
(1963) 05 PAT CK 0001
In the Patna High Court

State of Bihar

APPELLANT

Vs

Harikant and Another

RESPONDENT

Date of Decision : 17-05-1963

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34, 394

Citation : (1964) CriLJ 473

Hon'ble Judges : G.N. Prasad, J;Anant Singh, J

Bench : Division Bench

Judgement

G.N. Prasad, J.—Harikant Singh alias Sia Kant Singh and Ra-Jendra Singh alias Faudari Singh have been convicted by the learned First Additional Sessions Judge of Patna under Section 302/34, Indian Penal Code, and sentenced to death. They have also been convicted u/s 394 of the Code, but no separate sentence has been imposed upon them thereunder. They have preferred separate appeals which "have been heard along with the death reference made by the learned; Judge for confirmation of the death" sentence of both.

2. The victim of the occurrence was Military Jamadar, named Gyanchand Kapoor, who at the relevant time was posted at Panagarh. The murder took place in a first class compartment of the 15 UP Varanashi Express between Hathidafa and Tal junction stations of the Eastern Railway. The time of the occurrence as mentioned in the first information report (Ext. 10/1), drawn up at 0.55 hours on the 24th October 1961 at Mokamab G. R. P. S. was 0.42 hours of the same night, but the materials on the record show that the occurrence must have taken place at least ten- minute earlier.

3. On the 23rd October, 1961, Kapoor proceeded on one month's leave and on the same night he boarded compartment No. D of a first class bogie of the Howrah Varanasi Express at Panagarh for travelling to Delhi. It was a coupe of which Kapoor was the sole occupant. The train was proceeding from the east to the west. In compartment No. E of the same bogie on the adjoining west, which again was a coupe, were travelling: V. V. Ramanathan (P. W. 25) and Upendra

Thakur (P. W. 16). Nathan (P. W. 25) was a Divisional Accountant posted at Chara-li in Assam, and he was returning after the expiry of his leave from Madras. He had boarded the Varanasi Express at Howrah and he was due to detain at Mokamafe junction for the purpose of catching a train proceeding to Barauni on his onward" journey to Charali. Upendra Thakur (P. W. 16) was a Folicie Sergeant then posted at Arrah. On the 22nd October, 1961, he had escorted the Governor of Maharashtra from Mogalsarai to Bhagalpur, from where- he was returning on the night of the reactance-and had boarded compartment No. E of the Variants Express at Keel. The train reached Barahiyaa at 0.1 hours and left Barahiya at 0.8 hours. The next stoppage of the train was Mokamah inaction, there being no scheduled stoppage at the intervening stations, Hathiadah and Tal junctions.

The train was approaching Tal junction station, when it suddenly stopped, due to someone-pulling the alarm chain and also because the pontiff signal was not down. It was at the outer signal of Tal junction that the train stopped. While the train was so standing, Thakur (P. W. 16) opened? the northern door of his compartbient and peeped out out of curiosity. As soon as he peeped on he heard a groaning sound coming from the adjoining compartment D. He then got down france his compartment and went in front of the compartment. He found the door of that compartment open and a man lying fallen down- thereon the floor besmeared with blood. Nathan (P. W. 25) had also got down and" seen the same thing. The injured passanger was unable to speak and he-was on the point of death.

In the meantime the news went round that a man had been assaulted in a first class compartment, and the driver (P. W. 8) and the guard (P. W. 9) of the train, besides a T. T. E. Ramashankar Ojha (P. W. 23), who was on duty in the same train, all rushed to the ill-fated" compartment and they all saw the victim with injuries on his person and unconscious. There was profuse blood at various places in the compartment including the bed which was found spread on one of its berths. The train was detained at the outer signal of Tal junction for eighteen minutes, it then proceeded on its journey j to Mokamah junction, where it arrived at 0.50 hours. The guard (P. W. 9) of the train travelled with the victim from Tal junction to Mokamah junction. As soon as the train reached Mo-kamah junction, the T. T. E. (P. W. 23) rushed to the Assistant Station Master (P. W. 17) on duty and informed him about the occurrence. The latter in bis turn sent a cryptic note (Ext. 10) to the G. JR. P. to the following effect:

Just now I have been informed by the T. T. E. Sri Ojha that one 1st class passenger has been stabbed in 15 Up date. Please come at once, and a attend.

This note Ext. 10 was timed as 0.52 hours and it Was received by Sub-Inspector Tribijoy Na-fain Singh (P. W. 29), who on the basis of it, drew Up the first information report (Ext. 10/1) at 0.551 hours and proceeded to investigate into the case. He first directed his junior Sub-Inspector to depute the Assistant Sub-Inspector with some constable to find out the culprits. He then proceed to the Up

platform where the train was standing and entered into the ill-fated compartment. He saw the injured passenger lying besmeared with blood on the floor of the compartment in a state of unconsciousness. There were several injury marks on his body. P. W. 29 prepared his injury report and sent for the railway doctor, i. The railway doctor Amarendra Ghosh (P. W. 22) came and attended upon the injured passenger. P. W. 22 found seven injuries, all caused by sharp cutting weapon, such as a dagger, on the different parts of his body. He was unconscious. The latter was taken down from the Express train and brought to Patna by the Punjab Mail accompanied by the railway doctor (P. W. 22). He was admitted into the Patna General Hospital where he died at about 10.30 a. m.

4. Thereafter a constable (P. W. 18) attached to Patna Junction Railway station was sent for and he took the dead body to the morgue. At 8.15 a. m. on the 25th October, 1961, a postmortem examination of the dead body was conducted by the Police Surgeon of Patna (P. W. 13) who found ten incised wounds of various dimensions on the dead body, all of which were ante-mortem. There were three injuries on the left side of the face, two on the chin, one each on the left cheek, left clavicle and right wrist, and two on the right thumb. On dissection the Police Surgeon (P. W. 13) found two vessels in the neck, the carotid and the jugular, cut at two places with collection of blood clots in the neck. The injuries had been caused by a long sharp weapon like a dagger and death was due to shock and haemorrhage as a result of the aforesaid injuries. In the opinion of the doctor (P. W. 13), the injuries had been sustained by the deceased about 12 hours before his death, which was about 18 hours before the time of the post-mortem examination.

