Ram Bali And Ors. vs State on 10 October, 1950

Equivalent citations: AIR1952ALL289, AIR 1952 ALLAHABAD 289

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Bench: Raghubar Dayal

JUDGMENT

Desai, J.

1. Ram Bali Singh, Harbans Singh and Param Sukh Lal appeal from a judgment of a Civil and Sessions Judge of Banaras convicting them under Section 302, Penal Code, and sentencing the first to death and the others to transportation for life. The appellants live in village Thana and are said to be friends. The first two are Thakurs but no relationship exists between them, and the third is a Kayastha. Achaibar Singh, mukhia of the village, is a collateral of Harbans Singh and has disputes with him over joint land. The disputes were referred for arbitration of a Panchayat consisting of five men. Harbans Singh claimed the right to nominate all the five panches himself but was made to agree that one Panch at least should be nominated by Achaibar Singh. Accordingly Harbans Singh nominated four Panches one of whom was Uma Shankar while Achaibar Singh nominated Nankoo Singh deceased. There is a Gram Sudhar and Panchayat in the village of which Param Sukh Lal was the Vice-President and P. W. Mohammad Akil the Secretary. Nankoo Singh had previougly been a member of the Panchayat but was not a member at the time when the occurrence took place. He was, however, a very peace-loving educated man who would try to settle all differences between the villagers. He was respected for this by the whole village. The five Panchas met on 26-11-1948, to settle the disputes between Harbans Singh and Achaibar Singh but did not succeed; on the other hand, there is evidence that some hot words were exchanged between Nankoo Singh and two of the nominees of Harbans Singh. On the next day Harbans Singh and others cut away Achaibar Singh's paddy crop after beating him. Achaibar Singh lodged a complaint against them on 1-12-1948 citing Batuk Singh, Tilak Singh, Laldhari Singh and Mohammad Akil and four others as his witnesses. Out of those only Tilak Singh and three of the others were actually examined as prosecution witnesses. (The complaint was dismissed after the murder of Nankoo Singh.)

2. Param Sukh Lal was an autocrat in the Gram Sudhar Panchayat and liked to do everything according to his desire. The public was dissatisfied with him on account of his method of working. Thus Nankoo Singh was an eye sore to Harbans Singh and Param Sukh Lal. The third appellant Ram Bali Singh had no direct enmity with Nankoo Singh but since he was a friend of Harbans Singh he also did not like Nankoo Singh.

3. On 5-12-1948, at about 7 P. M. when there was moon in the sky, Harbans Singh and Uma Shankar went to the house of Nankoo Singh and asked him to go to the house of Harbans Singh to settle the dispute between him and Achaibar Singh about the cutting of the paddy crop. Nankoo Singh was disinclined at first but was persuaded by Uma Shankar to go and so he accompanied them to the house of Harbans Singh which is at a distance of about seven houses from his own. On the way they passed by the house of P. W. Katwaroo who accompanied them. Arriving at the door of Harbans Singh's house they found Ram Bali Singh and Param Sukh Lal sitting on the Chabutra of a Nim tree just in front of Harbans Singh's house. Below the Chabutra was a fire. Nankoo Singh, Harbans Singh, Uma Shankar and Katwaroo sat round the fire. Marjadi, mother of Harbans Singh, was at her door. Harbans Singh told Nankoo Singh that he had brought him to have the matter about the cutting of the paddy crop compromised. Nankoo Singh replied that he should return the paddy and the expenses of the complaint to Achaibar Singh and then live peacefully with him. Harbana Singh did not give any reply to this suggestion. Ram Bali Singh went inside the house of Harbans Singh and came out after short time and sat down on the Chabutra again covering himself with a black cloth, described by two witnesses as a blanket and another as a cotton Chaddar. When Nankoo Singh did not receive any reply from Harbans Singh he got up saying that it was no use waiting there. Others also got up ail the same time and Param Sukh Lal and Harbans Singh shouted that he should be struck. Immediately Ram Bali Singh threw off the cloth and plunged a knife into the abdomen of Nankoo Singh, extracted it and ran away along with Harbans Singh and Param Sukh Lal. Nankoo Singh fell down. The crime was witnessed not only by Uma Sankar and Katwaroo but also by Batuk Singh and Sheikh Nazir Hasan. Batuk Singh was at that moment returning to his house from a pond after answering the call of nature while Sheikh Nazir Hasan was returning home after collecting arus leaves from a place behind the house of Harbans Singh. Both were witnesses of the instigation by two of the appellants and the stabbing by the third. Batuk Singh shouted as soon as he saw the stabbing and there was uproar also, hearing which Ram Iqbal (younger brother of Nankoo Singh), Lal Dhari Singh (their uncle), Jhuro Singh, Tilak Singh and Mohammad Akil arrived there. Nankoo Singh said to them that he had been stabbed by Ram Bali Singh on being instigated by Harbans Singh and Param Sukh Lal. Achaibar Singh also arrived there and suggested that Nankoo Singh should be taken to the police station which is less than a mile by foot path and a report be lodged there. But Nankoo Singh who was in great pain said that he should be taken at once to the hospital in village Pindra which is about two miles from the village. So he was carried on a cot by Lal Dhari Singh and others to the hospital where they arrived at about 8-30 P. m. Dr. Paul, the Medical Officer at the hospital, cleaned and dressed the wound in the abdomen and advised that Nankoo Singh be taken at once to the King Edward Hospital, Banaras, about 18 miles away. Nankoo Singh was then in senses but restless. Lal Dhari Singh got a report of the occurrence scribed by Tulsi (of village Pindrai which is about a mile from the hospital) and took it to the police station which is about two miles from there while Nankoo Singh was taken in a motor vehicle to Banaras. Lal Dhari Singh handed over the written report at the police station at 10-30 P. M.

