Privy Council Appeal No. 81 of 1944

Chainchal Singh - - - - - - - - - *Appellant*

v.

The King-Emperor - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JULY, 1945

Present at the Hearing:

LORD GODDARD
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD GODDARD]

This is an appeal by special leave from a judgment of the High Court of Lahore dismissing an appeal by the appellant from a conviction for murder by the Additional Sessions Judge of Amritsar. The question of law which arises and was the ground on which special leave was given is whether the previous statement of a witness for the prosecution made before the committing magistrate was properly admitted at the trial under section 33 of the Indian Evidence Act, 1872. While contending that the statement was properly admitted the Crown submits that even if it ought to have been rejected there was ample evidence justifying the conviction and that accordingly no grave or substantial injustice has been done. Their Lordships have already stated that they will humbly advise His Majesty that the appeal should be dismissed and now proceed to give their reasons.

The appellant was charged before the learned Additional Sessions Judge along with thirteen others with the murder of one Sohan Singh. The Sessions Judge convicted seven of the prisoners and sentenced them all to death, and acquitted the remaining seven. All the convicted persons appealed, and the High Court upheld the conviction and sentence on the appellant; they upheld the conviction of one other of the prisoners but substituted a sentence of transportation for life for that of death and quashed the convictions of the other appellants. The evidence showed that there was undoubted enmity between the murdered man and the appellant and there is also no doubt but that the former was attacked by a considerable number of persons, some of whom were armed with weapons, that he was killed and his body afterwards disposed of so that no trace of it has been found. It has not however been disputed before the Board that there was not ample evidence upon which it could be found that the man was murdered, and the only question was whether the evidence showed that the appellant took part in the murder. The murder took place at the Gorewala well in the village where the murdered man was lying on a cot. There were several persons called who alleged they were eye-witnesses. Among them was a "patwari," Lachhman Das, who happened to be at the village that night in the course of his duties. He was examined before the committing magistrate and there gave evidence in considerable detail showing that the appellant took a prominent part in the attack on the deceased, and he was cross-

examined by counsel for the accused. On 8th December, 1943, the appellant along with the other accused persons was committed for trial to the sessions which were held on 19th January, 1944. On 6th January a summons was served on Lachhman Das ordering him to appear and give evidence at the trial on the 19th. This summons was served upon him by a police officer, Ganda Singh. Lachhman Das wrote on the summons:—

> "Sir, I am seriously ill and am unable to attend the Court. My statement may kindly be recorded at my place of residence."

and gave it to the police officer. He did not appear at the trial and the officer was called and his evidence was as follows:—

> "I was entrusted with the summons issued for the service of Lachhman Das. I found him ill and unable to move from his house. He is suffering from tuberculosis. I got a report to that effect made by the Patwari on the summons."

The Public Prosecutor, on that evidence, applied to have his statement made before the magistrate transferred to the sessions file and read, under section 33 of the Evidence Act. It appears that counsel for the accused stated that he had no objection to this being done and thereupon the learned Additional Sessions Judge admitted the statement. The material provisions of section 33 are in these words:—

> "Evidence given by a witness in a judicial proceeding is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is incapable of giving evidence or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable."

Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the court, and it is only by a statutory provision that this can be achieved. But the court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved. In a civil case a party can if he chooses waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence. In the present case the only evidence was that of the police officer already mentioned and his visit was thirteen days before the trial. The officer was not a proper person to prove from what disease the witness was suffering; he could only say what someone told him. If such evidence as he gave were sufficient it would mean that any reluctant witness could take to his bed when he found there was a likelihood of being served with a witness summons and get excused from attendance by telling the server that he was suffering from some serious complaint. Their Lordships do not mean to lay down that in every case there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. That is not the law in England (see *R.* v. *Noakes* [1917] 1 K.B. 581), and there is no reason for a different rule to apply in India. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness. Here there was no evidence at all except that the policeman found the witness was ill thirteen days before the trial and as he was not competent to speak to the illness their Lordships are of opinion that there was no evidence before the court that he was incapable of giving evidence on 19th January. The learned Additional Judge was no doubt largely influenced by counsel for the accused consenting to the evidence being read, but in their Lordships' opinion that does not do away with

the necessity of the court being satisfied by proof. Neither counsel nor his client could have had any personal knowledge on the subject, unless indeed counsel had recently seen the witness, in which case he could have so informed the court and not merely given a consent. It may be that there are some matters as to which it would be possible for a prisoner to consent to be taken as proved though no strict evidence was given; if there are, as to which their Lordships express no opinion, they could only be such as might reasonably be supposed to be particularly within the knowledge of the accused. Their Lordships accordingly consider that this previous statement was wrongly admitted. Their Lordships would also observe that though in this case the accused was represented before the committing magistrate and the witness was therefore cross-examined, in very many of these cases the accused is not represented at this stage, so while he has the opportunity to cross-examine it is not often that this would be effectively done. This is another reason for exercising great care before admitting a statement.

Next it was contended for the appellant that if the previous statement of Lachhman Das was inadmissible the appeal must be allowed as it was on that evidence that the High Court relied in upholding the conviction. Before this Board will advise His Majesty to allow an appeal in a criminal case on the ground of the misreception of evidence they require to be satisfied that grave and substantial injustice has been caused thereby. In their Lordships' opinion there was ample evidence to justify a conviction in this case apart from Lachhman Das' statement, and they feel no doubt as to the guilt of the appellant. The trial judge who saw and heard the witnesses saw no reason to disbelieve the eye-witnesses on the main points in their evidence. It appears to their Lordships that the main reason the High Court had for not accepting their evidence as satisfactory was that it did not accord in all aspects with that of Lachhman Das, and because he apparently did not see the two principal witnesses, Mula Singh and Mangal Singh, at the scene of the murder, to which he himself was not particularly close. Considering the number of people who were collected at the spot, either as participants in the attack or as onlookers attracted by the uproar, it is no ground for disbelieving witnesses who have given an apparently reliable account and whose evidence was believed by the trial judge, that another witness says he did not see them there, as might well be the case. Another reason given by the High Court for disbelieving Mula Singh was that he gave as a reason for his presence on the scene that he was suffering from dysentery and had gone to the well to relieve himself. The High Court do not believe he would have gone a distance of 600 karams for this purpose. But there was no evidence that his house was so far from the well and he denied that it was. Moreover if the statement of Lachhman Das is excluded it follows that the principal reason given by the High Court for not accepting the evidence of the eye-witnesses, who as has already been said were not disbelieved by the learned judge, no longer exists. Looking at the evidence as a whole their Lordships entertain no doubt that the appellant took an active part in the murder, and they were accordingly unable to advise His Majesty that there were any grounds for quashing the conviction.

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In the Privy Council

CHAINCHAL SINGH

v.

THE KING-EMPEROR

DELIVERED BY LORD GODDARD

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