

**Lachman Sing Vs. the King**

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**Court :** Kolkata

**Decided On :** Nov-26-1948

**Reported in :** 1949CriLJ456

**Judge :** Mookerjee and; Das Gupta, JJ.

**Appellant :** Lachman Sing

**Respondent :** The King

**Judgement :**

ORDER

1. This rule is on behalf of one Lach. man Sing who has been convicted under Section 304A, Penal Code, and sentenced to rigorous imprisonment, for six months.

2. The prosecution case was that at about 6 p. m. on 2nd March 1947, a girl Bithi aged about 5 to 6 -years was run over by a lorry No. BG2809 driven by the petitioner Lachman Sing. The girl was killed instantaneously. The lorry did not stop but went away at a great speed. The number of the lorry was noted by some of the persons present and though an attempt was made to block the passage of the running lorry it could not be stopped. The number of the lorry as obtained from the witnesses was taken charge of by the police who came to the spot: immediately thereafter and made the necessary enquiry.

3. The accused pleaded not guilty to the charge and the defence was that the number of the offending lorry had not been correctly recorded by the witnesses and even if it were so it had not been proved that the accused was driving the lorry at the time when the accident took place. The accused in his statement before the Court had stated that he was not driving the lorry. The learned Magistrate found the case against the accused proved beyond reasonable doubt and convicted him as stated above.

4. On an appeal being taken by the accused before the learned Sessions Judge the conviction and the sentence were upheld.

5. When this Rule came up for hearing on 17th August 1948, before Roxburgh and Blank JJ., the case was sent back for further evidence being recorded to establish that the accused was the driver of the particular lorry in the evening of 2nd March and certain directions were given about the nature of the evidence to be taken. The record of the evidence taken has now arrived from the lower Court.

6. Mr. Mukherjee appearing in support of the rule urges that whatever might be argued in favour of the prosecution in proof of the fact that there was an accident and the lorry NO, be X 309 was responsible for the accident there is no evidence on the record to prove that the petitioner Lachman Singh was driving the lorry at the time when the accident took place. The only evidence on which reliance has been placed by the trial Court as also by the learned Sessions Judge is the entry in the garage register where-from it appears that one Lachman Singh had taken out this particular lorry in the morning . and had come back that day in the evening at about 7 p. m. It is pointed out by the Court of appeal below that the fact that the accused had taken out the lorry as a driver and had brought it back in the evening raised a presumption that he was also driving the lorry when the accident took place. Further the fact as to who was driving the lorry at that time was within the special knowledge of the accused and under Section 106, Evidence Act the burden of proving that fact is upon him although he is the accused and as no explanation has been furnished by the accused relating to the question as to who was driving the lorry at the relevant hour he must be held to have been driving the lorry throughout from the moment when the lorry was taken out by him from out of

the garage till be brought it back in the evening, Mr. Mukberjee argues that this line of reasoning is not supported either by the provisions of Section 106, Evidence Act or on the general principle that the onus of proving the guilt of an accused is on the prosecution

7. It may be pointed out that after the order of remand by this Court on 17th August 1948 a finger-print expert examined the thumb impression appearing on the garage register against the relevant date and be reported that the thumb impression was not distinct enough to warrant any expression of opinion by him as to whether that thumb impression was of the same person who had put his thumb impression below the statement by the accused before the Court. The evidence of the owner of the garage was also not available. So the evidence on the record on which we have to proceed remains what it was before the order for remand was made by this Court.

8. It is quite clear that Section 106, Evidence Act refers to such cases where the fact is within the knowledge of a person and of nobody else. It cannot be attracted where the fact in question having regard to its nature is such as to be capable of being known not only by the accused but also by others if they happen to be present when it took place. See the case of *Bam Bharosay v. Emperor* : AIR 1936 All 833 . Applying this test to the facts of the present case it is significant that the evidence of the witnesses who saw the accident is to the effect that a lorry with a large number of persons on it ran over the poor girl but there is no evidence on the record though evidence could be available as to who was the person who was driving the lorry at that relevant moment. Evidence could have been available from other witnesses present, the destination of the lorry could have been ascertained if the entry in the garage register be taken to be correct. Section 106, Evidence Act does not entitle the Court to say that the accused must explain this and that he must satisfy it on this point or another or be found guilty. The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of an accused is not in any way modified by the provisions contained in Section 106, Evidence Act. This section on the other hand is to be taken along with the provisions of that general rule.

9. There is no evidence on the record to fix the guilt on the accused as there is no legal evidence to prove that he was driving the lorry at the relevant hour.

10. The result therefore is that the rule is made absolute, the conviction and the sentence passed by the trying Magistrate on the petitioner are set aside and he is acquitted of the charge. The petitioner will be discharged from his bail bond.

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