4. Nankoo Singh reached Banaras in the latter part of the night and was admitted in the King Edward Hospital. As his condition was serious a Magistrate was sent for and he took down his dying declaration at 8:20 A.M. on 6th December. In this dying declaration Nankoo Singh said that he was stabbed by Ram Bali Sigh at the door of Harbans Singh. Nankoo Singh died in the hospital on 8th December at 5 A. M. According to the Doctor the death was due to shock and haemorrhage resulting

from the stab wound in the abdomen involving the stomach, the entrails and the mesentery. On the abdomen there was a liner incised wound 1 inch long.

5. The police reached the spot on 7th December for investigation. Harbans Singh was arrested at once and the other appellants were found absconding. Ram Bali Singh had run away to Bombay which he used to visit previously and was arrested there sometime before 19-12-1949. Param Sukh Lal surrendered himself in Court on 20-1-1949. Steps under Sections 87 and 88, Criminal P.C., had been taken against both.

6. The prosecution relied upon the evidence of Katwaroo, Batuk Singh, Sheikh Nazir Hasan, Tilak Singh, Lal Dhari Singh, Ram Iqbal, Jhuro Singh, Mohammad Aqil and Aehaibar Singh. The first three deposed that the occurrence took place in the manner stated above and that Ram Bali Singh stabbed Nankoo Singh on being prompted by the other two appellants and that they all ran away together. All the witnesses except Achaibar Singh stated that Nankoo Singh informed his brother and others who arrived at the spot, that the crime was committed by Ram Bali Singh at the instigation of the other two. There is further the evidence of the Magistrate who proved the dying declaration of Nankoo Bingh made on 6th December. Achaibar Singh gave evidence about the enmity between him and Harbans Singh, the setting up of the arbitration and the part played by Nankoo Singh as his nominee in the Panchayat.

7. The names of Katwaroo, Batuk Singh, and Sheikh Nazir Hasan are mentioned in the report lodged by Lal Dhari Singh. There was no suspicious delay in the lodging of the report; it was quite natural for Lal Dhari Singh and Ram Iqbal Singh to carry Nankoo Singh first to the hospital where his wound could be attended to and then think of going to the police station to lodge a report. There is absolutely nothing suspicious in Lal Dhari Singh's getting the report scribed by Tulshi even if he himself was literate. In the report it was written at first that the occurrence took place at 5 P. M. but the figure '5' was altered to the figure '7' in different ink. The evidence of Lal Dhari Singh and Tulshi is that the correction was done at the hospital when the report was read over to Lal Dhari Singh but this does not appear to be a fact. Had the correction been made there and then it would have been in the same ink. On the other hand, the correction seems to have been made at the police station. I do not know what advantage the prosecution would have got by shifting the time of occurrence from 5 P. M. to 7 P. M. It is nobody's case that the occurrence took place at 5 P. M. and not at 7 P. M. Therefore putting down the time as 5 P. M. originally must have been an innocent mistake which was probably detected when the written report was handed over at the police station. Katwaroo has his house quite near Harbans Singh's and was a most likely witness of the occurrence. The other two witnesses of the actual occurrence happened to be passing by the house of Harbans only by chance. This fact may excite our suspicion but is not alone enough for a finding that the evidence given by them is false. Katwaroo was cross examined on behalf of the accused with a view to show that Sheikh Nazir Hasan could obtain arus leaves from a place nearer his house than the place behind Harbans Singh's house. This cross examination was against the law because no evidence could be produced by the accused to contradict the evidence of Sheikh Nazir Haaan about the reason for his being at the place of occurrence at the time when it took place. Obtaining matter through cross examination of another witness is same as obtaining it from examination in chief of own witness. In this respect the law makes no distinction between matter brought on record through examination-in-chief of

own witness and that brought on record through cross-examination of a witness of the adversary. That evidence was not on a matter relevant to the issue. Whether arus leaves could be found at another place or not was not a matter relevant to the issue. The law, as stated by Phipson on Evidence, Edn 8 is :

> "After a proper foundation has been laid in cross-examination (Browne v. Dunne, ante, 468), a party may contradict his opponent's witnesses by independent evidence on all masters relevant to the issue, and in particular as to their previous contradictory statements." (at p. 471).
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> "A party may not, in general, impeach the credit of his opponent's witnesses by calling witnesses to contradict him on irrelevant matters, and his answers thereon will be conclusive." (p. 472).
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> Similar statement of law would be found in Taylor's Law of Evidence, paras. 1435 and 1438. He gives the reasons on which the rule is founded, in para. 1439; they are :
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> "First, that a witness cannot be expected to come prepared to defend, by independent proof, all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion, by raising an almost endless series of collateral issues."

