

legal or illegal. That question is of no importance in the circumstances of the case.

Hence we dismiss the appeal. The accused is on bail. The bail bond will be discharged.

Appeal dismissed.

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APPELLATE CRIMINAL.

*Before Mr. Justice Muhammad Raza and Mr. Justice
A. G. P. Pullan.*

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DWARKA (APPELLANT) *v.* KING-EMPEROR (COMPLAIN-
ANT-RESPONDENT).*

Evidence Act (I of 1872), section 27—Nothing discovered in connection with the crime from the information given by the accused—Section 27, Evidence Act, applicability of—Motive—Corroboration—Murder case—Evidence of motive or of commission of crime to be considered in a murder case.

Held, that section 27 of the Evidence Act has no application where nothing in connection with the crime is discovered as the result of any information given by the accused.

Held further, that in a case of murder the proper course to adopt is to examine the evidence as to the commission of the crime and not the evidence establishing a motive for the murder. The motive may never be discovered and the suggestion of a motive—possibly a wrong motive—may well lead the Court astray.

A motive can hardly be considered as corroboration of the evidence of an eye-witness.

Mr. N. N. Sinha for the accused.

The Assistant Government Advocate (Mr. Ali Mohammad), for the Crown.

RAZA and PULLAN, JJ. :—Dwarka Kumhar and Thakur Pasi have been convicted by the learned Sessions Judge of Lucknow of the offence of murder under section 302 of the Indian Penal Code. They have been sentenced to death and the sentence is before

*Criminal Appeal No. 489 of 1930, against the order of L. S. White, Sessions Judge of Lucknow, dated the 13th of November, 1930, sentencing the appellant to death.

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us for confirmation. Both of them have submitted appeals from jail in which they entirely deny that they had any part in the crime. Tulshi Pasi, who was a resident of the village of Samesi, was undoubtedly murdered. He received several severe wounds presumably from a *gandasa* or similar weapon. The murder was reported on the 3rd of June at 9 a.m. at the police station Mohanlalganj by the village *chaukidar* of Samesi named Imami. The Sub-Inspector in charge of the police station went to the village which he reached at midday. He held an investigation and sent the body for *post mortem* examination to the Lucknow Medical Hospital. The body was examined by a doctor on the 4th of June, but unfortunately the doctor did not state at what hour he had conducted his examination. It is most essential that the time of the *post mortem* should be recorded, as in many cases it assists the court in determining whether the death took place at the time alleged or not. In this case all that we know is that the body was despatched at 3 p.m. from Samesi 24 miles from Lucknow by *kachcha* road in a bullock cart and that it was examined on the 4th of June. If it was examined in the morning, as we would expect, we would be inclined to think either that 48 hours had not elapsed since the time of death, or that the time stated in the first report and by the witnesses for the commission of the crime is erroneous. It is unfortunate that we can draw no conclusion from the *post mortem* examination except that it appears likely that the murder was committed earlier and not later than the time stated. This fact in itself is of some importance because even if the murder was committed as late as midnight there was an inexcusable delay in making the first report at 9 a.m. The *chaukidar* appears to have waited for four hours before leaving the village and then waited on the road-side until he could catch a motor lorry going to Mohanlalganj. The village being only ten

miles from Mohanlalganj he could easily have reached the police station in the early hour of the morning, and the Sub-Inspector might have commenced his investigation some four hours earlier than he did.

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The learned Sessions Judge who has convicted these persons of murder commenced his judgment by saying that "the first point to be considered is the evidence establishing a motive for the murder." We cannot accept this statement. In our opinion the proper course to adopt is to examine the evidence as to the commission of the crime. The motive may never be discovered and the suggestion of a motive—possibly a wrong motive—may well lead the Court astray. We prefer to commence our consideration of this case with the first report. This report appears to be an unstudied production of a village *chaukidar*. There is in it no suggestion of manufacture and the only suspicion which can be attached to it is that it was made late, and this may certainly be accounted for by the negligence of the *chaukidar* in preferring to wait for the motor lorry rather than proceed direct to the station. The report runs as follows:—

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"Last night Tulshi, son of Doli Pasi, Gorait of Behari Lal, Mukhtar, resident of Samesi was lying in bed at the door of his house. Between the hours of 12 and 1 some unknown person killed him with a *gandasa* and spear. Injuries have been inflicted on his head, arm and neck. Lekhai Pasi a resident of the village was coming back from the place of Ishri Pasi having seen a dance, who seeing Tulshi writhing raised an alarm and then females from inside Tulshi's house cried out. The chain on the outside of the door was fastened. This was unfastened by Tulshi's mother.

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A little later Tulshi died. I do not know if Tulshi made any statement or not.”

