State vs Ram Autar Chaudhry And Ors. on 1 October, 1954

Equivalent citations: AIR1955ALL138, 1955CRILJ394, AIR 1955 ALLAHABAD 138

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. This is a Government appeal against the acqui ttal of Munnoo, Budhoo, Arjun and Bam Narain of the offence under Section 302, I. P. C., and of Ram Autar Chaudhari Kanurnan Prasad, Gopi Lal Sharma and Madan Lal Singhania of the offence under Section 302, read with Section 109, I. P. C. Arjun, op posite party No. 7, has not been ssrved of the notice of this appeal and his case is, therefore, not before us at the moment.

2. One Radha Krishna, elder brother of Ram Autar Chaudhari respondent, was murdered at about 11-30 p. m. on the 30-7-1343 on the Mall in front of the District Intelligence Staff office, Kanpur, when he, accompanied by his wife and two infants and driver Sen Gupta, was returning from the dinner at the house of Nandan Prasad Saxeria. Ha and his wife received injuries when attacked by three or four persons with knives and hockey stick.

3. The prosecution case is that the assailants had followed the jeep car in which Radha Krishna and his party were returning from near the house of Sexeria and could reach the victims because the jeep car stopped suddenly. It is alleged that the stoppage of the car was not accidental but was due to the tampering with the car by one shital, driver of the respondent Hanuman, at the suggestion of Hanuman and Ram Autar respondents. The tampering was done by pouring of about three quarters of a gallon of water inside the tank of the jeep when Sen Gupta, driver of Radha Krishna, and Ram Adhar, the cleaner of Ram Autar respondent, had been sent away on the ostensible pretext of fetching Ram. Autar'a and Madan's wives from their houses to the dinner. The actual assailants, who were following in an ekka, were, therefore, sure that the car would stop after going some distance and therefore could reach them.

4. There is no direct allegation as to who procured the actual assailants and arranged with them the carrying out of the plan. The suggestion seems to be that Hanuman had arranged them because two of these alleged assailants, namely Mannoo and Arjun were employed in the Juggi Lal Kamlapat cotton Mills at Kanpur of which Hanuman was the General Manager and also from the fact that it was Hanuman who is alleged to have enquired from Shital as to whether any ekka had followed the

car.

5. The actual conspirators who hatched the conspiracy for the murder of Radha Krishna are said to be Ram Autar, Hanuman, Gopi Lal Sharma and Madan Lal. Of them Ram Autar and Hanuman are said to have had reasons for planning the murder of Radha Krishna. Ram Autar had differences with his brother Radha Krishna on account of Radha Krishna and his wife not approving of the conduct of Ram Autar's wife going out in the company of Hanuman and Madan Lal and also on account of Radha Krishna's taking over the charge of the Ganga Oil Mills at Kanpur from Ram Autar, who though a student of the degree class had been looking after that mill on behalf of his father and one Bhagwan Das, the two proprietors of the mill. It is also alleged that Radha Krishna did not approve of Ram Autar's mixing with Kanuman and Madan Lal and his ways of life, specially his visits to prostitutes in their company. Evidence has been led about these causes of the ill-will between Radha Krishna and Ram Autar respondent.

6. Hanuman is said to have had a grudge against Radha Krishna on account of the alleged complaining of Radha Krishna to Sri. Padampat Singhania, the proprietor of the J. K. Cotton Mills, against Hanuman, and on account of which complaint Hanuman is said to have been rebuked by the managing director Sohan Lal.

7. Gopi Lal Sharma and Madan Lal had no grievance against Radha Krishna Chaudhari.

8. There is no direct evidence about Madan Lal's conspiring with the others about this murder. The other three are said to have been seen together shortly before the dinner on the 30-7-1948. At that meeting Shital approver, driver of Hanuman, was present. Ram Adhar, cleaner of Ram Auter, is also said to have been nearabout, if not actually with the other conspirators in their consultations. Shital had been asked by Hanuman at about 8 O'clock that morning for a suggestion for stopping a car. He could not offer any suggestion and rather felt surprised at the question. Hanuman asked him to come to his house that evening and when he went there the other three persons, namely Hanuman, Ram Autar and Gopi Lal Sharma were there. Hanuman again questioned Shital with respect to the query he had put to him in the morning and on his inability to make any suggestion questioned Gopi Lal Sharma, who is a textile engineer in the Lakshmi Ratan Mills. Sharma suggested that the simple way of stopping a car is to mix a certain quantity of water with the petrol.

Shital accused expressed his inability to give an opinion on the suggestion and also raised such protest as was possible for him, an employee of the J. K. Cotton Mills, to the carrying out of Hanuman's directions that he should pour water in the petrol tank of the jeep in which Radha Krishna was expected to go to the dinner. Radha Krishna had to go to the dinner in the jeep car because his own car was out of order for some days. He was, however, ordered to get the tin used for petrol from the garage, fill it with water and to pour water in the jeep when Ram Autar would direct him for the purpose. Ram Autar then handed over a key to Ram Adhar, who, in his turn, passed it on to Shital. Shital then took out one gallon mobil oil tin which had been in use for keeping petrol, filled up about three quarters of it with water and kept it with him in Hanuman's car.

9. Hanuman and Sharma then left for Saxeria's house. Ram Autar went to Madan Lal's house, took Madan Lal from there and then proceeded to Saxeria's house in his new Studebaker. With him was his cleaner Ram Adhar. Radha Krishna and his wife reached there in the jeep car. All these three cars were parked on the road at some distance from Saxeria's house which is in the lane closeby. The occasion for pouring water came when Sen Gupta and Ram Adhar had been sent away in Ram Autar's car to fetch his wife. Shital alone remained there. Ram Autar had come there to order Sen Gupta to take away his car and to guide him about the use of the gear. He had got to that car recently and Sen Gupta, who was a driver of Radha Krishna, had had no occasion to drive this car. He could not have had any occasion to acquaint himself with this car as, according to the prosecution allegations, the differences between the two brothers were such that members of one family were not speaking with the servants of the other family. Ram Autar then after the departure of Sen Gupta and Ram Adhar asked Shital to pour water in the tank and Shital complied with the request at the second asking of Ram Autar.

10. Sharma's complicity in the crime is alleged to be on account of his friendship with Hanuman with whom he had stayed for some time on his arrival in Kanpur about two months before this incident. He was, as already mentioned, consul- ted about the manner of stopping the car. It is, however, not in evidence that at any time Hanuman or Ram Autar or Madan Lal or anyone else indicated to Sharma the purpose for which this enquiry was made and that Sharma had expressed ; his readiness to be a party to the plan for murder. ' x The fact that Sharma did not go to the dinner in his own car and the fact that none of these accused took their wives to the dinner are relied upon for drawing an inference that both these facts were due to their having conspired in committing the murder of Radha Krishna.

11. Madan Lal's joining the conspiracy is sought to be inferred from the fact that Ram Autar soon after the meeting at Hanuman's place drove to Madan Lal's house and then took Madan Lal with himself to the dinner and also the other fact that their wives also did not join the dinner.

12. The other circumstances which are relied upon for the charge of conspiracy are that after the dinner Ram Autar, Madan Lal and Hanuman did proceed towards the place of incident on the pretext of having betels from the reputed betel-seller Lakshmi Narain in spite of Saxeria's giving out that the betels got by him were also from the same shop. There was nothing unusual in such a visit at about midnight as it is in evidence that many well-known people of Kanpur are in the habit of visiting this particular shop. He did not go by the same road by which Radha Krishna had left and which is expected to be the better road but went by the Grand Trunk Road. On their way back from the shop there was a tyre burst in their car. Saxeria speaks about this, and, according to him, it appears that the tyre had really burst; but the prosecution suggests that it was a fake bursting of a tyre and was just an excuse by Bam Autar for stopping the car and getting information from some persons he had already arranged with about the carrying out of the murderous plan. Saxeria states that two persons whom he had described in his statement before the police and whom he does not name in court had some talk with Ram Autar and that after that talk the party went to the Ursila Hospital where shortly before had arrived Radha Krishna deceased and his wife in some car which had happened to reach the place of incident soon after the attack on Radha Krishna.

13. Hanuman remained outside the hospital. Saxeria, Ram Autar and Madan Lal and also a cousin of Saxeria went in. Ram Autar lamented, cried and enquired as to what had happened to his brother. Shrimati Naraini Devi, wife of Radha Krishna, though in grief, burst out stating to the effect that they had come to see the fun after having played the game and whether the dinner had been arranged for that purpose. There is no agreement between the parties as to whom this suspicious statement was addressed. The prosecution suggests that it was addressed to Ram Autar as she suspected him of having planned the murder. The defence alleges that it was addressed to Saxaria. Any way it was Saxaria who then told her that that was not the proper occasion for such remarks. This remark of Naraini Devi is much emphasized for the prosecution as a definite, prompt expression of her suspicion against Ram Autar and which must be taken to be very good evidence of the strained relations between the parties and a good corroboration of the other prosecution evidence.

