

has taken. Section 2 of the Whipping Act of 1909 only lays down as a general proposition that offenders are also liable to the punishment of whipping in addition to the punishments described in section 53, Indian Penal Code, which do not include whipping; but a comparison of sections 3 and 4 of the Act leaves no room for doubt that in regard to the offences mentioned in section 3, the intention of the Legislature was that whipping should be inflicted, if at all, in lieu of any punishment to which the offender may be liable under the Indian Penal Code, and it is only in case of offences under sections 375, 377, 390 and 391 of the Indian Penal Code, and of abetment of or attempt at an offence under section 375, that a person can be punished with whipping in addition to any punishment that can be awarded under the Indian Penal Code. Theft under section 380, Indian Penal Code, is included in the offences mentioned in section 3. Therefore an offender under section 380, Indian Penal Code, can be sentenced to whipping but only in lieu of the punishment of imprisonment or fine to which he is liable under the Code.

I, therefore, accept the reference and set aside the sentence of whipping passed on Sheo Narain and Lal Ji. Let the record be returned.

*Reference accepted.*

### APPELLATE CRIMINAL

*Before Mr. Justice Ziaul Hasan, Acting Chief Judge, and  
Mr. Justice J. R. W. Bennett*

KING-EMPEROR (COMPLAINANT-APPELLANT) *v.* MENDAI  
AND OTHERS (ACCUSED-RESPONDENTS)\*

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July, 26

*Murder charge based on purely circumstantial evidence—  
Evidence—Circumstantial evidence, when sufficient to base  
conviction for murder—Circumstantial evidence, value of.*  
Where a charge of murder is based purely on circumstantial evidence that evidence must point conclusively to the guilt of the accused and must practically exclude the possibility of

\*Criminal Appeal No. 148 of 1939, against the order of Mr. Bhagwat Prasad, Sessions Judge of Bara Banki, dated the 24th February, 1939.

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the murder having been committed by other persons. It must be such as to show that within all human probability the act must have been done by the accused. Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though no explanation of them is forthcoming. *Pakala Narayana Swami v. Emperor* (1), distinguished, *Arajalli v. Emperor* (2), *Gurdit v. Emperor* (3), *Muhammad Ali v. Emperor* (4), *Barindra v. Emperor* (5), and *Chiraguiddin v. Emperor* (6), relied on.

Mr. H. S. Gupta, *Government Advocate*, for Crown.

Mr. S. S. Nigam, for the accused.

ZIAUL HASAN, A.C.J. and BENNETT, J.:—This is an appeal by the local Government under section 417 of the Code of Criminal Procedure against the judgment passed by the learned Sessions Judge of Bara Banki acquitting Mendai, Bharosey and Ishwar Din with the concurrence of all the assessors on a charge under section 302 of the Indian Penal Code.

The charge against these three persons was that on or about the 20th October, 1938, at a village called Pirpur, police station Kothi, they committed murder by intentionally causing the death of a man named Lachhman Pasi.

The prosecution allegation was that the accused Mendai, who, like the other accused, is a Pasi by caste, was on such terms of enmity with three persons, named Bikram Singh, Sitla Bakhsh Singh, and Chakkar Pasi, that he determined to kill the deceased Lachhman, with whom his relations had previously been friendly, and implicate his enemies in the murder. To this end, it was alleged, he induced the other accused, Bharosey and Ishwar Din, to lend him their assistance.

The case against the accused was entirely one of circumstantial evidence. The learned Sessions Judge accepted the prosecution evidence which indicated

(1) (1939) O.W.N., 282.

(3) P.L.R., 1909.

(5) (1910) 14 C.W.N., 1114.

(2) (1926) 98 I.C., 102.

(4) 10 I.L.J., 525.

(6) (1914) 18 C.W.N., 1144.

the existence of a conspiracy between two of the accused, Mendai and Bharosey, to implicate Bikram Singh, Sitla Bakhsh Singh, and Chakkar Pasi in the murder. He also accepted evidence which showed that the three accused were seen with Lachhman Pasi on or about the day when he was probably murdered. But while concluding that it was highly probable that they committed the murder he held that their guilt was not proved beyond doubt, since the possibility of the murder being committed by some one else was not excluded by the prosecution evidence. He further observed that it was possible that any one of the accused might not have been a party to the murder, the prosecution evidence not justifying the conclusion that they must all have been concerned in it.