5. It appears that in the morning of the 24th October 1961, a telegram was sent to Shushila Kapoor (P. W. 1), the wife of the deceased who was at Panagarh, asking her to go to Patna as the condition of her husband was serious. Shushila (P. W. 1) reached Patna in the morning of the 25th October, 1961, and went to the Patna General Hospital, where she saw the dead body of her husband. After the post-mortem examination, the dead body was handed over to her.

6. In course of his inspection of the ill-fated compartment, the investigating officer (P. W. 29), who will hereafter be referred to as the I.O., saw a dagger (Ext. XX) stained with blood lying near the southern door of the compartment. He also saw a number of articles in the compartment, such as a holdall (Ext. XVI), a carpet (Ext. VUI), three chadars (Exts. I, V and XIII), two towels Exts. II and III), a Tosak (Ext. IV), a pajama (Ext. VI), a cricket bat (Ext. VII), an underwear (Ext. IX), a Shirt (Ext. X), a pant (Ext. XI), a pillow (Ext. XII) and a bunch of keys (Ext. XVII) with blood stains on most of them. Among other articles which P. W. 29 came across in the compartment were a small note book with plastic cover containing sixteen ten-rupee currency notes with the name of Gyanchand Kapoor written on it, a leather money bag containing Rs. 49/- in currency notes of various denominations, a military warrant and a leave certificate in the name of the deceased, besides small coins of the value of 0.74

nP. The blade of the dagger had a piece of black hair mixed with blood attached to it. P. W. 29 seized all these articles under a seizure list (Ext. 2/9) in the presence of two witnesses. He also noticed blood stains on the outer handles (Exts. XXXII and XXXIII) of the northern door of the compartment, on the outside of the door-leaf of which also there were blood stains at several places. There were blood stains on all the three foot-boards on the northern side of the compartment. There were impressions, of blood stains on the northern alarm chain of the compartment and on the wall of the compartment near about the said alarm chain.

7. Shortly after the I.O. (P. W. 29) had proceeded to inspect the place of occurrence, he was informed that a box was lying unclaimed on the Up platform near the Train Examiner's office, where the train was still standing. Accordingly he went to the spot and found a steel box (XIV) with blood stains on it lying on the platform with the name "G. C. Kapoor Patiala" written in white paint on the box. The box was locked with a pad-lock. P. W. 29 took charge of the box under a seizure list (Ext. 2/6) in the presence of two witnesses. The box had been seized at 1 a. m. on the 24th November, 1961.

8. The prosecution case against the appellants and the circumstances under which they were arrested may now be stated. It is alleged that while the train was standing at Barahiya station, Nathan (P. W. 25) and Thakur (P. W. 16) had noticed three or four persons on the platform who wanted to enter into their compartment, but they gave up the attempt and they knocked at the compartment on the adjacent east (compartment D) and entered into it, P. W. 16 had noticed that one of those three or four persons had something like a bandage wrapped round his head. When the train left Barahiya, P. Ws. 25 and 16 remained talking to each other. Ultimately when the train stopped at the outer signal of Tal junction, Nathan (P. W. 25) felt as if some person had got down from compartment D, but he did not peep out at that stage. He then heard the sound of somebody getting down for the second time. Then he began to look out through the window which was adjacent to his seat on the southern side of his compartment, and then he saw that one person had got down from compartment D and fled away towards the east, While he was still looking in that direction, Nathan (P. W. 25) again heard the sound, of some body getting down from compartment D and he saw another person getting down with a box from that compartment. The person who had got down with a box had a bandage tied round his head and he was wearing a dhoti and a shirt. Nathan (P. W. 25) subsequently identified appellant Rajendra Singh as the person whom he had seen getting down with a box from compartment D. Nathan (P. W. 25) naturally felt suspicious and he inquired from Thakur (P. W. 16) as to what the matter was and whether those persons were travelling without tickets. Thakur (P. W. 16) said that possibly they were passengers without tickets because such persons generally travel on this line without tickets. Thereafter P. Ws. 25 and 16 took no further notice of the movements of the aforesaid three or four persons. Only Thakur (P. W. 16) opened the northern door of his compartment and peeped out

for ascertaining the fact, when he heard the groaning sound coming from the adjoining compartment and then saw the injured passenger lying unconscious on the floor of that compartment, which was also seen by P. W. 25 as already mentioned above.

9. The prosecution case further is that the appellants were among the three or four persons who had entered into compartment D at Barahiya and had got down from that compartment when the train stopped at the outer signal of Tal junction, carrying away the steel box (Ext. XIV) belonging to the deceased. At Tal junction, the appellants got into a third class compartment near the brake-van of the guard along with the box the a which and his of with in appellants. two as them both identified 2 W, P. head on bandage had persons those One possession. their box standing, was he where spot near train, from alighting saw but brake-van, Guard?s compartment third down taken being see actually not did W. Tun, alias 2) (P. Sharma Chandrasekhar occasion that platform duty who Examiners Train office. Examiner?s front left they XIV) (Ext, carrying got then junction, Mokamah at stopped train when XIV) They brought the box and kept it on the platform near the office godown of P. W. 2. leaving the box at that spot both the appellants hastily went away towards the west. P. W. 2, however, proceeded with his duty which was to examine the wheels of the train, to get water filled in the train and to supervise the work of cleaning the compartments. On that occasion P. W. 2 saw a crowd in front of the first class bogie and learnt that a Military Officer had been murdered in the train, while proceeding forward towards the west on the platform, P. W. 2 came across Bulu Pathak alias Narendra Kumar (P. W. 7). Bulu Pathak (P. W, 7) was working in the Electricity Department at Bakhtiyarpur, where he was proceeding by the same train. He had boarded a third class compartment near the engine of the train. In that compartment Bulu Pathak saw two persons coming hurriedly and boarding his compartment for sometime, both of them remained standing in the compartment and then they sat down. They were both talking amongst themselves that a murder had been committed in the train and that they should sleep in the passengers" shade of Mokamah junction. On hearing their talks, P. W. 7 got down from the train and proceeded towards the east. He came across Chandrasekhar (P, W. 2), who was then proceeding oh the platform towards the west. P. W. 7 told P. W. 2 that he suspected the movements of the two persons who had boarded his compartment near the engine. Both P. Ws. a and 7 went in front of the said third class compartment and saw the aforesaid two persons in it.

