

The State and anr. Vs. Maharajkumar Saday Chand Mahtab and ors.

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Court : Kolkata

Decided On : Mar-26-1965

Reported in : AIR1966Cal217,1966CriLJ530

Judge : K.C. Sen and ;A.K. Das, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 207A, 209, 423, 437 and 439

Appeal No. : Criminal Revn. Nos. 83 and 157 of 1965

Appellant : The State and anr.

Respondent : Maharajkumar Saday Chand Mahtab and ors.

Advocate for Pet/Ap. : J.P. Mitter, ;P.C. Ghose, ;B.K. Ghose and ;S. Sinha, Advs. in CrI. Rev. No. 83 of 65; ;N.C. Banerjee, ;C.R. Das, ;A.K. Dutta, ;P.C. Ghosh, ;B.K. Ghosh and ;S. Sinha, Advs. in CrI. Revn. No. 157 of 196

Judgement :

Sen, J.

1. These two revision cases have been taken up together as they arise out of the order of the learned Additional Sessions Judge of 24-Parganas, Shri T.K. Mutsuddi passed on 21st January 1965, in the criminal revision case No. 83 of 1966 Saday Chand Mahtab is the petitioner. He has come up before this Court for

quashing the order passed by the learned Additional Sessions Judge whereby he was committed to the Court of Session for standing his trial under section 302 of the Indian Penal Code for the alleged murder of Aroo Lama.

2. The facts on which the present applications have arisen may be stated briefly as follows : In January 1960, Maharajadhiraj Bahadur Uday Chand Mahtab of Burdwan made a gift of a portion of premises No. 10, Diamond Harbour Road with buildings thereon to his staff officer Nima Ongal Lapecha of Darjeeling. It was alleged on behalf of the prosecution that his son, the present petitioner did not take the gift in good grace. It transpired subsequently in November 1963 that the gifted house was heavily damaged and, as such, Nima Ongal Lapcha was asked by Maharajadhiraj Bahadur to send somebody to take charge of the house and to arrange for its repairs. Nima, in his turn, after he had received the information sent Aroo Lama, Thupden and Santhala and an advocate of Darjeeling Daulat Singh Rasaily to arrange for repairs and to take legal action, if required.

3. On 11th February 1964 Aroo Lama, Thupden Santala and Pattay Lama came to Calcutta and stayed in the servants' quarters at 10-B, Diamond Harbour Road. It is the prosecution allegation that on 14-2-1964 the accused Saday Chand Mahtab went to the servants' quarters and threatened the said persons and as a sequel thereof a G. D. entry at the Alipore Police Station was made. On that date at about 7 p.m. Dawa Wangal came to that quarters from Darjeeling and during night Santhala heard some sound of 3/4 gun shots within the palace compound and on the next morning Dawa Wangal and Aroo Lama were found lying dead in the compound. On the following morning the police were informed and a first information report was lodged with the result that Saday Chand Mahtab was arrested. During investigation he produced one Browning Pistol with 4 cartridges and one Sauer Pistol by opening an iron safe from the room of his house at 14/8 Burdwan Road. He was put under arrest and the other two accused persons Madheswar Pathak and Ram Ekbal Dubey were also arrested. In pursuance of a statement made by the accused Madheswar Pathak one broken S. B. B L. gun with 25 cartridges and one bamboo lathi were recovered from his room. The butt end of the gun and the lathi were found stained with blood. His wearing apparel also were found stained with blood. Saday Chand Mahtab had also an injury on

his right leg which appears to be caused by fire from a projectile.

4. The post-mortem report of Aroo Lama showed that he had two gun shot wounds and the post-mortem report of Dawa Ongal also showed that he received one gun shot injury and 23 other injuries. Furthermore, the gun seized from Madheswar Pathak and the pistol seized from the possession of Saday Chand Mahtab had traces of firing as per report of the Arms Inspector.

5. After completion of the investigation the police submitted charge-sheet against Saday Chand Mahtab, Madheswar Pathak and Ram Ekbal Dubey under Section 302/34 of the Indian Penal Code and under Section 25(1)(a) and 27 of the Arms Act. The learned Magistrate, First Class, Alipore, Shri H. R. Deb held an enquiry in the matter. At the enquiry stage, no witness was examined and on perusal of the papers submitted under Section 173 of the Code of Criminal Procedure, he framed a charge under Section 302 of the Indian Penal Code against Saday Chand Mahtab for allegedly murdering Dawa Ongal. A charge under Section 25(1)(a) and 27 of the Arms Act was also framed against him. He, however, did not frame any charge against Saday Chand Mahtab for the death of Aroo Lama. Similarly, he did not also frame any charge against the accused Madheswar Pathak either for the death of Dawa Ongal or for the death of Aroo Lama. A charge was framed against Madheswar Pathak under Section 26(1)(a) of the Arms Act and the learned Magistrate placed him on trial before him. The other accused Ram Ekbal Dubey was, however, discharged. Thus, it appears that only Saday Chand Mahtab was sent up by him to the Court of Session to stand his trial under Section 362 of the Indian Penal Code, for the alleged murder of Dawa Ongal. Against the order of the learned Magistrate the State filed a revisional application before the learned Sessions Judge under Section 437 of the Code of Criminal Procedure. The learned Addl. Judge to whom the case was transferred on a consideration of the materials placed before him, was of opinion that the learned Magistrate was wrong in not framing any charge against Saday Chand Mahtab for the alleged murder of Aroo Lama inasmuch as, there was prima facie evidence about the guilt of the accused with respect to his murder. The learned Magistrate found that the Browning pistol contained five live cartridges out of which four cartridges were found intact and the fired cartridge prima(sic)the bullet recovered from inside the body of the deceased

fitted in with the Browning Pistol. The 5th cartridge according to the learned Magistrate has been accounted for and, as such, on such prima facie evidence he was committed to the Court of Session for standing his trial under Section 302 of the Indian Penal Code, for causing intentional death of Dawa Ongal. The learned Magistrate, however, did not find that there was any prima facie evidence to connect Saday Chand Mahtab with the murder of Aroo Lama. The learned Judge has found that the learned Magistrate totally overlooked the fact that another pistol was found in the possession of the accused Saday Chand Mahtab and that the barrel of pistol also contained traces of firing. In these circumstances, the learned Magistrate, according to the learned Judge should have drawn a prima facie inference that the accused Saday Chand Mahtab had a hand in the matter of death of Aroo Lama as well. The learned Judge also commented that it was not the function of the Committing Magistrate to weigh the evidence before him as he has only to follow the procedure as laid down under Section 207-A of the Code of Criminal Procedure. On such materials as placed before him the learned Judge framed charge against this accused petitioner' under Section 302 of the Indian Penal Code for allegedly causing the murder of Aroo Lama.

