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Court : Kolkata

Decided On : May-24-1963

Reported in : AIR1965Cal598,1965CriLJ713

Judge : Debabrata Mookerjee and ;D.N. Das Gupta, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 164, 236, 237, 238 and 337; ;Indian Penal Code (IPC), 1860 - Sections 120B, 395 and 396; ;Evidence Act, 1872 - Sections 10, 114 and 133

Appeal No. : Death Reference No. 14 of 1961

Appellant : Samunder Singh and ors.

Respondent : State

Advocate for Def. : S.N. Banerjee (D.L.R.) and Anil Sen, Advs.

Advocate for Pet/Ap. : S.S. Mukherjee, ;Kishore Mukherjee, ;Ajit Kumar Dutt, ;Mukti Maitra and ;D.N. Trivedi, Advs.

Disposition : Appeals dismissed

Judgement :

Debabrata Mookerjee, J.

1. Seven persons were arraigned for offences in connection with plunder and murder at the Kanoria house 15, Burdwan Road. Of them one Pratap Singh was tendered pardon and made an approver. At a trial held by an Additional Sessions Judge of 24 Paraganas four of them Samunder Singh, Bhamar Singh, Nandalal Singh and Ruhr Singh have been convicted of dacoity with murder under Section 396 of the Indian Penal Code and sentenced to death. These four have in addition been convicted of conspiracy to commit dacoity with another named Bhur Singh and sentenced under Section 120B/395 of the Code to imprisonment for life. The said Bhur Singh and another called Bhagirath Singh charged respectively under Sections 396/109 and 412 of the Code, for abetment of dacoity with murder and for dishonestly receiving stolen property in the commission of the dacoity, have been acquitted by the trial Judge.

2. The convicted persons have appealed. The four condemned men have appeared by counsel, one of whom has, with the court's leave, also appeared for Bhur Singh who has been given life sentence. The sentence of death passed on the aforesaid four men has been referred for the court's confirmation. The reference and the appeals have been heard together and are disposed of by this judgment.

3. The Kanorias are prosperous business men residing at 15, Burdwan Road. The house is a large one with spacious grounds. It is reached by a gate leading to a drive across the grounds to the portico where there is a woodenentrance door opening into a flight of stairs leading to the first floor. The south eastern room on that floor was the scene of the crime; it used to be occupied by Bhagabati Prasad Kanoria, an educated young man who assisted his father Ram Sundar Kanoria, the head of the house who run the family business. Ram Sundar used to occupy a room to the south of the room in the occupation of his eldest son the aforesaid Bhagabati Prosad. A younger son used to occupy a room to the north east of Bhagabati's room. The entrance door at the foot of the staircase used to be kept under lock the key of which would be in charge of the durwan on duty. Bhagabati's room had five windows the middle of which was the point of entry of the miscreants. Bhagabati lived in the room with his wife Padma Debi and two children, one of whom was just a baby in arms. The Kanorias maintained a large

retinue of servants, drivers and durwans. The appellants Nandlal Singh and Ruhr Singh were two of the durwans in the employ of the Kanorias at the relevant time.

4. At a distance of nearly a quarter of a mile from the Kanoria house there was a substation of the Oriental Gas Co. The Company had its Head Office at 12A, Park Street and there were several Sub-stations, one of which was situate at 36, Diamond Harbour Road and within a mile of it, there was another Sub-station at Behala. The Company had in its service a number of durwans at the material time. The approver Protap Singh and the aforesaid Bhur Singh were in the company's employ at the Diamond Harbour Road Sub-station. Strictly speaking Bhur Singh was attached to the Behala Sub-station but according to the prevailing practice he used to reside in the durwans' quarters at the Diamond Harbour Road station.

5. The said Bhamar Singh and Bhagirath Singh were employed as durwans or night guards at Purnamal Colliery, Ranigunj, the owner of which was one J. N. Butchasia. Only recently Bhamar Singh was transferred to the owner's residence at P. 862, New Alipore where he was employed as watch-man.

6. The durwans aforesaid attached to the Oriental Gas Co.'s Sub-station as well as those employed at 15, Burdwan Road and at New Alipore were alleged to have conspired to commit dacoity with murder and in pursuance of the conspiracy committed murder of Bhagabati Prosad Kanoria in committing dacoity, while the said Bhagirath Singh was said to have received stolen properties transferred by the commission of the dacoity.

7. The case for the prosecution was that except the aforesaid Bhagirath Singh the accused persons conspired sometime in the middle of January 1961 to commit dacoity. Ruhr Singh who was in the employ of the Kanorias suggested that the dacoity should be committed at 15, Burdwan Road where booty to the tune of a lac of rupees could be obtained. These suggestions were mooted by Ruhr at 36, Diamond Harbour Road in which many of the conspirators were present and they fell in with thatidea. Thereafter, confabulations were held from time to time at 36, Diamond Harbour Road and 15, Burdwan Road. In one of these conferences it was suggested that the dacoity should be committed on a night when the accused Nandalal would be on duty. The project was further discussed in later meetings

and 15, Burdwan Road was visited by Samunder Singh, Bhamar Singh and Bhur Singh with a view to reconnoitre the surroundings and finalise theplan. Eventually the decision was made that the raid would take place in the early morning of February 3, 1961 when Nandalal would be on duty. On February 2, further meetings were held and some of the persons engaged in the conspiracy moved from Diamond Harbour Road Sub-station to Burdwan Road as a preliminary to the raid. The hour selected being the hour when the approver Protap Singh was scheduled for duty at 36, Diamond Harbour Road arrangement was made to get a proxy from him and the aforesaid Bhur Singh was asked to deputise for Protap Singh. Close upon 3 O'clock in the morning of the 3rd, Bhur Singh was roused from sleep to take his place at the Sub-station in order that Pratap Singh might be free to join the raid. Bhur as arranged went to his post when after a ceremonial drink of liquor the appellants Samunder Singh, Bhamar Singh and the approver Pratap Singh set out for the raid. Of the raiding party Samunder Singh armed himself with a big knife called Punjabi Katari kept in a scabbard with a leather string attached to it, Bhamar Singh also carried a knife. Directly on reaching 15, Burdwan Road they jumped the gate and landed on the drive leading to the portico where they met appellant Nandalal shading a book. Nandalal was cooperative. He did not raise any alarm. Samunder went to call Ruhr Singh who had been sleeping in the durwan's quarters on the premises. Bhamar Singh then asked for the key with which to open the entrance door. Nandalal brought out the key, opened the door and asked to be immediately bound up in accordance with the arrangement previously made so that Nandalal could pretend to have been tied up by unknown miscreants and rendered ineffective. Bhamar Singh tied Nandlal's head and face with Nandlal's own muffler and Bhamar's napkin. The approver Pratap Singh then tied Nandlal's hands with a piece of cloth taken from the mouth of a bucket close by. Nandalal lay himself prostrate on the ground suggesting as if he had been completely immobilised by the miscreants Samunder had meanwhile returned to the portico with Ruhr Singh. Thereafter, Samunder Singh, Bhamar Singh and Ruhr Singh went up the stairs but were disappointed to find that Bhagabati Prasad's room was bolted from inside. Within two or three minutes a device was hit upon to reach the room through the middle window which had no bars or grill attached to it. Ruhr suggested that the height might be negotiated with a ladder which was lying

close by. Samunder brought it up and fixed it to a place under the open window through which they were to enter the room. A little while ago Bhagabati's wife (sic) Debi had been roused from sleep byher crying child. She had put on the light, lulled the child to sleep again, but being overpowered by sleep herself, could not put out the light. Thus, in the room at the moment were sleeping the husband, the wife and the two children and the light was on. Samunder reached the window height and planted himself on the floor. Ho was soon followed by Bhamar Singh. When Bhamar got in, he brushed against the rod attached to the window screen. That produced a rattling noise which roused Padma Debi from sleep. She found in the light burning in the room the two men Samunder Singh and Bhamar Singh. She at once roused her husband from sleep who jumped out of bed and challenged them. Bhagabati Prosad and Samunder at once engaged in a duel in the course of which Samunder Singh inflicted several knife wounds in consequence of which Bhagabati Prosad fell motionless on the ground in a pool of blood. While this was happening, Bhamar Singh stood guard knife in hand, on Padma Debi and demanded the keys of the almirahs in the room. She pointed out the pillow underneath which the keys were found together with a Movado wrist watch belonging to her husband. Bhamar took them up and opened with a key one of the almirahs and brought out cash, watches and other valuables, including diamond buttons, sleeve links and put them on the floor. While Bhmar Singh was engaged in the plunder, Samunder Singh came and stood guard holding the knife, bathed in her husband's blood, upon her head and telling her on pain of death to keep silent. When Bhagabati Prosad fell on the floor a cry of distress was uttered and the thud of a falling body was heard. Thereafter, the booty consisting of four wrist watches including a lady's wrist watch, buttons, sleeve links and sundry other things together with 26 hundred rupee notes and some ten rupee notes and silver coins was collected and Samunder Singh and Bhamar Singh opened the door which led to the stairs which were so long guarded by Ruhr Singh. But before leaving, they put the latch on the door from outside. Reaching downstairs Samunder Singh inspected the faked bandage on Nandalal Singh and the appellants Samunder Singh, Bhamar Singh and the approver Protap Singh who had been mounting guard downstairs all the while, hurried back to 36, Diamond Harbour Road where in a small garage they divided the booty which was shared

by them with Bhur Singh. Appalled by what she had seen, Padma Debi cried out 'Bhaiya Bhaiya' asking her brother-in-law Raghunath to come in. This cry was heard by the senior Kanoria as well as by Raghunath who opened the door by removing the latch, entered the room and found Bhagabati Prosad lying still and motionless on the floor in a pool of blood. Ram Sundar Kanoria at once hurried down to the ground floor to find to his utter amazement that the entrance door was wide open. He found Nandalal with his faked bandage at the place and at once charged him for disloyalty and treachery. The injured Bhagabati Prosad was removed by Ram Sundar and Ragunandan in one of their cars to the Karnani Hospital where the doctor-in-charge declared Bhagabati Prosad dead. An information of the occurrence was given to the Alipore Police by one Sham Nath Kanoria in consequence of which an investigation at once commenced and the Police arrived at the place at about 6-30 a.m.

8. According to previous arrangement Bhamar Singh left the city and a telegram was despatched by him from Ranigunge advising Samunder to leave Calcutta on the pretext of his brother's illness. The telegram reached Samunder Singh on the 4th and he left that very evening. Meanwhile Nandalal had been taken into custody by the police in the afternoon of the 3rd. Upon his statement Ruhr Singh was arrested on the 4th and upon Ruhr's statement the approver Pratap Singh and Bhur Singh were arrested on the 5th, Samunder was traced to Puranmal Colliery and was arrested along with the aforesaid Bhagirath Singh on the 6th and eventually Bhamar Singh was arrested at a dharmashala in Rajasthan on February 13, 1961.

9. In consequence of statements made by the approver and some of the accused persons, recoveries of stolen articles as well as of the weapons used in the commission of the crime, were made. A test identification parade was held on March 10, 1961 at which Padma Debi identified Samunder Singh and Bhamar Singh before a Magistrate. On February 22, Pratap Singh confessed to his crime and the confession was judicially recorded. A charge sheet was eventually submitted on April 22, 1961 against these appellants, the approver and others. An enquiry preliminary to commitment was held in the course of which Pratap Singh was tendered pardon and made an approver. He gave evidence at the committal

proceedings. The enquiring Magistrate committed the appellants for trial before the court of session.

10. At the trial appellants Samunder Singh, Bhamar Singh, Nandalal Singh and Ruhr Singh were charged under Section 396 of the Indian Penal Code. The charge reads as follows:

'That you along with Protap Singh on or about the 3rd day of February 1961 at premises No. 15, Burdwan Road, P. S. Alipore, conjointly committed dacoity, and that, in the commission of such dacoity, murder of Bhagabati Prosad Kanoria, an inmate of the house, was committed by Samunder Singh or by some others conjointly committing the dacoity and thereby committed an offence punishable under Section 396 of the Indian Penal Code.'

