

**State of Rajasthan Vs. Darbara Singh**

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**SooperKanoon Citation :** [sooperkanoon.com/753540](http://sooperkanoon.com/753540)

**Court :** Rajasthan

**Decided On :** Mar-31-2000

**Reported in :** 2000CriLJ2906; 2000(2)WLN685

**Judge :** G.L. Gupta and; J.C. Verma, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 109, 120-B, 302, 307, 379, 394, 397, 398, 401 and 411; [Arms Act, 1959](#) - Sections 3, 25, 26, 27 and 29; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161, 164, 313 and 342; [Constitution of India](#) - Article 22; [Evidence Act, 1872](#) - Sections 10

**Appeal No. :** D.B. Criminal Death Reference No. 01 of 1997 & 2 Ors. Appeals

**Appellant :** State of Rajasthan

**Respondent :** Darbara Singh

**Advocate for Def. :** S.R. Bajwa, Sr. Adv.,; V.P. Bishnoi and; V.R. Bajwa,

**Advocate for Pet/Ap. :** Rajendra Yadav, P.P.

**Judgement :**

ORDER

**Gupta, J.**

1. The above death reference and appeals have arisen out of the judgment dated 30.7.1997 of the learned Sessions Judge, Jaipur District, Jaipur whereby he convicted and sentenced accused Darbara Singh and Bakshi Singh as follows :-

**DARBARA SINGH**

U/S 302 r/w Section 120B IPC - Death sentence.

U/S 307 r/w Section 120B/34, IPC - S.I. for 10 years and a fine of Rs.2,000/-

in default, 2 year S.I.

U/S 394, 397, 398 r/w Sec. 120B, IPC - Ten years R.I. and a fine of Rs. 5,000/-,

in default, 2 years S.I.

U/S 379 and 411, IPC - No separate sentence awarded.

**BAKSHI SINGH**

U/S 302 r/w Section 120B, IPC - Imprisonment for life & a fine of Rs. 5,

000/- in default, 2 years S.I.

U/S 307 r/w Section 120B, IPC - Ten years S.I. and a fine of Rs. 2,000/- in

default-2 years S.I.

U/S 394, 397, 401 r/w Sec. 120B, IPC. - Ten years RI and a fine of Rs. 2,000/- in

default -6 months RI

U/S 411, IPC - One year RI and a fine of Rs. 500/-, in

default - 6 months RI

(2). The prosecution case can be summarised as follows. During the working hour in the State Bank of Bikaner and Jaipur, Khari Gram, Gulabpura Branch robbery was committed on 5.4.1984. The intruders, who were 4 in number,

entered into the bank premises, having fire arms in their hands and they forced the employees of the bank to part with the amount lying in the bank as also their wrist watches. The intruders after looking the bank while making their escape good fired a shot killing one person and injuring another outside the bank, They boarded a fiat car (No. RRZ 3155) parked outside the Bank which was of a customer. While leaving the place of occurrence, they noticed one person going towards the Mayur Mill, which was situated near the bank. They chased him and fired a shot at him causing his death instantaneously. Thereafter, they ran away. The persons killed outside the bank and the gate of Mayur Mill were Shri R.K. Choudhary and Shri J.K. Jain, and the person who suffered murderous assault was Shri J.C. Laddha.

(3). The FIR of the occurrence Ex. P 11 was lodged by Shri G.C. Jain, Manager of the Bank (PW 5) at 9.30 P.M. at P.S. Gulabpura, on which, a case u/S. 379,302,394 and 397 IPC, was registered. During the course of investigation, the police inspected the site, prepared the inquest memo of the two deceased persons and interrogated various witnesses. Injured J.C. Laddha was taken to the hospital where his injuries were examined by Dr. D.K. Gupta. The post mortem examination of R.K. Choudhary and J.K. Jain was conducted by Dr. R.P. Kapoor who prepared the post mortem reports, Ex.P 21 and P 22. The police arrested 5 persons, including the two appellants. The other persons arrested were Kamikar Singh, Swaran Singh @ Billu and Guru Sewak Singh @ Babla. The police succeeded in recovering some articles at the instance of the persons arrested. In the identification parade held during investigation, (he witnesses identified the accused persons. During the course of investigation, accused Bakshi Singh, Sukhdeo Singh, Kamikar Singh and Darbara Singh desired to confess their guilt and therefore, they were produced before the Judicial Magistrate who recorded their confessional statements. After the completion of the investigation, the police submitted a challan against 5 persons, who were sent up for trial by the learned Magistrate vide order dated 4.5.85.

(4). During the course of trial, accused Svvaran Singh and Guru Sewak Singh absconded and therefore, their trial could not proceed. Accused Kamikar Singh, though faced the trial upto the stage of final arguments in the case, yet on the date of judgment he did not appear so the learned Sessions Judge treated him as

having absconded, and did not pronounce judgment so far as his case is concerned.

(5). The following charges had been framed against the appellants:-

Darbara Singh @) Gyani:

Section 120-B, 394 read with Sec. 397 and 398, 302/34, 307/34, 411 and 379 IPC, and 3/25, 3/26, 3/27 and 3/29 of the Indian Arms Act.

Bakshi Singh:

Section 120-B IPC, in the alternative 109 IPC and 401, IPC.

