

Gaya Prasad Vs. the State

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Court : Allahabad

Decided On : Feb-06-1957

Reported in : AIR1957All459; 1957CriLJ803

Judge : Roy and ;Sahai, JJ.

Acts : [Evidence Act, 1872](#) - Sections 24, 25, 26, 27 and 101 to 104; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 367

Appeal No. : Criminal Appeal No. 1698 of 1956

Appellant : Gaya Prasad

Respondent : The State

Advocate for Def. : Shri Rama, Dy. Govt. Adv.

Advocate for Pet/Ap. : S.N. Mulla, Adv.

Disposition : Appeal allowed

Judgement :

Roy, J.

1. The appellants Gaya Prasad and Behari Lal are two young boys aged about eighteen or nineteen years. They are Patwas by caste and reside in village Malaka in district Fatehpur which is situate at a distance of about five miles from police

station Fatehpur. Gaya Prasad was a student of Class X of Anglo Sanskrit College attached to the Government Higher Secondary School at Fatehpur and was appearing at the High School Examination on the relevant date. Behari Lal was following his ancestral occupation of Patwagiri or the threading of ornaments.

They were charged with having committed the murder of one Kumari Raj Dulari, the daughter of Badri Prasad Baniya who was carrying on a flourishing business, in that village, on 7th of April, 1956, some time in the day and also for having committed robbery of the property of Badri Prasad. Kumari Raj Dulari was aged about nine or ten years. Badri Prasad's wife died about four years back. Badri Prasad has a son by name Ram Prasad aged about twelve or thirteen years. Badri Prasad used to go away to the Fatehpur market twice a week on market days in order to make purchases for his shop.

2. The facts of the case as disclosed from the evidence of Badri Prasad lies within a short compass and may be stated as follows : On 7th of April, 1956, which was a market day, Badri Prasad left home with his son Ram Prasad for Fatehpur market at about 8 a.m. He left his daughter Kumari Raj Dulari in his house which he had locked from outside. He returned back at about 5 p.m. and when he opened the lock he found the doors of the house chained from within. He gave some calls to his daughter Raj Dulari but there was no response.

He therefore went to the ruins behind his house which lay to the north of the house. The ruins were on a higher level. He scaled the wall of the house from that side and went up the atari. He found the ladder which he had left in the barotha placed near the atari in the courtyard and with the help of the ladder he climbed down. After going inside the dalan he found the chain of the adjacent kothri broken. There was another kothri known as chor-kothri inside the aforesaid kothri. He found the lock of the chor-kothri also open. He also found boxes broken and goods removed.

When he went to the northern kothri by the side of this dalan he, found Km. Raj Dulari lying dead in a pool of blood with her neck cut down. Her mouth was gagged with a portion of her own dhoti which she was wearing. He also found a bloodstained kulhari Ex. 1 and a khurpi Ex. 2 lying there.

3. After leaving his son at his house Badri Prasad proceeded to the, police station where he lodged a report of the occurrence at 9.10 p.m. On return from the police station he found some more articles missing and he prepared a list in respect of them. It is said that he inspected his house a little more carefully and in that connection he also went to the roof, of the house and found a small potli containing a sum of Rs. 2,799/-, in currency notes, as also a gold nathuni, a silver bar and four gold-mohurs lying on the roof amidst grass and phoos at some distance from the place where the ladder had been placed.

Second Officer Malkhan Singh of police station Fatehpur reached Badri Prasad's house, the same night at about midnight. It is said that a subsidiary list of articles was handed over to him by Badri Prasad who also showed him the potli containing the currency notes and also the other articles mentioned above. The Second Officer found the dead body of Raj Dulari in the northern portion of the kothri in a pool of blood and he also found the bloodstained khurpi and the kulhari lying close by. He prepared the inquest report on the following morn-ing. He secured blood-stained earth from that place.

After performing some other acts in connection with the investigation and after having recorded the statements of Badri Prasad, Gaya Prasad and Mathura Prasad witnesses in the afternoon of 8th of April, 1956, he returned back to the police station on 9th of April, 1956, some time in the forenoon, and went again to village Malaka on 9th of April reaching there at about 3 p.m. It is said that Raghubir Prasad E. W. 19 who was the mukhia of the village for well-high twenty years and whose brother Rampal is now the Pradhan of the village came to him some time in the afternoon that day and told him that the two appellants were present on his khalyan and they had made a confession of their guilt,

The Sub-inspector proceeded to the khaliyan of Raghubir Prasad. It is in evidence that he arrested them there and he took down from their person the banyan and the janghias which they were wearing and which according to the witnesses had been blood-stained. The Second Officer interrogated the two accused. Gaya Prasad is said to have offered to show the looted articles of Badri Prasad which he had kept at his house. Gaya Prasad is said to have taken the Second Officer and

the witnesses to a kothri inside his house where he had opened a box with a key which he had with him and took out the ornaments and a cloth bag containing Rs. 201/- in currency notes.