6. In the first instance, I would like to place here and now the submissions as made by the learned Counsel Mr. J. P. Mitter on behalf of the petitioner Saday Chand Mahtab as to the propriety of the order passed by the learned Addl. Sessions Judge. His first contention is that the learned Magistrate did not overlook the fact that one Sauer Pistol was recovered from the possession of Saday Chand Mahatab and that only because some traces of firing were found in this pistol, it cannot be said to be a piece of prima facie evidence to connect the accused with the death of Aroo Lama. This is a case of no evidence and the learned Judge misdirected himself in making out a case against the accused on the basis of absolutely no evidence in record Furthermore, he has said that the learned Judge's appraisal of the circumstances has really vitiated the true test which ought to have been adopted in a case like this under Section 207 A of the Code of Criminal Procedure. His next contention is that the learned Judge was wrong in finding that the body of Aroo Lama was found at a place not far from a place where Dawa Ongal was lying dead, as the materials in record clearly disclose that the two bodies were lying at a distance of about 72 feet and that the learned Judge

was wrong in presuming that Dawa Ongal and Aroo Lama died at about the same time and in course of the same transaction. He has also overlooked the fact according to the learned counsel, that there might have been possibility of Aroo Lama being killed by gun shot injuries inflicted by Dawa Ongal as nitrate was found on his hand which showed that he had fired a pistol. His contention is that(sic)sticking to the hand of Dawa Ongal unless he had fired a pistol.

7. On a perusal of the order of the learned Magistrate it appears clear that he did not take into consideration the recovery of a sauer pistol containing traces of firing and the question, therefore, arises whether the learned additional Sessions Judge was justified in passing an order of commitment of the petitioner Saday Chand Mahtab for the murder of Aroo Lama as well. It may he said in this connection that the petitioner has not moved this Court against the order of his commitment to the Court of Session for standing his trial for the alleged murder of Dawa Ongal as there appears to be prima facie evidence as to the death of Dawa Ongal caused by firing of the Browning pistol.

8. Before dealing with the facts as to whether traces of firing from the saner pistol has anything to do with the murder of Aroo Lama, we should discuss the law regarding the powers of the Magistrate under Section 207-A of the Code of Criminal Procedure. In this particular case no witness was examined and both the courts below came to their conclusions regarding commitment and discharge on the papers which were produced by the police under Section 173 and copies whereof were given to the accused. The relevant provision of Sub-section (6) is that when the evidence referred to in Sub-section (4) has been taken and the Magistrate has considered all the documents referred to in Section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him.. .. It will be appropriate to mention in this connection that under Sub-section (4) the Magistrate shall proceed to take any evidence of such person, if any, as may be produced by the prosecution. This being the provision it appears that it is optional with the

prosecution to examine any witness before the committing Magistrate and if no such examination is held the Magistrate on perusal of papers may exercise his discretion as to whether the accused should be committed to Court of Session or not. Sub-section (7) provides that when upon such evidence being taken, such documents being considered..he shall frame a charge under his hand declaring with what offence the accused is charged. The language in Sub-section (6) regarding discharge of an accused is different from that used in Section 209(1) which provides that when the evidence referred to in Section 208 Subsections (1) and (2) has been taken..theMagistrate shall, if he finds that there are no sufficient grounds for committing the accused person for trialdischarge him. In Sub-section (6) of Section 207A the expression 'Sufficient grounds' has not been used This led to several decisions which need not be referred(sic)refer to the recent Supreme Court decision reported in AIR 1962, SC 1196, Bipat Gope v. State of Bihar. In this decision their Lordships of the Supreme Court referred to that Court's decision reported in AIR 1968 SC 97, Ram Gopal Ganpal Rai v. State of Bombay. The latter decision was made with reference to Section 209(1) of the Code of Criminal Procedure. At page 1197 of the former case, their Lordships observed as follows:

'Mr. Sarjoo Prasad for the appellants, contends on the basis of the ruling of this Court in AIR 1968 SC 97 that the course followed by the Magistrate in determining whether there was credible evidence or not was the right course, and points to certain passages in the judgment in the above case as supporting his proposition. The cited case interpreted Section 209 of the Code of Criminal Procedure which, after amendment of the Code by Act 26 of 1965, deals with proceedings instituted otherwise than on a police report and under which the Magistrate can discharge an accused if he finds that there are ' no sufficient grounds' for committing the accused person for trial. The words of the two sections are not the same, and it is possible to say that the force of the two sections is also not the same, and that Section 209 gives a power to enter upon the merits of a case in a manner which Section 207A does not warrant. Whether the change of the language is deliberate or due to the fact that different draftsmen drafted two sections, the test for discharging the accused must, in a large way, be the same under both the sections, and it is hardly necessary to decide the full ambit of Section 207A and

contrast it with that of Section 209. If there is any indication in the language, it is altogether on the side that the Magistrate must find a stronger, case for discharging an accused under Section 207A than under Section 209. But, whatever the meaning of the two expressions, neither of them invests the Magistrate with the jurisdiction to decide the case as if the Sessions Trial was before him. To this extent, Mr. Sarjoo Prasad fairly concedes, Section 207A(6) cannot be carried. Put in other words, this section can only mean that if there is a prima facie case triable by the Court of Session, the Magistrate must commit the accused to the Court of Session to stand his trial. What those cases would be, which would satisfy the test, may not generally be stated here, because, in our opinion, this case is far from the border line, where only difficulties are likely to be met.'

