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**Chhotka Vs. the State**

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**Court** : Kolkata

**Decided On :** Jan-15-1958

**Reported in** : AIR1958Cal482,1958CriLJ1170

**Judge** : J.P. Mitter and ;Debabrata Mookerjee, JJ.

**Acts** : Evidence Act, 1872 - Sections 6, 8, 114 and 167; ;Code of Criminal Procedure (CrPC) , 1898 - Sections 154, 288, 297, 374 and 423

**Appeal No.** : Ref. No. 6 of 1957 and Criminal Appeal No. 385 of 1957

**Appellant** : Chhotka

**Respondent** : The State

**Advocate for Def.** : A.C. Roy and ;Mukti Maitra, Advs.

**Advocate for Pet/Ap.** : Ajit Kumar Dutta and ;N.C. Talukdar, Advs.

**Judgement** :

**Debabrata Mookerjee, J.**

1. Three persons, Pannalal Ganguly alias Ganguly alias Chhotka, Shyama Charan Das alias Shyama and Nero alias Dulal Chandra Das alias Panja were tried upon a charge Under Section 302/34 I. P. C. before an Addl. Sessions Judge, 24 Parganas, sitting with a Jury. By a unanimous verdict the Jury found Shyama and

Nero not guilty and found by a majority of 7 to 2 the accused Chhotka guilty of the offence of murder. In agreement with these verdicts the trial Judge acquitted Shyama and Nero and convicted Chhotka of murder and sentenced him to death. The condemned prisoner has preferred an appeal. The trial Judge has made a Reference which he was required to do in accordance with the provisions of Section 374 Cr. p. C., for confirmation of the sentence of death. The appeal and Reference have been heard together. They are disposed of by this judgment.

2. The deceased Bhutnath Haldar alias Bhuto lived in a bustee at 54 Tollygunge Road with his mother Mati Bewa and his wife Manada Dasi. Mati Bewa was the owner of the bustee. Bhuto appears to have been a dissolute young man and was seen to associate with the three accused persons in the locality. There was a prostitute named Kachi who, at one time, was in the keeping of a man called Mahabit. Mahabit happened to be incarcerated and this gave opportunity to accused Chhotka and the deceased Bhuto to pay attentions to her. They became rivals and soon fell out. Chhotka appeared to have been complaining that Bhuto had been responsible for keeping Kachi out of his way.

3. The case for the prosecution was that about a fortnight prior to the date of the occurrence which was 10-9-1956, the accused Chhotka presented himself, knife in hand at midnight at Bhuto's house and demanded restoration of Kachi under pain of retaliation by way of murder of Bhuto. Next morning accused Chhotka repeated his visit in front of Bhuto's house still carrying a knife in hand.

4. On the date of the occurrence, the deceased Bhuto was called away from his house at about 4. 30 or 5 p. m. by the accused Shyama and these two along with accused Chhotka and Nero proceeded south along the Tollygunge Road and had a drink of wine at a comparatively secluded place under the Railway Bridge over the Road. When proceeding towards the bridge, Bhuto told a cousin of his that all disputes had been squared up with his companions which included Chhotka.

5. At about 6-30 p.m. the deceased Bhuto with Shyama and Nero came up to the tea shop of one Muralidhar Barik at 94 Tollygunge Road close to Bhuto's house. They sat on the cemented ledge in front of the shop had been served with tea when the accused Chhotka came up from the south at about 7 p. m. and inflicted

multiple stab injuries on Bhuto. After the first few blows Bhuto was heard to cry out 'Chhotkada, do not strike any more; I am bringing Kachi.' The cry was heard by several persons who witnessed the assault. Bhuto reeled into the open drain near by from where he was picked up by the accused Shyama and Nero who placed him first on the Kutcha flank of the Road and then shortly thereafter carried him to the dispensary opposite at 64 Tollygunge Road of a Homeopathic doctor Kalipada Dey by name. The injured was placed on the Verandah of the dispensary where quite a crowd collected. Information reached the mother of the deceased and she rushed to the spot. The cloth which the injured was wearing having been completely soaked in blood, was changed by a piece of cloth supplied by the mother Mati Bewa. An ambulance was called in and the injured was removed to the Mugneeram Bangur Hospital with the assistance of Shyama and Nero who accompanied him to the Hospital. Bhuto's Injuries were severe and he succumbed to them at 10-10 p.m. at the Hospital. A post-mortem examination was held later which revealed that at least ten incised injuries besides several abrasions had been suffered by the deceased.