14. Ram Autar fainted in the hospital and was taken aside. This fainting is alleged to be fake by the prosecution even though Dr. Chaturvedi, the Medical Officer attached to the Hospital, did not think so. This alleged fake conduct of Ram Autar is also relied upon as pointing to the correctness of the prosecution charge of conspiracy.

15. Coming to the main incident of assault, what happened there was that the jeep, which Radha Krishna was driving, stopped all of a sudden with a jerk according to the earlier statements of the two persons competent to speak about it, namely Sen Gupta and Naraini Devi. Naraini Devi, however, stated in Court that there had been some sound of That Phat' also before the car had stopped. The car stopped in front of D. I. S. office. When the car stopped Radha Krishna and Sen Gupta got down and one of them noticed wether the tank had petrol and was satisfied that had petrol. Sen Gupta is not consistent In his two different statements whether it was Radha Krishna who had noticed it or he himself had noticed it Having noticed that there was petrol in the tank, neither of them did anything to find out why the car stopped. Radha Krishna took his seat in the jeep behind the steering-wheel and Sen Gupta was to get in the jeep when the assail- ants came on the left side of the jeep on which side was the steering-wheel and attacked Radha Krishna with knives. Sen Gupta at once went away with the child which was sitting on the front side and returned after some time.

Naraini Devi was in the back side of the car with another child. To protect her husband she leaned over him and got many a blow herself. One of the assailants had a hockey stick according to the prosecution witnesses in Court. Their cries brought on the spot Har Narain and Vishwanath, D. I. S. constables, who were sleeping in the D. I. S. office compound and shortly afterwards the Peputy Superintendent of Police Shri Inderjeet Sharma reached the spot. Shri Sharma naturally as a senior officer took charge of the situation and directed Vishwanath to inform the police of police station Colonelganj, 3 furlongs away, about the incident. Vishwanath sent the telephonic message to the effect that three persons had attacked a man on the jeep in front of the office. No further information was conveyed. Details of the incident need not have been conveyed and need not have been known by that time; but something which Vishwanath had noticed himself and which is now relied upon to be of great significance to the prosecution case was omitted by him in his telephonic message and, that is, his having heard the sound of the horses hooves indicating that some

horse-driven vehicle was going at a very fast speed in the same direction in which the Colonelganj police station lay.

He suspected that the assailants had made good their escape on that vehicle; but he did not communicate this fact. Its communication might have helped the police to follow the alleged horse driven vehicle. It is true that it had got some start, but after all the sentry on duty at the gate of the police station might have noticed the vehi-cle passing the police station or some other passer- by might have been able to give some clue with respect to the progress of that vehicle. Vishwanath himself was not to be the final judge of the use- fulness of such an importanat information to the police at police station Colonel Ganj.

16. On the receipt of the telephonic message S. I. Deo Dharisingh with the police party reached the spot and passed the vehicle in which Radha Krishna and Naraini Devi were being taken to the hospital. He reached the spot, looked up the locality and started the investigation. Mr. Inder-jeet Sharma, Deputy Superintendent of Police, re-tired to his office and there prepared the first information report, a note addressed to the Station Officer, Colonelganj. The significant statements made in this report are that he was, informed by Har Narain Singh of his staff that a person going in the jeep car in front of the office had been attacked by some unknown persons with daggers and lathi, that he found Radha Krishna Chau-dhari, the victim, lying in the driver's seat in the jeep and his wife weeping and embracing him, that the driver Sen Gupta was standing nearby and about 20 people were on the spot and that the woman, i.e., Naraini Devi and driver, i.e., Sen Gupta told him that the car failed suddenly and just after a while three persons of whom one was armed with lathi having a 'pharsa' and two armed with daggers attacked Radha Krishna and fled towards the east, the direction from which they had arrived.

17. Having given this description of the incident Shri Sharma started the second paragraph with reference to the arrival of Constable Har Narain Singh and Head Constable Vishwanath on the scene of occurence and their hearing the noise of fastly running of a horse on the road towards the east, indicating that the culprits ran away on some hackney carriage. It is after mentioning this fact relating to the arrival and observation of Vishwanath and Har Narain Singh that he mentioned that one of the culprits was said to be wear-Ing a shirt and a dhoti and was stout and tall with moustaches and that the other. two were dressed in banyan and dhoties and had their faces uncovered.

It is not said in the report whether this information was given by Naraini Devi or Sen Gupta and this would not appear to be so as otherwise its normal place should have been in the first paragraph where the facts stated by them had been narrated. Having mentioned these facts the Deputy Suprintendent of Police stated further in his report that the car stopped near the electric pole and that there was sufficient light for the woman, driver and others, who had reached at once, to see the culprits well. None of the others, who are said to have reached the spot at once and to have been able to see the culprits has been traced or produced in Court as a witness. In fact, according to the prosecution case none had reached there in time to see the culprits.

18. The jeep was moved from the road to the compound of D. I. S. office and, according to the prosecution evidence, constables were deputed on four-hourly duties to keep an eye on the jeep. Udairaj, a prosecution witness, was the first constable put on duty in this connection and was on duty from 11 P. M. to 3 A. M. The other two constables have not been examined. In fact it has been suggested that the investigating officer could not trace who they were, though, curiously enough, according to Udairaj it was Deodhari-singh, the sub-inspector who had started the investigation, who had deputed the constables. Whoever might have deputed them, it is a great strain on credulity to think that the names of the two constables could not have been traced. However, on the afternoon of the 31st of July, the jeep was examined by Mr. Dawkins, a motor engineer. According to him he found no defect in the car which could account for the alleged sudden, stoppage. He, however, found that water was in the fuel system.. He used the hand liner of the fuel pump and found that only water was delivered instead of petrol. He continued pumping until petrol began to come out, and the water which came out of the tank thus was placed inside a jar which was sealed. Its quantity was estimated by him at the time to be about one to one and a quarter gallon.

After he had taken out this water and connected up the line he found no difficulty in starting the engine, which was operating well. In order to express a definite opinion regarding the effect of the amount of water in a running vehicle he opened and examined the fuel tank next day, i.e., on the 1st of August. On opening the tank next day he found tiiat the fuel feed was through a "U" tube reaching from the upper step of the tank to the lower step. This "U" tube did not reach right to the bottom of the tank, making it possible for the engine to operate for some time due to the motion of vehicle keeping the liquid in the tank in motion and resulting in a certain amount of water having reached into the carburettor together with the petrol. He expressed the opinion in his note, Ex P24, prepared on the 1st of August, that the presence of water in petrol caused an engine to first spit and give jerky operation and that later when the quantity of water predominated the vehi-cle would spit and jerk excessively and then come to a standstill and that while a mixture of water and petrol was being sucked in the jerky operation of the engine that would restrain the speed of the vehicle.

In his deposition Mr. Dawkins further stated that the bottom, end of the fuel tube indicated by A on the sketch plan Ex. P23 was about an inch higher than the bottom of the tank and that if the liquid in the tank was below point A it could not be sucked up and whatever reached that level would be sucked. This would mean that the water which had been taken out on the 31st of July was the water which was in the tank above the level of the point A, the lower end of the fuel tube, and that the water in the tank below the point A would be in addition to the water which had been taken out. The other portion of the water mixed with petrol would be in the carburettor. Thus the total quantity of water mixed would, according to Mr. Dawkins' statement, be a total of the water taken out on the 31st of July, the water remaining in the tank below point A and water in the carburettor or which got wasted. This quantity, according to the learned Sessions Judge, would be much above one gallon in volume.

19. Mr. Dawkins further stated that the pre sence of water in petrol caused the engine to first spit and give jerky operations and that when later the quantity of the water predominated the vehicle would spit and jerk excessively and then come to a standstill. He was very definite on this point and repeated that before the car as mentioned by him with that amount of water should have stopp ed,

the spitting and jerking must have taken place almost invariably, before the car stopped, and also that if it was said by someone that he did not notice anything unusual in the jeep car from Saxeria's house upto the place where it stopped he would not agree to that if the stoppage was due to the presence of water.

20. Mr. Dawkins also deposed about the distance from Saxeria's house to the place of incident ac-cording to the meter fixed to his car and said that it was just 30 or 40 yards short of a mile and a half and that the route included a portion with an uphill gradient. He further deposed that the petrol in the fuel line and the carburettor above the point A would be just sufficient for the jeep to go about a mile on the level road.

