Birey Singh vs State on 25 September, 1951

Equivalent citations: AIR1953ALL785, AIR 1953 ALLAHABAD 785

JUDGMENT

Desai, J.

1. This appeal and the connected matters have come 'to me for my opinion on a difference between my brethren Agarwala and Gurtu. The appeal is by Birey Singh alias Birey from his conviction under Section 396, I. P. C. resulting in a sentence of death. There is also the reference by the sessions Judge for confirmation of the death sentence. The connected Government appeal is from acquittal by the learned Sessions Judge of Birey Singh of thirteen other charges which were framed against him in addition to the charge under Section 396, I. P. C.

2. It is proved beyond any doubt, and is not disputed, that a very serious dacoity was committed on 22-7-1946, at about 11 p.m. in the house, of Mashal Singh in village Samachipur by about, twelve dacoits led by Girand Singh. The dacoits killed six persons including Mashal Singh and his wife and wounded others by shooting at them" or striking them with lathis. Among the injured was Mahtab Singh, resident of village Jijota, son-in-law of Mashal Singh and employed as a police constable. He was involved in case of rioting & murder was committed on 1-4-1946 in Samachipur where he was in those days staying when on leave. ON being involved in the case, he absconded & joined the gang of Girand Singh who was a notorious dacoit. He remained in his gang for a month or two and one day got an opportunity to seize Girand singh's rifle and shot him with it.

After shooting Girand Singh he ran away and gave information to the police that he had shot Girand Singh dead and deposited the rifle in the police malkhana. He expected thereby to be shown favour in the case of rioting and murder pending against him. Actually Girand Singh had not died; he had simply been wounded on a hand. He took a vow to avenge himself upon Mahtab Singh. On the day of the occurrence Mahtab-Singh accompanied by his wife, Mashal Singh. and others went from Jojota to Samachipur. He had heard of Girand Singh's vow and was in constant fear. Girand Singh heard on the same day that Mahtab Singh had gone to Samachipur in order to fetch his wife; so he took a gang of about eleven men to Samachipur. In the evening two men dressed as police constables arrived in Samachipur and asked Kanhai Singh, brother of Mashal Singh, to point out the house of Harpal Singh mukhia.

This Harpal Singh was the person against whom the riot was committed on 1-4-46. Kanhai Singh took the two men to the house of Harpal Singh where they had some talk with him. It is said that the appellant was one of them. At about 11 p.m. Girand Singh brought his gang at the house of Mashal Singh and started beating Mashal Singh, etc., who were lying outside. The gang was armed with guns, pistols, spears and lathis. Mahtab Singh was at that time reading in a kotha inside the house. Mashal Singh shouted from the door that Mahtab Singh should run away because Girand Singh had

arrived to kill him. The dacoits shot dead Mashal Singh and others who were outside the house. Then Girand Singh accompanied by three or four men were into the kotha and shot at Mahtab Singh. Mahtab Singh was wounded, fell down and feigned to be dead.

Girand Singh, etc., then left him there and plundered the house and injured other persons. In the meantime Mahtab Singh got an opportunity to run away from the house. Girand Singh climbed up the roof of the house and shouted that he was Girand Singh and had come to kill Mahtab Singh and called upon him to surrender himself if he was a Kshatriya. Harpal Singh seeing the dacoity being committed in Mashal Singh's house, promptly went to the police station Nawabganj which is about three miles away and at 3 a.m. lodged the first information report. He had not seen the dacoits; so he did not name anybody. But he did mention the fact that one of them was proclaiming that he was Girand Singh, that those who had not seen him could see him and that Mahtab Singh should be caught and the house plundered. The dacoits left the house after committing the dacoity and murders.