They were the same two persons whom P. W. 2 had seen only shortly before with the box which they had left behind on the platform near his office godown. Thereafter Chandrasekhar (P. W. 2) came across a T. T. E. and requested him to check the tickets of the aforesaid two persons. The T. T. E. checked their tickets and found that each of them had a third class ticket from Barahiya to Bakhtiyarpur. Chandrasekhar (P. W. 2) then proceeded towards the east in search of the police since he had developed suspicion in his mind. He came across the Havildar and the Assistant Sub-Inspector and narrated to them what he had seen

and suspected. He accompanied both the police officers to the third class compartment near the engine, but he did not find either of those two persons there. Near the same compartment, the Assistant Sub-Inspector (P. W. 15) and others learnt that those two persons had got- down from the third class compartment by the northern or the wrong side of the train. The Assistant Sub-Inspector (P. W. 15) thereupon deputed the Havildar and a constable along with Bulu (P. W, 7) to trace out the suspected culprits, while he himself remained standing on the Up platform in search of those two persons in the various compartments of the train.

10. It was Havildar Ram Sewak Singh (P. W. 26), who along with Bulu Pathak (P. W. 7) had set out in search of the two suspects as directed by the Assistant Sub-Inspector (P. W. 15), P. Ws. 23 and 7 went to the Down platform by the over-bridge and after making some search on the Down platform; they went near the Rickshaw stand outside the platform and met three or four rickshaw-pullers. They inquired from them as to whether they had seen two persons going outside the station. One of the rickshaw-pullers Ram Kishun Sao (P. W. 6) had seen two persons going hurriedly towards the third class passengers' waiting shed which was in an outer part of the station building. P. W. 6 told the Havildar what he had seen. Thereupon P. Ws. 26 and 7 both went into the passengers' shed, where they saw the two appellants sleeping on a platform (chabutra) of the passengers' waiting shed. They had covered their bodies with the half portion of the dhoties which they were wearing. P. W. 7 identified both of them as the persons whom he had seen in the third class compartment near the engine. The Havildar stayed near them, and in the meantime P. W. 7 went to the Up platform and called the Assistant Sub-Inspector (P. W. 15) to the passengers' shed where Chandrahekhar (P. W. 2) also accompanied him.

After reaching the passengers' shed, the Assistant Sub-Inspector (P. W. 15) arrested the two appellants who disclosed their names to him. The Assistant Sub-Inspector had found signs of blood on the clothes of both of them. After arresting them, the Assistant Sub-Inspector took them to the Down platform, where the I.O. also arrived. The I.O. took their statements. Both the appellants handed over to the I. O, one ticket each. They were third class tickets (Exts. XXX and XXXI): which had been issued on the 23rd October, 1961, at Barahiya for Bakhtiyarpur. The number of Harikant's ticket was 5582 and that of Rajendra's ticket was 5583.

The I.O. then proceeded to take the personal search of both the appellants. From the person of appellant Harikant, the I.O. recovered (i) a cinema book (Ext. XXV), (ii) a dhoti (Ext. XXII) with kathai border stained with blood at certain places, and (iii) a pair of black shoes (Exts. XXIII-and XXIV) with some stain of blood on the sole of the left shoe. From the possession of appellant Rajendra, the I.O. recovered (i) thirty currency notes of Rs. 10/- each which were tied in the folds of his dhoti, (ii) a check designed full shirt (Ext. XXVI) which he was wearing and which bore blood stains at places, and (iii) a pair of black sandals

(Exts. XXVII and XXVIII) which he was wearing and which were suspected to contain some blood stain on the left shoe. The I.O. (P. W. 29) took charge of all these articles from the possession of both the appellants in the presence of two search witnesses, one of whom was Kusmakar Prasad Singh (P. W. 10), a railway contractor. A seizure list (Ext. 2/8) was prepared by the I.O. (P. W. 29) in regard to these recoveries, and it was signed by the two search witnesses, the signature of P. W. 10 be it being Ext. 2/4 and that of the other search witness, who was a Ticket Collector of Mo-kamah, being Ext. 2/5.

Thereafter both the appellants were sent in custody; to the hajji from where they were forwarded to Court on the 25th October, 1961. The I.O. (P. W. 29) proceeded with his investigation, in course of which he got the first class bogie in question detached from the Express train which left Mokamah junction on its onward journey after detention of two hours. At about 6.30 a. m. in the morning of the 24th October, 1961, the I.O. (P. W. 29) proceeded towards Tal junction. He came across blood between Tal junction and Hathidah stations. The blood was on pieces of stones which lay spread in between the Up line and the Down Line, the blood stained pieces being nearer to the Up line, that is to say, the line by which the Express train in question had passed. The I.O. took charge of the blood stained stone pieces under a seizure list (Ext. 2/10).