9. In this connection, we may also refer to a decision passed by our Court (J. P. Mitter and Bhattacharyya JJ.) reported in : AIR1959 Cal207 , Panchanan Ballay v. The State In this decision it has been found that Section 207-A does not enjoin that there should be evidence in the proper sense to found an order of commitment. The new procedure is designed to ensure expedition. Nevertheless, the requirement of a prima facie case for commitment is inherent in the section What the Magistrate(sic)der not only the evidence adduced before him, oral as well as documentary but also whether the materials as furnished by the documents are capable of being transformed into evidence. If either the evidence or the documents or both make out a prima facie case he must commit. If the evidence and the documents together do not make out a prima facie case, he must make an order of discharge.

10. This decision was followed by Amaresh Ray, J. in a case reported in 69 Cal W.N. 292, Rameswar Daga v. State of West Bengal. He went a step forward by observing that in case of circumstantial evidence, the circumstances in their totality shall be such as would not only be consistent with the guilt of the accused but also inconsistent with any reasonable hypothesis of his innocence. Short of that, circumstantial evidence would not establish guilt of the accused even prima facie. The evidence establishing each item of circumstance need only pass the prima facie test that, if believed, it would establish the fact indicated by it. But the total

bundle of the circumstances to pass a prima facie test need be of the character that would make circumstantial evidence a safe basis for the inference of the guilt of the accused.

11. It appears that no other decision need be cited with regard to the matter under decision before us. Considering the above three cases, it seems to me that the following are the matters which should be considered by the learned Magistrate in the matter of commitment or discharge under Section 207A:

(1) The test for discharging the accused must in a large way be the same under both the sections, i.e., Sections 209 and 207A of the Code of Criminal Procedure, in so far as prima facie test is concerned.

(2) As Section 207A Sub-section (6) empowers the Magistrate to discharge the accused 'if there is no ground' it obviously indicates that the Magistrate must find a stronger case for discharging an accused under Section 207A than under Section 209. Neither of these sections invests the Magistrate with the jurisdiction to decide the case. The test therefore is that the commitment order may be made if prima facie there is some ground as opposed to 'No ground' in which case the order of discharge shall follow.

(3) If the prima facie case be far from the border line leaning in favour of the accused it is better that the Magistrate should commit.

(4) If the papers as placed before the teamed Magistrate do not make out a prima facie case he must make an order of discharge.

(5) The materials as placed before the committing Magistrate must be such as are capable of being translated into evidence at the time of the trial.

12. In this particular case we are required to focus our attention to the facts whether Saday Chand Mahatab was prima facie responsible for the death of Aroo Lama. The statements under Section 161 of the Code of Criminal Procedure were laid before the Magistrate and the factum of recovery of the sauerpistol was also placed before him. The learned Additional Sessions Judge is of opinion that since the Arms Expert's report shows that the sauer pistol contains traces of firing this

should be treated as prima facie evidence as to the guilt of Saday Chand Mahatab regarding the death of Aroo Lama.

13-15. (His Lordship perused and discussed the evidence and materials before him and proceeded.)

16. Having considered these broad materials I am of opinion that the learned Judge was correct in coming to the conclusion that a prima facie case has been made out to connect the accused with the death of Aroo Lama and, as such, his order asking the Magistrate to commit him under Section 302 of the Indian Penal Code to the Court of Session for the alleged death of Aroo Lama should be sustained.

17. In criminal revision case No. 157 of 1965 the State Government is the petitioner. Both the court's below discharged the accused Madheswar Pathak as according to them there was no prima facie evidence of guilt under Section 302 read with Section 34 of the Indian Penal Code The learned Magistrate discussed the circumstances which were thought to be insufficient for passing an order of commitment. The circumstances against Madheswar Pathak according to the learned Magistrate were as follows:

(1) One broken S.B.B.L. gun was recovered from his room and it contained stains of blood.

(2) Blood was detected on the half-shirt and the pajama worn by him. He was of opinion that regarding the breaking of the gun the Maharajadhiraj under whom he worked as the head Jamadar did not report to him about it. He has made a comment to the effect that the statement of Maharaja Bahadur showed that his interest in this matter was not such as would lead any one to expect that Madheswar Pathak would report to him the breaking of the gun and there being no prima facie evidence as to when the gun was broken this fact could not connect him with the offence of murder either of Dawa Ongal of Aroo Lama The chemical examiner's report shows that the blood found on the gun and the lathi was insufficient for seriological test and as such, he was of opinion that this could not also be treated as the prima facie evidence of guilt The blood detected on his half

shirt has been found by the chemical examine to be of human blood As according to the learned Magistrate this blood might be the blood of the accused Madheswar Pathak it cannot be inferred that the accused had something to do in the murder of those persons The learned Judge in revision concurred with the finding of the learned Magistrate The prima facie evidence disclosed that a gun in broken condition and a lathi were found in possession of the accused on 15-2-64, that is, on the day following the night of murder. It also appears that some blood stains were found in the but of the gun and lathi and the wearing apparel of the accused Madheswar Pathak. The learned Judge has also noticed that multiple injuries were found in the body of Dawa Ongal and according to the Doctor these Injuries could be caused by blunt and hard substance. Further it appears that this gun was found in order on 14-2-64 at about noon. According to the learned Judge, who was dealing with the revision case under section 437 Cr. P. C., also found that these circumstances alone could not lead to an inference that Matheswar Pathak had my hand in the murder of Dawa Ongal or of Aroo Lama.

18. It appears that the accused was sent to a Doctor and he admitted before him that he came to the spot at the time of the occurrence. As this statement was made while in the police custody he agrees with the learned Magistrate that the admission on the part of the accused cannot be taken into consideration He relies on the judgment of Amaresh Roy, J. referred to before reported in : AIR1965 Cal38 , and has found that the Magistrate under the new procedure must consider not only the evidence adduced before him oral as well as documentary but also whether the materials as furnished are cogent circumstances for roping in the accused Madheswar. The matter as dealt with by the courts below smack of weighing the evidence before commitment or discharge.

19. In this revisional application Mr. Nalin Banerjee appearing for the State has submitted that the order of discharging the accused Matheswar Pathak is erroneous and illegal as the courts below went beyond the scope of enquiry, failed to consider the relevant materials which were collected by the police during investigation and which are capable of being transformed into evidence. He submits that the following facts were not considered by the learned courts below :

(a) The broken gun was discovered pursuant to the statement of Matheswar and this bore traces of recent firing.