The Second Officer sealed up these articles, excepting the currency notes, and he prepared a recovery memo, Behari Lal accused is said to have offered to point out the chakkas (an iron rod with a circular iron hook attached to it which is used by the Patwas in threading ornaments) which he had kept at his house. Behari Lal it is contended took the Second Officer and the witnesses to his house and from underneath the bhoosa which was stored in his dalan he took out the blood-stained chakkas Ex. 34.

4. The post-mortem examination on the dead body of Raj Dulari was performed on 8th of April, 1956, at 4 p.m. and the following ante mortem injuries were found on her person :

1. Incised wound $2\frac{1}{2}' \times 1\frac{1}{2}'$ x muscle deep over the front of the neck at its root (transverse).

2. Incised wound $2\frac{1}{2}' \times 1\frac{1}{2}'$ x bone deep cutting the right side of trachea and soft parts in that region and giving a transverse cut of the body of the fifth cervical vertebra underneath the injury noted, $\frac{1}{8}'$ deep, $1'$ above the injury No. 1 on the neck in front,

3. Incised wound $3' \times \frac{3}{4}'$ x bone deep on right side of neck $\frac{1}{4}"$ behind and below injury No. 2 cutting all the soft parts and blood vessels in that region on right side neck and cutting the body of third cervical vertebra completely and also spinal cord.

4. Incised wound $1\frac{3}{4}' \times 1\frac{1}{2}' \times \frac{1}{4}'$ on right side neck $\frac{1}{2}'$ below injury No. 3.

5. Multiple linear transverse abrasions 17 in number varying in size from $1' \times \frac{1}{8}'$ to $3' \times \frac{1}{6}'$ in an area of $5' \times 3\frac{1}{2}'$, $\frac{1}{4}'$ below injury No. 4 noted extending up to the right shoulder and right side chest.

6. Linear abrasion $1' \times \frac{1}{8}'$ on middle of right side face.

7. Four abrasions 1/2' x 1/2' each on right side back in the middle in an area of 2 1/2' x 3'. There were two more injuries, a wound 3' x 1 1/2' x bone deep on the middle of right leg outer side, and another injury over the second toe of right foot. The skin over this second toe of the right foot had been eaten by insects exposing the tendons and the bone in an area of 1" x 1/4'. The first injury out of these two appeared to the Medical Officer to be the result of the injured portion having been eaten by ants after the death of the deceased although the initial injury according to him could be ante-mortem.

The second injury in the opinion of the Medical Officer was post-mortem. The stomach contained about six ounces of semi-digested food. The Medical Officer was of opinion that the injuries were sufficient in the ordinary course of nature to cause death and the incised wounds could have been caused by kulhari and khuroi and the abrasions could have been caused by friction against some hard substance.

5. In respect of the various properties said to have been recovered at the instance of the accused identification proceedings were held by a Magistrate on 5th of May, 1956, and the properties were identified by the inmates of the house of Badri Prasad.

6. The Chemical Examiner found blood-stains on the kulhari Ex. 1, Khurpi Ex. 2, the blood-stained earth that was taken from the northern kothri of Badri Prasad's house, the dhoti Ex. 26 of the deceased, the janghia Ex. 30 alleged to belong to Gaya Prasad, and the chakkas Ex. 34 alleged to have been recovered at the instance of Behari. The Serologist in his turn found the kulhari, khurpi, earth, dhoti and janghia stained with human blood. No blood was found on the banyan and underwear of Behari and on the banyan of Gaya Prasad. The stains on the underwear of Gaya Prasad and the chakkas were found not sufficient for blood grouping test and the reaction of control of the blood-stains on the dhoti of the deceased subjected to test by the Serologist was such that an opinion regarding blood grouping was not possible.