The rest of the report is purely formal. When the Sub-Inspector reached the village he found the body in the place where the murder is said to have been committed, that is to say outside the door of the house, which goes by the name of one Lekhai, who is dead, and who was either the uncle or the brother of Tulshi deceased. This house adjoins the house of Tulshi. It is stated that some dried blood was found at the place where the body was lying. It does not appear, and the fact strikes us as remarkable, that Lekhai Pasi has ever been examined either by the Magistrate or the Judge. We do not even know who Lekhai is, but we find from the map prepared by the Sub-Inspector that the house marked No. 7 belongs to Ajudhia and Lekhai Pasi. It is Ajudhia and not Lekhai who has been put forward as the man who found the body first and who indeed states that he was an eye-witness of the crime. There is a second and very important point which we observe in the first report and that is the statement that the door was unchained from the outside by Tulshi's mother. The case which has been believed by the learned Sessions Judge is built up on the facts that Tulshi's wife had been found by her husband to have been unfaithful with Dwarka accused, that Tulshi had on that account refused to eat food cooked by her, that he had brought his mother into his house to cook his food and that she and his wife were both sleeping together in the house on the night of the murder. We cannot understand why, if this was the case, the *chaukidar* should have definitely stated that Tulshi's mother opened the door from the outside. But as to the failure of the courts to examine Lekhai we find an explanation of this in the police diary which we have perused in the interest of the accused, for Lekhai, the brother of Ajudhia is

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there recorded as making a statement to the police which does not show that he himself was the first to see the injured man and therefore is inconsistent with the first report, and further does not in any way bear out the statements made by Ajudhia as to the complicity of Thakur in the crime. Ajudhia himself is the principal witness for the prosecution. He gives evidence incriminating both the accused persons. According to his statement Thakur, who is a Pasi living in a village about eight miles away from Samesi, came to his house on the day preceding the murder, that is to say on the 2nd of June, and while at his house was called by the wife of Tulshi and went with her to Tulshi's house, suggesting no doubt that Tulshi's wife and Thakur were conspiring together to kill her husband. In the evening according to Ajudhia this Thakur suggested to him that they should go to the *nach* or dance at the house of Ishri Pasi which was mentioned in the first report. On the way they called for Dwarka but both Thakur and Dwarka stayed behind on the pretext of wishing to make water and did not go to the dance. It does not appear why they should have stayed behind for the murder is not supposed to have taken place until much later after Ajudhia had gone to bed and after Thakur had come and lain down on the bed beside him. We have read the statement of Ajudhia both in the Vernacular and the English notes prepared by the Judge and there are some discrepancies between the two in matters of detail, for instance, the Judge has written in his note "I was woken up by Tulshi calling out and I saw Dwarka and Thakur struggling with Tulshi. I shouted and I saw Dwarka hit him on the head with a *gandasa*. He told Thakur to beat me and ran at me with a *gandasa* so I ran away. I ran into my house and shouted and the two accused were still there. I went out when I heard other people arriving." In the Vernacular record we do not find any mention of a shout by Tulshi except in the cross-examination.

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Ajudhia is merely reported to have said that he saw Dwarka and Thakur struggling with Tulshi and said "What are you doing?" There is no word to represent "shout" in the Judge's note. In the Vernacular also Dwarka is said to have struck the deceased on the head, not on the neck and it is not said in the Vernacular that either Thakur or Dwarka ran at Ajudhia with a *gandasa*. Moreover the Vernacular record does not show that Ajudhia came out when he heard others arrive but that he came out when they (namely the murderers) had gone. This appears to us to be a strange description of the murder. The murderer or murderers dealt this man five blows with a *gandasa* or a similar weapon, undoubtedly when he was asleep, and to say that two men were struggling with him is a most unnatural expression. No one intending to murder another with a *gandasa*, when he was asleep, would struggle with him. He would strike him standing at some distance from the bed. No doubt if Ajudhia woke up and saw two men struggling with Tulshi who was lying down he might have said "What are you doing?" but this was not a likely remark for him to make if he saw two men killing Tulshi with a *gandasa*. It is true that it was a dark night and we would not have examined the statement so minutely had it not been for the fact that it is in our opinion practically the only evidence against both the accused. The statement too that Tulshi's wife called Thakur is not in accordance with her statement on this point.

The Judge himself had some hesitation in accepting the statement of Ajudhia which, as we have already pointed out, is entirely inconsistent with the first report, and was made only when the Sub-Inspector went to the village leaving unexplained the reason why Ajudhia, when he found his neighbour dying and himself was the first to lift up his head and give him

water, did not at once tell Tulshi's brothers that he had seen and recognised the murderers. The Judge has observed however that he is prepared to believe the statement, if it is sufficiently corroborated and he found as against Dwarka the corroboration first in the existence of a motive and secondly in Dwarka's conduct in getting his sister-in-law to hide the *gandasa* and subsequently in giving it up. As against Thakur he admits that there is no known motive but he finds corroboration in the recovery from Dwarka's possession of a *saluka* or *bandi* which, as the Judge observes, fits Thakur passably well and in the production of a stick and a *lota* with a string which are said to have been left by Thakur at the house of Ajudhia and found next day in the possession of Ajudhia's little boy.

