that he saw

Kanwal Singh in Tarapur with the other accused at 10 p.m. on the night of 24th July. Beoti Lal corroborates Lakshmi Narain; but the learned Sessions Judge has discarded his testimony. I have considered his evidence and I am of opinion that the learned Sessions Judge was right in refusing to rely upon it. The next evidence to which I would refer is the dying declaration of the deceased and the testimony of the tahsildar, who recorded the deposition, and of Dr. Asthana who examined the deceased on his admission to hospital. Sham Lal reached the hospital at Iglas at about noon on 25th July. He was immediately examined by Dr. Asthana. Dr. Asthana says that his condition was precarious and that he immediately sent a report to the tahsildar requesting him to come and record his statement. The tahsildar went at once to the hospital on receipt of Dr. Asthana's message. In the presence of Dr. Asthana he recorded a dying declaration made by Sham Lai. That declaration is in the following terms:

At this time I am in full possession of my senses. In mauna Tarapur I was sleeping under the thatched roof of my shop when at night 10-12 men together attacked me. When those men came I was asleep these men came and attacked me with spears. At that time I at once woke up and knowingly saw (the assailants), I thoroughly recognised six persons and asked them not to do so, but they did not yield to it. I recognised Kanwal Singh, son of Naubat, Sahib Kam, son of Dongar Singh, alias Ijallu. Singh, Mukhtar Singh and Sheodan Singh, sons of Ram Singh, Karaa Singh, son of Kaso Ram, and Nem Singh, son of Nahar Singh. I continued to look till they took to their heels. I cannot state with certainty as to how many strokes they gave me with spears. Besides these there were 4 - 6 men more whom I could not then recognise. But it is possible if they come before me I may be able to identify them. I do not bear any enmity against these men, but these people have all along been beating grudge against me. Padam Singh, Karan Singh and Nem Singh have been cherishing ill-feeling against me for about a year. Besides them there are other men also. I have lodged a report regarding this also at the police-station stating that these men bear ill-will against me. After departure of these men I had a talk with my cousin Kanwal Singh. Up to that time I was in my senses. Afterwards Kanwal Singh went to make a report and I became unconscious. Now after coming to Iglas I have come to senses.

12. It will be observed that in this declaration Sham Lal names only the six appellants who were named by Kanwal Singh In the first information report and who were named by the witnesses whose evidence we have already referred to. He says that he thoroughly recognised these six persons and that he might be able to recognise the others who attacked him if he saw them. The medical evidence shows that he had sustained during the attack a very serious injury to his head. His skull bone had been fractured by some heavy sharp weapon and the brain was exposed. Despite this fact however In bin declaration it will be observed that Sham Lal says that he continued to look out his assailants until they took to their heels. He further states that after the departure of his assailants and before he became unconscious he had a talk with his cousin, Kanwal Singh. Up to that time he was in his senses.

13. Now, Kanwal Singh definitely denies that, he had any conversation with Sham Lal. Every one of the prosecution witnesses say that when they reached Sham Lal's cot Sham Lal was unoonsoious. The medical evidence makes it clear beyond all doubt that Sham Lal was rendered unconscious by the blow which he received which resulted in the fracture of his skull. He could not have watched his assailants till they took to their heels, nor could he have engaged in conversation with Kanwal before becoming unconscious. This declaration, therefore, to which I should have ordinarily attached very great weight, is, in my opinion, of very doubtful value. It contains two obvious untruths. I can only conjecture as to how and why these untruths appear in such a declaration. It appears that after having recorded this declaration the tahsildar left the hospital. He returned however at about 4 o'clock in the afternoon in the company of one Gulab Rai. It seems that for some reason or other he had decided to gat Sham Lal himself to record his declaration in writing. He states in the course of his evidence that the rules, by which he presumably means the Manual of Government Orders, prescribe that if a person writes out his dying declaration himself, it would be better. Whatever may have been the explanation, there is no doubt that the tahsildar visited the hospital again in the afternoon and it is alleged he got Sham Lai, who was then sufficiently recovered to be able to write, to record a second dying declaration, Ex. P-3. This declaration is in the following terms:

Last night I was sleeping under the thatched roof of my shop. At about 12 or 1 o'clock in the night 10 or 12 men armed with spears, etc., came and began to beat me. Although I made entreaties to them, yet they did not mind them. When I became almost helpless they ran away. Of them I know about 6 persons. I shall identify the other 4 or 6 persons if they come before me. When these people came to beat me I recognised 6 of them, namely, Kanwal Singh, son of Naubat, Sahib Ram, son of Dongar Singh alias Lallu Singh, Mukhtar Singh, Sheodan, sons of Padam Singh, Nem Singh, son of Nahar Singh, and Karan Singh, son of Kase Ram, caste Jat, residents of mauza aforesaid. I have made 3 - 1 reports against them at this police station. I have no grudge against them. They bear grudge against me.

