

Khan and anr. Vs. the State

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Court : Kolkata

Decided On : May-06-1954

Reported in : AIR1955Cal146,1955CriLJ485,58CWN1055

Judge : Chakravartti, C.J. and ;P.B. Mukherji, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 154, 297, 299 and 423; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 34, 300 and 302; ;[Evidence Act, 1872](#) - Section 1

Appeal No. : Criminal Appeal Nos. 2 and 3 of 1954

Appellant : Khan and anr.

Respondent : The State

Advocate for Def. : Ajay Basu, Adv.

Advocate for Pet/Ap. : N.R. Das Gupta, Adv.

Judgement :

Chakravartti, C.J.

1. The appellants in these two appeals, Khan 'alias' Md. Rezak and Allauddin Khan 'alias' Allauddin Ferozuddin, were tried in the Sessions Division of this Court by Sen J. with the aid of special jury, the former on a charge under Section 302, Penal Code, and the latter on a charge under Section 302 read with Section 109.

The Jury returned a unanimous verdict of guilty against both the accused persons and the learned Judge, accepting that verdict, sentenced the first appellant to death and the second appellant to transportation for life. They have appealed.

2. Originally, both the appellants sent separate petitions of appeal from jail. Since then, a further petition of appeal has been filed by the first appellant through a solicitor and at the hearing before us, he was represented by Mr. N. R. DasGupta, appearing with a number of juniors. The appeal by Allauddin Khan remains an appeal from Jail and before us he has gone unrepresented.

3. The act charged against Md. Rezak was that on 19-4-1953, he caused the death of one Md. Safi by inflicting several wounds on his person with a dagger and the act charged against Allauddin Khan is that he instigated Md. Rezak to assault Md. Safi and that he aided him in the commission of the crime by holding Safi by his hands.

The prosecution case is that on 19-4-1953, at, about 10 or 10.30 p. m. the deceased Safi was engaged in conversation with one Gaffur Mia, a little to the west of a betel shop kept by one Md. Omar at Terete Bazar Street. As Safi and Gaffur were talking, the two appellants came up to them from the east. Thereupon, Safi told the appellants that he was having some private conversation with Gaffur and they were intruding and he asked them to move away. The first appellant, however, said that he did not intend to do anything of the kind and challenged Safi to do what he could.

Thereafter, Safi repeated his request a number of times, but the appellants paid no heed to him, Met with such defiance, Safi put his hand on the back of Rezak and started pushing him away. Rezak resisted and the two became engaged in a kind of scuffle, but Safi succeeded in pushing Rezak upto a Chinese club which was situated at some distance on the same side of the street. At that point of time, the second appellant, Allauddin, shouted out to Rezak to strike Safi down and what he did further was to grab Safi by the hands and to hold him fast. Thereafter, Rezak whipped out a knife and inflicted several injuries on the person of Safi who cried out that he had been stabbed. That cry attracted the attention of the keeper of the betel shop, Omar, who also shouted out that a person had been stabbed with a

dagger. Omar rushed to the spot and then Allauddin loosed his grip on the hands of Safi who crouched down and Rezak then inflicted a final blow. Thereafter both ran away.

Safi was able to stagger to a small hotel on the other side of the road and collapsed on a stool in front of the hotel. Omar hailed a passing rickshaw and put him into it and by the time he had done so, two acquaintances of Safi, named Salim and Asraf, came up and took charge of the wounded man. Salim got into the rickshaw itself and as the rickshaw started for the Bowbazar Police Station, Asraf ran alongside it. It is alleged that while being driven to the Police Station Safi made a statement to Salim as to how he had come by his injuries. At the Police Station the officers found the wounded man to be in a very serious condition and accordingly they rushed him to the hospital while they detained Salim for the purpose of obtaining a statement from him. Salim made a statement and an entry was made in the General Diary in accordance with what he said:

Thereafter, some officers of the Police Station went to the hospital along with Salim and Asraf and found that preparations were being made to perform an operation on Md. Safi. Before, however, he was removed to the operation table, the Police Officers were able to obtain a statement from him in the course of which he gave an account of what had happened and how he had come by the serious injuries on his person. The medical aid rendered to Safi proved to be of no avail and he expired in the same night at 2-30 a.m.

