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Hari Ram Vs. State

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Court : Jammu and Kashmir

Decided On : Nov-16-1971

Reported in : 1972CriLJ961

Judge : Mian Jalal-ud-Din and; Mufti Baha-ud-Din, JJ.

Appellant : Hari Ram

Respondent : State

Judgement :

Mufti Baha-ud-Din, J.

1. The appellant, Hari Ram has been convicted by the learned Sessions Judge. Udhampur under Sections 302 and 380 R. P.C. and sentenced to death for the first offence and to rigorous imprisonment for two years for the second offence. by this appeal the appellant challenges his conviction as also the sentence imposed on him. Alongside the learned Sessions Judge has made a reference for confirmation of the death sentence. This Judgment will govern the disposal of both the appeal and the reference.

2. Briefly stated. the prosecution story is that Mst. Jamna was the legally wedded wife of one. Jagat Ram whom she deserted in the year 1947 and ever since lived as a concubine with one, Lal Singh. Lambardar who had no wife of his own nor any issue. So living Mst. Jamna also contacted illicit connections with the appellant

and in concert with him murdered Lai Singh on the night intervening 28/29 October. 1969. by inflicting fatal injuries on him with a khokhari while he was sleeping on a cot in his house. The murder of Lai Singh having been accomplished. Mst Jamna collected all the valuables including ornaments and cash lying in the house in a bid to elope with the appellant. Suspecting her fidelity the appellant, as the story goes, turned round and inflicted iniuries on her with a khokhari and an axe which but an end to her and thereafter dumped the dead bodies under a heap of grass and left the house with the valuables. as aforesaid. The dead bodies were discovered on the next day in the evening by Kaka Ram. Sita Ram. Shanker Dass and Vijay Singh who raised an alarm which attracted the peodle of the village to the spot and thereafter a report EXP. A of the occurrence was made by Kaka Ram with the police concerned. Upon the investigation and committal proceedings which followed the appellant was sent up for trial under Sections 302/380 R. P.C. which resulted in his conviction and sentence. as aforesaid.

3. There is no eve witness of the occurrence. The case rests entirely on circumstantial evidence and the circumstances relied upon by the prosecution are these:

i) That the accused was seen last residing with the deceased:

ii) That on the morning following the night of occurrence the accused seen en-route at Sarpo and Tarpat on his wav back to his home:

iii) That a confession was made by the accused under Section 164 Cr. P.C. which he retracted at the trial.

iv) Admissions made by him before the committing Magistrate regarding his involvement in the murders as also with regard to the confession made by him under Section 164 Cr. P.C.

v) Recovery of a khokhari Exp. 1 and blood stained shirt belonging to the accused from the house of the accused pursuant to the disclosure statement made by him as also that of a blood-stained axe from the scene of occurrence.

vi) Recovery of the articles belonging to the deceased from the house of the accused pursuant to the disclosure statement made by him: and:

vii) Medical evidence.

4 (a) Taking the first circumstance we propose to examine the evidence of Mithu Ram. P. W. 2. Tara Chand. P. W 3 Mst. Vidhya P. W. 4, Sita Ram P. W. 5 and Krishan I-al. P. W. 6. The evidence of Mithu Ram. Tara Chand. Mst. Vidhva and Sita Ram is to the effect that they saw the accused collecting paddy in the field belonging to the deceased Lai Singh about 4/5 days before the occurrence and then again on the day preceding the night of occurrence. None of them admittedly knew the accused before. Their identification of the accused is based on a test identification parade which was conducted by K. B. Pallai. S. D. M. Reasi. P. W 21. in the course of investigation of the case by the police. The trustworthiness or otherwise of their evidence. therefore. depends mainly on whether the test identification parade is reliable or not. Before dealing with this question it would be useful to refer to the observation made by their Lordships of the Supreme Court in Budhsen v. State of U.P. : 1970 CriLJ1149 :

