

Equivalent citations: 3 Ind Cas 625

Bench: Bell, Ryves

Khudiram Bose vs Emperor on 13/7/1908

JUDGMENT

1. The appellant Khudiram Bose was placed on his trial before the Sessions Judge of Mozufferpur. charged under Section 302, Indian Penal Code, with having committed murder by causing the deaths of Mrs. Kennedy and Miss Kennedy by means of an explosive bomb on the 30th April 1908 or in the alternative with having abetted the commission of the murders by Dinesh Chunder Roy or some person or persons unknown. The appellant pleaded guilty to the charge of murder. The Sessions Judge recorded the plea, but decided to hear the evidence and to try the appellant. He also asked a pleader to assist the accused in his defence. The trial was with the aid of assessors both of whom unanimously found the appellant guilty of murder. The Sessions Judge agreeing with the opinion of the assessors convicted the appellant of the offence charged and sentenced him to death under Section 302, Indian Penal Code. The case has been submitted to this Court under Section 374, Criminal Procedure Code, for confirmation of the sentence, and the appellant has also filed an appeal.

2. The case for the prosecution was as follows:

On the 30th April 1908 at, 8-30 P.M., Mrs. and Miss Kennedy left the Station Club in Mozufferpur to drive home in a single-horsed carriage. Their carriage is similar in appearance to that which the District Judge, Mr. Kingsford, was then using. On their way home the ladies had to take the road turning to the right or west after leaving the Club grounds and to pass in front of the compound of the house occupied by Mr. Kingsford. The night was dark. As the carriage reached the eastern gate of Mr. Kingsford's compound, two men ran towards it from the opposite or southern side of the road where they had been concealed under the trees, and one of them threw a bomb or both threw bombs into the carriage. A loud explosion followed and the horse bolted with the carriage. It was stopped after a short distance and taken back to Mr. Kingsford's house. The body of the carriage was then found to have been shattered and the two ladies to have sustained terrible injuries. The syce who had been standing on the footboard at the back of the carriage was picked up near the eastern gate insensible and wounded. Miss Kennedy died of her injuries within an hour. Mrs. Kennedy survived till the morning of the 2nd May, when she also died of the injuries which she had sustained. The syce at time of trial had not recovered. The medical officers who examined the ladies both before and after death, and also the syce, have given their evidence and it leaves no doubt that the injuries which caused the deaths of the two ladies as well as those received by the syce were caused by an explosive bomb. The nature of the injuries leaves no reasonable doubt that the intention of the person or persons who threw the bomb or bombs was to cause the deaths of the inmates of the carriage. Whether his intention was to cause the death of the two ladies or of some one else does not affect his or their guilt (see Section 301, Indian Penal Code) and there can be no doubt that the person or persons who threw the bomb or bombs committed the offence of murder. As to the above facts there has been no contention in the appeal.

3. The questions we have to decide are, whether the appellant is the man who threw the bomb or one of the men who threw the bombs; if there were more than one, or whether supposing the bomb to have been thrown by his companion, the appellant is equally guilty of the offence by reason of the fact that the act was done in furtherance of the common intention of them both (see Section 34, Indian Penal Code). The case for the prosecution is that the appellant and his companion were both present at the scene of occurrence with the common intention of killing the District Judge by means of an explosive bomb, and, if this was

so, and one only 'of them threw the bomb in prosecution of their common intention, the other was equally guilty of the offence of murder (see Foster's Crim. L. 350.)

