

**Lakhan Vaish Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/458406](http://sooperkanoon.com/458406)

**Court :** Allahabad

**Decided On :** Dec-03-1957

**Reported in :** AIR1958All445; 1958CriLJ722

**Judge :** M.C. Desai, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 162 and 342;  
[Evidence Act, 1872](#) - Sections 145

**Appeal No. :** Criminal Appeal No. 1659 of 1955

**Appellant :** Lakhan Vaish

**Respondent :** State

**Advocate for Def. :** D.P. Uniyal, Adv.

**Advocate for Pet/Ap. :** J.P. Goyal, Adv.

**Judgement :**

**M.C. Desai, J.**

1. This is an appeal by Lakhan against a judgment of the Sessions Judge of Budaun, who has convicted him under Section 307 of the Indian Penal Code and sentenced him to rigorous imprisonment for four years.

2. The appellant lives in Bisauli town and his neighbour Badri Prasad previously practiced as Mukhtar and is now doing business. Badri Prasad has an oil and flour mill and a cane-crusher in Bisauli about three furlongs to the east of his house. His relations with the appellant and his brother Sohan Lal and cousins Basanti Lal and Puran Mal had been strained for the last five years due to litigation between them. There was a case instituted by his Karinda against the appellant or his relations and there have been cases brought against him. One suit was instituted by him against Basanti Lal and Puran Mal for possession and damages and its summonses were served on them on 29-4-55.

After the institution of the suit but a few days before the summonses were served, he complained to Sohan Lal against filthy water coming from the latter's compound into his compound and Sohan Lal replied that he could file a suit against him just as he had filed one against Basanti Lal and Puran Mal. Sohan Lal evidently referred to the above suit; he might have heard about the institution though the summonses were served a couple of days later. Badri Prasad was in the practice of going from his house to his mill every day in the evening at 5 P.M. and returning home after sunset. Accordingly on 9-5-55 he returned from his mill at about 8 P.M. On his way, there lies a kathal grove of Bijai Singh and he took the foot-path through the grove. Just to the north of the grove is a pathway and to its north is a grove of Jai Jai Ram.

When Badri Prasad was walking through the grove of Bijai Singh, he noticed a man walking towards him from the north, it was dark and he could not recognise him. When the man approached him and was 5 or 6 steps from him he noticed that he had in his hand something like a pistol. He instinctively raised his stick and threatened to use it in case he went nearer whereupon the man fired at him. In the blaze of the fire, he recognised that the man was Lakhan appellant. He was wounded and at once shouted 'Lakhan is running away after shooting with a pistol.' His shouts were heard by Hira Lal, Buddha and Kewal. Hira Lal was at that time washing himself on the bank of a pond just close to the two groves; as soon as the shouts were heard he flashed his torch in the direction of the person running away and recognised him to be Lakhan.

Buddha was on a well to north-west of the grove of Bijai Singh and in the light of the torch flashed by Hira Lal, he also recognised the running man as Lakhan. The two men went up to Badri Prasad, who at once said that Lakhan after shooting him had run away into the grove of Jai Jai Ram. Hira Lal and Buddha took him to the police station which is at a distance of One furlong. At 8-15 A.M. Badri Prasad handed over a written report of the occurrence at the police station. He was at once sent to the hospital in the town where his injuries were examined at about 8-30 P. M. He had six gun-shot wounds in an area 2 1/2' x 2', the sizes ranging from 3/4 x 1/2' to 1/2 x 1/4' skin deep 1/2' lateral to the middle of right side abdomen, on its upper part.

There were four rents on the kurta that Badri Prasad was wearing and there was a slight blackness. There was one rent on the vest that he was wearing under the kurta. The two garments were taken possession of at the police station after his medical examination. The station officer at once went to the spot for investigation. He recovered wads from, the grove of Bijai Singh. He examined both the eye-witnesses at once in the night and then went to the house of the appellant taut found him absconding. He got no trace of his whereabouts from his brother Sohan Lal. He continued to search for him but in vain and on 12-5-55 got his property attached under Section 88 Cr. P. C. He suddenly came across him in the court compound on 18-5-55 and arrested him.