Now facts which establish the identity of an accused person are relevant under Section 9 of the Indian Evidence Act. As a general rule the substantive evidence of a witness is a statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under which circumstances he came to pickout the particular accused person and the details of the part which the accused played in the crime in Question with reasonable particularity. The purpose of a prior test identification. therefore. seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them. in the form of earlier identification proceeding. There may. however. be exceptions to this general rule, when for example, the Court is impressed bya particular witness, on whose testimony it can safely rely. without such or other corroboration. The identification parades belong to the

investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence. who were not previously known to them. This serves to satisfy the investigating officers of 'he bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in Court. Identification proceedings in their legal effect amount simply to this. that certain persons are brought to jail or some other place and make statements either express or impli ed that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by Section 162. Criminal Procedure Code. It is for this reason that the identification parades in this case seem to have been held under the supervision of Magistrate. Keeping in view the purpose of identification parades the Magistrates holding them are expected to take all possible precautions to eliminate any suspicion of unfairness and to reduce the chance of testimonial error. They must. therefore. take intelligent interest in the proceedings. bearing in mind two considerations (i) that the life and liberty of an accused may depend on their vigilance and caution and (ii) that justice should be done in the identification. Those proceedings should not make it impossible for the identifiers who after all. have. as a rule. only fleeting glimpses of the person they are supposed to identify. Gener-ally speaking. the Magistrate must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused so that the Court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence. The power to identify. it may be kept in view. varies according to the power of observation and memory of the person identifying and each case depends on its own facts but there are two factors which seem to be of basic importance in the evaluation of identification. The persons reauired to identify an accused should have had no opportunity of seeing him after the commission of the crime and before identification and secondly that no mistakes are made by them or the mistakes made are negligible. The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to identification

deserves.therefore. to be subjected to a close and careful scrutiny by the Court.'

(b) The identification memos prepared by K. B. Pallai. S. D. M. Reasi. are EXP.01. EXP. P. EXP Ql and EXP Rl There is nothing in these memos to indicate that any effort was made to make the bearing and general appearance of the accused resemble with those mixed with him at the identification parade. On the other hand there is a frank statement of K. B. Pillai on record at the trial that the accused was wearing a white turban, a shirt resembling that worn by the military personnel and a white dhoti while those mixed with him wore different gar ments. According to him. however. those others also wore turbans. Mithu Ram P. W. 2. likewise says that all those mixed with the accused were having different garments and that the accused was wearing a shirt like that worn by the military personnel. Tara Chand. P. W. 3. says that the accused was wearing a shirt of Badami colour. Mst. Vidhva does not remember what garments were worn by the accused or those others mixed with him. Sita Ram states that the accused had put on a khaki shirt. With the insignia of a khaki shirt on the person of the accused it could not be impossible for the witnesses to pick him out. In this state of evidence we cannot help observing that the test identification parade was not held with the amount of care and caution that its importance demanded. The casual manner in which it was held strips it of all reliability should be attached to ii. It does not clearly provide any safe and trustworthy evidence on which identification of the acoused by the witnesses.as aforesaid. as one who resided last with the deceased may be based. Along-side it is noteworthy that Kaka Ram. P. W. 1' does not mention having noticed the accused on the evening preceding the night of occurrence when according to him, he found Lal Singh going to his house who upon enquiry told the witness that he was collecting paddy crop. Equally note-worthy is the fact that no suspicions were raised about anybody much less the accused in the first information report. EXP. A. although it was made by Kaka Ram after the neighbours numbering. about 30 of 40 including Mithu Ram had assembled at the scene of the occurrence following the alarm raised by him. There is also nothing in the evidence to suggest that any such suspicion was raised even when the police came on spot and when also the people assembled there. In this context no reliance can also be placed on Krishan Lal. P. W. 6 who says that the accused met at a place known as Narha Majran on 27-10-1969 at 5 'O' Clock and told him

on his enquiry that he belonged to Chamb Jeorian and was going to the house of Lai Sinsh. Lambardar particularly so when. according to the witness himself he did not know the accused before nor is he one who was invited to identify the accused at the test identification parade. The witness is a casual witness and it is really surprising as to how the police could get in touch with him. At the top of everything it is noteworthy that there is no evidence that the accused had any relation with any one of the deceased much less illicit liaison with Mst. Jamna or that he was a frequent visitor to their house. As such the question of his visiting their house on the day prior to the night of occurrence appears simply to be a figment of imagination of those concerned with the investigation. The learned Sessions Judge has omitted to notice all these circumstances and by a mechanical reading ot the evidence come to the conclusion that the accused was seen last residing with the deceased a conclusion which cannot be obviously sustained in the circumstances stated above. That being so. the first circumstance relied upon by the prosecution does not stand proved.

