

BABU SINGH

v.

1963

August 28.

STATE OF PUNJAB

(P. B. GAJENDRAGADKAR, K. C. DAS GUPTA and  
J. R. MUDHOLKAR, JJ.)

*Criminal Trial—Confession—Voluntariness of—Circumstances showing confession involuntary—Duty of Magistrate recording confession—Code of Criminal Procedure, 1898 (Act V of 1898), ss.164(3), 364(3).*

The appellants were tried for murder and for concealing the dead body. The evidence against them was their retracted confessions and the recovery of the dead body at the instance of appellant Babu Lal from his Kotha. The courts below held that the confessions were duly recorded and were voluntary and relying upon them and on the evidence of the recovery of the dead body convicted both the appellants under ss. 302 and 201 read with s.34, Indian Penal Code. The appellants contended (i) that the confessions were inadmissible as the provisions of s.364(3), Code of Criminal Procedure, were not complied with in as much as the confessions were actually recorded by the readers of the magistrate and the magistrate had not made any memorandum of the examination as it proceeded, and (ii) that the confessions were not voluntary. The respondent contended that the non-compliance with the provisions of s.364(3) was cured by s.533 of the Code as the error had not injured the accused as to their defence on merits and that the confessions were voluntary:

*Held*, that the confessions were not voluntary and could not be used against appellants. The investigating officer had kept the appellants in police custody for several days even after a substantial part of the investigation was over ; there was no endorsement on the confession showing how much time had been given to the appellants before they made their confessions ; less than 24 hours had elapsed between the time when the appellants came out of police custody and the time when their confessions were recorded ; the magistrate who recorded the confessions had taken part in assisting the investigation by attesting the recovery memos ; in recording the confessions the magistrate had adopted a somewhat casual attitude by disregarding the provisions of s.164(3) and s.364(3) which provided valuable safeguards to protect the

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interests of innocent persons. Having regard to these features, the confessions could not safely be treated as voluntary. After exclusion of the confessions, the charge of murder could not be sustained against the appellants. But the conviction of Babu Lal under s.201 Indian Penal Code could stand on the basis of the recovery of the dead body at his instance and of the evidence of the witnesses of the recovery.

*Nazir Ahmed v. The King Emperor* (1936) L. R.; 63 I. A. 372 referred to.

**CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 121 & 140/62.**

Appeals by special leave from the judgment and order dated March 6, 1962, of the Punjab High Court in Criminal Appeals Nos. 63 and 213 of 1962 and Murder Reference No. 10 of 1962.

*O. P. Rana*, for the appellants.

*B. K. Khanna, R. H. Dhebar, R. N. Sachthey and P. D. Menon*, for the respondent.

1962. August 28. The Judgment of the Court was delivered by

*Gejendragadkar J.*

GAJENDRAGADKAR, J.—These two Criminal Appeals Nos. 121 and 140 of 1962, arise out of a criminal case in which the two appellants Babu Singh and Babu Lal were charged with having committed offences under s. 302 read with s. 34 and s. 201 of the Indian Penal Code. The prosecution case against them was that on or about December 22, 1960, the two appellants murdered Mahtab Singh in furtherance of their common intention and thereby committed an offence under s. 302 read with s.34. The case further was that on or about the day or the third week of January 1961, they did cause the evidence of the said murder to disappear by burying the dead body of Mehtab Singh and thereby committed an offence under s. 201 of the Code.