14. The declaration does not differ in any material respect from the declaration which was made earlier in the day except that it does not include the statement that the deceased had conversation with Kanwal before he became unconscious. According to the prosecution case and to the evidence of Dr. Aathana and the Tahaildar, this statement, Ex. P-3, was written out in Sham Lal's own hand. I have examined the original document. It is written in a clear and comparatively steady hand and it would indicate that the writer was in full possession of his mental and physical faculties. When one considers the nature of the injuries which had been sustained by Sham Lal and the fact that he had been unconscious as a result of these injuries for almost 12 hours one cannot but remark that this declaration, Ex. P-3, is a most extraordinary document. The writing is steady and clear. There are no indications whatever that the writer was suffering from any inability. There is of course the fact that Sham Lal lingered on for six or seven days and died as a result of the wounds on the head and supervening septicaemia and epileptic fits which followed the injury to the brain. He must therefore have been a man of extraordinary vitality. But despite that the fact that he was able to write, Ex. P-3, after having sustained the injuries which he did and after having been unconscious for 12 hours is truly a remarkable occurrence in the history of medical jurisprudence. It has been argued before us that the declaration which is alleged to have been made to the tahsildar when he first arrived at the hospital was never in fact made by Sham Lai. It was contended that his condition was such that he could not have made such declaration. In support of this contention learned Counsel

referred to the evidence of Capt. Kapur, who performed the post-mortem examination. In the course of his evidence Capt. Kapur states:

Injuries which in my opinion were caused by a heavy sharp weapon were probably caused by a gandas. Death was probably instantaneous. The man could never have spoken after receiving the first injury. The fracture of the skull was not due to more blows than one.

15. It is true that Capt. Kapur modifies this statement somewhat in cross-examination. Learned Counsel has argued that the doctor and the tahsildar realized that it would never be believed that Sham Lal was able to speak and omit the declaration which they say he made, and that was the reason why this second declaration, was written in Sham Lal's own hand. If this explanation is sound, then not only must the first declaration be rejected, but the second also, and it must be held that both the tahsildar and the doctor were guilty of conduct of a highly reprehensible character. The argument however was not urged in the Sessions Court, there was no cross-examination on the point. In these circumstances I cannot hold it proved that...these declarations are not genuine documents. On the information on the record there is no ground therefore for questioning the bona fides of the Doctor or the Magistrate. It would appear from the evidence that besides the doctor and the Tahsildar a number of others were present when Sham Lal emitted his declarations. Why they were there is not explained. How far they may have intervened during the recording of the declarations is not clear. I take this opportunity of stating that the recording of a dying declaration, which may subsequently be produced as evidence in a Court of justice is a grave and solemn proceeding. Unauthorized persons should not be permitted to crowd round when the declaration is being made. It is the bounden duty of the Magistrate to take every possible step to ensure that no influence is brought to bear on the declarant and that he is not prompted or aided in anyway in making his statement. The proceeding should be so conducted that the declarant is as free from personal influence in emitting his declaration as he would be if he were giving evidence in a Court of law.

16. Taking the declarations in the present case as genuine, their evidentiary value is however as I have already observed, considerably lessened by the fact that there are two false statements in the first. That concludes the main evidence which has been adduced by the prosecution. Learned Counsel for the appellants has subjected it to several most damaging criticisms. All the eye witnesses declare is that they recognized the accused in the light of the lantern which hung above Sham Lal's cot. There can be no question that the night was dark and Sham Lal's assailants could not have been recognized by the witnesses, had there not been a light above his cot or somewhere on the platform on which he was sleeping. Although the eye witnesses stated in the committing Magistrate's Court and in the Sessions Court that there was a lantern there, it is a remarkable fact that none of them make any reference to the lantern either in their statement to the police or in their statements under Section 164. So far as Narain Singh is, concerned, he states that he recognized two of the accused, Karan Singh and Nem Singh, running suddenly past his cot. He does not depend upon the light of any lantern to explain his recognition of two of the accused. Learned Counsel for the appellants has contended, and I think with a certain amount of reason, that it is difficult to place any reliance upon the evidence of Narain. He was suddenly awakened. Two persons ran past him in the dark and he says he recognized them though the night was so dark that even a witness wide awake would have had difficulty in recognizing a person a few yards off. Taking all the facts into consideration, I must say that I hesitate to accept the testimony of this witness.

