

The State Vs. Magga and anr.

The State Vs. Magga and anr.

SooperKanoon Citation : sooperkanoon.com/752236

Court : Rajasthan

Decided On : Oct-27-1952

Reported in : AIR1953Raj105

Judge : Wanchoo, C.J. and; Bapna, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 276, 278, 284, 285, 285(1), 285(2), 286, 326, 326(1) and 537; [Indian Penal Code \(IPC\), 1860](#) - Sections 300

Appeal No. : Criminal Murder Ref. No. 2 of 1952

Appellant : The State

Respondent : Magga and anr.

Advocate for Def. : Makhtoor Mal Singhvi, Adv.

Advocate for Pet/Ap. : Kansingh, Adv.

Disposition : Reference accepted

Judgement :

Wanchoo, C.J.

1. This is a reference by the Sessions Judge of Pali for confirmation of the sentence of death passed under Section 302, Penal Code on Bhagga and Magga.

There has been no appeal however by Bhagga and Magga and the reference is, therefore, to be disposed of in the manner provided under Section 376, Criminal P. C.

2. The case relates to an incident which took place on the night between the 3 and 4-4-1951. There is a well known as Imaratia in village Gadhware. The lands attached to that well were cultivated by eight persons in 1950-1951. These were Bhika, Parbhoo, Gheesa deceased, Ganesh deceased, Ratna, Chala, Kanji and the two accused Bhagga and Magga who are brothers. When the crop was ripe for cutting at the end of March, 1951, there was some dispute in that connection. Three labourers were engaged to help the partners in cutting the crop; but after their engagement the accused objected to the employment of labourers on 3-4-1951. In that connection there was exchange of abuses between the accused and Ganesha and Gheesa deceased, and the accused had grappled with Ganesh and Gheesa. Ganesh deceased had received some injuries in this struggle but the other partners intervened and separated these persons. The accused had then gone away giving a threat to the other partners. Ganesh and Gheesa deceased also went to the village in order to make a report of the incident to the police; but the accused's sister Diwli had intervened and assured the mother of Kanji one of the partners that she would co-operate with them in cutting the crop and that the matter should not be reported to the police. Thereupon the idea of making a report to the police was given up.

3. Then we come to the incident of the night. Gheesa and Ganesh deceased, Ratna, Govind, another Ganesh who is a witness in the case and Hardas had gone to the well that day after night-fall to keep watch there. Gheesa slept in one 'Od', which is a kind of shed, near the well while Hardas had slept in another 'Od' some distance away and Ratna slept in a third 'Od' near the entrance gate. Ganesh deceased, Ganesh P. W. and Govind had slept on the thrashing floor. Some time after mid-night, Ratna woke up on hearing the cries of Gheesa deceased. He then saw the two accused hitting Gheesa. Magga had a 'Farsi' while Bhagga had a 'Katari' and an axe and used them to attack Gheesa deceased. Hardas also rushed up and thereupon Magga and Bhagga fell on Hardas and attacked him with 'Farsi' and axe. Ratna ran away out of fear to the 'Saran' of the

well. He then heard further cries of 'Mare re Mare re' and had raised an alarm himself also on which one Kishna who worked on Kankaria well nearby had come up and seen the attack on Hardas. These accused after they had finished with Gheesa deceased and Hardas deceased went to the thrashing floor where Ganesh deceased was sleeping. Ratna, however, did not see that part of the incident and we have the evidence of Govind about it.