7. Twenty-three witnesses were produced on the side of the prosecution. There was no eye-witness to the occurrence. The case rested purely upon circumstantial

evidence. The circumstances which the prosecution wanted to set up against the two appellants were these:

1. The recovery of the blood-stained banyan Ex. 29 and the janghia Ex. 30 from the person of Gaya Prasad accused on 9th of April, 1956.
2. The recovery of the Ornaments and the bag containing currency notes of Rs. 201/- at the instance of Gaya Prasad on 9th of April, 1956, from a locked box in his house.
3. The recovery of the blood-stained banyan Ex. 27 and the janghia Ex. 28 from the person of Behari Lal on 9th of April, 1956.
4. The recovery of the blood-stained chakkas Ex. 34 at the instance of Behari Lal accused on 9th of April, 1956, from the bhoosa in the dalan of his house.
5. The existence of two injuries on the left wrist joint of Behari Lal accused at the time of his arrest on 9th of April, 1956, which were also subsequently found by the jail doctor on 11th of April, 1956, and his admission before him that he, namely, Behari Lal accused had got these injuries from a fall on his hand.
6. The two accused having been seen together in the khandhar to the north of Badri Prasad's house at about 9 a.m. on the date of occurrence.
7. The two accused having been seen jumping from the roof of Badri Prasad by Mathura P. W. 18, on the date of occurrence at about 10 a.m. and,
8. The extra-judicial confession by the two accused to Raghubir Prasad Mukhia P. W. 19 on 9th of April, 1956.
8. Both the accused pleaded not guilty to the charge. They denied their participation in the crime or their having had any connection with it. They denied the recoveries of the articles mentioned above. Their contention was that they had been falsely implicated in the case at the instance of Raghubir Prasad on account of enmity.

9. The learned Sessions Judge upon an examination of the evidence which was produced before him held that certain facts were established against the two accused and that those facts conclusively proved that the murder and the robbery had been committed by the accused and by no other. As against Gaya Prasad appellant the facts which he held to be established were to the effect that

1. He was seen in the khandhar to the north of Badri Prasad's house on the date of occurrence at about 9 a.m. by Gaya Prasad P. W. 16,

2. The janghia Ex. 30 with stains of human blood was recovered from his person on 9th of April, 1956.

3. The ornaments and other articles of Badri Prasad were recovered at his instance from a box in his house and the lock of the box was opened with a key which was widi Gaya Prasad, and

4. The extra judicial confession had been made by him to Raghubir Prasad Mukhia. without any coercion or undue influence having been exercised against him.

10. As against Behari appellant the facts which the Sessions Judge held to be established-were the following :

1. He was seen along with Gaya Prasad accused on the date of occurrence at about 9 a.m. in the khandhar to the north of Badri Prasad's house by prosecution witness Gaya Prasad.

2. The blood-stained chakkas Ex. 34 was recovered at his instance from beneath a stack of bhoosa in the dalan of his house.

3. There were two injuries on his left wrist at the time of his arrest on 9th of April, 1956, which were noticed by the jail doctor on 11th of April, 1956, and he had admitted before him that he had received those injuries from a fall on his hand. And

4. The extra-judicial confession' had been made by him to Raghubir Prasad Mukhia on 9th of April, 1950.

11. We shall first take up the circumstances which were taken by the Sessions Judge as proved against Gaya Prasad and we shall proceed to examine whether those circumstances conclusively proved the guilt of the accused. The fact that the two appellants had been seen in the khandhar to the north of Badri Prasad's house on the date of occurrence at about 9 a.m. had been vouched to by Gaya Prasad P. W. 16. That was the only evidence bearing upon the point.

Closely connected with that evidence was the evidence of Mathura Prasad P. W. 18 who was produced to swear that on that very day at about 10 a.m. he had seen the two appellants jumping down from the roof of Badri Prasad complainant into the ruins to the north of Badri Prasad's house. So far as the evidence of Mathura Prasad was concerned the learned Sessions Judge disbelieved it and held that it could not be relied upon. According to Mathura Prasad he entertained no doubt or suspicion against the two accused when he saw them jumping down the roof.

But he went on to state that when he came to know on that very evening that Badri Prasad's daughter had been murdered, suspicion crept into his mind and he told one Merwa in the evening when he was still on his threshing floor that he had seen the two appellants coming down from the roof of Badri Prasad and that he suspected that they must have been involved in the murder. The alleged suspicion, according to him, was not conveyed to Badri Prasad. And we do not know how the police came to be informed of the fact that Mathura Prasad was an important witness bearing upon the question.