(b) Although Matheswar Pathak was responsible to Shri T.P. Chatterjee, an officer of the Maharajadhiraj Bahadur for the maintenance of stock of arms and ammunition made over by Shri T.P. Chatterjee, there was no report as to how and when the gun was broken and one of the live cartridges from out of the twenty-five recently purchased cartridges from Manton Company was found missing.

(c) The gun which was found intact even on the 14th of February 1963 was found broken on the 15th of February 1963 when Matheswar Pathak's quarter was searched pursuant to a statement made by him to the police presumably under Section 27 of the Indian Evidence Act.

(d) At about 12.30 p.m. on 15-2-64 Matheswar called Shri T.P. Chatterjee and asked him to come as he (T.P. Chatterjee) was wanted by Saday Chand Mahatab.

(e) Statement made by Matheswar Pathak before the Doctor of Medical College Hospital and various other facts and circumstances lead to a reasonable inference about the complicity of Matheswar Pathak in the murder of Dawa Ongal and/or Aroo Lama and possession of arms for unlawful purpose.

20. Before dealing with the submission made by Mr. A.K. Dutt appearing for the opposite party Matheswar Pathak we shall proceed to examine as to what are the incriminating circumstances which were placed before the courts below in connection with the complicity of Matheswar Pathak. The occurrence is alleged to have been taken place as stated before after mid-night of 15-2-64. From the seizure list it will appear that on 15-2-64 between 4-5 p.m. to 4-30 p.m. the room of Matheswar Pathak, the head Jamadar of the Maharajadhiraj Bahadur situated within the servant's quarters at 2 Judge's Court Road was searched. During search one S.B.B.L. gun with a broken leather belt was seized. The butt of this gun was completely broken and the barrel was found dented. This gun bore the No. 7615. The wearing apparel, however, was seized at a later stage. The Maharajadhiraj Bahadur in his statement before the police said that one T.P. Chatterjee would be able to say whether the gun and cartridges seized from the

custody of Matheswar Pathak belonged to him or not, Matheswar was answerable to T.P. Chatterjee for the gun and cartridges. Matheswar Pathak did not report to him that the gun in his custody was broken, nor did T.P. Chatterjee report to him of that matter. This statement of his was recorded on 23-6-64 i.e., after the recovery of the gun from the room of Matheswar Pathak. Shri T.P. Chatterjee, who is said to be an Officer of the Maharaja of Burdwan was examined by the police on 17-2-64. He stated before the Police that on 15-2-64 at about 12.30 A.M. Matheswar Pathak woke him up and told him that he was called by the Maharajkumar (Saday Chand Mahatab). When he arrived there the latter asked him to report to the police about some golmal in the palace compound. His next statement is that the staff of the Maharaja in Calcutta were in his administrative control. The seized S.B.B.L. gun was brought by him personally from Burdwan long ago and was given over to Matheswar On 14-2-64 at about noon he found the gun in order but Matheswar did not report to him on 15-2-64 that the gun was broken. At this place it need be found neither whether the statement of T.P. Chatterjee before the police should be looked into as it is the admitted position that copy of this statement was not given to the accused when the enquiry was being conducted before the learned Magistrate but was for the first time filed before the learned additional Sessions Judge. The learned Judge recorded the order to the effect, on 14-1-65, that at the time of hearing the opposite party i.e. the accused filed a petition stating that the statement of Shri T.P. Chatterjee should not be taken into account at this stage. On this date the learned Judge asked the Public Prosecutor to supply the learned Counsel with a copy of; the evidence of Shri T.P. Chatterjee. It is not denied that the copy of the statement of Shri. T.P. Chatterjee was made over to the accused when the revision case was pending before the learned Judge. This was not, however, taken into consideration by the Committing Magistrate obviously because at that stage no copy thereof was supplied to the accused. Now, the question is whether this statement of T.P. Chatterjee ought to have been taken into consideration by the learned Additional Sessions Judge while hearing the application under Section 487 of the Code of Criminal Procedure Section 437 provides that the Sessions Judge if he thinks that the accused persons have been improperly discharged by the inferior Court may instead of directing a fresh enquiry, order him to be committed for trial upon the matter of which he has been,

in the opinion of the Sessions Judge, improperly discharged. This order can only be made when the accused had an opportunity of showing cause to such Judge why the commitment should not be made. This provision shows that the Sessions Judge can also pass an order of commitment like that of a Committing Magistrate on the materials placed before him. Since a copy of this statement of Shri T.P Chatterjee was given to the accused person in his court, it appears to us that if he had taken into consideration his statement no prejudice was likely to have been caused to Matheswar Pathak. As he has not done this the question arises whether this court can consider this statement. This Court can quash an order to commit under Section 437 both on points of fact and law and it has also powers under Section 439 read with Section 423 Cr. P. C directing an order of commitment. Accordingly, as it does not appear to us that any prejudice is likely to be caused to the accused Matheswar we can look into the statement of T.P. Chatterjee for the purpose of showing whether such a statement together with other facts can establish a prima facie case against Matheswar Pathak. Even assuming that the objection as raised by Mr. Dutt in this connection is sustainable there is prima facie evidence to show that Matheswar Pathak had to deal with this S.B.B.L. Gun and this will be borne out from the statement of Maharajadhiraj Bahadur who has said that Matheswar did not report to him that the gun in his custody was broken nor did T.P. Chatterjee say anything about it. Further he stated that the gun seized from Matheswar was not included in his licence due to the negligence of the staff and he could not say at this stage who was responsible

21. The next item to which our attention is drawn is the post mortem report regarding Dawa Ongal and Aroo Lama It will appear from the report regarding Dawa Ongal that apart from the gun-shot wound there were a large number of injuries on the body of Dawa Ongal. The injury No. 2 shows that there was one lacerated wound 3/4' X 1/4' into skull deep over left side of top of head The underlying left frontal bone shows a depressed comminuted fracture 2' X 1' The third injury is one lacerated wound 1/4' x 1/3' x skull deep over left occipital parietal junction. The underlying left parietal bone shows a depression comminuted fracture 1' X 1/2'. For the purpose of this case we need not refer to other injuries. The report further states that there are no signs of dragging and the presence of abrasions and bruises indicate that there was a struggle. Death in the opinion of

the Doctor was due to the effect of the injuries described in his report. Wound No. 1 was caused by the discharge of a bullet from a small firearm. The post-mortem report regarding Aroo Lama shows that there were no signs of dragging but the wounds Nos. 4, 5 and 6 are indicative of struggle. In this report also it appears that there was one punctured lacerated wound This wound passes through the soft tissues overlying the scapula--the scapula shows a comminuted fracture over an area of 3' x 2 1/2' over his upper outer part. Over and above that two gun shot wounds were found on the body of Aroo Lama. Death in the opinion of the Doctor was due to shock and haemorrhage as a result of the injuries described by him. On a perusal of these two reports, forming part of the police papers, it appears prima facie that barring the gun-shot wounds the deceased bore marks of various other injuries including fracture of the bones of some portions of the body and they might have been caused by hard and blunt substance.