3. After the occurrence, neither. Md. Rezak nor Allauddin could be found at their residences. Allauddin was arrested from a brothel at Bombay on 25-5-1953, and Md. Rezak surrendered before one Mr. Ram Chand Dewan, an - Inspector of Police attached to the Detective Department and working in the Security Control as the Officer-in-Charge of the Foreign Registration Section. Mr. Dewan, who had come to know of the Incident on 20-4-1953, had previously gone to the registered address of Md. Rezak and found him absent. Since then, a proclamation had been issued by the police for the apprehension or surrender of 'a Punjabi Muslim of the name of Khan and as he remembered that proclamation, he sent Md. Rezak to an Assistant Commissioner of Police. The Assistant Commissioner sent Rezak to the

Bow-bazar Police Station and the officers of that Police Station arranged a test identification at which Md. Rezak was identified by Md. Omar and another person, named Abdul Gaffur. Thereafter, he too was placed on his trial. I should, add that a challan had already been submitted against Allauddin and commitment proceedings in respect of him had already taken place.

4. It is necessary to state here that both in the General Diary Entry which was recorded in accordance with the statement made by Salim and in the statement made by Md. Safi himself, the alleged assailant was described as a Punjabi. Md. Rezak, however, is not a Punjabi, but an Afghan national. It appears from the evidence of Mr. Dewan that Afghan nationals are required to register their names in this country and they have to inform the relevant authorities, if they have occasion to leave their registered address.

5. I might add that, according to the prosecution evidence, Md. Rezak was wearing khaki shorts and a white vest in the night of the occurrence and Allauddin was wearing trousers and vest of a colour which some witnesses described as blue and some as green. It was not disputed that in view of the dress which he was wearing, Md. Rezak might well and appropriately be mistaken for and described as a Punjabi Muslim, although in fact he was an Afghan by nationality.

6. In due course, the Magistrate committed both the accused persons to the Criminal Sessions of this Court. The prosecution examined eighteen witnesses, of whom only three are really material. They are, the keeper of the betel shop, Md. Omar, a cook-cum-waiter of the hotel, named Abdul Gaffur, who claims to have witnessed the whole occurrence & Salim, who came to the place of occurrence shortly after the incident and in fact took the deceased to the Police Station.

As to the documentary evidence, it is necessary for the purposes of this appeal to refer only to Exhibit 2 which is the entry made in the General Diary and was treated as the First Information Report and Exhibit 7 which is the statement made by Md. Safi himself and which has been treated as a dying declaration.

7. The defence of both the accused persons was that they were not guilty, but it was not merely a bare defence of the usual type. Allauddin pleaded further that on

the day of the alleged occurrence, he had not been in Calcutta at all, but was in Bombay. Md. Rezak pleaded that he did not know either Omar or Safi and that he had not gone to the Terete Bazar locality on the day of the occurrence and that, between the day of occurrence and the day of his surrender, he had been out of Calcutta in the ordinary course of his business which was the selling of second hand goods. No evidence was called by either accused In support of his plea of 'alibi'.

8. The Jury, as I have already stated, returned a unanimous verdict of guilty in respect of both the accused and the learned Judge convicted and sentenced them in the manner which I have also stated.

9. An event occurred towards the close of the proceedings in this Court upon which the first argument advanced on behalf of the first appellant was founded. It appears that the learned Judge finished his charge to the jury at 3.10 p. m. whereafter the jury retired for their deliberations. At 4.20 p. m. they came back to Court and wanted to have Exhibit 2, which, it will be recalled, is the entry made in the General Diary, The learned Judge-- directed the document to be handed over to the jury after which they retired again. They returned at 5.15 p. m. after further deliberations and brought a unanimous verdict of guilty against both the accused persons. Although it is stated in the minutes that 'Exhibit 2 was sent to the Jurors who asked for it', which might suggest that only a message had been received from the Jurors to the effect that they wanted the document, we are informed that what in fact had happened was that the jurors themselves had returned to the court-room to ask for the document.

10. In view of the above facts, it was contended by Mr. N. R. Das Gupta that a grave error of procedure had been committed by handing over Exhibit 2 to the jurors and by allowing them to take the document with them to the retiring room. It was said that even in the case of documentary evidence, the jury could merely ask the document to be read over to them a second time or as many times as they might wish, but they could not be permitted to have the document and read it for themselves or keep it with them at the time of their deliberations.

Mr. Das Gupta was unable to cite any authority in support of the proposition for which he contended and could only recall his personal experience that certain eminent Judges of this Court had, in the past, declined to let the jury have any documentary evidence for their personal study and consideration.

11. I am entirely unable to assent to the proposition contended for by Mr. Das Gupta. It will be utterly trite to repeat that at a Sessions trial it is the Jury who are the judges of fact. It is their duty under Section 299 (a), Criminal P. C., 'to decide which view of the facts is true' and under Clause (c) of the same section, 'to decide all questions which according to law are to be deemed questions of fact.' The oath which has been prescribed for them by this Court and which they take at Sessions trials is that, they will 'justly and truly try and determine the questions submitted to the jury in the case and will give a true verdict according to the evidence.'