There is inherent improbability in the statement of Mathura Prasad when it is read along with the evidence of the Sub-Inspector who investigated the case. According to Mathura Prasad he had told the Sub-Inspector at the time of investigation that he had seen the two appellants coming down the roof of Badri Prasad at about 10 a.m. According to the Sub-Inspector, however, what Mathura Prasad had told him was that he had seen them in the khandhar and not jumping down from the roof of Badri Prasad.

The evidence of Mathura Prasad was therefore rightly rejected by the Sessions Judge. Gaya Prasad's testimony in our opinion was wrongly relied upon by the Sessions Judge. Gaya Prasad is no doubt a resident of the same locality. He

swore that in the morning in question he saw the two appellants in the khandhar to the north of the house of Badri Prasad and that at that time Gaya Prasad had an iron rod about one cubit in length in his hand. The question is entirely shrouded 'in mystery as to how Gaya Prasad's knowledge on the subject was conveyed to the Sub-Inspector because according to Gaya Prasad he did not disclose the information possessed by him to anyone before he was called by the Chowkidar at about 12 O'clock in the day when he was asked to appear before the Sub-Inspector to give his statement.

Gaya Prasad witness was definite on the point by stating that he had not told anyone about what he had seen in relation to this matter before he appeared before the Sub-Inspector to give his statement. Gaya Prasad's testimony is therefore not acceptable to us for that reason and for the further reason that his presence on the side of the khandhar at about 9 a.m. on that day was highly improbable, The first circumstance which has been taken as proved against Gaya Prasad appellant must therefore be rejected.

12. Coming now to the recoveries, namely, the recovery of the janghia Ex. 30 with stains of human blood from the person of Gaya Prasad on the 9th of April, 1956, and the recovery of the ornaments and other articles at his instance from a box in his house the lock of which was said to have been opened by him with a key given by him, we are of opinion that the evidence is much too flimsy and suspicious. Gaya Prasad denied that these recoveries were made from him or at his instance. In order to support the recoveries three witnesses were examined. They were Raghubir Prasad Mukhia P. W. 19, Ram Nath P. W. 20 and Raghuraj P. W. 21.

Raghubir Mukhia and Raghuraj are no doubt residents of Malaka where the occurrence is said to have taken place, but Ram Narain is a resident of Jaitpur which is several miles off from Malaka. Raghubir Mukhia is the brother of Rampal the Pradhan of the village. He is closely associated with the other witnesses who were produced on behalf of the prosecution and there is enough material on the record to prove that he is not favourably disposed towards the appellants and he nurses grievance against them on several scores.

Associated with these alleged recoveries there was also one Hori Lal. Hori Lal was a co-accused with Raghubir Prasad Mukhia in a criminal case about three years back. In that very case Raghuraj P. W. 21 was a witness on behalf of defence; and although Raghubir Prasad P. W. 19 feigned ignorance of it by putting forward the convenient plea that he does not remember about it, the fact was admitted by Raghuraj P. W. 21 himself.

Raghubir P.W. 19 had, however, to confess that he has appeared as a police witness in a number of cases and in one of those cases prosecution witness Sheo Ram was also a witness along with him. So far as Ram Narain P.W. 20 is concerned we have already stated that he is a resident of village Jaitpur which is several miles away from Malaka. According to him he was proceeding from village Jaitpur to Fatehpur and when he reached village Malaka at about sunset he was called by the Sub-Inspector who knew him from before and he was asked to witness the search.

He stated that Raghuraj P.W. 21 was also with him. Why independent and respectable witnesses of the locality were not associated with the alleged searches and recoveries had not at all been explained by the prosecution, although the prosecution evidence itself disclosed that village Malaka has an abadi of about two hundred houses and there was no dearth of respectable witnesses of that locality. Both Ram Narain and Raghubir witnesses had figured as police witnesses in a number of cases. For the reason stated above we are not in a position to place implicit faith upon their testimony. Sub-Inspector Malkhan Singh wanted to impress upon the Court that prosecution witness Ram Narain was an absolutely independent witness and that he himself did not know him from before.

But Ram Narain gave a lie direct on that point by stating that he knew the Sub-Inspector because this Sub-Inspector' was posted at police station Lalauli some time before this occurrence. The absence of respectable and independent witnesses to prove the searches and the recoveries and the doubtful circumstances attaching to this matter impel us to come to the conclusion that it would be unsafe to rely upon the alleged recovery of the bloodstained janghia Ex. 30 and the recoveries of the ornaments and the other articles at the instance of

Gaya Prasad.