4. The case for the prosecution connecting the appellant with the offence as deposed to by the witnesses for the prosecution was as follows :-Prior to the occurrence. in consequence of a letter dated 20th April 1908. received by the District Superintendent of Police of Mozufferpore from the Calcutta Police Office, two constables had been deputed by him to protect Mr. Kingsford. On the 30th April these constables, Tehsildar Khan and Faizuddin, were on duty guarding the road from the Club gate to the eastern gate of Mr. Kingsford's compound from 6 P. M. At 7 P. m. they saw two Bengalis on the road and spoke to them, told them to go away and escorted them beyond the east gate of the Club. Both the constables have been examined as witnesses and have deposed that accused was one of the two men and that he was wearing a dark or striped coat. The other man was wearing a white coat. At 8-30 p.m. the constables saw the Kennedy's carriage drive out of the Club compound, and heard and saw the explosion when the carriage reached the east gate of Mr. Kingsford's compound. They saw then two figures running away southwards from the spots, but lost sight of them in the darkness. Tehsildar Khan after following up the carriage and seeing that the ladies had been seriously injured went to the thanah and lodged information. These constables gave description of the two Bengalis whom they had seen at 7 P. m. to the District Superintendent of Police who came to the spot shortly after the occurrence. The District Superintendent of Police at once sent off Police officers with the descriptions given by the two constables by train with directions to watch the railway stations from Mozufferpore to Mokameh and Bankipore, and to arrest any one answering the descriptions. The next morning at about 8 a.m., the appellant was arrested outside Waini station 25 miles from Mozufferpur in a mudi's shop by constables Fateh Singh and Sheo Pershad Singh. At the time of his arrest a heavy revolver unloaded fell from his clothes and a smaller loaded revolver was taken from him as he drew it from his side with the apparent intention of using it. In his pocket were found 30 loose cartridges. He had a striped coat tied in a bundle round his waist. That has been identified to be the coat which he was wearing when seen outside the Club compound by the constable at 7 p.m., on the evening of the occurrence. He had also a white silk coat with him. Other articles were found with him, but they are not of importance. He was taken to Mozufferpore by the District Superintendent of Police, who went to Waini on hearing of his arrest and was identified by the two constables as one of the two men whom they had seen loitering in front of the Club on the 30th April at 7 p.m. He was met on his arrival by the Magistrate of the district and made a full and complete confession to him admitting that he had thrown the bomb which killed the two ladies. He explains that he and the other man, whose name he said was Dinesh Chandra Roy, had come up to Mozufferpore from Calcutta with the intention of killing Mr. Kingsford with a bomb and that they mistook Mrs. Kennedy's carriage for that of Mr. Kingsford. Mr. Kingsford was said to have incurred the enmity of the accused and the Society to which the accused appears to have belonged, because in the discharge of his duty as Chief Presidency Magistrate in Culcatta, he had convicted persons connected with certain vernacular papers for having published seditious writings. On the 1st May at 6 P. M. Nanda Lal Banerjee, a Sub-Inspector of Police, on leave, took the train from Mozufferpore to rejoin his station in Singh-bhoom. On the platform at the Samastipur station, he noticed a young Bengali dressed in new clothes and shoes whose appearance excited his suspicion in connection with the murder at Mozufferpore on the previous evening. He got into the same compartment with him and questioned him. This annoyed the other man who left the compartment, but at Mokameh Ghat, the Police officer made apologies and again got into the same compartment with him. Meanwhile the Police officer had telegraphed his suspicions to Mozufferpore and and Mokameh received a telegram directing him to arrest the suspected man. The Bengali on being told that he would be arrested on suspicion dashed off down the platform. He was pursued and caught by two constables at one of whom he fired a pistol but without effect. Immediately after his arrest he fired two shots into his own

neck and fell dead. His body was taken to Mozufferpore. On the way at Barauni junction the body was shown to the two constables, Tehsil-dar Khan and Faizuddin, and was identified by them as the body of the companion of the appellant whom they had seen loitering about with him near the Club house at 7 P. m. on the evening of the 30th April. At Mozufferpore the body was shown to the appellant in the presence of the District Magistrate and identified by him as his companion whose name he said was Dinesh Chandra Roy. The pistol with which the deceased had shot himself was shown to the accused and though he did not recognise it, he said that Dinesh had told him he had a pistol. It must be observed that 21 of the cartridges found with the appellant at the time of his arrest, fitted that pistol.

5. To go back now to what happened immediately after the murder, the evidence for the prosecution is to the effect that the Magistrate of the district was called to the scene of Occurrence and after his arrival there and after he had seen the two injured ladies in the Judge's house and the wounded syce lying by the culvert close to the scene of the explosion, his attention was called by a head-constable to a shoe lying on the maidan south of the trees from under which the two men were said to have run out to attack the Kennedy's carriage: and he afterwards found three others amongst a heap of kankar on the side of the road. Of these three, two, being a pair, were found lying side by side as if taken off and left there by the owner. On the 6th May this pair of shoes which were found lying side by side were tried on the appellant in the jail by Mr. Rowland Chandra, Deputy Magistrate and were found to fit him. The appellant also said to the Deputy Magistrate "they are my shoes." The other pair of shoes which were found lying apart were on the 3rd May tried by Mohamed Zamirul Husain on the feet of the dead body of Dinesh Chandra Roy and were found to fit exactly. The District Superintendent of Police who reached the spot soon after the occurrence also found a short distance off on the maidan south of the road a tin box in which was a piece of cloth. A constable Yakub Ali who was returning from duty at 8-30 p. m., on the 30th April, when on the road between the dharm-sala and the charitable dispensary saw two men running towards the dharamsala. He spoke to them and they said they were running "to catch a friend." One was wearing a striped coat, and the other a white one. The case for the prosecution is that the two men were the appellant and his companion fleeing from the place of occurrence.