It appears that Govind and others who were at the thrashing floor, which is at some distance from the 'Ods', heard some noise after mid-night from the side of the 'Ods', when they had just gone to sleep. These people however did not attach much importance to the noise thinking that it might have been due to a bullock having got loose. Shortly after however these people saw the two accused coming towards them. They got up and then Magga asked Bhagga to hit Ganesh deceased with the axe and Bhagga immediately hit Ganesh deceased with the axe and he fell down. Thereafter Magga hit Ganesh deceased two or three times with the 'Farsi' on the legs and finally Bhagga cut the neck of Ganesh deceased with the 'Katar'. Govind asked these people not to kill Ganesh deceased but they threatened to kill him also if he did not keep quiet. Thereafter the two accused went away and Govind and Ganesh P. W. remained where they were during the night. Later in the morning Ratna had come to these people and asked them who had been killed and they said that Ganesh had been killed. Later still the village people had come to the field after daybreak after the information of the incident had been carried to the village by Ratna. A report was made in the thana at 11-30 A.M. on 4-4-1951, by Shankerdan, and it may be set out in detail:

'I heard this morning that on the night before, Charans had fought at the Imaratia well in village Gadhwara, and two or three persons had been killed at the well. Further, Bhagga son of Bhura and Magga son of Bhura Charans of Gadhwara are standing at their house with swords and are saying that they would kill more persons. Village people are surrounding them outside the house. I do not know how many people have been killed and who have been killed. I have heard rumour in the village and have come to report.'

4. As the information was vague, Head Constable Azim Khan immediately started for Gadhwara to find out what had really happened. On reaching the village he, inquired from Ganeshram P. W. 1 who is the father of Hardas deceased. The information which was given to him was that

'Bhagga and Magga had wounded Ganeshram's son Hardas the previous night at Imaratia well with sword and 'Farsi' where he was sleeping. Ganeshram came to know of it in the morning. There were a number of injuries on the body of Hardas who was unconscious and had been removed to his house. Ratna, Ganesh and others had seen the accused causing injuries to Hardas and action should be taken.'

Thereafter investigation proceeded.

5. We may also refer to the circumstances in which the accused were arrested. Shankerdan had already reported that the accused were standing at their house with swords and they had been kept surrounded by the village people. Sub Inspector Premgiri has told us what he saw when he arrived in the village. We here refer to his statement in Hindi as the memorandum prepared by the learned Judge is very brief and does not indicate exactly the circumstances in which the accused were arrested. The Sub-Inspector says that he went first to the house of the accused. He found their house surrounded by the village people. The door of the house was closed from inside and the accused were standing on the 'Chabutra' inside. Magga had a 'Farsi' in his hand and Bhagga had an unsheathed sword. The Sub-Inspector got the door opened and asked the accused to come out. They then came out of the house and were arrested. The Sub Inspector took into possession the 'Farsi' as well as the sword. On search of the house later on, he recovered an axe and a 'Katari' which were blood-stained though the blood on the 'Katari' was faint. The clothes which the accused were wearing were also taken into possession after their arrest and appeared to have blood stains on them. Then the Sub Inspector proceeded to the well where the incident is alleged to have taken place. He found the sheath of the 'Katari' near the place where the dead body of the Gheesa was lying. He also found the broken handle of the axe at the thrashing floor near the well where the dead body of Ganesh was lying and

this was also taken into possession. Not much importance, however, can be attached in this case to the clothes and various weapons being blood-stained because no steps were taken to send these articles for chemical examination so that it may be established that they were stained with human blood. This in brief is the prosecution case.

6. Both the accused pleaded not guilty. They admitted their partnership in cultivation at Imaratia well; taut they denied that any quarrel had taken place between them and the other partners about the cutting of the crop. They also denied that they had gone to the well armed with various weapons and had committed the murder of Gheesa, Hardas and Ganesh deceased. They were questioned whether they were standing armed with sword and 'Farsi' in their house on the morning of 4-4-1951, while the house was surrounded by the villagers & whether they had thrown stones at the villagers. They replied that the villagers had thrown stones at them and not vice versa. They denied the recovery of either the sword, Farsi, Katari, axe and the clothes from their possession or their house. They also denied that they had anything to do with the sheath and the broken handle which were recovered near the dead bodies. Their case is that they had been implicated out of enmity by the witnesses. They alleged that the witnesses who were kinsmen had joined hands and had ruined them. One of them Magga went further and said in the committing Magistrate's Court that the villagers had attacked them in the house at day-dawn shouting 'Maro Maro'. The two brothers asked the villagers why they were going to beat them and the villagers said that they would beat them for no reason. They then shut the door of their house from inside and sat down. The villagers then climbed over the roof of their house and broke the tiles. They then shouted for help. Then the Chokidar came up. The villagers were armed with swords, Farsas, spears and other weapons. The chokidar asked the villagers to come down. The villagers then attacked them again and then the Sub Inspector arrived. If the Sub Inspector had not come in time they would have been killed. In effect the accused denied everything except that the villagers were surrounding their house when the police arrived, though their case is that the villagers were attacking them for no rhyme or reason. They have produced two witnesses in defence to show that they were at home in the village that night.