11. At about 12 noon on the 24th October, 1961, the I.O. took charge of the bandage which was wrapped round the head of appellant Rajendra. It was a hospital bandage and the I.O. had taken charge of it in the presence of two search witnesses, one of whom was Kusmakar Pd. Singh (P. W. 10) the relevant seizure list being Ext. 2/7 bearing the signatures (Exts. 2/2 and 2/3) of P. W. 10 and the other witness respectively.

The I.O. took the statements of the various prosecution witnesses and prepared a rough sketch map (Ext. 14) of the compartment which was the scene of the occurrence. At the instance of the I.O., the statements of P. Ws. 2 and 7 were recorded u/s 164, Code of Criminal Procedure, by an Honorary Magistrate (P. W. 5). On the 4th November, 1961, the I.O. sent the bloodstained articles to the chemical Examiner at Calcutta through the Sub-Divisional Officer, Barh. The reports of the Chemical Examiner and the Serologist are on the record as Exts. 16 to 16/3. and I shall have occasion to refer to them hereafter. On the 15th March, 1962, after the investigation was complete, the I. O. submitted charge-sheet against both the appellants, who were sent up for trial after the usual commitment inquiry.

12. Both the appellants pleaded not guilty and denied their participation in the crime. Their case is that they have been falsely implicated at the instance of Chandrasekhar (P. W. 2) who bore enmity against both the appellants from before. Both the appellants admitted that they were arrested in the passenger's waiting shed on the night of the occurrence itself. They also admitted that they were in possession of the third class tickets (Exts. XXX and XXXI) which they had handed over to the I.O. after their arrest. They further admitted that they had

purchased these tickets at Barahiya at about 10 a. m. on the 23rd October, 1961. Rajendra, however, stated that he had travelled up to Mokamah by the 13 Up Express in the day time. At Mokamah he had come across his Sala in whose company he had gone to his father-in-law's place which was at Mokamah itself. Appellant Harikant also denied having boarded the 15 Up train at Barahiya, but neither he nor appellant Rajendra gave any explanation of their own as to why they were both sleeping in the passengers' shed on the night in question.

Appellant Harikant denied his ownership of the dhoti (Ext. XXII) and the pair of shoes (Exts. XXIII and XXIV) and he also denied that they had been seized by the I.O. from his possession. Appellant Rajendra admitted that a sum of Rs. 300/- was recovered by the I.O. from his possession, but he denied that he was wearing the shirt (Ext. XXVI) and the pair of chappals (Exts. XXVII and XXVIII) or that they had been seized by the I.O. from his possession. He, however, admitted that on the relevant occasion he had a bandage on his head which had been seized by the I.O. from his possession, but added that he had got the bandaging done in the hospital on an earlier occasion since he had sustained some injury on his head in the course of a quarrel in his family. Both the appellants maintained that they had been falsely implicated on mere suspicion.

13. Upon a consideration of the materials on the record, the learned Additional Sessions Judge has found the prosecution case against both the appellants to be substantially true and has rejected their defence. The learned Judge has held that both the appellants had committed the murder of Kapoor in furtherance of their common intention and they had also committed robbery in respect of some of his belongings, namely the box (Ext. XIV) and a sum of Rs. 300/- besides a wrist watch. The learned Judge has accordingly found the appellants guilty u/s 302/34 and Section 394, Indian Penal Code, and convicted and sentenced them as stated above.

14. There can be absolutely no room for doubt that Kapoor was murdered in the compartment of the 15 Up Varanasi Express on the night in question. The signs of occurrence which the I.O. (P. W. 29) and the other witnesses had seen in that compartment and about which they have borne testimony are conclusive on these aspects of the prosecution case. The reports of the Chemical Examiner and the Serologist (Exts. 17 to 17/3) prove conclusively that the stone pieces which the I.O. had seized from near the railway track between Hathidah and Tal junction stations were stained with human blood, which were of the same group, namely, group "A" as also of scrapings of blackish brown substance which the I.O. had collected from the floor of the compartment. It is, therefore, manifest that the murderous assaults on the deceased had taken place in the running train at some point between Hathidah and Tal junction stations. The results of the post-mortem examination conducted by the Police Surgeon (P. W. 13) leave no manner of doubt that a sharp long weapon had been employed by the assailant, whoever he may have been, in causing the various injuries to the deceased, which ultimately proved fatal.

Evidently, the dagger (Karwali) Ext. XX, which the I.O. (P. W. 29) had seized from the compartment in question was the murder weapon, proved by the reports of the Chemical Examiner and the Serologist to have been stained with human blood. Human blood was also found on the holdall (Ext. XVI) of, the victims which the I.O. had seized from the compartment in question. Only with respect to the actual time of the occurrence which has been stated in the first information report (Ext. 10) to be 0.42 hours, I have some doubt, because if the train had been detained at the outer signal of Tal junction for 18 minutes, as deposed to by the Guard (P. W. 9), then even if to allowance is made for the time spent by the train in travelling from Tal junction to Mokamah junction, where it reached at 0.50 hours, it is clear that the occurrence must have taken place at 0.32 hours, if not a few minutes earlier than that. This, however, is not of any material consequence in this case. The time of the occurrence receives ample support from the medical evidence.

It has been proved by the evidence of Pathak (P. W. 16) and Nathan (P. W. 25), supported by the evidence of the driver (P. W. 8), the Guard (P. W. 9) and the T.T.E. (P. W. 23), that the murder was discovered at the outer signal of Tal junction where the train had stopped on account of want of line clear signal as also upon somebody having pulled the northern alarm chain of the first class compartment in question. Upon the materials on the record, I feel satisfied that the prosecution case with regard to the factura, the time and the place of the occurrence is substantially true.

15. The material question for determination in this case is whether the appellants had taken part in the murder and robbery. There is no eye witness deposing to the complicity of the appellants in the crime, but a number of circumstances have been relied upon by the prosecution for the purpose of proving the guilt of both the appellants.