6. After the body of Dinesh Chandra Roy had been brought to Mozufferpore, the District Magistrate with the District Superintendent of Police took the appellant, in consequence of statements made by him, to the dharamsala and the appellant pointed out a room there in which he said he and Dinesh had put up. The door was locked but on its being broken open a canvas bag amongst other things was found, on the bottom of which a layer of cotton wool was carefully spread. In the cotton wool were two indentations one of which might have been caused by the tin box which was picked up by the District Superintendent of Police, close to the scene of occurrence after the murder. Two servants employed at the dharamsala, Khema and Ramdhari Misser, have stated that the appellant with a companion stayed at the dharamsala from the 10th or 11th April up to the date of the occurrence, and another witness, Keshub Lal Chatterjee, says that he saw the appellant on the Secundrapore maidan in Mozufferpore on the 10th April and spoke to him. The case for the prosecution was that the appellant and his companion had been for some days in Mozufferpore prior to the day of occurrence waiting an opportunity to carry out their intention of murdering Mr. Kings-ford.

7. To prove the above facts 24 witnesses have been examined and the evidence of the Medical Officer has been put in.

8. The witnesses include the District Magistrate and the District Superintendent of Police who prove the discoveries made on the spot after the murder, the arrival of the accused after his arrest, his confession, his identification by the two constables and by the coachman of Mr. Kennedy's carriage, and the discovery of the canvas bag in the room in the dharamsala.

They also prove arrival of the body of the other man Dinesh Chandra Roy and his identification by the appellant and Babu Joytish Chandra Sen, Sub-Divisional Officer of Barh, proves the identification of the deceased by the two constables as the man whom they saw with the : accused at 7 p. m. on the evening of the occurrence. The District Judge Mr. Kings-ford proves the occurrence, that the two injured ladies were driven to his house, and the death of Miss Kennedy shortly afterwards. He also proves that he heard that an attempt was to be made on his life by. some body sent from Calcutta. The coachman Kali Ram who was driving Mr. Kennedy's carriage at the time of the murder was also examined. It appears that when examined by the District Magistrate immediately after the occurrence he said that one man ran out and threw the bomb. The next morning, before he saw the accused, he said that there were two men who came out from under the trees, and one of whom threw the bomb into the carriage. The other man, he said, also threw something which too exploded and struck him in the back. This witness and another, Mr.. Wilson, who was offered for cross-examination alone speak of two explosions. The coachman repeated his second story in Court and distinctly said that he identified the appellant as the man who threw the bomb, and the Sessions Judge has believed his evidence on this point. The syce Sangat Dosadh proves the throwing of the bomb but speaks of one man only who was dressed in white. He was injured by the explosion and thrown senseless from the carriage. The constables, Tehsildar Khan and Faizuddin, prove that they saw the appellant and his companion loitering on the road-outside the Club-house at 7 p.m. on the night of occurrence and ordered them to move on. They also saw and heard the explosion when the bomb was thrown. They afterwards identified the appellant and the deceased Dinesh Chandra Roy. Yakub Ali constable proves that he saw two men running away after the occurrence towards the dharamsala, and that one was wearing a dark and the other a white coat. Keshab Lal Chatterjee proves the presence of the appellant and Kheman the presence of appellant and Dinesh Chandra Roy in Mo-zufferpore before the occurrence. Ramdhani Misser partly corroborates Kheman. Fateh Singh and Sheo Prasad Misser, constables, prove the arrest of the accused at Waini at 8 A.M., on the morning after the occurrence and the articles with him while Chatterbedi Ramadhur Samar and Nando Lal Benerjee prove the arrest and' suicide of the man Dinesh Chandra Roy. Mahomed Zemirul Husain proves that one of the pairs of shoes found by the District Magistrate fitted the deceased and Mr. Rowland Chandra that the other fitted the accused and that he admitted they were his. The evidence of Col. Graniger, I. M. S., proves the injuries sustained by Mrs. and Miss Kennedy and that their deaths were due to those injuries. Other witnesses including Police Officers were also examined to prove minor and less important points. In addition to this there was the confession of the appellant made by him to the District Magistrate, and the statement of the accused recorded by the Committing Magistrate

9. The evidence has been discussed by the District Judge in his summing up of the case to the assessors which summing up he asks in his judgment may be read as part of his judgment. In his judgment he finds that the circumstantial evidence against the accused is overwhelming and fully established his guilt of the offence of murder and he says that he convicts the accused on that evidence.

