

Kesar Singh and anr. Vs. the State

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Court : Punjab and Haryana

Decided On : Jun-08-1954

Reported in : AIR1954P& H286; 1955CriLJ86

Judge : Harnam Singh and; Kapur, JJ.

Acts : [Evidence Act, 1872](#) - Sections 1, 33, 114 and 133; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 367

Appeal No. : Criminal Appeal No. 270 of 1954

Appellant : Kesar Singh and anr.

Respondent : The State

Advocate for Def. : Har Parshad, Asst. Adv. General

Advocate for Pet/Ap. : C. Rai, Adv.

Judgement :

Harnam Singh, J.

1. In Sessions Trial No. 4 of 1954 the Additional Sessions Judge, Hoshiaipur, has convicted Kesar Singh and Ranbir Singh under Section 302 read with Section 34, Penal Code, hereinafter referred to as the Code, and has sentenced each of them to death.

In that trial the Additional Sessions Judge has convicted Kesar Singh and Ranbir Singh under Section 397 read with Section 394 of the Code and has sentenced each of them to suffer rigorous imprisonment for seven years, sentence of imprisonment to be suffered by the convicts in case the sentence of death imposed upon them is not confirmed by the High Court. Surat Singh father of Kesar Singh and Ranbir Singh who was prosecuted in Sessions Trial No. 4 of 1954 upon charges under Section 302 read with Section 34 and Section 397 read with Section 394 of the Code has been acquitted.

2. Kesar Singh and Ranbir Singh appeal under Section 410, Criminal P. C., and the proceedings are before us under Section 374 of that Code for the confirmation of the sentence of death imposed upon them.

3. In order to appreciate the points that arise for decision it is necessary to set out the facts of the case in some detail.

4. On 2-8-1953 Kora Earn P. Wf 22 went to Hoshiarpur for private work. In village Bihini the house of Kora Ram was separated from other houses in the village. Indeed, the nearest house to the house of Kora Ram was that of Ram Ratan situate at a distance of half a furlong from his house. Before leaving village Bihini he asked Ram Ratan to sleep at his house in his absence. Kahon, aged 13 years, was his servant.

5. On the night between the 3rd and 4th of August 1953 Mst. Labhdo mother of Kora Ram, Mst. Kartari wife of Kora Ram, Ram Ratan and Kahon were murdered in the house of Kora Ram. In the absence of Kora Ram P. W. 22, Gilho chaukldar P. W. 19 made the first information report, Exhibit P. R, at police post Dehra on 4-8-1953 at 12.50 p. m.

6. Assistant Sub Inspector Pritam Singh P. W. 23 who recorded the first Information report, Exhibit P. R, reached village Bihini at 3 p. m. on 4-8-1953.

7. Reaching village Bihini Assistant Sub inspector Pritam Singh found the body of Mst. Kartari in her room and bodies of Mst. Labhdo and Ram Ratan on cots in the verandah and body of Kahon in the courtyard of the house. Assistant Sub

- Inspector Pritam Singh prepared inquest reports, Exhibits P. L, P. H, P. E, and P. K. 1.
8. No clue of the culprits was found by Assistant Sub Inspector Pritam Singh on 4-8-1953.
9. On 5-8-1953 Sub Inspector Sain Das reached village Bihini at about 7 a. m.
10. On 5-8-1953 Kora Ram P. W. 22 saw Kesar Singh and Ranbir Singh at Bihini well. Seeing that Kesar Singh and Ranbir Singh had not joined the investigation Kora Ram P. W. 22 suspected the complicity of Kesar Singh and Ranbir Singh in the crimes. On 6-8-1953, Sub Inspector Sain Das P. W. 24 recorded the statement of Kora Ram.
11. Sub Inspector Sain Das searched for Kesar Singh and Ranbir Singh but they were not available in the village on 6-8-1953. On the following day Kesar Singh was produced before Sub Inspector Sain Das by Foot Constable Hukam Chand. On the same day Ranbir Singh was produced before Sub Inspector Sain Das by Lekh Ram P.W. 20 and Jal Ram P. W. 21. Ranbir Singh had watch, Exhibit P. 5, on his wrist when he was produced before Sub Inspector Sain Das.
12. On 7-8-1953 Ranbir Singh produced bloodstained 'barchha', Exhibit P. 31, from underneath the grass in his cattle-shed.
13. On interrogation Kesar Singh gave information that he had kept shirt, a cigarette box and some coins in his house in his trunk. That information is contained in the memo, Exhibit P. BB. From the trunk cigarette 'debba', Exhibit P. 4 shirt, Exhibit P. 32 and cash, Exhibit P. 33, were recovered. On 7-8-1953 at 2 P. m. Kesar Singh and Ranbir Singh were formally arrested.
14. Sub Inspector Sain Das went to the house of Mangtu P. W. 4. Finding that Mangtu was not in his house Sub Inspector Sain Das sent some constables and Sardar Mehr Singh M. L. A. In search of Mangtu. Mangtu was produced before Sub Inspector Sain Das on 7-8-1953 by Sardar Mehr Singh M. L. A. and constables. Mangtu unlocked and opened the door of his house and opened the box with a key that he possessed. Purse, Exhibit P-6, was taken out of the box

