

*Privy Council Appeal No. 66 of 1924.*

*Oudh Appeal No. 17 of 1923.*

**Balbhaddar Singh and another** - - - - - *Appellants*

*v.*

**Badri Sah and another** - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 16TH MARCH, 1926.

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*Present at the Hearing :*

VISCOUNT DUNEDIN.

LORD BLANESBURGH.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* VISCOUNT DUNEDIN.]

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The appellants and respondents are lambardars and the principal inhabitants in the village of Mohiuddinpur. The suit arises out of circumstances of a remarkable character, which took place in connection with a crime as to which the complete truth will in all likelihood never be discovered.

One Sheo Bux, a humble inhabitant of the village, was last seen alive on the evening of the 17th September, 1919. As he was under police supervision his absence after that date was noticed by the village policeman, but it was supposed that he had gone to some other village.

On the 20th September, a little after noon, a party of four persons arrived at the police office, which is situated at a place called Pasgawan, about two miles from the village. These were Badri Sah, a lambardar in the village, and one of the respondents, Hazari, a cultivator, his son, Raghunath, aged 18, and Bharat,

a cultivator. The sub-inspector of police was, at the moment, absent, and a policeman was in charge. Raghunath then proceeded to make a confession, which was recorded in the police diary of the day. The confession was to this effect :—

The appellants had, some time ago, offered him Rs. 500 if he would do away with Sheo Bux. He had returned an ambiguous answer to the proposal. On the 17th September his father had gone away from the village. The appellant Bachchu had then said that this was the opportunity desired. Accordingly when nightfall came the two appellants came to his house and despatched Teja, a barber, 16 years old, to fetch Sheo Bux. They all sat down ; then Balbhaddar fell upon Sheo Bux, put his hand on his mouth, while Bachchu grappled with him. With the assistance of Teja and himself, Raghunath, they carried him into the house. He and Teja held his feet. Balbhaddar sat on his chest and held his mouth and Bachchu, with a knife, cut his throat and he died. A hole was then dug in the floor of the house and the body buried. He applied for his Rs. 500, but was told by the appellants he would get that when they took the body away. On the 19th September he asked them to take away the body, but they said that they had had no opportunity of doing so. This day, that is, the 20th, his father had returned and he told him the whole story. His father went to Badri Sah, who told him to bring Raghunath to him where he was sitting along with Bharat Singh. To them he repeated the story, whereupon they all took him to the police office. After this he was consigned to the lock-up, and the policeman in charge sent a message to the sub-inspector. The sub-inspector hurried back to the village and sent for Raghunath from the lock-up. He repeated to him the same confession, and on being taken to his house pointed out where the body was buried and where the shoes and garments of the deceased were also buried.

The body was exhumed ; the shoes and garments found. It was the body of Sheo Bux and his throat was cut. The sub-inspector thereupon arrested Teja and locked him and Raghunath up. The next morning he sent both Raghunath and Teja to Lakinpur, and there, on the 24th September, they were brought before the magistrate. The magistrate, as in duty bound, took a statement from each of them, no policemen being present, and he having duly informed them that he was a magistrate. Raghunath repeated his confession with a little more dramatic detail, but in all essential respects as before. Teja gave a shorter account. He described the murder in identical terms. To each of these confessions the magistrate appended this note :—

“ I believe that this confession was voluntarily made. It was made in my presence and hearing. It was read over to the person making it, and was admitted by him to be correct. It contains a full and true account of the statement made by him.”

On the 27th October the magistrate, having examined some other witnesses, among whom was Musammat Parbati, the

mother of the murdered man, who swore that, on the 17th, she saw the two appellants along with Raghunath and Teja at Raghunath's house, issued warrants for the arrest of the two appellants. The appellants were absent and the warrant was not executed.

On the 30th December the magistrate took up the case, and on the evidence committed Raghunath and Teja for trial, but discharged the appellants who, without the execution of the warrant had voluntarily appeared, as he considered there was no real evidence against them except the confessions of Raghunath and Teja. Subsequently, some doubt having arisen in the mind of the District Judge as to whether this dismissal was right, summonses were issued to the appellants to appear before the District Judge. These were taken up by the District Judge, Mr. H. G. Smith, who was not the Judge who had raised the doubts. He again discharged the appellants, considering that there was not sufficient evidence to warrant them being put on their trial.