If the jury is the tribunal and indeed the only tribunal of fact at a Sessions trial and if they are to decide, as they must, questions of fact upon the evidence in the case, it seems to me to be extraordinary to suggest that nevertheless, they must not be allowed to see and consider for themselves any document adduced in evidence.

Mr. Das Gupta referred to Section 297 of the Code and the provision contained therein that the Judge, in charging the jury, should sum up the evidence for the prosecution and the defence and contended that so far as the evidence in a case was concerned, the jury was to be limited to what they heard in the course of the trial and what was put to them by the Judge in the course of the summing up. A more direct contact with the evidence was, according to Mr. Das Gupta, forbidden. I can find no authority whatever for so strange a proposition.

When the law says that the jury are to decide questions of fact on the evidence, it plainly means that they must give their decision after considering the evidence and in order that the evidence may be considered, it is but common sense that the evidence should be made available to the jury. Again, when the law says that questions of fact should be decided on the evidence, I conceive it means that they should be decided on primary evidence, whenever such evidence is available. When one person reads out a document to another person, what the person who

listens gets is in my view, not primary evidence of the contents of the document, but only secondary evidence in the form of a copy, though it is not a copy in writing but a copy made in the form of a vocal rendering.

I cannot see how it can be said that the jury must be limited to secondary evidence of the documents adduced in a case and that they cannot be allowed to ask for the primary evidence itself. When the jury are sworn in to decide questions of fact on the evidence, they are sworn in for that purpose and not, I imagine, for giving exhibitions of the retentive power of their memory and of their ability to carry in their minds the contents of documents after having them read out once or oftener. I am clearly of opinion that the point taken by Mr. Das Gupta has no warrant either in law or in reason and that it must, accordingly, be rejected as of no substance.

12. I have already stated that Mr. Das Gupta recalled what he stated to us to be his personal experience of the practice followed by some Judges of this Court in the distant past. From what enquiries I have been able to make, I gather that it is a common practice with all Judges presiding over Sessions trials in this country to let the Jury have such pieces of documentary evidence as they may wish to see. The practice could not intelligibly be otherwise, because a contrary practice would mean demanding of the jury that they must decide the issues of fact and at the same time denying them the means of doing so.

As regards the practice in England, our attention was drawn by Mr. Basu, who appears for the State, to the celebrated trial of Sir Roger Casement and the very full account of it given in the volume in the Notable British Trials series. The trial of Sir Roger Casement was what is technically known as a 'trial at Bar', in which the Bench has to be constituted of at least three Judges. The Judges at the Casement trial were Lord Reading himself, the then Lord Chief Justice of England and two other Judges, well known for their experience in criminal law, namely, Avory J. and Horridge, J. At the end of the charge to the jury, which was delivered by the Lord Chief Justice, certain directions were given as regards the use of the documentary evidence by the jurors in the course of 'their deliberations.

It would be useful to reproduce the account in ' the actual words of the report. It appears that although the Lord Chief Justice was presiding, the first observation

was made by Avory, J.: 'Mr. Justice Avory -- Gentlemen, if you want any of the exhibits that have been referred to, you can have them by asking.

The Lord Chief Justice -- There is some request about a map. There is no map of Ireland that has been proved in the case except the one to which Colonel Gordon deposed.

Mr. Bodkin -- Except the one which is in pieces.

The Lord Chief Justice -- The jury would like to see the original code found and an authentic specimen of the initials and signature of the prisoner. None such has been proved. The original code, of course, they can have. That', we will send in to them. They also ask for an original copy of the circular posted at Limburg Camp, but I understand that was not proved.

Mr. Artemus Jones -- No.

The Attorney-General -- I think there is a specimen of the signature and handwriting of the prisoner, the letter written when he received his knighthood, exhibit 32.

The Lord Chief Justice .-- That is quite true. I think it is better not to put it in. I think really what they want is the initials. One sees why they may have been asking for it. . I think it better to treat it that there is no evidence of it and leave it there. The original code, exhibit 18, shall be sent in, and also the map.

At a later stage,

The Lord Chief Justice -- The jury have asked for a copy of the indictment, which we will send them, and they also ask for a copy of the evidence, but we do not propose to send that'.

13. Mr. Das Gupta contended that the case cited was exceptional in that what the jury was allowed to have in that case were documents which proved the connection of the accused with certain acts by the evidence of his signature or initials appearing upon them, in such cases, Mr. Das Gupta contended, the jury had to be allowed a view of the relevant documents, as it had to be done in cases

of forgery.

The fact, however, is that the accused in the Casement trial did not raise any dispute as regards any alleged signature of his, appearing on any document. It is clearly stated in the charge to the jury what the defence was and it is also stated that none of the facts alleged by the prosecution was disputed. Sir Roger Casement was prosecuted for the offence of adhering to the King's enemies in Germany and the only defence put forward by him was that while he admitted the acts ascribed to him, he did not admit that their effect was what was contended for by the prosecution, namely, reasonable (treasonable?) activity. The case was, therefore, not one where the documents were required only for the purpose of identifying or verifying the signature of the accused.