The victim Mehtab Singh was the father of the appellant Babu Singh and Babu Lal is the friend of Babu Singh. It appears that Mehtab Singh was living alone and that the relations between him and his son Babu Singh were not cordial. In fact, Mehtab Singh had complained to the police authorities that he apprehended danger from his son. The prosecution case as it was laid before the trial court was that on December 22, 1960, the two appellants entered the house in which Mehtab Singh lived. They caught hold of Mehtab Singh while he was sleeping on a cot. Babu Singh sat on his chest and throttled him while his companion held the victim down. The dead body of the victim was then packed up in a gunny bag and concealed in a corner. Babu Singh who was familiar with the house and its contents forced open a locked trunk and removed a bag containing Rs. 1200/- . With this bag the culprits left the house Babu Singh taking care to lock the house before they left the scene of the offence. With the money thus obtained, Babu Singh made several purchases. Some days later Babu Singh with the help of Babu Lal removed the dead of his father to the house of Babu Lal where it was put underground in a kotha. That, in brief, is the prosecution case against the appellants. The discovery of this offence was made in a somewhat unusual manner. Babu Lal was arrested in connection with another theft case, and whilst he was being interrogated in the course of the investigation of that offence he made a disclosure statement and showed his willingness to make some discoveries. He then took the police party to his house and as a result of the statement made by him the kotha containing the dead body of Mehtab Singh was dug up. On the same day, Babu Lal made another disclosure statement as a result of which a pair of shoes, watch, radio, hundred rupees in currency notes and some other articles were found. The prosecution alleges that these goods had been purchased by Babu Singh

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with the money he took away after murdering his father and were kept in the house of Babu Lal.

Babu Singh who was arrested on January 22, 1961, made a similar disclosure statement which led to the discovery of shoes, copper trunk and purchase receipt relating to the watch.

After these discoveries were made in pursuance of the statements made by the appellants it is alleged that they expressed a desire to make confessional statements, and so they were sent to the magistrate on February 6, 1961. The learned magistrate directed that they should be handed over to jail custody and accordingly they were taken to the jail. On February 7, 1961, both the appellants were produced before the said magistrate and their confessions were recorded. In addition to the discovery made by the investigating officer, the prosecution relied on these two confessions in support of their charge against the appellants.

It also appears that on January 15, 1961, a telegram was sent addressed to the appellant Babu Singh described as Bhola Ram from Patiala. This telegram purported to say "Mehtab Singh seriously ill, send Babu Singh". It was the prosecution case that this telegram had been deliberately sent by Babu Lal and was addressed to Babu Singh in order to conceal the commission of the principal offence of murder. It is on this material that the prosecution relied in support of its case against both the appellants in respect of the two charges already specified.

The learned trial judge has accepted this evidence and has attached no importance to the fact that the appellants retracted the confessions made by them. Accordingly, he convicted both the appellants under s. 302 read with s. 34 as well as s. 201. Babu Singh was sentenced to death for the offence

of murder and to rigorous imprisonment for 7 years for the offence under s. 201. Babu Lal was sentenced to imprisonment for life for the offence under s. 302 read with s. 34 and 7 years for the offence under s. 201.

The sentence of death imposed on Babu Singh was submitted to the Punjab High Court for confirmation. The two appellants also preferred appeals challenging the order of conviction and sentence passed against them by the trial court. The High Court heard the said matters together and concurred with the view taken by the trial court. The High Court has held that the confessions were duly recorded by the magistrate, and that they were voluntary and true. The High Court took into account the fact that the said confessions had been retracted and so it proceeded to examine the question as to whether they were corroborated. In dealing with this question, the High Court took into account the discoveries made as a result of the statements made by the two appellants and it held that the said discoveries corroborated the two confessions. That is how the order of conviction and sentence imposed by the trial Court on the two appellants were confirmed. It is against this decision that the appellants have come to this Court by their two appeals.

Mr. Rana, for the appellants, contends that the confessions on which the prosecution relies have not been proved in this case. In the alternative he contends that having regard to the circumstances under which and the manner in which the said confessions have been recorded, they should not be treated as voluntary. Unfortunately, this aspect of the matter has not been considered by the High Court. The High Court has observed that the confessions were duly recorded by the magistrate and it has held that the appellants were given enough time to consider whether they should make the confessions before the said confessions were

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recorded. In coming to the conclusion that the confessions had been duly recorded by the magistrate the High Court appears to have relied on the statements made by Mr. Agnihotri, the magistrate, in his examination-in chief and its attention does not appear to have been drawn to the admissions made by the said magistrate in his cross-examination. From the said admissions it is clear that in recording the said confessions the procedure prescribed by s. 364 (3) of the Code has not been complied with, and that naturally raises a very important issue in the present case. It is to be regretted that though this aspect of the matter obviously arises in view of the statements made by the magistrate in his cross-examination, the High Court has not addressed itself to this point and has not noticed the defect in the recording of the said confessions and its effect before it decided to come to the conclusion that the confessions had been duly recorded and were voluntary and true.

