

## **Gaya Prasad And Ors. vs State on 31 July, 1953**

**Equivalent citations: AIR1954ALL59, AIR 1954 ALLAHABAD 59**

### **JUDGMENT**

Randhir Singh, J.

1. This is an appeal on behalf of Gaya Prasad, Ram Sundar, Ram Ratan and Sheo Shankar, who have been convicted by the Additional Sessions Judge of Partabgarh and have been sentenced to seven years rigorous imprisonment under Section 307 and to one year's rigorous imprisonment under Section 323, Penal Code.

2. The case for the prosecution was that there was long standing enmity between the appellants on one side and Rameshwar and his son Bindeshwari on the other side so much so that the appellants and Rameshwar had ceased to be on speaking terms. Ultimately a complaint was filed by Ram Ratan and Gaya Prasad against Rameshwar in the Court of a Magistrate in Partabgarh. 11-4-1951 was fixed for the hearing of this case at Partabgarh. The parties are residents of a place about 22 miles away from Partabgarh, and there was a lorry service which touched Derwar bazar and persons of the village, to which the parties belonged, used to catch the lorry plying between Derwa bazar and Partabgarh at Derwa which was at a distance of two miles from the place where the parties resided. Mangla Prasad, son of Rameshwar, was sent early in the morning of the 11th of April by Rameshwar to Derwa bazar to arrange for seats for them for Partabgarh.

At about 7 a. m. Bindeshwari and his father Rameshwar were going to the lorry stand and on the way passed in front of the house of Gaya Prasad. When Bindeshwari arrived near the house of Gaya Prasad, it was alleged by the prosecution, that the appellants and two others, who have been acquitted by the Sessions Judge, came out of the house of Gaya Prasad and started beating Bindeshwari. One of them was armed with a spear and the others had lathis in their hands. Rameshwar, who was some 50 paces behind Bindeshwari, ran up to the rescue of Bindeshwari on seeing the assault. He was also assaulted by the appellants and their two companions with spear & lathis. Rameshwar fell down and the assailants continued to strike him even after he had fallen down. It is also alleged that the assailants shouted that he should be killed.

An alarm was raised by Bindeshwari and Rameshwar and some persons who were near about ran up when the assailants left the place. Rameshwar was taken on an ekka to the police station Jethwar which was at a distance of four or five miles from the place of occurrence. A report was lodged by him at 8. 45 a. m. The details of the incident were mentioned in the first information report and the names of eight persons were mentioned as witnesses besides others who were not named. Investigation was taken up by the police and the Sub Inspector visited the place of occurrence. Ultimately six persons, including the four appellants, were sent up for trial.

3. The defence of the appellants was that Rameshwar and Eindeshwari had been assaulted by some unknown persons at a distance from the house of Gaya Prasad and that as the assailants could not be known, Rameshwar implicated the appellants on account of enmity. The Sessions Judge found the case established against the appellants and convicted them as mentioned above. He entertained reasonable doubt about the complicity of two of the six accused and acquitted them. The appellants have now come up in appeal.

4. The prosecution examined Rameshwar and Bindeshwari, the two persons who had received injuries. The injuries of Rameshwar and Bindeshwari had been examined by the Civil Surgeon when these persons were taken to the hospital. He found a number of injuries on the person of Bindeshwari. He had a contused wound on the top of his head 5"x3/4"x bone deep and a set of six contused wounds on the left side of the head. There were two contused wounds on the right leg and two contused wounds on the left arm. Besides these contused wounds there were a number of contusions on the arms and back. The Civil Surgeon has noted the number of these injuries as 11, but it appears that the injuries were more numerous as he has shown six wounds as one injury and five contusions on the right, side of the back also as one injury.

Rameshwar had an incised wound bone deep on the right side of the forehead half an inch above the right eye-brow and another incised wound on the left side of the nose and upper lip. There was a contusion with fracture of both bones of the forearm and two contusions with swelling-and with fractures of the left leg and foot. There were three contused wounds also on the left leg besides some marks of contusions and two abrasions. Two of the injuries on the person of Rameshwar were found to be grievous and the incised wound had been caused by some sharp-edged weapon. The Civil Surgeon also noticed tenderness and rigidity with pain on palpitation over left side of the abdomen which was indicative of the fact that there had been injury caused to the internal organs also. The right pulse was found to be weak and the injured was in a condition of shock. The respiration at the time of the examination was hurried and shallow and the general condition of Rameshwar was serious.