5. This brings us to the second circumstance. To prove it the prosecution has relied upon the evidence of Nek Ram P. W. 1 and Gurbachan Singh P. W. 15. Nek Ram says that on the morning of 29-10-1969 while he was sleeping inside his shoo at Sarpo the accused knocked at his shoo and after he opened the shutter. the accused obtained from him a cigarette packet and then sat in the compound ad joining the shop carrvine alone a bundle and a bag and then boarded a bus going to Reasi at 8 or 8-30 A. M. Gurbachan Singh. P. W. 15. states that he is the conductor of bus No. 7370 JKA and that on 29th October. 1969. while the vehicle was Diving from Tarpart towards Reasi the accused alongwith 5 others including Tehsildar Nawshera and his peon boarded the bus at a distance of 3 kilometers away from Tarpat. There is nothing in the statements of these two witnesses to indicate that they knew the accused before. In fact Gurbachan Singh has expressly admitted that he did not know the accused before. None of them was invited to identify the accused at the identification parade. Their identification of the accused is therefore simply based on his identification in the court at the trial. This is evidence of a weak character and made still weaker by the improbabilities and the divergence in the statements of the two witnesses. It is improbable that in the state of mind in which the accused might have been. if he had committed the

murders, he should have dared knock at the shop of Nek Ram and asked for cigarettes. Then again while Nek Ram states that the accused carried alone a bundle and a bag. Gurbachn Singh significantly omits to make a reference thereto. The witnesses are merely casual witnesses whose evidence has been procured simply to prop up the case against the accused. On their evidence it is difficult for us to hold that the accused was actually seen by them on the morning following the night of occurrence. The second circumstance does not therefore also stand proved against the accused.

(a) Then comes the confession made by the accused under Section 164 Cr. P.C. It is EXP. 5/2 on the file. The learned Counsel for the appellant objected to its admissibility on the twin ground that it was not recorded by a competent magistrate and that it was involuntary resulting from prolonged torture to which the accused was subjected by the police. His first objection is based on the ground that it was recorded by an Executive Magistrate as distinguished from a Judicial Magistrate who alone could do it after the Separation of Judicial and Executive Functions Act. 1966. came into force. This obiection is based on misreading of facts. The confession has been recorded by Tara Chand Khaiuria. Chief Judicial Magistrate. Udhampur who has appeared as P. W. 20 at the trial. The only objection that survives for consideration is whether the confession was voluntary or not.

(b) Section 24 of the Evidence Act is clear that a confession made by an accused person is irrelevant in criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient. in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceeding against him.

The words. 'appears to the court' in the section are significant and indicate a lesser degree of 'Proof than that contemplated by Section 3 of the Evidence Act. That does not certainly imply that mere allegation by an accused about inducement

threat or promise is sufficient to exclude the confession made by him but it does imply that a suspicion regarding such inducement threat or promise reasonably founded on the facts and surrounding circumstances would Justify the exclusion of such confession. This naturally brings us to the consideration of facts and circumstances attending the confessional statement EXP. 5/2 made by the accused. In this connection it is noteworthy that the accused was admittedly arrested on 21-12-1969. He remained in police custody upto 4th January 1970 when an application EXP. N was made by the Circle Inspector Police. Reasi, to the Chief Judicial Magistrate. Udhampur saving that the accused wanted to disclose the truth and that he may record his statement. The Magistrate remanded the accused to Judicial lock up till the next day when he was again produced before him. On being questioned by the Magistrate the accused told him that though no police-man was present inside the room but they were there in a room below which he described as 'Courty'. He further added that he had been subjected to torture by the police and was not possessed of sound mental condition to be able to give by statement. He sought an adjournment of 4 or 5 days before he was called upon to give the statement. This statement of the accused is as EXP. Q. The accused was again remanded to judicial lock up till 9-1-1970 when his confessional statement EXP. 5/2 was recorded. That makes it clear that the accused remained in the custody of the Police for a long time before he was produced for getting his confessional statement recorded by the Magistrate. The delay caused in the production of the accused before the Magistrate has nowhere been explained by the prosecution. This circumstance is sufficient to stamp the confession as involuntary. regard being had to the view taken by their Lordships of the Supreme Court in the case reported as : 1956 CriLJ152 that prolonged police custody immediately preceding the making of the confession is sufficient. unless it is properly explained to stamp it as involuntary. It may be remembered that in that case. the accused had remained in police custody for 13 days before the confession was made by him. Here also the accused remained in police custody for 13 days before he was produced before C.J. M. Udhampur for getting his statement recorded. This prolonged custody lends support to the statement made subsequently by the accused before the Chief Judicial Magistrate on 5-1-1970 even after remanding for judicial custody for one night that he was subjected to

illtreatment and torture by the police to the extent that he had lost his mental outfit In this context it is not inconceivable that he was labouring under the fear of torture even on 9th when the confessional statement EXP 5/2 was made by him. There is nothing in EXP. 5/2 or in the evidence eiven by the Chief Judicial Magistrate at the trial to indicate that the learned Magistrate tried to dispel this apprehension from the accused before recording his statement. The observation made by the trial Judge that the accused 'was eiven an assurance of protection against any apprehended oppression if he did not make any confession' is clearly sratuitous and based upon a misreading of the evidence. Both the committing court and the trial court failed to take note of these facts and circumstances and landed themselves into error in holding that the confession was voluntary and admissible in evidence. In the view we have taken it was involuntary and inadmissible in evidence.

