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BIPIN BEHARI SARKAR AND ANOTHER

v.

THE STATE OF WEST BENGAL

(JAFER IMAM, S. K. DAS and J. L. KAPUR JJ.)

Criminal Trial — Pardon, tender of — Refusal by accused to turn approver — Trial of such accused jointly with other accused — Legality of — Code of Criminal Procedure (V of 1898), ss. 337 and 339.

The two appellants and one other person were accused of committing a murder. The second appellant made a confession before a Magistrate. The police submitted a charge sheet against the three accused. Thereafter the prosecution made a prayer to the sub-divisional Magistrate that the second appellant may be tendered a pardon under s. 337, Code of Criminal Procedure and the Magistrate recorded an order to the effect that he was tendered a pardon under s. 337 on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge. Before the Committing Magistrate the second appellant stated that the confession made by him was not voluntary and that he did not wish to become an approver. The appellants were committed to the Court of Sessions and were convicted of the murder and were sentenced to death. On appeal the High Court confirmed the conviction and sentence. It was contended by the appellants that the second appellant having been tendered a pardon the joint trial of the appellants was vitiated as it was barred by the proviso to s. 339(1) of the Code.

Held, that there was no effective pardon under s. 337 of the Code and consequently the provisions of s. 339 did not come into operation in this case. A mere tender of pardon does not attract the provisions of s. 339; there must be an acceptance of the pardon by the accomplice and he must be examined as a witness. It is only after this that s. 339 comes into play if the accomplice who has accepted the pardon fails to comply with the conditions on which the pardon was tendered. In the present case though a tender of pardon was made to the second appellant there was no proof that it was accepted by him and as such it could not be said that there was in existence an effective pardon under s. 337.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 102 and 103 of 1958.

Appeals by special leave from the judgment and order dated March 28, 1958, of the Calcutta High Court in Criminal Appeal No. 428 of 1957 and reference u/s. 374 Cr. P. C. No. 8 of 1957 arising out of the

judgment and order dated September 21, 1957, of the Court of the Sessions Judge of Cooch Behar in Sessions Trial No. 2 of 1957 (Sept. Sessions) (Sessions Case No. 18 of 1957).

S. K. Kapur, for the appellants.

B. Sen, P. K. Ghosh for *P. K. Bose*, for the respondent.

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1958. September 19. The Judgment of the Court was delivered by

IMAM J.—In these appeals the appellants were convicted for the murder of Malchand Bhadani. A charge under s. 302, Indian Penal Code had been framed against each of them. The Sessions Judge found that the murder had been committed in the furtherance of their common intention. In his opinion as appellant Bipin Behari Sarkar had actually committed the murder he convicted this appellant under s. 302 of the Indian Penal Code. He convicted the appellant Bishnu Charan Saha under s. 302/34 of the Indian Penal Code. He sentenced both the appellants to death. The appellants appealed to the Calcutta High Court while the Sessions Judge made a reference for the confirmation of the death sentence passed by him. The High Court found the appellants guilty under s. 302/34 of the Indian Penal Code. It accordingly confirmed the sentence of death imposed on the appellants by the Sessions Judge.

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According to the prosecution, one Tarachand Bhadani had a cloth shop at Mathabhanga in the district of Cooch Bihar. He was joint in business and mess with his two sons, Prithiraj and the deceased Malchand. The annual turn-over of the shop was between Rs. 50,000 to Rs. 60,000. On December 18, 1956, Tarachand had gone to Rajasthan and Prithiraj had gone to Falakata Hat. Accordingly at the shop on that day Malchand was the only person in-charge of it. At about 8-30 p. m., after the close of the day's business, Malchand was counting the cash in the iron safe in an ante-room of the shop when the appellants with one Sanatan Das, who was acquitted at the trial,

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called at the shop. Malchand came out of the ante-room into the shop to attend to these late customers. He had left open the safe and one of its drawers on the floor. The appellants purported to make certain purchases and examined various pieces of cloth. After selection of the cloth they were put into packets. Cash memoes in duplicate were prepared and signed by Malchand and the appellant Bishnu Charan Saha. The cash memoes had been completely filled in. Two of them had been separated from the cash-memo book, but before the 3rd cash-memo could be detached from the book, Malchand was struck down by the appellants with a heavy cutting instrument which they had carried. The neck was so severely cut that the head was nearly severed from the trunk. Just about then, a neighbour called out to Malchand by way of casual enquiry before retiring for the night. This so frightened the miscreants that they fled. The money in the open safe was left untouched. The motive for the murder was to steal the money from the safe.