The Civil Surgeon had been examined to prove the injuries received by these two persons. Besides Rameshwar and Bindeshwari, some other witnesses were also examined in this case. Wall Mohammad who stated that he had gone near, the place of occurrence to roll his camel supported the version given by Rameshwar and Bindeshwari. His evidence has been criticised by the learned counsel for the appellants on the ground that the statement given by him before the Committing Magistrate was different from the statement given by him before the Sessions Judge. Wali Mohammad had stated in the Court of the Committing Magistrate that he had gone with his camel to get it loaded while in the Court of the Sessions Judge he stated that he had gone to graze his camel and to allow it to roll on the ground. Wall Mohammad was confronted with his earlier statement and he stated that the word used by him in the Court of the Committing Magistrate was "lotana" and not "ladana". This mistake is possible, and the explanation given by Wali Mohammad cannot be rejected as wholly fantastic or incorrect. There was no particular purpose in giving a different version on this point which was wholly immaterial for the purposes of this case in the Court of the Sessions Judge. There is, therefore, no ground to reject the evidence of Wali Mohammad because of this discrepancy.

It has also been argued that Wali Mohammad did not reside very close to the place of occurrence and had therefore no valid reason to be there at the time of the occurrence. The story given by Wali Mohammad that he had gone with his camel is not improbable or unusual and his testimony which has been accepted by the Sessions Judge, should not be rejected on this ground also.

5. Another witness Budh Ram who is a boy aged about 12 years was also examined on behalf of the prosecution. He supported the story given by the prosecution. Learned Counsel for the appellants has pointed out that this witness had, in his statement made before the Sub-Inspector, stated that the assailants were sitting near the khaliyan while in his statement before the Sessions Judge he deposed that they came out of the house. It is in evidence that the khaliyan of Gaya Prasad adjoins the house of Gaya Frasad and if there was some slight discrepancy on this score between the statement made by the witnesses before the Sub-Inspector and the statement given before the Sessions Judge it would not make his testimony unworthy of belief. Three other witnesses, Mosim, Babu Bam and Dudh Nath, were examined in the Court of the Committing Magistrate and their evidence has been read under Section 33, Evidence Act by the Sessions Judge on the ground that these persons could not be found and could not be had without unreasonable delay.

6. Learned Counsel for the appellants has argued that the evidence of these witnesses should not be admitted under Section 33, Evidence Act and reliance has been placed on two rulings, --'Chanchal Singh v. Emperor', AIR 1946 PC 1 (A) and -- 'Savlimiya Miyabhai v. Emperor', AIR 1944 Bom 338 (B). Section 33, Evidence Act reads as follows :

"Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the Court considers unreasonable." In order, therefore, to enable a Court to admit evidence given by a witness in a judicial proceeding at an earlier stage, or in any other case, the requirements of Section 33 have to be fulfilled. In the present case, the learned Sessions Judge has admitted the evidence of Mosim and Babu Ram on the ground that they could not be found and their presence could not be obtained without an amount of delay which under the circumstances of the case the Court considered unreasonable. It appears from the record of the Court below that both these witnesses, who had been examined earlier before the Committing Magistrate, were summoned to appear before the Court of Session. Direction was sent as usual to the Committing Magistrate to obtain their presence before the Sessions Judge on the date of hearing. Whether summonses were actually issued to these persons, or whether they were served on them, is not quite clear from the record, but there is on the record a letter addressed by the Sessions Judge to the Magistrate pointing out that these two witnesses were not present on the date fixed for their appearance and that their attendance should be procured.

Warrants for their arrest were issued twice, though at short intervals by the Sessions Judge and the reports of the constables who took the warrants for execution show that they were not available and their whereabouts were not known. These constables were examined before the Sessions Judge and they stated that these persons were not to be found & their whereabouts were not known. The accused also agreed to their statements being taken into evidence under Section 33, Evidence Act. One other witness, Dudh Nath, was said to be seriously ill and unable to move and evidence was led to prove his illness. His previous statement was also admitted into evidence under Section 33, Evidence Act.