3. The prosecution relied upon the evidence of Badri Prasad, Hira Lal and Buddha, who fully supported the prosecution case; The statement of Badri Prasad is amply corroborated by the first information report made by him immediately after the occurrence before he had any time to think of the person to be implicated and to tutor Hira Lal, Buddha etc. to give evidence in support of his version. He mentioned in the report how he recognised the appellant as the person who shot at him, once in the blaze of the pistol fire and again in the light of a torch. There was no conflict whatsoever between his deposition in court that the torch was of Hira Lal and the first information report in which he mentioned the torch but not the fact that it was of Hira Lal. The names of the witnesses Hira Lal and Buddha are mentioned in the report. The injuries found by the doctor on his person also fully corroborate his evidence.

There was futile cross-examination of the doctor about the injuries; the case set up in defence was not that Badri Prasad was not shot at or that he inflicted the injuries himself, but that he was shot at by somebody who could not be recognised on account of darkness. It is in the evidence of the doctor that Badri Prasad was shot at from a distance of a couple of yards and this is also the evidence of Badri Prasad. He created a very favourable impression upon the learned Sessions Judge and there is absolutely no reason for my saying that he did not speak the truth or that he could not recognise his assailants. There is nothing whatsoever to create even a doubt about his recognising the assailant. Even in some darkness he could recognise the appellant, who was his immediate neighbour. A flash of light was enough to enable him to recognise him. There is no reason to disbelieve the evidence of Hira Lal and Buddha also. No enmity between them and the appellant has been suggested. It was suggested that Hira Lal used to buy sugarcane from Badri Prasad's mill, that Buddha worked at Hira Lal's shop and that his son was employed by Badri Prasad; but these suggestions were denied by the witnesses. Badri Prasad admitted that Hira Lal previously used to buy sugarcane from his mill but said that he had not been doing so for the last 2 or 3 years.

Hira Lal denied having ever purchased sugarcane from the mill but admitted that his brother used to purchase it; so he does not contradict Badri Prasad. It is in the evidence that Badri Prasad filed a suit against Hira Lal for the price of sugarcane supplied to him; so Hira Lal would not have given false evidence at his instance. There is no evidence to show that Buddha had any connection with Badri Prasad Or could be under his influence. There was no difficulty whatsoever in his and Hira Lal's recognising the appellant in the light of the torch when he was running through the grove of Jai Jai Ram. Both were to north of the grove of Bijai Singh, and the appellant was running to north.

4. The investigating officer has marked in the site-plan the well and the pond, from where the two witnesses heard Badri Prasad's shouts, but none mentioned the fact that they were standing there and has not given the distances between the Places and the place where the shooting took place, and he was allowed to be subjected to cross-examination on these omissions. The cross-examination was

against law and a waste of public time and energy and ought to have been disallowed by the learned Sessions Judge. The investigating officer acted rightly in whatever he did and in whatever he omitted to do. His duty was to mark in the site-plan only what he personally saw or observed anything that he marked on it on the basis of statements made to him during the investigation was hit by the provision of Section 162, Cr. P. C. as much as the statements themselves, and could not be used as substantive or positive evidence.

If he had mentioned in the plan that the witnesses were standing at such and such places at the time of the occurrence, it would have been inadmissible in evidence and the court could not take it into consideration. Anything marked on a site-plan on the basis of a statement made during the investigation is as good as the statement itself, cannot be distinguished from it and is governed by the law which governs the statement. Not only is it not a substantive piece of evidence but also it cannot be used even to contradict the witness who had made the statement during the investigation, unless the formality of drawing his attention to it was gone through. The investigating officer rightly marked on the plan the pond and the well and also the place where he found blood (because he had personally seen them at the spot), but he had not personally seen where Badri Prasad was when shot at and where the witnesses were when they heard his shouts; consequently he could not write in the plan that the occurrence took place at a certain point or that the witnesses were standing at certain points when it took place or the distances between the two. If he had written these facts in the plan, the Court would have been obliged to ignore them and to read the plan as if it did not contain them.

The mention of such facts in the plan would also be hit by the rule against hearsay evidence; the Court could not receive hearsay evidence. In the memorandum prepared by the investigating officer of the recovery of blood-stained earth, he, however, committed the mistake, commonly committed by investigating Officers, of not describing the exact place from where he took the earth; his merely stating that he took it 'from the spot' or the place of occurrence' is meaningless. He could not say what was the spot or the place of occurrence because he was not present at the time of the occurrence. He ought to have described the place from where the blood-stained earth was taken by referring to its surroundings.