11. A charge under Section 120B read with Section 396 of the Indian Penal Code was framed against appellants Samunder Singh, Bhamar Singh Nandalal Singh. Ruhr Siugh and Bhur Singh (along with Protap Singh). It reads as follows:

'That yon between the middle of January 1961 and February 3, 1961 at 36, Diamond Harbour Road, and 15 Burdwan Road being parties to a criminal conspiracy agreed to commit or caused to be committed the offence of dacoity with murder at 15 Burdwan Road, P. S. Alipore, and in pursuance of such conspiracy accused Samunder Singh, Bhamar Singh, Nanda-lal Singh, Kuril Singh with approver Protap Singh did in fact commit the said offence and accused Bhur Singh stood proxy for Protap Singh on the night of the 2nd February 1961 at the gate of Messrs. Oriental Gas Co. at 36 Diamond Harbour Road to facilitate Protap Singh's participation in the con mission of the offence of dacoity with murder and thereby committed an offence punishable under Section 120B read with the Section 396, Indian Penal Code.'

12. Appellant Bhur Singh was further charged under Section 396/109 of the Code as under:

'That you on or about the 3rd day of February 1961 abetted accused Samunder Singh and others in committing dacoity in the house of Ramsunder Kanoria at

premises No. 15, Burdwan Road, P. S. Alipore, and in the commission of such dacoity murder of Bhagabati Pro-sad Kanoria, an inmate of the House, was committed by Samundar Singh by relieving Durwan Pratap Singh, approver and by remaining on duty at the gate of Messrs. Oriental Gas Company at 36 Diamond Harbour Road in place of durwan Pratap Singh, approver, so that durwan Pratap Singh, approver, accused Samunder Singh and other might commit dacoity in the house and thereby committed an offence punishable under Section 396/109 of the Indian Penal Code.'

13. The aforesaid Bhagirath Singh was charged under Section 412 of the Indian Penal Code. The charge reads as follows:

'That you on or about 6th day of February, 1961 at Ranigunge, P. S. Ranigunge District Burdwan, dishonestly received from accused Samunder Singh and/or Bhamar Singh whom yon knew or had reason to believe to have committed dacoity at Calcutta stolen properties to wit, 5100 rupees G. C. notes (marked Ext. XXI in the lower court) belonging to Padma Devi of 15 Burdwan Road and a wrist watch (marked Ext. VII in the committing court) belonging to Bhagabati Kanoria of the same place and retained the same knowing or having reason to believe that the possession of the said articles had been transferred by the commission of dacoity and thereby committed an offence punishable under Section 412 of the Indian Penal Code'.

14. The appellants pleaded not guilty to the charges framed against them and their case was that they had been implicated out of suspicion. The case ot Samunder Singh and Bhamar Singh generally was that they had been falsely implicated and their identification by Padma Debi was seriously challenged. It was suggested that the deceased had been killed by unknown assailants at a time when there was no light burning and in the darkness of the night it was not possible for her to recognise anybody; that their identification at the parade was of no value since she had been shown their photographs with the result that she was able to 'pick them out; that the circumstances in which the parade was held not having precluded the possibility of collusion, the evidence of identification was of no use at all. Appellant Samunder's casefurther was that on receipt of an urgent wire he proceeded to

Ranigunje where he had been sleeping in the room of one Man Singh at Puranmal Colliery when the police arrested him together with Bhagirath Singh. Samunder denied all knowledge or the occurrence. He denied having kept the Punjabi kathari at the place from where the police recovered it. Although the recovery of stolen properties was challenged on his behalf, he said nothing as regards the notes and the railway ticket found upon his person but stated that one Man Singh took him to the colliery and at about 5 in the morning, he had gone to ease himself and when he returned the police arrested him. Appellant Bhamar Singh denied all knowledge of the dacoity, denied having been to Ranigunje from where he was said to have sent a telegram to Samunder Singh. He asserted that he had gone on leave to see his ailing grand-mother in Rajasthan and the police arrested him from a temple. Ruhr Singh denied all knowledge of the occurrence and stated that he was in bed when the occurrence is alleged to have taken place. He denied all complicity in the crimes charged. Bhur Singh pleaded innocence, challenged the disposal of stolen money by him and suggested that one of the witnesses Narayan Singh by name who had given evidence against him was inimically disposed towards him. There was a scuffle between him and the witness sometime ago, a fact which he said was known to some of the durwans at Hind Motors where Narayan Singh worked. He stated that the Security Officer, S. D. Dogra had somehow been displeased with him who falsely implicated him. Nandlal Singh pleaded innocence and denied all knowledge of the conspiracy. He stated that he was a new man and consequently knew nothing. He completely denied the charges brought against him and suggested that he had been rendered ineffective by being bound by unknown raiders. Bhagirath Singh denied the charge of having received any stolen property transferred by the commission of the dacoity. He claimed the money found as his own. He disclaimed all connection with the wrist watch as well as other stolen property found in the room. He claimed the sum of Rs. 500 found upon his person as his own.

15. As we have indicated, Bhagirath Singh was acquitted by the trial Judge. We have, therefore, to consider the cases of Samunder Singh, Bhamar Singh, Nandalal Singh, Ruhr Singh and Bhur Singh, all of whom have been convicted of conspiracy to commit dacoity and the first four of whom have also been convicted of dacoity with murder.

16. It is to be observed that the charge of conspiracy as framed related to committing dacoity with murder. Upon a consideration of the evidence, the trial Judge found that the conspiracy proved in the case was a conspiracy to commit dacoity only. An argument has accordingly been addressed to us that the conspiracy found being different from the conspiracy charged, the conviction on such charge of conspiracy is unsustainable. We have to examine this contention.

17. It would be useful to note the findings of the learned Judge on the question in his own words 'As I read the evidence as a whole, I am not persuaded that the conspiracy as it was originally entered into contemplated murder from its inception. What the evidence discloses in point of fact, is that the conspiracy was simply to commit dacoity at 15 Burdwan Road, and nothing more. That is what the approver means to say, and that is what the circumstances and probabilities of the case establish beyond reasonable doubt. In this state of things, I am not prepared to say that, simply because a murder came to be committed in course of the commission of the dacoity, the instant accused or for that matter any of the accused arraigned against excluding of course Bhagirath Singh, individually participated in the criminal conspiracy to do anything beyond committing a dacoity at 15 Burdwan Road. This is the total impact of the evidence as it relates to the charge now under consideration, and, in the circumstances, I must hold that although the actual participators in the dacoity all come within the mischief of Section 396, I. P. C. by operation of law, it does not follow that the original conspiracy was one to commit dacoity with murder. As a matter of fact, the offence of conspiracy to commit a crime is a different offence from the crime that is either the object of the conspiracy or the consequence thereof. In the view taken the appellants have thus been convicted of conspiracy only to commit dacoity under Section 120B/395 of the Indian Penal Code.

18. It has been strenuously contended that the conspiracy found being different from the conspiracy alleged, a conviction on such altered charge is not maintainable. In aid of this contention reliance has been placed upon a decision of this Court in Golok Behari Takal v. Emperor : AIR1938 Cal51 where Mcnair, J., observed that when a conspiracy to commit a particular offence or offences has been charged, it is not open to the prosecution to prove a different conspiracy,

such as a conspiracy to commit one of the offences set forth as the objects of the conspiracy charged or several conspiracies to commit the several offences. Section 237 which is controlled by Section 236 applies only to a doubt as to the provision of the law applicable to the facts and not to a doubt as to the facts themselves which would not justify a conviction for one offence where the charge has been made for another. In that case various questions arose one of which was whether the trial should have been held with the aid of a jury. Mcnair, J. took the view that the evidence in the case could only be reached upon misdirection being established whereas Biswas, J. was of the opinion that the appellants not having been lawfully tried with the aid of a Jury, when they should have been tried with the aid of Assessors, they could not be deprived of the right of appeal on facts. In the result, the learned Judges agreed that the evidence had not established the charges brought and in that view acquitted the appellants. The charge common to all the accused tried in that case was one under Section 120-B/302/201 ofthe Indian Penal Code. The trial Judge, in course of the summing up, advised the jury that if they entertained any doubt as to the intention or the persons charged with committing murder, it would be quite open to them to find an intention to cause grievous hurt and in that view they might, if they believed the evidence, hold the accused guilty under Section 120-B/326/201 of Indian Penal Code. This advice given on the footing that the charge of conspiracy to cause grievous hurt and to cause disappearnce of the evidence of that crime would be a minor charge in relation to the one framed in the case under Section 120B/ 302/201 of the Indian Penal Code, was however, ignored by the Jury who found the accused guilty on the latter charge which was the charge actually framed; and yet McNair, J. observed 'that the conspiracy must be established as charged and that the prosecution is not entitled to prove a different conspiracy in furtherance of a minor offence'. Biswas, J. expressed the same view and observed--'Seeing that one single conspiracy was charged--a conspiracy to commit both an offence under Section 302 and an offence under Section 201, not a combination of two conspiracies, one in respect of each offence, I think the prosecution must stand or fall according as they can or cannot establish the conspiracy as charged. A conspiracy to commit a particular offence or offences having been charged, it would not be open to the prosecution to prove a different conspiracy. Nor could the

prosecution, conspiracy failing, ask for a conviction for one or more of the offences alleged to constitute the object of the conspiracy, or for any minor offence.' In our opinion the actual verdict made these observations wholly unnecessary. It is by no means clear either that McNair, J. entered into evidence in the case upon holding that that was the sole misdirection established in the trial judge's summing up. The learned judge referred to the direction above stated as one of the many failings in the charge and then proceeded to consider the evidence and in the end reached the conclusion that the accused in that case could not properly be convicted. Biswas, J. having held that the appellants in that case had a right of appeal on facts since the trial by Jury ought to be treated in law as having been held with the aid of Assessors, he at once considered the evidence on the merits and found that the case made had not been proved. This being the position, we do not think it was necessary in that case for a decision to be reached that a charge of conspiracy for a graver offence would not include a charge of conspiracy for a minor offence. Whatever may be said of the view entertained by Biswas J. as to the right of appeal on facts which the appellants in that case claimed and which he allowed, there can be no difficulty in appreciating the position that the learned Judge was quite entitled, on the view he held, to find on evidence that the case brought had not been established. McNair, J. as we have said, did not hold that that was the only misdirection upon which he chose to proceed. That was just one of the many faults in the charge which hementioned, and by which he justified his interference with the verdict although the Jury had disregarded the advice. The actual verdict did not involve any alteration; there was no conviction on an altered charge. That being the position, we do not think that the view expressed in that case, not being a decision necessary for determination of the question before the learned Judges, can be held binding upon us. It was in the nature of an obiter dictum which may be entitled to respectful consideration, but which, in our judgment, cannot bind us.

19. It may be observed that there is in this present case no question of two conspiracies. Moreover the view that a charge of conspiracy to commit a graver offence would not include a charge of conspiracy to commit a less serious one, was not arrived at after as full a discussion as one might wish. It was merely observed that such alteration was not permissible in terms of Sections 236 and

237 of the Code of Criminal Procedure. This decision was rendered in 1937, but the Judicial Committee had already decided in 1925 in Begu v. King Emperor that where five persons had been charged with murder and two of them convicted, but the evidence established that the other three had also assisted to remove the dead body, knowing that a murder had been committed, Section 237 of the Code of Criminal Procedure was applicable and although no further charge had been made under Section 201 of the Penal Code, they could well be convicted of causing disappearance of the evidence of murder under the provision of Section 237 of the Code of Criminal Procedure. It is true, reference to Sections 236 and 237 of the Code was made in Golak Takal's case : AIR1938 Cal51 but no attempt was made to study the implications of the decision in Begu's case which ruled that a man may be convicted of an offence although there has not been a charge in respect of it, if the evidence is such as to establish the charge that might have been made.