14. Assuming, however, that there is some reason to take of the 'Casement trial' the view which Mr. Das Gupta put forward, I am able to refer to two more trials where the correct practice appears without the slightest obscurity. I would refer first to the 'trial of Rattenbury and Stoner' from the account given in the relevant volume in the same series. That trial was presided over by Humphreys J., a Judge reputed for his erudition in and experience of criminal law. The report states that in bringing his charge to the jury to a close, he observed as follows: 'Mr. Foreman, would you like any of the things that have been produced in this case, what I call the Exhibits, I mean statements, so far as they are in writing, the mallet or anything else?'

It is perfectly clear that the learned Judge was inviting the jury to take with them, if they liked, the statements made in writing which had been exhibited in the case and therefore the documents which the jurors were allowed to see in that case were exactly of the nature of the documents to which Mr. Das Gupta objected in the present case.

I might conclude the citations on this point by referring to a third trial, that of Adelaide Bartlett, which was presided over by Wills J. At the end of the charge to the jury the learned Judge, observed as follows:

'Should there be any of these documents that you may wish to consult, you will tell me, and they shall be handed to you. They are at your disposal if you wish it.'

It is unnecessary to multiply instances. Not only, therefore, has the argument of Mr. Das Gupta no support of either the statute law or of reason, it cannot also claim the support of practice or precedent.

14a. A more plausible argument, however, was advanced by Mr. Das Gupta which also was based upon the jury's use of the General Diary Entry. The argument was put in the following way. When the jury returned to the court-room at 4.20 p. m., they had obviously not been able to come to a clear decision and they obviously required the aid of the General Diary in order to remove the uncertainty in their minds. It was thus clear that, in the view of the jury, the General Diary was a vital document, but the General Diary had been treated as the First Information Report in the case and the learned Judge had nowhere directed the jury in the course of his charge that it could not be used as substantive evidence. Nor had he given such directions by way of re-charging the jury when they wanted to have the General Diary for their particular examination.

In view of the events which had happened, it was reasonable to presume that it was the General Diary which had ultimately tilted the scales against the accused and in the absence of the direction which the law required, it was reasonable to presume that the jury must have, or at least might have, used the General Diary, not as merely corroborative evidence, but as substantive evidence in itself of the facts recorded therein. If such use had been made of the General Diary Entry, the verdict of the jury had been improperly influenced by it and could not accordingly be upheld.

15. In my view, there are three answers to this contention. In the first place, the General Diary Entry contains no statement of fact by Salim except that Safi gave a certain account to him of how he had come by his injuries. The only facts stated by the person upon whose information the entry, in the General Diary was made are that the deceased had told him that he had been stabbed by a Punjabi and that the deceased had been brought to the police station by the informant in a rickshaw. There is no account at all of the incidents given by Salim himself.

In those circumstances, it seems to me that there is nothing in the General Diary Entry which could be treated as substantive evidence of anything and therefore even assuming that it could be properly regarded as a First Information Report, to give the usual direction in respect of it would be little more than a routine observance of a bare formality.

In fact, although in one part of the charge Sen J. described the entry in the General Diary as the First Information Report, he really put it before the jury as a statement of the deceased person as to the cause of his death made to a private individual and even invited the jury to discard that statement altogether. Apart from Salim's evidence with regard to it, what it itself embodied was only hearsay and that of the second degree. In those circumstances, it appears to me that the usual direction that a First Information Report could not be treated as substantive evidence was hardly called for.

16. In the second place, assuming that a technical omission occurred, I am of opinion that it can by no means be said that the resultant mis-direction caused an erroneous verdict.

Besides Exhibit 2 which is the entry in the General Diary, there was another piece of evidence in the case, viz., Exhibit 7, which is the statement of the deceased Safi himself, made shortly before his death and recorded by a Sub-Inspector of Police. That statement is, if anything, even fuller than the entry in the General Diary and it is perfectly clear that if the statements contained in Exhibit 7 be good evidence, no prejudice could possibly have been caused by the use of Exhibit 2 as substantive evidence, inasmuch as Exhibit 2 adds nothing to what is contained in Exhibit 7.

If it had been a case where there were certain facts stated in Exhibit 2 which were not to be found elsewhere, a legitimate grievance might be made that the use of statements contained in Exhibit 2 as substantive evidence was fraught with the possibility that the verdict had been improperly influenced by such use. But in the special facts of the present case, it appears to me that the statements contained in Exhibit 2, such as they are merely duplicates of statements found in another document, which are good evidence and which the jury were entitled to take into account. For this reason also, I am of opinion that the omission of the learned

Judge to give the usual direction cannot be made a ground for assailing the verdict of the jury.