We have already stated that the appellants were produced before the magistrate on February 6, 1961, and they were directed to be sent to jail custody on the evening of February 6. On February 7, 1961, their confessions were recorded during court hours. When the magistrate gave his evidence to prove these confessions, he stated that the appellants were produced before him on February 7, 1961, that he gave them one hour to consider whether they should make the confessions and then he proceeded to record the confessions in question verbatim. "I verbatim recorded", says the magistrate, "whatever the accused stated", and he adds "the statements were read over by me to the accused and he thumb-marked it after admitting the same to be correct". It is this statement on which the High Court appears to have acted in dealing with the question as to whether the confessions had been duly recorded or not. When the

magistrate was cross-examined in regard to the recording of these confessions, he admitted that the confessions had in fact not been recorded by himself. The two confessions are Exhibits P. P. and P. Q. and he stated that they were recorded by his Ahlmad Reader. He was asked whether he remembered which confession was recorded by which Reader and he added that he could not say who wrote Ex. P. Q. or P. P. The magistrate explained why he adopted this course by saying that the statements were recorded by the Readar as a verbatim record in urdu was required and he was not well conversant with Urdu writing. Then he was asked whether he made a separate memorandum of the statement as required by s. 364 (3) and he stated that he had not made such a memorandum. He was further asked whether he remembered the sequence in which the statements were recorded and he stated he did not remember the sequence. He was asked whether he remembered where appellant Babu Singh was kept when Babu Lal made his confession and where Babu Lal was kept when Babu Singh made his confession. He stated he did not remember where the other appellant was. It would thus be seen that the confessions have not been recorded by the magistrate in his own hand for the reason that he was not familiar with the writing in Urdu and that means that the requirements of s. 364 (3) have not been complied with.

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There is another aspect of the matter which would be relevant in dealing with the question as to whether the confessions can be safely taken to be voluntary in this case. It appears that the Magistrate who is an Ilaqua magistrate of Ambala was directed by the Additional District Magistrate to go to the police station at Ambala Cantonment on January 22, 1961, in connection with the recovery of the dead body. Accordingly, he went to

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the police station and he has attested the signatures of witnesses of the disclosure document which led to the discovery of the dead body. He was present when the statement was made by Babu Lal. He was present when the dead body was recovered and he has attested the recovery memo. He has also attested the other recovery memo which showed the discovery of other articles made in pursuance of another statement made by Babu Lal. It is thus clear that the magistrate who recorded the confessions had actively assisted the investigation by attesting the recovery memos which naturally play an important part in the present case. This aspect of the matter has also not been considered by the High Court.

It is unfortunate that though it was brought out in the cross-examination of the Magistrate that the confessions had not been recorded by the Magistrate himself, the prosecution did not examine the officers of the court who actually recorded the said confessions, nor did the trial court call upon the prosecution to examine those witnesses. The defence examined Harbans Singh, one of the officers who recorded the confession of Babu Lal. This witness stated that the two appellants were brought to the court of the magistrate and that they made their confession on February 7, 1961. He stated that the confession of Babu Lal was recorded first and it was he who wrote it down. Then he added that the statement of Babu Singh was recorded by Rajinder Dat, Ahlmad of the court. It would thus be seen that Rajinder Dat Ahlmad, who recorded the confessional statement of Babu Singh has not given evidence and Harbans Singh has given evidence as a witness for the defence. It is very much to be regretted that in a case of this kind where the appellants are charged

with murder the prosecution should not have examined the scribes who actually recorded the confessions. It is conceded by the Magistrate that he was not familiar with the writing of Urdu and that indeed is his justification for not recording the confessions himself. In such a case, it was of utmost importance that the scribes should have given evidence and an opportunity should have been given to the appellants to test by cross-examination, the prosecution claim that their confessional statements had been duly and properly recorded. That is the safeguard to which the appellants were undoubtedly entitled. That is another aspect of the matter which has to be borne in mind in dealing with the points raised before us by Mr. Rana.