6. In consequence of an information received, the Police arrived at about 10-30 p.m. It is said there was a shower of rain which prevented the arrival of the Police earlier on the scene. Scrapings from the ledge in front of the tea shop and the Verandah of the dispensary were taken for detection of blood stains. The cloth which the Injured had on his person at the time of the assault was produced at the thana by the mother Mati Bewa herself at the time she lodged her information. The chemical examiner's report Indicated the presence of blood in the scrapings taken and of human blood on the cloth which the injured had on at the time of the assault. The accused was looked for but he remained untraced until the 29th November, 1956 when he was arrested by the Police. After the investigation which followed, a charge sheet was submitted against the accused Chhotka and the aforesaid Nero and Shyama.

7. Upon these facts the three accused persons -were charged with having committed murder of Bhuto Under Section 302/34 I. P. C. in furtherance of the intention common to them all.

8. The accused persons pleaded not guilty to the charge framed against them. The accused Chhotka in particular denied having assaulted Bhuto and stated that he knew nothing about the assault. He said that he used to know the deceased Bhuto about 5 or 6 years ago whereby it was implied that -- he had nothing to do with him thereafter, suggestions on behalf of the defence further were that Bhuto was a dissolute person who had many enemies and he might have come by his injuries at the hands of one or other of them, that the circumstances under which the murder took place were entirely different from those which had been alleged; that Bhuto having been drunk, might have fallen Into the drain and! received those injuries by coming into contact with broken pieces of glass and crockery. It was also suggested that Bhuto's brother-in-law Balai Halder might have been responsible for his death. The defence of the other two accused was that they knew nothing about the occurrence; they merely noticed a crowd and came up and found Bhuto inside the drain from where they picked him up and took him to the Hospital.

9. To prove its case the prosecution adduced direct evidence of assault by examining as many as 5 witnesses. Apparently the Jury believed that evidence and found the appellant Chhotka guilty ofmurder.

10. In the appeal Mr. Dutta appearing on behalf of the appellant has attacked the verdict on several grounds. He has complained of misdirections and non-directions which have, according to him, caused an erroneous verdict. He has also complained of the admission of inadmissible evidence which, he said, has gravely prejudiced his client.

11. To appreciate some of Mr. Dutta's criticisms of the charge, it is necessary to recall the fact that directly after the assault, one Purna Chandra Das (P. W. 18) went to the Tollygunge police Station and lodged an information (Ex. 4) which was recorded in the General Diary. That information was merely to the effect that a man, name not known, was lying on the Verandah of a house with some bleeding injuries upon him. The information was recorded at 7-30 P. M. It was followed up by another information which was also recorded in the General Diary at the instance of Mati Bewa, the mother of the deceased at 7.55 P. M. This latter

information contained details, particularly, as to the name of the person responsible for the injuries on Bhuto. The accused Chhotka was mentioned as having caused the injuries. The information given by Mati Bewa and recorded at 7. 55 P. M. was treated as the first information report in the case (Ex. 8). Mr. Dutt's criticism is that the learned Judge seriously misdirected the Jury by omitting to place before them the circumstances transpiring in evidence in the case relative to the lodging of this information by Mati Bewa. Attention is drawn to the evidence of Purna Das (P.W. 18) who stated that he waited at the thana after lodging the ejahadar for ten minutes. and thereafter came in a truck with the police officer to the Place of occurrence. Mati Bewa stated that the police Officer came to Investigate 'at once', that is to say, directly after the receipt of the information from her. The evidence of the police officer Kabi Ranjan Dhar (P. W. 27) was that after Puma Das's statement had just been recorded, he was leaving the police Station when in the compound he met, Mati Bewa who wanted to see the officer-in-charge of the police Station. Rabi Ranjan Dhar brought Mati Bewa to the officer-in-charge before whom she made a statement and under his direction that statement was recorded by Sub-Inspector Rabi Ranjan Dhar.

