

Mannalal Khatic Vs. the State

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Court : Kolkata

Decided On : Sep-20-1966

Reported in : AIR1967Cal478

Judge : Amaresh Roy and ;S.N. Bagchi, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 154, 162, 221 to 232, 233, 234, 235, 235(1), 236, 535 and 537; ;Indian Penal Code (IPC) - Sections 155, 302 and 324; ;Evidence Act - Section 157

Appeal No. : Criminal Appeal No. 9 of 1963

Appellant : Mannalal Khatic

Respondent : The State

Advocate for Def. : Ajoy Kumar Basu and ;P.C. Baarooah, Advs.

Advocate for Pet/Ap. : Bejoy Kumar Bhose and ;Bolin Basu, Advs.

Disposition : Appeal allowed

Judgement :

Bagchi, J.

1. The accused-appellant Mannalal Khatic stood a trial, charged with two counts of distinct offence, viz. under Section 302 of the Indian Penal Code, for having

committed murder of Gulab, and under Section 324 of the Indian Penal Code for having caused hurt to Dayaram with a sharp-cutting weapon, at the Third Criminal Sessions of 1963 in the Original Criminal Jurisdiction of the Calcutta High Court before the Hon'ble Mr. Justice T. P. Mukherjee and a Special Jury. Of the nine jurors, six found Mannalal Khatic, the accused-appellant guilty on the charge under Section 302 of the Indian Penal Code for murdering Gulab and seven found Mannalal Khatic, the accused-appellant guilty for having caused hurt to Dayaram with a sharp-cutting weapon. The learned Judge agreeing with and accepting the majority verdict of the Jury on both the charges against the accused-appellant Mannalal Khatic, convicted and sentenced him under Section 302 of the Indian Penal Code to suffer rigorous imprisonment for life and under Section 324 of the Indian Penal Code rigorous imprisonment for three years respectively, the latter sentence to run concurrently with the former one.

2. The accused-appellant preferred this appeal against the conviction and sentence on both the charges before the Criminal Appellate Jurisdiction of this Court under Section 411-A of the Code of Criminal Procedure, and on an application made in that behalf had also obtained leave to appeal under Clauses 'b' and 'c' of Sub-section (1) of Section 411-A of the Code of Criminal Procedure, on 27th November, 1963.

3. The prosecution case as presented before the Court appearing from the charge of the learned Judge to the Jury is as follows:--

4. Tulshiram Mali or Khatic (P. W. 16) lives at Presidency Town of Calcutta, 34, Sibtala Street near Tarasundari Park, P. S. Barabazar. The marriage of his daughter, Taradevi, was arranged with one Mahadeo Khatik (P. W. 18), brother of Ganesh Khatik of Howrah and the marriage was to take place on the night of 17th May, 1962. On that day, between 10-30 and 11 O'clock of the night, the bridegroom party came in a procession from Howrah Town to Sibtala Lane within the jurisdiction of this Court, The bridegroom himself was in the procession sitting in a coach drawn by four horses. Inside the coach certain ornaments, meant for the bride were kept in a box by his side. Five friends of the family of the bridegroom came as the bridegroom's escorts. Near about 11 P. M. the procession

came near Tarasundari Park, accompanied by a Band Party and Gaslight bearers walking in a line. The procession was a licensed one and two constables and a Head--Constable accompanied it from Howrah to Tarasundari Park. Sibtala Street is a narrow lane, according to the prosecution, and the procession as a whole could hardly enter into the said lane. So, the procession dispersed near Tarasundari Park and the coach carrying the bridegroom entered inside the lane. While the coach carrying the bridegroom was approaching the house of Tulsiram Khatik (P. W. 16) the accused Mannalal forcibly tried to get into the coach. He was resisted but he could not be desisted from his attempt at boarding the coach. One Chunilal Gupta (P. W. 20), one of the five escorts coming with the bridegroom party's procession gave a slap to the accused-appellant Mannalal Khatik. The accused-appellant thereupon used abusive language and left the place threatening with dire consequences. Thereafter, Lachmi Prosad (P. W. 21) of the bridegrooms party took their dinner at the bride's father's house, i. e. Tulshiram's house and came out to Kalikrishna Tagore Street near Tarasundari Park. When they were talking standing at a spot beyond the eastern periphery of Tarasundari Park the accused Mannalal came out from the southern side of the park and proceeded towards Chunilal, Ramnarayan and Lachmi Prosad. The accused then came close to them and began to abuse them. They attempted to catch hold of the accused, with a view to take him to the bride's father, and gave him a chase for the purpose. The accused, thereupon, entered into a lane called 'Haripada Gali' and came out shortly thereafter armed with a dagger in his hand gave a chase to Lachmi Prosad, Ramnarayan and Chunilal, Lachmi Prosad ran eastward over the north footpath of Kalikrishna Tagore Street pursued by the accused Mannalal with a dagger and deceased Gulab, Lalmohon (P. W. 15) and Chunilal Gupta (P. W. 20) also ran east-ward along the southern footpath of Kalikrishna Tagore Street. Lachmi Prosad was chased upto Halwashia lane and as he entered into the lane the accused stood at the mouth of the lane and then turned back. Lachmi Prosad also turned back and followed the accused. Just then Gulab and Lalmohon came near about that place. Gulab tried to cross the road, i.e. Kalikrishna Tagore Street with a view to reach the northern footpath from the southern footpath. The accused with a dagger came in front of Gulab just on the East of a temple that stands on the middle of Kalikrishna Tagore Street, and there stabbed Gulab on the

chest. From there the accused ran a little further to the east and then turned back and ran westward. Dayaram Khatik (P. W. 10) was one of the bridegroom's party, as also one Sudama Dosad (P. W. 12). Both Dayaram and Sudama were out on Kalikrishna Tagore Street, and when Dayaram was proceeding westward beyond Tarasundari Park. Sudama sat down by the road-side to ease himself. Two other persons were then coming following Dayaram and Sudama. Dayaram heard a noise, turned back and found the accused chasing those two men who were following Dayaram. Those two persons on being so chased by the accused ran past Dayaram and Dayaram also began to run; the accused came up to Dayaram and gave Dayaram a blow with a dagger on Dayaram's left buttock.

5. When Gulab was stabbed on his chest by the accused and fell down, Lachmi Prosad (P. W. 26) and Lalmohon (P. W. 15) came upon the site where Gulab had fallen down being stabbed, Gulab gave oath to them that he had been stabbed by the accused Mannalal Khatik. Gulab was carried from Kalikrishna Tagore Street to a ledge nearby on northern footpath and kept there seated for some time. Gulab's brother Buddhu (P. W. 3) happened to come to that spot. A taxi was called and Gulab was put inside the taxi. While being put inside the taxi. Gulab again named the accused as his assailant to his brother Buddhu (P. W. 3). Gulab was taken to the Medical College where he was declared dead. Buddha stayed away at the hospital and sent Lalmohon (P. W. 15) to Barabazar Thana for lodging information. After having been stabbed at his buttock Dayaram accompanied by Sudama went to Barabazar P. S. From the Thana Dayaram was sent to Marwari Relief Hospital. At the Marwari Relief Hospital Dayaram's wound was bandaged and he came back to the Thana when Sudama allegedly lodged information about Dayaram having been stabbed at his buttock by the accused. Lalmohon (P. W. 15) had in the meantime, lodged an information at the Thana about the accused having had stabbed Gulab on his chest resulting in Gulab's death. The Police started investigation on the information received from Lalmohon. The two occurrences, the stabbing of Gulab on the chest and the stabbing of Dayaram at his left buttock by the accused were interconnected. On completion of investigation the accused was charged under Sections 302 and 324 of the Indian Penal Code respectively.

6. The defence was a complete denial of the two occurrences as stated by the prosecution. The defence story was that Tulshiram the bride's father, had made arrangements for entertainment of his guests inside Tarasundari Park and the entertainment included supply of alcoholic drinks. When the guests were being thus entertained, there was a drunken brawl inside the Tarasundari Park and in course of that brawl Gulab might have received the injuries which later caused his death. At the drunken brawl inside the park, Gulab and Dayaram had a fight, and Gulab might have injured Dayaram on the buttock with a dagger and Dayaram might have snatched away that dagger and stabbed Gulab on the chest. The further case in defence was that because of his second wife Piyari, Buddhu, the brother of Gulab wanted to do away with Gulab and that Buddhu was responsible for his brother Gulab's death, and that Lalmohon and his associates helped Buddhu in causing Gulab's death. The furthermore case in defence was that the accused Mannalal had been falsely implicated on a bona fide mistaken identity.

7. The trial of the accused Mannalal Khatik opened before the Sessions Court on 4th day of July, 1963. The name of the accused was called out and the charges being (1) committing murder of one Gulab Khatik on or about 17th day of May, 1962 at or about midnight at Sibbala Street near Tarasundari Park at Calcutta by stabbing him with a knife under Section 302 of the Indian Penal Code, and (2) voluntarily causing hurt to one Dayaram Khatik on or about 17th day of May, 1962 at or about midnight at Sibbala. near Tarasundari Park at Calcutta by means of a knife or a dagger under Section 324 of the Indian Penal Code, were read over and explained to the accused by the Clerk of the State and his plea was taken. The accused pleaded not guilty to both the charges and claimed to be tried on each of the charges. A Special Jury was duly empanelled and the jurors selected their Foreman. The Jury was duly sworn in. The State was represented by the learned Advocate Mr. Ajoy Kumar Basu and the accused was represented by the learned Advocate Mr. Bejoy Bhose. Mr. Bhose stated before the Court that the charge No. 2 was not correct in respect of time and place of the alleged occurrence. The learned Judge directed that the matter would be heard when the hearing of the case would commence. The trial was adjourned to 10th July, 1963. On 10th July, 1963, Mr. Bhose appearing for the accused, submitted for amendment of the charges, and prayed for separate trial on the two charges. The learned Judge

directed the charges to be amended as follows :--

(1) Committing murder of one Gulab Khatik on or about the 17th day of May, 1962 at or about midnight at Kalikrishna Tagore Street at Calcutta by stabbing him with a knife or dagger under Section 302 of the Indian Penal Code and

(2) Voluntarily causing hurt to one Dayaram Khatik on or about the 17th day of May, 1962 at or about the midnight at or about Kalikrishna Tagore Street, Calcutta, by means of a knife or a dagger under Section 324 of the Indian Penal Code.

8. The charges were read over and explained to the accused and he pleaded 'not guilty' to each of the charges and claimed to be tried. The learned Counsel for the State then commenced chief examination of the witnesses followed by cross-examination by Mr. Bhose for the accused. The trial continued on and from 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 22nd, 24th, 25th, Jury and concluded on 26th of July, 1963.

9. Mr. Bhose appearing for the accused-appellant Mannalal Khatik first contended before the Court that on the very face of the two charges upon which the accused was tried, the trial of the accused in clear contravention of the mandatory provisions of Section 233 of the Code of Criminal Procedure was null and void, and that the convictions and sentences passed against the accused at such a trial should be set aside. Mr. Bhose next contended that the evidence as admitted before the Sessions Court could neither establish beyond reasonable doubt either of the occurrences relating to two distinct offences as stated in the charge, nor the association of the accused with either or both of the offences as stated in the charge. The further contention of Mr. Bhose was that on material points of law and fact relating to the offences charged the learned Judge's charge to the Jury was characterised by a number of misdirections and non-directions, amounting to misdirections which eventually misled the jury in coming to their verdict against the accused at the trial for both the offences charged and materially prejudiced the accused, resulting in the miscarriage of justices. He, therefore, submitted that the accused should be acquitted of the charge for the two offences upon reversal of the verdict of the Jury thereon, and the convictions and sentences passed thereon by the learned Judge should be set aside.

10. The first and the foremost point for consideration before us is whether there had been contravention of Section 233 of the Code of Criminal Procedure, 1898 at the trial of the accused before the Court of Sessions on a charge of two counts of distinct offences; and, if there had been contravention of Section 233 of the Code of Criminal Procedure, 1898 at the trial, whether the trial was null and void.