13. The extra-judicial confession alleged to have been made by Gaya Prasad to Raghubir Prasad Mukhia suffers under the same infirmity. According to Raghubir Prasad he was on his threshing floor in the evening on Monday the 9th of April, 1956, when the two accused came to him together and told him that the police was after them. He enquired from them as to why it was so, and then he was told by Behari Lal accused that both of them were responsible for the incident at Badri Prasad's place and that they had killed the girl and had also looted the property. Raghubir Prasad witness further said that both of them implored him to save their lives.

According to him Gaya Prasad spoke to him in the same strain as the other accused. Raghubir Prasad went on to state that he asked the two accused to remain at the khalyan and he proceeded to contact the Sub-Inspector who was present in the village, that he brought the Sub-Inspector to the khalyan and that the Sub-Inspector then arrested the two accused. When the alleged confession is said to have been made to him no other person was present. Raghubir Prasad was cross-examined on that point and he stated that he was not in a position to give the exact words of the confessors and that he could only give a gist of what they had said.

When an attempt is made to rely upon an extra-judicial confession every prosecution should be taken to ascertain as exactly as possible the very words which were used by the prisoner who is supposed to have confessed. Extra-judicial confessions have to be received with great care and caution, and when the foundation of the conviction is the confession alleged to have been made by the accused there are three things which the prosecution must establish. Firstly, that a confession was made. Secondly, that evidence of it can be given. And thirdly that it is true.

In the present case all these elements are wanting. If Raghubir Prasad Mukhia who claims to be a responsible resident of the village was in the village itself since the 7th of April, 1956, when the offence is said to have been committed and if two other residents of the same village, namely, Gaya Prasad and Mathura were in

possession of definite knowledge-of the fact that the two accused had been seen loitering near the house in the morning in question and were also seen jumping down the roof of the house of Badri Prasad, Raghubir Prasad should not have been unaware of that information till the 9th of April, 1956, in the evening, when, according to him, he inquired of the two appellants as to why the police was after them and it was upon that query that he was told by the two appellants that they were responsible for the murder of Badri Prasad's. daughter and also for the loot.

We are unable to pin any faith in the testimony of Raghubir Prasad on this point and we are of opinion that the extra-judicial confession imputed to the two appellants and alleged to have been made by them to Raghubir Prasad Mukhia was not proved by any independent or satisfactory evidence.

14. In this connection we might state briefly a significant factor relating to the recovery. It is said that when the ornaments were recovered at the instance of Gaya Prasad a sum of Rs. 201/- in notes was recovered in a piece of markin cloth tied up at one end. In the first information report it was stated that a sum of Rs. 3,000/- in cash had been taken away by the miscreants. In order to make up for the lost money Badri Prasad came forward with. the story that after his return from the Thana after making the report he made a closer inspection of his house and when he went up the roof he found a small potli containing Rs. 2,799/- in currency notes, a gold nathuni, a silver bar, and four gold mohurs and that those articles belonged to him. He also stated that he found the two keys Exs. 3 and 4 in the angan which were blood-stained and those keys did not belong to him.

The implication was that those two keys had been left by the miscreants at that place. We do not know how and why the miscreants left a sum of Rs. 2,799/- in currency notes and the gold mohurs and the other ornaments on the roof of the complainant. If their intention was to loot the property, they could have easily taken away the currency notes and those ornaments instead of leaving them on the roof of Badri Prasad. There was further no evidence whatsoever to connect the two keys Exs. 3 and 4 with the two appellants. These disturbing features in the case had not at all been tried to be explained by the prosecution.

15. In regard to these recoveries the recovery lists that were prepared by the Sub-Inspector mentioned that these were articles of loot and were definitely stated to be so by Gaya Prasad. A statement to that effect made to the police would not be admissible in evidence in view of the provisions of Sections 24, 25 and 26 of the Indian Evidence Act. Section 27 of that Act is virtually a proviso to those sections and a statement made to police would be admissible evidence if it comes within the four corners of Section 27.

The Legislature has prescribed two limitations in order to define the scope of the information provable against the accused. The information must be such as has caused the discovery of the fact and the information must relate distinctly to the fact discovered. The requirements of both the conditions must be satisfied before an incriminating statement can be received in evidence. Thus only that portion of the information is provable under Section 27 which was the immediate or proximate cause of the discovery of the fact. The language of the section and its place in the Act make it clear that discovery therein referred to is discovery to or by police officers. Statements made by an accused person which are or may be provable under Section 27 should be clearly and carefully recorded as far as possible in the actual words of the accused and it will be for the Trial Judge to have such a record before him to decide how much of it is admissible under the section.