10. He adds that he sees no reason for doubting the voluntary character of the confession made by the accused to the District Magistrate, or of the plea of guilty made by the accused to the charge.

11. The Sessions Judge, however, in his summing up to the assessors condemns the examination of the accused before the Committing Magistrate as being in the nature of an inquisition but he does not in his judgment say how much of it, he has accepted. However improper some of the questions may have been, it is, in our opinion, clear that the whole examination cannot be rejected as inadmissible, and it is unfortunate that owing to the method adopted by the Judge of incorporating his summing up into his judgment, it is not clear how much he accepted.

12. It is evident from the proceedings before the Sessions Judge that the appellant made no effort to dispute the truth of the case for the prosecution or to deny his guilt or that he was present at the scene of the murder.

13. In his petition of appeal there is, too, no denial of his guilt or at least of his being implicated in the crime. In the first ground he says that he made his statement to the District Magistrate in order to save Dinesh Chundra as he had been instructed by that person, and in the remaining grounds he suggests that burdened as he was with two pistols and other articles and ignorant as he was of how to use a pistol or to throw a bomb, it rests with this Court to consider whether the bomb was thrown by him or by Dinesh Chundra, and in the last ground he suggests that Dinesh Chundra committed suicide only because he was absolutely guilty or he threw the bomb.

14. We will consider these grounds later on, but we have first to deal with the arguments of the learned pleader who has argued the appeal on the accused's behalf and has adopted a line entirely different from that followed in the Court before which the accused was tried and entirely inconsistent with the grounds of appeal set forward by the appellant himself. The grounds taken, we may observe, are almost wholly technical in their character and make no attempt to attack the case for the prosecution on the merits.

15. The first object of attack is the judgment of the Sessions Judge. It is urged that the Judge could not under the law embody his summing up to the assessors in his judgment, that, therefore, the judgment was incomplete as containing no statement or discussion of the evidence, and that on this ground the conviction cannot stand and that it should be set aside and a re-trial ordered. The objection is, in our opinion, purely technical and has no real substance. If the Judge had made a copy of his summary and had included it in the judgment, it is not disputed that there could be no legal objection to its being treated as a part of the judgment. Such a summary would indeed form a natural part of the judgment, and though in it the facts and evidence are marshalled for the assistance of the assessors, they are in reality the facts and evidence on which the determination of the case depended, the ultimate decision of which rested with the Sessions Judge. In his judgment the Judge records his findings on the facts and evidence as explained in his summary, and though his method is inconvenient and not one of which we could approve for general adoption, we are unable to hold that it is illegal or that it vitiates the judgment so as to render it invalid. In view, however, of the objection taken, we have thought it right, as we are dealing with the appeal on the facts, to set out the evidence in our judgment.

16. The next object of attack is the confession of the accused recorded by the District Magistrate. It has been recorded under the provisions of Section 164, Criminal Procedure Code, and it is contended that the confession as recorded is inadmissible in evidence for the following reasons : (1) The Magistrate did not tell the accused that he was making the statement to a Magistrate; (2) the provisions of Section 364, Criminal Procedure Code, were not complied with in that (a) every question put to the accused and every answer given by him were not recorded, (ft) it was recorded in English, though it is : clear from evidence of the District Magistrate that it was practicable to have had it recorded in the Bengali language in which it was made, (c) that it was not signed by the accused on the day when it was recorded or in the presence of the District Magistrate but was signed the next day in the presence of an Assistant Magistrate, and (d) that before recording it the Magistrate did not satisfy himself that it was being made voluntarily.

