

1929

BISHESHWAR  
v.  
KING-  
EMPEROR.

he had quarrelled with the approver at a fair. He further put up evidence of *alibi*. The learned Judge and the assessors believed the evidence of identification and disbelieved the evidence produced for the defence. After hearing the appellant's learned Counsel we have arrived at the same conclusion. We do not consider the sentence passed on the appellant excessive and dismiss the appeal.

*Appeal dismissed.*

### APPELLATE CRIMINAL.

*Before Sir Louis Stuart, Knight, Chief Judge and  
Mr. Justice Muhammad Raza.*

1929  
May, 3.

GANGA (APPELLANT) v. KING-EMPEROR (COMPLAINANT-RESPONDENT).\*

*Criminal Procedure Code (Act V of 1898) as amended, section 162—Oral statement made by a person to a police officer in an investigation, whether can be used for contradicting defence witnesses.*

According to the provisions of section 162 of the Code of Criminal Procedure as amended no oral statement made by any person to a police officer in the course of an investigation under this chapter and no record of any such oral statement can be used for any purpose in a court of law in respect of an offence under investigation at the time when such statement was made, except for the purpose of contradicting a prosecution witness, for which purpose only it can be used under special conditions. Such a statement cannot be used for the purpose of contradicting a defence witness.

Messrs. Jagat Narayan, A. N. Mulla and Ram Nath Shanglu, for the appellant.

The Government Advocate (Mr. G. H. Thomas) and Mr. L. S. Misra, for the Crown.

STUART, C. J. and RAZA, J. :—Ganga, Jaggu, Rama Shanker and Dwarka have been convicted by the

\*Criminal Appeal No. 192 of 1929, against the order of Thakur Bachhpal Singh, Sessions Judge of Fyzabad, dated the 4th of April, 1929.

learned Sessions Judge of Fyzabad on a charge under section 302 of the Indian Penal Code and sentenced to death, subject to confirmation by this Court. They appeal. The reference in confirmation is also before us. On the 10th of December, 1928 Nageshar a Brahman who resided in a hamlet of Bhati had left his village early in the morning with his son Baijnath to appear in a case before an Honorary Magistrate in the village of Jajwara some eight miles away. He and his son were answering a charge of house trespass in order to commit an offence, under section 451 of the Indian Penal Code, this charge being brought against them by the police on a complaint of a *chamar*. Three of the appellants Ganga, Jaggu and Rama Shankar had given evidence in this case and they were at the court of the Honorary Magistrate that day for the purposes of cross-examination. Ganga, Jaggu and Rama Shankar went away. They went away at 4 o'clock and at sunset Nageshar and Baijnath returned to their village. It is in evidence that Baijnath pressed on, leaving his father to follow him. It appears that some time that night Nageshar was the victim of a murderous attack with knives which took place under a *mahwa* tree, 320 yards distant from his house. He received severe injuries as a result of which he died the following day.

The case for the prosecution is that the four appellants together with a man called Janga, the brother of Ganga, were waiting for Nageshar on his way home and that they attacked him at about 9 o'clock in the night before he had reached his home. The evidence in support of this story is the evidence of Baijnath who says that while in his own house he was aroused by the cries of his father and that he came out at the time and the place already stated and saw the attack on his father. There is further the evidence of a Brahman called Achebar who says that hearing cries he ran towards the

1929

---

 GANGA  
 v.  
 KING-  
 EMPEROR.

 Stuart, C.J.  
 and Raza, J.

1929

GANGA  
v.  
KING-  
EMPEROR.