7. Before we deal with the evidence we would like to dispose of certain preliminary points that have been raised on behalf of the accused in connection with the assessors who sat to assist the Sessions Judge in the trial of this case. The trial began on the 22-3-1952. Three assessors were summoned for that date. Of these two were present while the third did not come. Thereupon one assessor who was present in the court premises was chosen as an assessor and the trial began with three assessors namely Jethmal, Balkrishna & Asharam. On 6-6-1952, Jethmal one of the assessors absented himself and for some odd reason which is not clear from the record; one Chimniram was asked to sit in place of Jethmal as an assessor, with the result that on the 6-6-1952, there were three assessors, namely, Balkrishna and Asharam who had been sitting throughout and Chimniram who was introduced for the first time that day. On the 23rd June also Chimniram, Balkrishna and Asharam sat as assessors. On the 27th June, however, Jethmal reappeared and was allowed to sit and thereafter four assessors sat throughout namely Jethmal, Chimniram, Balkrishna and Asharam. Eventually all these four assessors gave their opinion on 1-7-1952, when the trial came to an end.

8. The first preliminary objection is that the trial was vitiated as it took place in defiance of Section 284, Cr. P. C. which runs as follows:

'When the trial is to be held with the aid of assessors not less than three and, if practicable, four shall be chosen from the persons summoned to act as such.'

It is clear from this section that the trial has to start with the aid of at least three assessors and these three have to be chosen from the persons summoned to act as such. The assessors are summoned from a list which is prepared under the provisions of the Criminal P. C. vide Section 326 (1). The objection is two-fold: (1) that there is nothing on the record to show that Asharam who was picked out from among the persons present in Court was from the list of assessors prepared under the provisions of the Code and (2) that even if he was in that list, he had not been summoned to act as such.

9. So far as the first objection is concerned, it is submitted that there is a difference between Section 284 and Section 276 which relates to the choosing of jurors and that while the second proviso to Section 276 allows the Court to make the

deficiency in the number of jurors from such persons as might be present in court, Section 284 does not give this latitude to the Court and assessors must always be from the list prepared under the Code. We are of opinion that this is correct and considering the words of Section 284, assessors must always be chosen from the list prepared under the Code. There was nothing on the record of the trial court to show that Asharam's name was on the list; but an affidavit and a copy of the list of assessors have been filed on behalf of the State in this Court which shows that Asharam was in the list of assessors, which was in force when the trial began in March, 1952. It is also clear from these documents that Chinniram who had been added in June, 1952, as an assessor was also in the list. So there only remains the question whether Asharam was summoned to act as such. All that appears on the record is that when there was a deficiency in the number of persons who had been summoned and who appeared to act as assessors, the court sent for Asharam who was on the list of assessors and ordered him to sit as an assessor. No formal summons was issued to him in that connection. Reference in this connection may be made to these cases. In -- 'Balak Singh v. Emperor', AIR 1918 Pat 420 it was held that where a Sessions Judge chose from those present in court a person who was not on the list of assessors to act as an assessor that person could not be considered to be an assessor and as without him the statutory number of assessors was not complete, the trial was contrary to law and the conviction and sentence had to be quashed. This case would have applied if Asharam had not been on the list of assessors; but in view of the documents filed on behalf of the State which show that Asharam is on the list of assessors, the trial cannot be vitiated on this ground.