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A report by the accused Bharosey (exhibit 1), made to the Superintendent of Police, Bara Banki, on the 25th October, 1938, led to the discovery of Lachhman's body in a well situated in a grove called Kumharon-ka-Bagh in the village of Pirpur early the following morning. The body was taken out under the instructions of Thakur Bishal Singh, Station Officer at Kothi, who subsequently investigated the case. The accused Bharosey was present when the body was recovered and according to the evidence of this Police Officer it was Bharosey's conduct at the time that directed suspicion against himself and the other accused.

The medical evidence showed that death was due to strangulation, this being probably effected by tightly tying strips of clothes round the deceased's neck. The medical evidence further showed that death had probably occurred about a week before. The *post mortem* examination was performed on the evening of the 26th October. As we have mentioned the charge alleges that the murder was committed on or about the 20th October, this being the date suggested by Bharosey's report. The learned Government Advocate has suggested that it is

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rather more probable that it took place on the 19th October.

It will be convenient first of all to show why, if the prosecution case is true, Mendai should have selected Lachhman as the most appropriate victim to be the instrument of his vengeance on Bikram Singh, Sitla Bakhsh Singh and Chakkar Pasi. Lachhman was married to a woman named Mst. Paraga, who is one of the principal witnesses (P. W. 1) in the case. They had a daughter, named Mst. Parbata, who has also given evidence in the case (P. W. 2). Mst. Parbata was originally married to a man named Sri Ram. According to her evidence Sri Ram was a very young man and was unable to support his wife. So she left him and returned to her father's house. Early in 1938 she went to the house of a man named Ratan, and lived with him for about two months, leaving him then as he already had a wife, and she could not on this account get on well with him. Later in 1938 she went, she said, to live with a man named Jhabbar. She gives the time of this as July, 1938, but it is probable that it was some time before. It is proved that on the 26th May, 1938, her father, the deceased Lachhman, made a report (exhibit A-3) at the Kothi police station of an offence under section 498 of the Indian Penal Code, against four persons of a man named Sarnam. According to this report the accused were Chakkar, Suraj Bali, Ramphal and Jagannath. It has been suggested by the learned Government Advocate that Jagannath is a mistake for Jhabbar. Jhabbar also is a son of Sarnam and other evidence suggests that it was intended to implicate Jhabbar. According to this report on the morning of the 26th May, while his daughter, Mst. Parbata, was engaged in irrigation work, all four persons accused therein came and ran away with her "in connexion with some love affair". There was apparently some inquiry on this report and a finding that Mst. Parbata had gone away with one or more of the accused of her own accord.

It was admitted during the trial that she had been living with Jhabbar since this alleged occurrence as his wife. Mst. Paraga deposed that her husband agreed to Jhabbar marrying Mst. Parbata and affected ignorance about the complaint. So also did Mst. Parbata. Possibly the matter was compromised on these terms. It appears from the evidence of the investigating police officer that some complaint was subsequently filed by Lachhman on the 13th June, 1938. This was sent to the Sub-Inspector for report and he reported that it was not true. This complaint has not been filed and its exact nature is not known.

It is further shown, however, by the prosecution evidence that a complaint, purporting to emanate from Lachhman, was sent to the District Magistrate by registered post in October, 1938. This is exhibit 4. The prosecution evidence suggests that it was despatched from Ibrahimabad, the village of the accused Mendai, on the 17th October. The report refers to the previous complaint and alleges that Chakkar, Sarnam, Suraj Bali, Jhabbar, and Phalli, Pasis of Narainpur, had forcibly carried away Lachhman's daughter in the previous *Asarh* and were still keeping her confined in their house. Lachhman had previously made a complaint which was dismissed and now these persons named in this report were on the look-out to kill him.

It will be observed that this report suggests that the alleged abduction of Mst. Parbata took place in *Asarh* which corresponds to the latter half of June and the first half of July. Actually, however, the first report made by Lachhman shows that the incident took place in May. Possibly the previous complaint of Lachhman referred to is that of the 13th June.