The investigation started. None of the witnesses of the dacoity knew the appellant, not even Mahtab Singh. So none of the persons examined by the police gave out the name of Birey Singh or Birey. But the police were informed that during the progress of the dacoity one dacoit was addressed as Dilawar. No arrests were made and the police submitted a charge-sheet against Girand Singh, Ajodhi and Birey Singh alias Dilawar son of Baasi Singh Ahir of village Bijeypur. Girand Singh's name was given by all the witnesses; the other two names were obtained by the investigating officer from a report made by a sub-inspector of another police circle that on the day of occurrence a gang of dacoits including Girand Singh, Ajodhi and Birey Singh or Dilawar was seen going towards Samachipur and that the dacoity was committed by it. The charge-sheet was submitted against the three men as absconders and evidence under Section 512 Cr. P. C., was recorded by a Magistrate.

Subsequently Girand Singh and Ajodhi were killed in encounters with the police. The appellant was arrested in another encounter with the police led by the Superintendent of Police in police circle Kampil on 18-10-1949, At that time he had an injury on a hand. On 30-10-1949, he was produced before Shri C.M.L. Bhatnagar, a Magistrate exercising First Class powers, for the recording of his confession. Shri Bhatnagar recorded his confession in four instalments on November 1, 2, 3, and 24, 1949. In this confession he admitted that he. Girand Singh, Dilawar, Ajodhi, etc., had committed the dacoity in the house of Mashal Singh and murdered six men and injured six others, that they had intended to kill Mahtab Singh and that he had escaped somehow or other. The appellant was not put up for identification before the witnesses of the dacoity.

3. The prosecution examined five witnesses to prove the commission of the dacoity and murders. Four of them were the inmates of the house and the fifth is Harpal Singh mukhia. Out of these, only Mahtab Singh and Kanhai Singh deposed that the appellant was one of the dacoits; the other three did not give any evidence specifically against him. Kanhai Singh was not examined before the learned Sessions Judge. On the date fixed for his attendance at the trial he was absent and the learned Sessions Judge brought on record, under Section 33, Evidence Act, the deposition made by him before the Committing Magistrate. Besides the evidence of these two witnesses, there is the confession of the appellant; there is no other evidence against him.

4. Both my learned brothers have refused to rely upon the evidence of Mahtab Singh and Kanhai Singh as regards the participation of the appellant in the crimes. The evidence of Kanhai Singh has not been noticed at all by one of them, while the other, though he has not expressly disbelieved him, does not appear to have relied upon him. The learned Sessions Judge, while admitting Kanhai Singh's deposition into evidence, observed that it was of little use to the prosecution because Kanhai Singh had not named the appellant before he was examined in the Committing Magistrate's Court. It was certainly premature for the learned Sessions Judge to give this finding about the worth of Kanhai Singh's deposition. He was an important witness for the prosecution. In the Committing Magistrate's Court he had not bean cross examined with reference to his earlier statements during the investigation & under Section 512, Cr. P. C., and it was not open to the learned Sessions Judge to give a finding that no reliance could be placed upon his statement that the appellant was one of the dacoits.

The reason given by him for dispensing with his personal attendance in Court was quite insufficient. But it has not been contended before me that the deposition of Kanhai Singh should be completely disregarded because there was not sufficient justification for the learned Sessions Judge to act under Section 33, Evidence Act. I would, therefore, treat it as valid evidence. Coming to the merits, I am satisfied that it is not reliable evidence at all. His statement that the dacoits shouted that Girand, Birey and Ajodhi had arrived is against the statements of other witnesses who stated that only Girand Singh had shouted that he had arrived. His statement that the appellant was one of the two men who had gone earlier in the day disguised as constables is not supported either by Harpal Singh and Subedar who also had seen them or by the appellant's confession which makes absolutely no mention of two men going earlier to the village posing to be constables.

Then, in the absence of identification, proceedings, I do not know how the more 'ipse dixit' of the witnesses that the appellant was one of the dacoits could be believed. The prosecution has not offered any explanation for not holding identification proceedings. If it be said that they did not expect the eye-witnesses to identify anybody after three years, I do not know why Kanhai Singh should be made an exception and believed. His evidence about the appellant's complicity in the crime cannot be believed. Mahtab Singh's testimony is hardly better. He has been disbelieved on this point by both my learned brothers and, with respect, I agree with them. It is clear from the evidence that the appellant was not known as Dilawar while he was a member of Girand Singh's gang, that there was Dilawar in that gang but he was a different man, that that Dilawar had taken part in the crime and that during the dacoity it was he, and not the appellant, who was being addressed by the other dacoits as "Dilawar".