17. In dealing with these objections we find that the District Magistrate in his evidence admitted that he did not remember telling the accused that he was a Magistrate, but he adds that he did not do so because he thought that the accused must have been aware that he was a Magistrate as he took him in the first instance to his Court for the purpose of recording his confession. We are

of opinion that in the circumstances under which the statement was recorded the accused must have been fully aware that the officer who recorded the statement was the District Magistrate. That officer met the train in which the accused was brought from Waini and by his orders the accused was taken to his Court. The accused was not an uneducated illiterate man and he must have been aware that the District Superintendent being in the train with him, the only officer, with authority to pass those orders or to act in that way, was the Magistrate of the District. In fact in his examination before the Committing Magistrate the accused admitted that he understood that the officer who took his statement was a Magistrate.

18. Dealing with the next objection under its four heads, the District Magistrate admits that he questioned the accused, but wrote what he stated in a narrative form. The whole statement after it had been so recorded was read over to the accused in Bengali and was admitted to be correct, except as regards one sentence which was struck out. We have gone carefully through the confession and so far as we can judge any questions which may have been put to the accused were of a purely formal character. The Magistrate could not have been aware of the facts beforehand so as to have elicited answers embodying them from the accused. It is impossible to see how in this case the accused can be said to have been prejudiced by the omission to record purely formal questions.

19. The cases of Queen-Empress v. Bhairab Chunder Chakraborty 2 C.W.N. 702 and King-Emperor v. Bajani Kanto Koer 8 C.W.N. 22 to which we have been referred, have, in our opinion, no application in the present case. In those cases the officer who recorded the confessions was held to have had no power at all to record statements under Section 364, Criminal Procedure Code, and the statements were held not to be confessions within the meaning of Section 164, Criminal Procedure Code.

20. In this case we are satisfied that by the omission to record the statement in the form of questions and answers, the accused was not prejudiced or injured in any way in his defence on the merits, and that, therefore, the irregularity was fully covered by the provisions of Section 533, Criminal Procedure Code. As authority for the view we take, we have only to refer to the case of Fekoo Mahto v. The Empress 14 C. 539.

21. The learned pleader in dealing with the objection under the second head has contended, on the authority of the cases of Queen-Empress v. Nilmadhub Mitter 15 C. 595; Jai Narayan Rai v. Queen-Empress 17 C. 862; Lalchand v. Queen-Empress 18 C. 549 and Queen-Empress v. Razai Mea 22 C.817 that the confession was inadmissible' as it was recorded in English though given in Bengali, and the prosecution has not proved that it was impracticable to have had' it recorded in Bengali. The District Magistrate has stated in his evidence : "It was not possible to record it (the accused's confession) in Bengali because I could not write Bengali myself and had no clerk who could do so."

22. The learned pleader has, however, contended that as it appears from a subsequent passage in the evidence of the Magistrate that it was read over to accused in Bengali, it is clear that some person who knew Bengali was present, he has suggested that a Bengali Inspector of Police was present and has proposed that we should examine a police Officer-present in Court to ascertain whether this was so or not. Section 164, Criminal Procedure Code, however runs : "Every Magistrate not being a police officer may record any statement, etc." and we have no doubt if any Bengali police officer was present at the time the confession was recorded and if he had been employed by the District Magistrate to record the confession, that objection to its admissibility would have been taken on the ground that it was recorded by a police officer. Nor do we think that the fact that the police officer was employed as a scribe of the statement would have been sufficient to meet the objection that he was a police officer.

23. In our opinion the evidence of the District Magistrate is sufficient

proof, that it was impracticable at the time the confession by the accused was made to have it recorded in Bengali. It was, therefore, rightly recorded in English in accordance with the provisions of Section 364, Criminal Procedure Code, and was admissible in evidence before the Sessions Judge. It is clear that the statement was not signed by the accused on the day it was made, but it was signed the next day. The signature is taken as a voucher of the authenticity of the statement, not as an admission of its correctness. The omission to take the signature of the accused at the time the confession was recorded ought not to have been allowed, but in this case the Magistrate himself has sworn to the authenticity of the statement, and the omission seems to have been supplied by the accused without objection as soon as it was noticed. We are unable to hold that in this instance there was such an irregularity or illegality as would affect the admissibility of the statement in evidence.

24. Furthermore we have to observe that it is clear from the examination of the accused before the Committing Magistrate that the confession was read over to the accused then and admitted by him to be what he stated, though he alleged that in some particulars Dinesh had tutored him.

25. The provisions of Sections 164 and 364, Criminal Procedure Code, are clearly intended to secure a correct record of the statement of the accused. In the case of the confession in question the accused admitted on more than one occasion that it was correct and the objections which have been taken are purely technical and do not go to the merits of the case.

