

Prem Narain Vs. the State

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Court : Allahabad

Decided On : Nov-05-1956

Reported in : AIR1957All177; 1957CriLJ337

Judge : Mukerji and ;Chowdhry, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 367 and 512; ;
[Evidence Act, 1872](#) - Sections 5, 8 and 32(1); [Indian Penal Code \(IPC\), 1860](#) -
Sections 107 and 300

Appeal No. : Criminal Appeal Nos. 916 and 917 of 1956

Appellant : Prem Narain

Respondent : The State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : C.S. Saran and ;Makund Lal Agarwala, Adv.

Disposition : Appeals dismissed

Judgement :

Mukerji, J.

1. These are two connected appeals, one by Prem alias Prem Narain, and the other by Nanhey, who were both tried by the learned Sessions Judge of

Shahjahanpur at one trial held in May, 1956. Prem was convicted under Section 302 of the I. P. C. for having murdered one Lallan by shooting him with a pistol at about 10-30 p.m. on the 31st of October, 1955, in Mohalla Chaukasi in the city of Shahjahanpur, and sentenced to death for that offence.

Nanhey was charged under Section 302 read with Section 34 I. P. C., for having partaken in the common intention of Prem to murder Lallan. The learned Sessions Judge held Nanhey guilty alternatively under Section 302/114 I. P. C., and sentenced him to imprisonment for life. Prem gave out his age as 15 or 16 years, but the learned Sessions Judge thought he was 20 years of age. We ourselves had him before us and we were of the opinion that Prem was nearer 17 than 20 years of age.

Nanhey gave his age as 17 years but the learned Sessions Judge thought he was about 20 years of age. We have not had the advantage of seeing him, for he was not before the Court when these appeals were heard by us. Both the appellants were in any case very young persons.

2. The prosecution alleged that Prem and Nanhey, finding the deceased Lallan against whom they had a grievance, shot him, Prem using the pistol, when they found him going through a lane' which passes between certain temples, on the night of the 31st of October, 1955, at about 19-30 p.m. The position where the assault was made was indicated on the site-plan prepared by the Investigating Officer. The site-plan shows that the dead body of Lallan was recovered at point D. which was under the steps of the temple of one Nangu.

The assailants were said to have shot from a few paces away. According to the site-plan, Prem shot from point B which was to the south of the place where the deceased fell. The lane is a narrow lane and slightly bends a few paces away both to the right and the left of the place where the deceased fell. The only residential house shown on the site-plan is the house of one Beni Madho which abuts the south side of the lane; to the north are two temples, one the temple of Mahabirji, and the other, the temple, known as the temple of Lala Nangu.

Beyond the house of Beni Madho to the east is an open space and then there is the temple of Baba Ambar Das. To the north of the temple of Baba Ambar Das across the lane is the chabutra of the temple of Lala Nangu. Beyond the chabutra the lane has a bend and then narrows. The lane runs east and west. At the western end of the lane beyond the temple of Mahabirji are some steps which lead it on to a passage which goes to the chowk.

3. On the night of the incident the deceased Lallan was alleged to have been going to join a feast at the house of Ram Dayal P.W. 15, along with his brother Bhau Lal. When these two brothers had reached within five or six paces of one of the temples they noticed the two accused standing near one of the other temples and as these two brothers had passed by the accused, Nanhey called out to Prem to shoot, whereupon Prem fired and hit Lallan who staggered and fell. According to the witnesses Lallan died accusing the two appellants of having killed him.

The accused thereafter ran away from the scene of occurrence. The incident was noticed by several witnesses. Apart from Bhau Lal, who was with the deceased, the incident was seen by P.W. 2 Mool Chand, P.W. 3 Puran Panwala, P.W. 9 Sunder Lal, P.W. 10 Ram Gopal, P.W. 11 Hazari and P.W. 13 Ram Narain.

4. A first information report of the incident was forthwith made by Bhau Lal at police station Kotwali, which was within two furlongs of the place of incident, at 11 p.m. The first information report is an important document in this case insofar as it gave out the prosecution version at the earliest, before there was apparently any opportunity of making consultations to improve upon or add to the actual facts of the occurrence. This is what Bhau Lal dictated at the Kotwali police station:

'I live in Mohalla Baksaryan. A boy, whose name is Prem, who resides in Ghuran Talaiya and who is a Khattri by caste, had developed illicit connection with Nanhey Brahman, resident of Mohalla Ghuran Talaiya, and Prem, son of Ram Charan, Khattri, resident of Mohalla Bhitri Gali. Eight-ten days back there took place a quarrel between Prem and Nanhey on one side and my brother Lallan, on the other, when my brother Lallan asked Prem and Nanhey not to meet Prem.