8. A case exactly similar to the present case is Piddington v. Bennett & Wood Proprietary Ltd., 63 C. l. r. 533. A person claiming to be an eye-witness of an accident explained that he happened to be at the spot because he was carrying a message from a bank to J. The opposite party attempted to produce evidence to prove that J had not operated upon his account with the bank on that day and that consequently the witness was lying when he said that he was carrying a message to J. The High Court of Australia ruled out the evidence as inadmissible. It laid down that if a question in cross-examination affects only the credit of the witness and is not relevant to the matters actually in issue, the witness's answer cannot be contradicted by other evidence except in certain exceptional cases.

9. Uma Shankar, who was admittedly present at the spot, was not examined by the prosecution and it was argued that the effect of not examining him would be to raise the presumption that if he had been examined his evidence would have gone against the prosecution. It is the contention of the prosecution itself that his evidence would have gone against it and there is no sense in saying that this should be presumed. Uma Shankar was suspected by the prosecution of complicity in the crime. It is in the evidence that he was a nominee in the Panchayat of Harbans Singh, that he not only accompanied him to the house of Nanku Singh but also pressed the latter to go to the house of Harbans Singh where he was to meet his doom, and that he prevailed upon Laldhari Singh, etc to cite him in the report as an eye-witness. It is also in the evidence that he acts the part of Narad in the village and that Nanku Singh gained popularity at his expense by composing differences among people. The prosecution cannot be blamed for harbouring a suspicion against him in these circumstances and for withholding him from the witness-box. It was not bound to put him in the

witness-box even when it was not sure of his reliableness. After all, he was not an essential witness; he was only one more eye-witness of the occurrence. Had he been the only eye-witness and had the prosecution tried to prove its case by withholding him and relying upon circumstantial evidence, it could have been argued that withholding him would affect the prosecution adversely. When the evidence on the record itself suggests that Uma Shankar might not have given true evidence, that alone is a very good reason for the prosecution's not putting him in the witness box. That his evidence would go against it is one thing and that that evidence should be believed is another thing. All that can be presumed under Section 114 is that his evidence would go against the prosecution, but not that it would justly go against it or would be believed. The best evidence rule deals mainly with evidence of different kinds and not with the evidence of different witnesses. But even if it is applied to the evidence of different witnesses, it must first be established that Uma Shankar would have been the best eye witness. The circumstances mentioned above do not at all show that he would have been the best eye-witness. Lord Roche, delivering the judgment of the Judicial Committee in Stephen Seneviratne v. The King, A. I. R. (23) 1936 P. C. 289, observed at p. 300 :

> "They cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. It is dots so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of tie narrative on which the prosecution is based, must of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution."

Uma Shankar was not essential to the unfolding of the narrative on which the prosecution was based; that has been done by other witnesses. That the prosecution is not bound to put forward all witnesses named in the information report is settled since their Lordships' decision in Adel Muhammad v. Attorney-General, 1944 ALL. L. J. 466.

> "The prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion, unless perhaps, it can be shown that the prosecutor has been influenced by some oblique motive."

(ibid, p. 469, per Lord Thankerton). These two decisions of their Lordships substantially modify the law laid down by a Bench of this Court in Nem Singh v. Emperor, 57 ALL. 267 at p. 276. I, therefore, attach no importance to the fact that the prosecution did not examine him as its witness.

10. At the same time, I cannot help feeling that the Sessions Judge himself should have examined him under Section 540, Criminal P. C. A Sessions Judge is expected to try a criminal case intelligently and not leave everything in the hands of the Public Prosecutor and the defence counsel. It is his duty to find out whether the examination of any witness would be necessary in the interests of justice or not. He is bound to examine any witness whose evidence he considers essential in the interests of justice. He cannot evade this statutory responsibility by omitting to give all thought to

the question whether the evidence of any witness left out by the parties is essential or not. It is remarked by Phipson, at p. 466 that :

> "On charges of homicide, and perhaps in other serious cases, witnesses who, though not so named, were present at the transaction, are sometimes called by the Judge for the furtherance of justice."