17. The other witnesses, however depend upon the lantern, and if their evidence is to be accepted, then one must hold that there was a lantern hanging above Sham Lal's cot. Learned Counsel for the appellants in addition to stressing the fact that the lantern was not mentioned either to the police or in the statements under S.I 64, has argued that it would be highly unlikely that Sham Lal would have a lantern burning so near his cot in the month of July where the light would be sure to attract numbers of insects. He has further observed that one at least of the Crown witnesses, namely Kanwal Singh, 18 unable to say that he ever saw a lantern burning late at night in any other house in the village. Girwar states that he has seen a lantern burning at night in the houses of Bhudeo and Durga. Girwar's evidence however has been rejected by the learned Sessions Judge. There is

undoubtedly substance in the argument that it would be unlikely that Sham Lal would leave a lantern burning above his head when he went to sleep at night at that time of the year, The Sub-Inspector who investigated the case states that he made no inquiries about the lantern because although the night was a dark one, all the accused were known to the witnesses and he did not think it therefore necessary to make any inquiries about the lantern. When the Sub-Inspector reached the spot, there were, he says, a number of lanterns near the chabutra where Sham Lal was lying. He made no investigation however as to whether one of these lanterns belonged to Sham Lal. He did not examine the chappar for the purpose of ascertaining whether a lantern usually hung from it, whether there was a hook for the lantern on the chappar or whether the chappar itself bore signs of a lantern having been burnt below it. In fact, the Sub-Inspector in charge of the investigation of this crime made no inquiry or investigation at all upon what is undoubtedly one of the most important points in the case. The result is that the evidence with regard to lantern, in the light of which the witnesses are alleged to have recognized the accused, but which they did not mention to the police or in their statements under Section 164, is decidedly weak. Proof of the existence of the lantern was a necessary link in the chain of evidence and inasmuch as a chain is as strong as the weakest link, it is difficult to hold that the prosecution has succeeded in proving beyond all reasonable doubt, especially in view of the other circumstances of the case, that the accused persons were amongst Sham Lal's assailants.

18. Learned Counsel for the appellants has drawn our attention to one other remarkable feature in the evidence. All the injuries inflicted upon Sham Lal were, upon his head or shoulders. Learned Counsel contended that in all probability Sham Lal would have endeavoured to defend himself against the attack, in which case one would have expected to find injuries to his hands and arms. There are no such injuries, and undoubtedly the criticism of the prosecution case based upon this fact is a legitimate criticism. On the other hand, it may well have been that Sham Lal was rendered unconscious by the first blow which fractured his skull, in which case it is not surprising that there were no injuries on his hands and arms. There is one further fact which is somewhat remarkable. All the eye witnesses said that the assailants were armed with spears.

19. None of the witnesses suggested that any of the accused were armed with any other weapon. Now, there is nothing in, the medical report upon the injuries to suggest that these injuries were necessarily inflicted by a spear. Further it is clear from the medical Evidence that the blow which fractured Sham Lal's skull was inflicted not with a spear, but with some sharp heavy weapon. Dr. Asthana in the course of his evidence says that this injury was inflicted with a sharp heavy weapon, a gandasa or an axe. None of the eye witnesses speak to any of the assailants being armed with such a weapon. It would seem therefore that the fact is that the eye witnesses were unable to observe with what weapons Sham Lal's assailants were armed, despite the fact that all definitely stated in the course of their evidence that they were armed with spears. This would suggest that they were to a certain extent at least drawing upon their imagination. Before leaving this branch of the case we must draw attention to one significant and highly suspicious circumstance. Sham Lal in his dying declarations, Kanwal Singh in the First Information Report and the eye-witnesses in their evidence name the appellants amongst Sham Lal's assements and the appellants alone except one witness who names also Chidda and another. Ten or twelve persons are seen conferring before the crime; out of them only the appellants are recognized. Ten or twelve persons are seen attacking Sham Lal; only the appellants and Chidda and another are recognized. Sham Lal wakes up after being unconscious for twelve hours. He says he was attacked by ten or twelve men. He names only the appellants. Surely this is a somewhat extraordinary fact for which the prosecuting authorities have furnished no satisfactory explanation. I am inclined to the view that it is asking too much of judicial credulity to offer the explanation of mere coincidence. I would observe here that there are many suspicious circumstances connected with the prosecution case and this is not the least.