10. The next case is -- 'Ram Babu Jadav v. Emperor', 39 Cri L J 302 (Pat). In that case there was deficiency in the number of assessors present and the Judge there and then issued summons to a gentleman who was present in court and who was one of the qualified persons to serve as assessor and thereafter chose him to sit as an assessor. It was held that this was sufficient compliance with Section 284. There is, however, a slight distinction between that case and the present case because in that case formal summons had been issued before the assessor was actually chosen.

11. The third case -- 'Emperor v. Ramsidh Rai', 39 Cri L J 725 (Pat) is, however, on all fours. In that case there was a deficiency in the number of assessors and the court chose a gentleman present in the court compound whose name was in the list of assessors and asked him to serve as an assessor without any formal summons having been served upon him. It was held that the trial was not illegal, and the order of the Judge to requisition the services of the gentleman whose name was in the assessor's list, amounted to summoning him. We respectfully agree with the view taken in this case by the Patna High Court. We consider that the fact that the formality of issuing the summons was not gone into, was a mere irregularity which is curable under Section 537, CrP.C. as there was no failure of justice in this case on account of that irregularity. Therefore there was sufficient compliance with the procedure provided for the trial of the case in Section 284, Criminal P. C.

12. The second preliminary objection is that when Jethmal absented himself on the 6-6-1952, the court did not follow the provisions of Section 285 (1) of the Code, and, in any case, the addition of Chinniram at this stage of the trial was unwarranted by any provision of the Code and, therefore, the trial is vitiated. It is further urged that once Jethmal was absent on two hearings, he should not have been allowed to take part again in trial, and the court in allowing him to do so and in taking his opinion on 1-7-1952, acted irregularly and the trial was vitiated. Section 285, Criminal P. C. reads as follows:

'S. 285(1) If in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

(2) If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.'

It is clear from a perusal of Section 285 that the Code contemplates that if an assessor is unable to sit, the trial can go on with the aid of remaining assessors so long as there is at least one assessor throughout the trial. If, however, for some

reason not a single assessor is present throughout the trial, Section 285 (2) comes into play and the Judge must stay the proceedings and hold a new trial with the help of fresh assessors.

13. Learned counsel for the accused relies on two cases in this connection. In -- 'Baddan v. Emperor', AIR 1946 All 253 it was held that

'where one of the assessors appointed in a trial absents himself, the Court should ascertain before proceeding with the trial whether the absence of the assessor was due to a 'sufficient cause' and whether it is practicable to enforce his attendance, and, a failure to comply with the procedure is a material irregularity which will vitiate the trial'.

In this case, however, no reference was made to Section 537, Criminal P. C. and it was not considered whether the irregularity was curable in case there was no failure of justice. There is no doubt that Section 285 (1) requires whenever an assessor is unable to be present that the court should satisfy itself on one of two points, viz., (1) the assessor was prevented from any 'sufficient cause' from attending throughout the trial or (2) had absented himself and it was not practicable to enforce his 'attendance. The first point arises where, as for example, the assessor has given information to the court that he is ill and cannot attend the court. In such a case the court may be satisfied that the assessor is prevented from attending the court throughout the trial on account of sufficient cause viz., illness, and may proceed, after recording an order to that effect, with the trial. In such case, it is not necessary to consider whether it is practicable to enforce his attendance because the reason for his absence is known to the court. The second point arises where an assessor absents himself without any information to the court. In this event the court, before proceeding with the trials should come to the conclusion that it is not practicable to enforce his attendance. Having come to this conclusion which should be recorded in writing, the Court can proceed with the trial with the aid of remaining assessors. It is admitted in this case that the court recorded no order under Section 285 (1) when Jethmal absented himself and proceeded with the trial with the aid of the remaining assessors. There is no doubt that there was non-compliance with the provisions of Section 285 (1) in this case.