6.(a) With this we come to the admission made by the accused before the Committing Magistrate that he had murdered the deceased as also a like admission made by him that the statement made by him before the Chief Judicial Magistrate was voluntary and true. The questions and answers recorded in this behalf by the committing Magistrate are as follows:

Q) Did you stay in the house of the deceased on the night intervening 28/29 October and killed both of them with a khokhari EXP, 1 present in the court?

A) Yes. This is true I killed Lai Singh with a khokhari and killed Jamna by inflicting injuries with a khokhari and axe.

Q) Have you made a confessional statement before the Chief Judicial Magistrate and whether it is true?

A) Yes. I have made it voluntarily and it is true.

These admissions were tendered in evidence by the prosecution at the trial under Section 287 Cr. P.C. and have been relied upon by it as evidence in the case.

B) Section 287 Cr P.C. reads:

The examination of the accused. If any, recorded by or before the committing magistrate shall be tendered by the prosecutor and read as evidence.

The words 'if any' in the Section have been substituted for the Word 'duly' by Act XLII of 1956. This substitution appears to be simply consequential to the provisions of Section 207 (A) and 209 of the Code of Criminal Procedure which require a magistrate to examine the accused only 'If necessary' and does not dispense with the due recording of an examination of the accused when such examination is conducted by the committing Magistrate. The condition. therefore for the aforesaid admission being read as evidence at the trial is that they should have been duly recorded. This naturally takes us to the consideration of the provisions of Sections 209 and 342 Cr. P.C. which are as under:

209. (1) When the evidence referred to in Section 208 Sub-sections (1) and (3) has been taken and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. such Magistrate shall if he finds that there are not sufficient grounds for committing the accused person for trial record his reasons and discharge him. unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate. in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any Drevious stage of the case if. for reasons to be recorded by such Magistrate he considers the charge to be groundless.

342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court may at any stage of any inquiry or trial without previously warning the accused put such questions to him as the Court considers necessary and shall for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such Questions or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry into, or trial for any other offence which such answers may tend to show he has committed.

Both these Sections are intended to give the accused an opportunity to explain any circumstances appearing in the evidence against him and not to explain inferences deducible from such circumstances or for the purpose of cross-examining the accused or for the purpose of filling gaps in the prosecution case. Where therefore a Magistrate asks the accused an improper question or any question not justified on the evidence in the case the answer given by the accused cannot be taken into consideration against him being one not duly recorded. In this connection reference may be made to the decision of the Orissa High Court reported in Jairam v. State : AIR1968 Ori97 . in which it was held that if there are no circumstances appearing against the accused in evidence then the judge should not put to him any question under Section 342 Cr. P, C. and that if anystatement is made by an accused as a result of any question improperly out to him it cannot be taken into account against him. (c) The question that therefore arises is whether the admissions relied upon in the instant case were duly recorded. We have already found that the confession under Section 164 Cr. P.C. was involuntary and inadmissible in evidence. Its presence, therefore did not constitute a circumstance against the accused which he could be called upon to explain. Any question out to him in that behalf by the committing Magistrate was. therefore. improper. On the principles set out above. the answers given by the accused in relation thereto could not therefore. be taken into account against him. This is equally true about the other admission made by him. the reason being that in the committing court no evidence was tendered in terms to sav that the accused had murdered the deceased on the night intervening 28/29 October. 1969. As such there could be no justification for any question being put to him if he had killed the deceased on that night. The admissions are obviously not those duly recorded and could not, therefore. be read as evidence at the trial under Section 287 Cr. P.C. This is what the learned Sessions Judge has omitted to consider when he referred to this part of the case against the accused. The circumstance based on these admissions cannot therefore be held to be proved against the

accused.