20. The accused, Kanwal Singh, preferred a plea of alibi. In view of the facts which have been elicited in the Sessions Court and during the hearing of this appeal, it is necessary for us to refer to this plea at some length. Mr. Malaviya, for the appellants in the course of a most able and exhaustive argument has succeeded in raising in my mind the very gravest doubt as to whether Kanwal Singh was amongst Sham Lal's assailants. Further, if his contentions are accepted, and they seem to be well founded, there undoubtedly is a very grave suspicion that the

prosecuting authorities in the preparation of this case have been guilty of highly irregular conduct. Kanwal Singh's defence is that on the night in question he was in Aligarh and that he slept that night in the Dharamshala of Malik Ghand. Kanwal Singh is a history sheeter. He was under the surveillance of the police, and according to the prosecution evidence, he was found absent from his house in Tarapur on the night of the 24th July. P.W. 13, Waris Ali, Constable, deposed that the village of Tarapur is in his circle. Kanwal Singh and Tej Singh were under police surveillance in Tarapur. One Anwar Khan and he went to Tarapur on the night of 24th July 1933, at about 12 p.m. He went to Kanwal Singh's house and found him absent. As a result, he made a report which is Ex. P-15. In the course of this report he states:

When at 12 o'clock in the night we watched Kanwal Singh, bad character No. 98, in Tarapur he was not found at his residence. We went to the house of Nem Singh Mukhia. He too was not found present. Then we reached the house of Padam Singh Jat. We found Hem Singh and Padam Singh talking together. When we said that Kanwal Singh, bad character, was absent both the persons kept silent. After reflecting something Nem Singh Mukhia said that he (Kanwal Singh) had gone to Aligarh and would stay at the Dharmshala of Malik Chand.

21. As a result of this report the police in Aligarh were requested to report whether Kanwal Singh was in Aligarh on the night of the 24th July. Investigation was made by the police in Aligarh, and it was reported that Kanwal Singh arrived in Aligarh on 24th July 1933, at 8 p.m., and that he left on 26th July 1933, at 8 a.m. Independently of this report Abdul Rashid, Constable of Rasalgaanj, made a report Ex. 16. This report is in the following terms:

Kanwal Singh, son of Naubat Singh, caste Jat...resident of Tarapur, in the Gonda circle, entered in the history sheet, came in last evening in order to look after a case and stayed in the dharamsala of Lala Malik Chand in Mohalla Sarai Rahman in this circle. He was watched therein and was found present. He will be watched throughout his stay.

22. In the Sessions Court the prosecution produced Azimuddin, Constable, P. W. 14. This witness stated:

I am posted at Chowki Rasalganj, Aligarh. On 24th July 1933 at or about 7 or 7-30 p.m., a person came to the Chowki and said that he was under police surveillance and had come from thana Gonda, that he was resident of Tarapur and would stay at night in the dharamsala of Malik Chand. He told his name as Kanwal Singh. He told his father's name also which I do not recollect. I told the head constable when he came to the Chowki. I cannot identify that person as I have seen him at night in the dark.

23. Abdul Rashid, the Head Constable who made the report Ex. 16, gave evidence in the Sessions Court. He stated in his evidence that on 24th July 1933, Azimuddin, Constable, informed him that a person who gave his name as Kanwal Singh, Jat of Tarapur and of thana Gonda, had come and told him that he (Kanwal Singh) was under police surveillance and would stay at night in the dharamsala of Malik Chand. He proceeds:

Azimuddin told me this at about 8-30 p.m. I went on my round and then to Malik Chand's dharamsala at about 1 a.m. The doors of the dharamsala were shut and were chained from inside. I called out Kanwal Singh. One person replied that he was present. I did not see that person. I went to the Kotwali next morning and made a report of Kanwal Singh's arrival, whose copy is Exs. 16.1 got Ex. 17/1 and 17/2 for inquiry. The report Ex. P. 17 on the back of 17/2 was sent by me to thana Gonda. It is in my handwriting. I sent it to thana Gonda. On the night of 25th July 1933 also I went to the dharamsala of Malik Chand. I called Kanwal Singh and I got a reply that he was present. I did not see the person on the night of 25th July also. Some constables told me at the Chowki on the morning of 26th July that that person had gone. I made a report of his departure in the Kotwali.

24. It appears further from the police diary that the dharamsala was visited by two other Constables between the hours of 12 and 1 on the night of the 24th/25th July. They also called out the name of Kanwal Singh and a voice replied from within that Kanwal Singh was present. Under Singh, P.W. 16, is a clerk who keeps the register in the dharamsala. He produced the register in Court and states:

On 24th July 1933 at No. 1651 there is an entry of Kanwal Singh, son of Naubat Singh, Jat, of Tarapur. Ex. P-18 is the true copy in my handwriting of the entry in

the register. I cannot identify the person whose entry was made in the register at No. 1651. On the morning of 26th July 1933 a person came to me and told me that he had got his name entered in the dharamsala register day before yesterday, that he was going today and that his departure might be entered. I saw that person then. (The witness identified Kanwal Singh, accused, and said that this person (Kanwal Singh accused) came to get his departure entered on he morning of 26th July 1933). I cannot say whether Kanwal Singh, accused, was or was lot the person who got his arrival entered on 24th July. A boy who has been living in the dharamsala from before came with Kanwal Singh, accused, to me on the morning of 26th July. Ramcharan is the name of the boy.