For this reason Prem and Nanhey started harbouring a grudge against my brother, Lallan. About 10.30 P.M. today my brother, Lallan and I were going to attend a feast at the house of Ram Dayal Ahir in Mohalla Roshanganj. When we reached near the lane of Phulmati Devi's temple we met Nanhey Brahman, and Prem, son of Ram Charan Khattri. Prem was armed with a pistol. Nanhey said 'Prem kill'.

The Sala has met today by an opportunity'. Prem fired the pistol at my brother, Lallan which bit Lallan in the back. On receiving the shot. Lallan fell down. Avadh Behari Kayasth, Ram Narain goldsmith, Puran Kahar, resident of Mohalla Baqsaryan, Hazari, resident of Rangmahal. Mool Chand Ahir, resident of Bhitri Gali, and several other passers-by have witnessed this. I have come along with my brother to lodge a report.

The condition of my brother is serious. After the taking down of the report he may be sent to the Hospital and investigation made. I bring a charge against Nanhey Brahman and Prem, son of Ram Charan Khattri, for 'causing pistol injury to my brother with the object of killing him... .' Lallan died before he could be taken to hospital.

5. An inquest was held on the body of Lallan at the hospital by the Investigating Officer. The Investigating Officer attempted to find the accused but they could not be found by him. Proceedings under Sections 87 and 88 of the Code of Criminal Procedure were taken against the accused. Nanhey accused surrendered in court on the 11th of November, 1955, while Prem surrendered in court on the 12th of November, 1955. A charge-sheet was submitted against both the accused by the Investigating Officer on the 15th of November, 1955.

6. Blood was recovered by the Investigating Officer from the paved portion of the lane by which the position of the place where the deceased fell was fixed by the Investigating Officer on the site-plan.

7. A post-mortem was held on the body of Lallan on the 1st of November, 1955, at 12 noon. The injury which was found by the Civil Surgeon, was described by him as follows:--

'Lacerated, circular gunshot, wound of entry 1 1/4 x 1 1/4' x lung deep surrounded all round and adjacent by 45 small gunshot wounds of entry each 1/5' x 1/5' circular in shape and lung deep Blackening of the skin of wound present, situated on the back of the right chest in the middle and 2' away from the spinal column at the level of 4th and 5th rib. Ecchymosis present in the tissues and soft parts in the wounds. Six shots removed from the skin of the wound and preserved.' The 4th and the 5th ribs were fractured in posterior part under the external injury. The right pleura was lacerated in an area 1' x 1' and the pleural cavity was found to contain 30 ounces of fluid and clotted blood. Six shots were found in the cavity and were removed. Four pieces of cork were found in the right pleural cavity. They too were removed and preserved. The right lung was lacerated in an area of 1 1/2 x 1' x thickness. Twenty-one shots were found lodged in the lung which were removed and preserved. According to the Civil Surgeon death was due to haemorrhage and shock which resulted from gunshot injury.

On the post-mortem report there is no doubt that the deceased was shot at close range. According to the opinion of the Civil Surgeon, the person who shot at Lallan must have done so either from behind or from the side. The Civil Surgeon was unable to state from which side the shot had been fired probably because there was no exit wound to help form an opinion. According to the opinion of the Civil Surgeon, the probable time of death was about 12 hours earlier than the time of postmortem.

8. The defence of Prem, as put forward in the court of the Committing Magistrate, was that he had been falsely implicated in the case because he had enmity with prosecution witness Sunder Lal and Bhau Lal, brother of the deceased. The reason for this, as suggested by him, was his refusal to give evidence at their bidding in a case in which a woman was involved. Nanhey suggested false implication because of his having been on inimical terms with prosecution witness Mool Chand.

He also stated that his name was not Nanhey but Shyam Kishore. Both Prem and Nanhey elaborated upon their statements before the learned Sessions Judge. Before the court of session Prem accused added that he had enmity also with

P.W. Puran over some debt. He also stated that he did not know the boy Prem Khattri, or his co-accused Nanhey at all. Nanhey accused also suggested before the court of session that he had enmity with Puran.

He denied having known either Lallan deceased or his own co-accused Prem or Prem, the Khattri boy. Prem accused was specifically asked by the learned Sessions Judge as to why prosecution witnesses Mool Chand, Ram Gopal and Hazari deposed against him but he could give no reason for this and even admitted that he had no enmity with them. Nanhey was asked as to why Bhau Lal, Puran, Mool Chand, Sunder Lal, Ram Gopal and Hazari gave evidence against him. He said that he did not even know these people, except Puran and Mool Chand with whom he had enmity, but with the rest, he stated, that he had no enmity at all.

