

upon the plaint. But this is not all. Babu Baidyanatheswar Prasad, the Vakil who appeared for the accused in the miscellaneous proceedings, deposes that the accused was the man who came to answer the notice issued by the court. There the accused denied that he was the person who had filed the hand-note or the plaint. Babu Baidyanatheswar had several opportunities of seeing the accused and his evidence cannot be lightly brushed aside.

The result is that, in my opinion, the assessors were fully justified, upon the evidence, in believing the case for the prosecution and the learned Sessions Judge's order must, therefore, be affirmed. The conviction under section 209 of the Indian Penal Code for making a false claim fraudulently and under section 471 of the Indian Penal Code for dishonestly using as genuine a forged hand-note, is upheld. There is no doubt that the accused being himself the plaintiff knew of the fraudulent nature of the claim and of the fraudulent nature of the hand-note. In these circumstances the convictions under both sections are correct and the sentences are not unduly severe.

The appeal is dismissed.

WORT, J. I agree.

### APPELLATE CRIMINAL.

*Before Mullick and Wort, J.J.*

GHANSHYAM SINGH

*v.*

KING-EMPEROR.\*

1927.

ZAHURI  
SAHU  
v.  
KING-  
EMPEROR.

MULLICK, J.

1927.

April, 22,  
25, 26.

*Criminal Trial—Burden of proof—counter case capable of precise proof but not supported by evidence—mere discrepancies insufficient to rebut evidence on oath—Penal Code,*

\*Criminal Appeals nos. 35 and 39 of 1927, from a decision of Rai Bahadur J. Chatterji, Sessions Judge of Saran, dated the 19th of February 1927.

1927.

1860 (*Act XLV of 1860*), sections 304, 109—*Order to beat—deceased assaulted with spear and killed.*

GHANSHYAM  
SINGH  
v.  
KING-  
EMPEROR.

Although, in a criminal trial, the burden of proof lies in the first instance upon the prosecution, yet when evidence has been given on oath by witnesses who profess to have seen the occurrence and who directly implicate the accused and ascribe particular acts to them, the evidence is not discredited merely by reason of a discrepancy here and a discrepancy there or by reason of the absence of an adequate motive or by showing that there may be exaggerations in the story told by the prosecution witnesses. *G* and two others were charged under section 304 of the Penal Code. The evidence showed that one of *G*'s companions was armed with a spear and the other with a lathi; that *G* gave the order to "beat" *P* and that the two other thereupon assaulted *P* so that he died of his injuries. It was contended that the order given by *G* did not include an order to assault *P* with a spear, and, therefore, that he could be convicted only of abetting the offence of causing hurt and not of abetting the offence under section 304.

*Held* that *G* was rightly convicted under sections 304/109 of the Penal Code.

This was an appeal against an order made by the Sessions Judge of Chapra sentencing the appellant Ramkhusi to rigorous imprisonment for ten years for an offence under section 304 of the Indian Penal Code. The appellant Ghanshyam was sentenced to rigorous imprisonment for three years and a fine of Rs. 300 for an offence under section 304 read with section 109 of the Indian Penal Code. The appellant Ramautar was sentenced to rigorous imprisonment for one year for an offence under section 323 of the Indian Penal Code.

The case of the prosecution was that Ghanshyam, who was the president of the panchayat of mauza Sabalpur, set out about 1-30 p.m. on Saturday, the 27th November, 1926 for the house of a kayastha named Ramlagan who resided in another part of the same village. Ghanshyam was accompanied by his relatives Ramautar and Ramkhusi who resided in the same house with him. Ramkhusi was armed with a

spear and Ramautar and Ghanshyam were both armed with lathis. It was said that owing to the conduct of Ramlagan, which will be presently explained, Ghanshyam was annoyed and intended to punish Ramlagan that day. The evidence as regards the previous acts of Ramlagan was this: Ramlagan had a nephew called Ramchandra, a boy of 9 or 10 years of age. Ramlagan alleged that this boy had come under the influence of Audh Behari Singh, the son of Sheodhar, and of Baliram, the younger brother of Ghanshyam. Ramlagan did not approve of Ramchandra's association with these two young men and had been objecting for some time. Shortly before the 25th November Ramchandra disappeared from home. On the 25th November Ramlagan went to the fair at Sonepur which was close to Ghanshyam's house. There he found Ramchandra in the company of Baliram and Audh Bihari. An altercation took place between him and these two young men and he alleged that he gave them a beating.

It was suggested that Ghanshyam was annoyed at Ramlagan's impertinence and that he intended on the 27th November to take revenge upon him.

There were four eyewitnesses in this case, Deoki Singh, Sukhan Singh, Rambaran Singh and Rambadan Singh, and they all deposed to seeing Ghanshyam and his two companions coming from the direction of Ghanshyam's house and meeting the deceased Pardip, also a Babhan of the same village but apparently belonging to a separate faction.

It was alleged by these men that Pardip made some slighting remark about Ghanshyam and twitted him about his abusing his authority as the president of the local panchayat. Pardip next abused Ghanshyam in foul language who thereupon ordered his companions to beat Pardip. Ramautar then struck Pardip with his lathi and Ramkhusi delivered a mortal blow with his spear. It appeared that owing to some peculiarity of conformation the deceased Pardip had his liver on the left side instead of

1927.