12. Mr. Dutt has argued that if the foregoing evidence is borne in mind, then it is reasonable to think that the information lodged by Mati Bewa and treated as the first information report in the case could not be received in evidence. The argument is that Rabi Ranjan Dhar's evidence clearly shows that Mati Bewa made a 'statement'. That statement is not, according to Mr. Dutt, the statement received in evidence and marked as Ex. 8. The contention is in order to implicate the accused Chhotka, the statement actually made by Mati Bewa to the Inspector was not produced in the case because that statement did not contain the name of accused Chhotka. As the result of investigation when Chhotka's name somehow transpired, the statement of Mati Bewa was incorporated in the General Diary and the time 7.55 P. M. was deliberately put back to impart to it the appearance of having been made very soon after the occurrence and immediately after the information of Puma Das. Mr. Dutt's complaint founded on the evidence which has just been reviewed is two-fold. In the first place Mati Bewa's information (Ex. 8) was not receivable in evidence, since it was a statement made during investigation; and secondly the learned Judge failed to draw the attention of the

Jury to the circumstances set out above which are connected with the lodging of the information actually produced and proved in the case.

13. In our view Mr. Dutt's objection is not tenable on either of the two grounds he has put forward. His objection postulates that the time mentioned in Mati Bewa's information (Ex. 8) was deliberately put back. There is no warrant for such suggestion in the evidence. Purna Das's own evidence in this behalf, if Properly looked into, shows that he came with the police officer to the place of occurrence after an hour of lodging the Ejahar. He was detained at the Thana because of a heavy shower. There is besides the evidence of the police officer which clearly goes to indicate that there was a shower of rain for about an hour or more between 8 and 9/30 that evening. We are not prepared to say that in veiw of this evidence the Judge was required to tell the Jury that the circumstances disclosed justified an inference that the time mentioned in Ex. 8 had been deliberately put back. The Jury heard the evidence relative to the making of this information and We are clearly of the view that the alleged omission on the part of the learned Judge in this behalf cannot for said to be a misdirection. Again, official acts have to be presumed to have been regularly performed. It would require, in our view, much stronger evidence to warrant the inference that the time mentioned in Ex. 8 had been deliberately put back. If that is so, there could be no question that Ex. 8 was the first information report in the case and properly treated as such. It could not. therefore, be said that it was hit by the provisions of Section 162 Cr. P. C. Consequently, there could be no question of the failure of the trial Judge to direct the Jury totreat this information as inadmissible on thisaccount.

14. The next objection urged by Mr. Dutta is that the statements of two of the witnesses for the prosecution had been wrongly admitted under Section 288 of the Code of Criminal Procedure. Nakul Barik (P. W. 4) and Manada Dassi (P. W. 12) had been examined in the Court of the Committing Magistrate and their evidence appears to have been put in under the provisions of Section 288 at the instance of the defence. Mr. Dutta's contention is that the statements of these two witnesses in the Committing Court could not, in the circumstances disclosed, be treated as substantive evidence for all purposes inasmuch as they had been admitted without the provisions of Section 145 of the Evidence Act having been complied with. It

appears, however, that the statements were admitted at the instance of the defence although it is by no means clear from the records whether it was admitted at the instance of accused Chhotka who had been defended separately from the other two. It is true there is no indication in the record that the trial Judge exercised his discretion in the matter which was an essential preliminary before such evidence could be let in under the provisions of Section 288. It is also true that the record does not indicate that the provisions of Section 145 of the Evidence Act had been complied with. Nevertheless looking at the substance of the matter and in view of the content of the statements themselves. It seems to us that the improper admission of the statements of these two witnesses before the committing Court could not possibly have affected the verdict of the Jury. The case depended upon the evidence of eye-witnesses; and although Nakul Barik was one of the eye-witnesses there were others who, if believed, would prove the charge. Manada Dassi was not herself a witness to the occurrence and Nakul Bank's statement in the committing Court would not have influenced the Jury against the accused inasmuch as nothing new or substantial was contained in that statement which was not deposed to before the court of session. Mr. Dutta's objection on this account therefore fails.