(6). The prosecution examined as many as 46 witnesses. Out of them, Gopal Das (PW 4), G.C Jain (PW 5), Om Prakash (PW 12), Navin Chand (PW 13), Sheoji (PW 14), Om Prakash Jain (PW 20), Sua Lal (PW 29) and Bhanwar Lal (PW 44) are the employees of the bank where the robbery was committed. Out of them Madan Lal (PW 10), Navin Chand (PW 13) and Om Prakash Jain (PW 20) have been declared hostile, Gopal Das Pareek (PW 4), G.C. Jain (PW 5), Sheoji Lal (PW 14), Sua Lal (PW 29) and Bhanwar Lal (PW 44) state only this fact that the occurrence of robbery had taken place. They do not identify the appellants as the robbers/dacoits. O.P. Mathur (PW 2), Ishwar Lal (PW 25) Pooran Singh (PW 26), Jagdish Chandra (PW 31) and Magni Ram (PW 34) were examined to depose about the occurrence which had taken place outside the bank and in front of the Mayur Mill. All of them, except O.P. Mathur, have turned hostile and have not identified the appellants as the persons who had committed the offence. O.P. Mathur identifies Darbara Singh as the person, who had taken part in the occurrence which took place outside the Mayur Mills. Dr. D.K. Gupta (PW 7), Dr. S.S. Karobia (PW 8) and Dr. R.P. Kapoor (PW 9) had examined the injuries of the injured and had performed the autopsy on the body of two deceased persons. Kailash Chand Meena (PW 1), Prabhu Singh (PW 3), Hazari Singh (PW 4), Madan Lal (PW 10), Hanuman Prasad (PW 11), Babu Lal (PW 16), Ganpat Singh (PW 17), Talib Hussain (PW 18) and Tej Singh (PW 43) were associated as Motbirs during the investigation. Sajjan Singh (PW 33) and Janki Vallabh Joshi (PW 38)

were the Magistrates who had conducted the identification parade of the accused persons and had recorded their confessional statements Ex.P.45 and Ex.P.59, Gangadhar (PW 15), Pooran Braham (PW 19). Girdhari Singh (PW 21), Bhanwar Lal (PW 22), Ram Bhajan (PW 23), Shankar Singh (PW 24), Narendra Mohan (PW 27), A.V. Joseph (PW 36), Badru Din (PW 37), Mangu Puri (PW 40) and Sobha Lal Kothari (PW 45) are the police officials, who had either registered the case or had taken part in the investigation or had kept or taken the Malkhana articles from one place to another. Topan Das (PW 30), Pratap Chand (PW 32), and Madan Lal Jain (PW 35) were examined to connect the accused persons on the basis of some circumstances. Abdul Razak (PW 4), Suraj Narain (PW 42) are the employees of the Finger Print Bureau. The police had associated them for taking chance prints at the spot.

(7). Both the accused appellants in their statements under Section 313. Cr.P.C. denied the accusations. Accused Darbara Singh stated that he had already been shown to the witnesses at the police station before identification parade. For the confessional statement Ex.P.59, he stated that it was incorrect. According to him, he has been falsely implicated in the case. Accused Bakshi Singh stated that he did not give confessional statement EX.P.45 voluntarily and it was not correct statement. According to him, he has been falsely roped in the case. Both the accused have not led any oral evidence in defence.

(8). We have heard the learned counsel for the appellants and the learned Public Prosecutor and have gone through the record of the case.

(9). The contentions of Shri Bajwa, learned counsel for the appellants, may be summarised as follows:

(A) The identification evidence against Darbara Singh in the statement of Shri O.P. Mathur should not be believed because;

(i) Shri O.P. Mathur had not disclosed the description of the accused at the earliest opportunity or during the identification parade.

(ii) The identification parade was not held soon after the occurrence or even soon after the accused was arrested.

(iii) Five out of six witnesses, have failed to identify him in court.

He placed reliance on the cases of - Wakil Singh & Ors. vs. State of Bihar (1), Soni vs. State of Uttar Pradesh (2). Subhash & Shiv Shankar vs. State of U.P. (3), State of Andhra Pradesh vs. Dr. M.V. Ramana Reddy & Ors. (4) and Manzoor vs. State of Uttar Pradesh (5).

(B) The concessional statement of Darbara Singh should not be acted upon for the following reasons:-

(i) There is no note recorded by the Magistrate on the statement Ex.P. 59 that he was satisfied as to the voluntary nature of the confession. In this connection, he also pointed out that the application Ex.P. 57 does not bear the signatures of the accused.

(ii) The legal counselling was not provided to the accused before recording his confessional statement.

(iii) It had been retracted by the accused first in the bail application, and when the charges were read over to him and lastly in his statement under Section 313, Cr.P.C.

(iv) The confessional statement is exculpatory.

(v) No question regarding the confession was put to the accused in his statement under Section 313 Cr.P.C.

He cited the cases of - Tulsi Singh vs. State of Punjab (6), Preetam vs. State of M.P. (7), Shivappa vs. State of Karnataka (8), State of Madhya Pradesh vs. Shobharam & Ors. (9), Khatri & Ors. vs. State of Bihar & Ors. (10), Smt. Nandini Satpathy vs. P.L. Dani & Anr. (11) and State of Assam vs. Rabindra Nath Guha (12). Union of India & Ors. vs. J.S. Brar (13), Kora Ghosi vs. State of Orissa (14) and Palanisamy & Qrs. vs. State of Tamil Nadu (15). Smt. Priya Bala Ghosh vs. Suresh Chandra Ghosh (16), Balwant Kaur vs. Union Territory of Chandigarh (17)

and Wariyam Singh & Ors. vs. State of U.P. (18).

(C) The confession of Bakshi Singh should not be acted upon as the Magistrate had not taken pre-cautions in recording. The confessional statement and the same stood retracted at the earliest when his bail application was moved and also when the charges were framed against him.

(D) There is no direct evidence of the conspiracy against both the accused and therefore, they cannot be convicted u/Sec. 302 IPC with the aid of Section 120B, IPC. At the most, Mr. Bajwa contended, both the accused had the common intention of committing robbery only and therefore, they cannot be held liable for the murder which was committed by other accused persons.