The trial took place, but when Raghunath and Teja were asked as to their confessions, they both admitted that they had made them, but stated that they were untrue. Raghunath said :—

“ I said to Badri that the corpse seemed to be in the house. Badri Sah then took me to his Chaupal and there he gave me *sherbet* to drink. He took me to the police station and asked me to get the names of Bachchu Singh and Balbhaddar Singh recorded, adding that otherwise I would be hanged and that he would defend me. When I reached the police station I felt as if intoxicated. I do not know what I got recorded in the report.”

Teja said :—

“ The day on which the sub-inspector visited my village, *i.e.* on Saturday, Badri Sah came to my house at midday and said, ‘ Raghunath Singh names you. If you say what I ask you, I will get you released.’ Thereupon I stated before the Deputy (Magistrate) what Badri Sah and the Sub-Inspector asked me to say. I do not know who committed the murder.”

In the end both were discharged, there being, in the view of the Sessions Judge, not sufficient evidence against either of them.

After this the present appellants applied to the magistrate to order the prosecution of Raghunath and Badri Sah. The magistrate gave leave to prosecute under section 211 of the Indian Penal Code, which is :—

“ Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ;

“ And if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

The Sessions Judge on appeal came to a different conclusion as regards Badri Sah, and quashed the leave given. He said in the course of his judgment :—

“ I do not think it would be possible to prove that Badri Sah instigated the making of the charge.”

The appeal was taken to the Commissioner, but he confirmed the determination of the Sessions Judge.

The appellants then raised the present civil suit for malicious prosecution. The crucial averment was that the respondent Badri Sah had tutored Raghunath and Teja to say what they did in their original confessions. Evidence was led before the Subordinate Judge. The facts which have already been detailed and as to which there could be no controversy were proved. Some other witnesses were examined, as to whose testimony there was controversy, with which their Lordships will presently deal.

Teja, being examined, repeated his recantation of his original testimony, saying that Badri Sah had tutored him. But Raghunath reverted to his original account, saying that the story of the murder having been committed by the appellants with the assistance of Teja was true. The learned Subordinate Judge delivered an exceedingly careful judgment, and came to the conclusion that the plaintiffs, now appellants, had made out their case.

On appeal to the Court of the Judicial Commissioner of Oudh, the Judicial Commissioners reversed that judgment. Unfortunately, however, they took a completely wrong view of the law of the case. In their judgment they put the matter thus :—

“ In an action for malicious prosecution the plaintiff has to prove :—

“ (1) That he was prosecuted by the defendant.

“ (2) That he was innocent of the charge upon which he was tried.

“ (3) That the prosecution was instituted against him without any reasonable and probable cause.

“ (4) That it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect.”

Proposition (2), as stated, is quite erroneous. It should be “ That the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating.” This phraseology may be found in the judgment of Montague Smith, J., in *Basebé v. Matthews* (L.R. 2 C.P. 688). But the practice was in accordance with these words long before that case. Under the old forms of pleading a declaration, if the law were really as the Judges in this case defined it, would in all cases where there had not been an actual acquittal have been bad if there were not added the statement that the plaintiff was innocent of the crime charged. The reports may be searched in vain for any declaration so found bad, though there were many cases where prosecutions had terminated without acquittal. There was controversy as to what terminated proceedings, as, *e.g.*, whether a *nolle prosequi* of the Attorney-General was a termination.

But at any rate it was quite settled that a prosecution comes to an end when a magistrate declines to commit (*Delegal v. High*, 3 Bingham N.C. 950). *Weston v. Beeman*, 27 L.J. Ex. 57. *Huntley v. Simson*, 27 L.J. Ex. 134. Accordingly in Bullen and Leake's Precedents, 8th Edn., at p. 434, the regular form is given for an action for malicious prosecution when the plaintiff has been arrested and brought before a magistrate. After narrating the arrest and the charge, it continues: "The said Justice having heard the said charge dismissed the same and discharged the plaintiff out of custody, whereupon the said proceedings terminated." In the present case it was sufficient for the appellants to prove, as they have done, that the criminal proceedings threatened on account of the disclosure contained in the confessions of Raghunath and Teja ended so far as they were concerned when the Sessions Judge finally refused to commit them for trial. That opened the way for the proof of the next proposition that the respondents had instigated the proceedings maliciously and without probable cause.

The result of the view of the law taken by the Judges was that the evidence was gone into with a view of saying whether the appellants had proved their innocence, and finally the learned Judges held that "the plaintiffs have failed to prove their innocence of the crime."