On December 25, 1956, the police seized a sharp cutting weapon variously described as a sword or a dagger. It was found lying close to some shrubbery near Malchand's shop. It was stained with human blood.

It was a practice of the shop of Tarachand Bhadani to despatch from time to time, after obtaining *Hundis*, the accumulated proceeds of the business to Calcutta. On the morning of December 18, 1956, Prithiraj, before he went to Falakata Hat, had made enquiries from the firm of Bhairabdan Bhowrilal whether any *Hundi* was available. As Bhowrilal was not able to supply him the *Hundi* the cash remained in the shop. The contents of the safe showed that on December 18, 1956, before Malchand was murdered there was a sum of Rs. 3,913 in cash and 8½ tolas of gold. There was, therefore, a substantial amount in the safe at the shop which would have been stolen were it not that the miscreants fled after murdering Malchand because of a neighbour calling out to him.

The conviction of the appellants, as pointed out by the High Court, depended entirely on circumstantial

evidence. The High Court did not rely upon the confessional statement made by the appellant Bishnu Charan Saha to a Magistrate, as, in its opinion, it was not a voluntary statement. Reference will be made to the circumstantial evidence, upon which the High Court relied, in due course. Before we deal with that aspect of the case it is necessary to refer to a submission made on behalf of the appellants concerning the tender of pardon under s. 337 of the Code of Criminal Procedure to Bishnu Charan Saha and the failure of the prosecution to comply with the provisions of s. 339 of the Code of Criminal Procedure.

It was urged that the provisions of s. 339 of the Code not having been complied with the trial was vitiated as the appellant Bishnu Charan Saha could not be tried alongwith the appellant Bipin Behari Sarkar. In order to understand this submission it is necessary to state a few facts. Bishnu Charan Saha was arrested at about 3 p. m. on December 19, 1956. His confession was recorded by the Magistrate Mr. S. C. Chaudhury on December 20, 1956. A charge-sheet against the appellants and Sanatan Das was submitted by the police on June 20, 1957. On June 22, 1957, a prayer was made to the Sub-divisional Magistrate on behalf of the prosecution that Bishnu Charan Saha may be tendered a pardon under s. 337 of the Code of Criminal Procedure and the Magistrate recorded an order to the effect that this appellant was tendered pardon under s. 337 of the Code of Criminal Procedure on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof. The Sub-divisional Magistrate had already reported on June 20, 1957, to the District Magistrate that both he and the other Magistrate of Mathabanga should not hold the commitment proceedings as they had had something to do with the investigation. On August 1, 1957, the Magistrate Mr. Sinha, to whom the case had been ultimately transferred, recorded an order to the effect that the three accused had been produced before him and that he had seen the Court

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Inspector's petition praying that the accused Bishnu be made an approver in the case under s. 337 of the Code of Criminal Procedure. This accused had, however, stated that he made the confessional statement before the Magistrate at Mathabhanga as he had been assaulted by the police and that he did not wish to become an approver. After the completion of the enquiry before commitment, the appellants and Sanatan Das were committed to the Court of Session to stand their trial for the murder of Malchand.

Section 339(1) of the Code provides that "where a pardon has been tendered under s. 337 or s. 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter". The proviso to this sub-section prohibits the trial of such person jointly with any of the other accused and that such person shall be entitled to plead at such trial that he had complied with the condition upon which such tender was made. The provisions of this section clearly pre-suppose that the pardon which had been tendered to a person had been accepted by him and that thereafter that person had wilfully concealed anything essential or had given false evidence and therefore had not complied with the condition on which the tender was made to him. Section 337 of the Code, under which a pardon is tendered, shows that such tender is made on the condition that the person to whom it is tendered makes a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned whether as a principal or an abettor to the commission thereof. Sub-section (2) of this section requires that every person who has accepted a tender shall be examined as a witness in the court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