26. A further objection to the confession was taken that the District Magistrate before commencing to record it had not satisfied himself that the accused was making it voluntarily. The Magistrate was, however, careful after recording the statements to question the accused on this point and it was only after he had satisfied himself with regard to it that the Magistrate recorded the certificate that it was voluntarily made. No suggestion was ever made by the accused during the trial, nor has it been made in his grounds of appeal that the confession was not made voluntarily. We agree with the Sessions Judge that the confession was voluntarily made and that it was admissible in evidence against the accused at his trial.

27. The learned pleader has suggested that appellant must have been under the terror of the police when he made the statement. The accused himself never said that such was the case and he never attempted either before the Committing Magistrate or at his trial to withdraw from what he had said. In his examination before the Committing Magistrate he explained the points as to which he alleged Dinesh had tutored him, but they did not bear on the question of the accused's having committed the murder.

28. The learned pleader has lastly contended in respect of the confession that even if it be accepted as admissible, it is not to be relied on because it is clear from what the appellant subsequently said in his examination before the Committing Magistrate that some of the statements, namely those which he said he made at the instigation of Dinesh, were untrue, and because from the evidence of Babu Bechu Narain Lal, Deputy Superintendent of Police, it appears that the real name of Dinesh Chundra Roy is Profulla Chaki. We do not think this argument is sound, or that it is open to an accused who has made a confession, which is evidence against him, to contend that the whole confession is inadmissible because in his subsequent examination he may have said that some of the statements contained in it are untrue. In fact there is nothing to support the conclusion that the later statements are more to be relied on than those first made, while on the contrary there is the fact that between the making of the confession and the examination of accused before the Magistrate, Dinesh Chundra Roy had committed suicide. Moreover, the statements which are said to be untrue have no bearing on the guilt of the accused for the offence charged.

29. The confession gave a detailed account of the events leading up to the

murder, its commission, and what was done by the two men afterwards. It is supported by the evidence, and it has never been suggested that the accused was tutored as to the statements made in it by any body except Dinesh. It was admitted by the accused before the Committing Magistrate to be true, and it has never been retracted. The petition of appeal merely suggests, but does not distinctly allege, that Dinesh Chundra Roy was the man who threw the bomb which killed the two ladies.

30. On all these facts we must hold that the objections taken by the learned pleader fail, that the confession was voluntarily made, that it is admissible in evidence and that it is true.

31. The next objection which the learned pleader has taken is that the whole trial is bad in law because the Sessions Judge failed to comply with the provisions of Section 342, Criminal Procedure Code, and to examine the accused after the evidence for the prosecution had been concluded. Section 342, Criminal Procedure Code, is as follows :—"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court may, at any stage of any enquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." The learned pleader contends that the examination is imperative in all cases. As to this contention we have to observe that the purpose of the examination is to enable the accused to explain the circumstances appearing in the evidence against him, and that the first paragraph in the section was expressly added by the Legislature in Act X of 1882 to limit the power of interrogating the accused to the object. In the present case the accused had admitted his guilt and had been examined under Section 342, Criminal Procedure Code, before commitment by the Magistrate who held the inquiry. There could then have been no possible object in the Sessions Judge examining the accused further.

32. The provisions of Section 289, Criminal Procedure Code, which lay down the procedure in a trial by assessors after the examination of the witnesses for the prosecution have been concluded clearly indicate that such an examination is not necessary in all cases. The section runs :--' When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded etc."

33. We hold, therefore, that in the present case such an examination of the accused by the Sessions Judge was not necessary and that' the omission to examine the accused did not; constitute an illegality which would vitiate the trial.

34. In the present trial the accused was asked after the case for the prosecution had been concluded if he wished to adduce evidence and he replied in the negative.