11. The minutes of the proceedings dated the 10th day of July, 1963 at the trial of the accused in the 3rd Criminal Sessions of 1963 before the Sessions Court in the Original Jurisdiction of this Court, record, inter alia, as follows :--

'The amended charge, as directed by his Lordship is; (1) committing murder of one Gulab Khatik on or about the 17th day of May, 1962 at or about midnight on Kalikrishna Tagore Street, Calcutta by stabbing him with a knife or a dagger under Section 302 of the Indian Penal Code and (2) voluntarily causing hurt to one Dayaram Khatik on or about the 17th day of May, 1962 at or about midnight on or about Kalikrishna Tagore Street, Calcutta by means of a knife or a dagger under Section 324 of the Indian Penal Code. Both the charges are read over and explained to the accused by the Court Interpreter and his plea is taken separately on each charge. The accused pleads 'not guilty' on each charge and claims to be tried.'

12-13. Then the trial opened. At the commencement of the trial on the 10th day of July, 1963 Mr. Bhose, the learned Counsel appearing, for the accused before the Court of Sessions prayed for amendment of the charges and also for separate trial on the two charges. The learned Judge ordered amendment of the charges as recorded above, but did not pass any order for separate trial of the accused on each of the charges.

14. Section 238 of the Code of Criminal Procedure, 1898, runs as follows :--

'For every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately, excepting the cases mentioned under Sections 234, 235, 236 and 239.'

Sections 234, 235 and 236 of the Code of Criminal Procedure, 1898 deal with the joinder of charges and the trial of different offences against the same accused at one and the same trial, while Section 233 of the Code of Criminal Procedure, 1898 states the general rule that for every distinct offence of which any person is accused there shall be a separate charge and each charge shall be tried separately. Sections 234, 235 and 236 are exceptions from Section 233 of the Code and enable a plurality of offences to be dealt with in the same trial against the same accused. According to Section 234 of the Code not more than three offences of the same kind committed within the space of 12 months can be tried together against a person. The limitation contained in Section 235, Sub-section

(1) of the Code of Criminal Procedure, 1898 points out that more offences than one committed by the same person can only be tried together if such offences are in one series of acts so connected together as to form the same transaction. The one and the only one limitation in Section 235, Sub-section

(1) of the Code of Criminal Procedure, 1898 is that accusation should be of more offences than one committed by the same person in one series of acts so connected together as to form the same transaction. Sub-section

(1) of Section 235 of the Code of Criminal Procedure, 1898 deals with three matters; accusation, charge and trial. It says nothing about verdict. The condition is expressed in the words 'in one series of acts so connected together as to form the same transaction' and 'more offences than one are committed by the same person', then he may be (a) charged with, (b) tried at the one and the same trial, and (c) for every such offences. It is on the basis 'of what appears on the face of the accusation that the Court may proceed to charge and try. The accusation is necessarily anterior to the exercise of the discretion to the charge and trial under Section 235, Sub-section

(1) of the Code of Criminal Procedure, 1898. These are stages subsequent to the accusation. In case of trials in the High Court or Courts of Sessions charges will be framed on the accusation. It would suffice for the purpose of justifying the joinder of charges of two distinct offences of which any person is accused and his trial on such charges for such two distinct offences at the same trial if and when the

accusation on the face of the charges alleges that the two or more distinct offences had been committed by such accused in one series of acts so connected together as to form the same transaction. So long as the accusation against the accused is that he committed in one series of acts so connected together as to form the same transaction, more distinct offences than one, the necessary ingredients of a charge regarding 'the same transaction' as occurring in Section 235, Sub-section

(1) of the Code, would be fulfilled. So, the relevant point of time in the proceedings at a trial at which the condition as to the sameness of transaction must be fulfilled, is the time of accusation of facts as laid in the charges and not that on the eventual result at the conclusion of the trial. In the present case, the accused--appellant has been charged with two distinct offences

(1) murder of Gulab punishable under Section 302 of the Indian Penal Code, and

(2) voluntarily causing hurt to Dayaram with a knife or a dagger punishable under Section 324 of the Indian Penal Code, at or about the midnight of 17th May, 1962, on or about Kalikrishna Tagore Street. As the minutes of the proceedings before the 3rd Criminal Sessions of 1963 show, did not contain accusation of facts indicating therein that in one series of acts so connected together as to form the same transaction, the two distinct offences with which the accused-appellant had been charged, had, been committed by the accused so as to justify his being charged with the two such distinct offences and tried at one and the same trial for each of such distinct offences. The learned Counsel appearing for the State first attempted to justify the joinder of two distinct offences in one charge and the trial of the accused for such two distinct offences at one and the same trial relying on Section 234, Sub-section

(1) of the Code of Criminal Procedure, 1898. His argument did not impress us for the simple reason that Sub-section

(2) of Section 234 of the Code of Criminal Procedure clearly negatives his contention. Sub-section

(8) of Section 234 runs as follows :--

'Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or any special or local law.'

15. The accused-appellant was charged for one distinct offence punishable under Section 302 of the Indian Penal Code as well as with the other distinct offence punishable under Section 324 of the Indian Penal Code. So, both the offences are not of the same kind since they are not punishable with the same amount of punishment under the same section of the Indian Penal Code. The learned Counsel for the State then relied upon Section 235, Sub-section (1) of the Code to justify the joinder of the two distinct offences in one head of charge against the accused-appellant and his trial for two such distinct offences at one trial. A charge is the first notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty what the prosecution intends to prove against him and of which he would have to clear himself. In this case, two distinct offences have been dealt with in one head of charge in two counts against the accused-appellant at one and the same trial. The joinder of two distinct offences in one head of charge and trial of the accused-appellant for two such distinct offences so joined at one and the same trial could be justified only under Section 235, Sub-section (1) of the Code of Criminal Procedure, 1898. If, upon the accusation of facts stated in the two counts in the charge it would have appeared in clear and unmistakable terms that the accused-appellant was concerned in the commission of a series of acts so connected together as to form the same transaction, committing thereby the two distinct offences with which he was charged and tried at the same trial. The accusation of facts upon which the two counts of distinct offences in the charge had been joined for trial of the accused at one and the same trial, would not show that the acts of murdering Gulab and the act of voluntarily causing hurt to Dayaram either with a knife or a dagger were so connected together as to form the same transaction. In the second count of the charge as framed by the committing Court, there was a clear statement 'that while running away after committing the offence in count No. 1' the accused appellant committed the offence or charge in count No. 2, But in the Sessions Court the

expression aforesaid was omitted from the second count of the charge, when charge was amended.

16. The next question that remains further to be considered is whether it could be found that upon the evidence as adduced by the prosecution witnesses, the alleged acts committed by the accused for which he had allegedly committed two distinct offences were so connected together in a series as to form the same transaction within the meaning of Section 235(1) of the Code of Criminal Procedure. What does or does not form part of the same transaction may be considered to be a question of fact in each particular case. Certain tests have been laid down in various cases by which it may be determined whether certain acts do or do not form part of the same transaction. In some cases it has been held that acts may be considered to form part of the same transaction if there are between these acts conjoint existence of proximity of time, community of intention and continuity of action. The first of the alleged series of incidents, as the prosecution story indicates, started when the procession of the bridegroom party reached Tarasundari Park from Howrah and the coach carrying the bridegroom was entering Sibtala lane to reach the house of the bride's father Tulshiram Khatik (P. W. 16) at 34, Sibtala Lane. The first in the series of alleged incidents, as deposed to by P. W. 5 Jawaharlal Khatik will appear from questions Nos. 17 to 30 as appearing in the record of the deposition of the said witness. The bridegroom party reached Tarasundari Park at about 11 P. M. At that time other members of the bridegroom party went to Tarasundari Park and witnesses Jawaharlal Khatik (P. W. 5) and four others, that means, Lachmi Prosad Shaw (P. W. 18). Chunilal Gupta (P. W. 20), Ramnarayan Shaw (P. W. 21) and Dayaram Khatik (P. W. 10) who formed the escort party for the bridegroom's party came with the procession near 84, Sibtala Lane (Tulshi's house). The carriage carrying the bridegroom entered Sibtala Lane (Gali) which is a narrow 'Gali'. The carriage stopped at the door of the house of the bride's father, Tulshiram Khatik (P. W. 16). Just when the carriage and the escort party of five came into the narrow street, that means, Sibtala Lane, the accused came pushing people. It was about 5 to 10 minutes past 11 O'clock of the night. The accused after pushing his way through the crowd tried to get into the carriage of the bridegroom and tried to step on to the carriage but Chunilal (P. W. 20) stopped the accused. The accused would not listen. So,

Jawaharlal and four others of the escort party, that means, Lachmi Prosad, Chunilal, Ramnarayan and Dayaram, obstructed the accused. Thus, resistance was first offered to the accused-appellant by five persons when the accused-appellant was attempting to get into the carriage of the bridegroom just when the carriage was entering Sibtala Lane for reaching the house of the bride's father Tulshiram, (P. W. 10) at 34, Sibtala Lane. So, the evidence of the four other witnesses Lachmi Prosad Shaw (P. W. 26), Chunilal Gupta (P. W. 20) Ramnarayan Shaw (P. W. 21) and Dayaram Khatik (P. W. 18) as well as of Sudama (P. W. 12). Tulshiram (P. W. 16) and Lalmohon Khatik (P. W. 15) would be very material for consideration at this stage. (After discussing the evidence in Paras 16 to 25, and pointing out the material irregularities of evidence in the charge to the jury the judgment proceeds:)

25. Thus, upon a factual analysis of the evidence of the witnesses it cannot be held that the alleged incidents as testified to by the witnesses had actually happened at the time, in the manner and at the places as testified to by them, nor could it be held that in the alleged acts of the incidents that had allegedly happened, there was a connecting link joining the accused-appellant in the commission of the two distinct offences in one and the same transaction. On the fact of the charge relating to the two counts of distinct offences there is no accusation of facts showing or tending to show that the acts relating to the commission of the two distinct offences with which the accused was charged were done in a series so connected together as to form one and the same transaction. In Babulal Chaukhani's case (Babulal Chaukhani v. Emperor, AIR 1938 PC 130 (on page 133 col. 2) their Lordships laid down that 'the relevant point of time in the proceedings on which the condition as to the sameness of transaction must be fulfilled is the time of accusation and not that of the eventual result.' The charge as framed against the accused containing two counts of distinct offences does not state that in the acts relating to the commission of the two distinct offences there was the sameness of transaction. The evidence relating to the alleged commission of two offences with which the accused was charged does not also point out the sameness of transaction in the alleged acts relating to the commission of the alleged two distinct offences by the accused-appellant. So, our conclusion is that the charge containing two counts of distinct offences tried at one and the same

trial in which the accused was found guilty by the Jury and convicted and sentence by the learned Judge offended the mandatory provisions of Section 233 of the Code of Criminal Procedure rendering the trial null and void.

26. In support of his argument that the trial of the accused is in violation of the mandatory provisions of Section 233 of the Code of Criminal Procedure, 1898, Mr. Bhose, Counsel for the accused appellant, referred to the fundamental case of Subrahmanya Iyar v. King Emperor, (1901) 5 Cal WN 866: ILR 25 Mad 61 (PC). Subrahmanya Iyar's case, (1901) 5 Cal WN 866: ILR 25 Mad 61 (PC) was considered in Abdul Rahaman's case in . The distinction between Subrahmanya Iyar's case, (1901) 5 Cal WN 866: ILR 25 Mad 61 (PC) and Abdul Rahaman's case , was high-lighted by the Privy Council in Abdul Rahaman's case , in the following observation at page 49 of the report:

'The distinction between that case (meaning Subrahmanya Iyar's case. (1901) 5 Cal WN 866: (ILR 25 Mad 61 (PC)) and the present (meaning Abdul Rahamans case), is fairly obvious. The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused.' In Abdul Rahaman's case , Section 360 of the Code of Criminal Procedure, 1898 was violated. In that connection, the Privy Council observed at page 49 of the report:--'To sum up, in the view which Their Lordships took of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction which in their Lordships' view may be supported by the curative provision of Sections 535 and 537'.