The fact mentioned in the recovery list that

'as pointed out by himself Gaya Prasad accused under arrest himself handed over the articles being the stolen property in the case in the matter of the complaint of Badri Prasad after opening the lock of his tin box.'

was therefore not admissible in evidence in its entirety and the learned Sessions Judge ought to have excluded that portion of the statement which was hit by the provisions of Sections 24, 25, 26 and 27 of the Indian Evidence Act.

16. The circumstances held to be proved by the Sessions Judge against Behari Lal appellant need not, by reason of what we have stated in examining the circumstances against Gaya Prasad, be noticed in detail. We have already

observed that the evidence of Gaya Prasad P.W. 16 cannot at all be relied upon when he said that the two appellants had been seen in the morning in question in the khandhar to the north of the house of Badri Prasad. We have also said why the evidence regarding the alleged recovery cannot be relied upon and we have further said that the evidence regarding the extra-judicial confession was much too flimsy and worthless to merit acceptance.

There is only one other point which has got to be noticed against Behari Lal appellant. Behari Lal had two injuries on his left wrist which were found by the jail doctor on the 11th of April, 1956, after his admission to jail. It is said that Behari Lal had admitted before the jail doctor that he had received those injuries from a fall on his hand. Assuming that that circumstance was proved, the question would be whether that circumstance alone would be enough to fasten guilt upon him. The principles to be followed in criminal cases based upon circumstantial evidence have by a long trend of judicial decisions been held to be as follows:

1. The circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond all reasonable doubt and must be conclusively connected with the facts sought to be inferred therefrom. And

2. In order, to justify an inference of guilt the circumstances from which such an inference is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

17. The circumstance that Behari Lal appellant had two minor injuries on his wrist would not justify an inference of guilt; and it cannot be said that it was incompatible with the innocence of the accused and was incapable of explanation upon any other reasonable hypothesis than that of his guilt.

18. Two witnesses were produced on the side of defence. One of them was Kishore Narain the Head Clerk of the Anglo Sanskrit College attached to the Government Higher Secondary School, Fatehpur. Kishore Narain swore that Gaya Prasad accused appeared at the High School examination of 1956 and he was present in the examination hall in the afternoon of the 7th of April, 1956, from 3

p.m. to 6 p.m. in order to answer his Second Paper in Science. The 8th of April, 1956, was a Sunday.

Kishore Narain further swore that on the 9th of April, 1956, Gaya Prasad had his Biology First Paper from 7 a.m. to 10 a.m. and he was present in the examination hall during that period. The other defence witness was Sheo Shanlcar the father of Gaya Prasad. It seems extremely surprising that Gaya Prasad after having committed an offence of murder and of loot some time before 3 p.m. on the 7th of April, 1956, had had the equanimity of mind to proceed from village Malaka in order to be present at the examination hall at Fatehpur at a distance of five miles at 3 p.m.

19. The explanation offered by Sub-Inspector Malkhan Singh as to why he did not arrest Gaya Prasad and Behari Lal appellants before the evening of the 9th of April, 1956, was much too childish and puerile. If the evidence of the prosecution witnesses were to be believed, Malkhan Singh got definite clue from the two witnesses Gaya Prasad and Mathura Prasad that the two appellants were seen loitering near the house of the complainant in the morning in question and were also seen jumping down from the roof of that house.

Yet, in spite of that information, he postponed search of their house and postponed their arrest till the evening of the 9th of April, 1956, because according to Sub-Inspector Malkhan Singh the matter was 'still under investigation' and he therefore did not think it fit to take earlier and prompt action about the matter. This exhibits a sort of utter incompetency on the part of a Sub-Inspector of police who is in charge of the investigation of such a crime.

20. Upon the whole matter therefore we feel that the circumstances from which an inference adverse to the accused was sought to be drawn had not been proved beyond all reasonable doubt; and the circumstantial evidence relied upon by the learned Sessions Judge bristled with inconsistencies and improbabilities and ought to have been rejected. We are therefore unable to uphold the conviction and sentence of the appellants. Accordingly we allow the two appeals, set aside the conviction and sentence of Gaya Prasad and Behari Lal and direct that they be set at liberty at once unless wanted in any other matter. The reference is rejected.