11. Besides the evidence of the three eyewitnesses the statements made by Nanku Singh himself on at least two occasions about his being stabbed by Ram Bali Singh are substantive evidence. It is not disputed that he was a truthful man on whose statement implicit reliance could be placed. He was not likely to accuse anybody falsely. He was in his senses when he made the dying declaration before the Magistrate in the hospital. He must have been in his senses immediately after the occurrence also and must have mentioned the names of his assailants to Ram Iqbal and others who arrived on the spot on hearing of the crime. On both the occasions he stated that he was stabbed by Ram Bali Singh at the house of Harbans Singh.

12. It was contended that the prosecution witnesses are not independent. The main basis for this contention is that four of them were named by Achhaibar Singh in his complaint. They might have been on friendly terms with Achaibar Singh and at his beck and call, but it does not follow that they are at the beck and call of Laldhari Singh and Ram Iqbal. Further, they are only four out of eight witnesses named by Achhaibar Singh and only one of them was actually examined. I am not prepared to say that they would give false evidence without any hesitation at the instance of the prosecution. Nothing could be said against Katwaroo except that his uncle Mata Prasad also was a witness of Achhaibar Singh in that complaint. The relationship between Batuk Singh and Tilak Singh is immaterial. The relationship between a witness and the party examining him may show that the former is not an independent or impartial witness, but the relationship between two witnesses examined by a party does not lead to any inference that they are interested in the party. On 15-1-1948 Param Sukh made a report of an offence under Sections 323 and 506 against Tilak Singh and Jhuro; these witnesses might have given evidence against him on account of it, but there is no certainty that they have given false evidence on account of it. The evidence given by the prosecution witnesses is quite consistent and probable. Nobody had touched the cloth that Ram Bali Singh had wrapped round him and since it was black and it was night, there is no wonder that some described it as a blanket and Sheikh Nazir Hasan, as a chaddar. There is a mystery about an abrasion found on the band of Marjadi; none of the prosecution witnesses knows how-she received it. She did not take any part in the occurrence and remained at the door throughout. The appellants themselves did not say what had happened that evening and Marjadi has not come in the witness-box. When it is not known that she received the abrasion in the same transaction in which Nanku Singh received his fatal wound, it cannot be said that the prosecution witnesses should not be believed because they have not explained her injury.

13. The prosecution witnesses were cross-examined at great length by Shri P.N. Singh, Shri J.D. Dube and Shri B.K. Barrat, the learned counsel of the accused. The cross-examination, I regret to say, was a rambling and purposeless cross-examination. Many inadmissible and irrelevant questions were put to the prosecution witnesses. The learned Sessions Judge did not exercise any control, not

even to shut out irrelevant and inadmissible questions. The consequence was that the trial was very much protracted and much public time was wasted. Though there was not much evidence and the case was very simple, the trial took eleven days. An idea of the excessive length of the cross-examination can be had from the fact that the cross-examination occupied generally six times the space occupied by the examination in chief and in some cases even twelve times. Witness after witness was cross-examined about certain statements made by him in the deposition but not to be found in his statement under Section 162, Criminal P. C. A statement recorded by the police under Section 162 can be used for one purpose and one purpose only and that of contradicting the witness. Therefore if there is no contradiction between his evidence in Court and his recorded statement in the diary, the latter cannot be used at all. If a witness deposes in Court that a certain fact existed but had stated under Section 162 either that that fact had not existed or that the reverse and irreconcilable fact had existed it is a case of conflict between the deposition in the Court and the statement under Section 162 and the latter can be used to contradict the former. But if he had not stated under Section 162 anything about the fact there is no conflict and the statement cannot be used to contradict him. In some cases an omission in the statement under Section 162 may amount to contradiction of the deposition in Court; they are the cases where what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence. If the statement under Section 162 can be reconciled with the deposition in Court and can stand with it, there is absolutely no conflict. If a witness stated under Section 162 that A was attached by X and makes no reference to Y at all but in the Court deposes that A was attacked by X and Y, it is possible to argue that his statement under Section 162 amounts to this that A was attacked by X alone and that Y did not take part in the attack and thus contradicts the deposition in Court. It depends upon whether the witness intended to name all the assailants of A in his statement or not. If a witness states under Section 162 that an incident was witnessed by S, T, W, X and Y and deposes in the Court that it was witnessed by S, T, W, X, Y and Z, there may be or may not be any conflict between the two. If his list of the eye-witnesses under Section 162 was intended to be exhaustive, it may amount to his denying that Z also was an eye-witness and thus contradict his deposition in Court. But if it was not intended to be exhaustive, then it cannot be said that his statement amounts to denial of the fact that Z also was an eye-witness.