and given to Sub Inspector Sain Das. In that purse two currency notes of rupees 107-each and receipt, Exhibit P. 7, were found. From the thatched roof of his house Mangtu produced 'barchha', Exhibit P. 1.

15. From village Ghlori Mangtu was taken to village Bihini. In village Bihini he remained with the police for the night and on the next day was taken to police post Dehra.

16. In the investigation Mangtu was interrogated on 7-8-1953 and 14-8-1953. In the cross- examination of Mangtu P. W. 4 it was brought on the record that he denied his complicity in the crimes on 7-8-1953 and 14-8-1953.

17. On 22-8-1953 Mangtu was produced before the District Magistrate for tender of pardon. On Mangtu undertaking to make a true disclosure of the whole of the circumstances within his know ledge relating to the crimes under investigation the District Magistrate gave him pardon on 22-8-1953. On the last mentioned date Mangtu made confessional statement, Exhibit P. A, in the Court of Shri P. C. Bahl Magistrate P. W. 2.

18. In the Court of Commitment Kesar Singh stated that shirt, Exhibit P. 32, and 12 packages of cigarettes were recovered from him. In the Court of Session Kesar Singh stated that he had made the statement, Exhibit P. BB. That statement reads:

'My trunk which is locked up and lying in my' room contains a shirt of 'gumti' cloth with stripes of different colours, some change and a box made of papers containing about 10 cigarette cases of Red Lamp which I can produce.'

In the Court of Session Ranbir Singh stated that he had produced a small 'barchha' fixed in three feet long 'bamboo' stick from his cattle-shed.

19. In convicting Kesar Singh the Additional Sessions Judge has based his Judgment upon the evidence given by Mangtu approver and the recovery of shirt. Exhibit P. 32, and cigarette box, Exhibit P. 4, from him. In convicting Ranbir Singh the Additional Sessions Judge has based his judgment on the evidence given by Mangtu approver, the recovery of watch. Exhibit P. 5, from the person of Ranbir

Singh at the time of his arrest and the recovery of 'barchha', Exhibit P-31, from the cattle-shed of Ranbir Singh.

20. Mangtu P. W. 4 gave evidence that Kesar Singh and Ranbir Singh and Surat Singh were at the Bihini well when he went there with 'barchha'. Exhibit P-1. Ranbir Singh had 'barchha' Exhibit P-31, whereas Kesar Singh was armed with 'gupti'.

Surat Singh told them that he would wait at the Bihini well and they should all go to the house of Kora Ram, and bring 'mal thal' from that place and if anybody resisted he should be killed. Going to the house of Kora Ram, Kesar Singh called the wife of Kora Ram saying 'Shahni, open the door. My 'Bharjai' is lying ill at the house and give some kahra for her.' Upon this Mst. Kartari wife of Kora Ram opened the door and Kesar Singh alone went inside the 'deorhi' and got 'kahra' from her. Mangtu and Ranbir Singh remained outside the 'deorhi'. After taking the 'kahra' Kesar Singh went to Mst. Labhdo who was sitting on a cot inside the verandah of the house and began talking to her. Mangtu and Ranbir Singh were still outside the 'deorhi' when Kesar Singh told Mst. Labhdo to hand over whatever cash and jewellery she possessed.

On Kesar Singh giving signal by coughing Mangtu and Ranbir Singh went inside. Kesar Singh told Mangtu and Ranbir Singh that Mst. Labhdo was not prepared to part with cash and she should be murdered. Saying that Kesar Singh gave 'Gupti' blows to Mst. Labhdo and Mangtu and Ranbir Singh gave 'barchha' blows to Mst. Labhdo who died at the spot.

Kahon, aged 13 years, who was lying on a cot in the verandah got up and challenged the accused. Kesar Singh thereupon gave 'gupti' blows and Ranbir Singh gave 'barchha' blows to Kahon when Mangtu held him by his arms. Kahon died at the spot.