9. A request was made to the learned trial Judge to inspect the alleged site of occurrence. The learned Judge acceded to the request and made an inspection of the place of incident at 3 p.m. on the 17th of May, 1956. The learned Judge also had a scale-plan prepared by a draftsman, of the locality and that scale-map has been proved in the case by the Draftsman Maujood Ali Khan. This plan has proved useful in getting a clearer idea of the place of occurrence.

From the inspection Note of the learned Judge, which is at page 35 of the paper-book, it appears that the defence insisted on a local inspection by the learned Judge in order that the Judge could, according to the words of the learned Judge, notice the 'presence or absence of the source of Light'. At the time of the local inspection the learned Judge found an electric light alight in the temple of Mahabirji which was about 18 paces away from, the place where Lallan was said to have fallen.

This light was in the main room of the temple of Mahabirji and not 'in the narrow verandah outside it.' The main room itself was not a 'walled room' but an open space which had grated windows and doors. According to the inspection of the learned Judge, the light emanating from the electric light in the temple came up to the place where the deceased had fallen, and according to the learned Judge the faces of the accused would have been visible if they ran down the lane towards the west because at that place the light was found to be much stronger.

On the night on which the learned Judge made his local inspection there was a half moon in the sky and the light of the moon was found to fall in the lane. The learned Judge, also expressed the opinion that in the case of a full moon in the sky the light would be stronger, as it would be and from such light the features of the persons in the lane would be clearly visible.

10. It is important at this stage to know the positions occupied by the various eye-witnesses in relation to the accused and the deceased at the time of the incident. The deceased and his brother Bhau Lal were coming up the lane and proceeding from west to east. Lallan dropped, allegedly, on the paved portion of the lane opposite the open space which abuts the temple of Baba Ambar Das on its west side. P.W. 2 Mool Chand and P.W. 10 Ram Gopal were at that place of the lane which is just below the temple of Mahabirji (or Hanumanji) and according to the prosecution case, the accused after shooting ran towards them in their flight from the scene of occurrence.

P.W. 3 Puran. P.W. 11 Hazari and P.W. 13 Ram Narain were to the east of the alleged place of assault, a few paces away from it. They were going from east to west. P.W. 9 Sunder Lal was at the time of the incident, urinating on the first floor of a portion of the temple of BABA AMBAR DAS : the first floor of this temple was obviously the residential quarter of this witness.

11. The scale-map prepared by Maujood Ali Khan P.W. 20 shows that there is a bend in the lane just below the verandah adjoining the eastern side of the temple of Mahabirji and that the width of the lane at that place is 7 feet. The distance between the end of the verandah and the end of the shop of Pandit Beni Madho taken diagonally is 9 feet 5 inches. The distance from the place where the deceased was found lying after the assault on him and the place where witness Sunder Lal was supposed to be urinating is shown to be 20 feet.

The lane narrows down after the temple of Lala Nangu and the width of the lane at this bend is shown to be 8 feet 6 inches, while the width of the lane at the place where the deceased was shot at is shown as 12 feet. The place where witnesses Ram Gopal and Mool Chand were is said to be some 11 paces away from the place where the deceased was shot at, while witnesses Ram Narain, Puran &

Hazari are said to have been about 16 paces away.

The accused were said to be at the eastern corner of Beni Madho's house when Bhau Lal and the deceased Lallan passed by them. According to Bhau Lal, he saw the two accused when they had reached the Mandir of Phulmati and were 5 or 6 paces away from it standing near that Mandir two or three paces towards the south, it is clear from the testimony of Bhau Lal that when he referred to the temple of Phulmati he really referred to the temple of Mahabirji, for it appears from the evidence that the group of temples in this area were loosely referred to by people as the temples of Phulmati.

12. Two questions were raised on behalf of appellant Prem alias Prem Narain who was represented in this Court by Mr. Chandra Shesar Saran, and we should like to deal with those two contentions before we proceed to consider the case of Nanhey who has filed appeal No. 916 of 1956 and who was represented by Mr. Mukand Lal. The first question raised by Mr. Chandra Shekhar Saran was that the motive suggested by the prosecution for the commission of this crime had not been proved, and further, that even if that motive had been proved by the evidence, that motive was not sufficient for the commission of such a crime.

The second contention of Mr. Chandra Shekhar Saran was that the eye-witnesses, who deposed to having seen the assault, could not be relied upon for the reasons (a) that the witnesses could not have been at the scene of occurrence at the time of the assault, and (b) that they had not sufficient light for, and opportunity of, watching the incident.

Mr. Saran further contended that even if we were to hold that the witnesses were at the scene of occurrence at the time, then the incident having taken place so suddenly they could not possibly have noticed it.

