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members of the unlawful assembly of another offence, nor has the learned Assistant Government Advocate been able to refer us to any such case, and it seems to me clear from the section itself that if a member of an unlawful assembly is to be found constructively guilty of an offence under section 149 it must be the same offence of which the principal is guilty and not some other offence. If the members of an unlawful assembly are not guilty of the same offence as the principal the only reason why they are not guilty is because they do not come within the terms of section 149. If then the rest of the appellants are not constructively guilty of the same offence as Ram Prasad they cannot be found guilty under section 149 at all. This being so they must be acquitted of the offence under section 304/149. They are, however, guilty under section 147, and under this section I would sentence them to rigorous imprisonment for two years each. In the result then the appeal of Ram Prasad is dismissed and the appeals of the other appellants are allowed to this extent that their convictions and sentences under section 304/149 are set aside but they are convicted under section 147 and sentenced to rigorous imprisonment for two years each under this section.

DAS, J.—I agree.

*Order modified.*

## APPELLATE CRIMINAL.

*Before Coutts and Das, J.J.*

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June, 22.

*Hostile witness—question in nature of cross-examination put to prosecution witness by prosecutor, admissibility of—duty of Court.*

\* Criminal Appeal No. 98 of 1922, from a conviction and sentence passed by J. F. W. James, Esq., Sessions Judge of Shahabad, dated the 18th May, 1922.

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The prosecutor is not entitled to put to a witness called by him a question in the nature of cross-examination unless and until the witness has been declared hostile, and, if put, such question, and the answer are inadmissible.

It is the duty of the Court to see that such a question is not put.

The facts of the case material to this report are stated in the judgment of Courts, J.

*Gour Chandra Pal*, for the appellant.

*H. L. Nandkeolyar*, Assistant Government Advocate, for the Crown.

COURTS, J.—The appellant in this case, Jagdeo Singh, has been convicted by the Sessions Judge of Shahabad, under section 302 of the Indian Penal Code, and has been sentenced to transportation for life on a charge of shooting his father, Matadin Singh, about noon on the 15th of January last.

The case for the prosecution is that on the morning of that day Matadin Singh was working at his *kaluhar* (place where sugarcane is pressed). At about noon one Beni Singh met Jagdeo going towards the *kaluhar* carrying a gun and a haversack. Shortly afterwards he met Barhamdeo Singh, a cousin of Jagdeo, running towards the *kaluhar*, he asked him why he was running and Barhamdeo told him that there had been a quarrel between Jagdeo and his father and that Jagdeo had gone and got his gun. He asked Beni to join him in running after Jagdeo which he did. When they came near the *kaluhar* they saw Thakur Singh "trying to stop" Jagdeo. Matadin called out "Jagdeo is always troubling me if he kills me he will suffer for it afterwards". Thereupon Jagdeo pointed his gun at Matadin, fired it and Matadin fell down wounded in the chest. At this time Bachli Ahir, Thakur Singh, Garjan Dusadh and Rekha Ahir had come to the *kaluhar*, Jagdeo reloaded his gun and went off towards the south. Matadin was then found to be dead. Beni told Dwarka Ahir, Chaukidar, what had happened and Dwarka after going to the place and finding Matadin

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dead went off to the *thana* and laid a first information. The Sub-Inspector went to the spot and after making the inquest and sending the dead body for *post mortem* examination he began his enquiry. Jagdeo was not to be found and when his house was searched there was no trace of the gun or the haversack, but on the 30th of January a gun and a haversack were found by one Bali Koiri, a resident of Chaugain, six miles from the accused's village, in his sugarcane field. A warrant and subsequently proclamation and attachment were issued against Jagdeo and he eventually surrendered. I may mention that Jagdeo had apparently served in the army. The reason assigned by the prosecution for the commission of the crime is that Jagdeo objected to his father keeping a woman in the village.

So far as Matadin's death is concerned there can be no doubt that he died from the effects of a gunshot wound in the chest which traversed the lower half of the left lung, the left ventricle of the heart and its covering, the root of the left lung up to the spine at the fifth dorsal vertebra. A portion of a bullet was found in the wound and the shot appears to have been fired from a distance of ten to fifteen yards.