Ram Ratan, aged 17 years, was also sleeping in the verandah. Kesar Singh gave him 'gupti' blows and Ranbir Singh gave him 'barchha' blows. Mangtu asked Kesar Singh and Ranbir Singh not to kill Ram Ratan but they threatened to kill him as well if he raised any alarm. Ram Ratan died at the spot.'

In the meanwhile Mst. Kartari had gone inside her room and bolted the room from inside. Kesar Singh accused asked her to open the door but she did not open. Kesar Singh, Ranbir Singh and Mangtu broke the hinges of the door leaves. Kesar Singh and Ranbir Singh rushed inside her room. Mangtu, Kesar Singh and Ranbir Singh asked Mst. Kartari to hand over to them what-ever she possessed but she replied that she had nothing with her. Kesar Singh struck her with 'gupti' while Mangtu and Ranbir Singh gave her 'barchha' blows. Mst. Kartari died at the spot.

The lock of the room of Mst. Labhdo was opened with the key which was taken from underneath her pillow on the cot. In the room they found a locked wooden box, Mangtu brought 'sanshi', Exhibit P-2, and 'thainthi', Exhibit P-3, from the kitchen. Kesar Singh and Ranbir Singh broke open the locks of the box and the 'almirah'. In that room there were other boxes but they were lying unlocked. From the box Kesar Singh and Ranbir Singh removed cash and jewellery.

Going inside the room of Mst. Kartari Kesar Singh and Ranbir Singh broke open the locks of the trunks and boxes lying there and removed cash, jewellery and other articles. Kesar Singh and Ranbir Singh and Mangtu went to the shop of Kora Ram and from there removed watch, Exhibit P-5, cigarette box, Exhibit P-4, and some coins of the value of rupees 5/- or 6/- from that shop.

21. From the village Kesar Singh, Ranbir Singh and Mangtu went to the Bihini well where Surat Singh was waiting for them. Kesar Singh gave Mangtu purse. Exhibit 6, which contained rupees 20/- and receipt, Exhibit P-7, telling him that other property would be divided later on when the things had settled down.

22. Mangtu P. W. 4 was a previous convict in a dacoity case and his name was borne on Police Register No. 10.

23. In the Cross-examination of Mangtu P. W. 4 no suggestion was made that he had any motive to falsely implicate Kesar Singh and Ranbir Singh.

24. Mangtu gave evidence that he had worked for Surat Singh, Kesar Singh and Ranbir Singh for two days and had stayed for a night at their house at the instance of Kesar Singh accused. Indeed, in September, 1952 Mangtu had Joined Kesar

Singh in committing theft of cigarettes and two seers of sweets from the shop of Kora Ram.

25. That Mangtu denied his complicity in the crimes during the earlier stages of investigation does not show that the evidence given by him in the Court of Session was false. In such cases prisoners make a full and true disclosure of the whole of the circumstances within their knowledge relating to the offence under investigation only when they are assured of pardon.

26. In arguments it was said that Mangtu was a previous convict for dacoity and that his name was borne in Police Register No. 10. In my opinion, Mangtu was the type of man who could be expected to join Kesar Singh and Ranbir Singh in the crimes they committed.

27. Giving the matter my very best consideration, I think that the participation of Mangtu P. W. 4 in the crimes cannot be disputed.

28. Basing himself upon Section 133, [Evidence Act, 1872](#), and illustration (b) in Section 114 of that Act Mr. C. Rai urges that though Mangtu is a competent witness the Court may presume that he is not worthy of credit unless he is corroborated in material particulars.

29. As stated hereinbefore, on interrogation Kesar Singh gave statement, Exhibit P. BB, that he had kept his shirt, a cigarette box and some coins in his house in his box. In the investigation 'shirt', Exhibit P-32, cigarette 'dabba', Exhibit P-4, cash, Exhibit P-33, were recovered from the locked box. Key, Exhibit P-38/1, of that box was produced by Kesar Singh from underneath the pillow on a cot. In the Court of Commitment Kesar Singh stated that shirt, Exhibit P-32, belonged to him and that packages of cigarettes were recovered from him.

30. On examination the Imperial Serologist found that the blood on the shirt, Exhibit P-32, was of human origin.

31. Kora Ram P. W. 22 gave evidence that he had made a note on the cigarette box, Exhibit P-4, at the time of purchase. That note is Exhibit P-4/A. In cross-examination Kora Ram p. W. 22 stated that he had made note similar to the

writing. Exhibit P/4A, on all articles in his shop except on the bags. As stated hereinbefore, Kesar Singh admitted the recovery of twelve packages of cigarettes from him. In my judgment the cigarette 'dabba'. Exhibit P-4, has been proved to be the stolen property.