13. All the witnesses have stated that they were at the scene of occurrence at the time and had seen the incident. Nothing has been brought out in their cross-examination on which it could be said that they were not there. Bhau Lal, according to his statement, was accompanying Lallan at the time Lallan was shot at, for they were both going to the feast given by witness Ram Dayal. Two

arguments were raised by Mr. Saran against our accepting the testimony of Bhau Lal.

The first was that it was inconceivable that Bhau Lal and Lallan would be going to a feast at such a late hour in the night, when the feast at Ram Dayal's place started at midday; and secondly, that the route which had been taken by Bhau Lal and Lallan was not the direct route to Ram Dayal's house from the house of Lallan and Bhau Lal.

In regard to the first contention it may be pointed out that it is clear from the evidence of Ram Dayal that although the feasting at his house had commenced from midday yet people were actually at dinner at the time when information of the shooting at Lallan had been received by the father of the deceased who himself was then taking his dinner at Ram Dayal's. No reason was suggested why the statement of Ram Dayal was not to be believed.

It is common experience that Biradri' feasts in most parts of the country are a long affair and people are fed in batches, and that is because of dearth of space, and such feasting goes on from noon till almost midnight, so that, there was nothing inherently improbable in the statement of Bhau Lal that he was going with Lallan to the feast at Ram Dayal's at about 10.30 p.m.

In regard to the next question as to why Bhau Lal and Lallan should have taken the route that they did to go to Ram Dayal's house, it must be noticed that it was nobody's case that Lallan had not been shot at the place where he is alleged to have been shot. So that, there can be no doubt as to Lallan's presence at that place that night. The defence did not cross-examine Bhau Lal in order to show that the route that had been taken by him and the deceased was a much longer route or even a longer route than the other one suggested.

Bhau Lal gave the reason for going through this lane and the reason that he gave was that they intended to have 'Darshan' at the temples. It was the Poornmashi day and it is again common knowledge that on Poornmashi day people do generally visit temples. It may be pointed out that P.W. 3 Puran, P.W. 11 Hazari, and P.W. 13 Ram Narain were also in that locality for the purpose of having

'Darshan' at the temples in this lane.

We are, therefore, satisfied that Bhau Lal's statement that he and his brother happened to pass by that lane on the night of the incident because they intended to have 'Darshan' at the temples before they went to the feast at Bam Dayal's house was true.

14. In regard to the other witnesses, namely, Mool Chand, Ram Gopal, Puran, Hazari and Ram Narain, we find that their reasons for being at the scene of occurrence at that hour on that date should be accepted.

15. Mool Chand was going to the feast at the house of Ram Dayal. He had taken this route, namely, the route through this lane, because the other lane by which he could have gone was, according to him, in a very dirty state near the bridge of a Nalla and no one used that route at night. It appears that this witness, while he was passing by the temple of Mahabirji and near the verandah of the temple in the lane, noticed the assault.

16. Ram Gopal was also near Mool Chand When the assault took place. Ram Gopal was a resident of village Kunwarapur which is 16 or 18 miles away from Shahjahanpur. He had come to Shahjahanpur to make some purchases. He was at that hour of the night coming to the house of his cousin Sunder Lal where he proposed to stay. When he reached the temple of Mahabirji he noticed the accused.

This witness did not know the accused from before and there appears to have been no identification proceeding in regard to the accused in this case to test the capacity of this witness to rightly pick out the accused. The witness, however, purported to identify the two accused in the dock as the accused whom he saw on the date of the occurrence He stated that one of the accused called to the other saying 'Prem mardo mauqa bahut achha hai' and he saw a pistol in the hands of one of the two while the accused ran away from the scene of occurrence after the incident.

The witness was, however, unable to say which of the two accused called out to the other before the other shot, and further he was unable to state which of the two accused in the dock had the pistol with him while running away. The testimony of this witness, therefore, is not of much value except in so far as it proves that there was an assault in this locality on the date in question at about 10 p.m. and that the assault was made by firing of a pistol which was fired by one at the instigation of the other.

17. Puran was returning to his house after having 'Darshan' at one of the temples close to the temple of Phulmati and was passing through the lane near the temple of Nangu Lal when he witnessed the assault. According to his testimony, he was about 15 paces away from the accused and he was at the time going from east to west, that is to say, he was moving, so to speak, towards the accused.

18. Hazari was also going for 'Darshan' in the temples in the area in which the assault had been committed and he says that he met Ram Narain, Puran and another person named Avadh Behari in the lane. He saw the accused Nanhey and Prem standing by the temple of Nangu Lal.