(E) If the conviction of Darbara Singh is upheld, the sentence of death should not be confirmed as the case does not fall in the category of rarest of the rare case.

(10). On the other hand, the learned Public Prosecutor tried to support the judgment of the trial court. Pointing out that both the Magistrate had taken all the pre-cautions in recording the confessional statements of the accused persons he canvassed that the confessional statements Fx.P.45 and Ex.P.59 can be safely acted upon. He pointed out that both the accused did not retract their confessional statements at the earliest opportunity. According to him, the averments made in the bail application, or denial of the charges when the plea is recorded, do not amount to retraction of the confession. He submitted that the conviction of both the accused can be upheld on their confessional statements alone. He has placed reliance on the cases of Shankariya vs. State of Rajasthan (19) and Shankariya vs. State of Rajasthan (20). He contended that on the ground of delay in identification parade from the date of occurrence, the evidence of identification parade should not be discarded as the same could be held only after the accused had been arrested.

(11). We have bestowed our thoughtful consideration to the submissions made by the learned counsel for the parties.

(A) IDENTIFICATION EVIDENCE

(12). Shri O.P. Mathur P.W. 2 deposes that he had seen the occurrence which had taken place outside the Mill Gate. He says that accused Darbara Singh was the person who had alighted from the car and had caught hold of Mr. Jain and at that time Mr. Jain was shot dead by another person sitting in the car. This witness had also identified accused Darbara Singh in the identification parade held by Mr. J.V. Joshi P.W. 38 on 30.6.84 when ten other persons had been mixed. Mr. Joshi deposes that he had taken all the precautions in holding the identification parade and had prepared the Memo Ex.P.8. He further says that Mr. Om Prakash Mathur had correctly identified the accused.

(13). No authority, laying down the proposition that at the time of identification parade the witness must state the features of the assailant, has been cited by the learned counsel for the appellants. In our opinion, there is no merit in this contention that the evidence of the identification given by Mr. Mathur in the Court can not be acted upon as he had not given out the special features of the assailant at the time of the identification parade.

(14). There is nothing on record to believe that Mr. O.P, Mathur had not disclosed the features of the accused at the time, his statement was recorded by the police. The Police statement of the witness has not been brought on record. Therefore, even if some thing was missing in the police statement, it can not be considered. It can not be said that the prosecution has deliberately withheld the Investigating Officer who had interrogated Shri Mathur. Shri Narain Singh I.O. had expired during the trial of the case. It is significant to point out that no question with regard to his statement under S. 161 Cr PC has been asked to Shri Mathur when he was in the witness box. Simply on the basis of the answer given by Shri Mathur that earlier no body had asked him about the features of the assailant, it can not be inferred that the witness wanted to say that even the investigating officer had not asked him any question in that regard. In our opinion the testimony of the witness can not be discarded on the alleged ground that he had not disclosed the features of the accused during the investigation of the case.

(15). As to the contention of delay caused in the identification, it may be stated that the accused was arrested on 16.6.1984 and he was lodged in the jail and kept

'Baparda' throughout. The test identification parade was held on 30.6.84. It is obvious that the test identification parade was held within 15 days of the arrest of the accused and during that period the accused was in judicial custody.

The fact that the accused was kept 'Baparda', is amply borne out by the facts stated on the confessional statement Ex.P.59 as also by the letter Ex..58 which was written by the Judicial Magistrate to the jail authorities to keep the accused 'Baparda. It is significant to point out that no question challenging the fact of keeping the accused 'Baparda' has been asked in the cross- examination of Mr. Joshi. That being so, on the fact recorded in the identification memo Ex.P.8 that the accused had told the Magistrate that the witnesses used to visit the police station, it can not be believed that Darbara Singh had already been shown to Shri Mathur before the identification parade. It is relevant to state that Mr. O.P. Mathur denies in categorical terms that the accused had been shown to him by the police before the identification parade was held. There could not be any cause for Mr. Mathur to depose falsely against the accused. It is also significant to point out that Mr. Mathur gives details on the basis of which he had identified the accused. He says that looking to the height, thin body, age, face and beard, he had identified the accused. In our considered opinion, there is no cause to discard the testimony of Mr. O.P. Mathur on the basis of the contentions made by Shri Bajwa,

(16). As to the authorities relied on by Mr. Bajwa, it may be stated that in the case of Wakil Singh (supra) the occurrence had taken place in the night. There was no other evidence except the evidence of one witness as to the identity. Since the evidence was not absolutely clear, their lordships did not think it proper to rely on the evidence of the witness who had identified the accused. In that case, it was on record that the witness had not given out any description of the dacoits whom he had alleged to have identified in the dacoity. It is in these circumstances their lordships held that it would be unsafe to convict the accused on the basis of identification of the one out of the three witnesses. In the instant case, it is true that the other witnesses have not been able to identify the accused, but that can not be a ground to reject the testimony of Mr. O.P, Mathur. It has to be kept in view that the other witnesses who have failed to identify the accused were examined to depose about the occurrence which had taken place inside the bank. P.W. 5 G.C.

Jain, P.W. 17 Ganpat Singh and P.W. 20 Om Prakash have not claimed to have seen the occurrence which had taken place outside the Mill gate. That being so, the testimony of Mr. O.P. Mathur, who has identified Darbara Singh on the basis of the occurrence which had taken place outside the Mill Gate, can not be discarded.

For the case of Soni vs. State of Uttar Pradesh (supra), it may be stated that there was delay of 42 days in the identification parade from the date of arrest of the appellant. Not only that the identification parade had been held after lapse of a long time of the occurrence. It is in these circumstances their lordships did not think it proper to place reliance on the identification evidence. In the instant case, the identification parade had been held within 15 days of the arrest of the accused and also in less than three months of the occurrence.