15. It has next been contended that the learned Judge's summing up suffers from the infirmity that it does not contain necessary directions on the weaknesses in the prosecution evidence. Mr. Dutta mentioned in particular the circumstance that the learned Judge omitted to tell the Jury to consider that there was no reason whatever for Purna Das before leaving for the Police Station, not to have been able to ascertain the name of the assailant of Bhuto; that although Purna Das was with Mati Bewa at the police station for over an hour yet the former never heard the name of Bhuto's assailant that night; that although Methor Sardar, a cousin of the deceased had been apprised of the fact that Bhuto had been stabbed, the witness Methor Sardar never went to Bhuto's house that night to make an enquiry; that one of the eyewitnesses chased the assailant of Bhuto or raised a hullah or that the First Information Report did not contain the names of any of the witnesses in the case. These circumstances according to Mr. Dutta ought to have been referred to in detail by the trial Judge and the Jury's pointed attention should have been directed to them. The failure to do so, according to Mr. Dutta, amounted to a

misdirection which has vitiated the verdict. Taking these circumstances just mentioned we can at once say that these are details some of them comparatively minor details emerging from the evidence in the case which the Jury heard and must have considered. The failure to draw specific and pointed attention to each one of them in the manner desired could not possibly be said to have caused an erroneous verdict. The learned Judge's summing up read as a whole shows that he dealt with the points generally and we do not consider that failure to draw the Jury's pointed attention to these circumstances in consecutive sequence could be said to have amounted to a misdirection which vitiated the verdict.

16. Serious objection has been taken by Mr. Dutta to the following passages in the learned Judge's summing up :

''If you believe the testimony of P. W. 7 Ganga Charan Das then you may find it for a fact that the settlement of the dispute between them was celebrated with a bottle of wine brought by P. W. 7 Ganga Charan Das at the cost of accused Chhotka. If there was any settlement then it must have been with regard to the prostitute whom Bhuto was supposed to have kept in an unknown place.'

'You will consider whether you may infer that after the settlement of the dispute Chhotka wanted to ascertain the address of the public woman after taking the address from Bhuto and that he had arranged that Bhuto should wait in the company of the two other accused persons in front of the tea shop of P. W. 8 for accused Chhotka to go there after verifying the correct address of the public woman. You have been told by P. W. 1 Kalipada Sardar that Chhotka started stabbing Bhuto immediately after coming to the spot where he was sitting with two other accused persons. P. W. 9 Bimal Dutta also saw that the right hand of Chhotka was moving up and down from the moment he came to the spot. You will consider whether you may infer from these facts that failing to find the woman accused Chhotka came back with all the anger mounting in his heart and that he started stabbing Bhuto with fury immediately on reaching the spot where he was sitting.'

17. Mr. Dutta has complained that these directions taken as a whole had the effect of taking the case entirely out of the hands of the Jury and that looked at from

another view point, the learned Judge was clearly suggesting to the Jury to indulge in speculations or surmises which were in no way suggested by the evidence in the case. It is to be recalled that a short while prior to the wounding of Bhuto, the three accused persons and Bhuto took a bottle of wine under the railway bridge; thereafter Bhuto was seen along with Shyama and Nero to come to the tea shop of Murali Barik where they sat for tea; a short while thereafter accused Chhotka was seen to come from the south and straightway to attack Bhuto. It is also to be recalled that there was evidence to indicate that before the three accused persons and Bhuto went towards the railway bridge where they had a drink of wine, Bhuto stated to a cousin of his that all outstandings had been settled with his companions which included Chhotka. It is on the basis of these facts that the learned Judge was telling the Jury to consider whether an inference would be legitimate that Chhotka finding that he had been tricked as respects the whereabouts of Kachi, came and straightway attacked the deceased. The different circumstances emerging from the evidence were linked up and then the Jury were invited to consider whether they would infer from those circumstances that Chhotka attacked Bhuto after having discovered that he had been tricked. Looking at the excerpts set out above and in the context in which they appear, it must be held that the Judge was merely inviting them to consider the effect of the evidence which they had heard. He left it to the Jury to make the inference if they so thought fit. We fail to see how the learned Judge could be said to have misdirected the Jury by these directions, either by forcing on them ready-made conclusion or by inviting them to indulge in speculations.