21. S. I. Deodhari Singh examined Sen Gupta on the night between the 30th and 31st of July. He contacted Naraini Devi at the House of her brother Brij Mohan the same night and had a talk with her for some time, but, curiously enough, made no record of what she had stated. The police did not record any statement of Naraini Devi or Ram Autar till several days after the incident, the explanation being that Naraini Devi was not available and was not in condition to give an account of incident and that Ram Autar kept out of the way. Ram Adhar, cleaner of Ram Autar, was examined on the 1st of August. Shital driver was next examined on the 16th of August. His confession was recorded by a Magistrate on the 20th of August. On the 22nd of August a simultaneous raid was made for the arrest of the various accused and all of them, except Ram Narain, were arrested that day.

22. It may be mentioned that on the 7th of August the investigation changed hands. Circle Inspector Incirapal Singh of the D. I. S. took over the investigation from S. I. Deodhari Singh. Saxeria was examined on the 6th of August. Mata Din, the alleged ekka-driver who had taken the assailants to the spot that night, was examined on the 23rd of August.

23. Budhoo accused is said to have made a confession to a Magistrate on the night of 27-7-1949 during the preliminary enquiry after the challaning of the accused. In fact the case was up for hearing that day and the accused had returned to jail at about 5 p. m. The confession is said to have been recorded at about 8 p. m. This confession has not been taken on the record by the learned Sessions Judge on the ground that it did not come within the confession recorded under Section 164, Criminal P. C., and was, therefore, inadmissible.

24. The four accused who are said to be the actual assailants, namely Munnoo, Budhoo, Arjun and Ram Narain were put up for identifications and were identified by some of the three identifying witnesses, namely Naraini Devi, Sen Gupta-- who were admittedly in the car and had Witnessed the incident -- and Ram Murat, who deposed to have passed by an ekka going fast and on which were seated the four persons.

25. All the accused denied their alleged connec-tion with the conspiracy and the murder. We need not at this stage mention their statements in tail.

26. Dr. Chaturvedi examined the injuries on corpse of Radha Krishna and found fifteen (sic) les on the person, which included three pun- (sic) wounds two bruises and incised (sic)wounds. (sic)them except an incised wound on the righter were on the left side of the body. One offictured wounds was on the abdomen transacross mid-line 5"above the umbilicus. One (sic) bruises was on the front and the middle

27. Naraini Devi had twenty-one injuries. Allam were with a blunt weapon. Most of them also on the left side of the body. Three aries consisting of a contusion on the right buttock, another contusion on the right knee and an abraded contusion on the inner aspect of the right ankle were on the rignt side. The remaining injuries were on the left side.

28. It is really surprising that Naraini Devi should receive so many injuries while she was leaning over her husband from the back side and yet should not receive a single injury from a sharp-

edged or pointed weapon which apparently were mostly used against Radha Krishna. In this connection mention may be made of the observa tions of S. I: Deodhari Singh that he had found some blood at one spot and drops of blood at others on the road. The prosecution story as such does not tend to explain the presence of blood on the road.

29. Before dealing with the evidence, direct or circumstantial, on the record, it is necessary to dispose of a few points of law urged at the hearing of this appeal. The first is the effect of the recent rulings of the Supreme Court on the question of what the High Court is empowered to do when hearing an appeal against acquittal. It is not disputed and cannot be disputed in view of What was held in -- 'Sheo Swarup v. Emperor, AIR 1934 P. C., 227 (2) (A)' and fully endorsed by the Supreme Court in -- 'Prandas v. State, AIR 1954 SC 36 (B), that the true position in regard to the jurisdiction of the High Court under Section 417, Criminal P. C., in an appeal from an order of acquittal is to be found in the following :

> "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial. (3) the right of the accused to the benefit or any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice."

This was the first case decided by the Supreme Court laying down the law dealing with the jurisdiction of the High Court in an appeal against acquittal. It was decided by a Bench of six Judges on 14-3-1950. Thereafter the same view has been either repeated in exactly those words or has been in a way summarised in some other form. One subsequent case in particular requires direct mention at the moment and it Is -- 'Wilayat Khan v. The Stats of U. P.', AIR 1953 S.C., 122 (C), decided on 25-5-1951. It was observed in this case by the three learned Judges who decided it - two of whom were members of the Bench deciding 'Prandas's case (B)':

> "Interference with an order of acquittal made by a Judge who had the advantage of hearing the witnesses and observing their demeanour can only be for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the. evidence or the facts. As stated already, we feel that the grounds which have been given by the High Court for setting aside the order of acquittal are not such as to show that the conclusion arrived at by the Sessions Judge was not the proper one to reach."

30. The different form in which the same principle seems to have been expressed in the other cases has been that the order of acquittal should be set aside for compelling reasons and that the presumption of innocence of an accused gets reinforced after he had secured acquittal from the trial Court.

31. It was on consideration of these various cases that one of us held in -- 'State v. Puttoo (Criminal Appeal No. 674 of 1951)', (All) (D) when the case came up before him on a difference of opinion between the Judges originally hearing the appeal that "Substantial and compelling reasons would be deemed to exist when the opinion taken by the Sessions Judge of the material on the record is such which no reasonable Judge should have taken. If it is an opinion which could also be taken, due weight to that opinion can be given only by accepting it and not by upsetting it." Reference was then made in the case to the observations of the Privy Council in -- 'Ramanugrah Singh v. King Emperor', AIR 1948 PC 151 (E) in connection with what the High Court should do in a case on reference under Section 307, Sub-section (3) Cri P. C., and it was then observed by one of us : "The question before me then resolves itself to determining whether the view taken by the learned Sessions Judge is a view which a reasonable Judge could have taken or is a view which could not have been taken by any reasonable Judge."

32. The learned Advocate General has vehemently urged that this view that in an appeal on acquittal the High Court should not or could not upset the order of acquittal unless it was of opinion that a reasonable Judge could not have taken that view does not follow from what the Supreme Court has held and that the Supreme Court had not in any of the decided cases, which number about a dozen, expressed that view or dealt with the case in a manner which would indicate that that is the correct interpretation of the law with respect to the Jurisdiction of the High Court as laid down by the Privy Council and endorsed by the Supreme Court. The learned Advocate General submits that the four matters mentioned in the law laid down are not pecxiliar to the hearing of an appeal against acquittal but are to be considered even in appeal against conviction. It is urged that the High Court as naturally to consider the views of the Sessions Judge or the Court acquitting the accused and will

naturally be slow in differing from that opinion in any case, be it of conviction or of acquittal.

It is further urged that the presumption of innocence is incapable of being reinforced or weakened and must continue in its original condition and that the right of the accused to the benefit of doubt is always available to him even at the stage of the original trial and in the appeal, be it against acquittal or conviction. It is also urged with great emphasis that if these matters were to shackle the power of the High Court in dealing with an appeal on acquittal, that would not be consistent with what has also been held that the High Court has full power to review at large the evidence upon Which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. He suggests , that this well-settled law with respect to the jurisdiction of the High Court in regard to the appeals against acquittals simply means that the High Court should in its judgment consider the views expressed by the trial Court and that having considered those views the High Court is free to form its opinion about the evidence and decide the case according to the opinion so formed.

In support of such an interpretation reference is made to the fact that the Criminal P. C. or any . other statute does not create any distinction in the powers of the High Court in dealing with an . appeal against conviction or acquittal. Section 423 of the Criminal P. C., lays down the powers of the appellate Court in disposing of an appeal, and provides that after perusing the record of the case and hearing the appellant or his pleader and the Public Prosecutor, in case they appear, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may : do one of the things mentioned in its Clauses (a) to (d). Clause (a) deals with the appeal against an order of acquittal and the High Court can reverse such order and direct that further enquiry be made or that the accused be retried or committ-ed to trial or may itself find him guilty and sentence him according to law.

33. As there was no dispute about the law laid down and the real contention related to the practi cal application of that law or to the practical deal ing with a particular case, we went through the various cases with a view to find how the Supreme Court itself had applied this law in dealing with the appeals which went up to it. Among the 11 cases so far reported, there is none in which the Supreme Court had to deal with an order of ac quittal by the High Court and which could, there fore, be a very clear guide as to how to deal with an appeal against an order of acquittal. All the appeals were against the orders of the High Co upsetting the orders of acquittal and in practic all these cases except one the Supreme (sic) reversed the orders of the High Court and (sic) the accused. In the first case reported in 1954 S. C. 35 (B) already referred to, there(sic) thing in the actual discussion of the case w(sic)-

of any use in this connection.

The next case is of -- 'Tulsiram Kanu (sic) State', AIR 1954 S. C. 1 (F). It was observe Chief Justice Kania at page 2 that "Before proceeding to examine the reason. the High Court's conclusion, we think it nt sary to point out that in an appeal against..

order of acquittal on a charge of murder, under Section 417, Criminal Procedure Code, while the appeal Court has full powers to review the whole case, the Court must start with the realisation that an experienced judicial officer (with four assessors) had concluded that there was clearly reasonable doubt in respect of the guilt of the accused on the evidence put before the Court. It, therefore, requires good and sufficiently cogent reasons to overcome such reasonable doubt before the appeal Court comes to a different conclusion."