The Privy Council, however, clearly observed that in Subramania Iyar's case, (1901) 5 Gal WN 866: ILR 25 Mad 81 (PC) what the Board kid down was that the violation was of a procedure positively prohibited by the Code and as such it was possible that such violation might have worked actual injustice to the accused. The principle laid down by the Privy Council in Subrahmania Iyar's case, (1901) 5 Cal WN 866: ILR 25 Mad 61 (PC) was not deviated from in Abdul Rahaman's case . In Babulal's case offences which ought to have been separately charged are joined

together but the specific offences are satisfactorily proved by competent evidence corroborated in all necessary respects and no miscarriage of justice is caused, the irregularity is cured under Sections 225 and 537 of the Code. Considering Subrahmania Iyer's case, (1901) 5 Cal WN 866: ILR 25 Mad 61 (PC), the Privy Council in Babulal's case, at p. 132 of the report , right-hand column) observed:

'It has been taken as settled law on allsides throughout this proceeding that an infringement of section 239, Clause (d) of the Code of Criminal Procedure would, if made out, constitute an illegality as distinguished from an irregularity, so that the conviction would require to be quashed under the rule stated in (1901) 28 Ind App 227 (Subrahmania Iyer's case. ILR 25 Mad 61: 5 Cal WN 866 (PC)).'

In Babulal's case the Privy Council reaffirmed that violation of section 239 (d) and section 234 of the Code of Criminal Procedure would come within the rule laid down in Subrahmanya Iyer's case (1901) ILR 25 Mad 61: 28 Ind App 227 (PC). While considering the violation of Section 162 of the Code of Criminal Procedure, 1898, the Privy Council in the case of P. Kottaya v. King Emperor reported in 48 Cri LJ 533: AIR 1947 PC 67 considered Subrahmania Iyer's case. (1901) ILR 25 Mad 61: 28 Ind App 227 (PC) and Abdul Rahaman's case of the report (Cri LJ): (at pp. 69-70) and observed:--

'When a trial is conducted in a manner different from that prescribed by the Code as in Subrahmania Iyer's case, (1901) 28 Ind App 257: ILR 25 Mad 61: 5 Cal WN 866 (PC), the trial is bad and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct the irregularity can be cured under Section 537 and nonetheless so, because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of the degree rather than of kind. This view finds support in the decision of Their Lordships' Board in where failure to comply with section 360 of the Criminal Procedure Code was held to be cured by Sections 533 and 537, The present case falls under Section 587 and Their Lordships hold the trial valid notwithstanding the breach of Section 162.'

The Supreme Court of India in *Janardan Reddy v. State of Hyderabad*, : [1951]2SCR344 while considering the rules laid down in *Subrahmania Iyer's case* (1901) ILR 25 Mad 61: 28 Ind App 227 (PC) and *Babulal's case* observed:

'It appears that in all the three cases, besides being charged with murder rioting and certain other cognate offences, which on the face of the record appear to have been committed in the course of the same transaction, the petitioners were also charged with carrying unlicensed fire-arms. It was contended on behalf of the petitioners that the offence of carrying unlicensed fire-arms was wholly unconnected with the other offences and could not be said to have been committed in the course of the same transaction. It seems that this very point was raised in the High Court, but it was negatived, firstly on the ground that there was no misjoinder of charges and no violation, of the provisions of the Criminal Procedure Code and secondly on the ground that no prejudice had been caused by me so-called misjoinder. The entire argument on behalf of the petitioners was based on *Subrahmania Iyer's case*, (1901) ILR 25 Mad 61: 28 Ind App 227 (PC). That case had somewhat peculiar features because the accused was tried for no less than 41 separate offences in contravention of the provisions of Section 234 of the Criminal Procedure Code and--in these circumstances it was observed by the Privy Council that the mischief sought to be avoided by the section having been committed: 'the effect of the multitude of charges before the Jury had not been averted by dissecting the verdict afterwards appropriating the finding of guilt only to such parts of the written accusation as ought to have been submitted to the Jury.'

'The case has been discussed, explained and distinguished in a number of cases, and it must be read with the subsequent decisions of the Privy Council in and in , which have been understood by some of the Indian Courts to have greatly modified and restricted the very broad rule which at one time there was a tendency to. deduce from certain general observations made by the Privy Council. It may be that on a more .appropriate occasion we may have to review the case law on the subject and lay down the true scope of the pronouncements made by the Privy Council in the cases referred to above and the effect which in law the misjoinder of charges would have upon the trial.'

27. In the case of William Slaney v. State of Madhya Pradesh, : 1956 CriLJ291 the Supreme Court considered the effect of the decisions in the cases of AIR 1947 PC 67 against the background of the rule laid down in Subrahmania Iyer's case, (1901) ILR 25 Mad 61: 28 Ind App 61 (PC) and the rule that when a trial is conducted in a manner different from that prescribed by the Code, the trial is bad and no question of curing an irregularity arises,' was reaffirmed. Two classes of cases were considered by the Supreme Court in Slaney's case, : 1956 CriLJ291 firstly, a class of cases in which the Code deals with the matter expressly, and next class of cases for which there is no express provision in the Code, or where there is ambiguity. Subrahmania Iyer's case, (1901) ILR 25 Mad 61: 28 Ind App 227 (PC) and Babulal Chaukhani's case fall in the first class of cases. Kottaya's case, AIR 1947 PC 67 and Abdul Rahaman's case and Atta Mohammad's case fall in the second class of cases. At page 297 of (Cri LJ): (at p. 122 of AIR) in paragraph 16, the Supreme Court laid down after reviewing the two classes of cases as follows:--

'We prefer this way of stating the law, for the distinction that was once sought to be drawn between an express prohibition and an equally express provision positively stated strikes us as unreal. The real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to 'substantial' denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural justice'.

'It will be observed that disregard of an express prohibition was regarded as curable in Zahiruddin v. Emperor, AIR 1947 PC 75, so the question whether a particular provision is stated in positive or in negative terms is not the true criterion.

'It is possible (though we need not so decide in this case) that the recent amendment to Section 537 in the Code of Criminal Procedure (Amendment) Act, XXVI of 1955 where mis-joinder of charges has been placed in the curable category will set at rest the controversy that has raged around the true meaning of (1901) 28 Ind App 227 (257) (PC), Subrahmania Iyer's case. In any case, our opinion is that the real object of the Code is to leave these matters to the discretion

and vigilance of the Courts.'

In Willie Slaney's case, : 1956 CriLJ291 no rule was laid down by the Supreme Court deviating from the rule as laid down in Subrahmania Iyer's case (1901) 28 Ind App 227 (257) (PC).

28. In the case of Gurbachan v. State of Punjab, : 1957 CriLJ1009 a question arose as to whether non-supply of statement of witnesses recorded under Section 161, Cr. P. C. to the defence at the time of hearing of the case in the Sessions Court had been an infraction of any rule of law or procedure and even if that is so, whether any prejudice has been caused to the accused which cannot be cured by Section 537 of the Code of Criminal Procedure. In Gurbachan's case, : 1957 CriLJ1009 the statements recorded under Section 161, Cr. P. C. were made available only at a late stage of the trial and the Supreme Court held that no prejudice was caused to the accused even though the defence did not get them earlier. Kottaya's case, AIR 1947 PC 67 and Slaney's case, : 1956 CriLJ291 were considered. In Slaney's case, : 1956 CriLJ291 the Supreme Court as in Gurbachan's case, : 1957 CriLJ1009 observed that in judging a question of prejudice, as of guilty, Courts must act with a broad vision and look to the substance and not to the technicalities and omissions. Their main concern should be to see that the accused has a fair trial, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself But in Gurbachan's case, : 1957 CriLJ1009 the rule laid down in Subrahmania Iyer's case, (1901) ILR 25 Mad 61: 28 Ind App 227 (PC) was not also deviated from, A fair trial as in the present case, could hardly be had when, for the two distinct offences at, two separate trials the accused should have been tried before the Jury. We have already discussed the evidence of the witnesses and have pointed out how in the charge to the Jury, the learned judge himself created a mass of confusion in analysing the evidence of the witnesses, and referred to some witnesses as eyewitnesses to the murder of Gulab by accused-appellant though, in fact, such witnesses were not, witnesses to the said occurrence. Placing the evidence of the alleged acts of the accused relating to the alleged commission of two offences which could not be pointed out by the learned Judge in his charge to the Jury as being so connected in the

manner as to form one and the same transaction, the Jury was faced with the problem of tackling a mass of disjointed facts which necessarily confused the Jury in separating fee grain from the chaff, and that certainly prejudiced the accused resulting in miscarriage of justice.

29. The learned Counsel appearing for the State referred to a decision reported in : 1954 CriLJ1155 , Aftab Ahmad Khanyar Khan v. State of Hyderabad. In that case Subrahmania Iyer's case (1901) ILR 85 Mad 61: 28 Ind App 227 (PC), Abdul Rahaman's case , Babulal Chaukhani's case and P. Kottaya's case, AIR 1947 PC 67 were considered. The Supreme Court in Aftab Ahmad's case, at p. 1158 of (Cri LJ): (at p. 439 of AIR) observed:

'We are of opinion that the present is not a case under Section 233 of the Code, and it is, therefore, unnecessary to consider whether the violation of its provisions amounts to an illegality vitiating the trial altogether or it is a mere irregularity which can be condoned under Section 537. Section 233 embodies the general law as to the joinder of charges and lays down a rule that for every distinct offence there should be a separate charge and every such charge should be tried separately. There is no doubt that the object of Section 233 is to save the accused from being embarrassed in his defence if distinct offences are lumped together but the Legislature has engrafted certain exceptions upon this rule contained in Sections 234, 235, 236 and 239. Having regard to the facts and the circumstances of the case, we are of opinion that the present case falls under Section 235.'

30. So, this decision does not help the learned Counsel. The present is not a case under Section 235 of the Code of Criminal Procedure as we have already observed. This is a case under Section 233 of the Code. In Slaney's case, : 1956 CriLJ291 the Supreme Court did not consider Aftab Ahmad's case : 1954 CriLJ1155 . In Aftab Ahmad's case, : 1954 CriLJ1155 the Supreme Court clearly held that that case fell within Section 235 of the Code of Criminal Procedure and did not deviate from the rule laid down in Subrahmania Iyer's case, (1901) ILR 25 Mad 61; 28 Ind App 227 (PC). The learned Counsel for the State then referred to a decision reported in : [1964]3SCR297 , State of Andhra Pradesh v. Ganeswara Rao. But the indirect effect of the rule in Subrahmam Iyer's case, (1901) ILR 25

Mad 61: 28 Ind App 227 (PC) on Section 233 of the Code for direct violation of Section 234 of the Code, where a case does not come within any of the exceptions laid down in the said section (Section 233 of the Code) was not considered in that decision. What was considered in that case was that where an objection to misjoinder of charges contrary to the provision of the Code is taken at an earlier stage of the trial, there is time enough to rectify the error. But, where such objection is raised for the first time only in the High Court what the High Court is to consider is whether prejudice has, in fact, been caused to the accused by reason of the multiplicity of the charges or misjoinder, if any, of the charges. Merely because the accused persons are charged with a large number of offences and convicted at the trial, the conviction cannot be set aside by the appellate court unless it, in fact, came to the conclusion that the accused persons were embarrassed in their defence with the result that there was failure of justice. In the present case as soon as the charge was amended by the Court at the opening of the trial the learned Counsel for the accused before the Court of Sessions demanded separate trial for each of the two distinct offences charged under one head of charge. The learned Judge in the Court of Sessions passed no order on the submission made by the learned Counsel for the accused appearing before him, relating to the demand of the accused for separate trial on separate charge for each of the two distinct offences. We have pointed out from the learned Judge's charge to the Jury a number of misdirections and non-direction amounting to misdirections on material points of law and facts that confused and misled the Jury in coming to a just conclusion, thereby prejudicing the accused and resulting in miscarriage of justice. So, the decision relied upon by the learned Counsel for the State does not help his contention, since the present case is not one falling within Section 239; Clause (d) of the Code, nor does it fall within the scope of Section 235 (1) of the Code. Moreover, the accused took the earliest objection demanding separate trial on a separate charge for each of the two alleged distinct offences. On a review of the authorities we are of the opinion that the principle laid down in Subrahmaniam Iyer's case, (1901) ILR 25 Mad 61: 28 Ind App 227 (PC) which, however, was a decision on Section 234 of the Code of Criminal Procedure applies with equal force to a case as this where there has been not only violation of Section 233 of the Code, but also serious prejudice to the accused, causing,

ultimately, miscarriage of justice.