18. The next complaint is that certain items of evidence which were not receivable in law were admitted by the learned Judge which prejudiced the Jury. It is said that the evidence of the incident which took place about a fortnight prior to the date of the occurrence at Bhuto's house at midnight when Chhotka was said to have threatened Mati Bewa could not properly be given in this case. Mr. Dutta's objection also relates to the incident which took place the following morning when Chhotka repeated his threat to kill Bhuto. It must, however, be said that Mr. Dutta somewhat faintly urged that these items of evidence were not admissible. We are clearly of the opinion, that they were admissible, as they by themselves and in conjunction with other facts make the existence of the facts in issue in the present

case probable. Besides they show motive on the part of the accused to act in the manner in which he is alleged to have acted inasmuch as it was an integral part of the prosecution case that the dispute between Chhotka and Bhuto centered round the woman Kachi.

19. It is true that certain items of inadmissible evidence have been admitted in this case, as for example, the statements of P. W. 3 Kalipada De to the effect that he told the police that he had heard that Chhotka had stabbed Bhuto or the evidence, of P. W. 7 Ganga Charan Das to the effect that he had heard that night that Bhuto had been stabbed by Chhotka. Some of these statements have indeed appeared in examination-in-chief, but many more in cross-examination. The statement of Rampada Das, P. W. 14, is another case in point when he was allowed to say in cross-examination that he had heard from his wife that Bhuto had been stabbed by Chhotka although the wife was not examined as a witness in the case. Question then arises whether these pieces of evidence which were improperly let in, could be said to have affected the Jury's verdict. They are not, in our view, of such importance as to have improperly influenced the Jury against the accused appellant. In any event, Section 167 of the Evidence Act provides that improper admission of evidence shall not be ground of itself for reversal of any decision in any case provided the Court is satisfied that independently of the evidence objected to, there was sufficient evidence to justify the decision.

20. Mr. Dutta has then contended that the learned Judge misdirected the Jury by omitting to tell them to consider if any of the exceptions to Section 300 of the Indian Penal Code applied to the facts of this case. The only exception which could possibly have the semblance of even a remote bearing on the facts of the case was Exception (1). But that exception requires that there must be not only provocation but the provocation must be grave and sudden. There was no question of the provocation being sudden in this case. There may have been provocation in the sense that the accused was being kept away from the woman of his heart as a result of what Bhuto did; but that could not, in our view, entitle the Judge to tell the Jury to consider if the present case was covered by that exception to Section 300 of the Indian Penal Code. There is no substance in this contention.

21. The next objection which to us appears to be a valid one relates to the mention of the appellant Chhotka's name in the First Information Report by Moti Bewa and in the evidence by some of the witnesses for the prosecution. The objection is grounded on the fact that Chhotka's complicity in the crime was sought to be proved by among other things, statements of by-standers that had collected at the place of occurrence and by the statements of his co-accused Nero and Shyama. Mr. Dutta's complaint is two-fold; first, such evidence was not receivable in law, and secondly, even if admissible there should have been suitable warning to the Jury that they could not find against the appellant Chhotka depending upon the statements of his co-accused which were obviously self exculpatory and which directly implicated the appellant. The facts are that Moti Bewa was informed of the assault on her son by the appellant by her sister Kiron Bala Dassi. Kiron Bala happened to have gone to the Pan-cum-Tea Shop in front of which the occurrence is alleged to have taken place. At the moment of Kiron Eala's visit the injured Bhuto had just been picked up from the drain by the two co-accused of the appellant and placed on the Kutcha road flank. In reply to one of the witnesses Bimal Kumar Dutta (P. W. 9) accused Nero stated then and there that it was the appellant Chhotka who had stabbed Bhuto. Bimal was standing at the time of the assault at a distance of about 30 cubits and was examined as one of the eyewitnesses in the case. A short while after when the injured was removed to the verandah of the dispensary opposite, Nero repeated to the people assembled there that it was the appellant Chhotka who had stabbed Bhuto ; Kiron Bala thus learnt from the bystanders shortly after the occurrence that the appellant had stabbed Bhuto and she communicated that information to Moti Bewa who hastened to the dispensary where again she was told by the other accused Shyama that the appellant had stabbed Bhuto. There are, therefore, these two statements made by the two co-accused Nero and Shyama at two different points of time and place; Nero made it to Bimal Dutta by the side of the drain from where the injured had just been picked up and Nero repeated it at the verandah of the dispensary later. Shyama made a similar statement at the dispensary to Moti Bewa, the mother of the deceased when she arrived later. Quite obviously, Moti Bewa's source of information that Chhotka had stabbed Bhuto was Kiron Bala; Kiron Bala's source of information was the crowd that had assembled at the spot.