So also in the case of Subhash and Shiv Shankar (supra) the identification parade had been held after the delay of four months and the witnesses had not given any description and therefore, the evidence of identification was not believed.

The case of State of Andhra Pradesh vs. Dr. M.V. Ramana Reddy & Ors. (supra) had gone before the Supreme Court against the judgment of acquittal. There was material on record that the police had shown the accused or their photographs to the witnesses. In these circumstances, the evidence was not believed. In the instant case, there are no such facts.

In the case of Manzoor (supra) it was on record that the eye-witnesses had failed to mention the identifying features to the Investigating Officer. As already stated, this is not the situation in the case in hand. It is also significant to point out that in that case the occurrence had taken place in the night and there could not be any occasion for the home guards to be present at the place of occurrence as they were supposed to be on duty elsewhere.

The Apex Court in the recent case State of Maharashtra vs. Suresh (21) has observed that the identification evidence should not be discarded on petty grounds. It is profitable to read the observations appearing at Para No. 32 hereunder:-

'If potholes were to be ferreted out from the proceedings of the Magistrate holding such parades possibly no Test Identification Parade is made from that angle atone and the result of the parade is treated as vitiated every Test Identification Parade would become unusable. We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting test identification parade is two fold, First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So the officer conducting the test identification parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held, (vide *Budhsen vs. State of Uttar Pradesh* (1970(2) SCC 128), *Ram-nathan vs. State of Tamil Nadu* (1978(3) SCC 86)).'

So also in the case of *Ramnathan vs. State of Tamil Nadu* (22) the Apex Court did not find it fatal that there was no evidence of the prosecution that the accused was kept 'Baparda'.

(17). On a careful consideration of the entire material on record, we are of the opinion that the evidence of identification given by P.W. 2 Mr. O.P. Mathur with regard to the occurrence which had taken place outside the gate of the Mill is worthy of credence. By his testimony, it is amply proved that the accused Darbara was the person who had alighted from the car, caught hold Mr. Jain and at that time one of the assailants sitting in the car had fired a shot at Mr. Jain killing him then and there. The trial court has thus not erred in placing reliance on the identification evidence given by Shri O.P. Mathur.

#### (B) CONFESSIOAL STATEMENT OF DARBARA SINGH

(18). P.W. 38 Janki Vallabh Joshi deposes that on 28.6.84 the S.H.O. Gulabpura had put in the application Ex.P.57 before him that Darbara Singh accused wanted to confess his guilt, on which he issued the letter Ex,P.58 to the jail authorities and when the accused was produced before him he made him to understand that he

was free to give the statement, and was not bound to confess the guilt. He further says that he had told the accused that the statement, which he would make could be read against him and after he was satisfied that the accused was making the statement voluntarily, he started recording the statement at 8.30 a.m. He deposes that he again asked the accused that he could re-consider as to whether he wanted to give statement voluntarily, and he handed over the accused to the jail authorities. He states that he was produced before him at 11.30 a.m., and as he was satisfied that the accused was making the statement voluntarily, he recorded the confessional statement Ex.P. 59, which was read over to the accused who admitted the same to be correct. He says that the accused put his signatures G to H on all the pages of his statement. In his cross-examination, the witness says that he had recorded the statement of the accused in the Court and not in the chamber. He further says that at the time he recorded the statement, no-body was present in the Court room and he did not allow any one to enter the court room. He also says that no police man was inside the court room, nor visible out side the court room.

(19). The serious question to be considered is whether accused Darbara Singh had made the confessional statement voluntarily.

(20). A reading of the statement Ex.P.59 shows that various questions had been put by the Magistrate to accused Darbara Singh to satisfy himself that the confession was being made voluntarily. Some of the questions and answers which are reproduced hereunder clearly indicate that the Magistrate had taken all precautions before recording the statement of Darbara Singh and there was material before him to satisfy that the confession was being made voluntarily:-

Question No. 3 : What was the behaviour of the police with him ?

Answer: The behaviour of the police was very good and he was kept like a brother.

Question No. 5 : If he was given physical torture or was shown as fear?

Answer: No. Police did not frighten him and he was never beaten. He was kept in good condition.

Question No. 6: Whether the police assured him that if he confessed his guilt, he would be excused and would be let off ?

Answer: No it was not told.

Question No. 8 : Do he know that he was the Magistrate, and the confessional statement made by him can be read against him in evidence ?

Answer: He knew it.

Last Warning : It was not compulsory for him to confess his guilt and if he confessed, it could be used against him. He could give statement as per his will.

(21). After the aforesaid questions put by the Magistrate and the answers given by the accused and the warning given to him, it can not be said that the Magistrate could not be satisfied as to the statement being made voluntarily. All precautions were taken by the Magistrate to remove the influence of the police on the accused, and (hereafter his statement was recorded.

(22). It is not [he requirement of law that there should be a note recorded by the Magistrate on the statement itself that he was satisfied as to the voluntary nature of the statement. What has been laid down by the Apex Court in the cases relied on by Mr. Bajwa is that the Magistrate must satisfy himself that the confession was voluntary so as to enable him to give requisite certificate under sub-section (4) of Section 164 Cr.P.C.

In the case of *Tulsi Singh vs. State of Punjab* (supra) it has nowhere been observed that there should be a certificate recorded by the Magistrate on the statement that the confession was being made voluntarily. In that case, there was no material which could show that the Magistrate had recorded the statement after giving due caution. The confession did not indicate the questions and the answers, which could satisfy the Magistrate that it was being made voluntarily. In this circumstance the confession was not acted upon.