14. Unless, therefore, a deposition in Court cannot be reconciled with what is stated under Section 162, the statement under Section 162 cannot be used to contradict the witness. It is stated by Willis on Circumstantial Evidence, Edn. 7, p. 443 :

> "Still less are mere omissions to be considered as necessarily casting discredit upon testimony which stands in other respects unimpeached and unsuspected. Omissions are generally capable of explanation by the consideration that the mind may be so deeply impressed with, and the attention so riveted to, a particular fact, as to withdraw attention from concomitant circumstances, or prevent it from taking note of what is passing. It has been justly remarked that, "upon general principles, affirmative is better than negative evidence. A person deposing to a fact which he states he saw, must either speak truly, or must have invented his story, or it must have been sheer delusion. Not so with negative evidence; a fact may have taken place in the very sight of a person who may not have observed it; and if he did observe it,

> may have forgotten it," (Sir Herbert Jenner in Chambers v. Queen's Proctor, (1840) 2 Curties. Rep. at p. 434.") Rowland J. observed in Deo Lal v. Emperor, A. I. R. (20) 1933 Pat. 440 at p. 441 :
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> "Entries of statements in the diary are notoriously very condensed and the omission of some detail in the note of a statement is not always a sure indication that such detail was absent from the statement; and certainly a Court should never use such an absence as a contradiction without taking the evidence to prove that no such thing was stated."

15. In Ponnusami Chetty v. Emperor, A. I. R. (20) 1933 Mad. 372 (2), the question was whether a statement under Section 162 could be proved to show that the witness made assertion in his deposition which he did not make in the statement. Burn J. answered it in the negative. He observed that the question had to be answered in the negative unless an omission from a statement under Section 162 can be said to be a contradiction of a statement made in the Court. He went on to say :

> "Whether it is considered as a question of logic or of language, 'omission' and 'contradiction' can never be identical. If a proposition is stated any contradictory proposition must be a statement of some kind, whether positive or negative. To 'contradict' means to 'speak against' or in one word to gainsay. It is absurd to say that you can contradict by keeping silent."

I would not go as far as Burns J. to say that an omission can never be a contradiction bat I certainly agree with him that it is not synonym, cms with contradiction and that generally it does not amount to contradiction.

16. Closely connected with this question when does an omission amount to a contradiction, is the question of the proper way of using a statement made under Section 162 for the purpose of contradiction. The section itself does not lay down the manner in which the statement can be used for contradiction. Under Section 145, Evidence Act, a witness may be contradicted by a previous statement made by him and reduced to writing but before the statement is proved, the witness's attention must have been drawn to it. When under Section 162 a statement can be used only for the purpose of contradicting the witness when in the witness-box, it means that out of the whole statement made by him under Section 162, only the particular assertion, which contradicts his deposition in Court can be used. The proviso to Section 162 itself speaks of the deposition being contradicted by "any part of such statement. "Reading Section 162 of the Code and Section 145, Evidence Act, together one finds that the proper way of contradicting the witness is by drawing his attention to the particular assertion or sentence in the statement under Section 162 by reading it over and not by reading over the entire statement. Naturally if it is not possible for the cross-examining counsel to point to any particular sentence or assertion in the statement as contradicting the deposition in the Court, he cannot draw the witness's attention to any sentence or assertion. This supports what I have said above that an omission is not a contradiction unless what is actually said contradicts what is omitted to be said. The test to find out whether an omission is a contradiction or not is to see whether one can point to any sentence or assertion which is

irreconcilable with the deposition in the Court. It would be quite meaningless to say that the entire statement under Section 162 contradicts the deposition; therefore, one cannot point to the entire statement as being irreconcilable with the deposition.

17. In the example given above, if the circumstances indicated that the witness meant to give an exhaustive list of the assailants to the police, when he deposed in Court that A was attacked by X and Y he may be confronted with his statement under Section 162 that A was attacked by X, and asked to explain the conflict. Similarly, in the other example he may be confronted with his statement under Section 162 that S, T, W, X and Y were the eye-witnesses and asked how he omitted the name of Z. If there is nothing to indicate that he meant to give an exhaustive list of assailants or witnesses, that itself is the explanation for his omitting to mention the name of Y as an assailant and that of Z as an eye-witness and there would be no sense in confronting him with his statement under Section 162 and calling upon him to explain. When the particular sentence or assertion in the statement under Section 162 is put before the witness, it must be marked by being underlined or enclosed in a circle and exhibited. The entire statement should never be exhibited; it is not admissible in evidence and has not been brought to the notice of the witness. If the witness admits having made that assertion or spoken that sentence, the assertion or sentence is proved also and nothing further remains to be done; if he denies or does not remember having made the assertion or spoken the sentence, the station officer will have to be called to prove that he made or spoke it. This will be done by asking him whether the witness made the assertion or spoke the sentence bearing exhibit number so and so. This is the right way of proceeding to contradict a witness. I have dealt with this matter at length because many Ses. Judges do not know when an omission is a contradiction and allow lot of public time to be wasted in long cross-examination about omissions, and do not know the right way of confronting a witness by his previous statement and of getting it proved by Sub-Inspector. It is quite wrong for a Sessions Judge to make a note, when a witness denies or does not remember having made a certain statement before the Sub-Inspector, that such a statement exists or does not exist. There was no dispute about Nanku Singh's being stabbed in the abdomen yet there was unnecessary cross-examination of Laldhari Singh about his not stating in the report that the stabbing was done in the abdomen. There was no sense in asking Ram Iqbal, who was not an eye-witness of the crime, whether anyone chased the assailants, whether he himself made any attempt to catch any of them and wheher he told anyone to catch any of them. The question whether Achchhaibar Singh's brother was married in the same village in which Nanku Singh was married was irrelevant because even if it was answered in the affirmative it would not at all show that Achchhaibar Singh's evidence should not be believed. Achchhaibar Singh's boil and his brother's widow had nothing to do with the case; yet they were introduced in cross-examination. Though the evidence is that Bam Bali Singh had run away with the knife, Jhuro and Mohammad Akil were unnecessarily questioned whether they made a search for the knife on the spot. Sheikh Nazir Hasan was not shown to have anything to do with the case K.E. v. Sheo Das, yet he was asked whether one Bageshwari was a witness against Sheo Das. The Station Officer was asked about statements made before him by Uma Shankar who wae not even a witness. Some fantastic suggestions were made in the cross-examination of the Station Officer which had no basis at all. These are some of the instances of meaningless and vexatious cross-examination conducted by the accused's counsel. I consider that it was an abuse of the process of Court. I am surprised that the learned Sessions Judge allowed so much of the public time to be wasted and the witnesses to be harassed by such cross-examination. Viscount Sankey L.C. stated in