This of course leaves out of account what Moti Bewa heard later at the dispensary from the accused Shyama.

22. Mr. Dutta's objection is that the statements of bystanders or even of the co-accused of the appellant were not admissible, and in any event the trial Judge seriously misdirected the Jury by omitting to caution them that they could not find against the appellant on the basis of such statements.

23. Section 6 of the Evidence Act and the succeeding sections embody the rule of admission of evidence relating to what is commonly known as res gestae. Acts or declarations accompanying or explaining the transaction or the facts in issue are treated as part of the res gestae and admitted as evidence. They are, roughly speaking, exceptions to the hearsay rule. Section 6 provides that facts which though not in issue are so connected with the facts in issue as to form part of the same transaction are relevant whether they occurred at the same time or place or at different times and places. Illustration (A) attached to the Section is instructive. 'A' is accused of the murder of 'B' by beating him. Whatever was said or done by A or B or by the bystanders at the beating or so shortly before or after it as to form part of the transaction is a relevant fact.

24. The obvious ground of admission of such evidence as is referred to in Section 6 is the spontaneity and immediacy of the act or declaration in question. The facts deposed to must form part of the transaction. The requirement is that the statement sought to be admitted must have been made contemporaneously with the act or immediately after it and not at such an interval of time from it as to allow of fabrication or to reduce the statement to a mere narrative of past events.

25. Judged by this test it seems to us extremely doubtful whether the statements of Nero and Shyama could properly be received in evidence. It is true that Bimal Dutta has deposed in the case to the effect that when the injured had just been picked up from the open drain and kept on the Kutcha road flank, Nero stated to him that it was accused Chhotka who had stabbed Bhuto. Bimal has given direct evidence of that. Whatever may be said of the value of Bimal's evidence in Court in this regard, it cannot safely be assumed that at the moment Kiron Bala came to the Pan shop and heard the crowd or the bystanders say that the accused

Chhotka had stabbed Bhuto, that crowd included Bimal Dutta. There is no evidence to indicate that Kiron Bala heard Bimal Dutta make the statement. It is not Kiron Bala's evidence that she heard it being made by Bimal. In our view, only statements of persons who were present at the scene of the crime could be proved. The bystanders or the crowd from whom Kiron Bala heard the statement could not be presumed to have been present at the time the murder was committed. Kiron Bala did not even say that when she heard that statement from the crowd, that crowd included Bimal Dutta.

26. There seems to be another objection open to the appellant. Section 6 appears to provide for proof of statements which are more or less of a collateral nature; not the principal fact but the subsidiary ones which are so connected with the facts In issue as to form part of the same transaction are relevant. The statement of Shyama or Nero directly concerns the fact in issue in the present case. It is therefore difficult for all these reasons to compress the statement of Nero within the limits of Section 6 of the Evidence Act.

27. The position as respects Shyama's statement to Moti Bewa later on at the dispensary is still more difficult. An attempt was made on behalf of the State to maintain that the transaction had not yet ended and that it continued right up to the point of time when the removal of the injured to the hospital took place. We do not agree. We have no doubt that Shyama's statement said to have been made to Moti Bewa at the verandah at the dispensary was made at a point of time when the transaction could not be said to have been continuing. There cannot be any doubt whatever that the evidence given by Moti Bewa in this regard relating to the fact that Shyama told her that it was the accused Chhotka who had stabbed Bhuto was clearly inadmissible under Section 6 of the Evidence Act. If this was the only basis of her information to the police (Ext. 8) we should have little difficulty in holding that the statement in that information as respects the complicity of the accused was equally inadmissible. Moti Bewa's evidence seems to be that she first heard from Kiron Rala that her son had been stabbed by the accused Chhotka and we have already indicated that Kiron had heard about it from the bystanders which had collected at the spot when the injured Bhuto had been placed on the Kutcha flank of the road. There is of course little doubt that the statement if any

made by any of the bystanders at that moment would be a statement shortly after the transaction. But then the difficulty remains that there is nothing on the record to indicate that the crowd which Kiron Bala spoke of included Bimal Dutta to whom Nero had madethe statement that it was Chhotka who had stabbed Bhuto. There is far less any indication in the record that Kiron Bala had it direct fromBimal Dutta.