So also in the case of *Preetam vs. State of M.P.* (supra) it was noticed by the Apex Court that though the Magistrate had explained the accused that he was not

bound to make a confession, yet the other requirements of putting questions to satisfy himself that the confession was voluntary so as to enable him to give the requisite certificate under sub-section (4), had not been fulfilled. The Magistrate had not asked any question whatsoever to ascertain whether the appellant was making the confession voluntarily. It is in these circumstances the confession was not acted upon.

In the case of Shivappa (supra) also the Magistrate had not made serious attempt to ascertain the voluntary character of confessional statement, and therefore, it was not acted upon.

(23). In the instant case, as already stated the Magistrate had taken all necessary precautions and had recorded the confession of Darbara Singh after giving warning to him. Therefore there is no cause to refuse to act upon the confessional statement of Darbara Singh.

#### THE ACCUSED HAD NOT SIGNED THE APPLICATION FOR MAKING CONFESSIONAL STATEMENT

(24). Shri Bajwa, pointing out that the application Ex.P.57 was not signed by the accused and was signed by the police officer, contended that it should be presumed that the police was putting pressure on the accused to make confessional statement and the accused had not voluntarily made the confession.

(25). In none of the cases relied on by Mr. Bajwa, it has been laid down that the application for recording the confession should be signed by the accused himself. In those cases, the confession of the accused was not acted upon for the reason that the same was found to be tainted or that the confession had been retracted at the earliest opportunity and there was no corroboration.

On the contrary, a reading of the facts mentioned at para No.6 and para No.9 respectively of the reports in the two cases of Shankariya vs. State of Rajasthan (supra), It becomes evident is noticed that the application for recording the confession of the accused was moved by the police officer, yet their Lordships upheld the conviction acting upon the confession. This leads us to infer that the

confession cannot be seen with suspicion simply on the ground that the application for recording the confession was not signed by the accused himself and the same was signed by the police officer. In our opinion, the probative value of the confession does not get diminished if the same is recorded on the request of the police. The important fact is whether the Magistrate who had recorded the confession had taken all the precautions or not before recording the confession. It is not material at whose request the Magistrate proceeded to record the confessional statement of the accused.

(26). In the instant case, we have already seen that the Magistrate had put various questions to the accused to satisfy himself that he wanted to make the confessional statement voluntarily. The answers given by the accused go to establish that he was neither under the influence of the police nor there was impact of the alleged threatening or inducement in his mind, at the time, his statement Ex.P.59 was recorded.

## LEGAL COUNSELLING

(27). The contention of Shri Bajwa was that the confession of the accused was recorded without providing him legal aid and therefore, this confession cannot be acted upon.

(28). The ratio of the case of State of Madhya Pradesh vs. Shobharam & Ors. (supra) is that provisions, denying an indigent person, who is arrested, right to be defended by a legal practitioner of his choice, shall be violative of Article 22 of the [Constitution of India](#). It has been observed that a person arrested and put on his defence against a criminal charge, which may result in penalty, is entitled to the right to defend himself with the aid of counsel and any law that takes away this right offends against the Constitution. This ruling obviously does not lay down the proposition that an accused is entitled to the legal counselling during the course of investigation.

Of course, in the case of Khatri (commonly known as Bhagalpur Prisoner's case) (supra), their Lordships have observed that constitutional obligation to provide free legal services to an accused arises even when the accused is for the first time

produced before the Magistrate, but, the condition is that he is an indigent accused. It is profitable to read the observations of their Lordships appearing at para No.4 of the report hereunder:

'Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate, it is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal service to an indigent accused not only at the stage when he is first produced before the Magistrate as also when he is remanded from time to time.'

The principle enunciated in that case is that it is obligatory for the State to provide an advocate to an accused even at the investigation stage. However, as already stated, this obligation arises only in respect of an indigent accused. A person is indigent if he does not have sufficient means to enable him to pay fee to a counsel. In the instant case, there is no material on record that the Magistrate who had recorded the confession, could be satisfied that the accused was indigent person. As such he was not obliged to provide an advocate to the accused before recording the confession.

The case of Smt. Nandini (supra) does not help the appellant. The ratio of that case is that if the accused person wants to seek a lawyer when his examination goes on, the facility of legal aid shall not be denied to him. There is nothing on record of the instant case that the accused at any time, had expressed to have a lawyer by his side before recording his confession. That being so, the ruling is of no help to the appellant.

Gauhati High Court in the case of Rabindra Nath Guha (supra) has observed that an accused whose confessional statement is recorded should be provided legal aid but again the observations are that such legal aid must be provided when an accused is an indigent person. This ruling is based on the observations of the Apex Court in the case of Khatri (supra).

(29). In our opinion, as there was nothing on record before the Magistrate that Darbara Singh was an indigent person, it was not obligatory for him to provide legal aid to the accused before recording his confession. There is thus no legal impediment in acting upon the confession Ex P 59.

#### RETRACTION OF CONFESSION

(30). The contention of Shri Bajwa was that the confessional statement Ex. P 59 cannot be acted upon as the same had been retracted by the accused when he moved bail application and when he pleaded not guilty to the charges. According to him, the trial court has faltered when it observed that the accused had retracted the confession for the first time in his statement u/S. 313. Cr.P.C.

(31). The contention is devoid of merit. No authority laying down the proposition that confession can be treated to have been retracted by averments in the bail application or by pleading not guilty at the time of framing of the charges, has been cited. The trial court has rightly placed reliance on the judgment of Shankariya vs. State of Rajasthan (supra). Their Lordships have observed at para N. 49 of the report that the confession was liable to be acted upon as it was not retracted at the earliest opportunity. In that case, the confession was recorded on 14.6.1974. The trial of the accused commenced on 10.1.1975. When the charges were framed and read over to the accused who pleaded not guilty. The statement of the accused u/S. 313, Cr.P.C. was recorded on 14.6.1975. It was observed that the retraction of the confession shall be considered for the first time on the date the statement of the accused was recorded. In other words, the plea of not guilty was not considered as the retraction of the confession.