19. Ram Narain was not produced by the prosecution but he was offered for cross-examination. From his cross-examination it is clear that he was in the lane at the time of the incident. The evidence of this witness was, however, of no practical value inasmuch as he stated in cross-examination that he could see the faces of the accused only 'cursorily' in the beginning and not when they were running away. In answer to a Court question the witness replied as follows:--

'When I was 16 paces from the two persons near the temple of Nangu Lal the young man with Prem had said 'Prem maro mauqa achha hai'. Soon after there was the explosion.

.....The boy Prem whom I know is present in the dock here.'

He also stated in reply to a Court question as follows:

'I knew Lallan. He fell on the spot saying 'Hai Nanhey Prem Mujhko mar dala.' It is clear to us that this witness had been tampered with and that it is not safe,

therefore, to rely on him for any purpose.

20. Sunder Lal was, as we have already noticed, on the upper storey of the temple known as the temple of Baba Ambar Das. He noticed the accused standing near the stairs of Nangu Lal's temple while he came out of his bath-room in the upper storey where he had gone to urinate. According to his testimony, his attention was diverted to the accused when he heard a noise below-The vernacular words, which have been translated into 'noise', used by the witness were 'Kuchh ghus phus ki avaz malum hui'. We do not think that the English rendering of this witness's testimony was accurate. What he said was not that he heard a noise but that he heard some whisperings down below which attracted his attention. It may be pointed out here that the place where the accused were alleged to be standing before the assault was within a few feet below the place where this witness stood. So, there could be no doubt that if this witness was at the place where he says he was then from the site plan it is clear to us that if his statement was believable that he came out of his bathroom at the time, then he could have heard the 'ghus phus' going down below and his attention would have been attracted by the 'ghus phus'.

21. If the positions of the witnesses were as we have found them to be, then there can be no doubt that they had good opportunity to see the assault. As for the sufficiency of light for purposes of visibility, we can see no adequate reason for discarding the testimony of these witnesses when they said that they actually saw the assailants and the assault because the Inspection Note of the learned Judge clearly indicates that the light from the verandah of Mahabirji's temple sufficiently illuminated the area of the assault.

We have also the fact that the day on which the assault took place was a 'Poornmashi' day and there was a full moon in the sky.' The Inspection Note of the learned Judge again indicates that moon-light would fall in the land uninterrupted by any shadows of buildings.

The learned Judge made his inspection, as we have already noticed, on a day when there was a half moon in the sky and he found that the light of the half moon in the sky that day fell in the lane. From what we have said just above, it is clear to us that there was sufficient visibility for the witnesses to see and recognise the

assailants.

22. The next question which needs consideration in this case is, whether the attack could have been noticed by the witnesses inasmuch as the assault was made suddenly and the assault itself took practically no time. In this connection we have to bear in mind the fact that according to the statements of the witnesses, Nanhey accused called out to Prem accused before Prem actually used his pistol to shoot.

The call of Nanhey to Prem would without doubt attract the attention of the witnesses who were in such close proximity. Learned counsel for the accused have contended that the statement of the witnesses, that Nanhey called out to Prem before Prem shot, was unnatural conduct for Nanhey and that it had been invented by the prosecution in order to meet the present argument raised on behalf of the defence.

It was further argued that there being disparity between the witnesses in regard to the actual words used by Nanhey to exhort Prem, the testimony of the witnesses in regard to this matter should not be accepted. We have closely examined this last part of counsel's submission and we are of the opinion that although there was a little disparity between the witnesses in regard to the actual words used by Nanhey, there was no disparity in the substance or in the meaning that those words were intended to convey. Bhau Lal stated that Nanhey said to Prem 'Prem maro ai sala mauqey se mila hai'. Mool Chand put the words of Nanhey like this:

'Mar do saley ko mauqa achha hai.'

Puran put the words of Nanhey like this:

'Kya dekhta hai mar saley ko'.

Sunder Lal stated:

'Achha mauqa hai Prem mardo sale ko.'

Ram Gopal stated:

'Prem mardo mauqa bahut achha hai'.

Hazari stated:

'Prem mauqa achha hai mar do Lallan ko'.

Ram Narain stated:

'Prem maro mauqa achha hai'.

From the aforementioned quotations from the statements of the witnesses in regard to Nanhey's exhortation to Prem it is clear to us that Nanhey emphasised two things, first, that the opportunity was good and, secondly, that it should be availed of.

The statements also make it clear that the exhortation was to 'Maro' which in the retrospect must be held to have conveyed no other meaning but to kill. Whenever witnesses attempt to reproduce either a conversation or an exhortation, of the type in this case, there is bound to be some little disparity. This disparity, to our mind, does not make the statements false because such disparity is born of want of capacity of illiterate witnesses to reproduce the words accurately several months later.

In our view, if the witnesses had been made to state the words which were not spoken at the time, then we would not have found the diversity that we do in this case. The witnesses would then have 'conned their parts by rote' and would have made no mistakes in reproducing the words.