31. The learned Counsel for the appellant Mr. Bhose next submitted that as the accused-appellant was not in any manner connected with the alleged occurrences upon which he had been charged with two offences, the prosecution from the very start indulged in several manoeuvres and manipulations first of which was the suppression of the First Information Report and the second of which was the tainted Test Identification Parade. Suppression of f.i.r. according to Mr. Bhose. the learned Counsel for me appellant reflected on the truth of the entire prosecution case and materially prejudiced the accused resulting in miscarriage of justice. The tainted T. I. Parade, nonetheless, according to the Counsel, seriously prejudiced the accused-appellant inasmuch as upon the tainted evidence of the identifying witnesses the Jury was misled to conclude as to the guilt of the accused on the two charges, thereby causing miscarriage of justice.

32. First we come to the F. I. R. The brief copy of the charge (at pages 13 to 18) contains the learned Judges discussion on the First Information Report, and some portion of the entries as to time in General Diary admitted in evidence in this case. This part of the charge of the Learned Judge bristles with misdirections on point of law as well as on point of fact, and non-directions amounting to misdirections as well. Section 154 of the Code of Criminal Procedure. 1898 runs as follows:--

'Every information relating to the commission of a cognizable offence if given orally to an Officer-in-charge of a Police Station, shall be reduced to writing by him or under his direction and be read over to the informant Every such information whether given in writing or reduced as aforesaid shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by the Officer in a form as the State Government may prescribe in this behalf.'

The scope and content of Section 154 has been explained by their Lordships of the Supreme Court in the case of R. P. Kapur v. Protap Singh Kainro, : [1961]2SCR143 . Section 154 of the Code does not say that an information of a cognizable offence can only be made to the Officer-in-Charge of a Police Station. The section says 'every information relating to the commission of a cognizable offence if given orally to an officer-in-charge of a police station shall be reduced to

writing by him or under his direction.' It is not correct to say, as the learned Judge has stated in his charge, that the F. I. R. is the first information of a cognizable offence that is given to the police. Further it is not correct to say, as the learned Judge had stated in his charge to the Jury that an information of the commission of a cognizable offence of a hearsay nature given orally to the Officer-in-charge of the Police station would be an information, admissible in evidence for two purposes, i. e., for corroboration of the informant or for contradiction of the informant if and when he is examined as a witness. Any information of the commission or suspected commission of a cognizable offence if given by a person to the Officer-in-Charge of the Police Station orally, shall be reduced to writing in a book prescribed by the State Government. Such information when so laid by a person having direct knowledge about the information would then be admissible as a real information under Section 154 of the Code of Criminal Procedure. Then, such information can be used either for corroboration of the informant or for contradiction if and when the informant gives evidence in Court touching such information. More over, the information must be first in time laid before the Officer-in-Charge of the Police Station before any step for the investigation starts upon any other earlier information received by the Police Officer, whether recorded or not by the Police Officer in the manner prescribed. If an information sought to be admitted in evidence as F. I. R. does not satisfy the condition of Section 154 of the Code, it would not be admissible as F. I. R. for the prosecution to corroborate the informant in Court while deposing but it may be used by the defence to contradict the informant in the witness box while deposing. Any statement to the Police after the investigation had commenced would be hit by the provisions of Section 162 of the Code of Criminal Procedure, 1898. If a witness who laid the F. I. R. on his own knowledge makes a statement in Court on oath different from what he had stated in the F. I. R.-that discredits the evidence of the witness in Court to that extent, but does not make the statement in the F. I. R. evidence in the case. F. I. R. can only be used to corroborate or to contradict the evidence of the maker of the F. I. R. adduced in Court provided the maker had direct knowledge of the information, F. I. R. may in certain circumstances be evidence as to the cause of the informant's death or as part of the res gestae pointing to the informant's conduct. It may be utilised by the defence to impeach the credit of the informant under Section 155 of

the Indian Penal Code. F. I. R. is the earliest version of the case for the prosecution and it must be placed before the Judge and the Jury to weigh the truth or falsity, corroboration or contradiction of the story of the maker of the information. If an accused lodges the F. I. R. the non-confessional portion is admissible against him. The substance of Section 154 is, therefore, that every information lodged in the police station relating to the commission or suspected commission a cognizable offence must be reduced to writing, if not already in written form and a substance of it must be entered in a book kept in the police station. Only that information, be it recorded as in the manner prescribed by Section 154 of the Code, or not, but on which investigation in the case is commenced by the police, is the first information of the occurrence. The law does not contemplate that when in the course of the investigation something is elicited a first information can thereupon be recorded. It is a matter of law whether an information is a first information or not, and it is not open, to the Officer-in-charge of the Police Station to treat an information as such or not, according to his discretion. There is no provision in the Criminal Procedure Code for any preliminary enquiry prior to investigation or prior to the lodging of the information within the meaning of Section 154 Code of Criminal Procedure. If circumstances indicate that after receiving some informations however incomplete, the police officer had commenced investigation, any subsequent information given to him about the commission of the offence by any other person cannot be regarded as first information report in the case and would not be admissible under Section 154 of the Code read with Section 157 of the Evidence Act, being hit by Section 162 of the Code of Criminal Procedure. If there is suppression of F. I. R. and the responsibility for such suppression lies at the door of the prosecution, apart from the inference to be drawn against the prosecution under Section 114, illustration (g) of the Indian Evidence Act, a case of prejudice to the accused is definitely made out (P. Kottaya's case, AIR 1947 PC 67). From the learned Judge's charge to the Jury relating to the F. I. R, and entries in the General Diary in Barabazar P. S. it would appear that before Lalmohon Khatik (P. W. 16) reached the Thana, Dayaram (P. W. 10) and Sudama (P. W. 12) had already reached there. Lalmohon and Buddhu (P. W. 3) brother of deceased Gulab took Gulab to Medical College Hospital after he was allegedly stabbed by the accused-appellant where Gulab

was declared dead. From Medical College Hospital Lalmohon was sent to the Police Station Barabazar where he caused a diary to be made. He reached the Thana near about 1 O'clock of the night of 17/18th May, 1962. Dayaram (P. W. 10) and Sudama (P. W. 12) (after Dayaram had been hit on his buttock between 11-30 P. M. to 12 of the midnight of 17-5-62 allegedly by the accused-appellant), had gone to the Barabazar Police Station in a rickshaw. They went inside the Police Station and came out with the Police Babu and a Constable. The Police Babu at once despatched Dayaram to Marwari Relief Society's Hospital accompanied by Sudama and a Police Constable. His wound was bandaged there. From the hospital he came back to the Police Station along with Sudama and the Police Constable. A diary was made but his statement was taken at about 6-30 a. m. or 7 a. m. of 18-5-62. Dayaram in his cross-examination said that He did not enter inside the police station but Sudama had gone inside the police station. While Dayaram was waiting outside the police station, on a rickshaw, A. S. I. Amiya Banerjee (P.W. 6) came outside the Police Station whom Dayaram saw from the rickshaw. Amiya Banerjee (P. W. 6) as his evidence, shows found at the Police Station Dayaram at about 12-30 A. M. of the night of 17/18th May, 1962. Dayaram had profuse bleeding injury on his left buttock. He was accompanied by one of his relations. They came in a rickshaw. P. W. 6 Amiya Banerjee filled up the injury report form and sent Dayaram to Marwari Relief Society's Hospital nearby. Dayaram returned from the Hospital an hour after, that means, between 1-25 to 1-30 A. M. Amiya Banerjee made a General Diary entry. When the injury report was made by the P. W. 6 Amiya Banerjee within 2 to 3 minutes after 12-30 A. M. the information relating to the commission of a cognizable offence allegedly by the accused in respect of Dayaram had been heard by Amiya Banerjee, Officer then in charge of the Police Station Barabazar. But he did not record the information under Section 154 of the Code of Criminal Procedure in any Book prescribed by law to be maintained at the police station. Sudama (P. W. 12) said (question Nos. 15 and 16) that he went to the Barabazar Police Station and that coming to Barabazar Police Station he saw a Babu and told him 'one man had been struck with a knife'. The Babu who saw the injured told him to go to the Hospital'. Sudama went to the Hospital with the injured. A Constable went with them to whom the Babu had given a paper having written something. From Sudama, the

A. S. I. Banerjee (P. W, 6) first heard about the commission of a cognizable offence but did not hear who the assailant was. He then came out of the Thana room saw the the injury on Dayaram's person and then made an injury report and despatched Dayaram to the Hospital with a Constable. It was about 12 or 12-30 A. M. of the 17/18th May, 1962. So, the aforesaid information given by Sudama to A. S. I. Banerjee was the information under Section 154 of the Code of Criminal Procedure, commonly known as F. I. R. relating to the commission of a cognizable offence but in that information Sudama, as his evidence shows, did not disclose who was the assailant of Darayam and where, how, and under what circumstances Dayaram was stabbed with a knife. It was the duty of the Officer who received the information from Sudama (P. W. 12) to record it under Section 154 Cr. P. C. in the prescribed form filling up the details of the columns of the prescribed form as well as filling up space set apart for recording the statement of the informant under the prescribed columns in the form for recording such information under Section 154 of the Code of Criminal Procedure. After filling up the form under Section 154 Cr. P. C. upon hearing from Sudama and seeing the injury of Dayaram the A. S. I. (P. W. 6) was to have prepared the injury report while sending Dayaram to the Hospital. The failure of the A. S. I. to record the information in the prescribed form immediately when he had received the information from Sudama amounts to suppression of the F. I. R. It is not known what version either Dayadam or Sudama had given to the A. S. I. Banerjee (P. W. 6) just on reaching the Thana at about 12-30 A. M. of 17/18th May, 1962 following which within 2/3 minutes past 12-30 A. M. the injury report was made by the A. S. I. Banerjee (P. W. 6). The A. S. I. Banerjee had no business to keep the information within his sleeves so soon as he had received it from Sudama.