32. But It is said that inasmuch as the recovery of shirt, Exhibit P-32, and cigarette box, Exhibit P-4, was made on 7-8-1953 that recovery is no corroboration of the evidence given by Mangtu P. W. 4. In my opinion, it cannot be laid down as a matter of law that the evidence of witnesses who support the statement of an approver is not corroborative evidence merely because their evidence was known to the police before the approver was given pardon. In such a case, it can, however, be said that the approver might have been tutored by the police to make a statement fitting in with the evidence already known to the police. In the present case there does not exist any such suggestion on the record.

33. Admittedly, it is not necessary that the. story of the approver should be corroborated in every detail of the crime nor is it necessary that the Corroborative evidence should itself be sufficient for conviction. In the present case on the information given by Kesar Singh Sub-Inspector Sain Das discovered that Mangtu was connected with the crimes.

34. Finding, as I do, that the evidence given by Mangtu approver is corroborated by bloodstains of human origin on the shirt of Kesar Singh, Exhibit P-32, the recovery of the cigarette 'dabba', Exhibit P. 4, bearing the note in 'lunda' characters in the hand of Kora Bam p. w. 22 and the discovery made by the police as to the complicity of Mangtu on the information given by Kesar Singh, I think that the participation of Kesar Singh in the crimes is proved beyond doubt.

35. As regards Ranbir Singh the corroboration offered is the recovery of the .watch. Exhibit. P-5, from the person of Ranbir Singh and the recovery of the blood-stained 'barchha'. Exhibit P-31, from the cattle-shed of Ranbir Singh.

36. Ranbir Singh was produced before Sub-Inspector Sain Das on 7-8-3953 by 'Iambardar' Lekh Ram P. W. 20 and Jai Ram P. W. 21. Sub-Inspector Sain Das gave evidence that when Ranbir Singh was produced before him on 7-8-1953 he

had watch, Exhibit P-5, on his wrist.

To similar effect is the evidence given by Assistant Sub-Inspector Pritam Singh and Gilho 'chaukidar' P. W. 19. Jai Ram P. W. 21 was tendered for cross-examination but was not cross-examined. Plainly, the practice of tendering witnesses for cross-examination is opposed to the provisions of Section 138, Evidence Act. That section assumes that before a witness is cross-examined he has given evidence in examination-in-chief.

37. Lekh Ram P. W. 20 who gave evidence in the Court of Commitment was found by the Additional Sessions Judge to be unable to make a statement. In these circumstances, the statement that he made in the Court of Commitment was transferred to the Sessions record under Section 288, Criminal P. C.

38. In -- 'Chainchal Singh v. Emperor', AIR 1846 PC 1 (A), Lord Goddard, delivering the judgment of their Lordships of the Privy Council, said-

'When evidence given by a witness in a Judicial proceeding is sought to be used under Section 33 in a subsequent judicial proceeding or in a later stage of the same judicial proceeding on the ground that the witness is incapable of giving evidence that fact must be proved strictly.'

39. In the present case Sardar Teja Singh, Public Prosecutor stated that Lekh Ram was unable to make statement on account of fever and pains in his body.

40. Shri Nagin Chand Advocate appearing for the accused stated-

'In view of the circumstances explained by the public Prosecutor I have no objection if the statement of Lekh Ram who was examined as P. W. 11 in the Court Of Committing Magistrate on 24-10-1953, is transferred to the Sessions record under Section 33, Evidence Act, and read as evidence in the case.'

No attempt was made to find whether in fact Lekh Ram was suffering from fever and pains in his body. If so, the case does not satisfy the test laid down by their Lordships of the Privy Council in -- 'AIR 1946 PC 1 (A)'. That being the position of matters, in determining the guilt of Ranbir Singh I have ruled out of consideration

the statement made by Lekh Ram in the Court of Commitment.

41. As stated hereinbefore, Sub-Inspector Sain Das, Assistant Sub-Inspector Pritam Singh and Gilho 'chaukidar' gave evidence that when Ranbir Singh was produced by lambardar Lekh Ram, and Jai Ram on 7-8-1953 he had -watch, Exhibit P-5, on his wrist.

42. In considering the evidence bearing on the recovery of the watch, Exhibit P-5, it has to be borne in mind that the police was in the village Bihini to which village Ranbir Singh belongs, for three days before the recovery of the watch, Exhibit P-5. In these circumstances, it would not be safe to act on the evidence given by Sub-Inspector Sain Das, Assistant Sub-Inspector Pritam Singh and Gilho 'chaukidar' that the watch, Exhibit P-5, was recovered from Ranbir Singh.