Mechanical and General Inventions Co. Ltd. v. Austin etc., 1935 A. C. 346 at p. 360:

> "A protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time. Such a cross-examination becomes indefensible when it is conducted, as it was in this case, without restraint and without the courtesy and consideration which a witness is entitled to expect in a Court of law. It is not sufficient for the due administration of justice to have a learned, patient and impartial Judge. Equally with him, the solicitors who prepare the case and the counsel who present it to the Court are taking part in the great task of doing justice between man and man."

Lord Wright said in Vassiliades v. Vassiliades, 1945 ALL. L. J. 34, at p. 37:

> "Now cross-examination is one of the most important processes for the elucidation of the facts of a case and all reasonable latitude should be allowed but the Judge has always a discretion as to how far it may go or how long it may continue. A fair and reasonable exercise of his discretion by the Judge will not generally be questioned by an Appellate Court."

His Lordship also referred to the above-quoted observation of the Lord Chancellor Lord Sankey.

18. All the appellants pleaded not guilty and 'alibi'. Ram Bali Singh stated that he was in Bombay and Harbans Singh, that he was in his Khalian in the neighbouring village Ajaipur. Ram Bali Singh could not explain why the witnesses had given evidence against him, while the other two appellants pleaded enmity with them. Ram Bali Singh did not examine any witness in defence, but the other two examined three witnesses between them.

19. I have not the slightest doubt that Nanku Singh was murdered by being stabbed in the abdomen with a knife at the door of Harbans Singh in the evening of 5-12-1948. The Station Officer found blood in front of Harbans Singh's house. Though the crime was committed in the evening and in the abadi, the appellants could not produce any evidence in rebuttal of the prosecution evidence about the occurrence. They did not have the courage to examine Uma Shankar and Marjadi. It seems to me that Uma Shankar did not have the courage to speak falsehood and go against the clear evidence and also did not want to admit the facts and thereby help the placing of the noose round the neck of one or more of his friends.

20. The evidence against Ram Bali Singh is unanimous; he is named by the eye-witnesses and was consistently named by Nanku Singh in his dying declaration. Neither the Committing Magistrate nor the learned Sessions Judge specifically asked the appellants to explain why Nanku Singh should have named them in the dying declarations. So it was contended that the evidence of the dying declarations cannot be used against them. Under Section 342, Criminal P. C. it was open to the Court to put specific questions to the appellants about the circumstances appearing in the evidence against them, but it was not bound to do so. What it was bound to do is to question them generally on the ease after the witnesses for the prosecution had been examined and that has been done. The

words used in the obligatory part of Section 342 are "question" .... "generally on the case"; they do not mean that the accused should be questioned specifically about every circumstance appearing in the evidence against him. It may be that the Legislature thought that when specific questions were put during the progress of the examination of prosecution witnesses, only general questioning was necessary to be done after the close of that examination. But, as I pointed out, the questioning about the specific circumstances is only optional and if the Legislature did not provide for the contingency in which this questioning was not done during the examination of prosecution witnesses, I do not think that the omission can be made good by the Court which can only interpret, but not legislate. In any case I do not find anything in the Code to suggest that if an accused is not questioned specifically about any circumstance appearing in the evidence against him, that circumstance cannot be used against him and the evidence about it becomes inadmissible. The admissibility of evidence depends solely upon the provisions of Evidence Act and is not affected by failure to comply with those of the Code. If the imperfect examination of an accused has prejudiced him in the defence, his conviction may be vitiated, but that is not the same thing as saying .... that part of the evidence, which is relevent and admissible should be struck off the record. If he has been prejudiced, an appellate Court may order his retrial, but counsel for the appellants do not want any retrial in the present case. The facts, in Dwarka Nath Verma v. Emperor, A. I. R. (20) 1933 P. C. 124., relied upon by the appellants, were different. There the trial Court had stressed the fact that the accused had offered no explanation about a certain matter. As the accused had not been questioned about that matter at all while under examination under Section 342, Lord Atkin observed that the departure from the statutory rule in Section 342:

> "deprives of any force the suggestion that the doctor's" (he was the accused) "Omission to explain what he was never asked to explain supplies evidence."

21. In the present case there is no question of relying upon the appellant's failure to explain why Nanku Singh named them in the dying declarations; the evidence consists of the dying declarations themselves and not of any failure of the appellants, to offer any explanation for them. The evidence about the dying declarations was quite prominently given; four witnesses were examined simply to prove the dying declarations. They were cross-examined at great length as I have already shown. In the circumstances the general questions put to them by the Magistrate and the learned Sessions Judge should have sufficed to make them offer explanation, if they had any. I do not think any prejudice was at all caused by the failure of the Courts below to ask them specifically about the dying declarations. Nanku Singh had no enmity with Ram Bali Singh and when one has regard to his character one would find it impossible to imagine that he falsely accused him of the crime. As regards the other two appellants there is the evidence of the eye-witnesses and of the dying declaration of Nanku Singh at the spot. But there is no mention of them at all in the dying declaration made in the hospital. There were four occasions on which Nanku Singh could have referred to them in the latter dying declaration but failed on every occasion. This dying declaration stands in sharp contrast with the oral dying declarations about which evidence has been given by Ram Iqbal etc. That evidence is dimply this that Nanku Singh had said that he had been stabbed by Ram Bali Singh as the instigation of Harbans Singh and Param Sukh Lal. If in that one-sentence declaration Nanku Singh could mention the part played by Harbans Singh and Param Sukh Lal, it is difficult to understand why he did not even mention them in his more detailed declaration in the

hospital. Under Section 82, Evidence Act, it is the statement actually made by the deceased (as to the cause of his death or of the circumstances of the transaction which resulted in his death) which is relevant and not what he omits to state. In other words, no argument can be built upon what he has not said in his declaration. His declaration must be distinguished from the deposition he would have made if he were alive. One could have drawn some inferences from his failing to mention a fact in his deposition, but one cannot draw any inference from his failure to mention it in the dying declaration. This follows from what I said above, namely, that what is relevant is what he has said and not what he has not said. The position, however, is different when what he has omitted to say would be irreconcilable or inconsistent with what he has actually said. If he has named only X as his assailant and the circumstances suggest that he intended to be exhaustive it means that everybody else was not his assailant. If Harbans Singh's and Param Sukh Lal's sitting there with Ram Bali Singh, instigating him to strike Nanku Singh and running, away with Ram Bali Singh is inconsistent with what Nanku Singh mentioned in his dying declaration, it means that the dying declaration contradicts the evidence given by the witnesses about the part played by Harbans Singh and Param Sukh Lal, I think in this particular case it is not easy to say that there is no inconsistency between the two. I find it difficult to say that the positive statement that Ram Bali Singh was sitting there, that as soon as he (Nanku Singh) and Uma Shankar got up to go he was stabbed by Ram Bali Singh and that Ram Bali Singh after knocking him down fled away, does not impliedly deny the presence of Harbans Singh and Param Sukh Lal and their instigation and running away together with Ram Ball Singh. When this implied statement of a person whose truthfulness is not in question at all runs counter to the oral evidence, it creates a reasonable doubt about the truth of the oral evidence. Harbans Singh and Param Sukh Lal must; be given the benefit, of the implied statement of Nanku Singh that they did not take part in the crime.

22. The conviction of Bam Bali Singh must be maintained as also the sentence which was fully justified. For such a cowardly and treacherous attack on an innocent man, hanging was the only punishment that could be inflicted.

Raghubar Dayal, J.

23. I agree with my learned brother Desai J. that the appeal of Ram Bali Singh be dismissed and that the appeal of Param Sukh Lal and Harbansh Singh be allowed. I shall briefly note the reasons, and would not enter into a discussion of the evidence of witnesses who were cross examined at very great inordinate length, which led to an undue prolongation of the trial and much unnecessary expenditure of time.