25. In cross-examination the witness states that Ramcharan is the son of the murdered man. He continues:

This boy told me nothing when Kanwal Singh told me that his name was entered in the register day before yesterday and that he was going today. The door of the dharamsala is closed at 10 p.m. Tejpal is still the chaukidar and the dharamsala. Tejpal is still the chauki-tar and was on the 24th July also. Five persons stayed in the dharamsala on 24th July. A khatha was held in the temple which adjoins the dharamsala on the night of 24th July. I was tot present in the katha.

26. The boy Ramcharan referred to by this witness was examined by the Court under Section 540, Criminal P.C. He states that he had been living in the dharamsala of Malik Chand, for the last two years, and that he was there on the night of 24th July 1933. He heard of the murder of his father at 5 p.m., on 26th July 1933, and immediately 'started for the village of Tarapur, which he reached about 11 o'clock at night. He further states:

Kanwal Singh, accused, did not come to the dharamsala and did not stay there on the night of 24th July 1933. I did not see him in the day or at night on 25th July also. I was reading in my room. Kanwal Singh, accused, came to me at 5-30 a.m. on 26th July 1933. He told me that he had been staying in the dharamsala since day before yesterday. I told him that I had not seen him. He told me that he was busy in his work and did not see me.

27. This concludes the evidence which was led by the prosecution, and of the witness who was examined by the Court as to Kanwal Singh's presence in the dharamsala on the night of 24th July 1933. That evidence is certainly not conclusive that Kanwal Singh did spend any part of the night of the 24th July there. The only prosecution witness who saw Kanwal Singh in Aligarh on the night of the 24th was the Police Constable, Azimuddin. He states that a man calling himself Kanwal Singh reported that he was going to stay the night at the dharamsala. The night was dark however he says in evidence and he could not recognize him. Although during the course of the night the dharamsala was visited by the Head Constable and others, Kanwal Singh was not seen by any of them. The evidence is that these Constables called out his name and an answer came from within that Kanwal Singh was present. In these circumstances, the learned Sessions Judge held that Kanwal Singh had failed to establish his plea of alibi. Dealing with this question in the course of his judgment the learned Sessions Judge says:

The only evidence of Kanwal Singh having been seen at Aligarh is that of Indar Singh, who states that he saw Kanwal Singh on the morning of 26th July 1933, and that of Mihi Lal. D. W, 4, who, as mentioned above, has stated to have seen Kanwal Singh in the katha on Dauj of Sawan (24th July 1933). Mihi Lal's evidence cannot be relied upon. The other independent evidence referred to above does not help Kanwal Singh accused, and does not prove Kanwal Singh's presence at Aligarh on the night of the occurrence. On the other hand, the fact that Kanwal Singh did not see any person who could have been produced, although a person giving out his name as Kanwal Singh went to the chowki in dark and also responded to the call of Abdul Rashid, head constable, at night from inside the dharamsala without showing himself to the head constable, shows that a clever attempt was made by Kanwal Singh to create evidence of his alibi.

28. Upon the evidence which was before him the learned Sessions Judge was undoubtedly justified in rejecting Kanwal Singh's plea of alibi. Since the trial in the Sessions Court however certain facts have come to light which entirely alter the complexion of this part of the case. Mr. R.P. Sinha, an advocate of 20 years' standing practising at the Bar at Aligarh, was counsel for Kanwal Singh in the

Sessions Court. Some time after the trial namely on 22nd January 1934, he met the witness Ramcharan, Sham Lal's son, in the Court at Aligarh. He engaged him in conversation and asked him to say now that the case was over, whether in fact on the night of the 24th July, Kanwal Singh, was in the dharamsala at Aligarh. According to Mr. Sinha's statement, Ramcharan replied that Kanwal Singh certainly remained in the dharamsala till 8 p.m. Realizing the importance of this admission, Mr. Sinha asked the lad to repeat this statement before witnesses. The lad did repeat this statement before three other lawyers who are members of the Bar at Aligarh. The fact that Ramcharan had made this admission was communicated to Mr. Malaviya, Kanwal Singh's counsel in this appeal, who immediately moved this Court to direct that further evidence be taken, and that Ramcharan be again examined and that Mr. Sinha and the other three lawyers who heard Ramcharan's statement should also be permitted to give evidence. The evidence of these witnesses has been taken and it is now before us.