33. The learned Judge in his charge to the Jury did not place this very broad tact pointedly before the Jury and did not tell the Jury that in regard to the information relating to the alleged offence connected with the occurrence in respect of Dayaram, the Police Officer suppressed such information. According to Sudama he stated to the Police Officer (question No. 16) 'One man has been struck with a knife' and nothing more. But, in his examination in chief Dayaram (P. W. 10) said (immediately he was allegedly struck by the accused-appellant (question No. 38) in chief-examination) addressing Sudama 'Manna has struck me with a knife and

he has run away'. Sudama (P.W. 12), therefore, heard from Dayaram immediately after the alleged occurrence that Dayaram had been struck with a knife by Manna, the accused-appellant. But question No. 16 in chief-examination of Sudama would clearly show that he did not say before the A. S. I. Banerjee (P. W. 6) that Manna had struck him with a knife. What A. S. I. Banerjee had heard from Sudama on his reaching the Thana at 12-30 A. M. of 17/18th May, 1962 would not appear from his examination-in-chief. But the very fact of his filling up of the injury report clearly indicates that he had heard in all probability something from Sudama as to how Dayaram was struck and by whom and he did not record such information which he was to have recorded under Section 154 of the Code of Criminal Procedure, in the prescribed form. This act of suppression of the F. I. R. by the Police was to have been clearly pointed by the learned Judge in his charge to the Jury instead of saying in his charge that there is no F. I. R., so far as charge under Section 324 I.P.C. for causing hurt to Dayaram Khatik is concerned. For certain reasons law prevented any statement that a man might have made at me Thana from being treated as F. I. R. in this case. So, as I have said there was no F. I. R. so far as that incident is concerned. That there had been suppression of F. I. R. in regard to alleged offence in respect of Dayaram allegedly committed by the accused-appellant was not told by the learned Judge to the Jury in his charge nor did the learned Judge tell the Jury about the prejudicial effect of such suppression of F. I. R. on the entire prosecution case. This lapse by way of non-direction, and misdirection in the learned Judge's charge to the Jury on such material points of fact and law led the Jury to come to a wrong conclusion on the charge under Section 384 I.P.C. against the accused. The learned Judge was to have analysed the evidence of Dayaram, Sudama and Amiya Banerjee and was to have placed their evidence before the Jury to consider if there had been suppression of F. I. R. by the police in regard to the alleged incident relating to the injury allegedly received by Dayaram from the accused-appellant in the circumstances Dayaram and Sudama had deposed before the Court of Sessions. The learned Judge should have then cautioned the Jury saying that if Jury considered that there was suppression of the First Information Report that would reflect much upon the truth of the prosecution case in regard to the charge under Section 324 I.P.C. against the accused appellant, nonetheless on the truth of the prosecution story alleged to

be connected with the incidents relating to the murder of Gulab allegedly committed by the accused-appellant Manna. In his charge to the Jury, the learned Judge at page 10 of the charge (brief copy) stated. 'These two occurrences were connected and on completion of investigation the accused was charged under Section 302 and under Section 324 of the Indian Penal Code. That is the prosecution case'. The observation of the learned Judge that the two occurrences upon which the two counts in the charge for two distinct offences had been laid were connected should have persuaded the learned Judge to tell the Jury that if the earliest information relating to the occurrence, i.e. regarding Dayaram relating to which the F. L R. was suppressed by the Police, the mischief of law relating to suppression of F. I. R. in regard to one occurrence would equally affect the truth of the other occurrence since the learned Judge impressed upon the Jury in his charge that the two occurrences were connected. Now, Lalmohon (P. W. 15) reached the Thana near about 1 O'clock of the night of 17/18th day of May, 1962 and found Dayaram (P. W. 10) lying at the Thana. P. W. 37 is Probodh Chandra Banerjee, a S. I. of Police, Barabazar. At 1 O'clock of 17/18th May, 1962 Lalmohon came to the Police Station and made a statement before him. The witness recorded the statement as he was then on duty. The statement made by Lalmohon was proved and marked Ext 19. Upon that statement investigation was started. The witness informed about the murder of Gulab by Mannalal Khatik to the Officer-in-charge and the Assistant Commissioner and entered a case against the accused-appellant Mannalal Khatik. At 1-20 A.M. accompanied by the Sub-Inspector Talukdar, that means, P.W. 38 and O. C. Satyendra Nath Chatterjee (not examined as a prosecution witness) witness went out of the thana for investigation accompanied by Lalmohon Khatik. So, upto 1-20 A.M. of 17/ 18th May, 1962 there was in the Thana no recorded information about the accused-appellant having had stabbed Dayaram near a Pan-shop to the western side of Tarasundari Park at about 11-30 to 11-45 P.M. of 17-5-62. Question No. 5 and question No. 6 in the deposition of p.w. 37, P. C. Banerjee would show that at 1 O'clock of 18-7-62 he had recorded what he had heard from Lalmohon. At 1-20 A.M. the police party headed by the witness went out for investigation. The party during the investigation was under the guidance of Satyendra Nath Chatterjee, O. C., who has not been examined as prosecution witness in this case. The . party came back

to the Thana at half-past 6 in the morning. Question No. 117 cross-examination of P. W. 37. On 17/18th May 1982 the General Diary Entry No. 2029 was made at 1 A.M. upon the information given by a person reaching the thana at 1 O'clock of the night. The G. D. Entry No. 2031 was made at 1-20 A.M. of 17/18th May, 1962. The entries were not proved but only the date and hour against the entries were made defence exhibits. It is clear from the entry No. 2031 that 1-10 was changed to 1-20 which the witness (P. W. 37) denied and could not decipher changing of 1-10 to 1-20. When the witness (p.w. 37) was pointedly asked whether 1-10 was changed to 1-20 he said (question No. 135) 'That is not distinctly understood but it seems that something had happened in entry No. 2032 the time is 1-25. Under magnifying glass it was 1-25, according to the witness. The witness in answer to question No. 140 said 'Look at it again. Just see whether it was 1-15 or not?' 'Nothing can be understood like that. But, the person, who wrote it (Amiya Banerjee) if he writes the 2 in that fashion he might have written it. 'Next question-- 141. 'Please look at 2 of 1-20 in entry No. 2031, and 2 of 1-25 in entry No. 2032. These 2's are in the same hand ?/Yes, Regarding this 1-20 in place of 2 there may have been written 1 but something happened and it happened more than one year ago, what actually happened I do not remember, may be that I was changed into 2. 'Question No. 142.

'What about the time in entry No. 2032 'There also what happened I cannot say, because I did not write it. 'Entry No. 2032 would first show the time was 1-15 then changed into to 1-25. The Entry No. 2031 first contained the figures 1-10 which was changed to 1-20. Regarding changing of 1-10 to 1-20 in G. D. Entry No. 2031 the witness said 'that is not distinctly understood but it seems that something had happened. 'With regard to G. D. Entry No. 2032 the time was first recorded as 1-15 and then changed of 1-25. In this connection the witness said (question No. 145) 'This change of 1-15 to 1-25 with regard to entry No. 2032 is not by me, that is by somebody else'. 'I do not remember what had happened. It so happens at times. 'In regard to alteration of timing of G. D. Entry No. 2031 the witness said that he did not remember. Regarding all these interpolations in the timing of the G. D. Entries recorded above, the witness said (question No. 150).....

'What happened regarding this entry I do not know'. The witness in answer to question No. 160 said that he left the Thana at 1-20 A.M. of 17/18th May, 1962 for investigation and he must have made the G. D. Entry No. 2029 between 1 to 1-20 A.M. But, he could not say exactly at what point of time he made the entry. All these interpolations are uninitialled i.e. un-attested. Lalmohon Khatik reached the Thana at 1 A. M. of 17/18th May, 1962. The document said to be F. I. R. lodged by Lalmohon was marked Ext. 10, It would appear from the evidence of P. W. 37 that P. C. Banerjee that he had commenced recording the statement of Lalmohon at 1 O'clock of the night, but the subsequent G. D. Entries pointed out above would show that he did not record any statement of Lalmohon between 1 to 1-20 A. M. of 17/18th May, 1962, before he started the investigation. The G. D. Entry relating to information given by Lalmohon was not proved, nor the alleged information, if recorded, in the form prescribed for recording F. I. R. The statement (Ext. 10) said to be F. I. R. contains no time of its recording. The prescribed form with necessary columns thereof duly filled in, in which the information was to have been recorded under Section 154 Cr. P. G., that means the prescribed form for recording the first information should have been made an annexure to the statement made by the informant and recorded by P. W. 37 Banerjee. In the prescribed form there are certain columns in the top part of the form where specific particulars as to time and date of the occurrence and the gist of occurrence are to be clearly recorded. Below the prescribed columns in the form is a space with a printed heading under which the statement of the informant is to be recorded. The prescribed form with the columns duly filled in did not see the light of the day before the Judge and the Jury at the trial. The statement of Lalmohon (being Ext. 10) which was passed for as F. I. R. and admitted as F. I. R. could not be F. I. R. according to law. It may be a statement but not the information that was to have been recorded under section 154 of the Code of Criminal Procedure. The Supreme Court in Kainro's case : [1961]2SCR143 (Supra) has clearly stated that the Section 154 says that every information relating to the commission of a cognizable offence, if given orally to an Officer-in-Charge of the Police Station, shall be reduced in writing by him or under his direction. The rest, of the section, as we have already pointed out, says that 'the information must be read over to the informant and every such information whether given in writing or reduced to writing as aforesaid, shall be signed by the

person giving it and the substance thereof shall be entered in a book to be kept by such Officer in such, form as the State Government may prescribe in this behalf.' So, it was the duty of P. W. 37 P. C. Banerjee when he had recorded the information allegedly lodged by Lalmohon to make the entry of the information in the prescribed form filling up the relevant columns of the form and attaching with it the detailed statement of the informant relating to the commission of the alleged offence with regard to the death of Gulab who had allegedly been murdered by the accused-appellant. The entries in the prescribed form together with the statement (Ext. 10) would have then constituted the information under Section 154, Cr. P. C. which is commonly known as F. I. R. without the entries in the prescribed form in the circumstances where the alleged informant had gone to the Thana and lodged the information to the Officer-in-Charge, the bare , statement of the informant, recorded on a sheet of paper marked as Ext. 10 could not be -admissible in evidence as F. I. R. that is to be recorded and maintained in the prescribed form under the mandatory provision of Section 154, Cr. P. C. by the Officer-in-Charge at the Thana. If Lalmohon Khatik would not have gone to the Officer-in-Charge of the Police Station and would not have laid the information to the Officer-in-Charge and if he had met any police officer on the way to the Thana and laid the information to him that bare information would have still been sufficient as first information although such information could not be recorded in the prescribed form in the prescribed manner as laid down by the mandatory provision of the Statute. That bare information without even any record of it would have been an information not under Section 154 of the Cr. P. C. but sufficient under Section 157 Cr. P. C. for police to start the investigation. But, as, Lalmohon had gone to the Thana and laid the information to the Officer-in-Charge. P. C. Banerjee (P. W. 37), he was duty-bound to record the information in the manner provided for in the mandatory provisions made by the Legislature in Section 154, Cr. P. C. in the form prescribed. Unattested suspicious, unaccounted for, and unexplained interpolations (which should have been accounted for by P. W. 37 P. C. Banerjee and the other Police Officer, P. W. 6) in the timings relating to the General Diary entries mentioned above, coupled with the non-production of the entries, if any, in the form part of the F. I. R. with the statement part (Ext. 10) which under the law should have formed a part of the F. I. R. should have led the learned Judge to tell

the Jury to consider whether there was suppression of F. I. R. a regard to the alleged commission of an offence under Section 302, I.P.C. allegedly committed by the accused Manna m respect of the death of Gulab and to further consider whether for such suppression of F. I. R. would reflect on the truth of the entire prosecution case.

34. It is the duty of the Judge to decide whether an information is one under Section 154 Cr. P. C. and then to decide if it is or not admissible in evidence under section 35 of the Indian Evidence Act. If, in this case, the learned Judge himself considered that Ext. 10 did not satisfy the requirements of Section 154 Cr. P. C., as it, in fact and law, did not, since the document Ext 10 could sot be on its fact an information under Section 154 Cr. P. C. admissible in evidence under section 35 of the Indian Evidence Act, the learned Judge should have at once told the Jury that he had discarded the information which Lalmohon Khatik had allegedly laid to the Officer-in-Charge of Barabazar Police Station immediately after he had allegedly reached the Thana at about 1 O' dock of 17/18th May, 1962 when he had allegedly laid an information since such information had not been recorded at that time by P. W. 37, P. C. Banerjee following the mandatory provisions of law relating to me recording of such an information under Section 154 of the Criminal Procedure Code. Thereafter the learned Judge should have drawn attention of the Jury as to the nature of Ext. 10 pointedly to the absence of record of the time when the statement was recorded by P. W. 37 P. C. Banerjee as well as to the nature of the interpolations in the timings of the relevant G. D. entries and to the prevaricating evidence of Lalmohon (P. W. 15) and P. W. 37 and P. W. 6 two police officers relating to the circumstances surrounding the lodging of information by Sudama (P. W. 12) and Lalmohon (P. W. 15) respectively and then should have told the Jury to consider whether the prosecution agencies caused the real information to be screened. Thereafter the learned Judge should have told the Jury that if the Jury found suppression of two such informations by the police that would toll a death knell to the entire prosecution case. The learned Judge should not have left document (Ext. 10) and the interpolations of the timings in the G. D. entries mentioned above for assessment by the Jury as to whether or not, the Jury would decide that Ext. 10 in the context of the evidence of interpolations in the timings in the G. D. entries and the evidence of Amiya Banerjee and P. C.