7. (a) Next we come to the recovery of khokhari Ex. P 1 and a blood stained shirt belonging to the accused from his house as also that of a blood-stained axe from the scene of occurrence. Ex. P. H, is the seizure memo of one khokhari. one kachha and one blood stained shirt belonging to the accused. The recovery has been evidenced by Ram Dhan P. W. 11. Lachhman Dass P. W. 12 Sansaro P W 13 and Mst Sita P. W.22. The accused too has not denied this recovery. He has owned these articles and as regards blood stains on the shirt he has said that he was once bitten by a wild animal as a result of which the shirt got stained with blood. According to Kesar Mal. P. W. 14. Khokhari is a common place article. Admittedly it had no blood stain on it. Its recovery cannot therefore constitute a circumstance adverse to the accused.

(b Then comes the blood stained shirt. The Assistant Seriologist and Chemical Examiner to the Government of India to whom this shirt was referred for examination has been unable to confirm the prsence of blood on the shirt on the ground that it had eot disintegrated. His report is EXP. X/7 on the file. Contemporaneously various other articles recovered from the spot were referred to him for examination and he has said that except for the scrappings from the axe the articles were stained with human blood. If the blood stains on the shirt of the accused were contemporaneous to those on these articles he could have very well detected it on the shirt as well. His finding to the contrary is a circumstance confirming the plea made by the accused that it related to an earlier period and was the result of the attack made on him by a wild animal. The learned Sessions Judge has omitted to notice this circumstance and led himself into prror in holding that the recovery of this shirt was a circumstance against the accused. He has also misread the evidence and held that the kachha recovered from the house of the accused was blood stained. The seizure memo does not speak of the kachha haying been blood-stained nor also the evidence produced in sunnort thereof. The kachha on which blood has been detected by the Assistant Seriologist is actually the one recovered from the person of Lai Singh and entered in the seizure memo Ex. P. B. The disclosure statement Ex. P. K. leading up to the recovery of these articles cannot. in these circumstances be construed as statement leading to the

discovery of a fact and is. therefore. inadmissible under Section 27 of the Evidence Act.

(c) Ex. P.C. includes a blood stained axe as one of the articles recovered from the scene of occurrence. The presence of blood on the axe has not been confirmed by the Assistant Seriologist in his report referred to above. As such its recovery cannot be treated as the recovery of any relevant fact or as a circumstance supporting the prosecution case. The fifth circumstance cannot therefore. be held to be proved against the accused.

8. Then comes the recovery of cash. ornaments. clothes and other articles from the house of the accused. This recovery is covered by Ex. P. G. and has been testified to by Ramdhan. Lachman Dass. Sansaroo and Mst. Sita. The accused too has not denied this recovery from his house. He has however added that these articles all belongs to him. The only question therefore to be determined is whether these articles belong to the deceased or are those owned by the accused. Bodh Raj P. W. 7 is a gold-smith. He says that the ornaments seized in the case belonged to Mst. Jamna deceased for whom these were made by him. Sandur Singh P. W. 16 states that he is a tailor who had made two of the suits seized in the case for Mst. Jamna. He also identifies the clothes and ornaments as those which he had seen being worn by Mst Jamna. Mansa Ram. P. W. 17 identifies the Hukka as one belonging to Lai Singh deceased. According to him, it has the name of his father, Anantoo. inscribed on it and was in fact sold by him to Lai Singh in exchangp for a sum of Rs. 6/-. Mehant Ram P. W. 18 identifies two sickles as those belonging to the deceased Lai Singh Kakaram P. W. 1 identifies all the articles as those belonging to the deceased and savs that these include a Hukka on which was inscribed the name of Anantoo and two tumblers on which was inscribed the name of Lai Singh. Ex. P. G. also describes amongst articles recovered from the house of the acqused two tumblers bearing the name of Lai Singh and one Hukka bearing the name of Anantoo. The accused has produced no evidence to rebut this evidence nor also explained his acquisition of these articles. On the other hand his own wife Mst. Sita. P. W. 22 disowns these articles as belonging to them. That being so. we must hold that. these articles belonged to the deceased. In that view the circumstance regardin the recovery of the articles

belonging to the deceased covered by Ex. P. G. stands proved against the accused. The disclosure statement Exd. J. leading unto this discovery can. therefore. be treated as one leading to the recovery of relevant fact and therefore admissible in evidence. The circumstances about recovery of cash. ornaments etc. belonging to the deceased from the house of the accused Pursuance to his disclosure statement does. therefore. stand Droved.