Mst. Paraga has explained in her evidence how this application came to be made. She stated that the accused Mendai came to her house and persuaded her husband to go with him to Ibrahimabad. On his return she asked her husband why Mendai had taken him to

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Ibrahimabad, and he said that Mendai got an application written and induced him to put his thumb-mark on it. He did not know what the application was. The application had been posted.

There is also another witness, named Mathura (P. W. 8), who has given evidence about this exhibit 4. This witness deposed that he saw Mendai and Lachhman at Ibrahimabad about the time in question and saw Mendai giving a yellow paper to Lachhman and heard him ask Lachhman to go to the post office and despatch it by registered post. Lachhman, he said, went towards the post office. In cross-examination he committed himself to the statement that Lachhman put the paper in the letter box, which cannot be true, since the application was received by registered post. The witness further identified exhibit 4 as the paper which he saw in Lachhman's hand. We do not think that any reliance can be placed on Mathura's evidence.

Mst. Paraga further stated that on the following day Mendai came to their house and asked her husband to go with him to the Congress office at Lucknow and make an application there complaining that Bikram Singh, Sitla Bakhsh Singh and Chakkar Pasi wanted to implicate him falsely in some case. Her husband at first refused, but was finally induced to go. It may be noted here that Lachhman had apparently no grievance against Bikram Singh and Sitla Bakhsh Singh. He had at one time a grievance against Chakkar Pasi but it is doubtful whether this still existed in October.

In pursuance of this suggestion to make an application at the Congress office at Lucknow the accused Mendai and Bharosey came, Mst. Paraga stated, on the following day, which would apparently be the 19th of October, and took her husband away with them, promising to pay all his expenses. Her husband did not return and she did not see him alive again.

Two days later, according to the evidence of Mst. Paraga, Mendai came alone to her house and said that he

had left her husband at the Congress office in Lucknow, the Congress people having advised him to stay there for three or four days. Mendai asked her to accompany him to the Court of the Deputy Commissioner, Bara Banki, and make an application there, saying that her husband had advised this. He did not tell Mst. Paraga the nature of the proposed application. He promised to pay all the expenses of her journey.

Mst. Paraga accordingly accompanied Mendai to Bara Banki on the 21st October. According to her evidence she sat at some distance from him under his instruction while he got an application written, the contents of which she did not know. He made her put her thumb-mark on this and present it in court.

The application which Mst. Paraga made on the 21st October, is exhibit 2. It purports to be against seven persons, but does not allege an offence under any particular section of the Penal Code. This is possibly the reason why Mst. Paraga's statement was not recorded by the court. The accused persons are the four sons of Sarnam referred to above, Chakkar, Suraj Bali, Ramphal, and Jhabbar, and three other persons, Putti Lal, Bikram Singh and Sitla Bakhsh Singh. Putti Lal does not appear elsewhere in the case and there is nothing to show why he was implicated. According to this report the four sons of Sarnam had abducted Mst. Paragata in *Asarh* and were still keeping her. About this Mst. Paraga's husband had previously made an unsuccessful complaint. Subsequently her husband had made an application in the Congress office and on the previous day Mst. Paraga and her husband were returning home when all the seven accused persons met them at a place called Chiraiya Bagh, beat her husband and forcibly carried him away. It was apprehended by Mst. Paraga that they might fabricate some case and implicate him in it, or they might kill him. She herself had effected her escape when her husband was taken away.

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With regard to this complaint we have the evidence of the petition-writer Mahesh Prasad (P. W. 6) who wrote it. He deposed that it was written by him at the instance of Mendai, both Mendai and Mst. Paraga sitting near him at the time. Mendai gave him the facts and Mst. Paraga affixed her thumb-mark at his bidding. In cross-examination the witness said that Mendai stated the facts loudly in the hearing of Mst. Paraga. This is not admitted by Mst. Paraga who denies all knowledge of the contents of the application. For the Crown it has been suggested that Mahesh Prasad, being a petition-writer, was unwilling to admit that the contents of the report were not read out to Mst. Paraga. He deposed that it was read out and explained both to Mendai and Mst. Paraga before Mst. Paraga affixed her thumb-mark. We are inclined to agree with the counsel for the Crown that the evidence of Mahesh Prasad on this point in cross-examination is of doubtful reliability. There is no evidence to support the allegations made in this report of Mst. Paraga, and it seems likely that it was concocted by Mendai alone. It would appear from it that Lachhman was attacked on the 20th of October, and Mendai may have been anxious to suggest this date rather than the 19th of October, when he is shown to have gone away with Lachhman with the avowed intention of proceeding to the Congress office at Lucknow.