17. In the third place, it is not every non-direction or misdirection which entitles an Appellate Court to interfere with the jury's verdict. As is well-known, a misdirection is material only if it causes an erroneous verdict, but even an erroneous verdict cannot entitle an Appellate Court to interfere with the verdict of the jury unless the error has caused a failure of justice in fact. Having regard to the other evidence in the case which is of a direct and very firm character, I am entirely unable to hold, even assuming that Exhibit 2 had been used in a manner not wholly warranted by law and even assuming that such use had been caused by the absence of a proper direction, that it can by any means be said that an erroneous verdict was rendered in consequence and that a failure of justice in fact occurred. Both the branches of Mr. Das Gupta's argument upon his first point must, therefore, be rejected.

18. Another point urged by Mr. Das Gupta was that the learned Judge had omitted to point out to the jury that the evidence of the two eyewitnesses, Md. Omar and Abdul Gaffur, was contradicted by the alleged statements of the deceased himself, as contained in Exhibit 2 and Exhibit 7.

It was contended that the evidence in the case made it perfectly clear that the first appellant was well-known in the locality as Khan, but Md. Safi had described his assailant only as a Punjabi Muslim, and had not used the name 'Khan' or any other name. It could therefore be said that the eye-witnesses were naming a person whom the deceased himself had not named and this want of conformity between the statements of the deceased and of the witnesses should have been placed before the jury.

19. On going through the evidence, I am unable to find that there is any foundation for saying that the first appellant was well-known in the locality to each and all as Khan. There is certainly no evidence that Safi knew his name. Again, Salim says quite clearly that he did not know the name of the Punjabi accused, but only knew that he was a Punjabi. Omar undoubtedly said that people used to call the first appellant by the name of Khan, but he added that he did not see the first appellant

mixing with other members of the locality. It is, therefore, by no means clear what the extent of the circle was to which the first appellant was known as Khan and whether that circle included Safi.

It was only Gaffur who said that the first appellant used to be called by 'all the people there by the name of Khan, but it was not made clear whom he meant by 'all the people'. It has also to be remembered that, according to Gaffur, Khan was one of the occasional customers of the hotel where he worked and consequently his evidence, to my mind, is by no means any evidence of the general repute of the first appellant as a person bearing the name of Khan. Nor is it irrelevant to bear in mind that in the case of Muslims coming from the Frontier Provinces or beyond, the word 'Khan' is something like a generic name applicable to all members of the class, just as there are similar generic names applied in actual practice to members of other classes, for example, 'Sardarji' in the case of Sikhs. I am, therefore, of opinion that there is no real discrepancy between the statements of the deceased and the evidence of the eye-witnesses regarding the person who had committed the assault on Safi.

20. It was then contended that there was yet another matter in respect of which the learned Judge's charge was seriously defective and that was that he had failed to bring it to the notice of the jury that, according to the deceased himself, there was another person, called David, who was concerned in the brawl and that one of the prosecution witnesses, Md. Salim, had himself made a case in his examination-in-chief that David had even struck a blow. On the reference to David, contained in the statements by the deceased and in the evidence of Salim, Mr. Das Gupta founded two arguments.

21. It was said in the first place that since, according to the prosecution case itself, Md. Rezak was not the only assailant but David also had struck some blows, one could not be certain which of the two assailants had inflicted the fatal blow and that, in that state of things, the learned Judge should have explained to the jury not only Section 302, Penal Code, but also Section 326 and should have invited them to convict the first appellant of the minor offence, if they thought that the evidence left the commission of the major offence by him in doubt.

The basis of the argument was the statements in Ext. 2 that, according to what Md. Safi had told Salim, he had been 'stabbed by one Punjabi aided and abetted by Allauddin and David of Blackburn Lane,' as also a statement contained in Ext. 7 that, near the Chinese Club, David and Alauddin told that Punjabi ^ekj nko**-As regards the oral evidence in the case, the basis of Mr. Das Gupta's argument was the following passage in the evidence of Salim in answer to question 22;

Therefore a quarrel started between Safi and the persons who had arrived there. Then thereafter David stroke the man. Thereafter Safi moved a little away towards the east. Then Allauddin held the hands of Safi and said 'Maro Salako -- strike him'. Thereafter the Punjabi stroke him with a knife?'

22. 'Stroke', I presume, is the Interpreter's version of the past tense of the verb 'strike'.