The appellant in his confession stated that he was known as "Chotey Mian" and that Dilawar was another member of the gang. He never said that he also was known as "Dilawar" at any time or was addressed as such. There is only Mahtab Singh's evidence that the appellant was addressed as "Dilawar" by his accomplices. He did not know previously that his name was Birey Singh or Birey. But he stated that some of the dacoits addressed him as "Birey" also. If his pseudonym was Dilawar or Chhotey Mian, his accomplices would not have addressed him by his real name. Mahtab Singh further stated that the appellant was addressed as "Chotey Mian"; it is difficult to believe that he had two pseudonyms. And when there certainly was another dacoit known as Dilawar, that would not

have been the pseudonym of the appellant also. There is no doubt that because the police had submitted the charge-sheet against Birey Singh alias Dilawar, an attempt was made by the prosecution to prove that the appellant Birey Singh was also known as Dilawar. It is unfortunate that the prosecution could not try to prove the case against the appellant without fabricating some evidence.

Both my learned brothers have used the statement made by Mahtab Singh under Section 162, Cr. P. C., to contradict his deposition in Court, but in my opinion that statement was not available for that purpose. The reason is that the learned Sessions Judge, who ought not to have been unaware of the provisions of Section 145, Evidence Act, failed to confront the witness with his statement under Section 162. The statement under Section 162 could be used only to contradict the witness and before the witness could be contradicted, his attention ought to have been drawn to the contradictory portion of the statement as required under Section 145, Evidence Act. There is nothing on the record to show that the learned Sessions Judge did this. His failure to do so is fatal to the availability of the statement for the purpose of contradicting the deposition.

The rule contained in Section 145 is a common law rule. Referring to it McLean, J. said in -- 'Frederic D. Conrad v. David Griffey', (1853) 14 Law Ed 835 at p. 839 (A):

> "This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary-inquiries, which enables him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony. This rule is generally established in this country as in England."

He added that the rule is a salutary one and cannot be dispensed with. The law in India is not different. The other day our Supreme Court refused to look into a statement because it was not brought to the notice of the witness as required under Section 145; see -- 'Tara Singh v. State', AIR 1951 SC 441 (B), Bose, J. observed in that case that the failure to act as required under Section 145 is a fatal defect.

It is unsatisfactory that the learned Sessions Judge does not know how to confront a witness with his previous statement. He has exhibited the whole statement as D1; he should have exhibited only the particular portions which contradicted the deposition given in Court. He allowed the witness to be put question after question regarding what he had, or had not, stated to the investigating officer and recorded the answers. At one place he has made a note that a particular statement, said by the witness to have been made, is not there. This was not the proper way of contradicting the witness. The particular part of the statement which contradicted the deposition of the witness ought to have been read over to the witness and exhibited. In the whole memorandum of the evidence given by the witness, one would search in vain for a mention of Ex. D1, which is the number given to the entire statement recorded under Section 162, Cr. P. C. The learned Sessions Judge has not even seen that the statement Ex. D1 was properly proved by the investigating officer.

In these circumstances I would not consider Ex. D1 while weighing the evidence of Mahtab Singh. The fault is not exclusively of the learned Session Judge; the appellant's counsel also is not free from blame. If he wanted Mahtab Singh to be disbelieved on account of the conflict between his deposition and the statement Ex. D1, it was his duty to proceed according to law and to see that the provisions of Section 145, Evidence Act, were complied with and that Ex. D1, if denied by the witness, was properly proved by the investigating officer. When Mahtab Singh was not made to pick out the appellant in an identification parade, I would not rely upon his statement that he was one of the dacoits. I have no doubt about his presence during the dacoity. My brother Gurtu has not said that he was not convinced of the presence of Mahtab Singh during the dacoity, but he has mentioned certain suspicious features. Mahtab Singh was found present by the investigating officer on arrival in Samachipur on 23-7-46.