20. It was contended that whatever may be the position in respect of other offences, alteration of conviction in cases where conspiracy is charged, is not permissible. We cannot accept this proposition. The gravamen of the offence of conspiracy is the mental agreement and if the integrity of that agreement is not in any way affected or interfered with there can be no question that the charge of conspiracy for a graver offence may well be altered into a charge of conspiracy for a less serious offence. That alteration generally, is permissible has also been ruled by the Supreme Court in Bejoy Chand Patra v. State of West Bengal : 1952 CriLJ644 . It was held that where a person was charged under Section 307 of the Penal Code for attempt at murder, but the jury returned a verdict of guilty against him under Section 326 of the Code and the Sessions Judge accepting the verdict, convicted and sentenced him, the case fell under Section 237 of the Code of Criminal Procedure and the con-viction under Section 326 of the Penal Code was proper even in the absence of a charge. The judicial Committee's decision in Begu's case was approvingly referred to.

21. It seems plain that in this case on the trial Judge's own findings there was no question of doubt as to the facts; the doubt attached to the application of the law which the evidence hud established. It is not the case that there was some

evidence suggesting that a simple dacoity was the object of the conspiracy and some evidence from which an inference may be made that the object was to commit dacoity with murder. In this case the evidence was unequivocal that the appellants conspired to commit dacoity at Kanoria House. At the end of the trial the learned Judge held that on the proved facts about which there existed no doubt at any time, the only charge that could be held established was the charge of conspiracy to commit dacoity and not a conspiracy to commit dacoity with murder. This would, in our view, clearly attract the operation of Sections 236 and 237 of the Code of Criminal Procedure. Indeed, in the case of G. D. Sharma v. State of Uttar Pradesh : AIR 1960 SC400 the Supreme Court pointed out that the provisions of Sections 236 and 237 are clear enough to enable a court to convict an accused person of an offence with which he has not been charged, provided the court is of the opinion that the provisions of Section 236 apply. It was further observed that if in a case which attracts the provisions of Sections 236 and 237, the appellate Court instead of disposing of the case directs a retrial, it does not discharge its duty properly. In the case before us the trial Judge found at the end of the proceeding that the doubt related to the law applicable and not to the facts which the prosecution had set out to prove.

22. The Supreme Court had to consider the question again in the case of Purushottamdas Dalmia v. State of West Bengal : 1961 CriLJ728 . In that case there was a charge of conspiracy, the object of which was to commit forgery and/or to use a forged licence. It was held that there was no question of there being two alternative conspiracies the conspiracy was one, and it being doubtful what the facts proved would establish about the nature of the offence committed by the conspirators, the charge stated the offence in that form. Such a charge was justified by the provision of Section 236 of the Code and it did not suffer from any illegality. This position clearly negatives the contention raised on the appellants' behalf in the case before us that whatever may be said as to the legality or propriety of convicting a person of an offence upon which he has not been tried, Sections 236 and 237 can have no application to a charge of conspiracy. We have found no warrant for this view and if any doubt existed it is resolved by the decision of the Supreme Court just cited.

23. It is to be observed, however, that the decision of McNair and Biswas JJ. was not approved in a subsequent decision of this Court in the case of H. H. B. Gill v. Emperor : AIR1947 Cal162 . A Division Bench had occasion to deal with the question of alteration of conviction from one under Section 120B/161 to one under Section 120B/165 of the Indian Penal Code. It was contended that the conspiracy found being different from the conspiracy charged, it was hit by the dictum in Golak Takal's case : AIR1938 Cal51 . The Bench negatived the contention holding that the proposition laid down in the last cited case could not be accepted as an authority for the view that in no case such alteration was permissible.

24. Apart from the provisions of Sections 236 and 237 of the Code, we think the trial Judge was in this case quite entitled to treat a conspiracy to commit dacoity as being a minor offence in relation to a conspiracy to commit dacoity with murder. In dacoity with murder which is punishable under Section 396 I. P. C. there is the additional element of murder which is absent from dacoity punishable under Section 395 of the Code. It is well known that alteration may be made under Section 238 where the offences are cognate and not different involving different elements. The true test seems to be whether the facts are such as to give the accused notice of the offence of which he is convicted though he was not charged with it, so that he is not prejudiced by the absence of charge. In the present case the allegation contained in the charge framed was that the appellants had conspired to commit dacoity with murder. The finding is that they conspired to commit dacoity only. Surely, in such a case it can never be said that there was absence of notice of the offence of which the appellants have eventually been convicted. It is interesting to note that the identical question arose before the Federal Court in Gill's case : AIR1947 Cal162 when the case reached that Court H. H. B. Gill v. Emperor, 51 Cal WN (FR) 1: (AIR 1947 FC 9). The contention before the Federal Court was that the Magistrate was not legally competent to record a conviction under Section 120B/165 of the Indian Penal Code when the charge was in respect of an offence under Section 120B/161 of the Code. The Federal Court held that the charge under Section 120B/161 related to conspiracy to give and receive illegal gratification with the motive that a favour would be shown to the person giving the illegal gratification in respect of a business in which he was concerned and which was about to be transacted by the person receiving

the illegal gratification in his capacity as a public servant. But when the conviction was made under Section 120-B/165, it merely meant that one of the elements included in the charge under Section 120-B/161 was absent. Such alteration was accordingly held completely covered by Section 238 of the Code of Criminal Procedure. Applying the same test to the present case we hold that as the conspiracy found contained merely one element less than the conspiracy charged, it would eminently be a case under Section 238 of the Code of Criminal Procedure.

25. A cognate contention has been raised that a conspiracy to commit dacoity is mere tautology. It has been said that dacoity asdefined in the Code would imply joint action which in its turn would mean unity of will. The element of jointress is, therefore, an essential element of the offence of dacoity. Conspiracy, it has been argued, also means an agreement to commit an offence. Therefore, this would imply an additional agreement to do something which cannot be done without previous concert between the persons participating in the offence. It has accordingly been said that the charge of conspiracy to commit dacoity is the result of confused thinking and such a charge reflects an artificial combination which it must be difficult for the persons charged to meet and answer. We have not at all been impressed with this argument and have no hesitation to reject it. Dacoity as defined in Section 391 undoubtedly implies conjoint action. It is only when such action takes place that an offence is committed; but there may well be a stage where there is only an agreement to commit the offence; that agreement is itself punishable under Section 120B of the Penal Code. To say that a charge under Section 120B/395 of the Code is artificial is to ignore the essential fact that a conspiracy to commit dacoity is different from dacoity. It may well be that five men merely conspire to commit a dacoity. Tf there is proof of the agreement, the offence of conspiracy is complete. That being so, it must be held that there is nothing artificial in the combination implied in the charge of conspiracy to commit dacoity.

26. It has then been argued that the trial Judge having acquitted the appellants of the charge of conspiracy to commit dacoity with murder, that acquittal must mean and imply that there can be no conviction either for conspiracy to commit dacoity

or even for the substantive offence of committing dacoity with murder. Reliance has been placed upon the decision of the Judicial Committee in the case of Sambasivam v. Public Prosecutor, Federation of Malaya, 54 Cal WN 695 (PC) as well as upon the decision of the Supreme Court in Pritam Singh v. State of Punjab : 1956 CriLJ805 . The Supreme Court in the latter case approvingly referred to the proposition laid down by the Judicial Committee. In the case before the Judicial Committee as well as before the Supreme Court there was a question of retrial or of subsequent trial. Accordingly, it was ruled in Sambasivam's case, 54 Cal WN 695 (PC) that the effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not only that the person acquitted cannot be tried again for the same offence but that the verdict is binding and conclusive in all subsequent proceedings between the parries to the adjudication. The maxim 'Res judicata pro veritate accipitur' is no less applicable to criminal than to civil proceedings and accordingly the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the retrial and the accused was equally entitled to rely on his acquittal in his defence at the retrial, since the facts proved in support of one charge were clearly relevant to the other. It would be at once seen that there is no question of retrial or subsequent trial in the present case. What has happened is that the trial judge has found on evidence that the charge of conspiracy to commit murder with dacoity could not be held established. Accordingly, he found the appellants guilty of the charge of conspiracy to commit only dacoity. The principle just enunciated is entitled to respect every where and is bound to be accepted in suitable cases. Surely, in the present case there is no manner of application of that principle. There has been, in this case, merely a conviction on a charge of conspiracy to commit a minor offence, when the appellants had been charged with conspiracy to commit a graver offence.

27. Having thus, in our own way, cleared the ground of the misconceived objection to the validity of the conviction for conspiracy to commit dacoity, we have now to approach the consideration of the relative evidence. Whether that evidence would be sufficient to sustain the conspiracy found, is of course, another matter.

28. Initially a question arises as to the effect of Section 10 of the Evidence Act where a charge of conspiracy has been laid. The section says that where there is a reasonable ground to believe that two or more persons have conspired to commit an offence, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by anyone of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. The illustration attached to the section shows that once a reasonable ground to believe that several persons have conspired to commit an offence exists, the acts and declarations of a particular person in reference to the common intention, are relevant facts although that person may not so much as even know of the existence of many others engaged in the conspiracy or were utter strangers to him. The question thus is whether there is material in the case to justify the belief that the appellants conspired to commit the offence charged. We have perused the evidence and are definitely of the opinion that there is, initially, a reasonable ground to believe that they all conspired to commit an offence of dacoity. It is to be observed that this reasonable ground of belief will depend upon the proof of facts; such belief may be initially entertained and may later be refused. That is what the Judicial Committee ruled in H. H. B. Gill v. The King . A trial Judge may admit evidence under Section 10 of the Evidence Act where he has a reasonable ground to believe as is postulated, yet he may reject it, if at a later stage of the trial, that ground of belief is displaced by further evidence. It is not the true view that in a conspiracy charge, evidence once admitted remains admissible evidence whatever new aspect the case may assume whether in the original or in the appellate court. We have accordingly, on a review of the evidence, found no reason to refuse the belief which the trial court entertained that the appellants conspiredto commit an offence of dacoity. Accordingly, the evidence properly admitted in this case will be evidence touching not only the person directly affected by it but also his co-accused. The question of probative value of that evidence is of course another matter. It must, therefore, be held that the acts and declarations of each of the appellants would be available against the rest as well for the purpose of proving the existence of the conspiracy as for the purpose of proving that any

one of them was a party to it. The words 'in reference to the common intention' are words of wide import and if the acts and declarations of which evidence is given in the case can reasonably be said to have reference to the object of the conspiracy, they will be good evidence not only against the maker but also against others who are believed to be so conspiring.

29. The evidence of the approver apart, there is in this case a considerable body of direct evidence of plunder and murder. That evidence bears directily on the charge of dacoity with murder and indirectly on the charge of conspiracy as well. It is not unoften that a conspiracy is proved by overt acts. As the Supreme Court observed in the case of Swamirathnam v. State of Madras : 1957 CriLJ422 proof of specific offences would furnish the best proof of the offence of conspiracy, since conspiracy is the root and the specific acts, the offences, are the fruits.

30. It is well known that the gist of the offence of conspiracy is the agreement itself where the object of the agreement is to do an illegal act. Express proof of agreement is rarely available and may not even be necessary. Agreement can be inferred from overt acts and conduct. If it is proved that the persons charged pursued by their acts the same object, one performing one part and the other performing another part, with a view to attaining the object they were pursuing, the inference of conspiracy will be justified. Indeed where the agreement is to commit an offence no overt act need be proved. Overt acts raise a presumption of agreement, knowledge of the purpose of conspiracy, and properly looked at, they evidence the existence of a concerted intention. It is true, conspiracy in many cases is a matter of inference largely from the facts and circumstances established in the case. But where, as here, overt acts are committed in pursuance of a conspiracy, those acts form part of the same transaction which embraces the conspiracy and the acts under it. Thus the requirement of proof, where conspiracy has for its object commission of an offence, is merely proof of bare engagement or association. In the present case, however, overt acts were committed in pursuance of the conspiracy. Therefore, proof of the conspiracy depends very largely upon proof of overt acts.

31. For proof of the unlawful agreement as well as for proof of the overt acts, we have to depend, to an extent, upon the evidence of the approver Protap Singh. It will be useful at this stage to take into account his evidence.

(After discussing approver Protap Singh's evidence his Lordship continued): On the 22ndFebruary, 1962 the approver confessed to his crime and the confession was judicially recorded by a Magistrate.