22. I have indicated the circumstantial evidence to consider whether they prima facie make out a case for implicating Malheswar Pathak.

23. Mr. Ajit Kumar Dutt appearing for Matheswar Pathak has submitted before us that the circumstances stated above cannot prima facie make out a case against Matheswar Pathak. He has first of all invited our attention that a charge under Section 302 read with 34 of the Indian Penal Code cannot be sustainable because there is no prima facie evidence that the murder was committed under the same transaction According to him, there is no prima facie evidence of common intention which must constitute pre-concert presence and participation According to him there is prima facie evidence to show that several persons were involved in the alleged dispute and, as such, the injuries on the person of the dead man cannot warrant a prima facie inference that they were caused by Matheswar Pathak This apart, his contention is that there being no prima facie evidence that both he and Maharajkumar had a prima facie common intention to kill Dawn Ongal and Aroo Lama the charge should not in any circumstances be framed against Matheswar Pathak under Section 302 read with Section 34 of the Indian Penal Code First of all it may be said that in terms of Section 207A Sub-section (7) the learned Magistrate if he is of opinion that the accused should be committed for trial he shall frame a charge under his hand declaring with what offence the accused is

charged. In this section the expression 'the Magistrate is of opinion that the accused should be committed' has been deliberately used by the Legislature as in the parallel proceeding under Section 210 Sub-section (1) the words are 'the Magistrate is satisfied that there are sufficient grounds for committing.' Furthermore, as already pointed out before that the accused under Sub-section (6) shall be discharged if the documents and evidence placed before the Magistrate disclose no ground for commitment. If we read the two expressions used in Section 209 (1) and Section 207A(7) it appears clear that if there is some evidence as opposed to no evidence to connect the accused, the Magistrate should ordinarily commit. Accordingly, it need be considered whether there is any justifiable prima facie evidence for committing Madheswar Pathak to the court of Session. Firstly, a broken gun was found in the possession of Madheswar Pathak. Secondly, on the body of both Dawa Ongal and Aroo Lama apart from the gunshot injuries various other injuries were found which might have been caused by strokes given by hard and blunt substance Thirdly, it appears that the gun was in order on 14-2-64 but no report as to the breakage of the gun was made to the Maharajadhiraj Bahadur or to person responsible for the distribution of arms and ammunition to the guards in the palace. I have already said that the statement of T.P. Chatterjee can be looked into in view of the fact that no prejudice was caused to the accused for the reasons stated by me before.

24. The next important matter which we should deal with is whether the Doctor's injury report regarding Madheswar Pathak can be looked into. Mr. Banerjee has argued that Madheswar Pathak was present at the time when the alleged murders of the said two persons were committed and for this purpose he has referred us to the injury report. This injury report was prepared on 15-2-64 at 8-40 p.m. by J. Choudhury, a doctor attached to the emergency outdoor dispensary of the Medical College. Under head 'cause of injury' it is noted as follows.

'The patient says that since evening 14-2-64 two Nepali persons came in the compound of the place of occurrence after being intoxicated with alcohol and were threatening him to kill showing a dagger to him and at about midnight they began to shoot bullets from pistol making a bad situation On hearing the quarrelling sound he came on the spot Being intoxicated they (the two Nepali persons

mentioned above) died from their own bullets.'

From this document it has been tried to be shown by Mr. Banerjee that Madheswar's presence at the time of the occurrence is prima facie made out. This document at the time of the trial can never be treated as a piece of evidence. If the doctor is examined before the Trial Judge he can at best refresh his memory with reference to the document as to what had happened. Now the question whether at this stage this can be looked into by the Committing Court or by the revisional court as forming part of the police papers. We have said that in this case none of the witnesses has been examined and the Magistrate after consideration of all the documents referred to in Section 173 may pass an order that the accused should be committed for trial or not. A copy of this document was obviously given to the accused persons and it can be said that this being a part of the police papers might be looked into by the learned Magistrate to form his opinion in the matter regarding the presence of the accused Madheswar at the time of the alleged occurrence. Both the Courts below found that the statement before the doctor cannot be looked into as it was made when Madheswar was in Police custody. The learned Magistrate in support of his finding has referred to the Privy Council decision in the case of Pakalanarayana Swami, (AIR 1939 P.C 47), I think the decision of the Privy Council in this matter has not been properly appreciated by the learned Magistrate. Section 26 of the Indian Evidence Act provides that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Here in this section the expression 'confession' has been used. 'Confession' as used in this section as also in the other relevant sections of the Indian Evidence Act provides that no confession not an admission simpliciter. From this injury report it prima facie appears that the statement as made by him to the Doctor was self exculpatory and is in the nature of an admission as to his presence at the place of occurrence. If we refer to this Privy Council decision as reported in 43 Cal WN 473: (AIR 1939 PC 47), we find that their Lordships have held at p. 481 (of Cal WN) : (at p. 52 of AIR) that Section 26 covers a confession made to a police officer before any investigation has 'begun or otherwise not in the course of any investigation. Section 27 seems to be intended to be a proviso to Section 26 which includes any statement made by a person whilst in custody of

the police and appears to apply to such statements to whomsoever made e.g., to a fellow prisoner, a doctor or a visitor. Such statements are not covered by Section 162. Further, their Lordships held that no statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms of the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession,....' From this decision it appears that a statement in order to be confession must relate to the commission of the offence or at any rate substantially to all the facts which constitute the offence. Accordingly, if the material as found in the injury report is transformed into evidence at the time of the trial when the doctor is examined, will not be treated as a confession as it contains a self exculpatory statement. At best if translated into evidence it may amount to an admission to the doctor by the accused while in police custody and it may be proved against him after it has been orally proved by the doctor if examined. If the doctor is not examined at the time of trial, this document left to itself will not have any evidentiary value.