The Supreme Court then discussed the evidence and felt that the views of the Sessions Judge were right and those of the High Court were wrong and therefore allowed the appeal. This case supports the view that good and cogent reasons are necessary to upset an order of acquittal and that in its turn implies that merely because the appellate Court thinks differently from the trial Court would not be sufficient to upset the order. Of course, it will always be an open question what would be good and cogent reasons in a particular case.

34. The next case is AIR 1953 S. C. 122 (C). In this case the High Court Judges expressed their consciousness of the facts that in an appeal from an acquittal the presumption of innocence of the accused, continued right up to the end and that great weight should be attached to the view of the Sessions Judge, and kept those considerations in mind according to their own expression in the judgment. They also proceeded to discuss and weigh the evidence in meticulous detail and in doing so they brushed aside several circumstances which weighed with the Sessions Judge as improbabilities in the prosecution story, with the result that they were convinced of its truth, even though they were of opinion that the evidence of the prosecution witnesses had to be subjected to close scrutiny having regard to the admitted existence of the party feelings and enmity between the accused and the eye witnesses. This is, therefore, a case which would satisfy what the High Court should do in an appeal against an acquittal according to the submissions of the learned Advocate General and which should be sufficient for upsetting the order of acquittal.

Chandrasekhara Aiyar J., who delivered the judgment of the Supreme Court, observed at page 124 when considering the testimony of one no witness :

> "The High Court rejected his testimony for reasons which do not appear to be conclusive,..".

the nd again at another place on the same page :

> injur. The inference that the Sessions Judge, drew (sic)these circumstances that the witnesses did (sic)probably see the occurrence, but came on (sic) scene after the murder, and evolved a pro- (sic) story against their enemies is not far- be fetched or unreasonable. His conclusion appears (sic) us to be more sound than the one reached Stay the High Court, who discounted the weight (sic) be attached to the infirmities by a process of father far-fetched reasoning".
>
> It Is at the conclusion of this case that they observed what has already been quoted as to when there should be an interference with an order of acquittal. The two earlier

observations juat mentioned indicate both that the reason for the High Court to differ from the view of the Sessions Judge should be of some such kind as can be said to be conclusive and that the High Court should also see whether the reason given by the Sessions Judge for a certain view is a far-fetched or unreasonable one or not. We are of opinion that both the final observations and these two observations in the midst of discussion amply bear out that the cogent and good reasons contemplated in AIR 1954 SC 1 (F), and the compelling and sub-stantial reasons referred to in subsequent judgments must be analogous to reasons which can be said to be conclusive and clinching so that there may not apparently remain any room for considering whether the view of the trial Court was a correct one or that of the High Court was a correct one. If the reasons which appeal to the High Court for disturbing a Judgment of acquittal are not of such a kind, then it would only be said that the evidence in the case was such that both the views could be reasonably arrived at and that therefore in a case of acquittal the High Court should not differ but confirm the view of the Sessions Judge.

The reason for the High Court's deciding tha appeal thus in spite of its own inclinations is to be found in the four matters which have been so significantly mentioned whenever the Privy Council and the Supreme Court formally laid down the jurisdiction of the High Court when dealing with an appeal against acquittal. The facts that the Sessions Judge had the advantage of seeing the witnesses whose statements he had recorded and had occasion to observe their demeanour --whether he had put in writing his views about it or not -- place him in a greater advantage than the appellate Court. Apart from this consideration, which can be explained away in many a case because such clear demeanour which should influence the opinion of the Court is not to be met every day, due weight must be given to two other matters, that is the presumption of innocence of an accused and the right of the accused to the benefit of doubt. These two matters, we think, have the effect of tilting the scale when merely on an appreciation of evidence accordingly to their inclinations the two Courts come to different views about the evidence on the record. In an appeal against acquittal the effect of this presumption and the right in favour of the accused would justify and would necessitate in a way the appellate Court's not interfering with the order of acquittal but maintaining it. It is the same two considerations which would explain the non-insistence of considering these matters in the process of arriving at the conclusion by the appellate Court when dealing with an appeal against conviction. The moment the appellate Court is inclined to view the evidence differently from the trial Court, these very facts, that is, the presumption of innocence of the accused and his right to the benefit of doubt must impel and necessitate the appellate Court to upset the order of conviction as otherwise effect is not given to these two considerations in deciding the appeal. In this view of the matter, it appears to us that though Section 423, Criminal P. C., uses only one expression in connection with the powers of the appellate Court in dealing with appeals, its provisions fully justify the subtle distinction in the powers of the appellate Court in deciding an appeal against conviction and an appeal against acquittal. Section 423 simply provides that if the

> appellate Court does not see sufficient reason for interference it may dismiss the appeal and im-pliedly if it sees sufficient reason to interfere it may pass any of the orders contemplated by Clauses (a) and (b) of Sub-section (1) of that section.

35. The learned Advocate General submitted that in the case under discussion, i. e., AIR 1953 SC 122 (C), the Judgment does not indicate that the Supreme Court had given pointed attention to the law .as formally laid down with respect to the power of the High Court in an appeai against acquittal because that has not been quoted in that judgment. Omission to quote it should not necessarily lead to that conclusion and specially When we find that earlier in the judgment they had drawn attention to the fact that the High Court was conscious of the two considerations, namely the continuance of the presumption of innocence of the accused and the great weight to be attached to the view of the Sessions Judge. In the subsequent cases, namely those reported in -- 'Surajpal Singh v. The State', AIR 1952 S. C. 52 (G) and -- 'C. M. Narayan v. State of Travan-core-Cochin', AIR 1953 S. C. 478 (H), the High Court had ignored the views of the Sessions Judge. In -- 'Puran v. The State of Punjab1, AIR 1953 S. C. 459 (I), the Supreme Court did not find that there were any compelling or substantial reasons for the reversal of the acquittal order by the High Court and none had been pointed out by the High Court in its decision, which also did not discuss the evidence of the prosecution witnesses or explain satisfactorily the discrepancies that were of a material nature and which had been pointed out in those statements by the Sessions Judge in his careful and detailed Judgment.

In -- 'Zwinglee Ariel v. State of Madhya Pradesh', AIR 1954 S. C. 15 (J), the High Court upset the order of acquittal without discussing the evidence of the different witnesses or adverting to the criticism offered by the Additional Sessions Judge and based their conclusion mainly upon certain circumstances with regard to which, however, no opportunity of explanation had been given to the appellant. It was observed by the Supreme Court that the High Court overlooked some of the well-known principles recognised in the administration of criminal justice as laid down by the Privy Council in AIR 1934 P. C. 227 (2) (A) and repeated by the Court for the guidance of appellate Courts in dealing with an appeal against acquittal and that the learned Judges did not appear to have kept in view that the order of acquittal had strengthened the presumption of innocence in favour of the appellant and that he was entitled to the benefit of reasonable doubt.

36. In -- 'Ajmersingh v. State of Punjab', AIR 1953 S.C. 76 (K) it was observed :

> "After an order of acquittal has been made the presumption of innocence is further reinforced by that order, and that being so, the trial Court's decision can be reversed not on the ground that the accused had failed to explain the circumstances appearing against him but only for very substantial and compelling reasons."

It appears that the two Courts had expressed divergent opinions on the credibility of the prosecution witnesses and that therefore the Supreme Court itself had to deal with that evidence and on consideration agreed with the view of the High Court. It is in this case that the appeal against the High Court's order upsetting an order of acquittal was maintained by the Supreme Court. This does not mean that what is necessary for the High, Court is simply to give reasons for differing from the view of the Sessions Judge as suggested by the learned Advocate General. It only indicates that when

an appeal against the High Court's order of conviction is to be dealt with by the Supreme Court, it has of necessity to deal with the evidence in the case and come to the conclusion whether the High Court had good and cogent reasons, or, what are said to be substantial and compelling reasons, for upsetting the order of acquittal.

37. It is observed in the case reported in. -- 'Trimbak v. State of Madhya Pradesh', AIR 1954 S. C. 39 (L).

> "It is settled law that the presumption of the innocence of an accused person is reinforced by an order of acquittal and a heavy onus rests on the prosecution in an appeal from such an order to prove that the order is manifestly erroneous. The High Court seems to have approached the case as if it was considering an appeal preferred against his conviction by an accused person."

This also indicates that the High Court should consider an appeal against acquittal differently from an appeal against conviction and should pointedly consider whether the order of acquittal is manifestly wrong, that is to say, based on reasons whose incorrectness is not difficult to see.