29. Ramcharan denied that he made the statement with regard to Kanwal Singh's presence in the dharamsala which he is alleged to have made by Mr. Sinha and the other three lawyers. I am convinced not only upon the evidence of Mr. Sinha and his colleagues, but upon other grounds to which I shall refer later, that Ramcharan was lying when he said that Kanwal Singh was not in the dharamsala on the night of 24th July 1933. I have already referred to the evidence of Ramcharan in the Sessions Court. It will be recollected that he stated that on the 26th July on hearing of the murder of his father he started from Aligarh at 5 p.m., and arrived in Tarapur at 11 p.m. He was examined when the additional evidence was being taken upon this point. It is clear from his answers that he was concerned to establish that it was possible to get from Aligarh to Tarapur in a period of two hours. He is a lad of 17, and he has shown wonderful ingenuity in endeavouring to explain how it was that he took so long himself in going from Aligarh to Tarapur on the night of the 26th July. We have been informed that the kutcha road, which is the direct route from Aligarh to Tarapur, in the rains is in a very bad condition and that passage by it must necessarily be slow. Ramcharan however states that he did not go by the kutcha road, but that he went for a part of the distance by the pucca road and then struck off to the south towards Tarapur. When asked to explain why he took so long to complete the journey, he said that

he spent two hours in Aligarh looking for an ekka. This statement is manifestly untrue. When he realized that even that was not sufficient to explain the time he took to travel from Aligarh to Tarapur, he said that the ekka broke down in the way. I am convinced that this witness has not told the truth, and it rather appears that he has been coached and tutored in his evidence. We were requested by learned Counsel for the appellants to examine the, police diary. An examination of this diary has brought to light another important fact which was not before the Sessions Judge when he decided this case. As already noted, Azimuddin was the only prosecution witness who testified to having seen Kanwal Singh in Aligarh on the night of the 24th July. He stated however in his evidence that the night was dark and that the man could not be recognized. This upon the face of it is unlikely. It is difficult to believe that a Constable would not take ordinary steps to enable him to observe the features of a history sheeter who is reported to him. In his statement which is recorded in the police diary which he made on 6th August 1933, Azimuddin said:

On 24th July 1933, a person who gave himself out as Kanwal Singh, son of Naubat Singh Jat, bad character, resident of Tarapur, police station Gonda, told me that he put up at night in the dharamsala of Malik chand. I did not know him from before. I can identify him if I see him. As regards the night I cannot say who was present and who responded to the call. Next day, on 25th July 1933, I again saw that very man at the outpost.

30. It will be observed that there is a very obvious and marked discrepancy between the statement which.... Azimuddin had made to the police on 6th August 1933, and the evidence which he gave in the Sessions Court. In his statement to the police he said that he could identify the man, and that not only had he seen him at night, but he had seen him on the following day. In this evidence in the Sessions Court he said that he had only seen the man in the dark and that he could not identify him. No explanation has been given by the prosecution for this discrepancy. It has been suggested that it was quite possible that by the time he came to give evidence in the Sessions Court, Azimuddin would not have been able to identify Kanwal Singh owing to the lapse of time. I cannot accept this Suggestion. Kanwal Singh was a history-sheeter. He may or may not have been

known to Azimuddin, but Azimuddin undoubtedly, as the police diary shows, saw Mm not only in the dark on the 24th but in broad daylight on the 25th July 1933. On the 26th July, this Constable must have known that Kanwal Singh was being named as one of the murderers of Sham Lai, and we refuse to believe that he could not, in these circumstances, have identified Kanwal Singh as the man he saw on the 24th July in Aligarh.

31. It is rather significant that he was not asked by counsel for the Crown in the Sessions Court to say whether he could identify Kanwal Singh or not. I am driven therefore to conclude that Azimuddin gave false testimony in the Sessions Court, and the inference is inevitable that he gave false testimony at the instigation of the prosecution authorities. Indeed no other reasonable explanation is possible. This conclusion is borne out by another act which an examination of the police diary discloses. As was stated in the evidence of Indar Singh, one Tejpal was the chowkidar on duty at the dharamsala on the night of 24th July 1933. Tejpal was not called as a witness by the Crown. No explanation was offered to the Court as to why he was not called. A suggestion has been made that the learned Sessions Judge was well aware of the existence of Tejpal and of the fact that he had made a statement to the police. The passage already quoted from his judgment however certainly does not bear out this suggestion. In that passage, in which he discusses the evidence as to Kanwal Singh's whereabouts on the night of the 24th July, he makes no reference to Tejpal. Furthermore he makes no reference to the visit to the dharamsala of the other Constables who, according to the diary, did visit the dharamsala and inquire if Kanwal Singh was there between 12 and 1 on the night of the 24th/25th July. I am bound to conclude therefore that the fact that Tejpal had made a statement to the police which was recorded in the police diary was not brought to the notice of the learned Sessions Judge and that he was unaware of the fact. Now, according to the police diary, Tejpal stated that Kanwal Singh, whom he knew, arrived and registered at the dharamsala at 8 p.m., on the night of the 24th July. Tejpal states that he was not in the dharamsala all night, and therefore he is unable to speak to Kanwal Singh's movements after the hour of 8 o'clock. This statement of Tejpal that Kanwal Singh was in the dharamsala at 8 p.m. on the night of the 24th was vital to the defence case. It was a most important piece of evidence bearing upon the movements of Kanwal Singh on the night of