43. In an earlier part of this judgment I have mentioned that on 7-8-1953 'barchha', Exhibit P-31, was recovered from the cattle-shed of Ranbir Singh. In the murders of Mst. Labhdo, Mst. Kartari, Kahon & Ram Ratan, Kesar Singh, brother of Ranbir Singh, has been found to have participated. For those murders Surat Singh. father of Ranbir Singh, was also prosecuted in Sessions Trial No. 4 of 1954. Ranbir Singh is stated to be seventeen years old.

In these circumstances the fact that 'barchha' Exhibit P-31, bearing stains of human blood was recovered from the cattle-shed of Ranbir Singh has no material effect on the guilt of Ranbir Singh for it was possible for Ranbir Singh to have knowledge of the place where the 'barachha'. Exhibit P-31, was to be found without himself being guilty of any offence. In this connection -- 'Sohan Singh v. Emperor', AIR 1930 Lah 91 (B) may be seen. In the ultimate analysis there is no corroboration of the evidence given by Mangtu approver connecting Ranbir Singh with the crimes.

44. In the result, while acquitting Ranbir Singh by giving him the benefit of the doubt. I maintain the conviction of Kesar Singh and the sentence imposed upon him.

45. Sentence of death imposed upon Kesar Singh is confirmed while the sentence of death imposed upon Ranbir Singh is not confirmed.

46. Ranbir' Singh should be set at liberty forthwith.

Kapur, J.

47. This is an appeal brought by Kesar Singh and Ranbir Singh against their convictions under Ss. 302. and 397/394, Penal Code, and sentence of death on Kesar Singh and transportation for life (Sic?) on Ranbir Singh under Section 302 and sentence of seven years' rigorous Imprisonment passed on them under Section 397 read with Section 394, Penal Code. The case is also before us for confirmation under Section 374, Criminal P. C. Surat Singh father of these appellants was also put on trial for abetment but was acquitted.

48. On the night between the 3rd and 4th August 1953 a robbery with murder was committed in the house of Kora Ram a shopkeeper of village Bihini. The prosecution case is that Kesar Singh aged 23 and his brother Ranbir Singh aged 17 Rajputs of the village along with Mangtu approver went to the house of Kora Ram somewhere towards midnight. Reaching the house Kesar Singh shouted to Mst. Kartari, the wile of Kora Ram, and ashed her to open the door and to give him some 'kahra' (a concoctive of indeginous herbs) because his sister-in-law was lying ill at home. The door was opened. Kesar Singh went inside and his two companions waited outside the 'deorhi'.

Kesar Singh then began to talk with Mst. Labhdo the mother of Kora Ram who was sitting on a cot in the verandah and he asked her to hand over whatever she had. On her saying that she had nothing to give he signalled to his two companions to enter the house and they decided to murder her. Kesar Singh gave her blows with a 'gupti' (a thin sword) and his brother Ranbir Singh and Mangtu started giving her 'barchha' blows and she died at the spot.

There were two boys--one a doom boy named Kahon and another Ram Rattan a tailor boy, who had been asked to sleep in the house in the absence of Kora Ram. They were also murdered and then the culprits went into the room in which Kartari

had shut herself. They pushed the door open and Kesar Singh and Ranbir Singh went into the room, Mangtu staying outside in the, door way and they all demanded from her the cash and Jewellery that she had with her and when she refused to hand over anything she was also killed. But a child (of Kartari and Kora Ram) was left unhurt.

The three persons then entered the room of Labhdo broke open the locks of a box and almirah with a 'sanshi' and 'thainthi' and took away whatever they could, and then ransacked the room of Kartari and then the shop of Kora Ram. It is stated that they carried away amongst other things a cigarette box Ex. P-4, a wrist watch Exh. P-5, a purse Exh. P-6, and some coins. They then went to Surat Singh, the father of Kesar Singh and Ranbir Singh, who gave the purse Ex. P-6, containing Rs. 20/- and a receipt for Rs. 200/- in favour of Kora Ram Ex. P-7 to Mangtu and the watch was given to Ranbir Singh. Mangtu then went away to his village Ohiori.

49. The Chaukidar coming to know of the commission of the murder in the house of Kora Rani went to Moti Ram P. W. 17. They along with Surat Singh, father of the appellants, went to the house of Kora Ram and found four dead bodies inside the house. The First information report was made by Gilho Chaukidar at Police Post Dehra which is Exhibit P. R. and investigation started on the arrival of Assistant Sub-Inspector Pritam Singh P. W. 23. The information of the commission of the offence was sent to Police Station Jawalamukhi and that is Exhibit P. S. at page 12 of the paper book.

50. The Assistant Sub-Inspector on arriving at the spot at 3 p. m. took up the investigation and prepared various 'fards' and took into possession various things.