23. When Lallan was hit he is alleged to have used certain words which indicated that he also was conscious of the fact that he had been hit by Prem's pistol and he made a declaration to that effect. Here, again, we find a disparity in the words as given by different witnesses.

Bhau Lal stated that Lallan after, having been hit called out 'Prem Nanhey tum ne hai jan se kyun mar dala'. Before the Committing Magistrate he had put these words slightly differently, for he had said there:

'Hai re Prem Kyun jan se mara'.

Puran gave the words of Lallan thus:

'Hai Prem kyun mar dala'.

Mool Chand stated them to be:

'Prem jan se mat marte'.

Hazari put the words thus:

Nanhey Prem tum hamen jan se na marte',

Ram Gopal put the cry of Lallan thus:

'Hai Nanhey Prem tum ne mujhe jan se kyun mar dala'.

Sunder Lal stated thus:

'Hai Nanhey Prem tum ne jan se kyun mar dala'.

Bam Narain in answer to a Court question put the words thus:

'Hai Nanhey Prem mujhko mar dala'.

Learned counsel contended that the statement by Lallan after he had been hit was a dying declaration and before we accepted it as such we must be sure that the actual words of that declaration were proved to our satisfaction. The contention of learned counsel amounted to our following the rule of 'ipsissima verba'.

24. In the case of 'Reg v. Mitchell' (1892) 17 Cox CC 503 (A), Cave, J., stated at p. 507 that:

'When a statement is not the 'ipsissima verba' of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence which it is desirable should not be open in cases in which the person has no opportunity of cross-examination.'

The observations of Cave, J., were made in connection with a case in which the dying declaration of a person had been taken down in answer to questions put to him and, therefore, the objection which Cave, J., saw to the reception of a dying declaration which was not the 'ipsissima verba' of the declarant but was the record of answers to questions stood on a different footing from the question that we have to consider in this case.

In the instant case, the statement ascribed to Lallan was a spontaneous statement made by him giving vent to his own feeling on being mortally wounded at the hands of Prem. We are conscious that the rule of 'ipsissima verba' is a very salutary rule, but we are unable to hold that unless the actual words are repeated by each witness of the declarant it is not possible for a Court to come to the conclusion that the declarant made a declaration or what the import or meaning of that declaration was.

The declaration by Lallan was evidence of conduct of the deceased which supplied a very important circumstantial link in the chain of circumstances of the present case. In the setting in which the witnesses found themselves it was, in our opinion, difficult for them to be able to correctly reproduce the words which they heard the deceased utter after he had been shot.

In the circumstances all that they could be expected to say was that the words very similar to the words that they purported to put in the mouth of the deceased were uttered by him. We think that the witnesses could be relied upon to that extent. The question that we have to consider is how far we can take this circumstance into account in judging the guilt of the accused. If the evidence against the accused was confined to the proof of this dying declaration by Lallan, then obviously we would have found it insufficient to warrant the accused's conviction.

We are not using this part of the witnesses' evidence in this case for any other purpose save for the purpose of believing that when Lallan was shot at he named Prem and Nanhey as his assailants. It has been pointed out by the Supreme Court that there has to be material corroboration of a dying declaration before a dying declaration can be used as evidence.

The statement of Lallan was, in our view, nothing but a dying declaration and as such it needed corroboration. In this case there is a good deal of corroboration from the eye-witness testimony. The difficulty, however, is not in regard to finding corroboration for the dying declaration, but the difficulty has been to know what exactly was the dying declaration.

We have noticed earlier that although in this case we could not be certain as to the very words used by the declarant, yet we could be certain of the meaning of that dying declaration in so far as we can be certain from the testimony of witnesses, who deposed to prove this dying declaration, that the declarant named both Nanhey and Prem as his assailants. Nevertheless, we have, for the sake of safety, thought it proper not to place much reliance on this dying declaration.

25. Before we come to considering the case of the co-accused Nanhey, we wish to notice the prosecution case in regard to their allegation about the motive which prompted this assault on Lallan. From the testimony of Bhau Lal it is clear that Lallan had a weakness or failing for boys, for he was homosexual. From the testimony of Bhau Lal--and it may be mentioned that this was brought out in cross-examination of Bhau Lal--it is also clear that the deceased had picked up improper relationship with a boy Prem Khattri, and from the testimony of Bhau Lal, again, it appears that the two accused also had some nefarious relationship with that boy.