It is clear, therefore, that a mere tender of pardon does not attract the provisions of s. 339. There must be an acceptance of it and the person who has accepted the pardon must be examined as a witness. It is only thereafter that the provisions of s. 339 come into play and the person who accepted the pardon may be tried for the offence in respect of which the pardon was tendered, if the Public Prosecutor certifies that in his opinion he has, either wilfully concealed anything essential or had given false evidence and had not complied with the condition on which the tender was made. In the present case, there is nothing on the record to show that on July 22, 1957, although Bishnu Charan Saha had been tendered a pardon, he had accepted the tender. Indeed, the order-sheet of the Sub-divisional Magistrate of that date does not even disclose that Bishnu Charan Saha had been produced before him. On the other hand, when Bishnu Charan Saha and his co-accused were produced before the Magistrate Mr. Sinha, to whom the case had been transferred, the prosecution made a prayer to the Magistrate that Bishnu Charan Saha may be made an approver in the case under s. 337 of the Code of Criminal Procedure. This would show that upto that time Bishnu Charan Saha had not accepted the tender of pardon made to him by the Sub-divisional Magistrate on June 22, 1957. On the prayer of the Prosecutor made to Mr. Sinha on August 1, 1957, Bishnu Charan Saha flatly denied that he wished to be an approver and had stated that the confessional statement made by him to Mr. Chaudhury was not a voluntary one. On the facts of the present case, therefore, all that is proved is that at one stage of the proceedings a tender of pardon had been made to Bishnu Charan Saha. There was, however, no proof that that tender had been accepted by him. Such being the situation it could not be said that there was in existence an effective pardon under s. 337 and that its provisions applied to the facts of the present case. Consequently, no question arises about the applicability of s. 339 to the proceedings before the Magistrate holding an enquiry before commitment or to the trial of the appellants, because the

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provisions of s. 339 can only come into operation if there is in existence an effective pardon under s. 337 of the Code. In our opinion, on the facts of the present case, there is no foundation for the submission which had been made.

Coming now to the circumstantial evidence in the case upon which the High Court relied for upholding the conviction of the appellants, which may be summed up as follows:

(1) The evidence clearly established that the appellants were local men who lived or worked not far from Malchand's shop. They accordingly had the means and the opportunity of knowing the state of things obtaining at his shop at a particular date.

(2) The association of the appellants and Sanatar Das immediately prior to the murder.

(3) The evidence of their movements towards the direction of Malchand's shop.

(4) The evidence concerning their presence in the shop of Malchand shortly before the latter was murdered.

(5) The evidence concerning the appellant Bipin Bihari Sarkar hurrying away from the direction of Malchand's shop closely followed by the appellant Bishnu Charan Saha.

(6) The evidence of injuries on the palms or fingers of the appellants found at the time of their arrest which took place within 24 hours, or shortly thereafter, of the murder.

(7) The evidence of the presence of human blood-stains on the shirt of Bishnu Charan Saha and blood-stains on the wrapper of Bipin Behari Sarkar with burnt holes at places where the stains were found.

(8) The cash-memoes with the signatures of the appellant Bishnu Charan Saha.

(9) In the opinion of the doctor the nature of the injuries on Malchand showed that probably he was overpowered by someone first and then another person pressed the weapon against his neck.

The matter for consideration is whether the circumstantial evidence, as stated above, is sufficient to prove

that the appellants had participated in the murder of Malchand.

Two findings of the High Court may be stated at this stage before the circumstantial evidence is referred to. One concerned the cash-memoes signed by Bishnu Charan Saha and the other concerned the colour of the wrapper worn by Bipin Behari Sarkar when he was seen by Kali Mohan Sarkar, P. W. 7 going away from a place near the shop of Malchand after the murder. The cash-memoes bore the date 11-12-56 and not 18-12-56. The High Court gave good reasons for holding that the date 11-12-56 was wrongly entered in these cash-memoes after examining the account books of Malchand's shop and the other circumstances in the case as well as the admission of Bishnu Charan Saha that on December 18, 1956, between 1-30 and 2 p. m. he had caused three cash memoes to be issued in the shop of Malchand. We find ourselves in complete agreement with the findings of the High Court in this respect. The wrapper worn by Bipin Behari Sarkar at the time he was seen by Kali Mohan Sarkar was described by the witness as blue in colour whereas, in fact, the recovered wrapper from the house of this appellant was green in colour. The High Court thought and, in our opinion, rightly that what was in fact green in colour might have appeared to be blue to a witness when seen at night by him. A mistake in describing the colour accurately in the circumstances of the present case did not materially affect the evidence that Bipin Behari Sarkar was wearing a wrapper at the time he was seen at a spot near Malchand's shop after the murder. Further reference to the wrapper will be made when we consider the case of this appellant.