16. The first circumstance which the prosecution has sought to prove is that both the appellants had boarded the compartment of the deceased at Barahiya station and had got down from it with the box (Ext. XIV) of the deceased when the train had suddenly stopped at the outer signal of Tal junction. The witness who has deposed to these facts is Nathan (P. W. 25), whose evidence has been substantially corroborated by his fellow passenger Thakur (P. W. 16). A substance of their evidence has already been given above while reciting the prosecution case. The relevant facts which emerge from the evidence of these two witnesses are these:

(i) That they had both seen three or four persons moving about on Barahiya platform near -about their compartment which was to the adjacent west of compartment D. P. W. 25 had seen a bandage round the head of one of them and he had subsequently identified him as appellant Rajendra. According to P. W. 16 also, one of those three or four persons had something like a bandage wrapped round his head.

(ii) P. W. 25 had seen the aforesaid three or four persons entering into the compartment D when the train had started moving along Barahiya platform. P. W. 16 had not actually seen them entering into the said compartment, but he had heard them giving a knock at the door of that compartment obviously with a view to get it opened.

(iii) When the train stopped at the outer signal of Tal junction, evidently soon after the murderous assaults on the deceased, P. W. 25 saw at least two persons getting down from compartment D, one after another, and the second of these persons was seen by him to be taking away a box and running away towards the compartment of the Guard on the rear side of the train. This was the same man who had a bandage tied round his head, and he was wearing a shirt and a dhoti. P. W. 25 had seen him in the light of his compartment and also of the adjoining first class compartment. As already stated, P. W. 25 had later identified appellant Rajendra as the person who had a bandage tied round his head and the same man whom he had seen getting down from the compartment D with a box.

(After discussing the evidence of P. W. 25 in Paras 17 to 20, His Lordship concluded:) I, therefore, hold that P. W. 25 has given true evidence in this case and that it has been proved beyond all manner of doubt that at least appellant Rajendra was among those who had entered into the compartment D at Barahiya, and got down from it at the outer signal of Tal junction immediately after the murderous assaults on the deceased, and carrying away a box from there, he had gone towards the brakevan on the rear side of the train.

21. The second circumstance upon which the prosecution has relied with a view to prove the complicity of the appellants in the crime is that both the appellants had got down at Mokamah junction from, a third class compartment near the guard's brakevan with a box (Ext. XIV) belonging to the deceased, which they had left behind on the platform near office godown of the train engine's office from where it was seized by the I.O. (P. W. 29) only about ten minutes after the train had reached Mokamah junction. A substance of the evidence of Chandrasekhar (P. W. a), who has deposed to this fact, has also been given above while setting out the prosecution case. There can be no doubt that the box (Ext. XIV) of the deceased which must have been in his compartment was found lying abandoned at the platform at Mokamah junction until it was seized by the I.O. (P. W. 29) from there. It is manifest that somebody is certainly responsible for taking out the box (Ext. XIV) from the compartment of the and putting it at the platform near the examiner's office or godown. Therefore, the for consideration is whether the evidence of P. W. a who has identified both the appellants in this context can safely be depended upon. (After discussing the evidence in Paras 22-25, His Lordship concluded:) The second circumstance upon which the prosecution has relied in order to prove the complicity of the appellants in the crime has thus been satisfactorily proved.

26. The evidence of Bulu Pathak (P. W. 7) provides the third link in the chain of circumstantial evidence which has been brought against the appellants and which

is to the effect that after having proceeded towards the western side of the train, both the appellants had boarded a third class compartment near the engine. It was in the same compartment in which P. W. 7 was proceeding to Bakhtiarpur, where his daily duty hours were from 6 a.m. to 4 P.M. (After discussing the evidence, in the rest of the para and para 27, His Lordship concluded:) I am, therefore, of the opinion that the conduct of the appellants in hastily boarding the compartment of P. W. 7 and talking in the aforesaid manner and then suddenly leaving that compartment by the wrong side of the train, in spite of being in possession of tickets tip to Bakhtiarpur, was wholly inconsistent with their innocence (28) I have already mentioned the various steps which were taken to apprehend the culprits and have set out in detail the circumstances and the manner in which both the appellants were ultimately arrested while they were both sleeping covering their bodies in the passengers' shed, where P. W. 7 had identified both of them as the very persons whom he had seen a little before in third class compartment near the engine. The fact of I the appellants' arrest at that place is not in dispute nor the fact that when they were brought before the I.O. (P. W. 29) in custody, they had handed over to him their respective tickets (Exts. XXX and XXXI) which were found to be consecutive serial numbers 5582 and 5583. This was really an indication of the fact that both the appellants were together from Barahiya itself and had purchased their respective tickets at one and the same occasion. Their association with each other from Barahiya until their arrest in the passengers' shed at Mokamah junction has thus been proved beyond doubt. I have also set out at length the articles which the I.O. (P. W. 20) had recovered from the possession of both the appellants as a result of their personal search made in the presence of two witnesses, one of whom was Kushmakar Prasad Singh (P. W. 10), and in regard to which the I.O. (P. W. 29) had prepared the seizure list (Ext. 2/8). Kushmakar Prasad Singh (P. W. 10) has fully supported the fact of recoveries of the various articles as a result of the personal search of both the appellants taken in his presence by the I.O. (P. W. 29).

28a. Mr. Nageshwar Prasad has challenged the bona fides of the evidence of P. Ws. 10 and 29 on certain grounds. He has pointed out that while P. W. 10 has deposed that the seizure list was prepared in the police station which was on the down platform, the Search List (Ext. 3/8) shows that it was taken on the UP platform, though P. W. 29 has deposed in Court that he had wrongly written UP platform instead of Down platform in column 2 of the search list (Ext. 2/ 8). In my opinion, the evidence of P. W. 29 given in Court is correct since he had clearly mentioned in column 2 of the search list (Ext. 2/8) that the place of search was the UP platform near the police station, which, as the evidence of P. W. 2 clearly shows, was situate on the western corner of the Down platform. Evidently, the UP platform could not have been near the police-station and, therefore, the word "UP" mentioned in Ext. 2/8 was clearly a mistake for the word "Down", as P. W. 29 also has deposed. There is, therefore, no discrepancy in the evidence with regard to the actual place of search.