The prosecution suggestion, therefore, was that this murder was committed because of carnal jealousy. The prosecution produced two witnesses Ashiq Ali P. W. 17 and Gulab Singh P. W. 18 to prove that prior to the actual assault the deceased had been warned to break his relationship with Prem, the Khattri boy, by the two accused. The evidence of Ashiq Ali and Gulab Singh was thoroughly discrepant and did not inspire the confidence of the trial Judge, nor has it inspired our confidence. So that, in this case, we had no better evidence to judge the motive for the assault than what has been deposed to by Bhau Lal. As we have said, the evidence of Bhau Lal did indicate that there was possibility, at any rate, of the deceased and the two accused having fallen out and having had bad blood over the Khattri boy, but beyond this we cannot go on the evidence produced in the case. Mr. C. S. Saran, appearing on behalf of appellant Prem, argued that

failure of motive In this case made the prosecution case doubtful. We do not think that to be so.

There was in this case direct eye-witness account of the assault and in the face of such eyewitness testimony motive became really of little consequence. As was pointed out by the Supreme Court in the case of *Atley v. State of U.P.*, (S) AIR 1955 SC 807 (B):

'Where there is clear proof of motive for the crime, that lends additional support to the finding of the Court that the accused was guilty but the absence of clear proof of motive does not necessarily lead to the contrary conclusion. The absence of proof of motive has this effect only, that the other evidence appearing on the guilt of the accused has to be very closely examined.'

We have followed this dictum of the Supreme Court with respect and we have scrutinised the evidence in this case with great care and we have found no reason on that scrutiny to discard' the eye-witness testimony. In the cross-examination of the witnesses nothing was brought out on which it could be said that any of the witnesses had any motive or reason for falsely deposing against the appellants. Mr. Saran contended that in this case the witnesses may have deposed against the appellants because they felt morally certain of the guilt of the appellants without actually having seen the assault.

We are unable to agree with this contention of learned counsel. There was no reason for the witnesses to have moral certainty in regard to the guilt of the appellants apart from what they had themselves seen of the assault. Nothing was brought out in the cross-examination of these witnesses which could indicate that these witnesses had any knowledge or even any suspicion about there being any enmity subsisting between the deceased and the alleged assailants of his. So that, under such circumstances, it is inconceivable that the witnesses, who had no reason for false implication, could have deposed against the appellants on any other ground save their own experience of having witnessed the assault on the deceased.

26. We shall now consider the extent of Nanhey's complicity in the crime. Nanhey did not take any part in the actual assault. His culpability is dependent upon the answer to the question, whether or not he was associated with Prem in the common intention of killing Lallan. Nanhey was charged in the following words by the learned Judge:

'That you on or about the 31st day of October, 1955, at about 10-30 p. m., along with the co-accused Prem who used a firearm committed the murder of Lallan in Mohalla Chauksi near Phulmati's Mandir in pursuance of a common intention, and thereby committed an offence punishable under Section 302 read with Section 34 of the Indian Penal Code, and within my cognizance.....'

The learned Judge convicted Nanhey under Section 302 read with Section 34 of the Indian Penal Code 'and in the alternative 114 I.P.C.'. Mr. Mukand Lal, appearing for Nanhey accused, argued that Nanhey could not be convicted under Section 302 either with the aid of Section 34 or with the aid of Section 114 I. P. C., because the circumstances necessary to prove such an intention on the part of Nanhey had not been established.

Mr. Mukand Lal further contended that there could be no conviction of Nanhey under Section 302 read with Section 114 I. P. C. because there was not sufficient proof of abetment of the crime by Nanhey. We shall first take up the second submission of learned counsel to see whether the submission is tenable. 'Abetment' has been defined in Section 107 of the Indian Penal Code as follows:

'A person abets the doing of a thing, who First: Instigates any person to do that thing; or,

Secondly: Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing: or

Thirdly: Intentionally aids, by any act or Illegal omission, the doing of that thing.

Explanation 1: A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or

attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2: Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.'

From the above definition of abetment it would be clear that the part assigned to Nanhey by the direct eye-witness testimony would fall under the 'First' part of Section 107 I. P. C., which speaks of instigation. On the evidence we find that Nanhey asked Prem to 'maro' Lallan. Mr. Mukand Lal's contention was that since there was slight diversity in the actual words ascribed to Nanhey By the witnesses we could not hold that there was any instigation within the meaning of Section 107 I. P.C., by Nanhey.

Learned counsel in this connection, again, emphasised that the rule of 'ipsissima verba' should be strictly adhered to and that if the actual words could not be found with certainty by us on the evidence, then we should hold that the prosecution has failed to prove any instigation by Nanhey. We have already noticed that the rule of 'ipsissima verba' is not a rule that could be made applicable to words of instigation used by a co-accused.