Mohan Lal Sarma, P. W. 4 had stated that at about 8 p.m. on December 18, 1956, he had seen the appellants and Sanatan Das sitting in the latter's shop. Bishnu Charan Saha was the first to leave the shop. 10 or 15 minutes later, Bipin Behari Sarkar and Sanatan Das left after padlocking Sanatan's shop. The evidence of this witness had been fully accepted

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by the High Court. Sudhir Ranjan De, P. W. 8 deposed that in the evening of December 18, 1956, at about 7-30 p.m. he had seen Bishnu Charan Saha passing in front of Gostha's shop which was nearly opposite Malchand's shop. He had on his body a *Sujni Chaddar*. 4 or 5 minutes later, Bipin Behari Sarkar and Sanatan Das were seen going in the same direction. The High Court believed the evidence of this witness. It came to the conclusion that on the evidence of Mohan Lal Sarma and Sudhir Ranjan De it was established that at about 8 p.m. the appellants and Sanatan Das were moving towards Malchand's shop. There was no doubt some discrepancy about the timing but, as was pointed out by the High Court, the witnesses were giving the time approximately and did not purport to give the exact time. Kumud Lal Saha, P. W. 2 deposed that at about 8-30 p.m. on December 18, 1956, he saw the appellants and Sanatan sitting with Malchand in the latter's shop. Malchand was at that time placing cloth for their inspection. The High Court referred to the various criticisms levelled against the testimony of this witness and after dealing with them came to the conclusion that the witness was a truthful witness and that his evidence established that the appellants were at the shop of Malchand at about 8-30 p.m. and that Malchand was last seen alive with them. The evidence of Khum Chand Bothers, P.W. 3 proved that at about 8-30 p.m. on the night of Malchand's murder he had called out "Malchand" "Malchand", but had received no reply. Kali Mohan Sarkar, P. W. 7 proved that at about 8 p.m. on the night in question when he was going home he met the appellant Bipin Behari Sarkar who was going away hurriedly from the direction of the Bazar. On some enquiry made by the witness this appellant stated that he had been pressed by a call of nature. Thereafter, the appellant Bishnu Charan Saha was seen coming behind Bipin Behari Sarkar. Bipin Behari Sarkar had on his person a blue coloured wrapper. The spot at which he had met the appellant Bipin Behari Sarkar was at a distance of about 100 cubits to the south of the passage meant for sweepers

of Malchand's house. He had heard Bishnu Charan Saha calling out "Hei, Hei" to Bipin Behari Sarkar. The evidence of these witnesses, which had been accepted by the High Court, established that the appellants were seen going in the direction of Malchand's shop. Thereafter, they were seen with Malchand at his shop. Subsequent to that, Bipin Behari Sarkar was seen going away hurriedly at a place not far from Malchand's shop followed by Bishnu Charan Saha who was calling out to him "Hei, Hei". The last time that Malchand was seen alive was in the company of the appellants. The existence of the cash-memoes, which were stained with human blood, with the signatures of Bishnu Charan Saha clearly established that at least Bishnu Charan Saha must have been present at the time of the murder because the cash memoes were being made out for him and they were stained with human blood which shows that Malchand was murdered while he was handling the cash-memoes. It had been further proved that Bishnu Charan Saha had on him certain injuries of which one was an incised injury. The evidence of the doctor was that this injury could have been caused by the same instrument with which the neck injury of Malchand had been caused. It had been further established that the shirt of Bishnu Charan Saha was stained with human blood. The explanation offered by Bishnu Charan Saha for the injuries on his person was not accepted by the High Court and, in our opinion, rightly. Bishnu Charan Saha had stated to the doctor at the time of his examination that injury No. 1 was caused as the result of contact with a grass cutting *dao* and injuries Nos. 2 and 3 by having drawn his hand over a rough piece of wood, but to the doctor this explanation was unacceptable inasmuch as this appellant was not a left handed person—a fact which appeared clear from his formation and development. When examined under s. 342 of the Code of Criminal Procedure, Bishnu Charan Saha told the Court that 2 days prior to his examination by the doctor he had been cutting straw for his cattle with his left hand when his daughter aged about