In another case of Shankariya vs. State of Rajasthan (supra), also their Lordships considered the question of retraction of confession at para No. 19 of the report. It

was specifically observed that the accused did not retract the confession at the time the charges were framed against him and that was the earliest opportunity at which he could retract the confession. In other words, the plea of 'not guilty' was not considered as the retraction of the confession. If the accused wants to retract the confession, it should be done in explicit terms. It is significant to point out that in the instant case, as in the case of Shankariya (supra) the accused was being defended by a lawyer of his choice. In view of the legal position stated by the Apex Court. We are unable to accept that the confession stood retracted at the earliest opportunity by plea of 'not guilty' on the date the charges were framed.

As to the averments made in the bail application, it may be stated that no specific averments of any application were brought to our notice during arguments which would indicate that the accused had retracted the confession. In any case, averments in the application that the accused is not guilty and he should be released on bail, cannot be considered as retraction of the confession.

(32). Consequently, it cannot be accepted that the accused had retracted the confession at the earliest opportunity available to him. There is therefore, no cause to refuse to act upon the confession Ex. P. 59. It is not insignificant to point out that there is other evidence in the form of identification against the accused, which leads corroboration to the confession Ex. P. 3.

In the case of Kora Ghasi (supra) the confession was not acted upon as it had been retracted and there was no corroboration by other evidence. So also in the case of Palanisami (supra), the confession had not only been retracted, but the same was found to be tainted and hence not acted upon. These rulings do not help the accused in the instant case.

#### CONFESSION BEING EXCULPATORY CANNOT BE ACTED UPON

(33). Shri Bajwa, trying to impress that the confession is exculpatory in nature, argued that conviction cannot be based on the confessional statement Ex. P. 59. The confessional statement Ex. P. 59, in our view cannot be said to be exculpatory. If the accused states that he himself did not fire the shot, that he himself did not make looting or that he did not see the occurrence of firing shots outside the gate,

it does not make the confession exculpatory. The accused in unequivocal terms states that he was party to the robbery, and that he was armed with a sten gun. He further states that he had gone to catch hold of a person outside the gate of the Mill and at that time, his companion had fired a shot killing that person. In our considered opinion, this statement cannot be said to be exculpatory.

(34). Apart from that, there is no legal bar in acting upon the confessional statement, so far as, it is inculpatory in nature; the exculpatory part may be rejected. In the case of *Jethamal Pithaji vs. The Assistant Collector of Customs, Bombay* and another (23), it was observed by their Lordships that all the parts of the recorded statement of an accused are not entitled to equal credit and inculpatory part of the statement should be accepted even though the exculpatory part of the statement of the accused was rejected. Of course, in that case the confession was not recorded by a Magistrate but the principle laid down in that case helps us for deciding the contention raised. In the case of *Bhagwan Singh Rana vs. The State of Haryana* (24), their Lordships have observed that the court can believe one part of the confessional statement and disbelieve another. It is profitable to reproduce the observations of their Lordships hereunder appearing at para 8 of the report:-

'It has also been argued by Mr. Ramamurthy that the courts below erred in accepting those parts of the statements of the appellant in Exs. PB and PC which were inculpatory and in rejecting those parts which were exculpatory, and that, in doing so, the courts lost sight of the requirement of the law that such statements should either be accepted as a whole, or not at all. For this proposition our attention has been invited to *Hanumanant vs. State of Madhya Pradesh* (1952 SCR 1091) = (AIR 1952 SC 343) and *Palvinder Kaur vs. State of Punjab* (1953 SCR 94) = (AIR 1952 SC 354). The law on the point has however been laid down by this Court in *Nishi Kant Jha vs. State of Bihar*, (1969) 2 SCR 1033 = (AIR 1969 SC 422) in which the two cases cited by Mr. Ramamurthy have been considered. After referring to Taylor's Law of Evidence and Roscoe's Criminal Evidence this Court has held that it is permissible to believe one part of a confessional statement, and to disbelieve another, and that it is enough if the whole of the confession is tendered in evidence so that it may be open to the court to reject the exculpatory

part and to take inculpatory part into consideration if there is other evidence to prove its correctness.'

(35). That being the legal position, there is not hesitation in acting upon the confessional statement Ex. P 59 even assuming that some part of the statement is exculpatory in nature.

#### CONTENTION AS TO THE QUESTIONING OF THE ACCUSED U/S 313, Cr.P.C.

(36). The contention of Shri Bajwa was that the trial court has not questioned the accused in his statement u/S.313 Cr.P.C. with regard to the confessional statement Ex. P 59, and therefore, the confessional statement cannot be acted upon.

(37). The contention is devoid of merit. With regard to the confessional statement Ex.P.59, the question No. 35 was asked to the accused in which it was informed to him that on the request of the police, Ex. P57, his statement Ex. P 59 was recorded by Shri Janki Vallabh Joshi, Judicial Magistrate. The reply of the accused to that question, is: 'It is incorrect.' Since specific question with regard to the confessional statement Ex.P. 59 in relation to the application of the police Ex. P 57 was asked to the accused, it cannot be accepted that the confessional statement was not put to the accused in his statement u/S. 313, Cr.P.C. It may be that the contents of the confessional statement were not put in the question but it cannot be accepted that that has led to the causing of prejudice to the accused.

(38). In the case of Shobhit Chamar and another vs. State of Bihar, (9), after noticing previous decisions, their Lordships have observed that unless prejudice is shown to have been caused to the accused, trial cannot be said to have vitiated on the ground of non-compliance of Sec. 313 Cr.P.C.