A number of inadmissible and irrelevant questions were put to the investigating officer; for instance the question, where Hira Lal and Buddha were at the time of the occurrence. I am surprised at the learned Sessions Judge allowing such a patently inadmissible question. He has also allowed the witnesses to be cross-examined about previous statements without there being any conflict with the deposition in Court.

A previous statement can be used only to contradict the witness, and if there is no contradiction between it and the deposition of the witness in court, it cannot be used at all. Moreover, the learned Sessions Judge has not followed the proper procedure of drawing the attention of the witnesses to the supposed contradictions in the previous statements; it does not appear that the previous statements were read over to them before they were asked whether they made them. Badri Prasad was allowed to be asked about enmity with other persons; the question was wholly irrelevant. It was the duty of the learned Sessions Judge to rule out such irrelevant and inadmissible questions.

5. The appellant pleaded not guilty and denied the occurrence. He suggested that he was falsely implicated on account of enmity and that he did not abscond but had gone to see a relation. He admitted that there was litigation between his brothers and Badri Prasad. His examination in the Sessions Court was more or less in the nature of cross-examination and the learned Sessions Judge has put the questions in inquisitorial form.

He was only required to place adverse, circumstances appearing from the evidence before the appellant for any explanation that he wanted to offer; so only the evidence ought to have been placed before him and the questions ought not to have been put to him in the form in which they are put in cross-examination. It was not proper to ask the appellant whether there was any enmity between him and Hira Lal and Buddha whether he was at his house at the time of the occurrence, how many days after the occurrence he had gone to see his relation, for how many years there had been enmity between him and Badri Prasad etc.

He should have placed before him the prosecution evidence that there was enmity between Badri Prasad and his brothers on account of various cases and that he

had absconded immediately after committing the crime and asked him if he had anything to say in respect of it. He had no justification to ask how many days before the occurrence he had gone to his relation; the question did not arise out of any evidence given by the Prosecution and was undoubtedly put in order to test the truth of the statement made by him in the Magistrate's court that he had not absconded but had gone to see a relation. Any question put in order to test the truth of an answer given by an accused is nothing but cross-examination and a Court has no right to cross-examine an accused person. However, no prejudice has been caused to the appellant by the defective examination done by the learned Sessions Judge,

6. The appellant did not examine any evidence in defence.

7. Two of the assessors found that the appellant was guilty. There is no reason for my taking a different view of the evidence. The case was amply proved against the appellant and there is no doubt that he fired at Badri Prasad from a pistol. His intention was obviously to kill him; he bore long-standing enmity, lay in ambush for him, took advantage of the darkness, used a pistol and from a very short distance and aimed at a vital part.

It is immaterial that the injury actually caused was not fatal. It is because it was not fatal that he is guilty of only an attempt otherwise he would have been guilty of murder. He himself has not said with what other intention he fired at Badri Prasad. There is nothing in the circumstances, to suggest that he had any other intention. He was rightly convicted under Section 307 of the Indian penal Code.

8. The sentence errs on the side of leniency. The learned Sessions Judge does not seem to have taken into consideration that the offence was committed in darkness and on account of enmity. It deserved deterrent punishment because offences in which fire-arms are used in darkness are becoming more and more common. The appellant well deserved a sentence of seven years' imprisonment

The sentence can be enhanced, but it might cause delay and an order under Section 106, Cr.P. C. may to a substantial extent serve the purpose of enhancement. I am satisfied that it is necessary to require the appellant to give

security under Section 106 of the Code of Criminal Procedure for keeping the peace. I gave an opportunity to Sri G.P. Goyal to show cause why an order under Section 106 Cr. P. C. be not passed 'and he has not been able to show any cause. There is enmity between Badri Prasad and the appellant and his brother and cousins and it is likely that he will repeat the offence on release from jail. They are neighbours and many occasions are likely to arise for his taking the law in his own hand. The enmity is deep-rooted and it is necessary in the interests Of peace to call upon the appellant to give security.

9. I maintain the appellant's conviction and sentence and call upon him under Section 106 of the Code of Criminal Procedure to execute a bond for Rs. 1000/- with two sureties for Rs. 1000/- each for keeping the peace for three years. In default he will undergo simple imprisonment for three years unless he gives the security earlier. The period of security will commence on the expiry of the sentence. The appellant must surrender himself to undergo the sentence.

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