7. It cannot be disputed that important witnesses in serious cases of murder or attempt to murder should be examined before the Sessions Judge so that he may be able to form his own opinion about their veracity by observing their behaviour in the witness-box. Courts should be loath to admit evidence under Section 33 by observing only formalities of law and the importance of examining witnesses before the Sessions Judge should, under no circumstances, be under-rated. It is, however, difficult to lay down a hard & inflexible rule which should govern all cases in all matters. It is primarily for the Sessions Judge to satisfy himself that there are good & lawful grounds for admitting the evidence of witnesses examined earlier, under Section 33, Evidence Act.

In the first case cited, -- 'Chanchal Singh v. Emperor', (A), a witness was summoned in a sessions case. He wrote on the summons as follows : "Sir, I am seriously ill and am unable to attend the Court. My statement may kindly be recorded at my place of residence."

The police officer who had gone to serve the summons was examined before the Sessions Judge and he stated that he found the witness ill and unable to move from his house. Their Lordships of the Privy Council held that the statement made in the Court of the Committing Magistrate should not have been admitted in evidence under Section 33, Evidence Act. In this reported case it is evident that the witness, though ill, was capable of giving a statement and he had in fact suggested in the endorsement on the back of the summons that he may be examined at his place of residence. It was also not clear from the evidence which was produced before the Sessions Judge in the reported case that the witness could not become fit to be examined sometime later. On these facts their Lordships of the Privy Council held that the evidence of this witness should not have been admitted before the Sessions Judge under Section 33, Evidence Act.

8. In the other case cited on behalf of the appellants, -- 'Savlimiya Miyabhai v. Emperor', (B), the witness who had been examined in the Court of the Committing Magistrate was summoned to appear before the Sessions Judge in a case of murder. The endorsement on the summons sent to the witness was that he was undergoing special training at Bombay. It was held that the circumstances did not justify the admission of his evidence under Section 33, Evidence Act as it could not be said that the witness could not be found. He could, have been easily summoned to come from Bombay to Ahmadnager which was only a night's journey.

In this reported case the accused had not cross-examined the witness and the learned Judge had not recorded any reason to show that he was satisfied that the presence of the witness could not be

procured without undue expense or delay. There are some other cases also in which the circumstances under which Section 33, Evidence Act is attracted have been discussed. Mere expense should not ordinarily be taken as a ground for refusing to summon a witness in a Sessions case.

9. In the present case the witnesses had been cross-examined at length in the Court of the Committing Magistrate and this circumstance also seems to have weighed with the Sessions Judge in being a little more lenient in admitting the evidence of the witnesses under Section 33, Evidence Act. Consent of the accused to the admission of the evidence under Section 33, Evidence Act has practically no meaning. Consent given by an accused would not relieve the Court of the duty of examining the circumstances and coming to a decision as to whether or not the evidence was legally admissible. Consent can, however, lead to some inference on a point of fact. If it is alleged on behalf of the prosecution that a certain witness is seriously ill and evidence is led to prove the illness of the witness and no cross-examination is directed on this point, the consent of the accused may lead to the inference that he does not challenge the validity of the assertion that the witness was very unwell and the Court can take into consideration this circumstance in accepting the evidence on a question of fact. Similarly, if the whereabouts of some witnesses are not known and evidence is led to prove that fact, the consent of the accused to the admission of the evidence and the absence of cross-examination on the evidence led to prove a question of fact with regard to the whereabouts about the witness, may lend support to the evidence led by the prosecution to prove that the whereabouts were not known.

No cross-examination in this case was also made of the witnesses who were examined to prove that the whereabouts of Mosim and Babu Ram were not known. It appears, therefore, that the Sessions Judge under these circumstances accepted the testimony of the two witnesses examined on behalf of the prosecution to prove that Mosim and Babu Ram were not available and in view of the fact that they had been cross-examined at considerable length in the Court of the Committing Magistrate and that the whereabouts of the witnesses were not known the Sessions Judge thought it fit to admit their evidence under Section 33, Evidence Act. It appears, therefore, that the statements of Mosim and Babu Ram as also that of Dudh Nath, which have been admitted into evidence and relied upon by the Sessions Judge, were admitted on good grounds. These witnesses have deposed that Rameshwar and Bindeshwari were attacked by the appellants and that they were attracted to the scene of the occurrence by the alarm raised by Rameshwar.