25. This being the position, I may again repeat that this injury report having formed part of the police report ought to have been considered by the courts below for consideration whether there is a prima facie case regarding the presence of the accused Madheswar Pathak at the time of the incident.

26. Now, considering all the facts and circumstances and the arguments of the learned Counsel it appears to me that there are prima facie materials as to the presence of the accused Madheswar Pathak at the time of the alleged occurrence. His participation is prima facie apparent as stated before in so far as the medical report regarding injuries on the persons of the deceased and the breakage of the gun are concerned. Now, about pre-concert prima facie there appears to be no evidence in the record. This element, in my opinion, has to be gathered from the evidence if the accused is put on trial but for the purpose of commitment it seems to me that the matters dealt with before would prima facie show that there was some evidence as opposed to no evidence about the complicity of Madheswar Pathak. Accordingly, he should also stand his trial for allegedly committing an

offence under Section 302 read with Section 34 of the Indian Penal Code for the death of both Dawa Ongal and Aroo Lama.

27. Regard being had to the facts and circumstances, I am of opinion that Saday Ohand Mahatab should be committed to the Court of Sessions for standing his trial under Section 302 of the Indian Penal Code for allegedly causing the death of Aroo Lama as well and that the accused Madheswar Pathak should also be committed to the Court of Sessions for standing his trial under Section 302 read with Section 34 of the Indian Penal Code in terms set forth above. The Rule in revision case No. 83 of 1965 is hereby discharged and that the Rule in revision case No. 157 of 1965 is hereby made absolute. We direct that the learned Committing Magistrate should commit the said accused persons to the court of session to stand their trial in terms given above.

28. We should, however, record that our observations regarding prima facie evidence should in no way be interpreted as deciding the merits or demerits, probabilities or improbabilities of the prosecution or defence case or the credibility or incredibility of any witness who may be examined before the court of sessions or the reliability or unreliability of the evidence oral or documentary referred to before.

29. Let Madheswar Palhak be re-arrested and released on bail to the satisfaction of the Committing Magistrate as soon as the order of commitment is passed by him.

Das, J.

30. In view of the various points of law raised, I would like to add a few words. The learned Magistrate found that a few hours after the death of the two persons, the browning pistol was found in the possession of Saday Ohand Mahatab with one bullet only fired. The Arms Expert found that the bullet extracted from the body of Dawa Ongal who had one gun-shot injury, was fired from the browning pistol produced from Saday Chand before the police. He, therefore, drew an inference of guilt against Saday Chand in respect of murder of Dawa Ongal and framed charge under Section 302 Indian Penal Code against Maharajkumar and committed him

for trial before the Sessions Judge Aroo Lama had however at least two gun shot injuries and Maharaja Bahadur stated in his evidence that he had given a browning pistol with 5 live cartridges to his son Saday Chand. Police found 4 cartridges in the pistol while the fifth bullet was accounted for in the body of Dawa Ongal and as such, the learned Magistrate came to the conclusion that no inference could be drawn that the two gun-shot wounds on the body of Aroo Lama were caused by the Maharajkumar from the browning pistol. He, therefore, discharged Saday Chand in respect of the charge under Section 302 Indian Penal Code for causing the death of Aroo Lama. The learned Sessions Judge however pointed out that in arriving at this conclusion, the learned Magistrate had totally forgotten the fact that Saday Chand produced another pistol from the same iron safe and that pistol was not only empty but contained traces of firing. The learned Sessions Judge therefore was of opinion that the learned Magistrate should have drawn an inference that the accused Saday Chand had a hand in the matter of death of Aroo Lama also and he therefore committed Saday for trial under Section 302 Indian Penal Code for death of Aroo Lama.

31. The prosecution case is that three/ four gun-shots were heard that night and the two dead bodies were found on the following morning lying on the western bank of the tank attached to 'Bejoy Manzil'. This is the evidence of Santala and Maharaj kumari also stated that she heard more than one gun-shot fired that night though it was at intervals. Maharajkumari's further evidence is that at that time they were going out of the house of Saday Chand and that while they were on the northern bank of the tank they heard the gunshot, At this time, Saday Chand went inside his house and then again came down within a couple of minutes and proceeded towards the west and reached the north-western corner where a shot was fired at him and he had a scuffle with the men. After police came Saday Chand produced the two pistols, one of which is unlicensed, from an iron safe on the first floor. The Sauer pistol was entirely empty and the learned Magistrate's conclusion that since only one shot was fired from the browning pistol, the death of Aroo could not be caused by the Maharajkumar, has therefore been rightly rejected by the learned Sessions Judge. Indeed, from what we have discussed above it is very legitimate to draw an inference of guilt of the Maharajkumar Saday Chand in respect of both the deaths as there were at least two, if not three gun-

shot injuries on the body of Aroo Lama and the Sauer pistol, which showed traces of firing, was empty. There are various other circumstances which may be considered in this connection. No information about the death or the gun-shot injury on the leg of Saday Chand Or the gun-shots in the palace compound was sent by either Saday Chand or by Tara Prosad Chatterjee, an officer of Maharaja who was called by Saday Chand at his house after the incident. Tara Prosad made a telephone call at the thana but the message was in respect of some golmal on the road only. Both the courts below found that the dead bodies were lying near about on the western bank of the tank and the prosecution case based on the evidence of Santhala is that three or four gun-shots were fired at about midnight within the palace compound. Maharajkumari also said that after the gate-crash of Nima's house, the men rushed at Saday shouting 'Marchu' and Saday had a scuffle with them. From all these a legitimate inference that the two deaths took place at the same time and place during the same incident can be drawn and there is therefore no reason why Maharajkumar should not be tried for the death of Aroo Lama also and the learned Sessions Judge's order cannot therefore be interfered with.