(39). As to the cases relied on by Shri Bajwa, it may be stated that in the case of Smt. Priya Bala Ghosh (supra), the High Court in an appeal against acquittal had observed that the statement of the respondent Ex. P 2, which was given in some other matter could not be considered, as the accused was not asked questions in his statement u/S. 342 Cr.P.C. (old Code). That view was upheld by the Apex

Court. There cannot be any dispute in this legal position that if a circumstance is not at all brought to the notice of the accused in his statement u/S. 313, Cr.P.C., the same cannot be used against him. But in the instant case, the evidence of confessional statement has been clearly put to the accused by way of question No. 35 and therefore, it cannot be said that the trial court has committed error in placing reliance on the confessional statement of the accused.

So also in the case of Balwant Kaur (supra), no question had been asked to the accused in his statement u/S. 313, Cr.P.C. with regard to the conspiracy. Therefore, their Lordships observed that that part of the evidence would be excluded from the consideration, in the instant case, the evidence of confession has been clearly brought to the notice of the accused by putting him question No. 35. The allegations of conspiracy, were also brought to the notice of the accused by way of question No. 1.

In the case of Wariyam Singh (supra), the contention of the learned counsel for the accused was that specific question with regard to the confessional statement, was not put to the accused and therefore it had caused a serious prejudice to the accused thereby vitiating the trial. Their Lordships, noticing that the gist of the confessional statement had been put to the accused, observed that it amounted to drawing the attention of the accused to the confessional statement.

(40). In the instant case, of course, the gist of the confessional statement was not stated in the question, but the fact that the accused had given the confessional statement Ex. P 59 before Shri Joshi, Judicial Magistrate, was specifically asked to Darbara Singh. In our opinion, neither it can be said that no question with regard to the confessional statement was put to the accused in his statement u/S 313, Cr.P.C. nor that it has caused prejudice to the accused as to vitiate the trial. That being so, there is no merit in the contention of Shri Bajwa.

#### CONVICTION UNDER SECTION 120B, IPC

(41). Shri Bajwa, learned counsel for the accused, contended that the prosecution has not produced any evidence to prove the conspiracy and therefore, the accused could not be convicted u/S. 120B IPC or 302/120-B IPC. His contention

was that conspiracy between the accused and others, if at all, was to commit robbery and therefore, the accused who had not himself committed murder, cannot be held liable u/S. 302/120B IPC, which was the individual act of other accused, committed beyond the terms of the conspiracy.

(42). We find ourselves unable to accept the contention. There is rarely a situation, where the direct evidence of conspiracy can be produced. Conspiracy is often hatched in utmost secrecy and it is difficult to prove the conspiracy by direct evidence. The conspiracy can be inferred from the acts, statements and conduct of the parties to the conspiracy: Vide *Bhagwandas Keshwani etc. vs. State of Rajasthan* (26), and *State of Delhi Adm. vs. V.C. Shikla* (27).

(43). Criminal conspiracy has been defined and made punishable under Chapter V-A of IPC. Sec. 120A IPC is reproduced hereunder:-

'120 A. When two or more persons agree to do, or cause to be done. -

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation - It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.'

The offence of criminal conspiracy is punishable u/S. 120B IPC, which says that the sentence for the offences of criminal conspiracy in the matter of offences, punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall be same, as if the conspirator had abetted.

(44). A combined reading of Sec. 120A IPC and Section 10 of the Indian Evidence Act, makes it clear that anything done or written by the members of the conspiracy in reference to their common intention is a relevant fact to prove a charge of

conspiracy.

(45). In the instant case, though there is no direct evidence of the conspiracy, yet the evidence of conspiracy is clearly available in the confessional statement of the accused. Ex. P 59 wherein accused Darbara Singh had stated that he had participated in the looting of the Bank along with Bakshi Singh (& Guru Baksh Singh, Billu @ Swarn Singh and Babla. He had also stated that when they reached Gulabpura, they had sent Babla to the Bank to know about the situation on the pretext of getting change of Rs. 200/-and after Babla came back at the truck, they went towards the Bank and alighted from the truck at a distance of 200 yards from the bank after giving instructions to Bakshi Singh. They went to the Bank to commit robbery asking Bakshi Singh to wait for them. He had further stated that all of them were armed with fire arms at the time of the occurrence. In our opinion, the facts which have come in the statement of Darbara Singh Ex. P 59 lead to irresistible conclusions that Darbara Singh, Babla, Billu, Bakshi Singh and Karmikar Singh had agreed to commit offences. It is also relevant to point out that after the occurrence Darbara Singh and his companions had left the bank together, and while making their escape good they had boarded a car parked outside the Bank and had taken part in the occurrence of killing of Shri J.K. Jain outside the Mayur Mill gate and then they had left the scene of occurrence together. On this evidence, We have no hesitation in holding that the charge u/S. 120B. IPC is fully established against Darbara Singh and Bakshi Singh. It may be that though some act was not done by a particular accused, yet he cannot escape from the punishment for the acts of other conspirators. There is no merit in the contention of the learned counsel for the appellants that appellants Darbara Singh and Bakshi Singh could not be convicted u/S 302/120B IPC for the murders committed and for the murderous assault made by other conspirators.

#### (F) CONFESSIONAL STATEMENT OF BAKSHI SINGH

(46). Shri Sajjan Singh Kothari (PW 33) deposes that on 21.7.84 and 23.7.84, the police had submitted applications before him for recording the confessional statement of Bakshi Singh; He proves the applications filed by the Addl. S.P. Ex. P 41, and also the application Ex. P 42 and says that he had sent the letter Ex. P 43

to the Incharge of Jail, Bhilwara, directing him to produce the accused before him on 23.7.84. He then deposes that after the accused appeared before him, he made him to understand that it was not obligatory for him to make confessional statement. He also says that after taking all precautions and giving warnings to the accused again and again, he had recorded statement of Bakshi Singh Ex. P 45.