Banerjee, the Police Officers and Lalmohon and Sudama could be admitted in evidence under section 35 of the Indian Evidence Act as an information under Section 154 of the Code of Criminal Procedure commonly known as F. I. R. and accepted by the Jury as such. The learned Judge should have further told the Jury that if the Jury decided that in the circumstances placed by the Judge before the Jury there was suppression of F. I. R. on if, in the circumstances, appearing in the evidence placed by the Judge in this behalf before the Jury even entertained any doubt as to whether or not the F. I. R. had been suppressed the Jury was free to conclude that a prejudice against the accused had definitely been made out.

35. The learned Judge after telling the Jury that there was no F. I. R. in regard to the offence allegedly committed by the accused in respect of Dayaram should have also told that there was also no F. I. R. in regard to the occurrence relating to the offence allegedly committed by the accused in respect of Gulab and, in that context should have also pointed out to the Jury after placing relevant circumstances as discussed above, that if the Jury was of opinion that there had been suppression of F. I. R. in respect of the two offences and that by the Police, the Jury should consider if such suppression of two F. I. Rs. caused prejudice to the accused and reflected on the truth of the entire prosecution case. The misdirections and non-directions amounting to misdirections in the learned Judge's charge to the Jury on the question of F. I. Rs. in the case prejudiced the accused and eventually caused miscarriage of justice.

36. As to the identity of the accused-appellant Mannalal Khatik, the learned Judge (at p. 19 of the charge to the Jury brief copy) stated inter alia 'The next question that caws for your decision is the question of identity of the assailant. I will ask you to split the evidence that has been adduced in this case into three parts recognition of the assailant at the time of the occurrence by persons not known to him from before and his identification subsequently at a T. I, Parade before the Magistrate. 'Later on in the charge the learned Judge (at page 20 of the brief copy) said Jawaharlal, Ramnarayan, Lachmi Prosad and Mahadeo, these four of the bridegroom's party did not know the accused from before and Srichand, Tulshiram, Dayaram, Lalmohon, Joggu and Bhutnath knew the accused from before.' (Re-examination of P. W. 5, Jawaharlal questions Nos. 202 to 206). Jawaharlal

came to Presidency Magistrate's Court at Bankshall Street at 10 a. m. on being summoned. According to him, the T. I. Parade in the Magistrate's Court held at 12 mid-day but not at 2 O'clock. Before the T. I. Parade had held, from 10 O'clock Jawaharlal (P. W. 5) was in the ground-floor of Bankshall Street Police Court, P. W. 26 Lachmi Prosad attended T. I. Parade on the same day as Jawaharlal did and both sat together in the Court house till the T. I. Parade had held. Jawaharlal was re-examined by the Public Prosecutor in the midst of the Cross-examination when he said that in T. I. Parade he had identified the accused (Question Nos. 202 to 203--deposition of P. W. 3 Jawaharlal). Ramnarayan (question Nos. 46, 47, 48 and 48 in chief-examination) first stated that he did not attend any T. I. Parade on the 22nd June 1962 in the Presidency Magistrate's Court where he identified the accused-appellant. According to Ramnarayan the T. I. Parade was held in the afternoon in a Court-room at about 2 to 2-30 P. M. Mahadeo (P. W. 19) (question No. 5). . . . 'When I arrived my mother-in-law came to perform the Parchan when this man came there and wanted to get on the carriage.' He did not tell in his chief-examination about the Test Identification Parade. He was not summoned to identify the accused in T. I. Parade but in his charge to the Jury the learned Judge did not point out this fact and did not tell the Jury that Mahadeo's evidence of identification of accused-appellant should be considered as of no value while identifying the accused in Court as having had been seen by him at 34, Sibbala Lane when he reached there in the carriage.

37. The accused-appellant was first produced before the Additional Chief Presidency Magistrate, Calcutta on the 19th May, 1962 the Magistrate ordered placing the accused to police custody upto 26-5-62. On 26-5-62 Mannalal Khatik, the accused-appellant was produced from police custody. On police prayer he was placed in police custody till 29-5-62 the accused filed a petition before the Additional Chief Presidency Magistrate stating that the police officers were showing him to several sons while he was in police custody. The learned Magistrate passed no order on the petition and ordered the petition to be put up on the next day, that means on 29-5-62. On 29-5-62 when the accused-appellant was produced in Court from police custody he was ordered to be placed in Jail custody till 9-6-62. On 29-5-62, Shri S. K. Ghosh, Presidency Magistrate, has ordered to hold T. I. Parade of the accused and to submit his report on the next date i.e. on 9-

6-62. The Magistrate fixed holding of T. I. Parade inside his Court room at Bankshall Street on 6-6-62 at 2-30 p. m. He ordered the I. O. to arrange and to bring up witnesses. On 6-6-62 T. I. Parade held. The accused was placed again on 6-6-62 to Jail custody upto 23-6-62. Further T. I. Parade in respect of one witness was ordered to be held within the next date i.e. 23-6-62. On 11-6-62 the Magistrate fixed 22-6-62 for T. I. Parade of the accused Mannalal Khatik at 3 p. m. in the Court room I. O. was directed to arrange and bring up witnesses. On 22-6-62 T. I. Parade was held in regard to other witness. P. W. 30 Sri S. K. Ghosh Presidency Magistrate held the two T. I. Parades--one on 6-6-62 and the other on 22-6-62 inside his Court room in Bankshall Street Presidency Magistrates' Court. The identifying witnesses were Lachmi Prosad (P. W. 26) and Jawaharlal (P. W. 5) on the first day. The suspect was mixed up with ten others, of similar dress and similar social status. The identifying witnesses were kept out of sight and hearing of the place of the T. I. Parade. They were called one after the other and as soon as identification by individual witness was over he was taken to a segregated place and was kept there until the T. I. Parade was over. On the identifying witnesses Lachmi Prosad Shaw identified the suspect and Jawaharlal Shaw identified the suspect and the Magistrate was satisfied that the T. I. Parade was held under condition precluding the possibilities of collusion. On 22nd June, 1962 the Magistrate held the second T. I. Parade in his Court-room in regard to the suspect Mannalal Khatik, accused-appellant. Ramnarayan (P. W. 21) was the identifying witness. The Magistrate said that the accused had been produced on 22nd June from Jail custody. On 22-6-62 T. I. Parade was held and P. W. 21 Ramnarayan was the identifying witness. In Cross-Examination the learned Magistrate (question No. 18) said 'personally I should feel that T. I. Parade, as far as practicable, be held inside the jail. But, since Magistrates are preoccupied with other works, it is sometimes expedient that T. I. Parades should be held inside the Court premises after taking due precaution.' (Question No. 29 of the Magistrates deposition)....On the first date of the T. I. Parade i.e. 6-6-62 the accused complained to the Magistrate. The accused stated to the Magistrate that the identifying witnesses knew him from before and that the I. O. showed him to them off and on at the P. S. The accused complained in the same rein to the Magistrate again after the T. I. Parade was over. The Magistrate stated (question No. 33) 'He

did not open his mouth before that Generally, when there were such cases, I would not hold the T. I. Parade, I would refer the matter to the A. C. P. M. That is a different Matter.

38. The learned Judge at page 29 of the charge (brief copy) said 'next we come to T. I. Parade. Two parades were held by the Magistrate. One was attended by Jawaharlal and Lachmi Prosad; the other was attended by Ramnarayan. The three witnesses identified the accused before the Magistrate. But we find that before the officer had even prayed for a T. I. Parade the accused himself filed a petition before the Magistrate complaining that he is being shown to witnesses for his identification at a future T. I. Parade. Not only that. After the first T. I. Parade was held, he made the same complaint to the Magistrate. It has been argued on behalf of the prosecution that no complaint was made to the Magistrate before the parade. It does not matter whether it is before or after. It loses all its importance in view of that application dated 26th--3 days before the I. O. had made the petition for T. I. Parade if you put credence to the allegation made therein. So, there was that complaint by the accused before and after the parade. So far as witness Ramnarayan is concerned, he was declared hostile and he identified the accused before the Magistrate as the person who had created 'hulla' near Tarasundari Park. What this 'Hulla' means it will be for you to consider. Whether it relates to the 'Halla' in front of Tulshi's house or whether it relates to the 'Halla' after the incident when these persons--Ramnarayan, Lachmi and another man were talking in front of Tarasundari Park and the accused came and abused them, we do not know. But what is stated is this that is the man who created 'halla' in front of Tarasundari Park. 'Then the learned Judge in his charge to the Jury at pages 30 and 31 explained the law-relating to T. I. Parade and the value of T. I. Parade and the evidence of witnesses given in Court after identifying the suspect in the T. I. Parade. At page 31 of the charge (brief copy) the learned Judge stated 'You will consider the complaint made by the accused both before and after the T. I. Parade and then come to your decision as to whether you will act upon the alleged identification of the accused by the witnesses concerned. 'The learned Judge further told the Jury 'the place where the incident took place was very well-lighted. You may consider that according to evidence the place where the incident took place, the incident in front of Tulsi's house was very well lighted. The evidence is

that the place where this occurrence of murder took place was also well-lighted. You will consider whether in the light that was available it was possible for the witnesses who subsequently identified him to have noted the face and features of the accused in such a way as to leave an impression in their minds with reference to which it might have been possible as claimed by them, to identify him in the parades. But, remember at the same time, the complaints regarding the accused having been shown to the witnesses prior to the parade. Keep that in your mind. That is so far as the evidence regarding the allegation under section 302 is concerned.

39. Jawaharlal (P. W. 5) is no witness to any occurrence relating to the alleged stabbing of Gulab on his chest allegedly by the accused. In reply to question No. 23 Ramnarayan (P. W. 21) while narrating the incident that had allegedly happened at the door of Tulshi's house allegedly between 10-30 and 11 O'clock of the night of the 17th May, 1962, said pointing to the accused 'That man attempted 2/3 times to get on to the carriage.' He did not depose on anything about the incident relating to the accused allegedly having had stabbed Gulab. Mahadeo was no witness either to the accused appellant having had stabbed either Dayaram or Gulab. He was not produced at T. I. Parade for identification of the accused-appellant though he came to Court. Lachmi Prosad Shaw (P. W. 26) (question Nos. 9 to 16 and 29) claims to have had seen these incidents, first at or about the door of Tulshi's house at 34, Sibtala Lane when the accused had allegedly attempted, to get into the carriage of the bridegroom resisted by Chunilal, the other out-side the Tarasundari Park to the east when he and the witnesses Chunilal and Ramnarayan were standing talking amongst themselves when the accused came with a knife and threatened them with dire consequences and ran away. The third incident appears in the question No. 29. The witness said that 'when the accused turned back from that corner I also followed him from behind. When I had come to the mouth of that lane, I saw a man was trying to cross the road and there is a small temple in front of the large temple. When that man came near the temple, the smaller one, this Manna came in front of that man. This accused said 'Tum Sala Barati Hai'. That man said 'No, I am brother of Buddhu'. Upon that the accused stabbed him, holding the knife in his right hand, on his right chest.'