38. The last case in the series of decisions is reported in -- 'Shiv Bahadur Singh v. State of Vindhya Pradesh', AIR 1954 S. C. 322 (M). It was observed in this case at page 327 :

> "The appeal before us was very elaborately argued on behalf of the appellants and we were taken through the evidence of the several witnesses examined on behalf of the prosecution in great detail. We heard the appeal as an appeal on questions of fact with a view to see whether the judgment of the Judicial Commissioner reversing the acquittal of the appellants by the Special Judge was justified."

This again would indicate that when upsetting an order of acquittal the first thing to notice is whether the order of acquittal was justified. It should follow that if the reasons given for the order of acquittal are not such which could be shown to be erroneous on the basis of something which would be conclusive and clinching in nature, that order . will be considered to be a justified order even though, if the appellate Court was to form its own opinion independently, it might have been inclined to take a different view due to its own view of things but not on account of any conclusive reason which could be equated with substantial and compelling reason.

39. It was urged that the substantial and compelling reason would be the finding of the appellate Court that the evidence and circumstances on the record lead to the conclusion that the accused was guilty, as a finding about the guilt of the accused must compel the appellate Court to upset the order of acquittal and convict him. It cannot be disputed that if the appellate Court gives a finding that the accused is guilty, it must upset the order of acquittal and convict the accused. But what the law laid down in all these cases is that in coming to a conclusion about the guilt of the accused, the appellate Court will take into consideration the four matters which have been mentioned while exercising its full power of reviewing the entire evidence on the record. Consideration is to be given to these matters not after reaching the conclusion that the accused is guilty according to its views but before

arriving at that conclusion, and if the conclusion of guilt cannot be arrived at or ought not to be arrived at in a case of appeal against acquittal -- unless conclusive or substantial and compelling reasons are found to differ from the views expressed by the Sessions Judge -- no such conclusion would be recorded and there would be no compulsion to convict the accused.

40. We have dealt at length with this question due to its every day occurrence in Courts and its importance in connection with the appeals, though / it has been so often laid down by the Supreme Court. The necessity arose on account of different interpretations put on the law as laid down when that law was to be applied in practice.

41. It was also urged by the learned Advocate General that since the decision of the Privy Council no change in law had taken place as the Supreme Court simply endorsed what had been held by the Privy Council and that, therefore, there could not have been any substantial change in the law as understood and applied in the last 20 years. It does not appear that any case in which a High Court convicted an accused on an appeal from acquittal went to the Privy Council to see whether what it has laid down had been correctly applied by the High Court. The Supreme Court has endorsed the view expressed by the Privy Council; but it must be taken that the endorsement of that view is really endorsement of that view as contemplated by the Supreme Court & which can be evident only from the other expressions used by that Court in its various decisions.

42. In view of the above we are of opinion that in an appeal from acquittal this Court has the power to review the entire evidence and then to come to its own conclusions, but that in arriving at that conclusion it must keep in mind those four matters mentioned above and that in practical application, keeping in consideration those four matters, must mean that the High Court should find such reasons which may be termed compelling and substantial reasons or which may be deemed to be clinching and conclusive before it would be justified in upsetting an order of acquittal. It would not be so justified merely because it, after considering the criticism of the Sessions Judge and his views, feels that a different view should be taken for reasons which are not so strong as to be classed with substantial or compelling reasons, which, in our opinion, seem, to be at par with such; reasons against which practically nothing be possible to be said.

43. The other question of law urged related to the admission of the confession made by Budhoo. It was contended that though the confession could: not be recorded by a Magistrate under Section 164; Criminal P. C., after the investigation had concluded and enquiry had commenced before the committing Magistrate, the Magistrate recording the confession was not precluded from recording it if the accused was prepared to make it and tnat, therefore, the Magistrate was a competent witness to prove that Eudnoo had made a certain confession to him. We do not agree with this contention and are of opinion that the case reported in -- 'Nazir Ahmad v. King Emperor', AIR 1936 P. C., 253 (2) (N) is a complete answer to the contention. It is true that an accused is free to make a confession at any time he likes and the person to whom such a confession is made is also free to make a statement about it in Court and no Question of admissibility or otherwise of such a confession should arise. The question of weight to be attached to such a confession is a different one. But the real point is that a Magistrate is not just "any person". He occupies the position of a Magistrate. He purports to act as a Magistrate and not as an ordinary individual. It has been clearly laid down by

their Lordships in the aforesaid decision that when a power is conferred upon a certain public servant, it must be exercised precisely in the manner in which it is ordained to be exercised and that it was very undesirable that Magistrates should act like ordinary citizens and should appear as witnesses in Courts of law, and that they should appear as witnesses only in very exceptional cases when law makes it incumbent for them to play that role. This view of the Privy Council was endorsed by the Supreme Court in AIR 1954 S. C. 322 at p. 335 (M) though in another connection. We are, therefore, of opinion that a Magistrate could not have recorded that confession of Budhoo purporting to exercise the powers conferred on him U/S 164 Cr. P. C. and that a confession so recorded by him could not be taken in evidence.

44. With respect to this particular confession it may also be said that the prosecution did not try to lead evidence about it at the stage of preliminary enquiry before the Magistrate and that therefore they could not have claimed as a matter of right the recording of this evidence in the Sessions Court. We find that Budhoo was questioned about having made such a confession by the committing Magistrate. The justification for putting this question does not appear to be any. An accused is to be examined with respect to matters coming on the record and having a tendency to go against, him in the consideration of his guilt. When there was no evidence of the confession on the record the committing Magistrate was not Justified in putting that question to Budhoo. It may, however, be mentioned at this stage that when Budhoo was questioned about it on 29-7-1949, he denied having made the confession.

45. We have been taken through the entire evidence on the record and we have also been taken through the main portions of the judgment of the learned Sessions Judge and we may say at once that we are inclined to agree with the view of the case he had taken. The main grievance against judgment of the Court below has been the approach to the case. It seems to be the prosecution view that the Court should not have dealt with this case in the usual manner on looking to the credibility of witnesses but should have started from a particular fact which, if found in favour of the prosecution, would have naturally led to the conclusion that the other circumstances relied upon fitted with the prosecution case and, therefore, the evidence about those circumstances should have been taken to be worthy of belief. We do not think that that alone would have been the only correct procedure to deal with the case even if it is correct for a Court to pick up a certain circumstance and then begin with to find whether the other circumstances fitted with it or not; and in this case, in particular we are of opinion that this particular circumstance is not of such a nature a finding on which would have made smooth deductions about the other facts necessary to be found before the conviction of the appellants could possibly be recorded.

This particular circumstance is said to be the finding of water in the petrol tank on the 31st of July by Mr. Dawkins. The reasoning is that if water had been mixed in the car, this fact together with the fact that there was an expectation of the car stopping after going a certain distance must lead to the conclusion that people had planned this murder and that it was not an accidental murder by some ruffians on the road when the car happened to stop. The car went smoothly to Saxeria's house and therefore water must have been poured in when the car was standing at Saxeria's house. The best opportunity for this must have been when admittedly Shital alone happened to be with the car, Sen Gupta and Ram Adhar having gone away with Ram Autar's car to fetch his wife. It is also natural for

Ram Autar to have reached the car and ordered Sen Gupta to go with his car because he had to explain the working of the gear to Sen Gupta and that therefore Shital's statement that he poured water in the tank at the directions of Ram Autar should have been believed irrespective of the fact whether there was any good corroborative evidence of the statement of the driver Shital -- evidence which was sought to be led by producing Raja Ram, a hawker.

It may be said at this stage in fairness to Mr. Wadhwani, who argued the appeal on behalf of the State in the unavoidable absence of the learned Advocate General, that he did not rely on his statement in this Court because he considered it next to impossible for any person even if he happened to pass close to the car to notice the nature of the liquid which was poured in. Firstly, the presence of water in the tank even if proved would not necessarily mean that whatever Shital stetes with respect to the conspiracy must be true, or that Shital himself must have poured the water inside the tank. Secondly, we are in agreement with the learned Sessions Judge that the story of Shital's mixing the water in the tank should not be accepted as the quantity of water said to be put in by Shital is, much short of the quantity of water found inside the tank. In this connection it has been strenuously urged for the State that there is no definite evidence on the record with respect to the quantity of water found and that the Court missed in not getting on record the conclusive evidence on the point and which could have been by examining the tank and finding for itself how far the statement of Mr. Dawkins, the expert, could be relied upon in that connection.