There is no reason to doubt that Mendai took Mst. Paraga to Bara Banki on the 21st October, for in addition to the evidence of Mahesh Prasad we have the evidence of the *ekka* driver who took them (Majid P. W. 18) and also of the *ekka* driver who brought them back (Nanhey P. W. 21). Further an application (exhibit A-2) was made by Mendai at Bara Banki on the 21st October in connexion with the case pending against him. Mendai admitted being at Bara Banki on this day and seeing Mst. Paraga there, but he denied that he had taken her and had assisted her in making the complaint. He also denied that he had taken Lachhman to Ibrahimabad or to the Lucknow Congress office.



Bharosey and Ishwar Din live in the same village and according to the police evidence are half brothers. There is some evidence that they were employed by Mendai as his labourers and there is also some evidence, though it is not very strong, that they were in some way related to him.

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Bharosey denied in the Magistrate's court, but admitted in the Sessions Court, that the report (exhibit 1) about the murder of Lachhman was made by him. In this report he said that he had seen seven persons murdering Lachhman and had recognized only three of them, namely Bikram Singh, Sitla Bakhsh Singh and Chakkar Pasi. The prosecution suggestion is that this report was made by Bharosey at the instigation of Mendai. If the prosecution case is true, the body of Lachhman had been lying in the well at Pirpur for five or six days without discovery, and it was necessary in prosecution of the original design of Mendai to draw the attention of the authorities to the body and to implicate his three enemies in the murder.

It is proved by the evidence of Durga Dutt (P. W. 5), a petition-writer, that this report (exhibit 1) was typed by him under instructions from Bharosey and that the accused Mendai was with him at the time. The witness explained that he identified Mendai as the man, though he did not know him before, because on the following day Mendai was brought to him under arrest by the police. There appears to be no reason to doubt this evidence.

We turn now to the reasons suggested by the prosecution for Bikram Singh, Sitla Bakhsh Singh, and Chakkar Pasi being falsely implicated in the murder of Mendai.

It appears from the evidence of Bikram Singh and Sitla Bakhsh Singh (P. Ws. 4 and 7) that a burglary had taken place at Bikram Singh's house early in August, 1938, and that Mendai had been actually seized in Bikram Singh's house by Sitla Bakhsh Singh, who is his neighbour. A report (exhibit 3) was made by Bikram

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Singh at the Kothi police station on the 6th August, 1938, and according to it Mendai Pasi of Ibrahimabad was seized in the courtyard. Sitla Bakhsh Singh is referred to in this report as coming up with other persons and seizing Mendai. Sitla Bakhsh Singh further deposed that he appeared as a prosecution witness against Mendai. It is proved that Mendai was prosecuted for this offence and also that he was on bail in October when Lachhman disappeared.

The third person implicated by Bharosey, that is Chakkar Pasi, is the brother of Jhabbar. Chakkar gave evidence as a prosecution witness (P. W. 12) and stated that Mendai and his wife had filed a criminal complaint against him to the effect that he had enticed away Mendai's wife, Mst. Bhagwanta. For the prosecution the judgment in this case was filed (exhibit 5). It shows that the complaint of Mst. Bhagwanta against Chakkar, Suraj Bali and Sarnam under section 342 read with section 365 of the Indian Penal Code was decided on the 4th January, 1937, the accused being discharged under section 253 of the Code of Criminal Procedure.

It will thus appear that Mendai had a clear motive for implicating Bikram Singh, Suraj Bali and Chakkar in the murder.

If proceedings were taken against Bikram Singh and Sitla Bakhsh Singh for the murder of Lachhman, it might be difficult for them to prove the case of burglary against Mendai.

There is other evidence also which supports this part of the prosecution case. According to that case Bharosey was induced by Mendai to implicate these three persons, Bikram Singh, Sitla Bakhsh Singh and Chakkar, but a difficulty arose from the fact that Bharosey was not previously acquainted with Bikram Singh and Sitla Bakhsh Singh and might therefore have difficulty in identifying them.