40. Discussing the evidence of Jawaharlal, Ramnarayan and Lachmi Prosad and Mahadeo in the context of the T. I. Parade in pages 29, 30 and 31 (of the charge in the brief copy) the learned Judge concludes 'This is so far the evidence relating to the allegation under Section 302 is concerned'. This is clearly a misdirection on a material point of fact. Jawaharlal, Ramnarayan and Mahadeo spoke nothing about the accused-appellant having had been identified by them at or about the time of the alleged occurrence when he had allegedly stabbed Gulab on his chest near the small temple within Kalikrishna Tagore Street in the midnight of the 17/18th May, 1962. It is only in the evidence of Lachmi Prosad (P. W. 26) that he had allegedly witnessed the accused-appellant having had stabbed Gulab on his right chest with a knife at about the midnight of the 17/18th May, 1962, at a site nearabout the small temple within Kalikrishna Tagore Street as shown in the plan (Ext. 1). So, the learned Judge's telling the Jury at page 31 of the charge in the context of the evidence of Ramnarayan, Lachmi Prosad and Jawaharlal and Mahadeo, while discussing their evidence in relation to the T. I. Parades to the effect 'That is so far the evidence relating to the allegation under Section 302 is concerned 'is clearly a misdirection on a material point of fact, since neither Ramnarayan nor Mahadeo nor Jawaharlal was a witness to, the alleged occurrence of the accused-appellant having had stabbed Gulab at his chest with a knife nearabout the small temple within Kalikrishna Tagore Street (plan Ext. 1) in the midnight of 17/18th May, 1962. This misdirection on a material point of fact in the charge of the learned Judge to the Jury materially prejudiced the accused resulting in the failure of justice apart from the other misdirections and non-directions amounting to misdirections on point of facts and law in the learned Judge's charge to the Jury at pages 29 to 31 relating to the affairs of the T. I. Parades of the accused-appellant in the Magistrate's court. The Magistrate himself stated that if he knew before 6-6-62 that the accused had complained that he was being shown to witnesses by I. O. in the police lock-up he would not have held the T. I. Parade, We do not think that the Magistrate did not see the order sheet of the case. The order No. 5 dated 26-5-62 would show that the accused had complained by a petition to the Additional Chief Presidency Magistrate that he was being shown by the I. O. in the Police lock-up to persons who were to be witnesses in the future T. I. Parade. The Additional Chief Presidency Magistrate

was to have held an enquiry then and there and was to have determined whether the allegation had any semblance or possible semblance of truth but he took no action on such petition. On 29-5-62, the Magistrate Sri S. K. Ghosh saw the ordersheet but he took no notice of the allegations contained in that petition. He held two T. I. Parades without determining whether there was any semblance of truth of even any reasonable probability in the allegations that the accused had made in the petition he had filed before the Additional Chief Presidency Magistrate on 26-5-62. The petition was all along with the record and the ordersheets are clear (vide order No. 5 dated 26-5-62) at page 2 of the ordersheet. The Magistrate while deposing before the Sessions Court said that if he knew about the complaint before holding the T. I. Parade on 6-6-62 he would have referred the matter to the Additional Chief Presidency Magistrate. We think that the Magistrate did not shut his eyes to the order No. 5 under which he recorded the order No. 6 and he still held the T. I. Parade on 6-6-62 and passed the order No. 6 dated 29-5-62 and order No. 7 dated 30-5-62 and also order No. 9 dated 9-6-62 for holding the second T. I. Parade on 22-6-62. The Magistrate on seeing the order No. 5 dated 26-5-62 should have at once brought the allegations made in the petition filed by the accused-appellant on 26-5-62 before the Additional Chief Presidency Magistrate for determination as to whether there was any reasonable probability in the allegations made in the petition by the accused-appellant and should not have held the T. I. Parades on two occasions. On 6-6-62 after the first T. I. Parade had held, the accused-appellant made a verbal complaint to the Magistrate that he was being shown before the T. I. Parade in the police custody by the I. O. to possible witnesses (to several persons). Knowing this, the learned Magistrate should not have ordered on 11-6-62 holding of the T. I. Parade on 22-6-62. He should have at once reported this complaint to the Additional Chief Presidency Magistrate who was required by law to hold an enquiry instead of passing the order No. 10 dated 9-6-62 directing holding of T. I. Parade, in respect of one witness by the self-same Magistrate Sri S. K. Ghosh. The Magistrate Sri S. K. Ghosh himself admitted that as far as practicable T. I. Parades should be held not in the Courtroom but in the Jail. His explanation for holding the T. I. Parades in the Court-room should have been placed before the Jury by the learned Judge to consider whether that explanation was sufficient to satisfy the Jury as to the genuineness of the two T. I.

Parades. The learned Judge in his charge to the Jury did not point out that the accused was in police custody from 19-5-62 to 29-5-62 when he was produced in Court from police custody twice once on 26-5-62 and again on 29-5-62 when on 29-5-62 he was ordered to be placed in jail custody. If the I. O. thought that T. I. Parade in regard to the accused-appellant should be held he should have applied for jail custody of the accused on 19-5-62 when the accused-appellant was first produced before the learned Magistrate instead of taking him to the police custody and keeping him in the police lock-up where there could be reasonable probability of the witnesses to the T. I. Parade seeing the accused-appellant while in police custody. In his charge to the Jury this material fact was not placed by the learned Judge before the Jury. The witnesses came to Court at 10 O'clock of 6-6-62. The T. I. Parade was held at about 2 to 2-30 p. m. on 6-6-62. The accused was somewhere inside the court-house on 6-6-62, before the T. I. Parade was actually held. P. W. 38 Tarit Kumar Talukdar. S. I. who was partially in charge of the investigation into the case had personal knowledge (question No. 84) that 'on 6-6-62 T. I. Parade was held.' (Question no. 83). He however could not remember exactly whether he was present in the court on the date the T. I. Parade was held on 6-6-62 (question No. 85). He stated that the T. I. Parade was held in the courtroom of the Registrar, Bankshall Court (Question No. 87)...On 6-6-62 the witness said that he was not present in Court but P. W. 5 Jawaharlal Shaw saw the witness in Court in the afternoon. It will appear from the answer of the witness in cross-examination that his knowledge about the T. I. Parade had not been his personal knowledge but he derived the knowledge about the T. I. Parade held on 6-6-62 from Court personnel. But he admitted that before he had applied for T. I. Parade on 29-5-62 he had seen the petition filed by the accused in Court on 26-5-62. The witness got copies of ordersheets of the Magistrate. But he did not get a copy of the order of the Magistrate on the petition filed by the accused-appellant on 26-5-62. These facts were not placed before the Jury for consideration by the learned Judge in his charge to the Jury as to whether or not there was reasonable probability in the allegation made by the accused his petition dated 26-5-62 against the I. O. having had shown the accused to persons who would possibly figure as witnesses in the T. I. Parade while the accused was in police custody. The learned Judge did not draw the attention of the Jury to the following facts:--(1)

petition of complaint by the accused to .Additional Chief Presidency Magistrate on 26-5-62; (2) in spite of that complaint T. 1. Parade was Held on 26-5-62; (3) even after complaints to the Magistrate P. W. S. K. Ghose two T. I. Parades were held inside the Court-room of the Magistrate (5) witnesses to the two T. I. Parades came to the court-house where also the accused-appellant was present from about 10 O'clock of the day till 2 to 2-30 p. m. of the days on which the T. I. Parades were held (6) even after the complaint was made verbally by the accused-appellant to the Magistrate, P. W. S. K. Ghosh after the first T. I. Parade had held on 6-6-62, the Magistrate still ordered on 11-6-62, T. T. Parade in regard to another witness to be held on 22-6-62. (7) the reasonable probability of the accused having had been shown to the witnesses by the I. O. while the -accused was in police custody from 19-5-62 to 29-5-62 and about which the accused-appellant had made a written complaint to the Additional Chief Presidency Magistrate on 26-5-62 who had not passed any order on that petition of complaint; (8) the accused was produced for the first time before the Additional Chief Presidency Magistrate on 19-5-62 after being arrested on 18-5-62 and the accused was kept in police custody upto 29-5-62, (9) before 39-5-62, the I. O. did not think it wise to apply for T. I. Parade immediately after the production of the accused before the learned Magistrate and for putting the accused-appellant in jail custody on 19-5-62 thereby obviating any possibility of the accused being seen by or being shown to the identifying witnesses, (10) the learned Magistrate Sri S. K. Ghosh himself doubted the propriety of holding T. I. Parades within the court-house.

41. After placing all these facts for consideration of the jury the learned Judge should have first told the Jury in the language of Sir Trevor Harries, Chief Justice of this Court (*Kanailal Duwari v. King Emperor*, : AIR1950 Cal413). 'If the Jury were of opinion that the accused and the witnesses had been in Court for hours before test identification then they should attach no importance whatsoever to the identification of the accused.' Merely telling the Jury that they have to be satisfied and not making it clear what they have to be satisfied is no sufficient direction upon a point of this kind. 'The learned Judge stated at page 31 of the charge this much (brief-copy)' You will consider the complaint made by the accused both before and after the T. I. Parade and then come to your decision as to whether you

will act upon the alleged identification of the accused by the witnesses concerned. The learned Judge only asked the Jury to consider the complaints but he did not draw the attention of the Jury to the bold circumstances categorised above surrounding the T. I. Parades in the manner and to the extent we have just now pointed out. The bold facts as itemised above surrounding the T. I. Parades had not been placed before the Jury by the learned Judge in his charge. On placing those bold facts as itemised above, before the Jury, the learned Judge should have told the Jury that if the Jury entertained any reasonable doubt as to the propriety, genuineness and regularity of the holding of the two T. I. Parades, keeping, in mind the complaints made by the accused once in writing to the Chief Presidency Magistrate and another verbally immediately after the first T. I. Parade to the Magistrate who held the T. I. Parade on 6-6-62, and also the fact that the accused and the witnesses were for hours in the Court-house before the two parades had held, the Jury should extend the benefit of the reasonable doubt in favour of the accused holding that the T. I. Parades were absolutely worthless and the evidence of the identifying witnesses named above, given in Court was of no value.

42. The learned Judge in his charge to the Jury should have pointed out that it was only Lachmi Prosad who had deposed that he had seen the accused-appellant stabbing Gulab on the chest and the learned Judge should have further told the Jury Ramnarayan, Jawaharlal and Mahadeo were no witnesses to the alleged occurrence relating to the stabbing of Gulab allegedly by the accused. The learned Judge should have also told the Jury that P. W. Mahadeo did not identify the accused at T. I. Parades and that his evidence identifying the accused in Court should have no weight. The learned Judge while concluding the discussion in the context of the evidence on T. I. Parade and that given in Court by those witnesses stated at page 31 of his charge 'That is so far as the evidence regarding the allegations under Section 302 is concerned.' The learned Judge in his charge to the Jury should have clearly told that Ramnarayan and Jawaharlal were no witnesses to the alleged occurrence of the accused-appellant having had stabbed Gulab on his chest. While discussing the evidence of the identification of the accused at the T. I. Parades, the learned Judge should have further told in his charge to the Jury that if the Jury considered that the circumstances surrounding

the T. I. Parade of Lachmi Prosad held on 6-6-62 as pointed out above, gave rise to a reasonable doubt as to the genuineness and propriety of the T. I. Parade held on 6-6-82 in which Lachmi Prosad had allegedly identified the accused-appellant as having had stabbed Gulab on his chest who had allegedly made a dying declaration to Lachmi Prosad immediately after Gulab having had been stabbed allegedly by the accused-appellant, the Jury should not accept the evidence of Lachmi Prosad in regard to the accused having had so stabbed Gulab on his chest with a knife and Gulab having had made a dying declaration to Lachmi Prosad mentioning the accused as Gulab's assailant. The accused was charged under Section 302 for having had caused the death of Gulab and he was thereafter charged for having had caused hurt to Dayaram punishable under Section 324 I.P.C. These two distinct offences were joined together and the accused was tried on a charge for two counts of such offences at one and the same trial. The learned Judge's charge to the Jury in the context of the discussion of the evidence of T. I. Parades by the identifying witnesses named above, concluding the discussion in the charge at page 31 of the charge (brief-copy) saying. That is so far as the evidence regarding the allegation under Section 302, I.P.C. is concerned.' certainly caused confusion in the mind of the Jury and led the Jury to come to a conclusion as to the guilt of the accused on both the offences charged. This misdirection in the learned Judge's charge to the Jury materially prejudiced the accused resulting in the failure of justice.

43. We have therefore considered several of the material misdirections and non-directions amounting to misdirections in the learned Judge's charge to the Jury which in our opinion, caused prejudice to the accused resulting in failure of justice. We find that two counts of distinct offences were joined together under one head of charge at one and the same trial and the accused was tried for two such distinct offences as charged at one and the same trial contravening Section 333 of the Code of Criminal Procedure wherefor the trial was null and void. We have considered whether upon reversal of the verdict of the Jury, and upon setting aside the convictions and sentences we should order retrial of the accused for two distinct offences at two separate trials. We have given our anxious consideration to this aspect of the case and we hold that the ends of justice would not be met by ordering re-trial of the accused on two distinct charges at two separate trials.