29. Mr. Nageshwar Prasad then contended that the manner in which the entries were made in the Search list (Ext. 2/8) relating to the recoveries of some of the articles from the possession of each of the two appellants is highly suspicious and detract from the authenticity of the search list (Ext. 2/8). The fact is that the entries relating to the recovery of "one pair black shoes with bloodstained on left skoe sole and its inside" as one of the three articles seized from the possession of appellant Harikant and of "one check full shirt, one pair black Sandle suspected to contain bloodstains on left sole" among the article seized from the possession of appellant Rajendra, appear to be in smaller letters as compared to the entries made in the other portion of the search list (Ext. 2/8). But merely because these entries appear in smaller letters, there is no- reason to think that they were subsequent additions which the I.O. (P. W. 29) had made in the search list. The I.O. (P. W, 29) has frankly owned the aforesaid manner of the entry made in the search list (Ext, 2/8) and has added that he wrote the whole thing at one and the same time. No questions were put to P. W. 29 to enable him to explain the reason why he had made the entries in the search list in the manner aforesaid, and I am. therefore, unable to entertain any suspicion as to the bona fides of the search list (Ext. 2/8) on the mere ground that certain entries therein were made in smaller letters. Besides, the evidence of Kushmakar Prasad Singh (P. W. 10) gives some explanation of the fact. He has deposed:

Some words are written at one place in the list in small letters Says. They were written at the time of preparing the list. They appear to be small letters.

Some words are in small letters in the list, near the place where the description of shirt and chappal is given.....

At the time of preparing the list the S.I. of Police got up once and inspected and thereafter with another pencil he wrote in between in the aforesaid small letters.

I affixed my signature with the first pencil. Other witnesses had also used the first pencil.....

The second pencil was also on the table which the S.I. of Police picked up by mistake.....

In view of these facts elicited from P. W. 10 in his cross-examination, I have no reason to entertain any doubt whatsoever as to the bona fides of the search list (Ext, 2/8) relating to the recovery of the various articles from the possession of the two appellants. It may be pointed out that appellant Rajendra at any rate has admitted in his statement u/s 342, Code of Criminal Procedure, that besides the ticket and his bandage, the I. p. had seized a sum of Rs. 300/-from his possession, a fact which is to be found mentioned in the search list (Ext. 2/8) itself.

30. An argument was also advanced by the learned Counsel that P. W. 10 was not an independent witness since he was a railway contractor. But there is no force in this argument. Merely because P. W. 10 was a railway contractor, it

cannot be assumed that he had any interest in the present prosecution or he was under the influence of the police. It was also urged that the evidence of P. W. 10 is not consistent with the search list in one respect. It is pointed out that with regard to the dhoti recovered from the possession of appellant Harikant, the search list (Ext. 2/8) shows that it bore bloodstains at two or three places, whereas the evidence of P. W. 10 is that there were sprinkles of blood on it at about ten or twenty places.

This was really a matter of observation and it is quite natural that P. Ws. 10 and 29 had differed in their respective observations. In fact, P. W. 10 has also deposed that "there was blood in sufficient quantity at one place on the dhoti. There were sprinkles at other places". It was really with respect to these sprinkles that P. W. 10 had said that there were blood at about 10 or 20 places. We have ourselves seen the original exhibit (Ext/ XXII) and we are satisfied that the description which P. W. 10 has given is correct. The dhoti (Ext. XXII) did indicate that there were stains on it, at very many more than two at three places.

31. It was also contended on behalf of the appellants that there was undue delay in taking the search of the two appellants, which as the search list (Ext. 2/8) shows, was at 2-30 a.m. while the train had reached Mokamah junction 0.50 hours. This argument, however, ignores the fact that after the train had arrived at Mokamah junction, various steps were taken until the time when the appellants were arrested and their personal searches were taken. The first information report was lodged at 0.55 hours. The box (Ext. XIV) was seized at 1 a.m. In the meantime P. W. 7 had seen the appellants in his compartment after which he had contacted P. W. a and both of them had taken steps to have the tickets of the appellants checked by a Travelling Ticket Inspector.

Thereafter P. W. 7 had contacted the Assistant Sub-Inspector (P. W. 15), who along with the Havildar (P. W. 26) had visited the compartment of P. W. 7 and not finding the suspects there, he had deputed the Havildar (P. W., 26) along with P. W. 7 to trace out the culprits. P. Ws. 7 and 28 had made a search for the suspects on the dowa platform and then made inquiry from the rickshaw-puller (P. W. 6) who had told them that he had seen two persons going in haste in the direction of the passenger waiting shed. P. Ws. 7 and 2 had thereafter seen the two persons in the passengers' shed, after which the Assistant Sub-Inspector (P. W. 15) was again contacted and when he came to the passengers' shed and saw the appellants there, then he arrested both of them and was on the point of taking them to the I.O. (P. W. 39), when the latter was met with on the Down platform and then the personal searches of both the appellants were taken. In these circumstances, it is idle to contend that there was any delay worth the name in taking the personal searches of the appellants.

32. It was also contended by Mr. Nageshwat Prasad that there is no guarantee that identical articles which had been seized from the possession of the appellants were sent for chemical examination. It was pointed out that according to P. W. 10, no identification marks were put on the articles in question and the

evidence of P. W. 29 does not show where he had kept the exhibits in question after having seized them from the possession of the appellants. I am, however, unable to believe that the very articles which were recovered from the possession of the appellants as per the seizure list (Ext. 2/8) were not sent to the Chemical Examiner. There could have been no reason for P. W. 29 to have substituted the articles seized by him from the appellants by some-other articles, and, in fact, no suggestion to this-effect was ever made to the I.O. (P. W. 29). There is, therefore, no substance in this contention of the learned Counsel.