(47). A reading of the memorandum and the statement Ex. P 45 goes to show that the Magistrate had taken all the precautions before recording the confessional statement of Bakshi Singh. It is evident from the record that the accused has appeared from the Judicial custody on 23.7.84. It is also established that the Magistrate had enquired from Bakshi Singh about the behaviour of the police when he was in the police custody. He had also given him warning that it was not necessary for him to confess his guilt, and that if he confessed his guilt, it could be used against him. The Magistrate had also enquired from the accused that whether the police had tortured him or had made any promise to him or had given inducement to him,

(48). It has come in the statement of Bakshi Singh that initially he was not aware of the conspiracy between Karmikar Singh and other persons but after sometime he had come to know that they were having weapons in a bag and that they were going to commit offence. It has also come in his statement that he was not inclined to be the member of the conspiracy, but because of fear, he had joined the other accused persons. On these facts, Shri Bajwa argued that Bakshi Singh had not done anything intentionally.

(49). The statement fix. P 45 indicates that at Gulabpura, Babla, Barbara Singh and others went to loot the Bank asking him to wait for them at two Kms. away towards Bhilwara and that some 10-15 minutes after they had gone to loot the Bank, they returned in a car which was being driven by Bable and that on the signal given by Billu, Bakshi Singh followed the car upto 5-6 Kms. and thereafter the other accused persons alighted from the car and got in the truck driven by him. His statement further reveals that the other accused persons had informed Bakshi Singh that three persons had been murdered in the occurrence. Not only that according to him, Rs. 13, 400/- were paid to him as his share of the loot.

(50). It is true that the confessional statement of Bakshi Singh shows that at the initial stage, he was not willing to be party to the robbery but his subsequent conduct shows that he had also become party to the conspiracy. The very fact, that there were opportunities available to Bakshi Singh to run away, yet he did not go, goes to show that he had agreed to do illegal acts and help his companions, it is significant to point out that after Babla and others had gone to loot the bank, accused Bakshi Singh was all alone and he had an opportunity to run away, yet he did not go and waited for his companions, and took them to Shrinagar (Ajmer), then Jalandhar and again at Shrinagar (Ajmer), and obtained booty from them. From the conduct of the accused, it cannot be accepted that he was forced to do something and he did not have criminal intention. There is thus no cause to refuse to act upon the confession Ex. P 49.

(51). From the answers given by Bakshi Singh when questioned and warned by the Magistrate, it can safely be said that the confession Ex. P 45 was voluntary. The confessional statement of Bakshi Singh being voluntary is strongest piece of evidence. Need less to say, the confession is true. The evidence of confession Ex.P 45 is important piece Of evidence against Bakshi Singh and conviction is maintainable on this evidence alone.

#### (E) SENTENCE OF DEATH

(52). The trial court has awarded sentence of death to Darbara Singh on the ground that the murder was committed for gain and that the offence was of abnormal nature in which two persons were killed and one was seriously injured. The learned Judge has relied on the cases of Dagdu vs. State of Maharashtra (28), Bachchan Singh vs. State (29) and Machhi Singh and others vs. State of Punjab.(30).

(53). It is settled legal position that u/S 302 IPC, the general rule of sentence is imprisonment for life and sentence of death is an exception. Their Lordships of the Apex Court in the case of Bachchan Singh (supra) observed that the sentence of death should be awarded in the rarest of the rare case. The Hon'ble Supreme Court time and again has considered the observations of the case of Bachchan Singh (supra) to find out if a particular case is rarest of the rare or not.

(54). In the case of Machhi Singh (supra), the Apex Court has laid down guidelines where death sentence can be, awarded. Their Lordships have identified 5 circumstances which should be kept in view while awarding death sentence. It has been observed that a balance sheet of gravity and mitigating circumstances has to be drawn up before the option of death sentence is exercised. At para No. 34 of the report, the following observations have been made:-

'In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weight age to the mitigating circumstances which speak in favour of the offender ?'

(55). Keeping in view the observations made in the case of Machhi Singh (supra) as also in the subsequent cases cited at the Bar viz. Allauddin Main and others Sharif Mian and another vs. State of Bihar (31), Mukund alias Kundu Mishra and another vs. State of M.P. (32) and Ronny alias Ronald James Alwaris and others vs. State of Maharashtra (33), it has to be accepted that, so far as the case of Darbara Singh is ' concerned, it cannot be said to be a case of the rarest of the rare nature. It is noticed that accused Darbara Singh was not the person who had fired shots at the two deceased persons or at the injured. It is further noticed that Darbara Singh was having sten gun but did not fire a shot at the time of occurrence. It was pointed out that Darbara Singh was on bail for considerable period, but there was no complaint against him regarding his behaviour as to hold that his living in society would be hazardous. Also, it cannot be said that the part played by Darbara Singh was uncommon which renders the sentence of imprisonment for life inadequate.

(56). Taking all the facts and circumstances of the case into consideration, we are of the considered view that the appropriate sentence for Darbara Singh is the imprisonment for life. The sentence of death imposed upon appellant Darbara

Singh for his conviction u/S 302/120B IPC deserves to be commuted to imprisonment for life, maintaining the sentence imposed for the other offence.

(57). Consequently, the reference of death sentence is rejected. The appeal of appellant Darbara Singh is partly allowed. The sentence of death is commuted to imprisonment for life u/S. 302/120B IPC. The conviction and sentence of other offences are hereby upheld.

(58). There is no merit in the appeal of Bakshi Singh which is hereby dismissed.

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