The Court below was moved to look up the tank in case it had its doubts at the stage of the arguments and it did not accede to the request. It appears to us that it is not open to the prosecution to take advantage of indefiniteness, if any, with reference to the quantity of water recovered from the petrol tank. In his very first report which Mr. Dawkins prepared on 31st of July, he mentioned that the water taken out was about one to one and a quarter gallon. The tin in which the water was kept was sealed and kept in possession by the police. It should have been better if the investigating officer had got that water measured at that time. On the 16th of August Shital was examined by the police. Shital states in Court that he had filled in one gallon mobil oil tin with water and poured that water inside the petrol tank. In fact, according to his statement, the quantity of water would be three-fourths of a gallon. It may be presumed that he made a similar statement to the police on the 16th of August. The investigating agency should have, therefore, proceeded further in connection with the quantity of water and during the investigation found out facts which would have shown that what Shital had stated was correct. They did nothing of the kind. Even., when the case went to Court, the simple request to have the water in the sealed tin measured was not done. No such request was made to the Court.

If the quantity of water in the tin had been found to be in excess of three quarters of a gallon that would have demolished the prosecution case. This is admitted on behalf of the State even in this Court. If the prosecution failed to rebut the evidence on the record which tends to indicate as strongly as possible in the absence of a definite statement based on actual measurement that the water was more than three quarters of a gallon, it is the prosecution which should suffer and not the accused. Mr. Dawkins estimated the quantity of water as a gallon or a gallon and a quarter on the 31st of July. Besides this -quantity of water his statement shows that there had been some water in the carburettor and that there must have been some water inside the tank below the level of the

point A, the lower end of the fuel line. According to his estimate this point would be 1" above the bottom and therefore the quantity of water in the tank which could have been pumped out was estimated to be about a gallon.

Thus the approximate quantity of water put in, according to Mr. Dawkins, must have been about two or two and a quarter gallons. Whatever allowance may be made for the possible inaccuracy in the statement of Mr. Dawkins, it appears to us to be plain enough that the quantity of water put in must have been much more than three quarters to a gallon, which would be the case if Shital had put in water from one gallon mobil oil tin. This should mean, therefore, that either there was no water in the petrol tank at the time of the incident and water had been poured in later or that it was not Shital who had poured in the water in the petrol tank. Whatever be the actual fact, this inference should shatter the credibility of Shital as a good witness. As an approver he commanded little probative value and this inference Is sufficient to take away any evidentiary value which could have been given to the statement of the approver in the absence of good corroborative evidence.

46. Apart from this question of the quantity of water put in, the further statement of Mr. Dawkins with respect to the behaviour of the engine in case water in the petrol tank was the solitary cause for the sudden stoppage of the car goes against the theory that the car stopped on account of the water put in the petrol tank of the jeep. The first information report, which the Deputy Superintendent of Police recorded soon after the incident, presumably on the basis of the statements of both Ben Gupta and Naraini Devi, does not mention that the car stopped either with a Jerk or with jerks and spitting out, the necessary incidents of the ultimate stoppage of the car on account of the mixing of water in the petrol tank. As already mentioned, in their statements in Court Sen Gupta states that the car stopped with a jerk and Naraini Devi also says that the car stopped after a little noise of Phatphat. These statements in Court cannot be given greater weight than what they had earlier stated, and appeared to have been made to make their osbervations answer the necessary consequences, according to the expert of water mixing with petrol. They could not have failed to notice the jerks and the sound of spitting out, Which according to Mr. Dawkins, goes on increasing from the moment it starts. The failure of these witnesses to notice such incidents in the working of the engine goes against the theory that the car stopped suddenly on account of the water being mixed with petrol.

47. Similarly, the third statement of Mr. Daw-kins about the distance likely to be covered by the jeep on the petrol which would be in the fuel line and the carburettor above the lower end of the fuel line also goes against the prosecution case that the car stopped solely on account of the mixing of water with petrol. The jeep had covered a distance of about a mile and a half. According to Mr. Dawkins, it could not have gone beyond a mile on a level road. There was a steep up-gradient for some distance on this road. The car had to go from the place of parking to Saxeria's gate. This means that, according to the expert, the petrol in the fuel line and the carburettor alone would not account for the car covering this larger distance and that, therefore, the stoppage of the car must have been due to some other cause. The mere fact that Mr. Dawkins could not discover that cause or that the engine started and operated well after the water had been taken out need not mean that the jeep stopped just on account of the water reaching the carburettor. There might have been some other reason for the stopping of the car. It is useless to speculate what such reason could have been. For

the purposes of the case it is necessary that the reason alleged should have been proved to be the reason for the stopping of the car and therefore a reason which supports the approver.

48. Lastly, mention may be made of the other point why the prosecution evidence falls short of establishing that water found in the tank existed in it at the time of the incident. The prosecution did not lead evidence to the effect that nobody could have tampered with the jeep after the incident and during its custody with the police. A mere suggestion that the police could not have allowed anyone to tamper with the car or that no one would have tried to reach the car and pour water in the tank or that, if the police had connived at the pouring of the water, they must have known its exact quantity and there would not have been such difference in the quantity of the water poured in and the quantity found, is insufficient to make up for the lack of evidence that the water found did exist at the time the car stopped.

We are not concerned as to how the others act. We are concerned as to what was the state of affairs at the time when the incident took place. It is for that purpose that it was necessary to show that there was no tampering with the petrol tank beween the incident and Mr. Dawkins's examination of the car. The evidence is lacking. We have already expressed our views at the suggestion that the police could not trace the two constables, who in addition to Udai Raj, were on Sentry duty keeping an eye on the car. Even Udai Raj, the constable examined in the case, has not stated that during his period of duty between 11 p.m. to 3 a.m. that night and again from 11 a.m. to 3 p.m. on the 31st of July, nobody approached the car or nobody could approach it and pour water inside. In view of all these considerations which the learned Sessions Judge had dealt with at great length, we are inclined to agree with his view that it has not been proved that water had been poured in the petrol tank by Shital when the others were having their dinner at the house and Sen Gupta and Ram Adhar had been sent away.

49. Shital, as already mentioned, is an approver. He is the solitary witness of all the statements sought to be used against the accused. There is no other corporation pointing to the accuseds' conspiring together. There are other considerations which go a long way in throwing doubt on the veracity of Shital and they may also be mentioned briefly. Shital was arrested on the 16th of August, 1948, and was kept at the thana till the 18th of August. He was interrogated by the Inspector on the 16th of August. There is no justification for his detention at the police thana on the 17th and 18th of August. Circle Inspector Indrapal Singh has stated that he was detained on the 17th & 18th of August because he was arrested at 8 p.m. on the 16th of August and could be Kept at the thana till 24 hours after his arrest, i.e., till about 8 p.m. on the 17th of August & as it would be too late for his admission to jail at night on the 17th of August, he was kept on in the thana till the 18th of August. The explanation is not a good one and only betrays the gross lack of knowledge on the part of the Circle Inspector with respect to his powers in keeping an arrested person in detention in police custody. What Section 61 of the Criminal P.C. provides is that "No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court."

This does not empower a police officer to keep an arrested person in custody a minute longer than is necessary for the purposes of the investigation. It does not give him an absolute right to keep a person in custody till 24 hours and longer for other reasons like the one suggested, that is, inability of the admission of Shital in Jail. Shital should have been sent to court on the morning of the 17th of August for the purpose of his being sent to jail. He had been interrogated on the 16th of August. Apprently there was nothing left to interrogate him about and afer all even after the man had been sent to jail he could have been interrogated there by the police, though, of course, after obtaining permission from the Magistrate. His detention at the thana for two days unnecessarily must mean that he was being detained with some purpose which the accused could legitimately claim should affect his statement adversely. Why the police be so actuated is a different matter, and it is not necessary to be established.

50. Ram Adhar, cleaner of Ram Autar, was expected to corroborate Shital's deposition about the meeting of the cospirators at Hanuman's house shortly before the dinner as he made a similar statement in his statement recorded under Section 164, Criminal P. C. about Ram Autar's coming and directing Sen Gupta to take his car to fetch his wife, but he did not make such a statement before the committing Magistrate. Ram Adhar was declared a hostile witness in the court of the committing Magistrate. He did not support the prosecution case and alleged that the satements that he made under Section 164 Criminal P. C. were due to the beating of the police which had kept him confined for eight days. He was not produced in the Sessions court, it being reported that his whereabouts could not be traced. Brahma Deo Singh Head Constable and Sukkhoo Singh (P. Ws 50 and 51) depose that they could not trace him at the addresses given and the various mohallas they looked round. His statement before the committing Magistrate was therefore taken on record under Section 33, Evidence Act. His statement before the committing Magistrate does not help the prosecution and affords no corrobora-tion to Shital's statement. His statement under Section 164, Cr. P. C. cannot be used as substantive evidence.