32. The approver's evidence is the main plank of the prosecution case and before we appraise it in the light of the criticisms offered, we have to take account of another body of evidence which is the evidence of association. It must be said that association by itself proves little but it may acquire a sinister significance in the light of the other facts which suggest the culpability of the persons associating.

33. (After discussing the evidence of association at para 33, his Lordship continued). This is generally the evidence of association. It is true that such evidence would be of no use unless it could be shown with reference to other incriminating facts that the meetings which were fairly frequent between these appellants except Nandalal were for a criminal purpose. By itself such evidence can mean nothing. But taken in conjunction with other evidence to which we shall presently refer, it seems to us that the evidence of association produced in the case clearly suggests that the appellants except Nandalal confabulated or confederated for the purpose of advancing the object of the conspiracy. It is to be observed that the evidence which we have just noticed shows that even on the day previous to the dacoity some of these appellants were seen to associate together. The inference suggested by such association taken along with other incriminating facts is one of association for a criminal purpose.

34. The approver's evidence has been severely criticised on several grounds. (After discussing approver's evidence his Lordship continued at the end of para 38). We think that the evidence he gave in court is a substantially consistent, coherent and credible account, and other things being equal, can be acted upon.

35. It is to be recalled that the approver was arrested on February 5 and his confession was recorded by a Magistrate on the 22nd. He was produced from jail

custody where he had spent about two days before the confession was recorded. The Magistrate Sri K. K. Das who recorded the confession gave evidence to say that he had satisfied himself that the confession was voluntary and true. The Magistrate was cross-examined to show that although the confessing prisoner was given time for reflection and was segregated in the Magistrate's own chambers, he could not properly be said to have been completely cut off from police influence since the chamber and the open court was divided by a canvas partition with holes in it. The Magistrate stated that he did not remember whether he told the prisoner that he would be sent back to jail custody after the confession had been recorded. Nor did he remember if any question was asked as to whether the prisoner had any hope of pardon extended to him by the police, nor could the witness definitely deny the suggestion that there might have been police officer in plain clothes inside the Magistrate's Court room.

36. These besides, it was suggested to the approver that the decision to confess had notbeen taken independently of police advice. The approver, however, denied the suggestion and maintained that it was not a fact that the confession hud been induced by hope of pardon. He said that he was smitten with remorse when he came to learn that Bhagabati Prosad had succumbed to his injury and he decided to confess. Reliance has been placed upon the approver's evidence that during the space of about a fortnight he was being daily taken from the Entally Police station to Lalbazar for purposes of interrogation. The obvious suggestion was that he continued to be under police influence day after day and the mere fact that he was kept in jail custody for about two days would not be sufficient to wear away the police influence upon him. The approver's evidence that he had been making disclosures by instalments, that he had been intimidated by the police at Lalbazar, and at the initial stage subjected to third degree methods have been relied upon to show that the confession was induced by torture, threat and actual violence and is accordingly fit to be rejected. It is argued that the confession being a necessary prelude to the evidence he gave, the statement as well as the evidence is fit to be rejected. However much one might deprecate the use of violence on prisoners about to confess, we have to confine ourselves to the circumstances immediately preceding the making of the confession. The question is not a new one. It occupied the attention of the Supreme Court in the case of Sarwan Singh v. State

of Punjab : 1957 CriLJ1014 where it was held that when an accused person is produced before a Magistrate it is of the utmost importance that the mind of the prisoner should be completely free from police influence before his confession is recorded and he should be sent to jail custody and given adequate time to consider whether he should confess at all. It is true that the approver admitted intimidation and torture upon him. There is nothing definite to suggest that he continued to be so tortured or intimidated all the time before he was sent to jail custody. It is, however, useless to pursue this aspect of the matter. There is evidence that the approver was tortured and intimidated sometime before the confession was recorded. This would have been an important consideration if the prosecution ease was rested upon the confession. It is true the Magistrate deposed that he was satisfied that the confession was voluntary. Nevertheless, the fact remains that the confession was preceded by what distance of time we do not know--by unsavoury conditions produced by torture and intimidation. The prosecution however does not depend upon the confession; it depends upon the sworn testimony of the approver. Confession is one thing, evidence is quite another, although it may be the approver's evidence. It might require corroboration or the court might insist on safeguards in the shape of supporting evidence from independent source before it acts upon the approver's testimony. That being so, the criticism, that the confession was preceded by torture or induced by threat, loses its edge since there is the evidence of the approver who haspledged his oath and offered himself to be cross-examined. The circumstances antecedent to the making of the confessional statement cannot, we think, be justifiably relied upon to impugn the approver's evidence given in court. That evidence has either to be accepted or rejected; but the conditions which will govern its acceptance or rejection, are entirely different from those which govern the acceptance or rejection of a confession tendered in evidence against the co-accused. The confession in this case was made use of by the appellants to expose the approver's evidence. The prosecution did not rely upon the confession in support of the approver's testimony and we think we cannot look at it to corroborate the approver. Indeed, an accomplice cannot corroborate himself. We have to look for corroboration elsewhere from independent sources. Assuming therefore that the confession was preceded by circumstances suggestive of its not being voluntary,

the prosecution in the present case would not be affected at all since it rests its case not on the confession but on the evidence which the approver gave.

37. According to the defence the confession besides being an arranged version based on statements made in instalments to suit the prosecution, seriously affects the approver's testimony which followed the confession. Thus, it is said, there is an additional infirmity attaching to the approver's evidence. The influences at work which produced an arranged confession still operated in another form upon the approver's mind when he asked to be pardoned and allowed to give evidence; only that the fear of torture now gave place to the hope of pardon. In this view, it is said, the confession as well as the approver's evidence stands condemned. It is claimed that the basis of this criticism is provided by the evidence of the approver himself, of the Investigating Officer and of the circumstances immediately preceding the tendering of pardon to the approver in the Committing Magistrate's court. It was suggested to the approver that the decision to confess had not been independently taken by him but he had been tutored by the police to confess and accordingly he made a tutored statement. The approver said that he was smitten with remorse on the 4th of February on hearing of Bhagabati Prosad's death and yet admitted that he made disclosures to the police by instalments. The defence suggested that the confession in such circumstances could never be voluntary. It was argued that these proceedings were a prelude to the pardon which was granted on condition that he framed his evidence to suit the prosecution. The investigating officer, however, deposed that it was only on the 19th of February, 1961 at about 4 p.m. that the approver expressed his desire to make a judicial confession. He repelled the suggestion that the police having decided to obtain his evidence, a promise of pardon was given. The Investigating Officer asserted that it was Protap Singh himself who decided to give evidence and prayed for pardon. He made an application through his own lawyer appointed by his father and prayed for pardon. The invastigating Officer denied thatthere was any kind of understanding between him and Protap Singh or that he gave any kind of assurance to Protap Singh that after he made the confession he would Be treated as an approver.

38. The approver gave evidence that on the 20th of May, 1961 he filed a petition in court through a lawyer engaged by his father. The petition was filed before the Committing Magistrate's court through Protap Singh's own lawyer asking for pardon and offering to give evidence in the case. A reference to the record of proceedings of the date in the Magistrate's order sheet snows that on the 20th of May the Public Prosecutor filed a petition stating that Protap Singh having made a judicial confession in which details of the commission of the crime affecting himself and other persons had been disclosed, the confessing prisoner might be tendered pardon under Section 337 of the Code of Criminal Procedure on condition of his making a true and full disclosure of the whole of the circumstances within his knowledge relative to the offence and the persons concerned in the commission of the crime. This petition was opposed on behalf of the defence. At the same time a petition was filed by a pleader appearing on behalf of Protap Singh in which a similar prayer was made. The Committing Magistrate considered the matter and allowed the Public Prosecutor's petition in the interests of justice and tendered pardon to Protap Singh under the provision of Section 337 of the Code. Thereafter it appeal's that the petition filed on behalf of Protap Singh having been found to contain certain incorrect statements, the public prosecutor handed over the petition to Pro-tap Singh's pleader for necessary corrections. Thereupon, the pleader took back the petition and put in another. The first petition filed by Protap Singh's pleader was a typed one, the second or the substituted petition was written in hand. An objection was taken at this stage on behalf of the defence to the acceptance of the substituted petition by the Court when the lawyer on behalf of Protap Singh stated that the typed petition was not available since it had been destroyed. Thereafter a petition was filed on behalf of the accused persons objecting to the filing of the fresh petition.

39. These facts have been relied upon to show that the disappearance of the original typed petition filed on behalf of Protap Singh is a suspicious circumstance which vitiates the approver's evidence. It is far from clear how the filing of a fresh petition or any petition could be said to affect the evidence which the approver subsequently gave. But on behalf of the appellants it has been argued that the mystery surrounding the disappearance of the original petition is to be related back to the confession that had been made and connected with the evidence that the

approver was going to give; in retrospect, the day's proceeding condemns the confession already made and in prospect makes the approver's evidence suspect. We have not been able to appreciate this criticism since we find from the Magistrate's own order that he had seen the original typed petition and noted its contents. The learned Magis-trate observed 'seen the petition filed by Shri Govindalal Mukherjee, pleader on behalf of accused Protap Singh, praying for tender of pardon under Section 337 Cr. P. C.', therefore, it is not a matter of speculation as to what was the substantial content of the original petition; and we do not see how it can be said that the substituted petition paved the way for the approver to be pardoned and allowed to give evidence. It was on the public prosecutor's application that the Magistrate took action and tendered pardon. After all the approver pledged his oath and offered himself for cross-examination. If that evidence is found unworthy of credence, it is bound to affect substantially the prosecution case; if, on the other hand, it is found to be substantially true then the alleged mysterious disappearance of the petition cannot possibly affect its value. We have already noticed some of the criticisms of the approver's evidence and even if other alleged inherent improbabilities are taken into account, the evidence would not, in our view, be materially affected. For example, it was said that the approver did not tar himself with the same brush and took a comparatively minor part in the raid. Reliance has been placed upon the circumstance that he did not carry any weapon; that he did not disclose readily to the police where he hud kept concealed his share of the ill-gotten money and valuables; that he attempted to impress the court by giving an utterly absurd story that although Nandlal, a co-conspirator was at the place, still he as well as Samunder Singh and Bhamar Singh should have been reduced to the necessity of scaling the gale of 15, Burdwan Road despite the fact there were spikes upon it; that it is utterly improbable that when returning to 36, Diamond Harbour Road, the approver should have thought of 'casualty' occurring in the course of the raid; that Ruhr Singh should not have taken his co-conspirators completely round 15, Diamond Harbour Road or the latter should not have asked to be shown round the place properly before it was finally decided to commit the raid at the Kanoria house and that there should have been strong lights burning in the room at the time of the raid. It is said these are incredible circumstances which tax ones credulity. We

have considered the criticism that the approver's evidence bristles with improbabilities like these, but are by no means satisfied that they or any of them are such as to affect the value of his evidence, if it is otherwise acceptable.