28. In the foregoing circumstances we cannot but hold that the evidence relative to the two statements said to have been made by the appellant's co-accused Nero and Shyama must be held to have been inadmissible under S, 6 of the Evidence Act. There can be no doubt that such statements were the basis of the First Information Report. But that by itself seems to offer little difficulty since after all statements in the First Information Report are not substantive evidence of the truth of the facts conatined in it. They merely corroborate or contradict the maker of the statements. What was far more serious was their introduction into evidence in Court. In these circumstances we must hold that the items of evidence just referred to must be pronounced inadmissible, and we are persuaded that the admission of such evidence was fraught with grave consequences to the appellant. No directions have been given by the learned Judge in this behalf to the Jury. We are persuaded that these items of inadmissible evidence have affected the Jury's verdict by reason of the failure of the learned Judge to give suitable directions to the Jury disabusing their minds of the effect of such evidence and this amounts to a serious misdirection which caused an erroneous verdict.

29. There is another aspect of the matter. Assuming that the statements of Shyama and Nero referred to above were admissible, they were after all statements of the co-accused of the appellant.

The least that the trial Judge could do was to give them a direction to the effect that they could not possibly find against the appellant on such evidence. They were never told that the statements of Shyama and Nero were openly self-exculpatory and clearly incriminating so far as the accused Chhotka was concerned. The absence of such a direction is also calculated to have vitiated the Jury's verdict.

30. The appellant having thus succeeded in establishing misdirections it becomes necessary for us to examine the evidence in the case. At this stage Mr. Dutta contended that in the circumstances of the present case, the appellant ought to be granted a new trial. It is true a new trial is one of the forms of interference in an appeal. It is also a form of interference in a reference under Section 374 of the Code of Criminal Procedure. We have considered the matter and we have no doubt as to the course that we should adopt in this case. We think retrial is indicated only when the accused has been deprived of the substance of a fair trial. There is no such question in this case. Where the Court finds it difficult to take upon itself the responsibility of deciding on the guilt or innocence of the accused, a retrial should be granted. In the present case, there is abundant evidence which requires to be considered and upon which we think the question of the accused's guilt or innocence can safely be decided.

31. Whether or not the summing up suffers from misdirection is of little practical importance. In view of the sentence of death that has been passed by the learned Judge and the reference made by him under Section 374 of the Code of Criminal Procedure, we have to consider ourselves the evidence as a whole in order to see whether it justifies a conclusion of guilt. Where misdirection is established in the appeal, that gives the Court the right to go into evidence. But in a reference it is the duty of the Court to take the entire evidence into account. As was pointed out by the Supreme Court in the case of Ramkishan Mithanlal Sharma v. State of Bom., : 1955 CriLJ196 which approvingly referred to the decision of the Judicial Committee in Abdul Raliim v. Emperor that what has got to be done in cases where inadmissible evidence has been admitted and has been incorporated in the summing up is to exclude the inadmissible evidence and consider whether the balance of evidence remaining thereafter is sufficient to maintain the verdict. The Judicial Committee also expressed the view that in performing its duty under Section 374 of the Code of Criminal Procedure when a sentence of death is submitted for confirmation, this Court is of necessity entitled and bound to consider the merits of the case for itself. We have accordingly to consider the case on the merits and decide for ourselves whether the guilt of the accused has been established beyond all doubt.

32. Indeed, the provisions of Section 374 and the succeeding sections contained in Chapter XXVII of the Code are instructive. Section 374 provides that when a Court of Session passes a sentence of death the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court. Section 376 deals with powers of this Court to confirm the sentence or annul the conviction. It says that the High Court (a) may confirm the sentence or pass any other sentence warranted by law, (b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or (c) may acquit the accused person. Section 375 gives power to the High Court to direct further inquiry to be made or even additional evidence to be taken. It says that if it appears to the High Court that a further inquiry should be made into or additional evidence should be taken upon any poinb bearing on the guilt or innocence of the convicted person, the High Court may make such enquiry or take such evidence itself or direct it to be made or taken in the Court of Session. If the inquiry is not made or the evidence is not taken by the High Court, then the result of such inquiry or such evidence shall be certified to the High Court. These provisions taken together appear to be self-contained. It is true that there is a proviso to Section 376 which says that no order of confirmation is to be made under this Section until the period allowed for preferring an appeal has expired, or, if an appeal has been presented within such period, until the appeal is disposed of. The right of appeal is indeed a valued right and quite understandably the Legislature did not propose to deprive a condemned prisoner of the right to enter the superior Court. But the exercise of the powers and the duties under Section 376 does not appear to be limited or in any way affected by an appeal having been brought or not having been brought. The provisions contained in Section 418 (2) are significant! and become important in this 'context. Sub-section (1) of Section 418 provides that an appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only. Sub-section (2) of Section 423 introduces a further limitation on the powers of this Court in dealing with the jury's verdict by enacting that nothing contained in that Section will authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by