9. Finally comes the medical evidence Ex. P. S. is the postmortem report conducted on the person of Mst. Jamna and Ex. PT contains a similar report regarding Lal Singh. The post-mortem was conducted by Dr. Chaman Lal. Medical Officer who has appeared as P. W. 23 at the trial. He has noticed the following injuries on the person of Mst, Jamna:

1. A long incised wound from lower lip just inside the right angle across the angle of mandible obliquely extending to the neck. Carotid vessels on the right side were involved in the wound and the mandible near its angle was cut through whole of its thickness.

2. An incised wound about 24' long in temporal region placed between outer angle of the right eve and ear.

3. Incised wound about 14' long 1/4' deep along the lateral portion of the right eve brow.

4. 2' long and 4' deep incision anter-aposterior on vault of the head.

5. A lacerated wound V shaped. wings of the V about 1' long and separated by2' at the maximum at the vault of the head,

6. An incised wound 4' long 2 deep on the outer side of right arm in its mid third.

7. Incision along the length of little finger of the left hand.

8. Incision involving all the four fingers of the right hand across the proximal phalanges.

Likewise he has observed following injuries on the person of Lal Singh

1'/- Incised wound 3' long on the forehead a little to right of the middle with underlying depressed fracture of the frontal bone. The wound was anterio posterior.

2/- Horizontal incised wound in right temporal region 4' long with scalp separated from cranium for about 3'.

3/- A 4' incision 1/2' deep on the vault of the head anterio-posterior about 2' to the left of middle line.

4/- Incised wound 1/2' long and 1/4'' deep in middle just above forehead.

5/- Incised wound about 6' long on the right shoulder parallel to clavicle. The inner 3' are about 11/2' deep and then the wound suddenlv tapers to the superficial depth in its extension towards the arm

6/- Incised wound 44' long ' deep across the back of the neck obliauely from left to right downwards,

7/-Superficial incision 4' long on the back of thorax region parallel to spine.

8/- Two superficial incisions 4' and 3' respectively on the back lumbar region on the right side parallel to spine.

9/- 4' deep incision across the Palm of the right hand.

10/- 1/4' deep incision across the left palm from little finger to wrist. According to him. injury No. 1 was in each case fatal and could cause death in the ordinary course of nature. All the injuries except injury No. 1 in the case of Mst. Jamna, he says. could be caused by a sharpedged weapon and were of 48 hours duration at the time of the examination conducted by him on 30-10-1969. His evidence therefore goes to show that the death of the deceased was homicidal and was caused on or about the night intervening 28/29 October. 1969. This takes us to the examination of the motive for murder. The prosecution case is that Mst. Jamna was a concubine and not legally wedded wife of Lai Singh. Accordingly there was nothing in law to prevent Mst. Jamna from Darting company with Lai Singh and becoming attached to the accused, if she so chose. It is therefore. inconceivable

that she should have found it necessary to suggest it to the accused to kill Lai Sineh. leave alone the fact that there is no evidence to suggest that she had any illicit connections with the accused. Then again it is inconceivable that the accused. acting on the advice of Mst. Jamna in killing Lai Singh. should have immediatelv suspected her fidelity and turned round to kill her instantaneously. The story put up by the Prosecution is. if we may say so. purely fantastic and establishes no motive for murder by the accused. Here one cannot help noticing that the iniuries on the person of Mst. Jamna and Lai Singh are so widespread and multiple that death could not have taken place in the circumstances suggested by the prosecution when according to them. Lai Singh as lying asleep on a cot and Mst. Jamna did not apparently put up any resistance for otherwise her screams should have invited people around to the spot while there is none.

11. From the proved circumstances, therefore, it is no doubt true that Mst. Jamna and Lai Singh have met an unnatural death by murder but it is difficult the accused with the same. The recovery of the articles belonging to the deceased from the house of the accused which is the only circumstance established against him. would only suggest that he is a thief or a receiver of stolen property particularly so because the recovery has been made about two months after the occurrence. The only offence therefore that can be held to have been proved against the accused is that under Section 380 R. P.C. and not that under Section 302 R. P.C. In this. we are fortified by a decision of the Supreme Court reported as : AIR 1956 SC54 in which it was observed as under:

In this judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against the accused person is the recovery of stolen property and although the circumstances may indicate that the theft and murder have been committed at the same time. it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof.

12. For the reasons given above. we cannot maintain the conviction of the appellant under Section 302 RPC and we. therefore. acquit him of that offence. We. however. maintain his conviction and sentence imposed on him under Section

380 R. P.C. To the extent as aforesaid. the appeal is accepted while the reference is rejected.

Main Jalaluddin, J.

13. I agree.

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