51. There is nothing in the statement of Shital about any conversation between the three conspirators at the house which should indicate that they were hatching a plot for committing this murder, or for any other offence either. It is also surprising that Sharma who had no grievance against Radha Krishna should have joined the alleged conspiracy. The mere fact that he had put up with Hanuman for some time on arrival in Kanpur about two months before is hardly a good reason for Hanuman's reposing confidence in him for such a conspiracy and his agreeing to take part in it. It may be that Hanuman required the services of an engineer to know how to arrange for a certain stoppage of car but that information he could have got from Sharma before the alleged meeting and that did not make it necessary that Sharma should figure so prominently at the conversation and should have been invited to the dinner though not known to Saxeria. Both these alleged conducts of Sharma appear to be unnecessary.

52. The evidence of conspiracy against Madan Lal is even less than against Sharma. Merely his going with Ram Autar to dinner is no indication that he was a party to the conspiracy.

53. Reason for Hanuman having a grievance against Radha Krishna is simply alleged but no attempt has been made to establish it by legal evidence. Sir Padampat Singhania to whom a complaint is

alleged to have been made and Sohan Lal Managing Director who rebuked him have not been examined in court. The omission to examine them is explained by the suggestion that they would not have been expected to depose against Hanuman, one of their employees. The reason does not appeal to us. It might have been different that other good legal evidence had been produced and then other evidence was not produced because it was expected that that would not be reliable. But when there is no evidence about that fact it was the bounden duty of the prosecution if it seriously intended to prove it and use it against the accused to examine the witnesses who were competent to depose about it. The fact therefore remains that there is no evidence that Hanuman was rebuked by Sohan Lal or that Radha Krishna had complained to Sir Padampat Singhania. An attempt to make a suggestion about the fact, which is not intended to be proved, by leading evidence which is really no evidence and should not be admitted is never a fair procedure for the prosecution to adopt.

In this connection Sen Gupta driver of Radha Krishna deceased was examined. He deposed that he had overheard Saxeria telling Radha Krishna in the car that Sir Padampat Singhania had rebuk-ed Hanuman on the complaint which Radha Krishna had made to him. Such a statement of Sen Gupta is no evidence of the actual complaint or of the rebuke and should not have been led as it has a tendency to prejudice the court and especially the assessors who might not be able to discriminate between precise good legal evidence and what is not such evidence. Saxeria does not support this statement of Sen Gupta. It follows therefore that Hanuman too had no grievance against Radha Krishna.

54. The grievance of Ram Autar against Radha Krishan, if any, had been on account of differences between the two brothers. His father Rai Bahadur Jamuna Dass denies any knowledge of the existence of bad blood between his two sons. The evidence about the differences is of Naraini Devi, Sen Gupta, Ram Adhar & Saxeria. There may be differences of opinion between the two brothers but such differences on account of one brother not approving of the conduct of the other or of one brother having a larger control in the affairs of the firm are not expected ordinarily to be taken so seriously by any of the brothers as to plan a murder. Ram Autar was a student at tne college and must have been just looking to the affairs of the Ganga Oil Mills casually and in that setting the taking over of the management of the mill by Radha Krishna could not have been very offensive to Ram Autar. Older people do have objections to the conduct of the young members of the family but both the parties look to these differences in proper perspective. In this connection one other incident was referred to in evidence and that was Ram Autar's purchasing a new Stude Baker and a chaque delivered in payment of it being dishonoured. There is no evidence on the record to support the suggestion in the least, but it is suggested that this dishonouring of the cheque must have been at the instance of Radha Krishna who did not approve of the purchase of the new car, Rai Bahadur Jamuna Dass states that he had no objection to the purchase of the car. No attempt had been made to show from the papers of the Ganga Oil Mills that any directions had been issued by Radha Krishna that a cheque issued by Ram Autar in payment of the price of Stude Baker be not honoured by the Bank. Prom the statement of Biswa Nath Talwar (P. W. 20) a shop keeper it appears that when he approached Ram Autar for cash payment on the dishonouring of the cheque he was taken to the Ganga Oil Mills and he was paid in hard cash the price of the Stude Baker. We do not think that this incidental dishonouring of the cheque on account of the funds in de-posit of the bank being insufficient by about a couple of thousands of rupees was due to any action of Radha Krishna and

could have been responsible for any aggravation of the ill-feeling between the two brothers.

55. Another motive alleged for the ill-will was , the personal immoral conduct of Ram Autar in visiting prostitutes. Here again evidence was led not of the prostitutes said to have been visited or of the persons who had actually seen them there but of betel sellers and tonga drivers who depose about Ram Autar and others visiting the Sandila House in Nandan Mahal Road, Lucknow, and some prostitute, Shamim by name, at Unao. The evi-dence of such witnesses does not appeal to us and certainly falls short of proving that this conduct of Ram Autar at places other than Kanpur was known to Radha Krishna and that Radha Krishna had really reprimanded Ram Autar in that connection.

56. The other cause of ill-will between the two brothers is said to be Ram Autar's young wife going in the company of Hanuman and Nadan. Both of these persons are related to her. Hanuman is related as an uncle of Ram Autar's wife and Madan is a cousin of Ram Autar. She is an educated girl. In these times any disapproval of an elder person in this respect could not have been of any great significance and especially going out with relations could not have led to any such disapproval at all.

57. We are therefore of opinion that even Ram. Autar did not have any such enmity with Radha Krishna which can be said to be any motive for planning this murder. We do not agree with the prosecution suggestion that the existence of any ill-feeling suffices as a motive for any criminal conduct of any of the persons having enmity.

58. The fact is that the arrangement for the dinner which Saxeria gave is said to have been at the instance of Hanuman. It is alleged that that was the part of the conspiracy though Saxeria was not a party to it. The dinner was suggested several days before and was in view of an unsatisfactory dinner given by a relation of Saxeria at the Vale-rio's some time before. Merely because certain ladies invited to the dinner had not gone in company with their husbands is no reason to conclude that they were left behind because of the conspiracy to murder. If the prosecution allegation is correct we see no reason why any attempt was made to invite the ladies to the function. Only Radha Krishna and other gentleman could have been invited to the dinner. The reply is that in that case they could not have had the opportunity to send back the car and thus could not have given an opportunity to Shital to pour water in the jeep. This would mean that at the time Hanuman suggested the holding of the dinner by Saxeria on the 29th July he had known of the actual plan to be used for stopping Radha Krishna's car but according to the evidence led in the case it appears that the suggestion of pouring water was made by Sharma on the evening of the 30th July.

Further excuses were given for the non-turning up of the wives of Madan Lal, Ram Autar and Hanuman at the dinner. No attempt has been made to show that those excuses were not true excuses. The absence of Madan Lal's wife and of the wife of Ram Autar was due to Madan Lal's wife visiting lady doctor and Ram Autar's wife visiting Madan Lal's wife in that connection. It was very easy to disapprove that this excuse was not a genuine excuse. Similarly the excuse given by Hanuman was that his child was ill and so his wife was prepared to come when it was ready. She however did not turn up. If the child was ill she might have changed her mind. We therefore do not consider that this circumstance has any great effect on the allegation that the accused had conspired

to murder Radha Krishna.

59. The alleged remark of Naraini Devi at the hospital can at best be her suspicion, a natural suspicion in the circumstances. A dinner had been arranged at which, according to her, were present persons towards whom Radha Krishna was not favourably inclined. The car stops all of a sudden, Radha Krishan and she are attacked, she could have suspected that all was due to some plan and she expressed her suspicion. Her suspicion alone cannot be evidence about the conspiracy and cannot give support to other evidence equally weak In that respect.

60. Lastly, to conclude about a conspiracy on the premise that the assailants of Radha Krishna did know that the car would stop and that therefore there must have been a conspiracy would not be a right approach. It is dependent on the question that the stoppage of the car had been prearranged and that the assailants too had knowledge of it and thus reached there.

61. This brings us to the second part of the Incident, i. e., the actual assault. Four persons are said to have taken part in it. They are Budhoo, Munnoo, Arjun and Ram Narain. Arjun is an abs-conder and his case is not before us at the moment. We need not say anything about his alleged participation in the incident. The evidence against Ram Narain has been admitted to be inadequate for his conviction and we have not any more to worry about the case against him. One fact however remains that now four persons are alleged to have taken part in the attack while the case in the beginning at the time of the incident was that the assailants had numbered three. That was the telephonic-message given by Bishwa Nath Singh to Colonelganj police station and that was the version given in the first information report prepared by Deputy Superintendent of Police Indrajit Sharma soon after the incident. Why the number is raised to four is not clear.