40. The question as to how an approver's testimony has to be viewed is not a new one. Section 133 of the Evidence Act and the illustration (b) of Section 134 contain the statutory rule governing the appraisal of the approver evidence. It is true an approver is a guilty associate in crime who concurs in its commission and then implicates his partners in the crime. It is well known that an approver's evidence is admitted on the ground of necessity as otherwise the worst offenders will go up-punished and the most mischievous consequences will ensue. Accomplices are interested witnesses anxious to purchase their immunity, but there is no doubt as to the competency of their evi-dence. That competency conferred upon an approver by law does not, however, divest him of the character of an accused until by fulfilment of his undertaking he secures his discharge. Whether corroboration is at all required and the nature and extent of confirmation have been the subject of judicial decision in numerous cases. The Court of Criminal appeal in England decided in the case of The King v. Baskerville, 1916 (2) KB 658 the nature and extent of corroboration required of accomplice evidence. It was held that corroboration was required only of material circumstances and not confirmation of every detail deposed to by the accomplice. There must be corroboration of the crime as well as of the identity of the persons charged; the corroboration must be by in-dependent testimony and corroboration need not lie by direct evidence and may be circumstantial. It was observed 'the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

41. This decision was approvingly referred to by the Supreme Court in Rameshwar v. State of Rajasthan : 1952 CriLJ547 . In that case after a citation from Baskerville's case, 1916-2 KB 658 just referred to, the Supreme Court held that the law laid down by the Court of Criminal Appeal was 'exactly the law in India so far as accomplices are concerned. The only clarification necessary for purposes of this country is where this class of offence is sometimes tried by a Judge without the aid of a jury. In these cases it is necessary that the Judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case'. Again, 'the Rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained'. This view was reiterated in Kashmira Singh v. State of Madhya Pradesh : 1952 CriLJ839 . It has been held that independent corroboration really means that there should be some extraneous circumstance or some additional evidence which makes it, probable that the story of the accomplice is true and that it is reasonably safe to act upon it. In the case of (S) : 1957 CriLJ1014 it was held by the Supreme Court that the approver is undoubtedly a competent witness but his evidence has to satisfy a double test. His evidence must show that he is a reliable witness a tost which is common to all witnesses. If this test is satisfied, the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. In the case of Jnanendra Nath Ghosh v. State of West Bengal : 1959 CriLJ1492 the Supreme Court had again occasion to consider the question and it explained its previous decision in Sarwan Singh's case, (S) : 1957 CriLJ1014 . It was ruled that the approver's evidence must show that he is a reliable witness and that is a test which is common to all witnesses. Where nothing is shown that part from the approver's testimony being regarded as tainted evidence, his evidence as it stood was in no way unreliable, the conviction could not be bad if it was based on such evidence provided the Judge reminded the Jury

of the rule of practice. It was pointed out that if the corroborative evidence connected or tended to connect the accused with the crime and if such evidence related to the identity of the accused a conviction based upon the approver's testimony supported by such corroborative evidence could not be held bad. In E. C. Barsay v. State of Bombay : 1961 CriLJ828 it was held that it was not necessary to have corroboration of all the circumstances of the case or of every detail of the crime; it would be sufficient if there was corroboration as to the material circumstances sufficient to connect the accused with the crime. The Supreme Court further explained the dictum in Sarwan Singh's case, (S) : 1957 CriLJ1014 and observed that the evidence of the approver and the corroborating evidence cannot always be treated in separate compartments. The approver's evidence is not to be considered dehors corroborative evidence and fit to be rejected if the court finds it unreliable and it is only when the court finds it reliable that corroboration of the evidence is to be looked for. In most cases the two aspects would be so inter-connected that it would not be possible to provide separate treatment, for as often as not, reliability of the approver's evidence would depend upon the corroborative support it derives from other unimpeachable evidence. In Bhiva Doulu Patil v. State of Maharashtra : [1963]3SCR830 the Supreme Court considered the combined effect of Sections 133 and 114 (Illustration (b)) of the Evidence Act and observed that 'according to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter, which is a rule of practice, it is almost always unsafe to convict upon his testimony alone. Therefore, the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars'. In the case of State of Bihar v. Basawan Singh : 1958 CriLJ976 the Supreme Courtreiterated its view expressed in the earlier decision in Rameshwar's case : 1952 CriLJ547 viz., that corroboration is not essential to conviction if the Judge has in mind or the jury is cautioned about me necessity of corroboration of accomplice evidence.

42. This being the state of the law we have to consider the evidence in the case and see whether the approvers testimony has been corroborated as to the crime as well as to the persons concerned in its commission. Incidentally, we may

observe that the approver's evidence judged as a whole appears to us to be satisfactory and we have not found any reason to reject outright any part of his evidence. The degree of suspicion attaching to an approver's testimony must vary from case to case. In this case we are satisfied that the approver's evidence has a ring of truth about it although we think it would be safe to look for some additional evidence to fortify us in that belief.

43. We shall now consider the evidence of the actual raid.

44. (After discussing the evidence till para 58 his Lordship continued). From the foregoing it is quite plain that in the early hours of 3rd February, 1961 Bhagabati Prosad's room was burgled into and two of the appellants Samundar Singh and Bhamar Singh entered the room through the window. Lights were burning at the time and Bhagabati Prosad engaged Samundar Singh in a scuffle in the course of which the latter inflicted the stab wounds resulting in what was probably instantaneous death. One of the almirahs in the room was opened with the keys snatched away from Padma Devi and cash and valuables were taken away. This evidence of the actual raid and of the attack upon Bhagabati Prosad Kanoria has remained completely unshaken. Nothing has transpired in the evidence of any of the witnesses from which it could even remotely be said that the narrative of the incident has at all been shaken.

45. It would be convenient at this stage to notice the medical evidence. Dr. S. K. Roy (P. W. 41), Professor of Forensic and State Medicine held the autopsy. He found the following injuries on the dead body.

'1. One abrasion 1/2' x 1/4' over the lower part of the right side of the nose.

2. Six abrasions varying in size as from 1/10' x 1/10' to 1/2' x 1/3' placed over the right side of the face.

3. One bruise 1 1/2' x 3/4' over the inner part of the right side of the face.

4. One incised punctured wound 1 1/2' x 3/4' x 2' (deep) placed over the inner part of left shoulder transversely. The track of the wound was directed from a bone downwards, backwards and inwards.

5. One incised punctured wound 1' x 1/2' x 2 1/2' (deep) placed over the upper part of the inner border of the left scapula obliquely. The track was directed from above downwards forwards and towards the left, the underlying scapula was found cur for 3/4'.

6. One incised punctured wound 1 1/2' x 1/2' x 2' (deep) over the upper part of the left sideof the back of the chest--2' below the root of the neck close to the vertebral column placed obliquely--the left transverse process of the 2nd thoracic vertebrae was completely cut near about its middle. The track was directed from above downwards, forwards and towards the left.

7. One incised penetrating wound 1 1/4' x 1/2' X 4' (deep) placed obliquely and 1' below and more or less parallel to injury No. 6. The track was directed from above downwards forwards and towards the right side--it passed through the 4th left intercostal space cutting the 4th rib at its lower part for 3/4' then entered into the left pleural cavity and finally injured the upper lobe of the left lung at its back for 3/4' x 1/4 x 3/4' (deep).

8. One incised penetrating wound 3/4' x 1/2' x 3 1/2' (deep) placed over the lower part of the right side of the chest 2' medial to the posterior axillary line and at the level of the spinous process of the 12th thoracic vertebrae. The track was directed from above downwards inwards and slightly forwards.

9. One incised penetrating wound 1 8/4' x 3/4' x thoracic abdominal cavities (deep) placed obliquely over the lower part the inner wall of the left axilla at the level of the 6th rib. The wound passed through the 7th left intercostal space, then into the left pleura then injured the left leaf of the diaphra(sic) and finally injured the spleen at the lower part of its outer aspect for 2' x 1/2' x through and through.

10. One incised penetrating wound 1' x 3/4' x abdomen (deep) placed over the left side of the body just above the highest point of the iliac crest. The track was directed from above, downwards, forwards and medialwards.

On exploring the abdominal cavity the mesentery was found injured at 2 places measuring 3/4' x 1/3' x through and through respectively. A coil of small intestine

showed an injury measuring 3/4' x 1/3' x through and through, through which faeeal matters were seen to come out.

11. One incised perforating wound having (a) one wound of entrance measuring 1' x 1/2' placed obliquely at the upper part of the back of the left forearm and (b) one wound of exit 3/4' x 1/2' placed obliquely over the upper part of front of left forearm 1/2' below the medial epicondyle.

The track measured 3-1/3' length. Extravasated liquid and clotted blood was seen present at and around the sites of the injuries and also in the surrounding tissue planes. Brain and membranes were congested. The left pleura contained 2 lbs. 5ozs. of liquid and clotted blood.

Larynx and trachoea were congested and contained froth inside. Both the lungs were congested and oedematous, the left lung was injured as already described. The peritoneal cavity contained 10 oz. of liquid and clotted blood.

The stomach was healthy and 5 oz. of partly digested roti and vegetables were found within. The liver, spleen and the kidneys were congested. The spleen was injured asdescribed. Bladder was healthy and empty. Rest of the organs and structures were found healthy.'

46. The Doctor deposed that death was in his opinion due to shock and haemorrhage as a result of the injuries described above which were ante mortem and homicidal in nature. He said that injuries Nos. 7, 9 and 10 were individually sufficient in the ordinary course of nature to cause death. Injury No. 9 was the most grievous of all the injuries. Three injuries affected the vital parts of the body. In his opinion deatli had taken place at any time within four to twenty-four hours' time previous to the receipt of the dead body at the Calcutta police morgue on the 3rd of February, 1961 at about 11.20 A. M. and roughly within three to four hours of the intake of the last meal of the deceased. The Doctor further said that injuries. Nos. 2, 3 and 4 could have been caused by any hard and blunt subject. Injuries Nos. 4 to 11 could have been caused by sharp cutting weapon with a pointed end. Injury No. 11 appeared to be the result of an attempt to ward off an attack. In the Doctor's opinion injuries Nos. 4 to 11 could have been caused by the weapon

(Exhibit III), the Punjabi katari which Samundar was said to have carried.

47. According to the prosecution the weapon (Panjabi katari) produced in court and marked Exhibit III was the weapon which had been used by Samundar Singh for stabbing the deceased. This was later seized by the police on information supplied by Samundar himself. The evidence noticed above provides substantial corroboration to the approver's evidence which is that Samundar Singh and Bhamar Singh entered the room and in course of the raid Samundar Singh inflicted injuries on the deceased Bhagabati Prosad Kanoria. According to the approver the persons involved in the actual raid were he himself, Samundar Singh, Bhamar Singh, Ruhr Singh and Nandalal Singh. It will be recalled that when the raid was in progress Ruhr Singh was said to have been going up and down the staircase and maintaining vigil so that there might not be any kind of interference from any quarter and Nandalal Singh was in the portico present alright but putting up a pretence of having been overpowered with his hands tied and head and face bandaged. This evidence, would clearly show that there were five persons engaged in the mid. They were present at the raid and there can be no question that the charge of dacoity with murder is established. Having regard to the medical evidence noticed above one cannot have any doubt that the person who inflicted the stab wounds had the intention to cause death or at any rate, intention to cause injuries which were sufficient in the ordinary course of nature to cause death.

48. It is to be observed that Section 396 merely declares the liability of others as coextensive with that of the actual murder. Dacoity is the joint act of the persons concerned, and the essence of an offence under Section 396 is murder committed in commission of the dacoity. If Samundar Siugh and Bhamar Singh were conjointly committing robbery and if the approverNandalal Singh and Ruhr Singh were persons present and aiding and if in the course of that dacoity murder is committed by one of them, then there can be no doubt that the ingredients of Section 396 are satisfied. It does not matter whether murder is committed in the immediate presence of a particular person or persons. It is not even necessary that murder should have been within the previous contemplation of the perpetrators of the crime. As was observed by Chief Justice Rankin in the case of Monoranjan Bhattacharjya v. Emperor : AIR1932 Cal818 that 'where a dacoity was

being perpetrated with the use of revolver or dagger, there is no reason why it should not be taken that every one of the persons who came to the place was prepared to commit murder if necessary in prosecution of the dacoity. Obviously the murder was committed by one of the miscreants in order to facilitate his own escape and the escape of his fellow collaborators of the crime'. The learned Chief Justice further observed, 'in a dacoity it is necessary not only that a dacoit should' get the booty away but he should get away with the booty'. The would imply the use of arms when arms are carried, it was well known to the collaborators of the crime that Samundar Singh and Bhamar Singh carried deadly weapons and in the circumstances we find it proved that there was dacoity and the dacoity was committed with murder. In this context the observations of the Lahore High Court in the case of Punjab Singh v. The Crown, ILR 15 Lah 84: (AIR 1933 Lah 977) may also be taken note of.

'In this connection it is also important to note that in order to render the other dacoits liable under Section 396 for the act of one of their associates it is not necessary that murder should have been within the contemplation of ail or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in, or abetted, its commission. Indeed, they may not have been present at the scene of murder, or may not have known even that murder was going to be, or had in fact been, committed. But nonetheless they all will be liable for enhanced punishment provided a person is in fact murdered by one of the members of the gang 'in the commission of the dacoity' '.