It may be that in certain cases of confessions the rule of 'ipsissima verba' had to be adhered to as a salutary rule. We have already found that the witnesses had correctly given the substance of the incitement, though every witness may not have been able to give the actual words in which the incitement was conveyed by Nanhey to Prem.

It was pointed out that a charge of abetment was easily made and it was difficult to refute: therefore it was necessary to find out the exact words of the incitement if the abetment was by means of an incitement. There is no doubt that there has to be a reasonable certainty in regard to the meaning of the words used by the 'inciter' in order to judge whether or not there was an incitement, but We do not think it necessary in law to prove the actual words used for the incitement.

In this case we have already found that we could be reasonably certain of the meaning which Nanhey wished to convey by his words to Prem. In this case we further know how Prem reacted after hearing the words spoken to him by Nanhey. The immediate reaction in a particular manner by Prem to the words addressed to him by Nanhey afforded a good deal of guarantee that we were right in holding that the words used by Nanhey were words of incitement.

In our judgment, in this case, the prosecution had succeeded in proving several circumstances which pointed to one and only one conclusion, namely, that there was a pre-concerted plan between Nanhey and Prem to kill Lallan that evening if they were lucky enough to meet him. We have it in evidence that Prem and Nanhey came together to this lane, stood at a place in this lane, let the deceased and his brother pass by and then Nanhey called on Prem to act; that the two assailants ran away from the scene of occurrence together; and that the two appellants were associates. So that, there could be no manner of doubt that the two accused acted in concert. Learned counsel argued that there was no evidence to indicate that the accused had any knowledge on which they could expect the deceased to be passing by that lane on that particular night and, therefore, it was inconceivable that the two accused should have formed a plan to kill Lallan in this lane.

It is no doubt true that there is no evidence to indicate that the accused had any knowledge that the deceased was likely to pass by that lane at that hour of the night. Nevertheless, there is evidence to indicate that the accused Nanhey lived within half a mile of the house of the deceased and, therefore, it may be that the accused were aware of the fact that there was a dinner at the house of Ram Dayal to which the deceased had been invited and was going to attend.

News of such feasts travels quickly, particularly, when there were a large number of people invited to the feasts. It may be that the meeting at that place in the lane was not pre-planned but was an accidental meeting. Nevertheless, it is clear that the accused, with the knowledge they had to their possession, fairly well anticipated meeting the deceased that night and, therefore, they planned to murder him. The fact that Prem had armed himself with a pistol is clear indication

that the accused were not out on a harmless mission and that they just accidentally stumbled upon the deceased.

Learned counsel argued that although Prem was armed with a pistol, the pistol was not visible to those who saw him : therefore, the pistol with Prem must have been hidden and since there was no evidence to indicate that Nanhey had any knowledge of Prem having been armed with a pistol, it could not be said that Nanhey acted to 'maro' Lallan.

We are of the view that on the circumstances of this case there could be no doubt that Nanhey was aware of the fact that Prem was armed with, a pistol, for if Nanhey had no such knowledge, then his exhortation to Prem to 'maro' would be meaningless because it would have been thoroughly hazardous for both Prem and Nanhey to assault Lallan who was a stronger man than either of the two accused, particularly when he was in the company of his brother Bhau Lal and particularly when. there were certain people in the locality.

We have, therefore, no doubt that Nanhey was aware of the fact that Prem was armed with a pistol. Whatever the words of incitement by Nanhey may have been, if only one word of that incitement was clearly proved, namely, the word 'maro'-- and we have no doubt that on the prosecution evidence that word in the incitement of Nanhey has been proved--there was no doubt that the incitement was nothing but to kill which made Nanhey clearly guilty of even abetment.

27. Both learned counsel appearing for the accused attempted to shake the probative value of the evidence by drawing our attention to certain contradictions in the statements of the witnesses: it was pointed out that there was slight variation in the version of the witnesses in regard to the place where the two accused had first been seen and from where the shooting had been done and where the deceased had been hit.

We have carefully considered these contradictions, but, in our opinion, they are really not contradictions of a nature which could shake the probative value of the evidence, but these were errors in the statements which were bound to appear in the testimony of witnesses deposing to an incident which took place several

months back. We are, therefore, of the opinion that the evidence in this case was sufficient to warrant the conviction of both the appellants.

28. We accordingly uphold the convictions of Prem and Nanhey--in the case of Prem under Section 302 and in the case of Nanhey under Section 302 with Section 34 of the Indian Penal Code. Prem has been awarded the extreme penalty prescribed by law, while Nanhey has been awarded the sentence of imprisonment for life.

While we uphold the sentence of Nanhey, we are of the opinion that in view of the youth of Prem appellant the ends of justice would be eminently met by commuting his sentence of death to one of imprisonment for life. With this modification and this modification alone both the appeals fail and are hereby dismissed.

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