If the Magistrate under whose supervision the confessions were recorded has not complied with the provisions of s. 364(3) of the Code of Criminal Procedure, can it be said that the said confessions are not proved or that the making of the confessions and their recording is vitiated so as to make them inadmissible. The decision of this question would naturally take us to three sections of the Code of Criminal Procedure. Section 164 of the Code confers power on the magistrate specified in s. 164(1) to record statements and confessions. Section 164(2) provides a safeguard to protect the interest of innocent persons. It lays down that such statements, meaning the statements authorised to be recorded by s. 164(1), shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in the opinion of the magistrate, best fitted for the circumstances of the case. Then the section adds that such confessions shall be recorded and signed in the manner provided in s. 364 and they shall then be forwarded to the magistrate by whom the case is to be inquired into or tried. It would

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thus be seen that sub-s. (2) requires that the confessions should be recorded in the manner prescribed by s. 364; that is one safeguard provided by this section. Sub-section (3) then proceeds to provide further safeguards. It lays down that the magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and it provides that when the confession is recorded after following the procedure prescribed by it, the magistrate shall make a memorandum at the foot of such record to the following effect.

When we turn to s. 364 we find that sub-s. (1) provides for the recording of the confession in full in the manner prescribed therein and for explaining the contents of the same to the accused in a language which he understands, and the accused shall be at liberty to explain or add to his answer. Sub-section (2) lays down that when the whole of the confession is made conformable to what he declares is the truth, the record shall be signed by the accused and the magistrate, and the magistrate shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused. Sub-section (1) is important for our purpose. It provides that in cases in which the examination of accused is not recorded by the magistrate or judge himself, he shall be bound as the examination proceeds to make a memorandum thereof in the language of the court or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the magistrate or judge with his own hand and annexed to the record. It also

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says that if the magistrate is unable to make a memorandum as required he shall record the reason of such inability. It would thus be clear that if a confession is recorded not by the Magistrate himself as required by s. 364 (1) it is necessary that the magistrate should make a memorandum as the examination proceeds and the memorandum should be signed by him. It is conceded that in the present case, the confessions were not recorded as required by s. 364 (1) and yet the safeguard prescribed by s. 364 (3) has not been complied with. Mr. Rana contends that the failure to comply with the requirements of s. 364 (3) makes the confessions inadmissible.

In dealing with this question we must consider the provisions of s. 533 of the Code. It is on the provision of this section that Mr. Khanna, for the respondent, relies. Section 533 (1) lays down that if any Court before which a confession recorded or purporting to be recorded under s. 164 or s. 364 is tendered or has been received in evidence finds that any of the provisions of either of such sections have not been complied by the magistrate recording the statement, it shall take evidence that such person duly made the statement recorded ; and it adds that notwithstanding anything contained in s. 91 of the Indian Evidence Act, 1872 such statement shall be admitted if the error has not injured the accused as to his defence on the merits. Mr. Khanna contends that the magistrate has in fact given evidence in the trial court and the evidence of the magistrate shows that the statement has been duly recorded ; and he argues that unless it is shown that prejudice has been caused to the accused the irregularity committed by the magistrate in not complying with s. 364 (3) will not vitiate the confessions nor will it make them inadmissible. There is some force in this contention.

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In this connection it would be necessary to consider s. 80 of the Indian Evidence Act as well. This section provides that whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statements as to the circumstance under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken. Mr. Khanna also relies on this section in support of his argument that the confessions must be taken to be proved in the light of the evidence given by the magistrate, and his certificate appended to the confessions. It is open to argument whether s. 80 of the Evidence Act would be available in a case where the recording of the confessions is irregular in the sense that s. 364 (3) has not been complied with. But for the purpose of the present appeals we are prepared to assume in favour of the prosecution that the confessions have been proved and may, therefore, be considered on the merits if they are shown to be voluntary and that is the alternative argument which has been urged before us by Mr. Rana.