23. It appears to me that it is not possible for the appellant to found on this evidence the first argument addressed on his behalf by his learned Counsel. It is true that if more than one person are concerned in the commission of several injuries on the person of a particular individual and it is only one of the injuries which causes death, it will be impossible to treat one of the two assailants as guilty of the offence of murder, unless there is evidence that the fatal injury was inflicted by him or unless Section 34, Penal Code, applies.

In the present case, however, taking the evidence at the highest and assuming that David was concerned in some manner in the affray which undoubtedly took place, it is noticeable that even Salim does not say that David used a Knife or any cutting instrument. The deceased bore as many as six injuries on his person, one of which, according to the medical evidence was the fatal injury. I am unable to see how the responsibility for any of the injuries, including the injury which proved fatal, can at all be laid on David, since there is no evidence that any cutting instrument was ever used by him. In my view, no question arose in this case for placing before the jury the possibility of the first appellant having committed not murder, but the minor offence under Section 326, Penal Code.

24. The other branch of Mr. Das Gupta's argument was that, in any event, the fact that the deceased himself had alleged the presence of David and aiding and abetting by him, but the two eyewitnesses denied his presence, was sufficient to show that the latter were not witnesses of truth and therefore the learned Judge should have drawn the attention of the jury to this feature of their evidence and invited them to consider who the it would be safe to accept their evidence as respects the infliction of the injuries by the first appellant.

Referring to the evidence of Md. Omar the learned Judge observed as follows:

'Mohammad Omar says' that he did not see David at that place and the other witness Abdul Gaffur also does not speak of the presence of David at that time. Of course David is mentioned in the dying declaration proved by Mohammad Salim. This statement about David's presence is not corroborated by the other witnesses but as regards the other part that this man was talking with Gaffur and these accused came along and Safi asked them to move along and they refused to do so and there was pushing about and stabbing, that you see from this dying declaration.'

It is true that the learned Judge was at that moment dealing with the dying declaration, but he did bring, out the discrepancies between the evidence of Abdul Gaffur and Md. Omar on one side and the dying declaration on the other, regarding the presence of David.

It must however be conceded that, strictly speaking, it was necessary for the learned Judge to go further in view of the fact that it was a part of the prosecution case itself that David had struck a blow on the deceased, whatever the nature of the blow might have been, and that if the prosecution eye-witnesses said that David was not there at all, they must, to that extent, have given untrue evidence.

25. Having said so much, I must at the same time say that so far as one of the eye-witnesses, Abdul Gaffur is concerned, he was asked no question about David at all and he made no statement one way or the other. His veracity, therefore, cannot be impeached on the ground that he denied the presence of David, whereas the deceased himself asserted it. So far as the other eye-witness, Md.

Omar, is concerned, he did say that David was not there, but I do not think it would be fair to take that statement as meaning anything more than that the witness did not see David at the place. In any event, having regard to the rest of the evidence of the two eye-witnesses and the manner in which it was given and the fact that there is no direct evidence in the case that David was really present at the place, I am unable to hold that the omission of the learned Judge to refer to the discrepancy between the Statement of Md. Safi and the evidence of Md. Omar amounts to a material misdirection or that it has in any way affected the verdict. Besides, as I have already pointed out, Abdul Gaffur's evidence is left entirely unaffected.

26. Two other small points were urged by Mr. Das Gupta. It was said that the learned Judge should not have told the jury, as he had done, that the fact that the accused had absconded might be considered by them along with the other facts of the case. I am unable to see how this direction was a misdirection.

It is true that absconding is equally consistent with innocence and guilt and therefore it seems to me that it is a proper matter to be considered along with the other facts of the case, whether they bear upon guilt or upon innocence. It is not a matter which is foreign to the question of guilt or irrelevant. It is relevant but whether it will tend to prove innocence or guilt or whether it can be fitted in with the culpability of the accused or his innocence is clearly a matter which the jury are entitled to and indeed ought to consider.

The other small point urged by Mr. Das Gupta related to the possibility of identification on account of insufficiency of light. There is no ground whatsoever for saying that at the relevant time there was no sufficient light for any one to recognise faces at a distance of 5 or 6 or 10 cubits. A very full statement about lights at the place, whether street lights or shop lights, was made by Md. Omar in answer to question 35 and by Abdul Gaffur in answer to questions 181 to 187.

It appears that although there was only one gas lamp which was at a distance, there was a strong light in the betel shop, lights in the hotel, lights in the Chinese Club and lights also in the rooms occupied by certain washermen. They were all electric lights and Abdul Gaffur's evidence was that the light of the lamps,

particularly of the hotel, reached up to that place. Nothing, therefore, was required to be said to the jury regarding the insufficiency of light, nor is 'there anything for us to consider, even if we were a tribunal of fact.