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 GHANSHYAM  
 SINGH  
 v.  
 KING-  
 EMPEROR.

1927.

GHANSHYAM  
SINGH  
r.  
KING-  
EMPEROR.

the right and Ramkishun's blow penetrated his liver and intestines and caused almost instant death.

The evidence further was that the village chaukidar Bhajan arrived on the scene almost immediately afterwards but was unable to obtain from Pardip any account of who had caused his injuries. It was said that Pardip was alive but speechless. A stretcher was brought and, according to some witnesses, Pardip died before being placed upon the stretcher, and, according to others, he died on the way to the police-station. Under the orders of Bhajan, Roshan Dusadh another chaukidar of the village, then started for the police-station which was about three miles from Sabalpur. Roshan arrived at the police-station about 2 o'clock and made a communication to the Sub-Inspector which was recorded as a first information, although whatever he knew about the occurrence was mere hearsay.

In the meantime, Deoki Singh and Sukhan Singh set out with the body of Pardip Singh for the thana and arrived there some time about 4 o'clock.

The Sub-Inspector, after having recorded Roshan's information, set out on horseback for Sabalpur and arrived there about 3-30 p.m. He stayed there for about half an hour and then went back to the police-station in order, as he said, to take the dying declaration of Pardip in case he should be alive. He arrived at the police-station about 4 p.m. and found that Pardip was dead and that Deoki and Sukhan were there with the body. At 5 p.m. he took the statements of Deoki and Sukhan and then learnt for the first time that Ramkhusi had killed the deceased with a spear thrust under the orders of Ghanshyam and that Ramautar also had joined in the assault. The Sub-Inspector immediately hurried back to the village and proceeded to the house of Ghanshyam. He did not find any marks of violence in the house; but on the way to that house he noticed at the house of Sheodhar Singh

the gomastha of the village, traces of an attack of some kind. He then went to the house of a chaukidar named Raja Singh and there took down the statement of Ramautar who had several injuries upon his person. In consequence of what Ramautar said, he next sent for Sheodhar and took down a statement from Sheodhar containing a more or less detailed account of an attack upon his house by a large number of villagers. At 7 or 7-30 p.m. he took down the statements of Rambaran and Rambadan. The investigation was continued for many days after that and the result was that the police rejected the account given by Sheodhar and accepted the account given by Deoki, Sukhan, Rambaran and Rambadan and sent up the present appellants for trial.

The four assessors distrusted the prosecution evidence and found all the accused not guilty.

The Sessions Judge in an elaborate judgment came to a different conclusion and sentenced the accused as stated above.

*Sir Ali Imam* (with him *Md. Yunus, Jafar Imam* and *S. Ali Khan*), for the appellants.

*C. M. Agarwala*, Assistant Government Advocate, for the Crown.

MULLICK, J. (after stating the facts set out above, proceeded as follows): Before us the evidence of the four material witnesses has been examined very carefully and subjected to very destructive criticism by the learned Counsel for the appellants.

But after having considered all the matters brought into prominence in the course of the cross-examination of the prosecution witnesses in the lower court and in the address of the learned Counsel before us, I think on the whole that the learned Sessions Judge has taken a right view of the evidence. The fact is that in this case the accused have too unwisely relied upon the abstract doctrine of the burden of

1927.

GHANSHYAM  
SINGH.  
T.  
KING-  
EMPEROR.

26th April  
1927.

1927.

GHANSHYAM  
SINGHv.  
KING-  
EMPEROR.

MULLICK, J.

proof. They had a definite counter case which they put forward before the police on the very evening of the day of the occurrence. It was a clear cut case capable of precise proof. Ghanshyam was a well-to-do man and was the head of the village. Sheodhar, the man who was attacked, was the gomastha of the landlord. The village consists of a thousand houses and Ramlagan, the leader of the kayasthas, represents a very small minority. It was the easiest thing in the world for Ghanshyam to produce conclusive evidence before the trial court of the attack upon Sheodhar's house and of the manner in which Pardip came by his death. Instead of that the appellants have relied upon suggestions, indications and improbabilities for the purpose of discrediting the sworn testimony of the eyewitnesses. It is true that the prosecution must prove their case in the first instance before the accused can be called upon to make their defence; but when evidence has once been given on oath by witnesses who profess to have seen the occurrence and who directly implicate the accused and ascribe particular acts to them, I do not think it will avail the accused merely to rely upon a discrepancy here and a discrepancy there or upon the absence of adequate motive or on indications that there may be exaggerations in the prosecution story. I think in this case something more was expected of the accused and they should have called witnesses to prove on oath that Pardip was attacked not on a path near the houses of the witnesses Rambadan and Rambaran but in the house or outside the house of the gomastha, Sheodhar. The fact is that there is only one version before us of which there is any legal evidence and cross-examination has not materially shaken it.