The prosecution evidence suggests that to meet this difficulty Bharosey was sent by Mendai to the village of

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Bikram Singh and Sitla Bakhsh Singh, ostensibly to purchase a mare from them, but in reality to become acquainted with them. A witness named Umrao (P. W. 10) deposed that Mendai came to him some five or seven days before the Sub-Inspector of Police took his evidence, and introducing Bharosey as a Kurmi of a village called Bhilwal, asked him to take Bharosey to Sitla Bakhsh Singh and Bikram Singh to purchase their mare. Mendai explained that he did not want to go himself to the house of Bikram Singh because of the criminal case which was proceeding between them. The witness Umrao accordingly took Bharosey to the houses of Bikram Singh and Sitla Bakhsh Singh. They said that they had got no mare for sale and so Umrao and Bharosey returned. This story is supported by the evidence of Bikram Singh and Sitla Bakhsh Singh. An attempt has been made by the learned Counsel for the accused respondents to throw doubt upon it, but we do not think that there is sufficient reason to reject it.

In our opinion the prosecution have succeeded in establishing beyond reasonable doubt that Mendai at least had a strong motive for implicating Bikram Singh, Sitla Bakhsh Singh and Chakkar Pasi in the murder, and though the actual report against them was made by Bharosey it is extremely likely that this report was instigated by Mendai. There is nothing in the evidence which we have so far examined to implicate Ishwar Din except that he is related to Bharosey, lives in the same village, and also works for Mendai.

Other evidence in the case connecting the three accused with the murder was forthcoming, it would appear, soon after the discovery of Lachhman's body. It consists of the evidence of five witnesses, Moti (P. W. 17), Bhagwan Din (P. W. 13), Gharibey (P. W. 14), Buttoo (P. W. 15) and Bhallu (P. W. 9).

The evidence of Moti shows that one morning, either a little after or before the *Dewali*, (the *Dewali* being on the 22nd October) he saw two of the accused, namely

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Mendai and Bharosey, and Lachhman coming out of Lachhman's house and going in the western direction. He did not see Lachhman again.

Gharibey states that on the Wednesday just before the *Dewali* he saw the three accused and Lachhman sitting at a well called Manjha Kuan in the grove called Kumharon-ka-Bagh. He gives the distance from Ibrahimabad as half a mile, but the Sub-Inspector puts it at a mile and a half. This witness was going to Ibrahimabad a *pahar* after sunrise, that is about 8 or 10 a.m. The witness again saw the three accused as he was returning from Ibrahimabad, but Lachhman was not then with them. They were going towards their houses.

Similarly Buttoo says that at about 10 a.m. on a Wednesday he saw the accused and the deceased sitting at the well in this grove. He also was going to Ibrahimabad and on his return from Ibrahimabad he saw the accused going in that direction, Lachhman not being with them.

Bhagwan Din also states that he saw the three accused and Lachhman going from the north towards the south, that is presumably he saw them while they were on their way from Lachhman's house to the grove.

A reference to the sketch plan (exhibit 9) shows that the *abadi* of the village Kotwa where Lachhman lived is to the north-east of the grove which contains the well where Lachhman's body was found.

Finally the witness Bhallu stated that he saw the three accused and Lachhman entering the grove from the north side and that he shortly afterwards heard a cry, "*gau ko chhor do*". After a further period which he describes as a *ghari* he heard a sound "*ghum*". The prosecution suggestion is that Lachhman cried out "*gau ko chhor do*" meaning that he was imploring the accused to let him go, treating him like a cow, and that when the witness heard the "*ghum*" later on it was the sound made by the splash of Lachhman's body in the

well. The witness did not go to the grove to see what had happened and admittedly had no suspicion of foul play.

The learned Sessions Judge observed that he had no reason to doubt the testimony of these witnesses who were not shaken in cross-examination. They are, however, witnesses of low status, four of them being Pasis and the fifth, Buttoo, an Ahir. We are doubtful whether we can rely on their evidence to prove that Lachhman was in the company of the accused on the 19th or even on the 20th October about 10 a.m. in or near the grove in question. In any case we do not think that much reliance can be placed on the evidence of the witness Bhallu that he heard the cry and sound mentioned, since he did not go to the grove to see what had happened and admittedly had no suspicion at the time.