35. We have now to consider how far the examination of the accused as taken by the Committing Magistrate under Section 342, Criminal Procedure Code was admissible. The Sessions Judge describes it as being of the nature of an inquisition but we think that in saying this he goes too far. No doubt it consists of 55 questions but the greater number deal with facts deposed to by the witnesses as to which the accused might have wished to offer an explanation. Such questions were not objectionable nor indeed do the answers carry the case against the accused any further than the evidence. Others, that is to say the opening questions' were clearly such as the Magistrate ought to have asked and the answers of the accused were directed to explaining how far he had been tutored by Dinesh. Questions 6 and 10 to 19 should not have been asked and the answers may be discarded as evidence against the accused. Questions 39 to 43 seem to have been asked with the object of enabling the accused to explain his second answer and not with the object of eliciting from him statements to

supplement the case for the prosecution. Questions 49 to 51 should perhaps have been omitted. The examination was certainly not in the nature of a cross-examination to elicit statements from the accused. Apparently in the inquiry as in the trial, the accused attempted no defence and the object of the greater part of the questions seems to us to have been to ascertain whether the accused admitted the facts stated by the witnesses or wished to offer any explanation. The length of the statement seems to have suggested the impression that, it was inquisitorial.

36. We hold that, omitting the questions and answers which we have noted, the rest of the examination was admissible in evidence borne of the answers were clearly intended to tell in favour of the accused and though the learned pleader for the appellant denies the admissibility of the examination as a whole, he has yet based his arguments on some of the statements contained in it.

37. The learned pleader has further raised the objection that the Sessions Judge, having not accepted the plea of guilty, was not entitled to rely on it in convicting the accused. We do not think that the Sessions Judge has done so. In his judgment he has stated that he sees no reason for doubting the genuineness and the voluntary character of the plea of guilty returned by the prisoner when charged by the Court, but he has distinctly stated in the previous paragraph that he convicted the accused on the evidence. It would have been better if the Sessions Judge, when he decided to try the case, had followed the practice in England and directed the accused to enter a plea of not guilty. The recording of the plea of guilty after he had decided to try the case was meaningless, unless he accepted it. If on the other hand he accepted it, there was nothing in issue between the Crown and the prisoner at the bar which he had to try. We have taken for the purposes of this appeal that the plea of guilty was not accepted and was not acted on, and, therefore, we have held that the accused is entitled to appeal to this Court on the facts as well as on points of law.

38. On the merits the only contention advanced by the learned pleader for the appellant is that if the confession of the accused to the District Magistrate be rejected as inadmissible, there is nothing against the accused but circumstantial evidence, and that the evidence is insufficient to support the conviction. The contention loses much of its force as we have found that the confession is admissible, but we think further that it cannot be sustained. The circumstantial evidence against the accused is in this case overwhelming and is, in our opinion, consistent only with the conclusion that the accused committed the offence with which he was charged.

39. The evidence for the prosecution stands practically unchallenged at the trial and in the course of this appeal, except the evidence of the coachman. As to the evidence of this witness we see no reason to differ from the conclusion of the Sessions Judge that it may be accepted so far as the identification of the accused as the man who threw the bomb is concerned. His first statement taken immediately after the excitement of the occurrence when he must have been suffering from terror and excitement cannot be relied on implicitly. The second statement was made before the accused was brought in under arrest, and we think it may be accepted. As regards the identification of the accused, we think we should hesitate to differ from the finding of the District Judge who had the witness before him and saw his demeanour under examination. At the time of the occurrence the lamps of the carriage were alight and it was certainly possible to see distinctly the face of a person approaching the carriage especially as the evidence is to the effect that the accused's head was uncovered.

40. Apart from the evidence of this witness, however, we have it proved that prior to the occurrence the accused and his companion were staying in. Mozufferpore for no ostensible object, and that accused gave a false description of himself. On the night of occurrence, accused and his companion were seen loitering near the scene of occurrence an hour before the murder. Two men were seen to run up to the carriage when the bomb was thrown and two figures were

seen running away from the scene of occurrence, afterwards, also two men were seen running to the dharmasala whose description tallied with that of the accused and his companion. Two pairs of shoes, one pair belonging to each of them, were found close to the scene of the murder. After the murder the accused and his companion fled in different directions leaving the room in the dharmasala locked up with their things in it. The accused was arrested 25 miles off the next morning. He was armed with two revolvers and was carrying loose cartridges. He attempted to escape at the time of his arrest. Round his body were found a striped coat and a white coat similar to those which he and his companion were wearing before the occurrence. Close to the scene of occurrence was found a tin-box which corresponded with the marks in the cotton wool in the bag belonging to the two men found in the dharmasala, and which, as it had evidently been carried with care, presumably contained the bomb with which the murder was, committed. Accused's companion was arrested two days afterwards dressed in new clothes and shoes and after he had tried to escape and shoot one of his captors he committed suicide. Some of the spare cartridges found with the accused fitted the pistol with which Dinesh Chandra Roy shot himself.