49. It will be recalled that on the 3rd of February in the afternoon Nandalal Singh was arrested. That arrest led to the arrest of Ruhr Singh on the 4th. On the 5th of February the approver Pratap and Bhur Singh were arrested and on the 6th Samundar and the acquitted accused Bhagirath Singh were taken into custody. It was not until the 13th of February that Bhamar Singh was arrested in Rajasthan. It seems reasonably plain that one arrest led to another and we shall presently see that recoveries of stolen articles and other incriminating things followed closely upon one another. The evidence relating to the recoveries is, we think, of great weight and importance in the present case. The approver's testimony is amply corroborated by that body of evidence.

50. The approver was an old hand in the employ of Oriental Gas Company at (sic)Diamond Harbour Road. He was introduced to the Company by his father Jaswant Singh who worked in the place for a considerable time. On the 5/6th of February the approver was taken to Raniganj in search of Bhainar Singh, There the approver disclosed to the police officer that a sum of Rs. 600 which had fallen to his share as part of the booty had been kept concealed by him in the folds of the cot on which he and his father Jaswant Singh slept at 36 Diamond Harbour Road. Directly on receipt of the information the Police Officer at Raniganj telephoned the police at Calcutta to search Jaswant's Cot. The Search was held without delay. On the 6th of February between the hours of 4-30 p.m. and 5-30 p.m. six hundred rupee notes were found tied in a small torn white piece of cloth and kept concealed in a camp cot covered with gunny in the room occupied by the approver and his father Jaswant Singh at 36, Diamond Harbour Road. The relevant seizure list is Ext. 7. Sub-Inspector Gurudas Mukherjee (P. W. 50) deposed to the circumstances in which the recovery was made. He drew up the seizure list in the presence of search witnesses who signed it. He deposed that Jaswant Singh, the approver's father brought the money out of the camp cot. According to the approver the sum of Rs. 600 fell to his share. On the same day at about 9.30 p.m. another search was held by the aforesaid police officer in the presence of search witnesses Kashi Nath Mukherjee (P. W. 14), and Biswanath Roy (P. W. 49). Sub-Inspector Gurudas Mukherjee deposed that he again went to the place at that hour with the investigating officer when the approver brought out a discarded oven from a place to the south of the southern garage at 36, Diamond Harbour Road and a tin cigarette case was produced by him from the oven; when opened it was found to contain three wrist watches, a pair of gold coupling and silver coupling, tie pins etc. Witnesses Bangshidhar Muraka (P. W. 10) and Kashi Nath Mukherjee (P. W. 14) were present at the search. The evidence shows that the strip of land to the south of the southern garage was overgrown with weeds and shrubs. It was from this place that the approver brought out the cigarette tin concealed in the oven and the tin contained the watches and other valuables which were identified by Padma Devi.

51. Samundar Singh was an employee of the Gas Company at 36, Diamond Harbour Road. According to the approver immediately after the dacoity appellant

Bhamar Singh advised Samundar Singh to proceed to Raniganj. Bhamar said he would send a telegram to the effect that Samundar's brother was ill and advise him to proceed to Raniganj on account of his brother's illness. It appears that a false telegram in the name of one Bhawar Singh was sent by Bhainar Singh from the Raniganj post office at 8.20 p.m. on the 3rd of February, 1961. The telegram is marked Exhibit 15. It was seized under seizure list Ext. 14, Mohabir Prosad Singh (P. W. 34), a telegraph peon posted at Raniganj deposed that on the 3rd of February at 8 p.m. appellant Bhamar Singh presented himself at the telegraph office andrequested him to book a telegram. The witness identified Bhamar Singh by his moustache which he wore. He produced the message and proved it. It was suggested to the witness that he identified Bhamar Singh falsely at the instance of the police. The witness denied and claimed to be able to identify everyone who appeared in the post office to send telegrams on the 1st, 2nd and the 4th of February. This appears to be somewhat a tall claim on the part of the witness. In any event we think that it was not impossible for Mohabir to identify Bhamar Singh since there was something distinctive in Bhamar Singh's appearance. Another reason for his being able to identify was the fact that the man went at a time when there was hardly any crowd; Bhamar Singh went to the telegraph office after 8 p.m. Priya Nath Datta (P. W. 35) deposed to say that he was the head signaller and a man who gave his name as Bhowar Singh requested him to write out the message. He wrote the message. He did not quite remember the features of the man. Sub-inspector Monoranjan Banerjee (P. W. 61) seized the telegram with the assistance of the assistant Sub-inspector Anil Thakurta (P. W. 46). This evidence would show that the approver's statement that Bhamar offered to send a telegram advising Samundar to proceed to Raniganj was true. The evidence of Sitaram Bhowalka (P. W. 32) suggests that there was no one called Bhawar Singh in Nathmal Bhowalka Colliery also known as Kajora Selected Colliery of which his father was the proprietor. It will be recalled that the telegram was sent by one Bhawar Singh of Kajora Selected Colliery. It was addressed to appellant Samundar Singh. The approver's evidence is that when the telegram reached on the 4th, Samundar was not present; it was the approver who made it over to him later in the course of the day and Samunder left Calcutta with the permission of the principal officer sometime in the evening of the 4th. It will thus be seen that the

telegram determined Samunder's movements and he was traced thereafter at Puranmal Colliery in Raniganj. Sub-inspector Ashoke Kumar Kanjilal (P. W. 59) deposed that on the 6th of February the police received some clue about the appellant Bhamar Singh. Thereafter they proceeded to Puranmal Colliery in search of the acquitted accused Bhagirath Singh and the appellant Samunder Singh. Bhagirath Singh's room which was in the durwans' quarters was found closed from within. The manager who accompanied the police party knocked at the door when it was Hung open. The approver Pratap Singh had been taken by the police to Puranmal Colliery and upon his identification appellant Samundar Singh was arrested. The place was searched. Samundar Singh was found wearing a bush-shirt Ext. VIII which was a part of the uniform supplied to him by the Oriental Gas Company. It is remarkable that two buttons of the coat or bush shirt were found missing. Those two buttons were obviously the ones which had fallen off from the shirt in course of the struggle between Samundar and the deceased Bhagawati Prosad at the time of the raid. A search was made and in consequence of the search ofhis person seven hundred rupee notes including rupees thirty in currency notes, diamond set buttons, tie pin and sundry other articles were found inside the pocket of the bush shirt. Bhagirath's person was also searched. He was found wearing a shirt in the pocket of which a sum of rupees five hundred in five hundred rupee notes was discovered. On search of the room a pair of shoes was recovered from underneath the cot on which Bhagirath was found seated and in one of the shoes a wrist watch (Ex. 10) was found concealed. It was the yellow wrist watch which, according to the approver, Bhamar had taken for his personal use. These articles were entered in a seizure, list Ext. 9. Several Police Officers were present at the search, namely, Surya Kanta Sarkar (P. W. 21), Anil Kumar Thakurta (P. W. 46) and the Sub-inspector Monoranjan Banerjee (P. W. 61). The police officers have uniformly deposed to the details of the search and seizure. There is nothing in their evidence which will justify us in entertaining any doubt as to the fact that upon search of the person of appellant Samunder Singh a sum of rupees seven hundred thirty and seventeen naye paise together with four white stone-set burtons with chain, two couplings, one tie pin were recovered. The yellow wrist watch was also found in one of the shoes kept concealed underneath the cot on which Bhagirath was found seated. Besides this there is the evidence of

Bhuban Mohan Chatterjee (P. W. 31) and Arjun Singh (P. W. 39), both of whom happened to be search witnesses. Bhuban Mohan Chatterjee was the manager of the Colliery. Arjun Singh worked in Mahabir Colliery which was at a little distance from Puranmal Colliery where the search and seizure took place. Arjun's evidence is significant. He deposed to say that a man visited one Gopal Singh at Mohabir Colliery in the 1st week of February, 1961. Arjun Singh identified Bhamar Singh as the man who had come to see Gopal Singh. At about 9-30 in the night Bhamar Singh left the Colliery saying that he was proceeding to Puranmal Colliery. Before leaving Bhamar said that he would come back and take a bundle which he left behind at Mohabir Colliery. Next day Bhamar did not appear but the acquitted accused Bhagirath came and took the bundle away. The evidence of Bhuban Mohan Chatterjee and Arjun Singh as regards the actual search at Puranmal Colliery remains unshaken. The only thing to notice is that a suggestion was made in his cross-examination that Arjun Singh was a police spy, in the pay of the police and as suoh he aoted as an informer. The suggestions were denied. His cross-examination snows that he had omitted to tell the police that a man had come to see Gopal Singh at 9 p.m., that he took his meal and then left for Puranmal Colliery. This omission does not affect his evidence. This witness as well as Bhuban Mohan Chatterjee spoke to the circumstances of search and seizure and identified the articles and the coat or bush shirt which they said had been seized at Puranmal Colliery from the person of appelknt Samunder Singh. When the search was proceeding, Lachipat Batchasia (P. W. 22), the son of the proprietor of PuranmalColliery happened to be present. He did not see the search and appeared to have arrived after the search had commenced. He said that he noticed a number of men in front of Bhagirath's room and found notes and coins and other things spread out on the ledge.

52. There is another item of evidence to be considered against Samunder Singh; it relates to the recovery of the Punjabi katari (Ext. III). According to the approver this was the weapon which was carried by Samunder at the time of raid. The evidence is that on the 4th/ 5th of February Samunder Singh went to 19 Basak Street and told Bhowar Singh (P. W. 19) a durwan of the place that he was going to Raniganj after taking delivery of some clothings which were to be tailored. So saying, he left the knife with Bhowar Singh. The knife was left on a chowki. There

was at that time another man present with Bhowar Singh and that man was Lachmi Narayan Dubey (P. W. 48). He too stated that on the 5th of February at 9/10 a.m. he had gone to Bhawar's place at 19 Basak Street when Samunder left the knife with Bhawar. The knife was left on the chowki. Samunder said that he wanted to proceed to the tailor's shop for collecting his things and then he would take back the knife. This knife was seized by the police on the 6th of February 1961 at 11.45 p.m. Two police officers were concerned in the search and seizure. They were Sub-inspectors Gouranga Banerjee (P. W. 36) and Gurudas Mukherjee (P. W. 50). According to them Samunder pointed out the knife. It was upon a statement of Samunder that the police went to 19 Basak Street and recovered the knife from the chowki. The knife was produced by Bhawar Singh. There was a scabbard with ornamental velvet covering together with a leather chain attached to it. Besides a suggestion made that it was improbable that the knife should have been allowed to remain on the chowki for 24 hours or a little more, there is nothing else in cross-examination of the witnesses which might cast doubt upon this part of the case that it was upon the statement of Samunder himself that the knife was recovered on the 6th February, 1961. The Chemical Examiner's report (Ext. 23) shows that the khaki buttons which were left on the floor of Bhagawati Prosad's room were spectrosco-pically similar to the ones which were later seized by the police from Samunder's coat or bush-shirt and sent for chemical examination. The Chemical Examiner's report also shows that the dagger used at the raid was found stained with blood.

53. It is to be observed that certain injuries were found on Samunder Singh. They are examined by Dr. S. K. Roy (P. W. 41). He gave evidence to say that he found two abrasions on Samunder placed over the lower part of the inner border of the left palm. There was also a linear abrasion placed over the lower third of the fronto-medial aspect of the right forearm. According to the doctor the first injury could have been caused by human teeth and the second by the scratch of human nail. It is to be recalled that according to the evidence Padma Devi gave there was a souffle and itis not unlikely that in the course of the scuffle the deceased attempted to defend himself by trying to bite off a part of appellant Samunder's palm. The defence of Samunder Singh was that he had been falsely implicated. It was never said or suggested on behalf of the appellants that there was enmity

between them or any of them and the approver. According to the general defence the deceased was Killed by unknown assailants and that the prosecution with the help of the approver tried to bolster up a false case by suggesting that lights were burning at the time when the raid was committed. It was also a part of Samunder's defence that by reason of pock marks on his face it was not difficult for Padma Debi to pick him out at the test identification parade. His further case was that the police had maliciously shown to Padma Debi pictures of Samunder and Bhamar so that she might be able to implicate them falsely. In his statement under Section 342 Cr. P. C. Samunder denied all knowledge of the occurrence. He stated that the katari did not belong to him. He said that he did not know Bhawar Singh but he had received a telegram from Baniganj. He suggested that when the search at Puranmal Colliery took place he was absent and had gone to relieve himself in the early morning. He denied that he kept a knife at 19 Basak Street and tried to explain his injuries by saying that he had suffered them from a fall sustained on a coal heap. We have no hesitation to reject his defence and we are completely satisfied that the appellant Samunder Singh was properly identified by Padma Debi. There is no substance in his defence.