It is true that, having stated that "the two main issues in the case are (1) whether the plaintiffs have proved themselves to be innocent of the charge of murder, and (2) whether Badri Sah instigated Raghunath to implicate the plaintiffs falsely," they go on to consider this (2) which, taken by itself, is relevant, but unfortunately their view on the second issue is permeated by their view on the first. Indeed, they say so themselves: "The two issues of the plaintiffs' innocence and Badri Sah's tutoring run into each other." Although, therefore, there are various comments on the evidence in the judgment which are of value, the mistaken view so permeates it as to make it impossible for their Lordships to confirm the judgment as it stands. They are consequently compelled to consider the judgment of the learned Subordinate Judge just as if the appeal had come direct from him to them. Their Lordships will now advert to the evidence given in addition to that which proved the facts which have been already set forth, and it will be convenient to separate that as to which there is no controversy from that as to which controversy exists. It was clearly proved that between the appellants Balbhaddar and Bachchu, who are uncle and nephew, on the one hand, and Badri Sah on the other, there was a long standing and bitter enmity. They were the two principal families in the village and people of influence. The other persons who appear in the course of the case were all in very humble positions. This enmity had shown itself in litigations and prosecutions. Fines had been imposed and punishments inflicted, and there was a state of deadly feud between the two families.

On the night of the 17th a neighbour had heard a noise going on in Raghunath's house, and he had seen two men run out of the house and a light extinguished, but identification was out of the question.

So far as to matters which cannot be controverted. Next as to the evidence as to which there was controversy. Musammat Parbati, the mother of Sheo Bux, said that she remembered Teja coming for Sheo Bux to go to Raghunath's house a little after nightfall. She then said that she got dinner ready and went to Raghunath's house to ask Sheo Bux to come back to dinner. She found there Sheo Bux, Balbhaddar Singh, Badri and Teja all sitting together. In answer to her request Sheo Bux said he did not need dinner as he had eaten already, and that he would not come home; he would take his turn as watchman. On the other hand, it is pointed out that this witness originally made no statement to the police. She was examined twice before the magistrate, and on each occasion she said that the reason why Sheo Bux did not wish to dine was because he had already eaten yams. The post mortem disclosed that there was only pulse and rice in his stomach and not yams. Before the Sessions Judge she was again examined, and she then went back on the statement as to yams, and said that he had only eaten rice. It was her statement that led the magistrate to issue a warrant for the apprehension of the appellants.

Badri Sah, the respondent, confirmed the statement that he was approached by Hazari, the father of Raghunath, and then by Raghunath, and that after hearing the story he went with them to the police station. He denied having seen Raghunath previously to the joint meeting between him and Hazari. Hazari, it may be noted, had died before the evidence was led in this case. But a schoolmaster deponed that he had seen Badri Sah and Raghunath talking together "in the morning." A man called Bikari said that a day before the confession he went to Badri Sah's house and that, as he approached from outside, he overheard Badri Sah say to Raghunath that if he would not leave out the names of Balbhaddar and Bachchu he would save him. On the other hand, there seems no particular reason for Bikari being at the house. He had a grudge against Badri Sah, and the whole story is contrary to the united story of Badri Sah and Raghunath of the first communication having been made when Hazari brought Raghunath to Badri Sah.

As already stated, the learned Subordinate Judge decreed in favour of the plaintiffs. Their Lordships wish to emphasise their appreciation of the carefulness and ability of the judgment. They have given every weight to the reasoning, although, as will be explained hereafter, they are not able to reach the same conclusion. The reasons which led the Subordinate Judge to reach his conclusions may be summarised thus:—

(1) Not only were the appellants not prosecuted after being brought up before the magistrate, but the idea of their having

murdered Sheo Bux rests on no foundation. There was no enmity. Two motives were suggested. One a desire to get his house; but this is not really proved, and, besides, the widow would still have had it. Second, a supposed intrigue between Sheo Bux's wife and Bachchu and also Raghunath. This is only suggested by Badri and Raghunath, and the idea of co-paramours plotting together to get rid of a husband is against human experience. Musammat Parbati's evidence was quite unreliable.

(2) The undoubted hatred of Badri Sah to Balbhaddar and Bachchu.

(3) Badri Sah was the person who suggested that Raghunath should go to the police station and confess.

(4) All through the various proceedings Badri Sah was always to the fore. He got his own pleader to undertake the defence of Raghunath. All he wanted was that the appellants should be convicted.

(5) There was no reason, if Raghunath had confessed to his father Hazari, that Hazari should have gone to Badri Sah.

(6) The deputy magistrate in the application for sanction under the Indian Penal Code took the view that Badri Sah had tutored Raghunath and Teja. (It is omitted to be stated that two Judges took the opposite view.)

(7) There was no reason for Teja making his first confession voluntarily. He was not in danger if he kept quiet. *Ergo* it seemed to be inspired by Badri Sah.