41. These facts combined make out against the accused a very strong case and are in our opinion consistent with one view only, namely, that he committed the murder as charged. In addition to this evidence we have the confession of the accused made to the District Magistrate supplemented, so far as we have already noted, by his examination before the Committing' Magistrate.

42. In his petition of appeal the accused has suggested that it is improbable that he committed the murder as he was burdened with the two pistols, the cartridges and the two coats. Of the pistols, which are revolvers, one only is heavy, the other being very light. The cartridges could not weigh more than a few ounces and the coats were in the wearing of the accused and his companion respectively at the time of the murder. These things were certainly not in themselves so cumbersome as to have rendered the commission of the crime by the accused impossible or even difficult. Furthermore we have no evidence of what happened after the two men had been lost sight of in their flight to the dharmasala, and it is impossible to say that things carried by one at the time of the murder may not have been handed to the other afterwards. The fact that the silk coat which Dinesh is said to have worn was found with the accused supports such an inference. After the murder the accused was arrested with the spare revolver, cartridges and the clothes worn by him and his companion, which might have led to their detection and these circumstances seen to support the conclusion that the accused was' the leading spirit in the murder. We are unable to accept the suggestion made in the petition of appeal that the bomb was thrown by Dinesh.

43. We may add that even if such had been the case the guilt of the accused would have been equal. If he and Dinesh went that night with the intention of committing murder by means of the bomb and if in prosecution of this common object the accused stood by and held the heavy articles and the coat of Dinesh so as to facilitate the commission of the offence by Dinesh and to assist his escape afterwards, and if Dinesh throw the bomb, the accused would be equally guilty with Dinesh of committing the offence of murder (section 34, Indian Penal Code.)

44. We agree with the Sessions Judge and assessors in finding Khudiram Bose guilty of the offence of murder as charged.

45. The case has been tried with great care and fairness by the Sessions Judge and every assistance that was possible was given to the accused for his defence. We may add that we desire to endorse the encomiums passed by the Sessions Judge on the good work done by the District and Police authorities in the detection of the offenders and in the investigation and inquiry into the offence.

46. It remains for us to determine whether there are to be found in this case any extenuating circumstances in favour of the accused which would in law justify us in reducing the extreme sentence which has been passed by the Sessions Judge and in dealing with question, we are bound by the law and can only give effect to considerations which would in law justify us in interfering with the sentence. Other considerations, if there are any in this case, can only be dealt with by another authority.

47. The learned pleader for the appellant in pleading on behalf of his client for a mitigation of the sentence has urged the following facts:-(1) his youth, his age being about 19 years, (2) his confession to the District Magistrate which shows that his feelings have not been fully developed and that the crime was an insane act of criminal folly, and (3) his attitude during the trial which goes to support the inference that the accused is not a young man of strong mind, and that he was a mere tool in the hands of others.

48. The accused is not a mere youth but a young man who has attained the age fixed for majority in this country. The crime was not committed at the instigation of older men present on the spot. For twenty days the accused and his companion had been in Mozufferpore watching for an opportunity to commit the crime, and when they thought the opportunity offered itself they carried it out with deliberation and determination after first taking precautions to avoid detection and secure escape. It is impossible to treat the accused as a young man who did not know fully well the serious nature of the crime he was committing.

49. His confession does not appear to us to disclose that his feelings were undeveloped or that the act was one of criminal folly. He has given his reasons for the commission of the crime and has explained the steps which he took to carry it into effect in concert with his companion. His conduct may, as the learned pleader observed, indicate great depravity and wickedness of mind, but that is not a fact which could be taken into consideration in extenuation of the offence.

50. Nowhere in the defence during the trial was it stated that the accused was a tool in the hands of others. In his confession he claimed that the intention to commit the crime was his own, though it had been aroused by the speeches and writings of others and that the commission of the crime was carried out by him and Dinesh at their own initiative. Whether this be true or not it is impossible for us to say, but on the materials before us we are unable to give effect to the suggestion of the learned pleader that the accused was a mere tool in the hands of others in committing the crime.

51. The murder was deliberately planned and cruelly carried out under cover of darkness by the accused and his companion, both being armed with pistols and having made careful preparations for their own safety and escape.

52. We can find in the case no extenuating circumstance which would in law justify our interference with the extreme sentence which has been passed on the accused by the Sessions Judge. We, therefore, confirm the conviction and sentence, and dismiss the appeal.