33. Finally, it was pointed out that the report (Ext. 16/2) of the Serologist does not show that the blood, though of human origin, found on the dhoti (Ext. XXII) and the shirt (Ext. XXVI) of appellants Harikant and Rajendra respectively was of the same group (Group A) as that on the stone pieces and the scrapings taken from the compartment where the occurrence had taken place, and as such, it has not been proved that the stains of blood found on the clothes of the appellants, were from the wounds of the deceased". It must, however, be remembered that these articles of both the appellants, except, of course, the chappals (Exts. XXVII and XXVIII) of appellant Hajendia, which bore no blood, as the report (Ext. 16/1) of the Chemical Examiner shows, were found to be stained; with human blood, very soon after the occurrence, and it is, therefore, immaterial that the results of the group test were not conclusive.

In the context in which the dhoti (Ext. XXII) of appellant Hari Kant and the shirt (Ext. XXVI) of appellant Rajendra were found stained with human blood so soon after the occurrence, there can be in no manner of doubt that such blood had stuck on their respective clothes at the time of the occurrence itself, when they were present at the scene of the occurrence. An attempt was made to show that at least so far as appellant Rajendra was concerned, it was possible that the blood in his shirt (Ext. XXVI) may have been from his own head injury, the bandage of which was taken out by the I.O. (P. W. 29). But this suggestion is entirely baseless because the evidence of the I.O. (P. W. 29), corroborated by the seizure list (Ext. 2/7) and the evidence of Kushmakar Prasad Singh (P. W. 10), clearly shows that the bandage which was tied round the head of appellant Rajendra had been seized by the police several hours after the seizure of his shirt (Ext. XXVI) at 12 noon of the 24th October 1961, the shirt (Ext. XXVI) having been seized earlier at 2-30 a.m. on the same day. I am, therefore, unable to hold that any blood from the head injury of appellant Rajendra as a result of the seizure of his bandage could possibly have fallen on his shirt (Ext. XXVI) before the latter was seized.

I am therefore, fully convinced that the dhoti (Ext. XXII) of appellant Harikant as also one of his shoes, and the shirt (Ext. XXVI) of appellant Rajendra were found stained with human blood within a few hours of the occurrence, pointing unmistakably to their participation in the murder which was committed in the train.

34. Summing up, the following circumstances " have been firmly established as

against each of the two appellants:

(i) That appellant Rajendra had entered into the compartment D at Barahiya along with two or three others immediately before the crime had been committed and that he was seen coming out of that compartment with a box and going from that compartment towards the rear side of the train as soon as it stopped at the outer signal of Tal junction, which was immediately after the murder;

(ii) That both the appellants were seen taking the box (Ext. XIV) and keeping it on the platform in front of the train examiner's office. The box (Ext. XIV) unmistakably belonged to the deceased, as his wife (P. W. 1) identified it, apart from his name being written on it. Since it was found lying on the Up platform of Mokamah junction with blood stains on it, it follows that it had been removed from the compartment of the deceased after disabling him. This must have been the very box which Rajendra was seen by P, W. 125 to be carrying out of the compartment of the deceased at Tal junction out-signal:

(iii) That thereafter both the appellants were seen in the third class compartment near the engine where they were talking about the murder in an unusual manner and thereafter they had both suddenly left that compartment by the wrong side of the train and fled away to the passengers' waiting shed at Mokamah junction where they, were arrested by the police;

(iv) That both the appellants were in the company of each other, possessing consecutive third, class tickets, right from Barahiya up to the time-of their arrest at Mokamah junction; and,

(v) That soon after the appellants were arrested, human blood was found on the dhoti and one-of the shoes of appellant Harikant, and on the-shirt (Ext. XXVI) of appellant Rajendra, evidently having stuck on these articles at the very time-when, the murder was committed.

35. The question now is what conclusion can reasonably be drawn from these circumstances.

36. Mr. Nageshwar Prasad IAS argued that since P.W. 25 saw appellant Rajendra in the police lock up at Mokamah after his arrest, he stepped him out as one of the robbers by wrong, association of ideas on seeing the bandage on his head. But there is no reason why P. W. 25 would at all imagine a robber with a bandage on his-Head unless he had seen one. He had no motive to identify appellant Rajendra wrongly. On the-contrary, his identification of Rajendra could be easy since the latter had a bandage on his head. The fact that the evidence of P. W. 25 against: Rajendra is trustworthy, is indicated by the fact that he did not claim to identify the other appellant, although he had seen him also in the police-lock-up.

37. As to the guilt of both the appellants, u/s 394, Indian Penal Code, there can, in view of the aforesaid circumstances, be absolutely no room for doubt. But the fact that they had carried an article of the deceased soon after he had been fatally injured and robbed of some of his valuables, not only raises a strong

presumption that they were also among his murderers, but is conclusive of their guilt of murder, being otherwise wholly incompatible with their innocence. About the explanation of presence of blood on his shirt given by appellant Rajendra, it is quite clear, that it could not have come after his injury had been bandaged. It might, however, be said that blood spots on his shirt had dropped from his head injury before it had been bandaged at Barahiya hospital, but I think it to be highly improbable that with so many blood spots on his-shirt, he would move in the train and leave for Bakhtiarpore, changing train and dropping down. at Mokamah on the way where his Sasural was-and the going to sleep with his companion in the-passengers" shed. Then, he has denied the very-ownership and the recovery of the shirt from his-1-person and, therefore, the question of any explanation of blood spots on it does not arise.