On the morning of the 5th the investigation was taken up by Sub-Inspector Sain Das who was in charge of Jawalamukhi Police Station. Kora Ram according to the Assistant Sub-Inspector made a statement before him on 4-8-1953 and on the 6th August he was again examined by the Sub-Inspector who made a search for Kesar Singh and Ranbir Singh accused but on that day they could not be found in the village. Why he made a search for them is not quite clear on this record.

Kesar Singh was, however, produced before the Sub-Inspector by Foot Constable Hukam Chand on 7-8-1953 and on the same day Ranbir Singh his younger brother was produced before him by Lekh Ram and Jai Ram. When he was interrogated, Kesar Singh appellant made a statement Exhibit P. E. B. to the effect that he had kept a shirt, a carton containing cigarettes and some coins in a locked box in his room which at his instance were produced from a box which was opened by him, and when Ranbir Singh was arrested he was wearing the watch, Exhibit P-5, and he also made a statement, Exh. P-C.C., that he had kept a 'barchha' under the grass lying in his cattle-shed.

It appears that the name of Mangtu was disclosed by Kesar Singh as is stated by P. W. 21, the Sub-Inspector. After the statements were recorded Kesar Singh and Ranbir Singh were arrested and a search was made for Mangtu who was brought to the Sub-Inspector by Mehr Singh M.L.A. and the constables who had gone in search for him. The Sub-Inspector then went to the house of Mangtu and on his (Mangtu) producing a key the house was opened and he (Mangtu) then produced from a box the purse, Exh. P-6. containing Rs. 20/- and the receipt, Exh. P-7, which were both taken into possession and Mangtu also produced the 'barchha', Exh. P-1.

51. From the 7th August onwards the two appellants and the approver were in police custody. On 17-8-1953 Kesar Singh was produced for making a statement under Section 164, Criminal P. C., before a Magistrate but he refused to do so which is clear from Exhibit P. R. R/1. Mangtu then on 22-8-1953 expressed his willingness to disclose all the facts in regard to this Incident and he was given a pardon under the orders of the District Magistrate and on the same day he made a statement. Exhibit P-A, before Mr. Bahl. a Magistrate.

52. In support of the prosecution there are the following pieces of evidence-

1. the statement of the approver; and
2. the production of certain articles by Kesar Singh and of certain articles by Ranbir Singh.

These pieces of evidence have been accepted by the learned Sessions Judge and Kesar Singh and Ranbir Singh as I have said above have been convicted.

53. The first question to be decided is whether the approver is a person whose testimony should be accepted or rejected, i.e., whether he is a wholly false witness in the sense that he never took part in the offence or that he has falsely implicated the names of the two appellants, Kesar Singh and Ranbir Singh.

He is a previous convict having been convicted of an offence of dacoity and was on police register No. 10. He states that previously also he along with the appellants had committed a theft in the shop of Kora Ram about a year or a year and a half before. He had been cutting grass for Surat Singh, the father of the appellants. When his house was searched, from it were found a purse, Exh. P-6, which contained Rs. 20/- and a receipt in favour of Kora Ram, Exh. P-7, for a sum of Rs. 200/-. This was found at his instance and after the key of the room where these things were found was given by him, and this was on 7-8-1953 as is proved by Exh. P. B. and by the evidence of Ram Singh, P. W. 15.

This purse belonged to Kora Ram and therefore it shows that Mangtu at least did take part in the robbery which was committed at the house of Kora Ram on the night between the 3rd and 4th of August 1953. In the cross-examination of Mangtu no suggestion has been made that he is in any way inimical towards the appellants.

Some criticism was directed to that portion of his statement in examination-in-chief where he stated that he along with Ranbir Singh had given 'barchha' blows to Mst. Labhdo after Kesar Singh had attacked her with the 'gupti'. No doubt in the statement of the Civil Surgeon, Dr. Manmohan Singh, the injuries on Mst. Labhdo are given as incised wounds, but in the cross-examination which was directed at the instance of the accused he stated that injuries Nos. 2, 3, 5, 8 were probably the result of thrust blows and Nos. 6 and 7 as a result of strokes. It cannot be said therefore that the medical evidence is contradictory to the statement of the approver in regard to Mst. Labhdo, and the same can be said in regard to Mst. Kartari.

53A. It was then suggested that the approver had made a statement on the 22nd of August and he was in custody of the police from the 7th August onwards. That no doubt is a circumstance to be taken into account, but it is not of such a nature that it would by itself be sufficient for the rejection of his testimony.