32. So far as Madheswar Pathak is concerned the learned Sessions Judge stated as follows :

'Of course if it is found that this accused was found on the spot at the time of occurrence, then from the circumstances stated above one is entitled to draw an inference that this accused had a hand in the matter of murder but no witness says that this accused was found on the spot or near about the spot at or about the time of occurrence.'

This view apparently is based on the Privy Council case of Pakalanarayana Swami reported in 40 Cri LJ 364: (AIR 1939 PC 47) and later decision of this Court reported in : AIR1959 Cal207 It is true that the committing court was entitled to see whether any statement can be transformed into evidence but then all statements while in police custody are not in capable of being transformed into evidence The Privy Council decision refers to a case of a confessional statement while in police custody but in the present case, as we shall presently see, the statement is not

confessional but self-exculpatory and there is, therefore, no reason why it should be incapable of being transformed into evidence. The statement of Madheswar before the doctor to whom he was sent for examination of injuries runs as follows:

'The patient says that since evening 14-2-64 two Nepali persons came in the compound of the place of occurrence after being intoxicated with alcohol and were threatening him to kill showing a dagger to him and at about mid-night they began to shoot bullets from pistols making a bad situation. On hearing the quarrelling sound he came to the spot. Being intoxicated they (the 2 Nepali persons mentioned above) died from their own bullets'.

As I have already pointed out the decision referred to by the courts below relate to confessional statement while in police custody which could not be transformed into evidence during the trial. But it is well settled that exculpatory statement may be taken as admission and transformed into evidence during the trial. The statement of Pathak before the doctor is entirely exculpatory and the decision referred to will not affect such statements. That being the position, there is an admission of this accused that he went to the spot at the time of the occurrence and even on the learned Sessions Judge's own finding he should be committed to sessions for trial under Section 302/84 Indian Penal Code in respect of death of both Aroo Lama and Dawa Ongal.

33. Indeed apart from this statement of the doctor police seized a broken shot gun and a lathi from his room. There were multiple injuries on the person of Dawa Ongal which might be caused by hard and blunt substance. Maharaja also stated that the gun with 26 cartridges was given to Madheswar Pathak who was responsible to T.P. Chatterjee for this gun and that neither Madheswar Pathak nor T.P. Chatterjee reported to him that the gun was broken. T.P. Chatterjee, who is the palace Officer, stated that he found the gun in order on 14-2-64 at about noon and Madheswar did not report to him on 16-2-64 that the gun was broken. The learned Magistrate commented in the absence of the Maharaja's interest in these matters but the enquiring court should leave the weighing of evidence with trial court. Blood was found at the butt-end of the gun and lathi and also on the pyjama of Madheswar Pathak, though too small for serological test. No inference can be

drawn from this that the blood was either human blood or otherwise and the question should be left for trial court instead of rejecting it altogether Blood found on the shirt was found to be human blood by the chemical examiner; but the learned Magistrate anticipated a defence explanation that the blood was of the accused and refused to draw an inference of guilt in the absence of report that the blood was that of either of the deceased. It is not open to the committing court to appreciate evidence or dilate on possible defence but it should be left with the sessions Court.

There is also evidence that earlier in the evening Maharaj Kumar went to the servant's quarters and was visibly annoyed at the presence of so many persons at the quarters and threatened to deal with them. If two persons died of gun-shot injury for which Maharaj Kumar is being committed and if Madheswar Pathak was on the spot at the time of the occurrence and his wearing apparels had marks of blood, and if the broken gun and lathi containing blood stains were recovered from his room, the question of common intention is not far to seek. Indeed from the facts and circumstances and threats about which information was sent to the thana earlier and the subsequent events clearly show a common intention for the purposes of finishing up the visitors in the servants' quarters and an inference of guilt under Section 34 Indian Penal Code is not far to seek. The learned Sessions Judge rightly pointed out that the committing Magistrate could not weigh the evidence but unfortunately in deciding whether the blood was human blood or otherwise he was caught in the same trap.

34. This is a case based upon circumstantial evidence and Mr. Ajit Kumar Dutta, learned Advocate for Madheswar Pathak has drawn our attention to a decision of this Court reported in : AIR1965 Cal38 where the learned Judge stated as follows :

'To be a basis as evidence the circumstances in the totality shall be such as would not only be consistent with the guilt of the accused but also inconsistent with any reasonable hypothesis of his innocence. Short of that, circumstantial evidence would not establish guilt of the accused even prima facie., But the total bundle of the circumstances to pass a prima facie test need be of the character that would make circumstantial evidence a safe basis for the inference of the guilt

of the accused.'

Later on, the learned Judge further observed as follows:

'The learned Magistrate has himself found that the materials are such that an inference of innocence of Rameswar Daga cannot be ruled out but he has made the order of commitment in respect of that accused only because of his view that when two inferences can be drawn, one leading to the inference of guilt, another to the inference of innocence, it will be for the jury to decide which inference should be accepted. In my view, the learned Magistrate is clearly wrong there because in a case like the present one depending entirely on circumstantial evidence, neither a Court nor the jury can find guilt of the accused when from the evidence an inference of innocence can be made'.

Before we proceed to consider the implications of this decision we may refer to some of the many cases cited on the question of prima facie case before the Magistrate. We do not think, it is necessary to deal with all those cases starting from Justice Mahmud's decision in Lachman v. Juala reported in (1882) ILR 5 All 161, The question was considered by the Supreme Court in : 1958 CriLJ244 . The Supreme Court reviewed the earlier decisions on the point and laid down that a Magistrate holding a preliminary enquiry has to be satisfied that a prima facie case is made against the accused by the evidence of the witnesses entitled to a reasonable degree of credit and unless he is sp satisfied he is not to commit. The Supreme Court in applying the principles so laid down in Ram Gopal's case : 1958 CriLJ244 stated as follows:

'There is a large volume of oral evidence besides a large volume of documentary evidence which may lend themselves to the inference that the accused are guilty or to the contrary conclusionIt will be for the jury to decide which of the two conflicting versions will find acceptance at their hands'.