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4 came up from behind and pushed him which resulted in the injury to his finger by its contact with the *dao* and that he had also received injuries on the back of his finger by striking it against a piece of wood. So far as the shirt stained with human blood, which was found on his person at the time of his arrest, was concerned, Bishnu Charan Saha seriously disputed the identity of the shirt. The identity of the shirt, however, had been clearly established. His explanation to the Court was that some of the stains had been caused by betel spit and that one or two might have been caused by some drops of blood falling on the shirt at the time he had sustained his injuries. This explanation was also not accepted by the High Court and, we think, rightly. The evidence therefore established that so far as Bishnu Charan Saha was concerned he was seen in the company of Bipin Behari Sarkar and Sanatan Das near about 8 p. m. He was seen shortly thereafter, as were the other two, going in a direction which was towards the shop of Malchand. He was seen along with the other two persons at the shop of Malchand at about 8-30 p. m. Thereafter, he was seen not far from the shop of Malchand going in the same direction as Bipin Behari Sarkar and calling out to him. The cash-memoes at Malchand's shop had been signed by him. He had injuries on his person consistent with their having been caused while the murder of the deceased took place. The shirt that he was wearing at the time of his arrest was stained with human blood for which he gave no reasonable explanation. In our opinion, the sum total of the evidence against Bishnu Charan Saha established beyond any reasonable doubt that he had participated in the murder of Malchand.

Coming now to the case of Bipin Behari Sarkar the evidence against him is the same as against Bishnu Charan Saha about the movements towards the shop of Malchand, presence at the shop of Malchand and being seen going away at a place near the shop of Malchand and the existence of injuries on his person. In addition there was the evidence that a wrapper was seized the next morning after his arrest with marks of

burning round which there were traces of blood. Unlike the case of Bishnu Charan Saha no signatures of his were found on the cash-memoes. It is a matter for consideration whether in the case of this appellant any reasonable doubt could arise as to his guilt. It was urged that mere movements towards the shop of Malchand, his presence at the shop of Malchand and his being seen going away at a place near the shop of Malchand would not be sufficient circumstantial evidence to convict him. So far as the injuries were concerned the doctor had admitted that they could have been caused by a split bamboo. The doctor had at no time stated that they could have been caused by the same weapon which caused injuries to the neck of Malchand. The existence of the injuries, therefore, was no additional incriminating circumstance from which any conclusion could be drawn against this appellant. So far as the wrapper was concerned, there was no evidence that the burnt marks found on it were not there before December 18, 1956. Although blood-stains had been found on this wrapper it had not been established that they were human blood-stains. The wrapper was also, therefore, no additional incriminating circumstance against this appellant. It is, however, to be remembered that this appellant was with Bishnu Charan Saha and that Malchand was last seen alive in the company of the appellants. The murder of Malchand had already taken place when this appellant followed by Bishnu Charan Saha was seen going away hurriedly at a spot near the shop of Malchand and Bishnu Charan Saha was calling out "Hei, Hei" to him. It is remarkable that this appellant was seen not only at the shop of Malchand but near that shop after he had been murdered and that he was found to have injuries on his person when he was arrested at 10-30 p.m. on December 19, 1956. It would be a remarkable coincidence that both he and Bishnu Charan Saha should have injuries on their persons so shortly after the murder. Bipin Behari Sarkar denied ownership of the wrapper. His explanation was not that the burnt marks on the wrapper were there before December 18.

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This wrapper had blood-stains. They were too small in quantity to enable a Serologist to determine their origin, but it is remarkable that wherever the blood-stains were found on the wrapper an attempt had been made to burn out those marks. Unfortunately, for the appellant, his attempt to burn out the blood-stains on the wrapper was not entirely successful. This was, in our opinion, an incriminating circumstance against this appellant. The circumstantial evidence taken as a whole leaves no room for a reasonable doubt in our minds about the guilt of this appellant.

In our opinion, the High Court rightly found the appellants guilty under s. 302/34 of the Indian Penal Code. It could not be said that the sentence of death, for a murder of the kind proved in this case was unduly severe. The appeals are accordingly dismissed.

Appeals dismissed.

RATAN GOND

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(JAFER IMAM, S. K. DAS and J. L. KAPUR JJ.)

Evidence—Statement of dead person not made in judicial proceeding or to person authorised nor relating to the cause of his death—Admissibility—Confession—Person in authority—Circumstantial Evidence—Use in corroboration of confession—Indian Evidence Act, (I of 1872), ss. 24, 32 and 33.

The appellant was charged with the murder of a girl Baisakhi. On information given by Aghani, younger sister of the deceased, the headless body of the deceased was recovered. The appellant absconded but was found in another village and was brought back by the village volunteer force. On interrogation by the Mukhia, Sarpanch and a panch of the Gram Panchayat the appellant made an extra-judicial confession. A blood-stained cutting weapon was recovered from a room of the appellant. At his instance some strands of hair were recovered from a place at a short distance

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