But with all due respect to the Judges who decided --'Baddan's case', we feel that this irregularity is curable under Section 537, Cr. P. C. if there has been no failure of justice.

14. The next case is -- 'Brandaban v. State', AIR 1951 Madh. B. 29. In that case it was held that 'the failure to comply with the procedure laid down in S, 285 is a material irregularity which will vitiate the trial, and that no question of curing any irregularity under section 537 arises'. This is a single Judge's decision and the learned Judge after considering certain decisions of their Lordships of the Privy Council observed as follows at page 32:

'The intention of the Legislature clearly was that if any assessor absents himself the Court should endeavour to enforce his attendance. If it is not practicable, the Court should record it and only then can proceed further. If there is nothing to indicate that there was any endeavour to enforce the attendance, there will be a presumption that the procedure adopted was one which the Code positively prohibited, at the same time it is possible that it may work actual injustice to the accused by a reduction in the number of the assessors who might have expressed their opinion in his favour. The trial will thus be held to be conducted in a manner different from that prescribed by the Code and the trial will 'be bad according to -- 'Kottaya v. Emperor', AIR 1947 PC 67 and no question of curing any irregularity under section 537 arises'.

With due respect to the learned Judge we find it difficult to understand how any actual injustice can be said to arise by reduction in the number of assessors. Assessors merely aid the court which is not bound to follow their opinion. A reduction, therefore, in the manner of assessors cannot, in our opinion, occasion failure of justice. Further, with due respect to the learned Judge, we are not able to understand how if this provision of Section 285 (1) has not strictly been followed, it can be presumed that the procedure adopted was one which the Code positively prohibited. The fact is that the code does not prohibit trial with the aid of less than three assessors once it has begun with the requisite number. It actually allows it under certain conditions. We, therefore, find ourselves unable to agree with the reasoning in this case.

15. We may refer to three Privy Council cases in this connection.

16. The first is -- 'Subramania Iyer v. King Emperor', 28 Ind App 257 (PC). In that case Subramania Iyer was charged against the provision of Section 234, Criminal P. C., with as many as 41 counts extending over a period of two years. Their Lordships held that the trial so conducted was plainly prohibited and illegal and the conviction so obtained must be set aside.

17. The next case is -- 'Abdul Rahman v. King Emperor', AIR 1927 P C 44. In that case the provision of Section 360, Criminal P. C. regarding the reading over the statements of the witnesses was not complied with and it was held that:

'A mere omission or irregularity to comply with section 360 unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction'.

18. Finally, reference may be made to --'Kottaya v. Emperor', AIR 1947 P C 67. Their Lordships have there laid down the principle governing the use of section 537 in cases where various provisions of the Code have not been strictly complied with. That was a case where provisions of Section 162, Criminal P. C., were not complied with. It was contended on behalf of the accused that a breach of a direct and important provision of the Code could not be cured but must lead to the quashing of the conviction. The contention on behalf of the State was that every breach would not necessarily lead to the quashing of the conviction as some breaches were of minor nature and could be cured Under Section 537 of the Code. Their Lordships' decision appears on page 69 in these words:

'There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention, and reference may be made to --'Tirkha v. Nanak', 49 All 475, in which the Court expressed the view that Section 537, Cr. P. C. applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code, and to --'Maruda Muthu Vannian v. Emperor', 45 Mad 820 in which the view was expressed that any failure to examine the accused under Section 342, Cr. P. C. was fatal to the validity of the trial and could not be cured under Section 537. In their Lordships' opinion this

argument is based on too narrow a view of the operation of Section 537. When a trial is conducted in a manner different from that prescribed by the Code as in -- 'Subramania Iyer v. King Emperor', 28 Ind App 257 (PC), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' in -- 'Abdul Rahman v. King Emperor', AIR 1927 P C 44 where failure to comply with Section 360, Cr. P. C., was held to be cured by Sections 535 and 537. The present case falls under section 537, and their Lordships hold the trial valid notwithstanding the breach of section 162.'