This decision of the Supreme Court goes in our view, contrary to the view expressed in the decision reported in : AIR1965 Cal38 that the learned Magistrate was wrong in respect of order of commitment because two inferences could be drawn, one lead ing to the inference of guilt and another to the inference of

innocence The fact that it was a case of circumstantial evidence, in our view, makes little difference and it is not for the Magistrate to decide whether The circumstances in the totality are consistent with any reason able hypothesis of his innocence. No such con elusion can be drawn without appreciating evidence, which is not the function of the enquiring Magistrate. All that is required of him is to consider whether the evidence before him discloses a prima facie case and not whether the circumstantial evidence in their totality leads to the only conclusion of guilt.

35. We may also in this connection point out that the enquiry in the present case was under Section 207-A and not under Section 209(1) and one must note the difference in the language of the two sections. In respect of enquiries under Section 207-A, Sub-section (6) provides that

'the Magistrate shall if he is of opinion that such evidence and documents disclose no ground for committing an accused person for trial.. may discharge him'.

In section 209(1) however, the language used is that

'if the Magistrate finds that there are no sufficient grounds for committing the accused persons for trial.. discharge him'.

This difference apparently is made on the ground that an enquiry under Section 207A is held in proceedings instituted on police report, whereas in the other case the proceeding is instituted otherwise than on the police report and that is why in the one case, the Magistrate shall discharge where the evidence discloses no ground for committing the accused, and in the other, the question of discharge arises when there are not sufficient grounds for committing the accused. At one stage of his argument, Mr J. P. Mitter, learned Counsel for petitioner Sadya Chand proceeded on the basis that this was a case of no evidence and as such there should be no commitment in respect of the murder of Aroo Lama. That seems to be a correct position in law but as we have pointed out this is not only not a case of no evidence but there is sufficient evidence for drawing an inference about the guilt of Saday Chand in respect of murder of Aroo Lama and that of Madheswar Pathak for an offence under Section 34/302 Indian Penal Code in respect of both

the murders. The settled law now is that a committing Magistrate is not entitled to try the case on his own and forestall the decision of the court of sessions if there is a prima facie case and there is evidence in the present case to make out a prima facie case.

36. We have already referred to the statement of T. P. Chatterjee before the I.O. An objection was raised that T. P. Chatterjee's statement was not before the Magistrate not was a copy given to the accused persons during the enquiry by the Magistrate and as such, the learned Additional Sessions Judge or this Court cannot refer to it. There is no doubt that the statement is part of the police diary and under Sub-section (2) of Section 172 of the Criminal Procedure Code, any criminal court may send for the police diary of a case under enquiry or trial by such court, and may use such diary in the enquiry or trial. Section 436 Criminal Procedure Code empowers the Sessions Judge to direct further inquiry on examining any record under Section 435 or otherwise. Section 437 again says that 'when on examining the record of any case under Section 435 or otherwise, the Sessions Judge. considers that such case is triable exclusively by the Court of sessions and that an accused person has been improperly 'discharged by the inferior court, the Sessions Judge.. .. may thereupon, instead of directing a fresh enquiry, order him to be committed for trial.. ,. . . . '.

Mr. Dutta appearing for Madheswar Pathak argued that the police diary of which copies were furnished could be looked into by the Sessions Judge during enquiry under Section 436 Criminal Procedure Code, only for ordering further investigation and not for any other purpose; he was confined to papers produced before the enquiring Magistrate of which copies were supplied to the accused, in course of examination of a record under Section 437 Criminal Procedure Code. Section 436 gives power to the High Court or the Sessions Judge to direct the District Magistrate to make further enquiry, while Section 437 gives power to the Sessions Judge only, to make the order of commitment in suitable cases and virtually makes it the committing court. There is no similar power given to the High Court under Section 439 read with Section 423, Cr. P. C but the High Court may direct the Magistrate to make a commitment. The difference is that while the Sessions Judge examines a record under Section 437, he virtually becomes a committing court

and in suitable case may himself commit instead of asking the enquiring Magistrate to commit. That being the position, it is open to the Sessions Judge to take the police diary 'to aid it in such enquiry or trial' and the statements recorded by police during investigation under Section 102 Criminal Procedure Code are therefore available to the Sessions Judge during such examination, provided requirements under Section 173(4) Criminal Procedure Code are complied with. We may in this connection refer to order No. 3 dated 14-1-65 by the learned Sessions Judge where he heard the objection regarding taking the statement of T.P. Chatterjee. A copy of the statement was given to the accused who got sufficient time for consideration of the statement of Chatterjee. The learned Sessions Judge was therefore entitled in our view to take into consideration the statement of T.P. Chatterjee of which a copy was given to accused and his lawyer was also heard.

37. The learned Advocate for Madheswar Pathak also objected to the statement of Madheswar Pathak before the doctor being taken into consideration as the doctor was not cited as a witness. There is no force in this contention, for a copy of the statement was given to the accused persons under Section 173 (4) Criminal Procedure Code and we have already pointed out that the statement being of an exculpatory nature could be transformed into evidence at the trial and the doctor could give evidence after refreshing his memory from the statement earlier recorded by him.

38. We may also point out that High Court's power under Section 439 read with Section 423 Criminal Procedure Code is unlimited and in any case, this Court even sitting in revision would be justified in looking into the case diary for determination of the question appearing before it, if the ends of justice require it.

39. It is next urged that the scope of interference in a revisional application either under Section 437 or 439 Criminal P. C. is very limited and the revisional Court should not interfere unless the decision is perverse. From what we have discussed above it appears that the learned Magistrate did not frame any charge against Saday Chand in respect of murder of Aroo Lama on the faulty reasoning that the only missing bullet was accounted for in the body of Aroo Lama but he lost sight of

the fact of recovery of another unlicensed pistol which was completely empty from the same iron safe of Saday. In respect of Madheswar Pathak he misread the decision in : AIR1959 Cal207 and came to the conclusion that the admission of Madheswar Pathak before the doctor could not be transformed into evidence. The learned Sessions Judge also committed the same mistake but for which, on his own finding, he would have committed Madheswar Pathak for trial of an offence under Section 302/34 Indian Penal Code.

40. That being the position, the Sessions Judge rightly directed commitment of Saday Chand Mahatab on a charge under Section 302 Indian Penal Code for murder of Arro Lama also but he failed to pass similar order for commitment to Madheswar Pathak on a charge under Section 302/34 Indian Penal Code for the murder of both Aroo Lama and Dawa Ongal. With these words, I agree with the decision of my Lord, Sen, J.

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