(8) Raghunath is utterly untrustworthy. He confessed, recanted and then reconfessed. Teja only once recanted and then adhered to it.

There is much in this reasoning, but what, in their Lordships' opinion, the learned Subordinate Judge has a little left out of view is that this is not a case which must be determined on a balance of probabilities. The question is not, "Did the appellants commit the murder?" or, "Did Badri Sah invent the murder against them?" the two queries exhausting the possibilities of the situation. The question is, "Have the appellants proved that Badri Sah invented and instigated the whole proceedings for prosecution?" Of course there is nothing in the point which seems to have been taken in the Courts below but which was not urged before their Lordships, that here *de facto* the appellants were not prosecuted by the respondent. In any country where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused an action will lie. But it must be kept in view that, so far as the police were concerned, there was ample cause for the initiation of prosecution proceedings. There were the clear narratives of two people, Raghunath and Teja, concurrent in all necessary particulars. The appellants must, therefore, go the

whole way. There is no halfway point of rest. They must show that Badri Sah invented the whole story as far as it implicated the appellants, and tutored Raghunath and Teja to say it. That is a very heavy onus of proof, and unless they sustain it the appellants must fail.

Let the view which must be taken, if the appellants are to prevail, be analysed. As to the fact of a murder there is no doubt. That the corpse of the murdered man was lying beneath the floor of Raghunath's cottage is also without doubt. One of the suggestions in Raghunath's evidence was that the corpse had been put there by somebody else and that he discovered its existence owing to the progress of putrefaction. This is an unlikely story, but it does not matter. Nobody supposes, nor was it suggested, that Badri Sah murdered Sheo Bux. His first knowledge of the existence of the corpse must have come from Raghunath, and whether Raghunath told him that he himself was implicated in the murder, or whether he merely told him he had found a corpse, is for the moment immaterial. For in either case Badri Sah must have, according to the theory, said to himself: "Now is my opportunity; let me get my enemies implicated in the crime," and this he is supposed to have done. He goes with Raghunath and Hazari—it is a pity that Hazari was dead before the evidence in the case, and there is no trace at all in the papers of his evidence before the magistrate—and Raghunath makes his first confession. What is that confession? It implicated himself and the appellants, but it also implicated Teja. Now it is very important to notice that Teja by all accounts had not met Raghunath and Badri Sah till after Raghunath's confession. For this is what he, Teja, says in his recantation, which is, of course, the foundation of the appellants' case:—

"I did not call away Sheo Bux to Raghunath's house. The day on which the sub-inspector visited the village, that is, the Saturday, Badri Sah came to my house at midday, and said: 'Raghunath Singh names you. If you say what I ask you, I will get you released.' Thereupon I stated before the Deputy Magistrate what Badri Sah asked me to say."

What an extraordinary risk this was to tutor a confession which implicated not only his enemies but a man whom he had not yet interviewed, and why bring in Teja at all?

It is, of course, quite useless to pin any faith to what Raghunath and Teja have said. Raghunath had executed a double somersault in confession, Teja a single one, and yet, unless Teja's confession is strictly true, the appellants' case is gone.

The argument was used why should Teja recant except to speak the truth? The answer is easy enough. The appellants had got off by not being committed for trial. Teja and Raghunath then wanted to save their own skins. No doubt Teja stuck to his recantation. Raghunath, who had by this time been let off, had no skin to save and recanted again. The very argument which



has to be used to explain Teja's first confession may be used to explain his second. Fear was what prompted him, it is said, to make his first confession and implicate himself, though quite innocent. "Raghunath has mentioned you. You will be lost unless you say what I tell you." So fear would drive him to his second. "I have implicated myself foolishly. Let me now say I had nothing to do with it."

Lastly, as to Badri Sah's meddling with the case. That Hazari, if he was told the story by his son, would go to Badri Sah is likely enough. He would wish advice from some one in position, and Badri Sah was the only person except the incriminated men themselves. Further that when Badri Sah found that his enemies were implicated, he would be glad and would help to bring about their downfall is more than probable. But that is a different thing from being the sole author of it.

On the whole matter, therefore, their Lordships feel that while there is grave cause for suspicion and while the whole truth in the case is impossible to find, there is not sufficient certainty in this doubtful matter to find that the appellants have discharged the heavy onus laid upon them. The result arrived at by the Judicial Commissioners on appeal was right, though the methods by which they reached that result were wrong.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

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BALBHADDAR SINGH AND ANOTHER

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DELIVERED BY VISCOUNT DUNEDIN.