Stuart, C.J.  
and Raza, J

spot and met certain men running away from the spot. Both Baijnath and Achebar have named the four appellants and Janga as the men whom they saw. In addition there is what purports to be a dying deposition of the deceased man Nageshar and a mass of oral evidence that Nageshar from the beginning named the five men in question as his assailants. The case has been tried very carefully by an experienced Judge and it is only due to him where we differ with him to explain why the evidence which he considered reliable is not considered reliable by us. The first fact which struck us very forcibly but which has not struck him as forcibly is this. The post-mortem examination of the body of the deceased showed that his stomach contained a pound and a half of *dal* and rice which had hardly been digested. We have emphasized in this Court that too much stress should not be laid upon the condition of the food in a deceased man's body when the question is what time has passed between his death and his last meal. The reason why we do not usually lay great stress on such evidence is that the most recent medical researches have shown that sometimes the process of digestion is very greatly delayed when the deceased is an Indian and the food is vegetable food. But here we consider that we are on firm ground in drawing certain inferences from the fact that this food had hardly been digested at all. We know for certain that the deceased man had left his own village to go to Jajwara which is eight miles away very early that morning. It is most unlikely that very early that morning he would have eaten a pound and a half of cooked rice and *dal*. While he and his son were at Jajwara they would very likely have eaten something but, being Brahmins, if that something had been cooked food, they would have had to cook it themselves, and it was most unlikely that they would cook *dal* and rice by way side. There is no evidence that they took any vessel

for the purpose. Thus the condition of this food in his stomach would appear to us to indicate clearly that he was murdered after he had returned to his village, and after he had partaken of a meal. In other words he was not murdered at 9 p.m., but probably about 11 p.m. and this one fact appears to us sufficient to discredit the evidence of Baijnath, Achebar, and the others. There is thus left alone the fact that the deceased man mentioned the names of the four appellants and the name of Janga as his assailants. Now we have it in the first place that it was a moonless night. It was the night before a new moon. There may have been some light from stars but there was no other light. The deceased met his death under a tree. It is not impossible that in these circumstances he could have recognized his assailants, but there must be a distinct doubt as to whether he could have done so and this doubt is strengthened by the following circumstances. In the first place he mentions the name of Janga. Janga is Ganga's brother and it is in evidence that Janga had been absconding from the village for the last year. It is true he might have returned that night but the inclusion of Janga's name throws a further element of doubt into the case. We next come to the form of the first report and the dying deposition taken. The deceased had been very severely cut about the throat. It was possible for him to speak but it would have been very difficult for him to make a long statement and to make a detailed statement. There is no reason why he should not have been able to give the names of the persons whom he believed to be his assailants, but we are unable to believe that either the first report or the dying deposition were the deceased's unaided efforts. They appear to us to bear every sign of being recorded as answers to leading questions. Those leading questions must have been supplied by Baijnath. There is no reason to suppose that the deceased man did

1929

---

GANGA  
v.  
KING  
EMPEROR.

Stuart, G.J.  
and Raza, J.

1929

GANGA  
v.  
KING-  
EMPEROR.

Shart, C.J.  
and Raza, J.

not give the names of the four appellants as four of those of his assailants, but the anxiety to supply details does not assist towards an acceptance of the correctness of his statement. We thus have it that the only case against the appellants consists of the fact that the deceased man stated that they and Janga were the men who had attacked him. Every attempt has been made to improve upon this story by the addition of details which are not genuine details. The night was a moonless night. The star light may or may not have supplied sufficient means of recognition. The family of the deceased have deliberately chosen to put the attack back some two hours before it actually occurred and the evidence of identification given by Baijnath and Achebar does not convince us. In these circumstances it is impossible to uphold the convictions.

Before we leave this case we have to note one point. The learned Sessions Judge permitted statements made before the police and recorded in the diaries to be brought on the record for the purpose of contradicting the witnesses for the defence. He was not right in adopting this course. Section 162 of the Code of Criminal Procedure as amended is clear on the point. No oral statement made by any person to a police officer in the course of an investigation under this chapter and no record of any such oral statement can be used for any purpose in a court of law in respect of an offence under investigation at the time when such statement was made, except for the purpose of contradicting a prosecution witness. It can only be used for that purpose under special conditions. Such a statement cannot be used for the purpose of contradicting a defence witness.

As a result the appeals succeed, the convictions are set aside and Ganga, Jaggu, Ram Shankar and Dwarka will be set at liberty.

*Appeal allowed.*