There is no doubt that the object behind the crimes was to kill Mahtab Singh. The commission of so many murders, and Girand Singh's shouting that Mahtab Singh should be seized and killed are sufficient proof of this fact. The appellant admitted in his confession that Mahtab Singh was there. The mere fact that Mahtata Singh, to kill whom Girand Singh had taken his gang, had not been killed does not mean that he was not present in Mashal Singh's house. Girand Singh certainly knew him and would not have led him escape. But it may be that when Mahtab Singh fell down on being shot at, he thought that he had died. The injuries on Mahtab Singh are a contused wound on the right side of the head, another in front of the pigtail, a lacerated wound on the right arm and two patches of contusion on the left thigh caused with some blunt weapon. The doctor originally stated that all the injuries were caused with some blunt weapon. On a further question he stated that the lacerated wound could have been caused by a shot from a revolver. He was not asked about the other injuries, whether they also could have been caused by a shot from a revolver or a gun.

It appears that injuries looking like those caused with a blunt weapon have been inflicted on others by shooting at them. For example, Subedar stated that he was shot at on his foot with a revolver and the injuries on the foot are only two small round abrasions. Kanhai Singh stated that he was shot at in the jaw and he had a lacerated wound on the lower lip. So it cannot be said that the other injuries of Mahtab Singh also were not caused by shooting. There is, therefore, no reason to doubt that Mahtab Singh witnessed the dacoity. But I would not believe him when he said that the appellant was one of the dacoits.

5. There remains only the appellant's confession. Shri Bhatnagar has deposed that the confession was made by the appellant as taken down by him and that he had satisfied himself that it was a free and voluntary confession. In the Magistrate's Court the appellant denied having made the confession. In cross-examination Shri Bhatnagar was asked if he had not obtained the appellant's thumb-impression on a previously prepared statement without his having made it. Before the learned Sessions Judge the appellant stated that the confession is not his statement. He admitted that it bears his thumb-impressions and stated that the Superintendent of Police by promising to get him released and by threatening to get him hanged, induced or compelled him to put his thumb-impressions daily on what was written by the Magistrate. He denied that the confession was read over to him or is true.

In his grounds of appeal he states that on account of a serious wound in his right hand he was not in sound mind and health, that the Superintendent, and the Deputy Superintendent, of Police had compelled him to make the confession according to their dictation and that he had made the confession before Shri Bhatnagar as tutored. Both my brethren arc agreed, that the appellant made the confession as recorded, that he was in sound mind at the time of making it, that there was no evidence of any inducement or threat, that there was no defect or impropriety in the recording of it and that it is relevant in the case. Agarwala, J. held that the confession was genuine, but Gurtu, J. was not satisfied, of its genuineness. Agarwala J. was of the opinion that the appellant's conviction could be based solely on the confession while Gurtu J. was not prepared to act upon it without corroboration.

(6) When a confession is produced in evidence against an accused, there are three questions which can possibly arise; they are :

> (1) whether it was made by the accused, (2) whether it was free and voluntary, and (3) whether it was genuine or true. If it is found that the confession was made and was free or voluntary and genuine, there would remain nothing to be done by the prosecution to secure conviction. If the Court finds that it is true that the accused committed the crime, it means that the accused is guilty and the Court has to do nothing but to record conviction and sentence him. No question of corroboration of the confession can possibly arise in such a case. Even if there is corroboration, and corroboration in material particulars, the Court's finding would still be the same, e.g., that it is true that the accused committed the crime. If the finding remains the same, it is evident that the corroborative evidence was quite redundant. Corroborative evidence certainly does not add to the efficacy of the finding of guilt at all.

What I have said is axiomatic, but I found it necessary to say it because of remark made by my brother Agarwala that the appellant's counsel had "not attacked the Confession as being not genuine". Had he admitted that the confession was genuine, there was nothing left in the case. That would have meant that he admitted that the appellant had committed the crimes. Mr. Kripa Shankar denied that he had conceded before my brethern that the confession was genuine and my brother Gurtu has not proceeded on the basis that he had conceded so. Mr. Kripa Shankar did not contend before me that even a genuine or true confession must be corroborated before it can be acted upon. Gurtu J. is also not of that opinion. What Mr. Kripa Shankar contended before me, and what has been Mr. Justice Gurtu's conclusion, is that this particular confession cannot be acted upon without corroboration. They mean that the confession has not been proved to be genuine or true.