The principle which this case has clearly laid down is that where the trial is held substantially in the manner prescribed by the Code but some irregularity occurs in the course of such trial, the irregularity can be cured by Section 537. Now, as already pointed out, the Code allows a trial with the aid of assessors to be carried on even though one assessor is unable to be present and prescribes certain formalities to be gone through in that connection. If those formalities are not gone through and there is thus a breach of the provisions of Section 285 (1), it is, in our opinion, a mere irregularity for the trial is still conducted substantially in the manner provided by the Code. If these formalities are gone through, the trial can be continued with the aid of the remaining assessors. What actually happens when the formalities are not strictly complied with is that the trial continues with the aid of remaining assessors. The mode of trial, therefore, is substantially the same as prescribed by the Code and, therefore, the mere fact that Section 285 (1) is not strictly complied with would, in our opinion, result in an irregularity which is curable under Section 537 if no failure of justice has been occasioned. We are clearly of the view in a case of this kind that no failure of justice can be said to have been occasioned and therefore the court can continue trial with the aid of remaining assessors even though Section 285 (1) had not been strictly complied with. There is no positive prohibition of this kind of trial with the aid of the remaining assessors.

The prohibition is contained in Section 284 and again in Section 285 (2); but Section 285 (1) permits trial with the aid of remaining assessors and this is what has happened in this case though there was no strict compliance with Section 285 (1).

19. We may in this connection refer to --'King Emperor v. Subhi Reddi', 24 Mad 523. That was a case where one of the assessors was prevented from attending throughout the trial as his mother was ill. He was then allowed to resume his seat as an assessor & continued so to act and gave his opinion at the end. The question arose whether the trial was vitiated on account of this irregularity. It was held by the majority of the court that the defect in the trial did not affect its validity and was cured by Section 537 as the irregularity had 'not in fact occasioned a failure of justice'. The reason for this view was that one assessor at least was present throughout the trial and assessors were merely to aid the court and were not part of the court. It was pointed out by Bhashyam Ayyangar J. at page 539 that the phrase 'as members of the Court' disappeared in the corresponding Section 232 of Act 10 of 1872 and has not been re-introduced either in the Code of 1882 or in that of 1898.' Therefore as assessors are not members of the court and the trial was held by a court of competent jurisdiction and was not positively prohibited by the Code, S, 537, in our opinion, applies as it cannot be said that there was any failure of justice in that case. This disposes of the absence of Jethmal as well as his coming again. The proper course for the Judge was not to allow Jethmal to sit again once he absented himself; but the permission given to Jethmal was a mere irregularity as two assessors Balkrishna and Asharam were present throughout the trial.

20. Then we come to the last question viz., introduction of Chimniram on the 6-6-1952. We have not been able to understand how the Judge introduced Chimniram as an assessor on the 6th June. We wonder if the Judge thought that one assessor had to be substituted by another assessor. If he thought like this, we must say that there is no provision of law which requires substitution of an absentee assessor by another assessor. What has, however, happened is that another person Chimniram who was also in the list of assessors began to assist the Judge from 6-6-1952. To our mind, this irregularity is of the same nature as

non-compliance with the provisions of Section 285 (1) and so long as the trial was conducted substantially in the manner provided by the Code, as was the fact in this case, this irregularity is curable. We have not been able to find any reported case where an assessor had been added in the middle of the trial as has been done by the learned Judge. That is perhaps due to the fact that no Judge ever did such an obviously silly thing; but considering that the trial, in any case, continued with the aid of two assessors who were three throughout, there was, in our opinion, substantial compliance with the mode of trial provided in the Code and the irregularity committed by the addition of Chinniram in June 1952, is curable under Section 537 as it did not occasion any failure of justice. The Sessions Judge was still the court of competent jurisdiction to try the case and all that he did was to add unnecessarily one more assessor to advise him when he had no business to do so. We can ignore his presence altogether and as the irregularity has not caused failure of justice, the trial will not be vitiated.