First we shall consider the alleged motive for the crime, although we can hardly consider that a motive is corroboration of the evidence of an eye-witness. Dwarka, who is a Kumhar by caste had partnership with Tulshi in cultivation, and Tulshi's wife Kaunsillia is prepared to say that he was her lover. She says quite definitely that she gave up her love for her husband when she began to love Dwarka. She tells a long story as to how Dwarka was found in the house of Tulshi and escaped eight days before the murder. She also says that on account of this Tulshi wished at first to send her back to her father but finally consented to keep her on condition that his mother came and cooked his food. There is nothing in Kaunsillia's statement to suggest that she bears any love for Dwarka, on the contrary it appears that she wishes to incriminate him as far as possible. She is borne out in her story by the statements of her brother-in-law Hem, by the Mukhia Raghubar and by Ajudhia. But none of their statements goes to show more than this, namely that Tulshi was seriously displeased with his wife because of her misconduct. Admittedly Dwarka has

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a wife who is blind and it does not appear that he ever offered to give up his wife or that he intended to do so. The mere fact, if it is a fact, that he had intimacy with Kaunsillia is not really a motive for the murder of Kaunsillia's husband. His love for her might give rise to some motive for murdering her husband, but if so, we do not know what that motive was. The second point relied upon by the learned Sessions Judge for corroboration is the story of a certain *gandasa*. The *gandasa* is said to belong to Dwarka. Such *gandasas* are in the possession of almost all Indian cultivators. There is nothing to connect this *gandasa* with the crime except that it is one of many thousands of weapons with which that crime could have been committed. It was found in the following circumstances. Dwarka was taken by the police to his own house where in the presence of witnesses he asked his sister-in-law Musammat Mahraja where his *gandasa* was. She took the police party to a field where she pointed out the exact place where the *gandasa* was hidden and Dwarka picked it up. We are unaware how the conduct of Dwarka on this occasion can be used as evidence against him. Section 27 of the Evidence Act has no application because nothing in connection with the crime was discovered as the result of any information given by Dwarka. The Sub-Inspector says very clearly that the place where the *gandasa* was hidden was pointed out by Mahraja. The *gandasa* itself is not proved to be the weapon with which the crime was committed and we cannot take into account any statement made by Dwarka to the police or in their presence to the effect that he had given the *gandasa* to Mahraja. Moreover the evidence of Mahraja is itself hardly credible. Criminals are stated to make foolish mistakes, but we find it difficult to believe that a man having committed a murder with a *gandasa* from which he had removed all incriminating stains would hand it over to his sister-in-law with whom he was on

bad terms with a request that she would hide it. If he wished to hide the *gandasa*, though, why he should have done so we cannot say, he would have hidden it himself, and not asked his sister-in-law to do so so that he might raise up a witness against himself; and Mahraja's own statement is most vacillating. She says in one place that she did not hide the *gandasa* at all but merely put it in the field and it was only in re-examination that she said that she had put a little earth over it. We cannot find in this *gandasa* story any corroboration whatever of the statement of Ajudhia.

As to Thakur the corroboration is seen by the learned Judge to require some explanation. The story is that Thakur, when he went to spend the day with Ajudhia in order to commit a murder in the night, was so careless that he left behind him in Ajudhia's house not only his *saluka* or waistcoat but his stick and his *lota*. It is true that Thakur may have left these articles behind him in Ajudhia's house, but if he did so we should rather think that this was a sign of his innocence than a sign of his guilt. Whether he did so or not is again a matter of some doubt. The story that the little boy took the stick and *lota* into the field next day to play with them and brought them back later seems unlikely and we do not know why Dwarka should have attempted to commit himself by going to Ajudhia's house and asking Ajudhia's wife for the *saluka* which Thakur was said to have left behind. A *saluka* certainly of a striking pattern was recovered from Dwarka's house but the mere fact that it was a passable fit for Thakur is not proof that it belonged to him, and Ajudhia, who is after all the main witness for the prosecution, knows nothing of this striking looking *saluka* and in fact definitely says that Thakur brought only a *chadar*, stick and a *lota* with a string. We can find no room for this *saluka* in the statement of Ajudhia.

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Thakur moreover produces two witnesses who appear to be respectable persons and who maintain that he is the *chaukidar* of one of them and was in his village on duty on the night of the crime. Ajudhia when asked about Thakur says that he is a distant relation of his and that he bore a good character. Yet we are asked to believe that this man is nothing more nor less than a professional assassin who went out to commit the murder of a man of his own *biradri* at the instance of a Kumhar whose only connection with himself is said by Ajudhia to be that Dwarka's blind wife came from the village in which Thakur lives.

Our conclusion in this case is that neither of the accused person is proved to be guilty. Ajudhia's statement was made too late. If what he says is true we cannot understand why he did not make a statement at once. That statement is contrary to the first report which shows no signs of falsehood and if, as, the learned Judge observes, the statement should only be accepted if it receives material corroboration we are of opinion that it has no such corroboration. The alleged motive is in our opinion doubtful. The finding of the *gandasa*, the *saluka*, the stick and the *lota* are not in our opinion evidence, still less proof that either of these persons took any part in this crime. For these reasons we allow these appeals, set aside the convictions and sentences and direct that both Dwarka and Thakur be acquitted and released.

Appeal allowed.