the murder - a piece of evidence which was in the hands of the prosecuting authorities and which has been deliberately suppressed by them. A suggestion has been made that the prosecution authorities who were concerned in the preparation of the Crown case were inclined to the view that Tejpal was not telling the truth, and therefore they decided not to put him into the witness-box. I have no hesitation in saying that the suppression of the fact that Tejpal had made this statement was in the highest degree improper on the part of the prosecution authorities. There is no duty upon those who are charged with the preparation of a prosecution case to produce in Court every person examined by the police. But in a murder case where a witness has given evidence which supports a plea of alibi taken by one of those who have been charged with the murder, that witness ought beyond all doubt to be produced. In no circumstances should the fact of his statement be withheld from the Court.

32. The prosecution authorities have no right to take it upon themselves to decide whether a witness who gives vital evidence of this sort is or is not a reliable witness. That is the function of the Court. The prosecution has no right to usurp the function of the Court. The conduct of the prosecuting authorities in the present case in keeping back this piece of evidence is deserving of the strongest condemnation. It was only on perusal of the police diary, which the Court is entitled under the Criminal Procedure Code, to examine, that the vital fact that Kanwal Singh was in Aligarh on the night of the 24th July was brought to light. The defence has produced one witness in support of the alibi, namely, Mihi Lal. His evidence has been rejected by the learned Sessions Judge. It is doubtful however if that evidence would have been rejected had the learned Judge been aware that the fact was that Kanwal Singh was in the dharamsala at 8 p.m., on the night of the 24th. According to Mihi Lal, Kanwal Singh attended a katha near the dharamsala and was there at 9 p.m. The learned Government Advocate has argued that despite the fact that it now must be admitted that Kanwal Singh was in Aligarh at 8 p.m., on the night of the 24th July, his alibi is not completely established because it was possible for Kanwal Singh to have gone from Aligarh to Tarapur by 12 o'clock about which hour the murder was committed and back to Aligarh by the morning of the 25th. The suggestion that Kanwal Singh did do the journey to Tarapur between the hours of 8 and 12 we find difficult to accept. The

suggestion really involves the assumption that Kanwal Singh was so cunning that not only did he arrange to be at and register himself in the dharamsala at 8 p.m., on the night of the 24th, but that he arranged with some other person to answer his name when the police came round to visit the dharamsala during the course of the night. This is most unlikely. Further I find it difficult to believe that the journey from Aligarh to Tarapur on a dark night in the rains could have been completed in four hours. I would observe further that if the entire prosecution evidence is to be accepted, then Kanwal Singh was in Tarapur at 10 o'clock because Lakahmi Narain and Reoti Lal, both of whom were prosecution witnesses, say that they saw him there at that hour.

33. After giving this matter careful consideration, I have come to the conclusion that the prosecution have come nowhere near proving that Kanwal Singh was amongst the assailants of Sham Lal between 12 and 1 o'clock on the night of the 24th July. On the contrary upon the evidence I find it difficult not to hold that he spent the night in the dharamsala and that he has established his alibi. There can be little doubt that Kanwal Singh went to the dharamsala in Aligarh with the deliberate purpose of establishing a, alibi. No doubt he knew that an attack upon Sham Lal was planned, and he expected that if any harm came to Sham Lal, he (Kanwal Singh) being a history sheeter and an enemy of Sham Lal would be immediately implicated in connexion with the crime. He therefore took steps to ensure that he should be absent from Tarapur on the night of the 24th July and that he should have proof of his absence.