7. I am satisfied from the evidence that the appellant made the confession and that he made it voluntarily without any threat or inducement. He had first falsely denied having made it at all. I do not know how he could have been induced to make it by the Superintendent of Police. The charge-sheet in this case had been submitted by the police three years ago; it was against the appellant and two other men who had died before the confession. So as far as this crime is concerned, the appellant's confession was not to be used except as against his own self. I do not know how the appellant could have believed that by confessing to the crime he would be released.

There is absolutely nothing to support his allegations of inducement and threat. Shri Bhatnagar put him several questions before recording his confession & gave him ample time to think of the consequences of making a confession. He told him in clear words that nobody had beaten or tempted him. Shri Bhatnagar warned him not to be under any illusion that he would be released if he made he confession and warned him that it could be produced in evidence against him and could form the basis of his conviction.

But his reply was that he was not afraid of anything, even death, and that he had made up his mind to speak the truth regardless of all consequences. Shri Bhatnagar again told him not to make any confession unless it was voluntary and he replied that he was making it out of his own volition and not on any inducement. He told him that he had to appear before God and so wanted to make a clean breast of everything. Even after this Shri Bhatnagar did not proceed to record his confession but gave him twenty-four hours' time. On the next day the appellant told him that he had thought over the matter and adhered to his determination to confess. After confession to other crimes with which we are not concerned, he said that he felt tired and would continue next day. Next day he continued and described the dacoity in Samachipur and other crimes and then feeling pain in his hand stopped, promising to make further disclosures on the next day. So on the third day he made further disclosures and then again stopped because of pain in his hand.

Then his hand was operated and when, he felt better he himself sent for Shri Bhatnagar. Shri Bhatnagar went to the jail on 24-11-49 and the appellant concluded the confession. In the end he voluntarily said that he would be punished by God for his misdeeds, and that he had made no false statement consciously. The entire confession was read over to him and he corrected it at places and then, put his thumb-impression. It would be impossible for any one to say that a confession made in these circumstances was not made voluntarily.

I ignore the fact that the confession was recorded in jail and also the fact that Shri Bhatnagar went to jail on the first occasion in the company of the Deputy Superintendent of Police and on the second occasion in the company of the Superintendent, and the Deputy Superintendent of Police. It was quite injudicious on his part to go in the company of police officers to the jail for recording confession. If his car was out of order, he could have used another conveyance or borrowed a car from somebody but not accepted a lift in the car of police officers. He ought to have realised that his going to jail in the company of police officers was likely to be misunderstood or misinterpreted by others.

But I am satisfied that the appellant would have made the same confession even in the absence of these facts; so they had no connection at all with the making of the confession. He had certainly pain in his hand, but that does not mean that he was in a sound state of mind or that he did not understand the implications of what he was doing or saying. The jail doctor who was treating him in the jail hospital had advised amputation, but he was not agreeing to it. On one occasion he mentioned this fact to Shri Bhatnagar and told him that he would like to be under the treatment of the Civil Surgeon who had examined him on a previous occasion. He himself did not allege that he was threatened with amputation in case he did not confess. The amputation was advised on medical grounds and had absolutely no connection with his confession. The confession is, therefore, fully

relevant.