Now, in dealing with the question as to whether the confessions are voluntary or not, we have to bear in mind some broad features of this case. The first important circumstance on which Mr. Rana relies is that though both the appellants made discovery statements on January 22, and though it appears that on that date the substantial part of the investigation was really over, the investigating

officer kept both appellants in police custody until February 6. It is true that an investigating officer is entitled to keep an accused person in his custody if it is essential to do so for the purpose of investigation subject to the conditions prescribed by the Code of Criminal Procedure ; but where it appears that the investigating officer has kept an accused person in the police custody even after a substantial part of the investigation is over, the detention of the accused person in police custody is a matter which has to be borne in mind in considering the question as to whether the confessions substantially made by the accused persons are voluntary or not. That is one important fact in favour of the appellants.

The other fact which is equally important is that the appellants were produced before the magistrate on February 6 in the evening and they were sent to jail custody. Thereafter they were brought back to the magistrate's court on February 7 and the magistrate proceeded to record their confessions. In his evidence the magistrate has stated that he gave them one hour to consider whether the confessions should be made or not. Unfortunately, the record of the confessional statements does not make any endorsement to that effect. Usually, when a confession is recorded under s. 364 the magistrate makes an endorsement showing when the accused was arrested, when he was brought before him and how much time he gave him to consider whether he should make any confession or not. Amongst the many irregularities committed in the recording of this confession in this case, this one also is noticed that there is no endorsement showing how much time was given to the appellants before they made their confessions. The confessions were made on February 7 and the magistrate gave evidence in December. It is not easy to

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appreciate how the magistrate could have remembered that he gave the appellants one hour's time to consider. This comment falls to be made because when the memory of the magistrate was tested in other particulars he pleaded his inability to make any definite answer. Take for instance the question as to who recorded these confessions. That was a matter of some importance and yet the magistrate stated that he did not remember which Reader in his court recorded which confession. The magistrate was also asked in what sequence the two appellants came and made their confessions. That again is a matter of some importance and the magistrate said that he did not remember in what sequence the confessions were made. The magistrate was asked where the other accused was when one was making the confession and he stated he did not remember. It is in the light of these admissions made by the magistrate in respect of the other important details that we have to consider whether in the absence of any contemporaneous evidence on the record his statement that one hour was given to the appellants could be accepted without any reservation. Besides, even if we assume that one hour was given to the appellant, that does not make up even 24 hours after the accused came out of police custody. This Court has always emphasised the fact that before confessions are recorded the magistrate who records the confessions should satisfy himself that the accused person's mind has been freed from fear or other complexes developed during police custody and generally 24 hours atleast should be allowed to lapse before a confession is recorded. There can of course be no inflexible rule in the matter. In each case the magistrate has to decide how much time should be given to the accused before his confession is recorded. In the present case, having regard to the fact that the appellants were

kept in police custody for a long period it seems to us that the time given to them to consider whether they should make the confessions or not is wholly insufficient and unsatisfactory. That is another fact on which Mr. Rana is entitled to rely.

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Then we have the third unusual feature in the case and that is that the magistrate who recorded the confessions has taken part in assisting the investigation by attesting recovery memos in two cases. Mr. Khanna contends that there is no legal prohibition against a magistrate who has attested the recovery memos from recording a confession. That technically may be true, but the point we are considering is not a matter of technicality; it is a matter of propriety. The magistrate who recorded the confessions has stated that when the appellants were brought before him he told them that he was independent of the police and that they were free either to confess or not to confess. When the magistrate has taken active part in attesting recovery memos, to the unsophisticated appellants the claim made by him that he was independent of the police may have struck as rather subtle. It would be recalled in this connection that the Privy Counsel in the case of *Nazir Ahmed v. The King Emperor*(<sup>1</sup>) has stated that "in their Lordship's view it would be particularly unfortunate if magistrates were asked at all generally to act rather as police officers than as Judicial persons". We are therefore inclined to take the view that it is desirable that magistrates who take part in attesting recovery memos should not record confessions by person accused of the offence being investigated. It is conceivable that the investigating department seeks the assistance of the magistrates in the matter of investigation by requesting them to attest the recovery memos in order to give assurance and authenticity to the investigation. But if that is done care should be taken to see that