34. The learned Government Advocate has argued that even if it be held that the case against Kanwal Singh has not been established because of the evidence on the plea of alibi, the guilt of the other accused has been proved. I am unable to accept this contention. If Kanwal Singh was not amongst the assailants of Sham Lal, then all the eye witnesses and Sham Lal in his dying declaration have given false evidence. They have implicated an innocent man in a murder charge. In view of the evidence upon the question of alibi, it would appear that not only the Police Constable, Azimuddin, but the eye-witnesses have committed perjury. It may not be beyond the bounds of possibility that Kanwal Singh did arrange for someone to answer to his name during the night of the 24th/25th July at the dharamsala and

that he managed to get from Aligarh to Tarapur in four hours. But that is in the highest degree unlikely. In any event the two prosecution witnesses who say he was in Tarapur at 10 p.m., are clearly lying. To put it at its lowest it is with great difficulty that I refrain from saying that there is conclusive proof of perjury on the part of the alleged eyewitnesses. But if I have difficulty in not holding that these witnesses have committed perjury, I unhesitatingly refuse to convict on no evidence but theirs, men who have been charged with the crime of murder. On evidence so tainted and so suspicious no Court in my opinion is justified in recording a conviction. To proceed to convict on such testimony as if it were thoroughly reliable evidence would be to perpetrate a gross miscarriage of justice.

35. The result is that the appellants must all be acquitted. It may well be that amongst the appellants before us there are some who were concerned in the murder of Sham Lal, and that therefore as a result of our decision guilty men go free. For this however in a very large measure the police and the prosecuting authorities themselves are responsible. The police are responsible because they failed thoroughly to investigate one of the most vital points in the case, namely, whether there was a lantern burning over Sham Lal's cot on the night of his murder. The prosecuting authorities are responsible in a large measure also because they deliberately withheld from the Court evidence which ought to have been brought to the notice of the Court. I am well aware that it may be said, and sometimes is said, that the Court ought to shut its eyes to such irregularities on the part of the prosecuting authorities. After all it is argued if there is little doubt that accused challenged by police are guilty; the prosecuting authorities are entitled to do their best to obtain a conviction, I unhesitatingly reject any such suggestion. That 'the end justifies the means' is a doubtful proposition to any sphere. Emphatically it can find no countenance in a Court of justice. As a result of centuries of experience a code of principles has been evolved which 'British Courts observe in the investigating of criminal charges, in deciding civil disputes, and generally in the dispensing of justice. By rigid punctilious observance of those principles the administration of British justice has gained a reputation for purity and fairness unsurpassed in any part of the world. It is the right of every man, be he guilty or innocent to insist that he be tried according to those principles. Those principles are for the protection of the accused, not only against arbitrariness on

the part of the Court itself, but against the activities of a possibly unscrupulous prosecuting authority. His Majesty's Judges under the constitution of India are charged with the duty of administering the law according to the principles of British justice and not according to any rules or methods which may be adopted by the prosecuting authorities which it is sometimes sought to justify by reference to the conditions which may exist in this country or in a particular district. No such argument can justify the slightest departure from principles which under the constitution, as by law established the Courts are bound to apply. In the absence of legislative sanction this Court will refuse to countenance suggestions of deviations therefrom which come from those who are unacquainted with the principles of jurisprudence and who are neither learned in the law nor experienced in its practice. To sum up in the present case the prosecution has relied on a dying declaration which contains at least two false statements. It has relied on the evidence of four witnesses Ramcharan and Azimuddin, Lakshmi Narain and Reoti who clearly gave perjured evidence, and upon the evidence of other witnesses which in all likelihood is perjured so far at least as it relates to the accused Kanwal Singh. It has failed to produce reliable evidence on the vital question, as to whether a lantern was burning above Sham Lal's cot. Further the statement of one most important witness, Tejpal, was withheld from the Court. The suspicion which these facts raise against the prosecution case is further accentuated by the remarkable circumstances that although 10 or 12 men conspired to murder Sham Lal and did murder him, only the appellants were recognized by Sham Lal himself, by the witnesses who speak to the conspiracy and to the actual assault with this exception that one witness states that he recognized also Chidda and another. In all the circumstances I am clearly of the opinion that the conviction of the accused is not justified.

Kisch, J.

36. I agree that the appeal must be allowed and the appellants acquitted. The several peculiar circumstances about the case, which have been set out in full; by my learned brother, raise a grave doubt in my mind as to whether any of the appellants were in fact recognized by the so-called eye witnesses. I may note in this connexion that two mere boys, Sheodan Singh and Mukhtar Singh, appellants

aged about 17 and 15 respectively, the sons of Pad am Singh, an old enemy of the deceased, and some of the prosecution. witnesses, are among those stated to have been recognized. I concur in the view that the action of the prosecution in suppressing important facts connected with the plea of alibi of Kanwal Singh, appellant, is most reprehensible and consider that an inquiry should be made into the conduct of those responsible.

37. We set aside the convictions and sentences of the six appellants and we direct that they be set at liberty forthwith, provided they be not required by the authorities in connexion with any other charge. We direct that copies of these judgments be forwarded to the Secretary to the Local Government and to the Inspector-General of Police.

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