8. There remains the question whether the confession was genuine or true or not. In deciding this question I may have to consider whether there was corroboration of the confession but once I decide upon the genuineness, the appellant's conviction would have to be upheld even if there was no corroboration. There is no law that a conviction cannot be based exclusively on a confession in any circumstances and that even a genuine confession must be corroborated, in some particulars, whether material or not. The Evidence Act simply makes the confession relevant or admissible in evidence; it is a piece of evidence against the accused and warrants conviction, if it is relied upon. It is stated in Archbold's Criminal Pleading, Evidence and Practice, 32nd edition;

> "A free and voluntary confession of guilt by a prisoner, whether under examination before magistrates or otherwise, if it is direct and positive, and is duly made and satisfactorily proved, is sufficient to warrant a conviction, without any corroborative evidence. (p. 400).
>
> The same law is stated by Phipson on Evidence, 8th edition, page 249; but he adds that the general rule has been thought not to apply to confessions of murder. According to Archbold, in recent times confession has been acted upon even in cases of murder; p. 400. No such exception is made in Indian Law or even in American Law. According to Greenleaf on Evidence, 7th edition, volume 1, para. 216, judicial confessions are "Sufficient to found a conviction, even if to be followed by a sentence of death, they being deliberately made, under the deepest solemnities, the advice of counsel, and the protecting caution and oversight of the Judge."

Judicial confessions should be distinguished from extra-judicial confessions. It may be doubted whether a conviction can be based solely upon an extra-judicial confession, but there is no reason for hesitating to base conviction on a judicial confession. The evidence of verbal confessions of guilt may have to be received with great caution, as advised by Greenleaf in para. 214. But many of the reasons which necessitate great caution do not operate in the case of a judicial confession. Again a case where there is no proof of 'corpus delicti' must be distinguished from another where that is proved; in the absence of proof of 'corpus delicti', a confession alone may not suffice to justify conviction, (see Wills on Circumstantial Evidence, page 120).

In the present case there is abundant proof of 'corpus delicti'.

9. A confession, particularly a judicial confession is not a tainted piece of evidence and if it is made freely and without inducement or compulsion, does not suffer from any infirmity such as exists in the testimony of an approver. A confession may implicate other persons besides the maker. The effect of the confession as against the maker is different from that as against the others. The maker might have implicated the others out of enmity or in order to propitiate certain persons. He would stand to lose nothing by implicating the others along with him. This is one of the facts which make the confession, as against the others, of less value than as against the maker himself. Even if the confession is true as against the maker, it might be false as against the others.

So a distinction is made in law between the effect of a confession as against the maker and that as against the others. Under the Evidence Act the confession can only be taken into consideration as against the others. (sic) A rule of caution has been adopted by all Courts that A should not he convicted on the basis of B's confession without material corroboration. In the face of the distinct possibility that the others might have been falsely implicated, it would not be correct to convict them without material corroboration. Unless the Court is in a position to say that the others have not been falsely named in the confession, there would always remain a doubt which would prevent the conviction of the others. If they are to be convicted, that doubt must be removed by the production of evidence indicating the connection of the others with the crime. One cannot be said to be one's own enemy, and one would have no reason to accuse ownself falsely of a crime. One may not lose anything by implicating others falsely, but the same cannot be said of accusing ownself falsely. That is why confessions, as against the makers, arc supposed to be the best evidence; see Wills, page 119 and Greenleaf, para. 215.

Greenleaf quotes Eyre C. B. observing in --Warickshall's case, 1 Leach Cr. C. 299 (C):

> "a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers."

Phipson writes that "confessions may reasonably be taken to be true as against the defendant himself." (p. 249)

10. The retraction of a confession by itself does not require corroboration before the confession can be made the basis of conviction. If the confession is found to be voluntary and genuine, the retraction is wholly immaterial. A retracted confession is simply a mixture of two pieces of evidence, (1) admission of the accused that he committed the crime and, (2) his statement that his admission was false. The question that arises is which piece of evidence to believe. Both cannot exist together; both may be false, but both cannot be true. If it is found that the confession was genuine, it means that the retraction or subsequent statement about its being false has no value. If the Court is not satisfied that the confession was genuine, it cannot be used in evidence, whether corroborated or not. In that case in order to justify conviction there must be evidence of such a nature as to justify conviction without any confession.

11. The appellant has not explained satisfactorily why he should have made a false confession. It was not a confession made on the spur of the moment; it was a confession made with due deliberation and continued for several days. There could be no reason for making the confession, other than that it was true. I do not find any conflict between the confession and the rest of the evidence. Mahtab Singh went to Samachipur with his wife to stay there and not to fetch his wife from there.