54. It is submitted that as the facts which have been used for the purpose of corroborating the statement of the approver were already known it cannot be said in this case that the approver has been corroborated in material particulars as is required under Section 114, Illustration (b), Evidence Act. The law as given in Monir's Law of Evidence, third Edn., at page 1077 is as follows: 'It cannot be laid down as a matter of law that the evidence of witnesses who support the statement of an approver is not corroborative evidence, merely because their evidence was known to the police before the approver was examined by them. It can, however, be urged in such a case that the approver's evidence should not be believed, because he might have been tutored by the police to make a statement fitting in with the evidence of the other witnesses.'

This paragraph is based on three cases. In -- 'Shera Jiwan v. Emperor', AIR 1943 Lah 5 (C), which is a judgment of Monir J. himself, it was argued that the evidence of an approver in a case of dacoity is not entitled to any credence as he made his statement as an approver after all the accused had been arrested and recoveries of stolen property had been made, and it was held that it is a circumstance which the Court will take into consideration when deciding whether the approver's evidence should or should not be believed and that the question in such cases is , not whether the story could be put into the mouth of the approver to fit in with the facts but whether there are circumstances to show that this has been done and this in turn will depend upon the character of the approver, his position vis-a-vis the police, the incriminating facts discovered against him and the story alleged to have been narrated by him.

55. The next case referred to is -- 'In re Ibrahim', AIR 1926 Cal 374 (D). That was a case which had been brought against a conviction by a Sessions Judge sitting with a jury and the question was one of misdirection. It was held there that it could not be said as a point of law that the evidence of the witnesses who supported the

statement of an approver was not corroborative evidence because such evidence was known to the police before the approver was examined by them. But in that particular case this fact was held to be a matter of non-direction and not a serious matter of misdirection.

56. The next case which deals with this matter is -- 'Shyam Kumar Singh v. Emperor', AIR 1941 Oudh 130 (E), and all it held was that corroborative evidence about particulars not already known to the police and which were discovered in consequence of information given by an accomplice was of greater value than corroborative evidence about matters known to the police before any information was received from an accomplice.

57. Thus none of these cases lay down as a matter of law that facts already known to the police cannot be corroborative of the statement of an accused, and I respectfully agree with the statement of law as given by Monir J. in -- 'AIR 1943 Lah 5 (C)'.

58. The question then arises what are the facts which corroborate the statement of the approver in material particulars. I have already held that in my opinion there are no circumstances which are sufficient for holding that the testimony of the approver is 'per se' false and it is not necessary to repeat those reasons.

The question then to be decided is what are the recoveries which have been made and which corroborate the approver's testimony so as to amount to corroboration in material particulars. From Kesar Singh three things were recovered, one, a shirt. Exhibit P-32, which was bloodstained. The approver has not mentioned that this shirt was being worn by Kesar Singh. This is a blood-stained shirt, and in my opinion the stains of blood have not been satisfactorily explained by the defence.

59. The other thing recovered from Kesar Singh was a carton containing packets of cigarettes and signed by Kora Ram Exhibit P-4. Now. Kora Ram made a statement to the police on the 4th August, and a great deal of argument was raised on the question of this statement which it is contended was not made as stated by Kora Ram as the first 'zimni' was not sent on the 5th August as deposed to by Assistant Sub-Inspector Pritam Singh.

The reason which the defence gave in support of their submission was the statements of two constables, G'an Singh P. W. 13 and Wazir Chand P. W. 14. The former stated that the 'zimni' was received at the police post Dehra on the 5th August and that it was despatched the following morning to the police station Jawala-mukhi, and the latter deposed that the receipt of 'zimni' No. 1 was not entered in the 'roznamcha' at Jawalamukhi from 6-8-1953 even up to 9-8-1953. If this stood by itself then there would have been a great deal in this argument but Sub Inspector Sain Das P. W. 24 has deposed on oath that the first diary was received at Dharamsala in the office of the Superintendent of Police on the 6th August and was entered in the receipt register at serial No. 11526 and this register seems to have been summoned by the defence.

In these circumstances I do not think there is much substance in the submission of the defence in regard to the first police diary and if this is so there is no reason to doubt the deposition of Kora Ram P. W. 22 that he made his first statement to the police on 4-8-1953 which is supported by the testimony of Assistant Sub Inspector Pritam Singh at page 55, line 61. Kora Ram has also stated on oath that he found when he returned home on the 4th August that Exhibit P. 4 the carton, Exhibit P. 5 the watch, Exhibit P. 6 the purse, and Exhibit P. 7 the receipt were, amongst other things, found missing. From Kesar Singh this carton. Exhibit P. 4, was recovered.