54. Appellant Bhamar Singh was originally a durwan at Puranmal Colliery but his services were lately transferred to New Alipur where he was engaged to work as a night guard at his employers Calcutta residence. We have already noticed the movements of Bhamar Singh. He must have been present on the night of the 3rd of February at Baniganj; and on the 4th he was seen by Ramchij Chowbey (P. W. 44), one of the night guards at Puranmal Colliery. He was seen at the place inside Bhagirath Singh's room. On being asked Bhamar replied that he had corne to apply for leave. Next he was found at Calcutta on the forenoon of the 5th. There is evidence of Lachipat Batchasia (P. W. 22), the son of the proprietor of Puranmal Colliery that when he came to the Calcutta gaddi at 18 Mahatma Gandhi Road. Bhamar presented himself at the gaddi and asked for leave. Thereafter Bhamar disappeared and no trace of him could be found until the 18th of February when he was arrested in village Garode in a dharamshala in the district of Sikar in Rajasthan, Sub-inspector Ashoke Kumar Kanjilal (P. W. 59) arrested him with the assistance of an inspector of police Abdul Rashid Khan (P. W. 54). He was brought down to Calcutta on the 20th of February. On the very same day (20th

February) upon a statement made by Bhamar, the police proceeded to P. 862 New Alipur and a knife was brought out by Bhamar himself from the kitchen. The recovery of the knife was made under seizurelist Ext. 22. The recovery was actually made by the investigating officer. It will be recalled that according to the approver, Bhamar Singh had taken his share of the money. He had also taken the yellow wrist watch. That wrist watch was found at Puranmall Colliery in Bhagirath Singh's room concealed in a shoe. There is no doubt about the identity of the wrist watch. In answer to the court's question Bhamar said that he knew nothing about the incident. He denied having gone to Raniganj. He denied all connection with the knife and said that he had asked for leave to go home to see his ailing grand-mother. He went home and the police arrested him from inside a temple. That is all that he said. He was identified by Padma Debi as the companion of Samunder Singh who took part in the actual raid. We have no manner of doubt that he was one of the raiding party and committed the offences charged.

55. Bhur Singh is one of the durwans employed at the Oriental Gas Co's office. He was arrested along with the approver Pratap Singh on February 5. According to the approver, Bhur Singh was asked to deputise for Pratap Singh. The approver was required to do his duty at 36, Diamond Harbour Road between the hours 2 a.m. and 6 a.m. on February 3. It was decided that Bhur Singh would do that duty enabling Pratap to take part in the raid on promise to Bhur of an equal share of the booty. The approver's evidence is that as soon as they returned to 36 Diamond Harbour Road, Bhur Singh joined them and shared in the booty. Bhur got a sum of Rs. 600. According to the evidence, Bhnr Singh disposed of this sum very quickly. Narayan Singh (P. W. 6) deposed to say that on February 3 Bhur Singh came at about noon and deposited with him six hundred rupee notes and requested him to keep the money with him till he wanted it back. The witness had received from a friend of his named Hanuman Singh a request for a loan of Rupees 200. Accordingly, put of the sum deposited with him by Bhur Singh, Narayan Singh remitted Rs. 200. He lent another sum of Rs. 100 to Jaman Singh (Foreman) and an equal amount to durwan Jaman Singh. The witness said that he hoped to be able to reimburse Bhur Singh from his Provident Fund money that was lying to his credit. On February 11, 1961 Sub-inspector Gurudas Mukherjee and others contacted Narayan Singh who in his turn contacted Jaman Singh (P. W. 7). Out of

the sum of Rs. 200 thus left with him, Narayan Singh had spent a sum of Rs. 20. Accordingly he produced before the police the balance of Rs. 180. That recovery was made under seizure list Ext. 5. The sum of Rs. 100 taken on loan by Jaman Singh (P. W. 7) had not been spent and Jaman Singh produced the money under seizure list Ext. 4. The money order receipt showing that the sum of Rs. 200 had been sent to Hanuman Singh by Narayan Singh was produced and it was seized under Ext. 19. The evidence is to our mind quite convincing and nothing substantial has transpired which will cause any doubt about the disposal of the sum of Rs. 600 received by Bhur Singh as his share of the booty. The evidence of the Investigating Officer is that itwas on the identification of Ruhr Singh that Bhur was arrested. Narayan Singh's evidence has been severely criticised on the ground that although he was not a money lender he suddenly blossomed into one and started lending money. We must recall that these are durwans who are not likely to disoblige others of the same ilk. Narayan Singh denied the suggestion of enmity that he bore Bhur grudge and that it was at the instance of the police that he gave false evidence in the case. There is besides the evidence of the Security Officer S. D. Dogra (P. W. 8) of Hindusthan Motors which we have no reason to distrust. He deposed that on February 3 at about 11 he saw Bhur Singh at the place. A suggestion was made that there was enmity between the witness and Bhur Singh. It was said that Bhur Singh had been appointed by Rai Bahadur K. N. Mukherjee, a retired Indian Police Service man against the wishes of Dogra and that accounted for the false evidence which he gave. Bhur Singh merely pleaded innocence, denied having gone to Hindusthan Motors on the 3rd and suggested that he had quarrels with Narayan Singh with whom he had a scuffle sometime ago. He also said that S. D. Dogra (P. W. 8) was displeased with him when he got the appointment in spite of Dogra and the latter threatened him at the time. We are not persuaded that there is any substance in the defence. The disposal was made directly after the receipt of his share of the booty and the evidence of Narayan Singh and Jaman Singh together with the evidence of Dogra clearly show that a sum of Rs. 800 was disposed of within a few hours of its receipt as his share of the booty, Bhur Singh was clearly in the conspiracy to commit dacoity.

56. Nandalal Singh was one of the durwans at 15, Burdwan Road. According to the approver, it was agreed that Nandalal would co-operate, but in order that he

might not be detected he would pretend that he had been rendered completely ineffective by being tied by the miscreants who committed the raid. The approver said that as soon as he with others arrived, it was Nandalal who opened the key of the entrance door and then insisted upon his being bound down at once. Bhamar Singh tied him up by using Nandalal's own muffler and Bhamar's napkin. His hands were tied by the approver himself with a piece of rag which was found on the mouth of a milk bucket close by. At one stage Nandalal lay himself down on the ground after having let the raiders in. We have to test this evidence in the light of the circumstances proved in the case. In his case no recoveries of stolen property were made. It is to be recalled that he was arrested in the afternoon of the 3rd. According to Bam Sunder Kanoria, Nandalal was just loosely tied and when Ram Sundar charged him with having behaved in a treacherous fashion Nandalal answered back that he had been tied up by men who came from outside. Ram Sundar deposed that Nandalal spoke in a normal fashion and that he could not possibly have been tied up against his will. Nandalal's defence was that he had been caught unawares by some intruders and completely everpowered. He was silenced atthe point of a dagger and he was terrorised during the whole course of the operation and it was only with difficulty that he had removed the wrapping on his face after the miscreants had left. These suggestions were made to Ram Sundar Kanoria but the witness denied them all and stuck to the position that the tying up of Nandalal was a complete fake. Sachi Kanta Chakravarti (P. W. 52), a Sub-Inspector attached to the Alipore Police Station stated that when he came to 15, Burdwan Road at 6-30 a.m. he found Nandalal standing in the portico. His hands were tied with a rag; a muffler and a napkin were on his face but Nandalal could speak quite all right. Sew Dharsau Singh (P. W. 17) stated in cross-examination that Nandalal said that he had been terrorised by the dacoits at the point of a knife. Reading the evidence of the witness as a whole, we do not think that there could be any occasion for the witness to hear the statement being made by Nandalal. Obviously this statement could have been made in the context of the facts of the case only when Ram Sundar Kanoria openly charged Nandalal with treachery. Sew Dharsan was not likely to be present just at that time. We think however that this witness was stretching a point in favour of Nandalal or drawing upon his imagination. We are not prepared to accept this part of his evidence.

Even if Nandalal said so, it does not help him. It was a part of the plan to act like that, to say like that. The evidence of the two neighbours Bimal Kumar Bose (P. W. 20) and Balaram Ghosh (P. W. 26) shows that the senior Kanoria was heard rebuking the durwan by calling him a traitor. This would clearly demonstrate that Ram Sundar Kanori had no manner of doubt the moment he found Nandalal in the portico that he had behaved in a most treacherous fashion. The entrance door was flung open and Nandalal stood in front of it pretending helplessness. More elaborate pretence is difficult to conceive. We have ourselves inspected the muffler, the napkin and the rag with which his hands were said to have been bound. These would not render ineffective even a boy of 10. The evidence indicates that there was a torn piece of cloth taken from the mouth of a bucket which was used for the purpose of tying his hands. It is remarkable that the napkin found on Nandalal's face was found to contain human blood. On Nandalal's behalf it has been argued that the evidence does not conclusively prove that the napkin which had been sent for chemical examination was the identical napkin that had been seized from Nandalal's person. We have read the relevant evidence and have no manner of doubt that the napkin on Nandalal's face was the napkin which was found to contain human blood. It was the napkin supplied by Bhamar and according to the approver, Samunder Singh after the loot and the murder examined the bandage on Nandalal's face and expressed satisfaction that it was all right. It is only reasonable to think that the napkin thus became blood stained by being touched by Samunder's hands fresh from the murder of Bhagabati Prosad. According to Padma's evidence some of the durwans used to go upstairs sometimes. To thepolice, however, she stated that she did not quite remember if Nandlal had any occasion to go upstairs. The Investigating Officer deposed that the approver Pratap Singh had told him that the latter had been asked to mount guard on Nandlal in case he betrayed. It is to be observed that this evidence is in conflict with the approver's evidence in court. There was no question at all of maintaining watch on Nandlal. The approver deposed that Nandalal was a willing participant in the crime but he insisted on playing a passive part. The mere fact that such a statement was made at one stage to the police would not necessarily discredit the whole of the approver's evidence nor would it destrory the entire body of circumstantial evidence which points clearly to Nandalal's guilt. It is true the

evidence against Nandlal lies within a short compass. But that evidence properly assessed points only to one conclusion, namely, that he was deeply in the conspiracy although to keep up appearances he wanted to play a passive part. With that end in view the counterfeit of the fake bandage was hit upon. He was bound not with ropes, not with strings but with his own muffler and a torn napkin supplied by Bhamar. His hands were tied by the approver with a piece of rag which was found on the mouth of a bucket nearby. No one can be deceived by such device. This was a trickery, an artifice which cannot deceive even a child. It was suggested on Nandalal's behalf that the hands could not be loosened but somehow he had succeeded in loosening the bandage on his head and face. We definitely refuse to believe it in view of the fact that the rag used for tying his hands could not possibly have disabled him. Inspector Tapendra Mohan Chakravortti (P. W. 55), found Nandlal at 6-30 a.m. standing with his hands tied. The witness deposed that Nandalal's face was very loosely bound with a muffler and a napkin. He was standing in the portico. The witness removed the muffler and the napkin off his face and untied his hands, The seizure list shows that a muffler, an old torn napkin and a piece of old torn cloth were seized amongst other things. It appears in evidence that the torn cloth was found tied round Nandlal's hands. We have noticed Nandlal's defence that he was taken unawares and overpowered by unknown miscreants, that a dagger was held over him to silence him and on account of continued intimidation and threat it was impossible for him to raise an alarm. In his examination under Section 342 Nandlal does not say a word that he was rendered immobile or ineffective or that he yielded to force or threat of force. He merely said that he knew nothing and that he was a new recruit. We completely disbelieve the suggestion that he had been rendered ineffective by unknown raiders. The seizure list (Ext. 13) was attested by Patodia (P. W. 28) and others. There is no question that the muffler, napkin and torn piece of cloth produced were the ones that were actually seized. On Nandalal's behalf it was strenuously argued that there is no evidence to suggest that Nandalal ever went to 36, Diamond Harbour Road or even met any of the conspirators at 15,Burdwan Road or that he received any part of the booty. It is true there is no such evidence. At the same lime there is the evidence that he was very friendly with Ruhr and having regard to all the facts of the case we are definitely of opinion that instead of