If the appellant said in his confession that they had heard that Mahtab Singh had gone to Samachipur to fetch his wife, he is certainly not contradicted by Mahtab Singh. He mentioned what he and Girand Singh had heard; they might have been misinformed as to the purpose behind Mahtab Singh's visit to Samachipur, or they might have misunderstood their informant or the

appellant might have forgotten the exact purpose. I have previously dealt with the injuries of Mahtab Singh; they do not contradict the statement in the confession that he was only shot at. The appellant did not know Mahtab Singh still he could say in his confession that Mahtab Singh was wounded; he could say this on the basis of hearsay.

Mahtab Singh said that the appellant was one of the dacoits who entered into the Kotha and shot at him; the appellant did not expressly state that he entered into the Kotha; he simply stated that he remained at the door. Mahtab Singh also stated that it was the appellant who shot at him in the chest, but the appellant did not say anything like this. When we have disbelieved Mahtab Singh, it would be wrong to judge the genuineness or otherwise of the confession by comparing it with Mahtab Singh's deposition. It is quite likely that what Mahtab Singh deposed is untrue and if it is untrue, what the appellant said in the confession cannot be said to be untrue simply because it conflicts with Mahtab Singh's deposition. I do not think there is any connection between the genuineness of the confession and the fact that the appellant could not explain the escape of Mahtab Singh.

That Girand Singh knew Mahtab Singh and was one of the dacoits, that Mahtab Singh was present during the commission of the dacoity and was even shot at and that he escaped, are facts which cannot be controverted at all. The appellant, not knowing Mahtab Singh, could not explain how he escaped. To him Mahtab Singh was like several other persons inside the house. How he escaped was a mystery to all the dacoits including Girand Singh. Even Girand Singh could not have explained how he escaped; why then blame the appellant for his failure? Mr. Kirpa Shankar relied upon certain omissions in the confession but it would be illogical to say that the confession contradiscts the other evidence by not mentioning what is mentioned in the other evidence. Omission is not always contradiction. The appellant confessed to several dacoities and not only to the dacoity under consideration. He could not be expected to give detailed accounts of all the dacoities and had no reason to give a detailed account of the dacoity under consideration in particular.

It will suffice to say that what he omitted to say in the confession is not inconsistent with what he said. Thus he did not mention the visit of two persons in the disguise of constables or that he was one of them. If he were one of them he would have mentioned the fact. I have not believed the evidence of Kanhai Singh; otherwise there is no evidence that the appellant was one of the two men. He might have been even unaware of the fact that two men were sent in advance to Samachipur. Then the confession does not mention the fact that Girand Singh shouted from the top of Mashal Singh's house, that he was Girand Singh and had gone to kill Mahtab Singh. These are mere details which the appellant might not have thought fit to refer to in his confession. Once Mahtab Singh stands discredited their remains nothing to contradict the statement in the confession that the appellant was known as Chotey Mian and that another dacoit was known as Dilawar. Although I and that the confession is not contradicted by the rest of the evidence in the case, I also find that it does not contain inherent evidence of its truth.

My brother Agarwala was impressed by the wealth of details relating to other crimes; he remarked :

> "The details mentioned in his statement are of such a nature that they could not have been known to the police and could have been known only to the applicant."

My brother Gurtu has rightly pointed out that there is nothing on the record to show the truth, of the details of other crimes.

Mr. Sri Ram argued that the confession in respect of another crime has been accepted as genuine by this Court and the appellant has been convicted for that crime; he referred me to criminal appeal No. 1068 of 1950 (All) (D) 19-6-1951, in which the appellant on the basis of his confession was convicted for the murder of Mewa Ram. The judgment is certainly no evidence to prove the truth of the confession regarding the murder of Mewa Ram. The judgment proves nothing beyond the fact that the appellant was found guilty of that murder. Whether he committed that murder or not is another question. I do not think any particular inference can be drawn from the fact that the confession is a detailed one running into more than three closely printed foolscap sheets. Six pages are nothing compared to thousands of pages written by novelists without misleading any reader into thinking that what is written there is true.