It has been argued for the accused, and the argument is not altogether without force, that it is not very probable that the murder could have been committed at that time of day in a grove not far from which a man was working and close to which there is a path along which people were coming and going. The sketch plan, exhibit 9, shows that the path from Pirpur to Ibrahimabad skirts the grove on the south side, and it was apparently along this path that the witnesses Gharibey and Buttoo were going.

But even if the evidence of these witnesses is accepted as proving that the deceased was in the company of the accused on the morning in question nevertheless we do not think that the reasons given by the learned Sessions Judge for acquitting the accused are unsound. He observes:

“Though it is highly probable that the accused committed the murder of Lachhman, yet it cannot be said that their guilt is proved beyond the shadow of doubt, because the probability of some one else coming and committing the murder is not excluded. Moreover any one

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of the accused may not have joined in committing it. Lachman may have left the company of the accused and gone in another direction and was killed by some one else afterwards. The dead body was not recovered soon after Lachman was seen at the well. It was recovered seven days after. Many things could happen in seven days. The case is therefore not free from doubt whose benefit must be given to the accused."

Substituting the word "possibility" for "probability" we agree with the above. It has been held in numerous cases that where a charge of murder is based purely on circumstantial evidence that evidence must point conclusively to the guilt of the accused, and must practically exclude the possibility of the murder having been committed by other persons. It must be such as to show that within all human probability the act must have been done by the accused. Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though no explanation of them is forthcoming vide *Arajalli v. Emperor* (1), *Gurdit v. Emperor* (2), *Muhammad Ali v. Emperor* (3), *Barinda Kumar Ghose v. Emperor* (4), and *Chiraguddin v. Emperor* (5).

The Government Advocate referred us to the case of *Pakala Narayana Swami v. Emperor* (6), where their Lordships of the Judicial Committee upheld a conviction for murder based on circumstantial evidence. But in that case in addition to the existence of a motive for the murder it was proved that the deceased had been staying at the accused's house; that the trunk in which the body of the deceased was found was procured by the accused; and that the accused had taken the trunk to the railway station where it was placed in the train in which it was subsequently found. The circumstances in the present case were very different, one distinguishing feature being the fact that whereas in the case cited there was a clear attempt by the accused

(1) (1926) 98 I.C., 102.

(3) 10 I.L.J., 525.

(5) (1914) 18 C.W.N., 1144.

(2) P.L.R., 1909.

(4) (1910) 14 C.W.N., 1114.

(6) (1939) O.W.N., 282.

to conceal the body, in the present case the body was only discovered on information given by one of the accused.

The case is certainly one in which the circumstances suggest very strongly that two of the accused may have been either the actual murderers or may have instigated others to murder the deceased, but we cannot convict them on suspicion alone, and in our opinion the evidence which supports the very strong evidence of motive is too weak and too inconclusive to warrant any other finding than that at which the lower court arrived. We accordingly dismiss this appeal.

*Appeal dismissed.*

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### MISCELLANEOUS CRIMINAL

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*Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke*

RAM SHANKAR (APPLICANT) *v.* V. N. SHUKLA  
(OPPOSITE PARTY)\*

1939  
*April, 17*

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*Contempt of Court—Letter written to Magistrate before starting of proceedings under section 107, Criminal Procedure Code, against the accused—No intention of accused to influence Magistrate by his letter—Letter, whether amounts to contempt of Court.*

Every private communication to a Judge for the purpose of influencing his decision upon a pending matter is contempt of Court as tending to interfere with the course of justice.

A letter addressed to a Magistrate headed as "Informatory application for the arrangement of the *Utsav of Janam Ashtmi*" and praying merely that necessary arrangements be made and proper steps be taken, sent a few days before proceedings under section 107, Criminal Procedure Code, were started against the accused on the report of the police, does not amount to a contempt of Court.

Mr. S. C. Dass, for applicant.

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\*Criminal Miscellaneous Application No. 109 of 1938, for orders of the Hon'ble Court as it deems fit in a case pending in the Court of the Sub-Divisional Magistrate, Hardoi.