21. We now turn to the evidence in this case. The main witnesses are Ratna P. W. 2, Kishna P. W. 3, Govind P. W. 6, and Ganesh P. W. 10, as they actually saw the incident.

22-25. (His Lordship considered their evidence and proceeded).

26. There is, in our opinion, no reason to disbelieve the statements of these four witnesses as to what they saw in the night.

27. It has been urged, however, that there are certain circumstances in this case which throw doubt on the prosecution story and the benefit of that doubt should be given to the accused. It is first pointed out that the report that was made by Shankerdan was a curious document and throws doubt on the prosecution story as it has been given in the court. We have set out that report in full and there is no doubt that it does not give the story for the prosecution in full detail; but this much is clear from that report also that some incident had taken place in the night in which Magga and Bhagga were involved and that the villagepeople were surrounding their house in the morning while they were keeping the villagers at bay, after having shut the door of the house. The report was made by Shankerdan who is a Head Master of the school in Gadhwara. We have the evidence of

Ganesh Ram P. W. to the effect that Shankerdan was sent to report the matter to the police after Ratia had come to the village and informed the villagers about what had happened in the night and Hardas had been brought from the field to his house in the village. At that time, the main details of the incident which took place in the night ought certainly to have been known in the village and should, therefore, have found mention in the report made by Shankerdan. What led Shankerdan to make the report which he did merely suggesting that some crime had been committed by the accused and not giving any details is not clear. Shankerdan admits that he was informed at the school in the morning that two or three persons had been killed by Magga and Bhagga at Imaratia well. He admits that he went to the house of the accused and saw them standing armed with a sword and a 'Farsi' inside in their 'Kochar'; but he does not say that he had met Ganeshram before going to the thana. This report is, therefore, defective but it does suggest that some people had been killed and that the killers were Magga and Bhagga and that they were telling the villagers that they would kill more persons. The main fact, therefore, that the killers were Magga and Bhagga has come in the report and the absence of details which have been given in evidence is not, in our opinion, so fatal in this case as to discredit the evidence of the four eye-witnesses whose presence at the time of the incident is quite natural. We are, therefore, not prepared to doubt the evidence of the eye-witnesses on account of the defective report made by Shankerdan.

28. The next point that has been urged is that the time of the incident is also doubtful and the evidence of the eye-witnesses on this point is discrepant. (His Lordship reviewed the evidence and proceeded). Considering, however, that these people have not watches and men give time by rough guess, the time of the incident may safely be placed between 1 A. M. and 3 A. M. This time would not be contra by the fact that semi-digested matter was found in the stomachs of all the three deceased, if they had taken their food rather late that night say at 10 P. M. or 11 P. M. The slight discrepancy about the time that has arisen because of the statement of one witness that the moon had arisen while the other two had said nothing about the rising of the moon is, in our opinion, not a consequence in the circumstances of this case.

29. The next point that has been urged on behalf of the accused is that there was no adequate motive for this murder. (His Lordship considered the evidence and proceeded). It is, therefore, in our opinion established from the evidence in this case that there had been a quarrel on the 3rd of April between the accused and the other partners about the engagement of three labourers for hire, and that Gheesa and Ganesh deceased were the principal persons involved in this quarrel. But it may be said at once that the quarrel was not of a serious nature and would not normally be an adequate motive for murdering Gheesa and Ganesh deceased. It may, therefore, be accepted that there was not what may be called an adequate motive for murder in this case; but where, as in this case, we have the evidence of eye-witnesses, which there is no reason to disbelieve, the adequacy or otherwise of the motive is immaterial. The evidence of the four eyewitnesses cannot, in our opinion, be disregarded merely because the motive established by the prosecution is inadequate by normal standards.

30. The next point that has been urged is that the case of the prosecution is open to doubt because none of the eye-witnesses came to the village soon after the incident and that it was only after day-break that Ratna came and informed the villagers about what had happened. (His Lordship considered this aspect of the case and the evidence and the dying declaration of the deceased Hardas and proceeded). The dying declaration, therefore, made by Hardas before three witnesses is also an important piece of evidence showing that the case for the prosecution is true.