the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him. In this context if Sub-section (2) of Section 418 is read, then it seems clear that the Legislature intended that the case of a person convicted in the same trial at which a person is sentenced to death, has to be differently treated and the limitation imposed by Sub-section (2) will not be attracted to such a case. If that is how a co-accused of a condemned prisoner is to be dealt with, there can be no question that a person actually condemned to death is to be treated in the same way, at least not less preferentially than his co-accused upon whom the extreme penalty of the law has not been passed. The only limitation on the powers of this Court in dealing with a reference for confirmation of the sentence of death is to be found in Section 537 which says that subject to the other provisions of the Code, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII on account of any error, omission or irregularity in the proceedings before or during trial or on account of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice. In this view, the provisions contained in Chapter XXVII appear to be quite exhaustive; they constitute a complete Code.

33. The actual decision of this case dues not, however, depend on the view we take of the question. We have referred to it out of deference to the argument at the bar. We have before us here both the appeal and the reference. In the appeal itself we have held that misdirection sufficiently grave to vitiate the verdict has been established. We have also held there are no justifying reasons to think that the accused has been deprived of the substance of a fair trial which might make a new trial desirable. There is no question in this case of trying the accused on the paper book. The misdirection that has occurred gives us the right to enter into evidence and decide the case on merits, and we have felt quite able to do so on the materials on record. There is besides the reference in which our plain duty is to satisfy ourselves on evidence on the question of the accused's guilt or innocence. In either view, consideration of the merits of the case is therefore imperative.

34. In considering the evidence we propose to eliminate from consideration altogether the items of evidence which we have held inadmissible, or even

evidence of doubtful relevance. We propose to leave out of account the statements of the co-accused Shyama and Nero implicating the accused Chhotka, or even, the statements contained in the First Information Report whatever their value in determining the guilt of the accused. The case depends on theevidence of five persons who were put forward as eye-witnesses. If that evidence does not satisfy us beyond all reasonable doubt, the accused is bound to be acquitted.

35. (After discussion of the evidence in detail. His Lordship concluded as follows:) As we have indicated, we have fully believed the evidence of the four eye-witnesses. There is no reason why their testimony should be distrusted. There was no enmity proved or evensuggested between any of them and the accused and they are not proved to have in any way been interested. We hold therefore that the accused Chhotka did commit murder by inflicting multiple stab injuries on the deceased Bhuto.

36. There remains the question of sentence which has caused us anxiety. There can be no doubt that, in view of the nature and number of the injuries, the accused intended to cause them and they were sufficient in the ordinary course of nature to cause death. The medical evidence shows that excepting injury No. 5 all of them, were skin-deep or muscle-deep. The knife that was said to have been used could; not be produced in evidence. It was described as being nearly half a cubit in length. Quite obviously such evidence lacks precision. There can however be no doubt that the dispute which led to the murder was over the woman Kachi. We believe that the accused Chhotka was moved to act in the matter alleged by passion. Although the circumstances proved cannot spell out a lesser offence, nevertheless there can be no doubt that the accused was the victim of jealousy. In this view of the matter, we think that the ends of justice would be satisfied if we impose the alternative sentence of imprisonment for life in lieu of the sentence of death.

37. In the result, the conviction of accused Chhotka under Section 302 of the Indian Penal Code 19 affirmed but the sentence of death passed on him is altered to one of imprisonment for life. The appeal succeeds in part in so far as the sentence is concerned. The reference for confirmation of the sentence of death is

accordingly rejected.

**J.P. Mitter, J.**

38. I agree.

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