10. The names of Babu Ram and Mosim were mentioned in the first information report and the mere fact that they did not belong to the locality where the occurrence took place should not be enough to discredit their testimony. The site plan made by the Sub-Inspector who investigated the case shows that the houses of Gaya Prasad and Rameshwar are not situated in the thick of the locality but are more or less isolated and it is therefore not at all improbable that witnesses who were not residents of the locality but were nearabout the place of occurrence were attracted to the place of occurrence after the alarm was raised.

11. Much stress has been laid on the circumstances that Rameshwar and Bindeshwari were allowed to remain lying injured at the place of the occurrence for about half an hour or an hour and were not removed to their house. It is in evidence that arrangements for an ekka were made before these

persons were removed from the place of occurrence, and nobody could foresee at that moment that an ekka would not be available for some appreciable time. There was, therefore, nothing improbable if these persons who had been injured seriously were not removed till an ekka was available.

12. The defence has set up the story that these two persons, Bindeshwari and Rameshwar, had been assaulted by some unknown persons at a place which was different from the place of occurrence. The investigating officer found blood-stained earth at the place of occurrence, and this blood-stained earth was scraped and collected in a 'handi'. The learned Counsel for the appellants has argued that the blood-stained earth was not sent to the chemical examiner or the serologist for examination if the blood found on the earth was human blood. No doubt the blood-stained earth was not sent for examination and it is difficult to find out definitely the origin of the blood, but coupled with the evidence produced on behalf of the prosecution the recovery of the blood at the place of the occurrence has its own significance.

13. Even if the evidence of the two witnesses, Mosim and Babu Ram, is ruled out on the ground that it should not have been admitted the evidence of the two injured, and the two witnesses, Wall Mohammad and Budh Ram satisfactorily establish the guilt of the appellants. They had a clear motive for making the attack. Their evident object was to wipe out the existence of Rameshwar and Bindeshwari, who were the cause of so much trouble to them.

14. Lastly, it has been argued on behalf of the appellants that the facts of this case do not establish a case under Section 307, Penal Code. It had been, argued that the two incised wounds which were found on the head and nose of Rameshwar were not in themselves sufficient to cause the death of Rameshwar and it should not, therefore, be inferred that it was the intention of the assailants to cause the death of Rameshwar. Some rulings have also been cited to illustrate the viewpoint urged on behalf of the appellants. It is unnecessary to discuss these rulings as each case has to be decided on its own facts. The principle laid down in these rulings is not disputed. There should be an intention to murder or the knowledge that the injuries caused would result in the death of the person attacked before a man can be held guilty under Section 307, Penal Code, if the injured persons luckily escape, death. The injuries inflicted in this case should therefore be taken into consideration in arriving at the conclusion about the intention of the persons who had made the attack on Rameshwar. Besides the evidence adduced to prove that the assailants had given out that Rameshwar should be put to death, the presence of two incised wounds on the head and nose which were both bone deep and were caused by spear coupled with severe fractures of bones of other parts of the body do lead to the inference that it was the intention of the appellants to cause the death of Rameshwar.

It is well nigh impossible to gauge the exact intention of an assailant and his intention can only be gathered from the nature of injuries caused. In the present case I have no doubt that the injuries do lead to the inference that the assailants were actuated with a motive to murder Rameshwar and the Civil Surgeon's evidence also lends support to this inference. The appellants have, therefore, been rightly convicted under Section 307, Penal Code for the injuries caused to Rameshwar and under Section 323 for the injuries caused to Bindeshwari.

15. The learned Sessions Judge has sentenced the appellants to rigorous imprisonment for a period of seven years. This sentence appears to me to be a little too severe. A sentence of four years' rigorous imprisonment should in this case meet the ends of justice.

16. The appeal, therefore, is allowed to this extent that the sentence passed under Section 307, Penal Code is reduced to four years' rigorous imprisonment. The conviction under Section 307 and the sentence of one year's rigorous imprisonment under Section 323, Penal Code as also the order about the sentences running concurrently are maintained.