In his cross-examination, Kora Bam P. W. 22 stated that the box of cigarettes had with other things been purchased by him from Hoshiarpur and that he signed his name on all articles which were in his shop except on the bags.

There was some suggestion in the cross-examination that such empty cartons are sold away but there is no explanation in the statement of Kesar Singh as to how Exhibit P. 4 the carton was found in his possession. In answer to question No. 6 in the Sessions Court he only denied that he had committed any robbery and had taken away the cigarette box Exhibit P. 4, but in the Magistrate's Court he seems to have admitted this in question No. 8. I am satisfied that the statement in regard to the recovery of this carton from Kesar Singh has been satisfactorily proved.

60. Coins of the value of Rs. 1/7/- were found from the possession of Kesar Singh and these Kora Ram states were stolen from him. It cannot be said that the

identity of these coins has been satisfactorily proved because there was no particular mark on these coins which are alleged to have been lost by Kora Ram.

61. Thus in the case of Kesar Singh there is the carton which connects him with the robbery and there is the statement of the approver Which in my opinion is sufficiently corroborated by the recovery of this carton and connects Kesar Singh with the commission of the offence. In my opinion, Kesar Singh has rightly been convicted and as the offence was accompanied with such brutality and was of such a gruesome nature, the sentence of death has rightly been imposed upon him.

62. Coming now to the case of Ranbir Singh, what was recovered from him was a watch and a spear. It is stated that he was produced before the police by Lekh Ram and Jai Ram and that when these two persons met him he was found to be wearing the watch Exhibit P. 5 and when he was produced before the Sub Inspector he was still wearing that watch.

No doubt Sub Inspector Sain Dass P. W. 34 has stated that when this accused was produced before him on 7-8-1953 he had the watch Exhibit P. 5 on him. But the other two witnesses who were of the greatest importance in this case have not been produced.

In regard to Lekh Ram Lambardar the record shows that when he appeared in Court on 30-3-1954, the Public Prosecutor stated that he was suffering from fever and pain in the body and was incapable of making a statement and that the statement made in the Commitment. Court be placed on the record under Section 33, Evidence Act. It is true that because of the circumstances explained by the Public Prosecutor no objection was taken to this procedure by Mr. Nagin Chand, Advocate for the accused, and the learned Judge in making the order under Section 33, Evidence Act, was satisfied that the witness was incapable of making the statement on the ground that he thought 'it was reasonable' and that the Advocate for the defence had no objection.

I need only say that the consent to the admission of such evidence in a criminal case is not sufficient for the applicability of Section 33, Evidence Act. See Monir's

Law of Evidence at page 334. and -- 'AIR 1946 P. C. 1 (A)' where it was held that incapacity to give evidence must be strictly proved and that the consent of the counsel for the accused did not do away with the necessity of the Court satisfying itself by proof that the witness was incapable of giving evidence.

In the present case all that was stated was that the witness was suffering from fever and pain, but he was actually present in the Court, and just a statement of the Public Prosecutor that the witness was incapable of making a statement is in my opinion not sufficient compliance with the requirements of law. The statement made by this witness in the Commitment Court could not therefore be transferred to the Sessions file under Section 33, Evidence Act. Therefore, I would reject the evidence of Lekh Ram which is at page 52 of the paper book.

63. The other witness of this fact is Jai Ram P. W. 21 who was tendered for cross-examination, but he was not cross-examined. That again in my opinion is no evidence. The law in regard to examination of witnesses is contained in Ss. 137 and 138, Evidence Act. There is no provision in that Act for permitting a witness to be tendered for cross-examination without his being examined-in-chief and this practice is opposed to Section 138 of the Act: See -- 'Emperor v. Kasamalli Mirzalli', AIR 1942 Bom 71 (FB) (F) and Monir's Law of Evidence at page 1095. Thus there is no statement of Jai Ram P. W. 21 also. And these are the two witnesses (Lekh Ram and Jai Ram) who are alleged to have produced Ranbir Singh before the Sub Inspector. The other thing which was produced by Ranbir Singh was a barchha' from under the grass lying in his cattle-shed.

In the absence of the two very important witnesses who have deposed to Ranbir Singh being in possession of the watch, Exhibit P. 5, which is a very important piece of evidence I am not prepared to hold that Ranbir Singh who is a boy of seventeen and is a younger brother of Kesar Singh has been proved beyond all reasonable doubt to have taken part in the offence. I would, therefore, allow the appeal of Ranbir Singh and acquit him.

64. In the result, the appeal of Kesar Singh is dismissed and his sentence of death is confirmed, and the appeal of Ranbir Singh is allowed and I direct that he be acquitted forthwith.

65. I, for reasons stated above, agree with Harnam Singh J.

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