Though there is no corroboration of the confession in respect of the other crimes, my brother Gurtu was inclined to accept the confession as completely true as regards the other crimes. If so, it must be accepted as completely true as regards the dacoity under consideration also because there is nothing to distinguish between the confession as regards this dacoity and the confession as regards the other crimes as far as the genuineness is concerned. The appellant was arrested for all crimes committed by him and not for this dacoity in particular and he confessed also to all crimes committed by him. He had no reason to make a true confession in respect of the other crimes and to make a false confession in respect of this dacoity. That the confession was made three years later or that it was recorded in Jail does not affect its genuineness.

I am satisfied that the confession is true and that the appellant took part in the commission of the dacoity under consideration. I arrive at this finding, even though there is no material corroboration and there is no other evidence pointing towards the appellant's guilt. My brother Gurtu was not prepared to accept the confession as true without corroboration because the prosecution attempted to produce evidence of material corroboration and failed.

My learned brother had in his mind the false evidence of Mahtab Singh to the effect that the appellant was one of the dacoits and was addressed as "Dilawar" also as "Birey" by his accomplices. With great respects to him I would say that corroboration is not necessitated by the mere fact that the prosecution tried to provide corroboration and miserably failed. The prosecution might have been wrongly advised that corroboration was necessary, and might have unnecessarily produced spurious evidence. Because it felt the necessity of producing corroborative evidence it cannot be said that such evidence was necessary either under the law or on the facts of this particular confession.

12. The confession having been found to be true it must be held that the appellant was one of the dacoits who committed the various offences at Samachipur on the night of 22-7-1946.

13. No question of identity was raised before me. It was not contended that the appellant is not the man against whom the charge-sheet was submitted by the police. The charge-sheet was submitted against Dilawar alias Birey Singh son of Bansi Singh. It has been found that the appellant was never known as Dilawar and that his father's name is not Bansi Singh. The police submitted the charge-sheet against Dilawar on the basis of the evidence that one of the dacoits was addressed as such by his accomplices. But that dacoit has been found to be other than the appellant. Though the witnesses meant some other person by "Dilawar", there is no doubt that the police thought that it was the appellant.

Before the charge-sheet was submitted the police had already received information that Birey or Birey Singh alias Dilawar was one of the dacoits. The police could have prosecuted anybody and there is no reason to think that they did not intend to prosecute the appellant. One of the two names of the person against whom the charge-sheet was submitted applies to him and that is sufficient.

14. I do not understand at all the controversy that raged in the trial court about, the appellant's being guilty of "dacoity with murders" or of "murders with dacoity". The question is what offences the appellant committed? The dacoits are all guilty under Section 147, I. P. C., and as the offences against the various murdered and injured persons were committed by the members of the unlawful assembly in prosecution of the common object, all the members including the appellant are responsible for all those crimes. Section 149, I. P. C., clearly applies. The learned Sessions Judge has not come to a definite finding as regards the other charges; he ought to have recorded either conviction or acquittal under those charges.

15. My opinion is that the appellant's conviction and sentence under Section 396, I. P. C., be confirmed, the reference made by the learned Sessions Judge be accepted, the Government Appeal be allowed, the appellant be convicted under the remaining 13 charges and sentenced to death under the second, third, fourth, fifth, sixth and seventh charges, (relating to the murders of Mashal Singh, Atar Singh, Yadav Singh, Pan Singh, Smt Dhanwanti & Bagh Singh), to rigorous imprisonment for ten years under the eighth, ninth & thirteenth charges (relating to attempts to murder Mahtab Singh, Subedar Singh and Smt. Bittan), to rigorous imprisonment for two years under the 10th charge (relating to the injuries caused to Bechan Singh), to rigorous imprisonment for six months under the eleventh and twelfth charges (relating to simple hurt caused to Kanhai Singh and Man Singh) and to rigorous imprisonment for two years under the first charge (relating to the rioting armed with a deadly weapon), the sentences of death be carried out in accordance with law, and the other sentences of imprisonment be undergone simultaneously with the sentences of death.