putting himself in the forefront Nandalal was operating through Ruhr who was another durwan at 15, Burdwan Road. Indeed, it would require a stout heart for the durwan on duty to agree to the dacoity being committed when he would be on duty. It was Nandalal's hour and he agreed to take the risk. It seems to us on reading the evidence as a whole that Nandalal was considered to be the safe man for the job. It was Ruhr Singh who suggested that the dacoity should be committed at the time when Nandlal would be the durwan on duty. In the very nature of things the part which Nandalal agreed to play was the most difficult part since the crime when detected, suspicion would at once fall upon him. Consequently it became necessary for Nandalal to assume a vole of passivity and in aid of that he hit upon the device of an elaborate counterfeit suggesting as if he had been bound up and rendered ineffective. But that pretence did not succeed. It did not deceive any one and we consider it very important that Ram Sundar Kanoria at once saw it through and charged him with having behaved in a treacherous fashion. We do not think it at all probable that Nandalal was an unwilling person compelled to maintain silence at the point of the dagger; nor are we prepared to believe that he was made ineffective by being bound by the wretched rags and the muffler produced in evidence in the case. This simulated ineffectiveness sat ill on a durwan who was expected to guard the gate. He acquired the ability to protest when he was charged with disloyalty and treachery by the elder Kanoria; but he never raised his voice after the 'raider' had left to rouse the sleeping household. As we have said, it deceived no one, least of all the people who came up immedialely after the occurrence including the inmates. It was suggested that Nandlal hailed from Bihar and therefore it was not likely for him to associate with the other aroused who were people hailing from Rajasthan. This argument does not appeal to us. The mere fact that he did not open the front gate with the consequence that the approver, Semunder and Bhamar were compelled to jump it does not prove that he was not in the conspiracy; he opened the vital entrance door in the porch which led to the stairs. Nor are are impressed with the other argument that it mattered nothing whether the gag on Nandalal was tight or loose because Ruhr Singh and the approver mounted guard upon him. This argument presupposes that Nandalal was not in the conspiracy and that he was forced into a position of utter helplessness by the superior strength of the approver and Ruhr Singh. There is no

suggestion at all in the evidence in support of this case. It was said that Nandlal was selected as the most inexperienced person who was likely to further the purpose of the conspiracy by being overpowered. This would imply that Nandlalwas a victim of the conspiracy. There is no basis in evidence for the suggestion. We do not think that he was terrorised at all. There was no question of his being frozen with fear into imbecility and inaction. He knew what was happening. He let the raiders in and indulged in a make believe that he had been incapacitated even to protest. Even if there is no direct evidence of communication with the conspirators prior to the date of the raid we think we are entitled to draw the inference from the proved facts and attendant circumstances that he shared in the purpose common to all of committing raid in the house. As we have said, the passive part he played was the most daring thing that a man in his situation could do. To be the durwan on duty at air hour when the dacoity was to be committed was no less a daring act than that of Samunder Singh or Bhamar Singh who scaled the wall, threw themselves into the room through the open window, looted cash and valuables and one of whom committed murder. If the act of Samundar and of Bhamar Singh required desperate courage, the act of Nandalal required cool courage, a kind of sustained villainy, not frequently found. Therefore, the passivity of Nandalal is an artifice which in the circumstances proved, firmly establishes his participation in the conspiracy to commit dacoity as well as his complicity in the crime of dacoity with murder.

57. The case against Ruhr Singh depends largely on the evidence of the approver. If the evidence is to be believed, he idea of committing dacoity at 15, Burdwan Road originated with him. It was Ruhr who invited the approver and others to come to 15. Burdwan Road and see things for themselves. Reconnaissance over, a conference was at once held in Ruhr's room. According to the evidence, Ruhr frequently moved from 15, Burdwan Road to 36, Diamond Harbour Road. It was Ruhr who appears to have acted as the link between 36, Diamond Harbour Road and 15, Burdwan Road. Samunder and Ruhr interchanged visits very frequently. That is the result of the evidence and it fell to them largely to decide that the dacoity should take place on a particular day. They did so after having enlisted the support and co-operation of Nandalal. Indeed, it was not easy to induce a durwan on duty to join the conspiracy under cover of a pretence. The evidence shows that

Ruhr and Nandalal were particularly friendly. That by itself would not mean much since they were durwans living in the same place. But Ruhr's movements deposed to by the approver taken with other circumstances would suggest that it was Ruhr who piloted the whole project. Indeed, the plan seems to have originated with him. It was he who hit upon the device that the ladder should be used to reach the open window which was the point of entry for Samunder Singh and Bhamar Singh. It was Ruhr who led the Investigating Police Officer to 36, Diamond Harbour Road when the approver and Bhur Singh were arrested on the 5th. If the evidence of Padma Debi is to be believed, Ruhr had been to her room upstairs several times. Taking the evidence of the approver as a wholeas well as the attendant circumstances, we are persuaded that Ruhr was at the place going up and down the stairs during the plunder and murder with a view to prevent interference with the execution of the plan which he had taken good care to pilot. In his examination under Section 342 he merely stated that he was in bed and knew nothing. A complaint is made that he was not asked to say what he had to say about the approver's evidence that he had been going up and down the staircase when the dacoity was in progress. This was just one item of evidence against him. He was defended at the trial and the omission is not such as to have caused prejudice. There is evidence in the case to prove that Ruhr was present when the injured Bhagabati Prosad was being taken to hospital. There is no definite evidence that other servants and durwans also came up and congregate in the portico when the injured was removed. But according to Ram Dulari Singh as well as Sew Dharsan Singh, Ruhr was present at the time when the injured was being sent to hospital. It was not Ruhr's hour of duty. Normally he would be asleep unless it could be shown that by reason of the row made, the servants and durwans had been awakened from sleep. Ruhr was not in his room but quietly hanging about the place. This amongst ottiers would be a piece of circumstantial evidence corroborating the approver. Indeed, Ruhr had no sleep.

58. Taking into account the whole of the evidence, we are of opinion that the approver's evidence has a ring of truth about it. We are not unmindful of the caution given by the Judicial Committee in the case of Bhuboni Sahu v. The King where it was observed:

'The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of baa character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fall to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence, and the story may be true in all its details as to eight of them, but untrue as to the other two, whose names have been introduced because they are enemies of the approver.'

59. We have kept this caution in mind in dealing particularly with the cases of Nandalal Singh and Ruhr Singh. It is remarkable that there is not even the breath of a suggestion of enmity between the approver and any of the appellants. We have asked ourselves the question a number of times--what may be the reason for the approver for falsely accusing these appellants. We have found no answer. Indeed, the evidence does not give any answer. Besides being an approver there is nothing in the case to indicate that Pratap Singh was a detestable person. We have said above that we have found in his evidence a ring of truth, Even so, we have looked for some additional circumstances in the entire body of evidence,direct and circumstantial, to see if they fortify us in the belief that the case against the appellants as sought to be proved by the approver is true. The Judicial Committee pointed out in the case of Srinivas Mall v. Emperor, 51 Cal WN 900: (AIR 1947 PC 135) that the degree of suspicion attaching to approver's testimony might vary from case to case. In the case before us we are persuaded, on a review of the entire evidence, that even slight corroboration of the approver's testimony would be sufficient to bring home the charges to the appellants. Without repeating, it may just be mentioned that the evidence of conduct, of association which we reviewed acquires a sinister significance in the light of the totality of the facts proved in the case. While fully alive to the desirability of corroboration, we are prepared in this case, for the reasons we have again to act on the approver's testimony alone and upheld the convictions of Nandalal Singh and Ruhr Singh even if the corroborative evidence in their case is considered slender or meagre.

60. The evidence of the recoveries would, in our opinion, furnish a satisfactory basis for the belief that the approver spoke the truth. As regards Nandalal and Ruhr we are satified that the conduct of both was such as taken with the entire body of evidence would clearly establish their guilt. Besides, by reason of the evidence of conspiracy, the acts and declarations of the co-accused of these two persons would affect them in the same measure as those who were responsible for the acts and the declarations. The acts and declarations of one will become the acts and declarations of the rest. We have indicated that we have believed that there was a conspiracy afoot. Consequently anything said or done by anybody in reference to the common intention will prove the existence of the conspiracy as well as the participation of the persons concerned.

61. Thus the evidence of the approver receives substantial and independent corroboration as to the crime as well as to the persons involved in the crime. The evidence of association confirms the approver's testimony of meetings aad conferences. The presence of Nandalal and Ruhr at the place and hour, their participation, Nandalal's pretence and the fact of Bhur deputising for the approver at the substation at the fateful hour are independently corroborated. The entry inside the room by means of a ladder by Samunder and Bhamar, the loot and the murder are all corroborated by unimpeachable evidence. The division of booty, the recovery of stolen articles and their disposal are clearly corroborated by evidence to which no kind of taint attaches.

62. Some persons whose evidence would be expected not having been called, explanations were given by the prosecution. We have considered the explanations and they appear to us to be entirely satisfactory. Indeed the prosecution was not obliged to call all witnesses irrespective of their number and reliability. There was in this case nothing to show that anyone was withheld out of oblique motive. We mink all material witnesses whose evidence was essential to the unfolding of the narrative uponwhich the prosecution depended were called in the case and no adverse inference arises.

63. The evidence of overt acts which we have reviewed clearly establish that Samunder, Bhamar, Nandalal and Bhur were guilty of dacoity with murder. They

have accordingly been properly convicted under Section 396. We also find on evidence that these four persons along with Bhur Singh were proved to have conspired to commit dacoity. Accordingly, they have been rightly convicted also under Section 120B/395 of the Indian Penal Code.

64. It remains to consider the question of sentence. There is, in our view, nothing to be said in favour of Samunder Singh and Bhamar Singh. There is no extenuating circumstance in their case. Bhagabati Prosad was murdered in the immediate presence of his wife by Samunder Singh while Bhamar Singh looted and plundered. As regards Nandalal Singh and Ruhr Singh we do not think there is any circumstance which might reasonably be pleaded in mitigation of the sentence in the case of either of them. Ruhr was the person who piloted the whole thing. It was with him that the scheme originated. He seems to be a determined man who would refuse to be deterred by adverse circumstances. When the plan was about to collapse, it was he who thought of the ladder ana that saved the plan. Nandalal indulged in an elaborate pretence and tried to hoodwink everyone; he is 5'-4 1/2' of deceit, for that is his height; he is treachery and disloyalty incarnate. We have been asked to consider the cases of Nandalal Singh and Ruhr Singh on the ground of their age. They were said to be 19 at the time of trial. They might have been young in years but possessed quite mature minds. They carried old heads on their shoulders. It was also argued that Section 396 provides that punishment for dacoity with murder may range from death penalty to a prison sentence. Accordingly, a wide discretion is given to the court. But the discretion has to be properly exercised in every case. We have not found anything which might be taken as a mitigating circumstance in favour of any of the appellants. It was Nandalal's duty to guard and protect, shut the door against all comers, but he opened the door to the plunderers who took the master's money as well as his life. The same was the case with Ruhr. We think, therefore, in all the circumstances that the sentence of death passed on each of the four offenders was the only proper sentence. The sentence on Bhur Singh was also justified. It mattered little that he was not actually present at the Kanoria House at the time of raid. It was he who worked as the approver's proxy at the Diamond Harbour Road Sub-station and enabled him to participate in the raid.

65. We, accordingly, dismiss the appeals, accept the Reference, and confirm the sentence of death passed on the four appellants Samundar Singh, Bhamar Singh, Nandalal Singh and Ruhr Singh. The sentence on Bhur Singh is also affirmed.

D.N. Das Gupta, J.

66. I agree.

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