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for recording confessions the accused persons are sent to some other magistrate. That is another factor which has weighed in our minds in dealing with the voluntary character of the confessions in the present appeals.

We have also been disturbed to notice that in recording the confessions the magistrate has adopted a somewhat casual attitude. It is unnecessary to emphasise that the safeguards provided by s. 164 (3) and s. 364 (3) are valuable safeguards intended to protect the interest of innocent persons. The recording of confession is a solemn and serious act, and so any magistrate who records confessions must see to it that a tone of casualness does not enter in the transaction. Having regard to the evidence given by the magistrate in the present case we are constrained to observe that when got the confessions recorded in the present case he was not fully conscious of the solemnity and the seriousness of what he was doing. That is another factor which has weighed in our minds. Having regard to these features of the case we are not prepared to uphold the finding of the High Court that the confessions made by the appellants can be safely treated to be voluntary in the present case. If the confessions are, therefore, excluded from consideration it is impossible to sustain the charge of murder against either of the two appellants. In a case where the charge of murder was founded almost exclusively on the confessions it was necessary that the High Court should have considered these relevant factors more carefully before it confirmed the conviction of the appellants for the offence under s. 302 and confirmed the sentence of death imposed on Babu Singh. In our opinion, if the confessions are left out of consideration, the charge of murder cannot be sustained. The result is the conviction of both the appellants for the offence under s.302 read with s.34 is set

aside and consequently the sentence imposed on them for that offence is also set aside.

That takes us to the question whether the alternative charge under s. 201 can be held proved. This charge is held established against Babu Lal substantially because of the recovery of the dead body in his house. That recovery is evidenced by a memo made in that behalf, and the witnesses who were present at the time of the recovery gave evidence in support of the memo. The High Court has held, and we think rightly, that the circumstances under which the dead body of Mehtab Singh was recoverd, the time at which was recovered and the statement made by Babu Lal prior to the said recovery, all indicate that Babu Lal has committed the offence under s.201 I. P. C. The same cannot, however, be said about the conclusion of the High Court in respect of Babu Singh. In dealing with the charge against Babu Singh under s. 201, the High Court was no doubt influenced by its finding that Babu Lal was quilty under s. 302/34. If that finding had been affirmed by us, there would have been no difficulty in confirming Babu Lal's conviction under s. 201, because that finding was based on the two confessions made by Babu Lal and Babu Singh. If we discord the confessions, then there is no evidence on which Babu Singh can be convicted under s. 201. The recovery of certain articles purchased by him with the money alleged to have been stolen by him from the house of his father cannot, in law, justify the inference that he assisted the commission of the offence under s. 201. Therefore, the conviction of Babu Singh under s.201 cannot be sustained.

It may be that Babu Singh and Babu Lal both committed the offence under s.201 and it is not unlikely that both of them were concerned with the main offence of murder. But in a criminal

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trial, the presumption of innocence is a principle of cardinal importance and so, the guilt of the accused must in every case be proved beyond a reasonable doubt. Probabilities however strong and suspicion however grave can never take the place of proof. That is why we are satisfied that the appeal preferred by Babu Singh must be allowed and he must be acquitted of both the offences charged under s. 302/34 and s. 201 and ordered to set at liberty. Criminal Appeal No. 140 of 1962 preferred by Babu Lal partly succeeds. His conviction and sentence under s. 302/34 is set aside, but his conviction under section 201 as well as the sentence of seven years imposed on him for that offence are confirmed.

*Cr. A. 121 of 1962 allowed.*

*Cr. A. 140 of 1962 partly allowed.*