Mata Din ekka-driver deposes about taking three of these four accused to the spot and about the accompanying of the fourth accused on a cycle. Munnoo is said to have gone on the cycle. We are not impressed with the statement of Mata Din. He was Just traced during the investigation. He knew of the criminal intentions of his passengers. He was an eye-witness of the incident and just for the sake of his fear he continued to remain on the spot unmindful of any charge of complicity of murder against him. He brought back those passengers after they had committed the murder and drove his ekka knowing full well what he was doing. It appears to us that either he was not the person who had taken these accused persons on his ekka to the spot or he was an accomplice In this murder. He knew of the intentions of the others. He in a way aided them by taking them to the spot and by helping them in making good their escape. He is as good an accomplice as anyone can be in the circumstances and his statement therefore would be unworthy of belief unless corroborated by other good evidence.

62. The other good evidence in this connection could have been of the statements of Sen Gupta & Naraini Devi, the two occupants of the car, who could be expected to have seen the assailants. Sen Gupta and Naraini Devi did recognise some of these accused at the identification parade. Sen Gupta identified Munnoo, Budhoo and Arjun and Naraini Devi identified Munnoo and Budhoo. According to the statements of both the.se witnesses Sen Gupta could not have had much occasion to see the assailants. He was just entering the car when the assailants arrived and began to strike Radha

Krishna. He then fled away to another house in order to secure help. It is not therefore expected that he could have really a good impression of the assailants. The competency of these witnesses to recognise the assailants is dependent on the presence of sufficient light. In that connection it has been urged that there was an electric lamp at a distance of about eight or ten paces north-west of the jeep and that it afforded ample light for recognition. This fact is noted in the first information report as well. The electric lamp was on the right side of the Jeep. The assailants, according to the prosecution case, were on the left side.

The evidence is not consistent with respect to the hood of the jeep car being on at the time or not. Udairaj constable deposes that the hood was on when he was put in charge of the jeep car. The other witnesses namely the Deputy Superintendent of Police, Naraini Devi and Sen Gupta depose otherwise. The first information report or any record of the statements of witnesses does not mention that the jeep had no hood at the time. The incident took place on the 30th of July during the rainy season and it was open to question whether the hood must have been down that night or not. If the hood was on it would have obstructed the passing of light from the electric lamp to the assailants. Further Radha Krishna and Naraini Devi were inside the jeep, The assailants are said to have been standing on the road. Presumably their faces were on a lower level than the upper portions of the body of Radha Krishna and Naraini Devi and that too may account for the coming of the light from a post. Further one significant fact having a bearing on this question is the actual position of the jeep at the time and the actual location of the incident.

Sub-Inspector Deo Dhari Singh prepared a sketch of the locality and did not show the place where the car stood. He showed a certain place by letter B and mentioned in the index that from that place the attack was directed. The language used is ambiguous. It may mean that B is the place of attack or it may mean that the assailants rushed from that place. If it is the place of attack then the description of the position of the light vis-a-via the jeep given by the witness does not fit in with the position of the electric lamp according to the plan. If the jeep was not at B taut the assault too place at B then the prosecution story that Radha Krishna was attacked inside the jeep becomes false. The observation of Sub-Inspector Deo Dhari Singh of blood on the road as already mentioned is not explained by the prosecution story which confines the attack on both Radha Krishna and Naraini Devi inside the jeep. We have already mentioned a surprising feature that Naraini Devi should receive twentyone injuries in protecting her husband by leaning over from the back side and yet should have avoided receiving a single blow with a sharp-edged weapons which were most-ly used against Radha Krishna. In the circium-stances it appears to us that the statements of both these witnesses Naraini Devi and Sen Gupta about the actual incident are not fully consistent with how the incident must have taken place.

Possibly when the car stopped it would be the driver Sen Gupta who would be busy in looking to what happened to the car. It would be very unusual for the owner of the car to go himself to the petrol tank and to see whether the petrol was sufficient or not. Further if the petrol was sufficient the driver would try to see what was the fault with the engine that had stopped its operating. It may be that Radha Krishna and Naraini Devi also got down from the car and were strolling on the road when they were attacked. Radha Krishna succeeded in running to the jeep and got into it pursued by some of the assailants while Naraini Devi could not be so quick and continued to receive the blows

of the person possessing a lathi or hockey stick as now alleged. That may also account for the discrepancy in the statement of Sen Gupta with respect to Radha Krishna's actually having taken his seat in the jeep or Radha Krishna's just getting into the jeep when the attack took place.

Another statement in the first information report which does not fit in with the prosecution case and which was said to be based on the statements of Naraini Devi and Sen Gupta is that one of the assailants possessed a 'pharsa.' We are not prepared to say that Naraini Devi did not know what a pharsa is or mistook a long knife as pharsa. If she did not know what pharsa is she would not have used that word. If she knew she could not have mistaken a knife for pharsa. The allegation of the use of the pharsa is in the first information report.

63. In this connection it is also pointed out that the description given in the first information report is that a lathi was fitted in with a 'pharsa' and therefore there is no question of any mistaken information about actual description. Why a wrong description of a weapon is given in the first information report? It can lead to a conclusion that either the victim or the natural witnesses did not notice what weapons had been used and the weapons said to be used were either on their own suggestions or the suggestions of more competent minds. Whatever may be the position, a wrong description of the weapons in the first information report is bound to affect the value of their testimony. After all Naraini Devi whether attacked on the road or inside the jeep may not be in that frame of mind as to notice minutely what is being Josed and who is using them. She must be very much upset, very much alarmed, & very much concerned about her husband who was the main target of the attack. It follows therefore that the identifications of Budhoo & Munoo by Naraini Devi & Sen Gupta cannot be relied upon, and that the learned Sessions Judge was not wrong in not relying on those identifications for the purposes of holding these two accused guilty. It may also be mentioned in this connection that the description of the assailants was noted in the first information report. We have already mentioned that from the context it would not appear that that description was given by Sen Gupta and Naraini Devi because it was not noted in the first paragraph where other description of the incident was noted.

Further also the contents of the first information report tend to indicate that some persons had arrived in time to see the actual culprits. That should not have been a mere imagination of Indra-jit Sharma if it was not a correct affair. If he was told by any one that he had come to the spot at proper time to see the assailants, no explanation is given why such a person has not been examined as a witness. It may be therefore that these descriptions and the other statements have been the result of feeling the necessity to incorporate such facts in the first information report for supporting any prosecution case which may be later worked out. The descriptions given too are not such distinctive descriptions which may go a long way in sup-porting the identification of witnesses. The descrip-tion of a tall stout man with moustaches, it appears from the record, fitted three of the accused said to be the actual assailants. This is sufficient that this description was not particular description of any accused who is one of the accused to whom this description fits in. What is significant in connection with the description is the omission to describe Budhoo. Budhoo was a lad of 15 years of age at the time of incident. The first information report does not show that either Naraini Devi or Sen Gupta did mention that one of the assailants was a lad.

In connection with the identification of the accused reference may be made to the fact that the Magistrate conducting the identification proceedings did not make any particular note that the person mixed up included lads of the age of Budhoo. In fact it appears from the statement of Sri Rajendrai Nath, the Magistrate (P. W. 32) that he had omitted to note certain features of Munnoo and Budhoo and did not take necessary precautions about them. Budhoo had the ends of his ears pierced and a blackish patch on the skin of his nose. Both Munnoo and Budhoo had small-pox marks on their faces. The Magistrate states that care was taken that they were mixed with the people who possessed similar marks. He did not make any note in the identification memo and deposes that there was no necessity of noting it in the memo. We are not inclined to share his view and are of opinion that any competent Magistrate having experience of identification proceedings would have made a note about it if he had really paid attention to it. Munnoo had a deep dimple chin. That too went unnoticed. These defects in the conduct of the identification proceedings also reduce the value of the identification of Naraini Devi and Sen Gupta of these two accused Budhoo and Munnoo.

64. Lastly, we may refer to the evidence of Bam Das, Ram Shanker and Chhotey in connection with the alleged unguarded confession of Budhoo to his wife that he had murdered a Seth presumably. Radha Krishna Chaudhuri. Ram Das and Chhotey (P. Ws. 17 and 18 respectively) were the neighbours of Budhoo. Budhoo got annoyed with his wife 17 or 18 days before his arrest, i. e., on or about the 4th of August and threatened to kill her if she did not cease going about like an awara woman and in the same way as he had killed a Seth. These two witnesses fond of their lives felt so alarmed that they thought of changing their houses and therefore approached the third witness Ram Shankar who is not a house-agent to find a house for them. The entire story does not appear to us to be natural and true.

65. In view of the above it is clear that this is hardly a case for a difference of opinion with the views of the learned Sessions Judge. In fact this is a case in which we are of opinion that he had taken a correct view of the material on record. We therefore dismiss the appeal against the respondents other than Arjun, who has not yet been served with the notice of this appeal. The respondents other than Arjun are on bail. They need not surrender. Their bail bonds stand discharged.

66.Leave to appeal to the Supreme Court is refused as we do not consider this case fit for a certi-ficate for an appear to the Supreme Court.