31. Then it has been urged that Ratia, at any rate, did not see the attack on Hardas and his statement to that effect is not true. (His Lordship reviewed the evidence and proceeded). Ratia is a young man of twenty-two & it is difficult to understand the mentality of an illiterate villager when putting such a question. He might have thought it necessary to fortify himself by asking Hardas who was not dead. We are, therefore, not prepared to discard the evidence of Ratia on these grounds.

32. The next point that has been urged is that the evidence does not show how the villagers came to surround the house of the accused in the morning. The fact,

however, is that when the police arrived on the scene, the villagers were surrounding the house of the accused so that they might not run away. That is also the statement of Ganesh Ram P. W. It has not been brought out by the evidence of the witnesses except Shankerdan as to when the villagers began watching the house of the accused and who asked them to do so; but it is certain that that house of the accused was surrounded by the villagers in the morning because Shankerdan said so in the report which he made at 11-30 A. M. Shankerdan's statement in this connection is that when he reached the house of the accused on receiving information that they had killed some persons, he found them standing armed with sword and 'Farsi' in their 'Kochar'. He then arranged to have the accused watched and told the villagers to surround the house. Thereafter he went away to the police to report. (This is to be found in the Hindi statement of Shankerdan and not in the English memorandum prepared by the Judge). This statement explains that from about 8-15 A. M. at any rate, the villagers were surrounding the house of the accused. Perhaps they might have been there from before for if that was not so there was no reason why the accused should have been found by Shankerdan standing in their court-yard armed with sword and 'Farsi'. But this much is certain that from about 8-15 A. M. the villagers were surrounding the house of the accused because they were said to have committed the murder of three persons at Imaratia well. This conduct of the accused after the event showing how they were keeping the villagers at bay when the villagers probably wanted to catch them for the incident at the well in the night, is a strong piece of circumstantial evidence against them. Then there is another circumstance which goes against the accused. The sheath of the 'Katyar' and the broken handle of the axe were found near the dead bodies of Gheesa and Ganesh deceased respectively. The statement of Gokul P. W. 4 is that the sheath fits the Katari which was recovered from the house of the accused and the broken handle fits the axe which was also recovered from their house. We have satisfied ourselves that this is actually so. The recovery has been proved by the evidence of Sub-Inspector Premgiri and Modaram. The accused have certainly denied the recovery but it has been proved by the evidence of Modaram and Gokul. There is no reason to disbelieve the evidence of these witnesses who are all independent. The fact, therefore, that the sheath and the broken handle fit weapons recovered from the

house of the accused, goes to corroborate the evidence of the eye-witnesses. There is also evidence that the clothes recovered from the person of the accused appeared to be blood-stained; but these things were not sent for chemical examination and we do not attach any importance to the fact that something like blood was found on these articles.

33. It now remains to consider the defence evidence. Two witnesses have been produced to prove the alibi of the accused. The alibi is that the two accused were at home on that night when the deceased were murdered at Imaratia well. The first witness is Ramla. (His Lordship considered his evidence). The other witness Zora supports Ramla's statement. (His Lordship considered his evidence and proceeded). We are satisfied that the evidence of these witnesses is false and are not prepared to rely on them. It may be mentioned that the accused did not say that one of them was ill that night and the other was attending upon him.

34. On a careful consideration, therefore, of the entire evidence in this case, we are satisfied that the case for the prosecution is proved beyond all reasonable doubt. There are, in our opinion, no extenuating circumstances in this case. The murder was brutal and was committed on account of a very slight reason. Advantage was taken of persons who were sleeping to kill them. Bhagga is 27 years of age and Magga thirty-five, and it cannot be said that the accused are too young.

35. We, therefore, accept the reference and confirm the sentence of death passed on Magga and Bhagga accused.