38. Mr. Nageshwar Prasad has then contended that even if the appellants may have committed the offence of robbery, it cannot be inferred" that they had necessarily shared the intention of the assailants in commission of the offence of murder. A number of authorities were cited by the learned Counsel bearing on the question o the application of Section 34, Indian Penal Code. They are AIR 1945 118 (Privy Council) . The State Vs. Ruplal Koeri and Another, , State of Bihar Vs. Lala Mahto and Others, , Fazoo Khan and Others Vs. Jatoo Khan and Another, , Emperor Vs. Mujjaffar Sheikh and Another, and Rajaram Raghu Patil Vs. State, .

Relying on the above cases, the learned Counsel would visualise that the murderer of the deceased might have been only one, and if they were more than one, it might be that the appellants bad only boarded the compartment of the deceased as Irma fide passengers. But even if they had intend--ed to commit the offence of robbery, they might Tiot have necessarily shared the common intention -of other to commit also the murder of the deceased. His main contention is that the evidence does not point to the sure conclusion of the appellants being the murderers or even their sharing among themselves with any other persons the common intention of committing the murder of the deceased.

39. It is hardly necessary to enter into a discussion of the cases cited by the learned Counsel, because every case must depend upon its own particular facts. The principle governing the application of Section 34, Indian Penal Code, is well settled that in order that an accomplice can be made constructively liable for an offence committed jointly by more than one person, it must be established that the criminal act was done in fur- therance of the common intention of all of them. It is true that similar intention or same intention, conceived separately and independently, is not the same as common intention, which postulates preplanning or prior concert or meeting of minds to conceive and do an act. But it is neither necessary, nor, possible, in every case to get direct evidence of a prior concert. A common intention may well develop even at the spot and it has to be gathered from the surrounding circumstances and the conduct of the parties. The question, therefore, whether the appellants are guilty also of the

offence of murder by virtue of application of Section 34, Indian Penal Code, is a question which must be determined with reference to the facts and the circumstances which have been proved in this case.

40. From the facts found in this case, it is manifest that the appellants were among the group of three or four persons who had entered into the compartment of the deceased and at least one of them had carried the dagger (Ext. XX) which must have been employed in commission of the murder. The primary intention of the whole group may have been only to commit robbery, but it is implicit upon the foregoing circumstances of the case that the party must have also conceived to commit murder of the deceased in case of need. They must have conceived that they would also commit murder of the object if he offered any resistance, as the deceased appears to have done.

It is crystal clear that the appellants and their associates had gone prepared to commit murder since they must have anticipated that they would meet with resistance from the victim, particularly because he was a strong man, as the evidence of the wife (P. W. 1) shows, and a tall figure, as the evidence of the guard (P. W. 9) shows, and he was awake since it was at the knock of those three or four persons that the compartment was opened, enabling the intruders to enter into it. One of the party must have brought out the long deadly dagger (Ext. XX) which must have been seen by all before the victim was attacked by any one among them. None appears to have stopped the assailant from committing the act of murder. They could not have been mere spectators of the act of murder in the compartment, otherwise the clothes of these two appellants could not have got the blood-stains from the wounds of the deceased. The fact of the presence of human blood on their clothes right up to the dhoti of one and the shirt of the other, read in the light of their subsequent conduct in carrying away some of the booty of the person robbed and murdered, does unmistakably suggest that the appellants must have also shared the common intention of not only committing the robbery, but also the murder of the deceased.

Holding third class tickets, as they did, the appellants could never have been bona fide passengers in a first class compartment where robbery accompanied with murder had been committed. If they were so, they would not have disappeared and moved about with some booty, talked in a suspicious manner and tried to conceal their persons in the passengers' shed. The murder was undoubtedly committed in the same transaction in which the offence of robbery was committed, and it is, therefore, manifest that the entire group of three or four persons was actuated with the common intention of committing robbery at all costs, and it was really in pursuance of such common intention, which was undoubtedly shared by the appellants, that murderous assaults had been inflicted upon the deceased by one or more of the associates of the appellants, evidently to facilitate the primary design, which was to commit robbery, and which, in fact, was committed at least in respect of the box of the deceased, which the appellants themselves had carried away immediately after the murder.

Upon the facts found, it is impossible to dissociate the crime of murder from the crime of robbery committed in course of the same transaction in which the appellants had undoubtedly participated.

From these facts, the conclusion is irresistible that it was not merely the offence of robbery which the appellants had committed, but also that the murder was committed by one or more of the associates in pursuance of the common intention of all the three or four intruders so as to render all of them, including the appellants, equally liable for the offence of murder, on the footing that the act of one was the act of all. Unless there was a pre-arranged plan to commit the murder, there was no reason why one of the associates of the appellants should have armed himself with the dagger (Ext. XX), which must have been seen by all, at least, when it was brought to attack the deceased in the compartment in which there was electric light burning at the time.

It cannot be reasonably argued that the dagger had remained concealed from the view of any one of the participants in the crime. There is every reason to believe that it was really on account of the fact that one of their associates was armed with the dagger that the appellants were emboldened to participate in the occurrence. The murder was, therefore, committed in pursuance and furtherance of the common intention of all the associates, including the two appellants. I am, therefore, of the opinion that the appellants are guilty of; first degree murder and robbery, and they have been rightly convicted u/s 302 read with Section 34 as also u/s 394 of the Indian Penal Code.

41. for the reasons which I have given above, I uphold the convictions recorded by the learned trial Judge. The murder was committed in a running train and committed in a brutal manner, giving so many blows to the deceased who was a defender, one against three or four, one of whom, at least, had attacked him with a dagger. The murder was pre-conceived. Travels by train, particularly at night, have, by reason of such crimes, become highly unsafe, and it is a fit case in which the maximum penalty of death for both the appellants is indeed called for. I, therefore, confirm the sentence of death imposed upon the appellants, which, in the circumstances of the case, is the only appropriate sentence which the appellants deserve.

42. The appeals are dismissed and the reference made by the learned Judge is accepted.