The question is whether Jagdeo fired the shot. The most important evidence in the case is the evidence of the witness Beni Singh. This witness's evidence is to the effect that on the morning of the day of occurrence he had been working at his sugarcane press and as he was going towards his home he met the accused going towards his father's *kaluhar* carrying a gun and a khaki-coloured haversack. The witness went on and a little after he met Barhamdeo Singh who was running after Jagdeo. He asked him why he was running and Barhamdeo told him that there had been a quarrel between Jagdeo and his father and that Jagdeo had gone for his gun. He joined Barhamdeo in running after Jagdeo and when they got near the *kaluhar* they saw Thakur "trying to stop" Jagdeo and presently saw Jagdeo shooting his father. For corroboration of this evidence the prosecution relies on the evidence of

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three witnesses, Jagat Kahar, Rameshwar Ahir and Kadaru Singh. Jagat says he saw Jagdeo going towards the *kaluhar* with a gun shortly before he heard the shot; Rameshwar Ahir deposes to the same effect; and Kadaru Singh says that after he heard the shot he went to Matadin's *kaluhar* and saw Jagdeo there with what he thought was a gun; the witness, however, does not appear to be quite sure of this as his sight is defective. The learned Assistant Government Advocate contends that this is reliable evidence and should be believed and that with certain other evidence and circumstances on which he relies it is sufficient to substantiate the prosecution case.

The question is whether it can be believed and it has been made impossible for us to come to a decision by the way in which the case has been conducted. As I have already indicated Beni's evidence is the most important evidence in the case and it is attacked on three main grounds: (1) that Beni has a motive for deposing against Jagdeo; (2) that he has given different accounts as to the distance from which he saw the occurrence; and (3) that his evidence is inconsistent with the evidence of five witnesses who have been examined for the prosecution.

For reasons which will presently appear I do not propose to discuss the first point. The second ground for disbelieving Beni's evidence is that he stated in his evidence in Court that he was one *rassi* away from the *kaluhar* at the time the shot was fired whereas to the police he stated that he was at a distance of 10 *bighas* or about 400 yards, and it is urged that as there were crops, bushes and trees round the *kaluhar* it is impossible that Beni could have seen the occurrence. It appears from the map which has been prepared in the case that there were crops, bushes and trees round the *kaluhar* but the learned Sessions Judge does not appear to have considered the question of the place from which Beni is supposed to have seen the occurrence or whether it was possible for him to have seen it. There is no evidence on this point and the

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map prepared by the Sub-Inspector is useless. There is also nothing on the record to show where Beni is supposed to have met Barhamdeo. These are very important points which are essential to a proper decision of the case.

COTTIS, J.

The next ground on which we are asked to disbelieve Beni's statement is that his evidence is inconsistent with the evidence of the five witnesses, Thakur Singh, Bachli Ahir, Rekha Ahir, Garjan Dusadh and Barhamdeo Singh who have been examined for the prosecution in this case. All these witnesses are said by Beni to have witnessed the occurrence; further Barhamdeo is said to be the man who met Beni, told him about the quarrel and asked him to go with him; and Thakur is said by Beni to have taken an active part in trying to stop Jagdeo from firing. They all, however, in Court depose that they know nothing about the occurrence and that they did not see Jagdeo either before or after the occurrence. The Sub-Inspector states that they made important statements to him. In these circumstances the obvious course was for the prosecution to declare them hostile witnesses and ask to be allowed to cross-examine them. If the Court allowed this they could then have been cross-examined and their evidence could have been discredited. What was done, however, was that in the case of each of the witnesses, Thakur, Bachli, Rekha and Garjan, the prosecution put a question which could only have been allowed in cross-examination. In the case of Thakur the question was

"Did you then say (that is to the police) I saw the dead body of Matadin Singh and I saw Jagdeo Singh with a gun?"

to which the witness replied,

"No."

It was clearly not open to the prosecution to put a question of this nature to the witness without declaring him hostile and cross-examining him and it was improper for the Court to allow the question. This question and answer were inadmissible and they cannot be taken into consideration. So far as the witnesses

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Bachli Ahir, Rekha Ahir and Garjan Dusadh are concerned we do not know what the question asked by the prosecution was but the replies of Bachli and Rekha were,

“ I did not tell the police that I had seen Jagdeo.”

and the reply of Garjan was,

“ I did not tell the police that I saw Jagdeo Singh going towards south with a gun.”

This evidence is not only inadmissible but it is useless for it could not assist the Court to judge whether the witnesses were denying statements made to the Sub-Inspector or not. As to the witness Barhamdeo he was not asked any question about what he said to the police and the reason which the learned Sessions Judge gives for disbelieving his evidence is that from his demeanour it appeared to him that he was concealing something. The learned Sessions Judge, however, made no such remark at the time of recording the evidence. The result of this is that we have no means of judging whether these witnesses should be believed or not. If they have deposed falsely in Court their evidence could be discarded and the case decided on the rest of the prosecution evidence. As it is, however, we have also these witnesses whose evidence we have no means of testing.

There is other evidence on the record and there are many circumstances which if we were to decide the case now we would have to consider, but I do not propose to discuss the case further because in my opinion it has been so unsatisfactorily conducted that the only course open to us is to direct a retrial.

I would accordingly set aside the conviction and sentence and remand the case for retrial. The case will be transferred to the Sessions Judge of Saran for trial.

DAS, J.—I agree.

*Case remanded for retrial.*