24. There is ample evidence against Ram Bali Singh, who is alleged to have stabbed Nanku Singh with a knife. The evidence consists of the statements of Katwaru Singh, Batuk Singh and Nazir Hasan and also of the statements made by Nankhu Singh deceased on the spot and before Mr. Srivastava, Judicial Magistrate first class, Banaras. There is no particular reason for any of these witnesses to depose falsely against Ram Bali Singh. There is no reason to doubt the presence of Katwaru at the time of the incident. His house is very close to the place of incident. The presence of Batuk Singh and Nazir Hasan may be open to doubt, as their presence was accidental. Batuk Singh stated that he had gone to answer the call of nature at about sunset and that he was returning to his

house when he saw the incident. The incident took place at about 7 p. m. Nanku Singh in his dying declaration before the Magistrate gave the time of the incident as 7-30 p. m. Batuk Singh's statement that he saw the incident on his way back to his house after answering the call of nature is open to question. Ordinarily he would not be expected to be re-

turning at about 7.30 p. m. when he had left the house at about 5-30 p. m.

25. Nazir Hasan accounts for his presence by saying that he had gone to bring arus leaves from behind the house of Harbans Singh. It was elicited in cross-examination of Katwaru that there is an arus tree on the north of the house of Jang Bahadur Singh, which is closer to the house of Nazif Hasan than the house of Harbansh Singh. Nazir Hasan explained his going to the tree near Harbansh Singh's house by saying that at that time there were no arus leaves between the house of Jang Bahadur Singh and his house. The matter was not pursued further. If Nazir Hasan could get the leaves closer to his house, he would not be expected to go a longer distance. The extra distance which he had to cover, even if the nearer tree had leaves, is not much and is said to be about a bigha. So it cannot be said that Nazir Hasan's explanation for his presence near the place of incident must be wrong. I need not express any opinion, therefore, as to how far it was proper to question Katwaru in cross-examination about the existence of the other arus tree near the house of Jang Bahadur Singh in order to show the improbability of Nazir Hasan's going near the house of Harbans Singh.

26. I do not agree with the contention that the dying declaration of Nanku Singh should not be taken into consideration on account of the fact that Ram Bali Singh was not questioned to explain as to why Nanku Singh named him in his dying declaration. Ram Bali Singh should have been questioned on this point. It has been repeatedly emphasised by this Court that Courts should examine the accused with respect to all the matters on the record which go against them. That is the purport of Section 342, Criminal P. C. The mere omission to put necessary questions to the accused will not affect the trial, unless the accussed is prejudiced thereby. In the present case, I do not find that any prejudice has resulted to the accused on account of the omission to put him a question as to why Nanku Singh incriminated Mm in his dying declaration. The omission to question him does not also justify the non-consideration of the dying declaration. The dying declaration of Nanhku Singh is admissible evidence. The accused knew about it. If he had to say anything in particular to account for Nanhku Singh's accusing him, he could have said so in answer to the general question whether he had to say anything more.

27. Even if the statements of Batuk Singh and Nazir Hasan be not accepted, the statement of Katwaru Singh together with the dying declaration of Nanhku Singh amply justify the conclusion that Ram Bali Singh was the actual assailant of Nanhku Singh deceased.

28. The evidence against the other two appellants, namely, Harbansh Singh and Parana Sukh Lal consists of the statements of the same three eye-witnesses, namely, Batuk Singh, Katwaru Singh and Nazir Hasan, and of the dying declaration made by Nanku Singh on the spot. They were not named by Nanku Singh in the dying declaration made by him before Mr. Srivastava, Judicial Magistrate. The fact that Nanku Singh did not mention them as the instigators of Ram Bali Singh for striking Nanku Singh in his dying declaration recorded by the Magistrate justifies the doubting of the

statements of the prosecution witnesses that Nanku Singh had named them in his dying declaration and also the statements of the eye-witnesses that these two appellants, had instigated Ram Bali Singh. The omission is of such a nature that one can conclude that if these appellants had instigated Ram Bali Singh, in all probabilities Nanku Singh would not have failed to mention their names. Nanku Singh stated about the presence of Uma Shankar. He did not mention the presence of these two persons at the time of incident. He stated that Ram Bali Singh was also sitting there and yet he did not state that these two persons were sitting at the time. He then stated that Ram Bali Singh felled him down and fled away. In this connection he could have said that these appellants, fled away with Ram Bali Singh. Of course, as already mentioned, he did not mention that Ram Bali Singh stabbed him at the instigation of these persons. It follows, therefore, that the statement of Nanhku Singh on account of the omission of the names of Harbansh Singh and Param Sukh Lal as instigators throws doubt on the veracity of the witnesses with respect to his mentioning them as instigators on the spot or on the statements of eye-witnesses that they had seen these two persons instigating Ram Bali Singh.

29. I would, therefore, give the benefit of doubt to Harbanah Singh and Param Sukh Lal.

30. By the Court.--We maintain the conviction and sentence of Ram Bali Singh, dismiss his appeal, accept the reference and direct that the sentence of death be carried out according to law. We allow the appeal of Harbansh Singh and Param Sukh Lal, set aside their conviction and sentence and acquit them. They shall be set at liberty unless they are required to remain in custody under some other warrant.