Lachmi Prosad Shaw is the only witness who knew Gulab. It is Lachmi Prosad who claimed to have had seen the accused-appellant stabbing Gulab on the chest and Gulab having had made a dying declaration to Lachmi Prosad immediately after he had been stabbed declaring the accused-appellant to be Gulab's assailant. Lachmi Prosad gave evidence before the Sessions Court. The T. I. Parade held on 6-6-62 before the Magistrate, as we have already found, was not a genuine and a legal T. I. Parade. So, the evidence of Lachmi Prosad in Court at the trial identifying the accused appellant as Gulab's assailant is worthy of no credence and it would remain so even at a retrial of the accused under Section 302, I.P.C. When the accused had left the place of occurrence there came Chunilal (P. W. 20) and Lalmohon (P. W. 15). We have already pointed out that Chunilal, one of the most material witnesses, was not produced for further examination by the Prosecuting Counsel before the Court of Session. If retrial is ordered, the prosecution would get the advantage of producing Chunilal as a witness in such trial. The learned Judge in his charge at page 26 (brief copy) said 'At the same time you have the evidence of Lalmohon and Lachmi Prosad who claim to be eye-witnesses to the occurrence, and not only that you have the further evidence of Premangshu and Jawaharlal who came to the place of occurrence then and there and who were told of the occurrence and of the assailant by Lalmohon then and there. And Lalmohon is a man who was known to the accused from before and there is no evidence that personally there was any motive for his having falsely implicated this man.' According to Lachmi Prosad (P. W. 36) (question No. 28) it is he who alone saw the accused having had stabbed Gulab. Thereafter came Chunilal and Lalmohan. (Questions Nos. 31 to 33 of P. W. 26 Lachmi Prosad). (Questions Nos. 43 and 44). At 1-30 to 1-45 to 2 a. m. of 18-5-62 when this Lachmi Prosad came towards the Tarasundari Park, he met Ramnarayan and Jawaharlal. To them he narrated what had happened. P. W. 15 Lalmohon was asked 44 questions in chief-examination. In question 13 Lalmohon found Chunilal (P. W. 20) and Lachmi Prosad (P. W. 26) immediately after he had reached the spot where Gulab was stabbed. The learned Judge's charge to the Jury at page 26 runs as follows: 'Premangshu and Jawaharlal who came to the place of occurrence then and there.' Jawaharlal P. W. 5) (questions Nos. 30 to 31) came out from the house of Tulsi at 1 O'clock and went to Tarasundari Park. There

Chunilal (P. W. 20) and Lachmi Prosad (P. W. 26) told him that a man Mannalal who was creating that row then stabbed Gulab brother of Buddhu. But, the learned Judge in his charge to the Jury stated at page 26 of the charge that at the place of occurrence Lalmohon (P. W. 15) told Jawaharlal that he had seen the accused-appellant stabbing Gulab and that Gulab made a dying declaration implicating the accused-appellant. Lalmohon nowhere said in his chief-examination that he met Jawaharlal (P. W. 5) at the site where Gulab was stabbed and told him anything about the occurrence. This direction in the learned Judge's charge to the Jury was against the evidence of Jawaharlal and Lalmohon. Jawaharlal did not go to the alleged place of occurrence where the accused-appellant had allegedly stabbed Gulab and to Jawaharlal at the place of occurrence Lalmohon made no statement, Premangshu (P. W. 4) (question No. 7) heard from Lalmohon (P. W. 15) whom he did not know from before that Manua had stabbed. (Question No. 9)...."Do you find any of the persons then when the injured here in Court now?" "Yes, one person standing in front of me (identifying P. W. 26 Lachmi Prosad). Lalmohon is P. W. 15 and Lachmi Prosad is P. W. 26. Lalmohon (P. W. 15) (question No. 13) stated 'He (meaning the accused) chased us a little and there turned back. I ran upto Tarasundari Park and I again went back to the place. When I had reached there I found that there was one person who later transpired to be Chunilal and another person whose name I came to know later as Lachmi Prosad. We three of us took Gulab to the porch of the Marble House in front of a medicine shop (question No. 14). When you came to Gulab did Gulab tell you anything?' Gulab said Manna has stabbed. 'Lachmi Prosad (P. W. 26) is the only eye-witness who had allegedly seen the accused-appellant stabbing Gulab. Lalmohon did not see who had stabbed Gulab. (Evident from question No. 14 asked to Lalmohon in chief-examination). Lalmohon claimed (question No. 14) that Gulab told him that Manna had stabbed. Question No. 15 asked to this witness (P. W. 15) Lalmohon in chief-examination shows that the prosecuting counsel had put into the mouth of the witness that the witness had seen Manna stabbing Gulab and then the witness ran towards Ganesh Talkies and then towards the Tarasundari Park. The witness started the answer saying 'yes', then he narrated his flight. Lachmi Prosad (P. W. 26) (questions Nos. 29, 30 and 31) saw Gulab being stabbed 10/12 paces ahead of Lachmi Prosad. Gulab then fell down. At that time Chunilal and another man

Lalmohan were seen coming from the other side of the road towards Lachmi Prosad, i.e. from the southern side, that means, from the direction of the southern footpath of Kalikrishna Tagore Street. (Question No. 33) When Chunilal and Lalmohon came near Gulab, Lachmi Prosad also came near Gulab. The entire evidence in chief-examination of Lachmi Prosad (P. W. 26) would not show that there came any person named Premangshu (P. W. 4) or any person named Jawaharlal (P. W. 5) when Gulab was stabbed and was taken by Lalmohon, Lachmi Prosad and Chunilal to the ledge of Marble house on the northern footpath of Kalikrishna Tagore Street shown in the plan (Ext. 1). According to Lachmi Prosad one man came when Gulab was taken to the ledge and that man was Buddhu (P. W. 3), brother of Gulab. Question No. 42 put to Lachmi Prosad would show that Buddhu (P. W. 3), brother of Gulab had come there and to Buddhu Gulab said that Manna had stabbed him. Neither Lalmohon nor Lachmi Prosad said that they had told Premangshu (P. W. 4) and Jawaharlal (P. W. 5) that Manna had stabbed Gulab when they had come to the place of occurrence. In Court Premangshu (P. W. 4) identified Lachmi Prosad as having had told him that Manna had stabbed Gulab although he stated in Court that Lalmohon told him that Manna had stabbed Gulab. Buddhu (P. W. 3) is the brother of the deceased Gulab. Buddhu (P. W. 3) in answers to questions Nos. 39, 40, 41 and 42 in chief examination stated that 'Bhai Manna Chhori Mar Dia'. In cross-examination Buddhu (P. W. 3) laid that Lalmohon and Gulab told him that Manna, the accused-appellant had stabbed Gulab. Lalmohon (P.W.15) (question No. 21. Thereafter what happened?)--said that when Lachmi Prosad brought a taxi and Buddhu and Gulab got into the taxi and Buddhu asked Gulab what has happened. At that time Gulab was breathing a little. He said Manna has stabbed him. Lalmohon did never say that he told Buddhu that Gulab told Lalmohon that Manna had Stabbed Gulab. Premangshu said in the witness-box that Lalmohon told him that Manna had stabbed Gulab. But, while in the witness-box he identified Lachmi Prosad (P. W. 26) meaning thereby that it was Lachmi Prosad who told him that Gulab had been stabbed by Manna. In his charge to the Jury, the learned Judge did not point out all that we have analysed as appearing in the evidence of Lalmohon, Premangshu and Jawaharlal. Gulab's viscera contained alcohol. Jawaharlal (P. W. 5) came out of Tulshi's house at 34 Sibtala Lane at 1 O' clock of the night and went close to

Tarasundari Park where he met Chunilal and (P. W. 26) Lachmi Prosad (Question No. 31-P. W. 5). Sudama (P. W. 12) was sitting inside Tarasundari Park witnessing a magic show there (question No. 11-P.W. 12). Sudama was inside the park. Dayaram (P. W. 10) came out from Tulshi's house and met Sudama who was witnessing magic show inside Tarasundari Park. It was then 11-30 O'clock of the night (questions Nos. 20, 21, 22 of P. W. 10 Dayaram). P. W. 15 Lalmohon (questions nos. 7 to 12) and Gulab were inside Tarasundari Park between 11 to 11-30 O'clock of the night witnessing magic show. This fact that between 11 to 11-30 O'clock of the night of 17-5-62 Dayaram and Gulab and Lalmohon and Sudama were inside Tarasundari Park and were witnessing a magic show there and that inside the viscera of Gulab alcohol was found at the post-mortem examination had not been pointed out in his charge to the Jury by the learned Judge for consideration of the reasonable probability in the defence case that when Dayaram and Gulab were inside Tarasundari Park witnessing the magic show there was a drunken brawl following which there was stabbing incident which might have had caused the injuries to Dayaram and Gulab being mutually involved in such incident. Non-direction of this material point of fact in the learned Judge's charge to the Jury amounting to misdirection prejudiced the accused-appellant and misled the Jury to come to their verdict causing miscarriage of justice. The conduct of Lalmohon (P. W. 15) and Lachmi Prosad (P. W. 26) as well as that of Chunilal (P. W. 20) (question No. 43 of P. W. 26 Lachmi Prosad) is highly unnatural. He and Chunilal came away to Tarasundari Park from the place where Gulab had been stabbed by the accused appellant. They did not make any attempt to apprehend the accused-appellant who, according to P. W. 16 Tulsiram, lived closed to Tulshi's house at 34, Sibatala Lane. Lachmi Prosad (P. W. 26) did not inform Tulshi about such a ghastly incident at any time.

44. Considering the state of evidence we have reviewed, we do not think, that ends of justice would be met if we order re-trial of the accused for two distinct offences at two separate trials after a lapse of four years from the date of occurrence as alleged.

45. We accordingly allow this appeal. The verdict of the Jury is set aside so also the convictions and sentences against the accused-appellant who is acquitted of

the two offences charged. The accused-appellant, be therefore, set at liberty forthwith.

Amaresh Roy, J.

46. I agree that the appeal should be allowed and the appellant should be acquitted and set at liberty by setting aside the verdict and orders of conviction and sentences passed against him, for the broad and salient reasons which my learned Brother has so clearly stated, by elaborate discussions of law firmly settled long ago by authoritative decisions of the Judicial Committee of the Privy Council and of the Supreme Court, for holding that in this case joinder of the two offences, one under Section 302 I.P.C. and the other under Section 324, I.P.C. in one Head of Charge though against the same accused person, and joint trial of those two counts of Charges has been in violation of Section 233 Cr. P. C. and cannot be justified under Section 234 or 235 Cr. P. C., as neither in the charges framed prosecution said in the accusation, nor by the evidence in the case prosecution has been able to prove, that the two distinct offences, not of the same kind, were committed in the course of the same transaction; because in this case evidence in respect of one of offences has been inadmissible and prejudicial matters let in record in relation to the other offence, if the two offences had been separately tried, as they should have been in obedience to provisions of the Code, prejudice caused thereby is obvious and has brought about failure of justice. Prosecution has also failed to prove by reliable evidence that the two occurrences happened at the place, at the time or in the manner alleged by prosecution.

47. This appeal was heard on points of law and fact and also mixed questions of law and fact and extent of sentence, leave under Clauses (b) and (c) of Section 411A Cr. P. C. having been given by the order admitting the appeal at preliminary hearing. On consideration of evidence discussed in detail by my learned Brother we have arrived at the conclusion that no reasonable Jury properly directed could have arrived at the verdict of guilt on either of the charges upon that evidence.

48. We, therefore allow the appeal and set aside the verdict of the Jury and order of conviction and sentences passed by the learned Judge in respect of both the

offences charged against the appellant. The accused-appellant is acquitted, he be set at liberty forthwith.

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