27. In my opinion, the arguments advanced by Mr. Das Gupta in support of the appeal of Md. Rezak must all fail.

28. There remains the appeal of Allauddin Khan 'alias' Allauddin Ferozuddin. As I have said, he, has not been represented before us, but Mr. Basu appearing for the State drew our attention to the relevant parts of the charge of the learned Judge, so far as he was concerned and the evidence bearing upon his alleged complicity in the crime, The only point which requires consideration about Allauddin is that, in his first statement before the Committing Magistrate, Md. Omar had said that Allauddin 'was trying to separate the two from the time Safi was pushing Khan'.

When this passage was put to him during his cross-examination, he denied having made any such statement before the Committing Magistrate. The learned Judge drew the attention of the jury prominently to this, statement of Md. Omar and indeed I may take this opportunity for saying that no one could be more critical of the prosecution evidence as a whole, than the learned Judge appears to have been.

The learned Judge even told the Jury, as he was bound to 'do, that if the statement of Md. Omar before the Committing Magistrate about Allauddin represented the truth, then that accused was entitled to an acquittal inasmuch as he had not committed any offence at all. The jury, however, took into consideration the remaining evidence in the case and chose to return a verdict of guilty. In view of the fact that there was no misdirection whatsoever and that there is abundant evidence in support of the charge which the jury was entitled to believe and which, in my opinion, was worthy of belief, it is impossible to say that the verdict against Allauddin was vitiated by any error or irregularity. No case for interference with the verdict as against Allauddin, therefore, exists.

29. There remains the question of the sentences. No argument was specially addressed to us on the question except to suggest casually that we might consider

it. We have considered it and it appears to us that there is one feature of the case which bears very pertinently on the question of sentence and requires attention. As I have already stated, the eye-witnesses of the occurrence are two in number and they are, Md. Omar and Abdul Gaffur.

In giving his account of what happened immediately before the murderous assault, Md. Omar stated that after the two appellants had refused to move away from the place where the deceased was having his private conversation with Gaffur Mia, the deceased 'placed his hand on the back of Khan and began to push him for some distance'. He proceeded to say that the deceased 'pushed Khan near the Chinese Club' which, according to the evidence in the case, is at a distance of several cubits. Gaffur, as I have already stated, was a waiter-cum-cook serving at the hotel kept by one Sabrati Mia and according to his evidence, he was standing at the door of the hotel and was able to witness the whole occurrence from the beginning. His evidence is that he 'saw that Khan, Md. Safi and Allauddin were quarrelling with each other' and, again, that they were 'proceeding towards the east and quarrel-ling all the time' and further that 'Safi and Khan were scuffling with each other and they were at a distance of half a cubit.'

The most realistic piece of evidence comes last and it is to the following effect: 'Khan was pushing Safi and Safi was pushing Khan (witness demonstrates).' It is thus clear that after the appellants had refused to quit the place where the deceased was having his talk with Gaffur Mia, it was the deceased who first laid his hands on the first appellant and not merely did he lay his hands upon him, but he also started pushing. It must have been pushing of a somewhat vigorous kind, because he was able to push Rezak away as far away as the Chinese Club. He was resisted because, as Gaffur stated, each was pushing the other. It was in the course of such an affray that the knife was suddenly whipped out and steel took the place of bare hands.

In those circumstances, it appears to me that although no sudden and grave provocation, such as would reduce the crime from murder to a lesser offence can be made out, yet there was such provocation as bears pertinently upon the question of sentence, even if the provocation might have been caused by the

conduct of the first appellant himself and therefore might not be a lawful excuse for the act done by him. But the pushing is a fact and a part of the prosecution case and it was pushing, for some considerable time, and it was pushing between men who are notoriously of an excitable nature, although I must hasten to say that there is no specific evidence to that effect in the present case.

In all the circumstances, we have come to the conclusion that this is not a case where the extreme penalty of the law is called for and that the alternative punishment will meet the ends of justice. I am by no means saying that an excitable person is entitled to go about in the streets and do people to death whenever his will is opposed, and then plead his excitability as an excuse. But here, physical assault was commenced by the deceased and it is quite clear that as the struggle grew in intensity, the fury of the first accused, fanned all the time by Allauddin, also rose till at last he became sufficiently inflamed to bring out his knife.

30. The sentence passed on Allauddin calls for no modification. Not only did he shout instigations to Rezak to strike the deceased down but he also grabbed the hands of the deceased and held them fast so that Rezak might strike without having to contend against any resistance.

31. In the result, for the reasons given above, the appeal of Khan 'alias' Md. Rezak (Criminal Appeal No. 2 of 1954) is allowed in part. His conviction under Section 302, Penal Code, is upheld, but the sentence is reduced from death to transportation for life,

32. The appeal of Allauddin Khan 'alias' Allauddin Ferozuddin (Criminal Appeal No. 3 of 1954) is dismissed both as regards his conviction and as regards his sentence.