As to what Sheodhar's account was, we have no idea whatever. It is said that the first information was allowed to be read out at the trial, but we have no knowledge of the contents of that information. I thought perhaps that we should be able to

gather from the statements of the accused what their precise case was; but I find that in his examination in the Session Court on the 12th February Ramkhusi was asked why he had been implicated by the witnesses who had deposed against him. His answer was:

"They have falsely implicated me out of malice. I shall make further statement in writing."

He also stated that he was not in the village at all on the day of occurrence; but no evidence has been given to prove alibi.

Ramautar also was asked the following questions

"Would you at all like to say if Pardip was struck with a bhala to your knowledge?"

*Answer*—"No Sir."

Then he was asked:

"Did you appear as a witness for Sheodhari Prasad before the daroga and supported Sheodhari's story by saying that you had witnessed Pardip being struck with a bhala?"

*Answer*—"I will not say anything further orally. Whatever I have to say I will submit in writing."

Ghanshyam was asked:

"Is it a fact that you admitted your presence at the occurrence and supported the case of Sheodhari made to the daroga as his witness who had seen such an occurrence?"

*Answer*—"No, Sir. I shall file a written statement."

The written statements filed do not give any details. They merely state that the accused have been falsely implicated owing to enmity and that the real truth as to the cause of Pardip's death and the place of the occurrence has been suppressed.

In this unsatisfactory state of affairs I think that unless it can be shown beyond all doubt that the witnesses for the prosecution have broken down, their testimony is entitled to be accepted as a substantially true account of the occurrence.

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The result, therefore, is that I agree with the learned Sessions Judge in believing that the four eye-witnesses are substantially speaking the truth in the court.

1927.

GHANSHYAM  
SINGH  
v.  
KING-  
EMPEROR.

MULLICK, J.

1927.

GHANSHYAM  
SINGH  
v.  
KING-  
EMPEROR.

MULLICK, J.

It may be that the motive alleged was not adequate for so severe an injury, but it is impossible to speculate as to the sufficiency or insufficiency of motive for a criminal act. There may have been other matters of enmity between Ghanshyam on the one hand and Pardip on the other, or it may be that Ramkhusi acted under the excitement of the moment and delivered the fatal blow without thinking what he was doing. In this connection it has to be mentioned that Pardip was wearing wooden sandals. It is suggested that this part of the story is a fabrication; but we have the evidence of the Sub-Inspector that as soon as he came to the place he found the wooden sandals on the road and that they were besmeared with blood. The fact that Pardip was wearing these sandals to some extent supports the case that he was not a member of a mob making a determined attack upon the house of Sheodhar.

As regards the damage to the house, the evidence is that the Sub-Inspector found that some tiles were dislodged from the roof and one of the pillars of the verandah was cut with a sharp-cutting instrument and a picture in the verandah had fallen or been pulled down and the glass of the frame was smashed. He also found some blood marks upon the top of the plinth of the verandah about three feet from the ground. He suspected that in the yard in the front of the house there were blood marks also; but the Chemical Examiner reports that no blood was found in the earth scraped from these places. But the bricks removed from the plinth showed that the smears thereon were human blood. The learned Sessions Judge thinks it possible that after Pardip received his injuries on the road a large number of villagers attacked Sheodhar's house and did the damage found by the Sub-Inspector. With regard to the blood, he thinks that it might have come from Ramautar's injuries. He also observes that between Sheodhar's house and the spot marked B upon the police map there are no traces of any blood at all on the ground but that from B to G a distance of about



128 feet there were several patches, and that the theory that Pardip could not have been injured in Sheodhar's house gains some support from the fact that there are no blood marks between Sheodhar's house and the spot B. In my opinion the evidence in the case is consistent with the theory and on the whole we must hold the learned Sessions Judge's view of the guilt of the accused to be correct.

1927.  
 GHANSHYAM  
 SINGH  
 v.  
 KING-  
 EMPEROR.  
 MULLICK, J.

A point has been made with regard to the conviction of Ghanshyam. It is said that as he gave only the order to beat he cannot be held liable for the results of the act of Ramkhusi and that at most he can be convicted only of the offence of abetting Ramautar in voluntarily causing hurt; but having regard to the fact that Ramkhusi was armed with a spear and Ramautar was armed with a lathi and that Ghanshyam gave the general order to beat, I think it is a reasonable inference that he intended all the results that followed. Ramkhusi would not have attacked Pardip if it had not been for that order and this is the learned Sessions Judge's view and in my opinion it is correct.

The result, therefore, is that the convictions and sentences are affirmed and the appeals are dismissed.

WORT, J. I agree.

### APPELLATE CIVIL.

*Before Dawson Miller, C. J., and Ross, J.*

RAMGULAM SINGH

v.

RAJ KUMAR RAI.\*

1927.

April, 26

*Execution of Decree—execution restrained by injunction—decree set aside and subsequently restored—limitation.*

\*Appeal from Appellate Order no. 314 of 1926, from a decision of S. B. Dhavle, Esq., I.C.S., District Judge of Monghyr, dated the 14th December, 1926, confirming a decision of Babu Badri Narain Ray, Munsif of Begusarai, dated the 5th December, 1925.