P.B. Mukharji, J.

33. I think it necessary to add my own observations on the point of objection taken that the learned Judge was wrong in handing over to the Jury, the entry in the General Diary in this case treated as the 'First Information Report. To my mind that

objection is entirely unsound in law and is not founded on any practice.

34. In a jury trial the Jury along with the Judge form an integral and inseparable part of the constitution of the very court itself trying the offence. The jury under Section 166, Evidence Act, can, through or by the leave of the Judge, put questions to the witnesses and elicit evidence. The jury again under Section 293, Criminal P. C., shall, if the Judge considers necessary, have a view of the place of occurrence or any other place where any transaction material to the trial is alleged to have occurred. The Jury are also entitled to inspect the objects and articles exhibited at the trial as pointed out in Hailsham's Edition of Halsbury's Laws of England, Vol. 13, page 639. Then, again, the very basic function of the jury under Sub-sections (a) and (c) of Section 299, Criminal P. C., is to determine which view of the fact is correct and to decide all questions of facts.' The jury, therefore, are the judges of facts. To deny the jury the use of the document while they are considering their verdict will be to deprive them of one of the essential means to decide and determine facts.

The oath which the jury are required to take is 'to give a true verdict according to the evidence in the case'. To ask them to swear to do that and then to say that they will not be able to handle a document which is part of the evidence of facts in the case is to put a serious impediment on their proper function according to the oath which the court requires them to take. Under Section 297, Criminal P. C., the Judge's charge to the jury is expected to be a 'summing up' of the evidence. If after the summing up of the evidence the jury in order to better appreciate that charge want to look into a document forming part of the evidence, it seems to me unreasonable and improper to refuse them. It must be emphasised here that the jury are all the more entitled to have the document to decide a question of fact because while the Judge, if he thinks proper, can express his opinion on a question of fact, the Judge's opinion on facts does not bind the jury.

The ultimate legal obligation of the jury at the conclusion of the Judge's charge under Section 300, Criminal P. C., is 'to retire to consider their verdict'. If the jury feel that a proper consideration of the verdict requires looking up a document, then to deny the jury the use of that document at the very time when they are

considering their verdict is to cripple their proper consideration of the verdict. In many cases the documents themselves, as in the case of forgery, are the most material evidence which the Jury can very legitimately keep before them when they are considering their verdict.

The learned Counsel for the appellant contends, in order to avoid difficulties of such cases, that an exception may be made in favour of such documents and the jury may be allowed to have them at the time when they are considering their verdict. He argues that in this case the First Information Report is not such a document in relation to which an offence has been committed and it should not therefore have been handed over to the jury by the learned Judge. For the purpose of deciding the point whether the jury should have a document or not while considering their verdict, it is not desirable or permissible that there should be any discrimination as between one document and another or as between one document in relation to which an offence is charged and Other documents at the trial.

In my judgment the true principle of law is that where a document is duly proved at the trial and is a part of the evidence of a material fact at the trial, the jury should have such document before them; if they so desire, at the time when they are considering their verdict.

35. It has been contended on behalf of the appellant that the danger in handing over a document to the jury is that they may read more into the document than what is permissible. That, however, cannot be an objection to their having the document and can at best mean that the Judge when handing over the document may caution the jury, if he has not already done so, while charging the jury. This argument is one of suspicion.' The jury as themselves Judges of facts cannot be treated in this fashion as a kind of hostage for the ransom of not misreading a document.

36. In my experience at the criminal sessions trial in this Court both at the Bar and on the Bench, such a course of handing over documents when the jury wanted them has almost been uniformly followed without objection so far. Mr. Basu appearing for the State drew our attention to the trial of Sir Goger Casement for

high treason in the British Notable Trial Series where the English practice appears to be the same. There perhaps may be one exception as in the Casement trial and that is with regard to the transcript of the evidence of the witnesses who have deposed before the jury. That, however, is not a real exception to the rule. The jury are not entitled to the copies of the deposition for the simple reason that their duty is to hear the evidence when each witness is examined and cross-examined and the Judge also sums up the material and relevant part of such evidence.

37. It has also been contended that Instead of handing over the document to the jury the Judges should read out the document. That objection cannot also be sustained on the grounds I have just stated. In addition to such grounds, it is necessary to observe that a document may be a long and complicated one, that its exact phrasing, sequence and paragraphing may be very important. These considerations can never be met by the Judge simply reading out the document to the jury.

38. With these observations I concur with my Lord the Chief Justice in upholding the conviction of both the appellants and the sentence of the appellant Allauddin Khan 'alias' Allauddin Ferozuddin and in reducing the sentence of the appellant Khan 'alias' Md. Rezak to transportation for life.